The Colonial Lawyer is published at the Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia 23185.

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From the Board

Last year The Colonial Lawyer attempted to place greater emphasis on alumni of the law school. It was our feeling that the professional activities and accomplishments of alumni were of interest to students and faculty as well as other alumni. The responses received from individual alumni have been pleasing and, in some cases, flattering to the editorial staff.

As the emphasis on alumni coverage increased, so did questions concerning the propriety of serving an alumni audience with a magazine financed entirely by student funds. This year the College Board of Student Affairs, feeling that this publication should be financed partly from other sources, reduced The Colonial Lawyer budget by approximately thirty-five per cent. When this budget cut was made, the Editorial Board asked the Student Bar Association’s Director of Alumni Relations to explore the possibility of obtaining additional financing from the law school alumni organization. The Director later reported that the alumni organization, as a matter of policy, would not provide financial support for any student publication.

This financial situation has caused the Editorial Board to reconsider the role of The Colonial Lawyer in the law school community. Because this publication is financed solely by student funds and also because the alumni organization publishes its own newsletter, we concluded that it was improper to provide alumni coverage at the students’ sole expense. We also concluded that our alumni coverage might at times duplicate material appearing in the alumni organization’s newsletter. Consequently, this issue will be the last one mailed to alumni. We hope that the alumni organization will pass on to the students and faculty of the law school newsworthy items of alumni achievements and activities.

This issue of The Colonial Lawyer offers several articles which will be of interest to both the present law school community and alumni alike. An article by third-year law student Edward Flippen examines the effect of local zoning ordinances upon mobile-home ownership. Assistant Professor Joseph A. Miri of the Department of Government, College of William and Mary examines the proposed reorganization of Virginia’s environmental agencies. Several present and former Marshall-Wythe law students were instrumental in the drafting of this legislation. Finally, The Colonial Lawyer presents an article by Law Professor William F. Swindler in which he discusses the proposed organization and activities of the National Center for State Courts which is to be located in Williamsburg.
CONSTITUTIONALITY OF ZONING ORDINANCES
WHICH EXCLUDE MOBILE HOMES

EDWARD L. FLIPPEN, third-year law student, Marshall-Wythe School of Law

The problem of local zoning ordinances which preclude mobile homes from locating within the borders of a municipality is part of a larger subject, i.e. exclusionary zoning, often referred to as “snob zoning.” Whether it is the city excluding public housing, modular or mobile homes, or the suburbs legislating one-, two- or even four-acre lot sizes, requiring minimum floor space, or banning apartments in toto, the objective of the political unit is often to exclude housing that could be used by the poor.1

At a time when “snob zoning” laws are being used or enacted with greater frequency for exclusionary purposes, the Nation’s need for low-cost housing has never been greater. Commencing about 1966, the gap between demand and supply of basic housing requirements began developing into a chronic national problem. More than two million units are needed each year, one-half million alone to replace demolished housing. Yet actual construction has averaged only 1.3 million units.2 Coupled with an inadequate supply have been high inflation and construction labor shortages, all resulting in increased costs of conventional housing.3 Consequently, families with annual incomes in the vicinity of $8,000. are most often precluded from the conventional market since housing in most parts of the country which this income group can afford—$15,000. or less—is generally no longer being built.4 Therefore, to meet the housing needs of lower economic groups, it is anticipated that, by 1978, 26 million new and rehabilitated low-cost housing units will be needed.5

One of the major sources of low-cost housing to emerge during the last decade has been the mobile home. In 1969, 33 out of every 100 new single family dwellings were mobile homes, retailing for approximately $6,000, which includes furnishings.6 Doubles range from $8,000. and up and provide on the average 1,388 square feet of interior space, as much as a fair sized single-family house and more than most apartments.7 With the cost of conventional housing moving upward, placing more and more persons out of the new housing market, the importance of the mobile home can readily be seen, since it provides low-cost yet adequate housing.8

To aid in solving the well-documented fact that a shortage in housing is one of the most critical problems confronting the United States, the Housing and Urban Development Act of 1968 authorized the Department of Housing and Urban Development (HUD) to subsidize or directly finance a total of four million new housing units to be started by 1978, and to assist in the rehabilitation of two million additional units.9 To stimulate industrialized mass-production of low-cost housing, HUD has spent or will spend over 50 million dollars on Operation Breakthrough.10 From over 1,000 business and nonprofit groups came a total of 630 mass-production proposals, and of this group 22 business concerns were selected to build more than 2,000 units of modular or mobile type homes.11

But Operation Breakthrough has been embroiled in controversy from the start. Citizens’ groups have rebelled at the prospect of low-income projects in their neighborhoods.12 The attitude of these citizens’ groups is that the allowance of any form of low-cost housing in a neighborhood will turn it into a slum. Consequently, the ultimate weapon of the exclusionists has been snob-zoning which permits only single-family homes to be built on relatively large one- or two-acre lots. The argument that resounds forcefully at most rezoning hearings is that exclusionary zoning helps preserve the “quality of life” of the political units. In other words, higher population densities invariably produce higher rates of crime, welfare and pollution.13

The major problem emerging from the rapid expansion of mobile homes is that local homeowners fear being located within close proximity to these dwellings. Complaints abound that the trailers erode property values, create a greater than average strain on public revenues, provide lower property taxes because of the lower tax base,14 and invariably require higher public expenditures for schools (an item that already comprises the largest portion of most communities’ budgets) because of the fact that trailers are inhabited by more children than the norm.15

Even though there has been legislative recognition of the imperative of decent housing16 and the United
States Supreme Court has on at least five occasions proclaimed that housing is a "necessity of life." Much hostility has been directed toward mobile home owners. Usually, the hostility is implemented in zoning ordinances which exclude, in some fashion, mobile homes from the local community.

The issue, therefore, is the constitutionality of laws which, in the face of national policy and national needs, exclude housing which to date is the only expansionary form of decent housing available to low-income groups.

CONSTITUTIONALITY OF ZONING

The issue of constitutionality of zoning per se needs little attention at this date. In 1926, the now classic case of Village of Euclid v. Ambler Realty Company reached the Supreme Court, where it was held that zoning ordinances were valid. To be unconstitutional, zoning provisions must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." The strong presumption of constitutionality was reiterated by the court in 1928 in its last pronouncement dealing with the constitutionality of a zoning ordinance. Of course, the constitutionality of an ordinance also depends on its being authorized by the state constitution or legislative enabling statute and its not being in conflict with federal enactments.

DUE PROCESS

Because of the strong presumption of validity, a due process attack on an exclusionary zoning ordinance encounters a formidable obstacle. Zoning ordinances serve legitimate goals of city planning and are justified on the assumption that in the absence of regulation, private pursuit of self-interest in the land market will result in a net "social loss" to the community as a consequence of the imposition of external economics upon the property adjoining that of the individual. Thus, the theoretical objective of zoning ordinances is to eliminate this assumed discrepancy between the private entrepreneur and the interests of the community. In order to accomplish this objective, zoning ordinances divide the community into districts and permit only "compatible" land uses to locate on adjoining parcels. But rather than provide for compatible land uses, zoning is often used as an exclusionary device to condemn the poor to live in the urban core or conversely, to preserve the "quality of life" in the small town or suburb. Whether the exclusionary tool of zoning is a denial of due process is (1) a matter of fact, to be determined on a case by case basis, and (2) quite candidly, a matter of judicial preference and attitude about legislative discretion.

Fairfax County, Virginia, which contains over 400 square miles and 258,000 acres of land, is declared to be the fastest growing county in the United States. Its rapid growth has created problems of an inadequate sewer system, water supply, fire protection system and school system. Consequently, the Board of Supervisors enacted zoning amendments requiring two-acre minimum lot sizes. Upon review, the Virginia Supreme Court repeated the so often used judicial test, to wit:

[... the legislative branch of a local government has wide discretion in enacting and amending zoning ordinances. Action is presumed valid so long as not unreasonable or arbitrary [...].] The burden is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious and that it bears no substantial relationship to the public health, safety, morals and general welfare. The court will not substitute its judgment for that of a legislative body [...]. If reasonableness of the zoning ordinance is fairly debatable [...].

Nevertheless, the court went beyond the alleged legislative purpose and determined that the practical effect of the ordinance was to preclude low-income groups. The court held that such an intentional and exclusionary purpose would bear no reasonable relation to the health, safety, morals and general wel-
fare, but would serve private rather than public interests. 25

The mere power to enact an ordinance does not carry with it the right to arbitrarily or capriciously deprive a person of the legitimate use of his property. 26

The Virginia court has also held that aesthetic considerations alone may not justify police regulations. 27 Aesthetic considerations are, of course, one major reason why some believe it necessary to exclude mobile homes.

Due process attacks against zoning ordinances which make no provisions for multiple-family dwellings, 28 which prohibit outdoor moving picture theatres, 29 which prevent the use of land as an undertaking establishment, 30 or ordinances which refuse to grant rezoning essential to the erection of low-rent housing projects, 31 trailer parks, 32 or quarrying 33 have been sustained. But each zoning case litigated on due process grounds involves a different set of facts and circumstances upon which the constitutionality of the zoning ordinance must be tested. 34 In each case the test of validity is the reasonableness of the ordinance viewed in light of existing circumstances in the community and the physical characteristics of the area. 35 However, where the purpose behind the enactment has not borne a substantial relation to the general welfare, especially where restrictions indicate an attempt to bar "undesirables" from a particular area, due process arguments have been used successfully in attacking such ordinances.

In 1970, the Pennsylvania Supreme Court held that failure to provide for apartments anywhere in the township of Nether Providence was unconstitutional and unreasonable per se, indicating that the burden of persuasion had been shifted to the municipality. 36 Obviously the township had the right to preclude apartments, but if the general public interest in apartments outweighed the interest of the municipality, the township's enactment would be an unreasonable exercise of legislative power.

In effect, Pennsylvania is applying a substantive due process analysis allowing the applicant to show that a proposed land use is legitimate, then shifting the burden of proof to the municipality to establish the legitimacy of the prohibition by evidence of what public interest is sought to be protected. 37

Two of the more profound cases against exclusionary zoning in Pennsylvania arose out of attempts by townships to freeze the population and protect the aesthetic nature of the area by prohibiting multi-unit apartments 38 or enacting minimum lot sizes. 39 The decision of the township that it was content with things as they were, and that the expense or change in character that would result from people moving in to find a comfortable place to live was unacceptable. 40 The Pennsylvania court held that "... no community can be allowed to close its doors to others seeking a comfortable place to live." 41

In 1969, in Will County, Illinois, the governing body excluded mobile homes. In a due process attack on the ordinance, the court considered:

1. existing property uses,
2. whether mobile homes would diminish property values,
3. whether mobile homes were the most appropriate use of the property,
4. need for low-cost housing in the area,
5. length of time the property in question was vacant, and
6. suitability of the property for the zoned purposes. 42

The evidence clearly rebutted and overcame the so-called presumption of legislative validity. Relying on an earlier Illinois case the court concluded:

... when it is shown that no reasonable basis of public welfare requires the limitation or restriction ..., the ordinance fails and the presumption of validity is dissipated. 43

Where zoning ordinances restrict mobile homes to specific districts, courts generally agree that such restriction is valid. 44 Where there are zoned districts for mobile homes but the properties are being used for other purposes, the fact of such existing uses for other purposes does not, of itself, serve to render the zoning ordinance a ban on trailers altogether and hence invalidate the ordinance. 45 Conversely, jurisdictions regularly uphold zoning ordinances excluding mobile homes. 46 New Hampshire Supreme Court holdings along these lines have been commonplace, and in 1957, the North Carolina Supreme Court declared that the right of a municipality to place trailers in certain zones or totally exclude them is well-settled, even to the point of exclusion within one mile of the municipal limits of Raleigh. 47

In 1959, a Connecticut Court left to the legislative
authority the power to determine if the geographical situation and the resources of the municipalities would be overtaxed if mobile homes were allowed. Under this scheme the only test would be reasonableness. On the other hand, a Michigan court, rather than leaving it to a legislative determination, found it unreasonable to exclude a use from property that was undeveloped and surrounded by undeveloped property in a sparsely populated township. The controlling legal principle in the latter case is recognition that the zoning ordinance restricting an owner's use of his land must bear a real and substantial relationship to the health, safety, morals and general welfare. It was incumbent upon the township to show some facts from which a relationship between the zoning of the property and the proper exercise of the police power could be inferred, whereas in the former case the test of reasonableness only related to the legislative stipulation—not the facts inherent in a given case.

The difference in the two types of cases is basically the degree of presumption attached by the courts to legislative enactments. Does the governing body merely have to show that its ordinance is reasonable in relation to the general welfare, or must it prove, by facts, a substantial relationship to the general welfare before an exclusionary ordinance will be upheld?

In essence, successful attacks on due process grounds will in all cases require a showing of facts that constitute unreasonableness on the part of the political unit. Nevertheless, ultimate success will depend upon whether some form of a substantive due process test is used, balancing the interests of the municipality against those who are denied an otherwise lawful property use.

**EQUAL PROTECTION**

The fact that exclusionary zoning laws segregate people on the basis of their economic status cannot be refuted. Because of their limited financial means, many individuals are denied access to the housing and facilities of a community in which they desire to live and perhaps work. The effect of such segregation may possibly be an illegal classification, using the new equal protection analysis. Consequently, equal protection is the central legal argument against exclusionary zoning.

Traditionally, to determine the legality of a classification, courts have applied the rational basis test, with municipalities justifying their ordinances simply by showing a reasonable relation between the purpose of the ordinance and the general welfare. However, where the classification results in discrimination with respect to a right of very great importance, such classification will not be sustained merely because it has a rational basis. If the state fails to supply a substantial justification, its discrimination is deemed "invidious" and unconstitutional. Whenever legislation is based on inherently suspect criteria, the burden falls upon the state to justify such enactments. Lack of substantial justification, which requires the showing of a "compelling state interest," renders the law unconstitutional.

The major problem in an equal protection attack, which involves shifting the burden of justification and triggering the compelling interest test, is whether or not the legislation creates a suspect classification. More specifically, does the exclusion of mobile homes which may result in de facto wealth discrimination constitute a suspect classification and thus require the public authority to show a compelling state interest?

Beginning in 1942, the Supreme Court has put the onus on the state to do the justifying in cases where discrimination emerged against disadvantaged classes and where the classification was in derogation of a basic or fundamental right. For example, in 1966 the Virginia poll tax requirement was held unconstitutional. The court declared:

> We have been long mindful that where fundamental rights and liberties are asserted under the equal protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined . . . wealth or fee paying has in our view no relation to voting qualifications: the right to vote is too precious, too fundamental to be so burdened or conditioned.

In effect, the court declared restrictions on voting to be a suspect classification since the restriction infringes on a fundamental right. Of course, the equal protection clause permits the states to make classifications and does not require them to treat different groups uniformly. It is only where the classification results in invidious discrimination of a fundamental right that the burden of proof shifts and the state is

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**EDITOR'S NOTE**

This article will appear in the Spring 1974 issue of the American Business Law Journal.
required to show a "compelling interest."

The State of Virginia adopted miscegenation statutes to prevent marriages between persons solely on the basis of race. The court reiterated that the traditional rational basis test is to be applied in ascertaining the foundation of a classification, the effect being to defer to the wisdom of the legislature. However, where the statute, as here, creates a racial classification, the classification is inherently suspect and "... will be subjected to the most rigid scrutiny." In this context, New York, until 1968, denied welfare assistance solely on the ground that recipients had not lived in the state for a year. The state required the waiting period as a device to preserve the fiscal integrity of the public assistance programs. However, the Supreme Court on review held that "... the right to travel from one state to another ... occupies a position fundamental to the concept of our Federal union." Since the classification here was aimed at excluding welfare recipients from the state and touched on the fundamental right of interstate movement, the court declared that its constitutionality must be judged by the stricter standard of whether it promotes a "compelling" state interest.

A New York Education Law provided that those who were otherwise qualified to vote in federal elections may vote in school district elections only if:

1. they own or lease taxable real property in the school district, or
2. are parents or have custody of children enrolled in the local public schools.

Upon review, the court began by disregarding the traditional rational basis test and the presumption of constitutionality usually afforded state statutes. The denial of the right to vote was recognized as the denial of a fundamental right. The classification, therefore, is inherently suspect, and the burden is on the state to show a "compelling interest" to justify denying the franchise to appellant and members of his class.

Does the exclusion of mobile homes constitute invidious discrimination? Obviously it would if the facts and circumstances showed that the effect was to exclude all blacks, or a similar class, because only they lived in mobile homes. The court, regardless of the legislature's motive, upon review would look at the "effects" of the enactment and sustain an equal protection attack against an enactment which effects racial classifications. In all probability an attack in this instance would be successful because of the nature of the exclusion. In reality, however, even though blacks are predominantly in the lower socioeconomic group the exclusion of mobile homes does not classify on the basis of race but rather more along the lines of economic status. To shift the burden of proof then, where no racial classification is effected by the enactment, there must be a factual showing involving (1) infringement of a fundamental right, or (2) classification by wealth or economics.

Where the enactment is an attempt to limit the size of a city, possibly it is an infringement on the right to travel since the overall purpose of population limitation is to defer the influx of new residents, creating a barrier to the free flow of persons. Arguably, this is analogous to the invalidity of certain welfare residency requirements, a classification which was deemed to constitute invidious discrimination touching on the "fundamental right" of freedom of movement. It is certainly arguable that a municipality which restricts migration into the city has a more substantial effect on freedom of movement than do welfare residency requirements.

There are sufficient legislative and judicial proclamations declaring that housing is a necessity of life to enable the courts to hold that a classification which excludes certain types of housing is suspect under the Equal Protection clause. However, the courts to date have not held such to be a fundamental interest requiring such protection. Absent proof that an ordinance excluding mobile homes infringes upon the right to travel, that housing itself is a fundamental right, or facts that demonstrate de facto segregation, an equal protection attack must be made on the basis of an economic classification.

In 1968, welfare recipients were denied admission to public housing that was managed by a private corporation but financed by a Federal Housing Administration. The court held that classification solely on the basis of status as a welfare recipient was an arbitrary classification in violation of the Fourteenth Amendment. In an Illinois case, but by way of dictum only, the Supreme Court said:

... where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect, an exacting judicial scrutiny is especially warranted.

In 1970, thirty acres of land were purchased in Lackawanna, New York, for the development of low-income housing. Immediately the city amended its zoning ordinance to declare a moratorium on approving subdivisions. The city claimed that increased...
Coming: The National Center For State Courts

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The locating of the headquarters of the National Center for State Courts in Williamsburg, announced in August at the time of the American Bar Association convention, promises a variety of benefits, both tangible and intangible, for the Marshall-Wythe School of Law. Williamsburg was chosen after a screening of applications of more than a dozen cities throughout the country, and apparently the two overriding practical advantages in its favor were (1) proximity to national government in Washington and (2) existence of the outstanding conference facilities in Williamsburg.

Among the specific advantages to the Law School in association with the National Center will be cooperative library acquisitions, in which the Law Library will make its resources available in exchange for access for research purposes to the special reference collections of the Center. When the Center's conference and training programs are fully operational, law students are expected to be called upon to serve as ad hoc clerks for visiting jurists engaged in the study projects built into the programs. Faculty and staff of the Law School will probably have opportunity to participate in Center research projects from time to time.

It is also anticipated that various professional and scholarly agencies working in the general field of court administration will establish branch offices or liaison programs at the Center headquarters. Such groups include the American Judicature Society of Chicago, the Institute of Judicial Administration in New York, and the National College of the State Judiciary in Reno, Nevada. The headquarters staff itself, once the building is completed and the national programs are fully functioning, may range from fifty to one hundred persons.

The National Center is only beginning to formulate its program of activities, but among them will probably be conferences and training programs for various types of court personnel, organization and funding of research projects, and collection and publication of studies on court administration and law reform. For the present, the work of the National Center will be implemented in various regional offices, three of which are already operating in Atlanta, San Francisco and St. Paul, Minn. At least two other regional offices, in the southwest and the northeast, will be added to the structure.

Edward M. McConnel, former State court administrator for New Jersey, is now the executive director of the National Center. Justice Louis H. Burke of the California Supreme Court and Justice James A. Finch, Jr. of the Missouri supreme court are president and vice-president, respectively, of the Center's board of directors. The first meeting of the board in Williamsburg.

(Continued on page 13)
VIRGINIA ATTEMPTS TO REORGANIZE ITS ENVIRONMENTAL AGENCIES

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To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

(Article XI, Section 1, Constitution of Virginia)

Since ratification of the new Constitution by the citizens of Virginia in 1971, the General Assembly has enacted several major pieces of legislation concerned with environmental quality in an attempt to fulfill the Constitutional mandate. Among them have been the 1972 wetlands legislation, the establishment of a Council on the Environment, legislation aimed at identifying and protecting "critical environmental areas," the Erosion and Sediment Control Law and the requirement of environmental impact statements on certain construction undertaken by State agencies.

In terms of the Commonwealth's commitment to a coordinated attack on environmental problems, however, the most important legislation introduced during the past several years was House Bill Number 1586, introduced in the 1973 Session of the General Assembly. This bill represented the culmination of a study by the Virginia Advisory Legislative Council (VALC) first initiated in 1971, when House Joint Resolution Number 35 of that year directed a study of "the desirability of establishing a single State agency to regulate and control all environmental pollution." The study was undertaken by a select Committee on Environmental Management, composed of members of the VALC and in January of 1973 the Council reported its recommendations to the General Assembly and Governor.

In that report the Council noted five general deficiencies "which have impaired the effectiveness of environmental management in Virginia." First among these is the duplication of effort under the existing arrangement of independent agencies. The shellfish protection program, for example, has required the technical services of five separate agencies and has been marked by much duplication of water sample collection and analysis. Likewise, plans for new sewage treatment facilities have involved double processing by the State Water Control Board and the Bureau of Sanitary Engineering of the Department of Health.

Second is "the fragmentation of properly unified environmental functions among several different administrative agencies" and the lack of coordination which results. The Council cited disagreements between the State Water Control Board and the Bureau of Sanitary Engineering stemming from the different criteria used by each agency in reviewing plans for sewage treatment plants, and the conflicts between the Water Control Board and the State Corporation Commission over minimum flow releases for new dams. The VALC pointed out that at present "there is no single agency which is either capable or authorized to take a broad look at and act upon the needs of environmental protection. Policy and standards are necessarily established in bits and pieces for specific media. No single board or official can act on environmental questions outside its narrow area of concern." Fragmentation was also found to have resulted in a third problem: the neglect of certain regulatory functions due to the absence of coordinative supervision which could fill in such "gaps." Here the Council singled out the failure to make on-site inspection of new sewage treatment plants.

A fourth problem is the numerous delays in administrative action on environmental permit applications which result from (1) fragmentation of responsibilities; (2) the requirement that part-time commissions decide on permits and (3) a lack of specific accountability for permit processing. Although the specific example given involved the Marine Resources Commission, the report reflected a general concern over the need for approval from several agencies, each making its own investigation, before some projects can proceed.

Finally, the VALC cited the "increased involvement of boards and commissions in the day-to-day management of agencies, largely due to insufficient delineation of responsibilities." The Council referred to the blurring of administrative and policymaking functions in some instances and appeared to be opposed to providing day-to-day leadership of an agency through a collegial body rather than a single administrator. Direct involvement in the running of an agency by a board or commission often leads to
confusion on the staff and a great reduction in the speed with which an agency can act.

To remedy these problems, the Council recommended a massive reorganization of the State's environmental agencies into a single department placed administratively under the general jurisdiction of the Secretary of Commerce and Resources.

Under the provisions of House Bill 1586 as originally introduced, there would be established the Department of Conservation, Development and Natural Resources. The Department was to be comprised of four divisions, each headed by a director: the Division of Environmental Quality; the Division of Natural Resources; the Division of Game and Inland Fisheries; and the Division of Marine Resources. In proposing to establish these new agencies, the Council took cognizance of the different categories of environmental functions. One broad type is pollution control, which has been carried out by relatively new agencies and has as its prime goal the enforcement of standards and regulations to maintain environmental quality. The other broad category is resource conservation and development, which has traditionally had as its major concern the development of the state's natural resources.

The Division of Environmental Quality was to combine those existing agencies and functions which were primarily concerned with pollution control. Specifically, this would mean abolition of the existing State Water Control Board and Air Pollution Control Board, and the transfer of their functions, along with certain functions of the Department of Health, to the new division.7 The Division would be divided along lines suggested by its combined components into the three bureaus of Air Quality, Water Quality and Solid Wastes.

The existing Department of Conservation and Economic Development was to form the basis of the proposed Division of Natural Resources. This Division would carry out the essentially conservation and development functions in resource management and consist of four bureaus: Forestry and Minerals; Parks and Recreation; Mined Land Reclamation; and the Bureau of State Travel.

Because of the "inherently close ties between wildlife preservation, land acquisition and management and other aspects of environmental management,"8 the third unit of the proposed Department was to be established by the abolition of the Commission of Game and Inland Fisheries and the transfer of its functions to a newly created Division of Game and Inland Fisheries. Similarly, the Marine Resources Commission would be abolished and reestablished as the Division of Marine Resources, the last of the four divisions. In conjunction with the establishment of these four divisions, House Bill 1586 also established four citizen boards along the same functional lines as the divisions. The Board of Environmental Quality was to be comprised of seven members: the Commissioner of the State Health Department and, initially, the three senior members of both the existing air and water boards. The Board of Natural Resources was to be comprised of twelve members, with the initial membership that of the existing Board of Conservation and Economic Development. Similarly, the proposed Board of Game and Inland Fisheries was to be selected as is the present Commission (ten members, one from each Congressional district) and was to be initially comprised of the current membership of the Commission of Game and Inland Fisheries. The present membership of the Marine Resources Commission would comprise the initial Board of Marine Resources, which would number seven members.

These four boards were to have several things in common. All were to be appointed by the Governor.

HOUSE BILL

A BILL to amend and reenact § 2.1-51.9 of the Code of Virginia; and to further amend the Code of Virginia by adding in Title 10 a chapter numbered 1.3, consisting of sections numbered 10-17.31 through 10-17.56, the amended and added sections relating to and providing for environmental management in State government by creating a Department of Environmental Protection and revising and reallocating functions of certain State agencies involved in this field; appropriations therefor.
and confirmed by the General Assembly. Their functions were to be limited to the power to establish broad policies and adopt standards and regulations concerning matters under their respective purviews. They were not, however, to become deeply involved in day-to-day administration. Each Board would elect its own chairman and establish rules for its internal organization. Staff support would be provided by the Commissioner of the Department.9

Of particular importance in the overall reorganization scheme embodied in House Bill 1586 was the establishment of a single administrator, the Commissioner of the Department, on whom previously fragmented administrative responsibilities would be centrally focused. He was to be appointed by the Governor and confirmed by the General Assembly for a term of four years, such term to run concurrently with that of the Governor. "The duties and authority of the Department, unless expressly assigned by law to a Board shall be performed and exercised by the Commissioner, who shall be the head and chief executive officer of the Department."10 These duties included (1) the maintenance of an environmental quality monitoring network; (2) determination of the Department's budget, including sub-budgets for each of the four divisions; (3) administration of all funds available to the Department; (4) application for federal aid and cooperation with federal agencies in implementation of federal programs; and (5) giving advice to the Governor and General Assembly "... on matters relating to environmental quality and natural resources ..." and measures deemed "... necessary to enhance the quality of the State's environment ...."11

The Commissioner was given power to appoint the Division directors, who were to serve at his pleasure, and to "reorganize or abolish any Bureau, create ... new Bureaus, and otherwise establish ... (the department's) . . . organization . . ."12 including the adoption of rules and procedures for internal management.13 Of equal if not greater importance than his administrative control over the Department, the Commissioner also would have the power to "issue, deny, revoke or modify, in accordance with duly adopted standards, policies and regulations, any and all permits, licenses and certificates that may be required by law."14 He could "develop . . . organizational capability for evaluating proposed projects and programs" and "consolidate, coordinate and expedite" permit procedures, "ensuring that any formal hearings required are consolidated into one such hearing."15 Thus, he would possess the power to begin to coordinate the awarding of the numerous environmentally related permits presently controlled by separate boards and commissions.

As a "check against arbitrary administrative action on permit applications,"16 the bill established an Environmental Appeals Board, to consist of the chairman of the four citizen boards and the Secretary of Commerce and Resources, who was designated Chairman. Further review of a decision of the Appeals Board would lie in the courts.17

As originally proposed, then, House Bill 1586 would have represented a considerable step toward genuine consolidation of existing environmental agencies. Although the concept of citizen boards was retained, the functions of these boards would be limited to the establishment of policies and the adoption of standards and regulations. The authority to manage the day-to-day operations of the department was clearly left in the hands of the Commissioner. The bill represented a fairly clear delineation of functions and authority and an effort to focus accountability for the State's environmental policies.

However, opposition to the measure, particularly from affected agencies, forced extensive changes in order to improve its chances of passage. As a result, the Environmental Coordination Act of 1973, which was ultimately passed and signed by the Governor, did not embody the basic reorganizational concepts of House Bill 1586.

That Act provides that the Department of Conservation, Development and Natural Resources will consist of five divisions: the Division of Air Pollution and Solid Wastes: the Division of Water Resources; the Division of Natural Resources; the Division of Game and Inland Fisheries; and the Division of Marine Resources. Within the Division of Air Pollution and Solid Wastes, the Act establishes two bureaus: the Bureau of Air and the Bureau of Solid Wastes. Within the Division of Natural Resources five bureaus are established: Forestry, Mineral, Parks, Mined Land Reclamation, and State Travel. The citizen boards remain as established in the original bill with the exception of the Environmental Quality Board.

Under the provisions of the amended bill, the present membership of the State Water Control Board is designated the Water Resources Board and the present membership of the State Air Pollution Control Board becomes the Air Pollution and Solid Wastes Board. The Commissioner of the State Health Department, as in the original bill, becomes a member of each of these two boards.

The most important change in terms of the relationship between the divisions and their corresponding boards is the broadening of the powers and duties of these boards at the expense of the citizen Commissioners. Under the provisions of the amended measure, the five boards will now have the power to (1) approve their own budgets ("(each of which ... shall be approved by the appropriate Board and thereafter shall be submitted by the Commissioner as approved to the Governor"); (2) appoint the directors of their
respective Divisions, who will serve at the pleasure of
the board; and (3) exercise the power of adminis-
trative review over actions of the Commissioner, in-
cluding the power to initiate review on their own
motion. The amendments to the bill, then, represent a con-
siderable erosion of the powers originally vested in
the Commissioner and as such greatly reduce the
prospects for genuine coordination and accounta-

bility. Under the terms of the Act each director re-
ports "to the Commissioner and shall perform such
duties as are assigned or delegated by the Commis-
sioner or as required by other provisions of law," yet these directors will be serving at the pleasure of
the respective boards. Moreover, whereas in the
original measure there appeared to be a clear de-
lineation of functions and duties and a clear focus of
responsibility, the possibilities for genuine coordina-
tion and effective management of the Department are
seriously weakened by the amendments. Nowhere

the act clearly delineate what the boards will
do and what the Commissioner will do to accomplish
the goals of the Act.

A rather broad mandate for coordinated action is
set out in the Act:

It shall be the duty of each Board to coordinate its
actions with all other Boards in the Department in
order to insure that all policies, standards, rules and
regulations of the Department are internally con-
sistent. To this end, the Commissioner, in conjunc-
tion with the Chairmen of the Boards, shall work to
establish such procedures as may be necessary to
achieve this coordination.

However, the Act does not compel this cooperation
and allows for conflicts among boards, which could
not be resolved at the agency level.

For example, the law specifies that each Board
"shall possess and exercise the power of adminis-
trative review . . . over final actions of the Commissi-
oner in the specific area or areas in which each
Board is authorized to establish policy and adopt

standards and regulations." To effectuate such
review, the law provides that each Board "shall be
empowered to initiate review on its own motion and
any final action of the Board taken thereafter shall
constitute agency action for purposes of judicial re-
view." Thus, whereas in the original bill a single
appeals board was provided for, which would com-
bine the interests of the individual boards and render
a single decision or "agency action," the amended
bill leaves open the possibility of several such "ac-
tions."

Although the Commissioner retains many of the
duties assigned him in the original bill, including the
authority in multiple permit projects to "consolidate,
coordinate and expedite" permit procedures the
wide discretion left to the individual boards could
deter any efforts at coordination.

On balance, it would appear that the deficiencies
noted in the VALC report have not been uniformly
addressed by the passage of House Bill 1586. The
which provided that “this act shall be in force on and after July one, nineteen hundred seventy-four, and shall expire at midnight on July one, nineteen hundred seventy-four, unless it shall be reenacted by the General Assembly prior to that date.”

This assured that the General Assembly would be afforded the opportunity to reconsider environmental reorganization at its 1974 session and could accept, modify or reject the concepts embodied in the measure. In conjunction with passage of the bill, the General Assembly also approved House Joint Resolution Number 265, which directed the VALC to continue its study of the consolidation of environmental agencies, along with other aspects of environmental problems. Finally, Governor Holton appointed an agency task force to formulate a position on the measure as passed and suggest possible alternatives.

During the course of the public hearings on the Act, it became apparent that there was little support for the measure. Some felt that the Act goes too far in consolidating existing agencies; some felt that it does not go far enough in ensuring genuine consolidation. A number of counter-proposals were offered, including the creation of an Environmental Protection Agency which would combine only those functions related to air, water or land pollution control. Such an approach was endorsed by Governor Holton.

A second proposal would establish an Administrator of Environmental Affairs to coordinate environmental policies and procedures with existing agencies, boards and commissions retaining their present autonomy and authority. This alternative was proposed by the State Water Control Board and was preferred by the Governor’s task force appointed to study House Bill 1586.

In a recent development, the VALC has recommended to the 1974 Session of the General Assembly that a slightly modified form of the Administrator approach be followed. The VALC has now suggested that: (1) House Bill 1586, as amended, be reenacted with an effective date of July 1, 1975, provided that it is once again reenacted prior to that date; (2) in the meantime, the position of Administrator be created and that he be designated chairman of the existing Council on the Environment with power to bring about coordination of environmental activities; (3) the membership of the Council on the Environment be expanded; and (4) the VALC continue its study of environmental management in Virginia.

Under these recommendations, the Administrator is given basically the same powers possessed by the Commissioner of the Department of Conservation, Development and Natural Resources under the amended version of House Bill 1586. Except for the expansion of the Council on the Environment to in-clude the Commissioner of the Health Department and the Chairman of the Board of Conservation and Economic Development, the Game and Inland Fisheries Commission and the Marine Resources Commission, and the transfer of the Council from the jurisdiction of the Secretary for Administration to the Secretary of Commerce and Resources, the structure of existing agencies remains the same.

This lack of structural change is the major difference between the amended House Bill 1586 and the current proposal and it appears to be the primary reason for the support from existing agencies which the Administrator approach enjoys. Whether this means that the General Assembly will follow the VALC recommendations is still unclear, but pressure is considerable to enact some form of reorganization. Developments at both the state and national levels increasingly point to the necessity of addressing environmental problems in a comprehensive manner. The General Assembly may find it more difficult than it has been in the past to avoid resolving this problem.

**FOOTNOTES**

2. Ibid.
3. Ibid., p. 7.
4. Ibid., p. 12.
5. Ibid., pp. 3-4.
6. Ibid., p. 11.
7. Ibid., pp. 8-9.
8. Ibid., p. 10.
10. § 10-17.38, House Bill No. 1586.
11. § 10-17.35, House Bill No. 1586.
12. §§ 10-17.38 and 10-17.36, House Bill No. 1586.
13. § 10-17.36, House Bill No. 1586.
14. §§ 10-17.38 and 10-17.35, House Bill No. 1586.
16. Ibid.
18. Ibid., § 10-17.37.
19. Ibid., § 10-17.58.
20. Ibid., § 10-17.37.
21. Ibid., § 10-17.40.
22. Ibid., § 10-17.58.
23. Ibid.
24. Ibid., § 10-17.56.
25. Ibid., Section 6.

**EDITOR’S NOTE**

At the time of this printing the ultimate fate of this legislation is yet uncertain.
The court said that where the effect of state action is to place upon a minority group a special burden of classification, the public authority has a heavy burden of justifying such classification—that is requiring the showing of a compelling state interest, a test which in this case the city failed to meet. Certainly there was a very reasonable basis for the city's action, but by shifting the burden of proof it was not enough for the city to show reasonableness but a compelling state interest which included a "duty" on the part of the city to consider and affirmatively plan for low-income housing. The court declared that... "If the plaintiffs are deprived of equal housing opportunity, the result is the same whether caused by open, purposeful conduct, by a subtle scheme, or by sheer neglect or thoughtlessness." 85

In effect this court considered housing a fundamental right; the denial of which created a suspect classification or, alternatively, that the exclusion of low-income persons is a suspect classification.

The Supreme Court has implied that economic groups such as the poor are protected by the Fourteenth Amendment86 and that in the absence of a showing of a compelling justification, discrimination based on economics is invidious and violates the equal protection clause.87 At least one lower federal court has held that since exclusionary zoning strikes most heavily against the poor, a classification based on wealth is suspect.88 Even though there are various holdings that stipulate or by way of dicta imply wealth to be a suspect classification, one very recent Supreme Court case almost entirely rejects such conclusion. Article XXXIV of the California Constitution requires that before any low-income public housing can be constructed anywhere in California, the development must be approved by the community in a referendum vote. Upon being challenged, Article XXXIV was held, by a three judge panel, to be a denial of equal protection. The panel started with the premise that the conjunction of race89 with poverty was sufficient to justify treating classifications based on wealth or poverty as if they had been race alone, hence "constitutionally suspect" and subject to a heavier burden of justification than other classifications.90

However, the Supreme Court reversed in a 5 to 3 decision because no racial classification was involved. The implication may well be that the majority of the Court is prepared to tolerate discrimination based on economic criteria.91 If so, attempts by public authorities to exclude the poor may be safe from equal protection attack.

In a dissenting opinion which was joined by Justices Blackmun and Brennan (Justice Douglas did not participate), Justice Marshall stated:

It is far too late in the day to contend that the 14th amendment prohibits only racial classifications; and to me singling out the poor to bear a burden not placed on any other class of citizens tramples the value that the 14th amendment was designed to protect... 92

Apparently the desire of the dissent to use judicial review to stamp out evil classifications by application of the "compelling interest test" will have to give way to the ordinary "reasonableness" or "rational" basis standard. Certainly the James v. Valtierra decision does not rule out an equal protection argument against zoning ordinances which exclude mobile homes. The case could be distinguished and limited to the facts therein. Referenda are an integral part of California's history and commonplace in the political life of the state,93 being used for Constitutional amendments, the issuance of municipal bonds, and authorization for municipal annexations,94 as well as for the approval of low-rent public housing projects. Consequently, it is at least arguable that within California the right to participate in the decision making process by voting is so fundamental that in balancing the interests, the Supreme Court will require more than a wealth classification before enjoining the referendum system.

Absent a limitation of the holding to the uniqueness of the California system, some allegation which speaks to more than merely exclusion of the poor will have to be presented—specifically, infringement on a basic right. However, there are no black and white lines as to what is a basic right, and whether such right is being restricted still seems to depend in part on the disadvantaged character of the person claim-
ing the right. And, no doubt, the equal protection clause will be extremely flexible upon review of a legislative classification. Nevertheless, absent any showing of facts or circumstances other than economic classification, the Supreme Court would most likely apply the rational basis test.

REGIONAL APPROACH

Some case decisions, notably in Pennsylvania, but also in New Jersey, New York and Virginia, show a trend toward an implied duty on the local zoning authority to consider the interests of all the persons in the area of the state. The New Jersey Supreme Court in declaring a zoning ordinance invalid because it aimed at excluding low-income families from undeveloped areas, held that the ordinance failed to promote a balanced municipality in accordance with the general welfare of the larger geographical region.

In Delaware County, Pennsylvania, the Town of Concord enacted exclusionary zoning ordinances aimed at keeping out low-income families. The Pennsylvania Supreme Court declared that the overall solution to zoning lies with greater regional planning; and the Court was firm in its commitment to require neighboring communities to work with each other until legislative enactments imposed regional authorities on local political units. Meanwhile, across the Delaware River, two developers in New Jersey who owned vacant land in the Township of Madison, and six low-income individuals who resided outside the town, sought to set aside a zoning ordinance which had the effect of barring a mobile-home park because of one- and two-acre minimum lot requirements. The highest court of New Jersey held that:

... In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs. ... Housing needs are encompassed within the general welfare. The general welfare does not stop at each municipality’s boundary.

In effect, the court said that local zoning must be based on regional needs.

One of the earliest of several cases expanding the responsibility of the municipality beyond its local borders and holding that a municipality had to zone with sensitivity toward its neighbors arose in New Jersey in 1954. There the court squarely faced the issues of regionalism versus the concept of "home rule" and whether the right of self-government gives local units the right to zone solely in their own interests. There the court held in the negative, but it is hard to deny that there is an essential conflict between the assumption that zoning is a local matter and the fact that in metropolitan areas, governmental boundaries are of almost no socioeconomic signifi-

CANCE. Obviously, general welfare does not stop at each municipal boundary.

If the power of the state legislature to legislate is accompanied by the duty to consider the interest of all the people of the state, then the delegation of legislative powers of the state to local units of government must, by necessity, be accompanied by the imposition (express or implied) of a duty to exercise such delegated power with the interests of all the state’s citizens in mind. Nevertheless, the doctrine of "home rule" pervades the legislatures and courts alike. Few enabling acts and few courts direct local zoning authorities to zone for the welfare of all the people of the region or of the state. Whether "regional general welfare" will give opponents of exclusionary zoning a legal weapon has not yet been determined.

CONCLUSION

Success in overcoming zoning ordinances which exclude mobile homes depends to a large extent on providing sufficient data and logical arguments that such exclusion is not in fact necessary for the public welfare—that is, it must be shown that the questioned ordinance is not within the limits of necessity for the protection of health or general welfare. In each case the test of validity will be the reasonableness of the ordinance viewed in light of existing circumstances in the community and the physical characteristics of the area affected or to be affected.

If the constitutionality of such ordinances is to be decided in a jurisdiction applying a substantive due process test, then upon showing that the proposed land use is legitimate, the burden of proof will shift to the municipality, requiring it to establish the legitimacy of the prohibition by evidence of what public interest the ordinance attempts to protect. Jurisdictions not applying a substantive due process test will merely test the ordinance in light of its reasonable relation to the stipulated legislative purpose. In these latter cases it appears that by attacking such ordinances, from the standpoint of due process, the judicial forecast appears bright. Whenever the ordinance effectuates racial discrimination or in some way infringes upon a basic right, such as freedom of movement, the legislation will be deemed suspect, with the burden of proof falling hard upon the state to show its compelling interest. Inasmuch as mobile homes are predominantly purchased by members of low income groups, the effect of an exclusionary ordinance may result in de facto wealth discrimination, a classification held suspect by many courts, thus requiring justification by showing a compelling state interest. However, the case of James v. Valtierra, supra, implied a willingness on the part of the United States Supreme Court to tolerate certain economic
classifications. The effect, if the implications are correct, might be to diminish the value of the equal protection clause as a means of attacking exclusionary zoning laws which segregate individuals and groups by income.

The most effective weapon to mitigate the effect of exclusionary ordinances and promote a balanced community lies with the respective state legislatures imposing upon local governing bodies a duty to enact ordinances with the regional general welfare in mind rather than merely concern for the public welfare within given municipal boundaries. Unfortunately, with few exceptions, the courts have not imposed a duty on the local zoning authorities to consider the interests of all the persons in the extended area, including that which lies outside the local political boundaries.

FOOTNOTES
3. Id., at 88. "In 1968, . . . prices of new houses financed by conventional mortgages (in major cities) average $35,000."
4. Id.
5. Comment, Mobile Homes in Kansas: A Need for Proper Zoning, 20 Kan. L. Rev. 87 (1971) [Hereinafter cited as Mobile Homes in Kansas].
7. Mobile Homes in Kansas, supra note 5.
14. Mobile Homes in Kansas, supra note 5.
24. Note, Qualified Exclusions through Zoning: Applying a Balancing Test, 57 Cornell L. Rev. 481 (1972) [hereinafter cited as Qualified Exclusions].
27. supra note 38.
28. supra note 38.
29. supra note 38.
30. supra note 38.
31. supra note 38.
32. supra note 38.
33. supra note 38.
34. supra note 38.
35. supra note 38.
36. supra note 38.
37. supra note 38.
38. supra note 38.
39. supra note 38.
40. supra note 38.
41. supra note 38.
42. supra note 38.
43. supra note 38.
44. supra note 38.
45. supra note 38.
46. supra note 38.
47. supra note 38.
48. supra note 38.
49. supra note 38.
50. supra note 38.
51. supra note 38.
52. supra note 38.
53. supra note 38.
54. supra note 38.
55. supra note 38.
56. supra note 38.
57. supra note 38.
58. supra note 38.
59. supra note 38.
60. supra note 38.
61. supra note 38.
62. supra note 38.
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67. supra note 38.
68. supra note 38.
69. supra note 38.
70. supra note 38.
71. supra note 38.
72. supra note 38.
73. supra note 38.
74. supra note 38.
75. supra note 38.
76. supra note 38.
77. supra note 38.
78. supra note 38.
79. supra note 38.
80. supra note 38.
81. supra note 38.
82. supra note 38.
83. supra note 38.
84. supra note 38.
85. supra note 38.
86. supra note 38.
87. supra note 38.
88. supra note 38.
89. supra note 38.
90. supra note 38.
91. supra note 38.
92. supra note 38.
93. supra note 38.
56. Supra note 53, at 735.
61. Legitimate Exclusions, supra note 38.
63. Legislation cited note 16 supra; cases cited note 17 supra.
64. Michelman, Foreword: On Protecting the Poor through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969).
68. Id., at 696.
72. Article XXXIV of The California Constitution was challenged by Mexican-Americans and poor blacks.
76. Id., at 141.
77. Id., at 142.
78. Karst, supra note 53, at 739.
79. Walsh, Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?, 3 Conn. L. Rev. 244 (1971).
85. Walsh, supra note 79, at 253.
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