COMMENTS

Environmental Law and Residential Exclusion: Protecting the Environment or Preserving Neighborhood Status Quo?

Concerned persons might fashion a claim, supported by linguistics and etymology, that there is an impact from people pollution on "environment," if the term be stretched to its maximum. We think this type of effect cannot fairly be projected as having been within the contemplation of Congress.[1]

There is a growing practice whereby environmental protection principles and the impact statement provisions of the National Environmental Policy Act[2] (NEPA) are utilized in efforts to bar housing or other facilities provided for unwanted social groups. This seeming adjunct to the environmental protection movement creates lawsuits in which environmental claims and defenses are offered to justify exclusionary purposes or effects. As a result, these cases present questions as to whether a legal strategy which relies on environmental law to justify exclusionary practices is an appropriate use of environmental protection concepts. This Comment will examine the variable meanings of the terms "environment" and "people pollution" and the use of these concepts in the service of exclusionary objectives in cases decided under local laws and NEPA.

1. Maryland-National Capital Park and Planning Comm'n v. U.S. Postal Service, 487 F.2d 1029 at 1037 (D.C. Cir. 1973) (denying an injunction sought on environmental protection grounds to bar a postal facility and the attendant "influx of low-income workers"). *See* notes 101-03 and accompanying text *infra*.

2. 42 U.S.C. §§ 4321-47 (1970). Section 4332(C) mandates that all federal agencies develop an environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment."

I. Introduction

In several recent federal court suits,[3] neighborhood residents have sought the federal environmental impact statements mandated by NEPA in attempts to bar construction of facilities which would attract different and unwanted socio-economic groups to their neighborhoods. The neighborhood residents claimed that the unwanted newcomers would adversely affect the environment within the meaning of the Act. In deciding these cases courts have acknowledged that NEPA mandates consideration of social and economic environmental factors, but ruled that in the cases before them the socio-economic status of groups of people was not the type of environmental factor contemplated by NEPA and which activates full-scale federal impact statement procedures.

Similarly, environmental protection principles and legislation have been utilized in cases involving local law issues such as restrictive zoning and permit-granting practices.[4] In questioning, criticizing, or refusing to validate such restrictive policies, many courts have observed that environmental protection claims and defenses had been applied for purposes of excluding unwanted socio-economic groups rather than to protect the environment. Thus, while the NEPA decisions are particularly significant because of their national impact, questions regarding the legitimacy of using environmental law to promote exclusionary policies arise in connection with local law considerations as well.

Although the precise legal issues involved are often questions of statutory construction, an underlying issue in each case concerns the use of environmental law and environmental protection principles as a legal justification for discriminatory or exclusionary housing policies. As a result of the central position of discriminatory intent or effect in these cases, they are significant not only for their interpretations of relevant local and federal statutes, but also for the principles they suggest regarding the scope and applicability of environmental law in limiting the availability and location of housing for unwanted social groups. The issue is not whether neighborhoods may bar housing for unwanted people; numerous United States Supreme Court decisions establish that the

3. *See* notes 60-105 and accompanying text *infra*.
4. *See* notes 16-59 and accompanying text *infra*.

Constitution does not prohibit housing and other policies which may operate to exclude specific socio-economic groups.[5] Rather, the issues are whether environmental law is an appropriate vehicle for promoting exclusionary aims and, more specifically, whether under NEPA it is an aspect of this nation's environmental policy to require an environmental impact statement to consider alleged "environmental threats" presented by new and different socio-economic groups.

The housing discrimination issues presented in these cases are not new, and, indeed, the purported environmental protection measures warrant special scrutiny because the case facts are often identical to many now classic cases which involved neighborhood attempts to exclude on the basis of ethnic identity or social status and which are universally identified as housing discrimination cases. These cases involved the use of restrictive covenants[6] and voter referenda[7] to exclude blacks or low-income groups, zoning regula-

5. *See* note 7 *infra.*

6. Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that courts may not enforce racially restrictive covenants).

7. In Reitman v. Mulkey, 387 U.S. 369 (1967), and Hunter v. Erickson, 393 U.S. 385 (1969), the Supreme Court held that citizens may not authorize racially restrictive housing policies through a state constitutional amendment or through city charter amendment which raised a referendum hurdle to certain equal opportunity housing ordinances. In *Reitman,* the Supreme Court had invalidated a California constitutional amendments which effectively nullified state anti-discrimination statutes by allowing private persons to discriminate on racial grounds in real estate transactions. Justice Douglas, concurring, had characterized the referendum on the amendment as follows:

> Proposition 14 is a form of sophisticated discrimination whereby the people of California harness the energies of private groups to do indirectly what they cannot under our decisions allow the government to do.

387 U.S. at 383 (footnotes omitted).

Several years later, however, in James v. Valtierra, 402 U.S. 138 (1971), the Supreme Court upheld a similar California statute which authorized voter referenda on low-rent housing. The Supreme Court distinguished *Valtierra* from restrictive precedents such as *Hunter* and *Reitman* by noting that unlike the legislation in those cases, the statute in issue in *Valtierra* involved a classification based on income, not race. Thus, *Valtierra,* together with decisions on issues other than housing such as Jefferson v. Hackney, 406 U.S. 535 (1972) (upholding a Texas statutory scheme which provided lower welfare benefits for AFDC families, most of whom were minorities, than for the aged and blind, most of whom were not minorities), and Palmer v. Thompson, 403 U.S. 217 (1971) (upholding a city's authority to close a swimming pool rather than desegregate), and San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (upholding a Texas school financing scheme against claims of income discrimination) indicate that racially discriminatory effects are not alone sufficient to invalidate such legislation.

tions to exclude senior citizens and college students,[8] and restrictive permit-granting policies to inhibit or bar housing intended for specific income or ethnic groups.[9] The long history of litigation on this question, the broad range of unwelcome social groups, and the varied methods developed and employed for the purpose of exclusion clearly demonstrate that the desire for socio-economic uniformity is a characteristic common to many American communities.

Many Supreme Court decisions have invalidated practices through which neighborhoods once barred blacks and other minorities, and forced neighborhoods to abandon previously effective discriminatory tactics.[10] However, while the Court has ruled that the Constitution prohibits express racial discrimination, a substantial "loophole" remains since exclusionary effects may be permissible as long as discriminatory classifications are rational and do not expressly discriminate on the basis of race.[11] Thus, recent Supreme Court and

8. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928) (invalidating an ordinance which had been enacted to bar an old people's home); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding an ordinance which prohibited more than two unrelated students from the State University of New York from living together in houses in an area zoned for single-family residences).

9. *See, e.g.*, Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part and rev'd in part without opinion*, 473 F.2d 910 (6th Cir. 1973); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970), (all invalidating practices whereby officials refused to authorize permits for construction of, or municipal services for, housing intended for racial minorities or low-income groups).

10. *See* notes 6-8 *supra*.

11. Recently, federal courts in Michigan, California, Ohio and New York have relied on the permissive Supreme Court precedents to uphold legislation or policies which barred low- and middle-income housing from objecting neighborhoods. *See* Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980, *pet. for reh. denied*, 397 U.S. 1059 (1970) (upholding citizens' right to a referendum which would nullify zoning ordinances that would have allowed low-rent housing for minorities in white residential areas); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970) (upholding city referendum which barred low-income housing); Mahaley v. Cuyahoga Metropolitan Housing Authority, 500 F.2d 1087 (6th Cir. 1974) (dismissing claim based on defendant's refusal to consent to the project); Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974) (dismissing claim based on defendant's abandonment of planned low-income housing after public opposition developed); Citizens Comm. for Faraday Wood v. Lindsay, 362 F. Supp. 651 (S.D.N.Y. 1973), *aff'd*, 507 F.2d 1065 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (upholding the City's decision to abandon plans for low-income housing in a white residential area). The current state of the law on this point has been summarized in *Citizens Comm. for Faraday Wood* as follows:

In view of *Valtierra* and *Palmer*, it appears that in housing, for a racially

lower federal court decisions which uphold local housing practices designed to bar unwanted newcomers for reasons other than race, regardless of possible discriminatory effects, allow local legislative judgment to determine housing policy as long as there is no express racial discrimination. These facts suggest that in order to avoid charges of unlawful discrimination, state and local legislatures dealing with these questions need only promulgate policies and legislation which on their face are rationally based and nondiscriminatory.

At this point environmental law and principles merge with housing discrimination issues: because judicial decisions have abolished many exclusionary tactics and other such tactics are only occasionally upheld, resistant towns and neighborhoods have adopted and adapted environmental protection principles as a legal theory to legitimate otherwise questionable practices. Seemingly, Supreme Court decisions do not forbid this practice. The issue, then, is whether these practices and those court decisions which uphold them properly interpret and apply environmental law and principles.

II. SEMANTIC CONSIDERATIONS: ENVIRONMENT AND PEOPLE POLLUTION

The potential applicability of environmental law for use as an instrument of exclusion stems in part from the variable meaning which attaches to two recent additions to the legal lexicon: "environment" and "people pollution." Furthermore, the now-limited utility of other previously available exclusionary devices such as restrictive covenants and racially discriminatory voter referenda creates a corresponding "need" for other techniques to replace those which the courts have invalidated. Environmental law serves this purpose for neighborhoods which perceive unwanted new resi-

> discriminatory effect to be found, there must be some showing that a policy or activity which has a racially discriminatory effect results from a prior pattern of discrimination or that such policies affect only racial minorities. . . . To hold that any action or failure to act is unconstitutional because it has an adverse effect on minorities, even though it affects members of the majority as well—albeit to a lesser degree—would be carrying the idea of a discriminatory effect too far.

362 F. Supp. at 659. The results in these cases reaffirm the long-standing principle of deferring to local legislative judgment on local issues. Thus, absent express racial discrimination, neighborhoods may constitutionally exclude unwelcome newcomers.

dents as a threat to their environment and turn to environmental law for redress.

The environmental claims and defenses in these cases are grounded in a broad definition of the term "environment," a term which in common usage and general understanding has no single meaning:

> "Environment" is a word with many connotations. In one sense it may refer only to the physical and ecological structures that exist around us. But also it denotes the culture in which we live with its social atmosphere, institutions and sets of values of which it is composed.[12]

Thus, although environmental concepts sometimes are defined only in terms of the natural environment, the term may embrace social and cultural factors as well.

Legally, a similarly broad definition emerges from recent legislative, judicial and administrative decisions on environmental issues. For example, NEPA, the most comprehensive federal legislation in this field, includes objectives such as assuring "esthetically and culturally pleasing surroundings" and preserving "historical, cultural, and natural aspects of our national heritage,";[13] and the Council on Environmental Quality's implementation guidelines require consideration of adverse environmental effects on "man, his physical and social surroundings, and to nature."[14]

Just as the term "environment" may embrace social as well as natural factors, so too a related term, "people pollution," has multiple meanings. On the one hand, people pollution refers to the fact that people may cause pollution through their activities which contribute to air, water and land pollution; that is, they pollute the natural environment by introducing new pollutants into a relatively clean natural system, by further contributing to an already polluted system, or by overburdening pollution control systems. This use of "people pollution" is a *quantitative concept* based on the fact that as population density increases, absent controls, pollution also increases. In this sense, then, people pollute the natural environment by virtue of their numbers.

12. *See* Sternlieb *et al., Planned Unit Development: Environmental Suboptimization,* 1 ENV. AFFAIRS 694 at 695 (1972).
13. 42 U.S.C. § 4331 (1970).
14. 40 C.F.R. § 1500.2(b) (1975).

Similarly, the people pollution concept has been applied to describe the social impact of increased numbers of people. The currency of this theory is suggested in the following excerpt:

> The term "people pollution" should not be taken to mean pollution of the natural environment by people or land use. It must be understood as shorthand for the somewhat intangible sociopsychological costs of density, as dramatized by the corelation [sic] between density and a high incidence of social, psychological and physiological pathology.[15]

Here again, however, people pollution is used in the quantitative sense to describe the effects of high population density on the social environment.

But the term people pollution is also used in the *qualitative sense.* People may be seen to pollute not because of their waste generating activities or their numbers but because of their particular social, ethnic or economic class or condition. Under this theory different social and ethnic groups, irrespective of their numbers or their effects on the natural environment, are characterized as adverse environmental factors because of their potential effects on the socio-economic character of a neighborhood. This is the environmental protection concept which underlies many exclusionary municipal regulations or neighborhood demands for an environmental impact statement in situations where unwanted social groups may be drawn to a neighborhood by proposed new projects.

As a result, then, of the variable meanings of the terms "environment" and "people pollution," there is a continuum whereby premises and theories which were developed originally in connection with the natural environment have been transmuted to include the social environment and often thereby to support a theory that unwanted socio-economic groups can be excluded from a neighborhood on an environmental protection theory. Consequently, environmental laws and lawsuits may be factored into several general categories which vary according to their different "environmental" premises and objectives. First, consistent with the origin and purpose of most environmental protection legislation, one category includes laws and legal theories which describe environmen-

15. Note, *The National Land Use-Environmental Problem: Legal and Pragmatic Aspects of Population Density Control,* 43 U. CIN. L. REV. 377 at 381 (1974).

tal issues in terms of the natural environment. In the second category are laws and cases which draw on principles relating to the natural environment and/or *quantitative* people pollution effects and in which environmental issues are defined in terms of the harmful effects of increased numbers of people on the natural or social environment. Significantly, however, many of these cases differ from cases in the first category in that scrutiny of case facts, particularly the original reasons for development of the disputed environmental protection measure, often reveals that the measure was proposed and developed primarily because the neighborhood sought to exclude newcomers unwelcome because of their social, ethnic or economic characteristics. That is, the neighborhood was concerned about social change rather than pollution. In this sense an environmental pretext is offered to preserve neighborhood social status quo. The third category includes recent NEPA suits in which the plaintiff neighborhoods dispense with all subterfuge in the form of natural environmental protection and quantitative people pollution theories and in which the *qualitative* people pollution principle is the stated central premise. In these cases the concept of environment is "stretched to its maximum," and the unwelcome people are characterized as "pollution" in complaints and legal arguments.

An examination of the elements in the stages of this progression from natural environmental protection principles to the qualitative people pollution theory follows. Section III examines the general use of environmental principles in local law cases; Section IV deals with the special issues which develop in connection with NEPA.

III. Environmental Principles and Exclusionary Practices: Local Law Cases

A. *Environmental Claims and Defenses Designed to Protect the Natural Environment*

Most, if not all, environmental protection legislation enacted during the last ten years is the result of public and legislative concern with pollution of the natural environment. The initial impetus for environmental laws has been to "clean up" and protect the natural environment and to preserve natural resources. A corollary concern is the impact of environmentally unsound practices

on human health in current and future generations. This view is articulated in many lawsuits involving environmental issues. In this sense, an enumeration of the kinds of factors which generally concern environmentalists would include

> the imminent shortage of potable water and food supplies, the sudden accretion of toxic wastes in the air, the presence of dangerous metals such as mercury in the food chain, the increasingly rapid deterioration of air in the cities, the psychological and physiological harm which results from constant noise assault and population density, the growing stockpile of deadly radioactive wastes, the pollution of soil with pesticides and herbicides and the peril of thermal imbalance.[16]

This approach to environmental issues reflects concern with the impact of overconsumption and pollution on the various natural components of the ecosystem.

1. *Legislation.* The view which defines environmental issues in terms of natural ecology is reflected in those statutes which clearly designate the natural environment as the object of their protection. The recently enacted Minnesota legislation is an example. The Minnesota Environmental Rights Act authorizes civil actions "to protect air, water, land and other natural resources located within the state from pollution, impairment or destruction."[17] The statute defines the terms "natural resources" and "pollution, impairment or destruction" in terms of the physical environment:

> 116B.02 (subdiv. 4) Natural resources shall include but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational, and historical resources. Scenic and aesthetic resources shall also be considered natural resources when owned by any governmental unit or agency.
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> 116B.02 (subdiv. 5) Pollution, impairment or destruction is any conduct by any person which violates or is likely to violate any environmental standard, limit, [etc.] . . . .[18]

The emphasis on the natural environment is further accentuated in the statement of purpose: the legislature sought to prevent

16. Donovan, *The Federal Government and Environmental Control: Administrative Reform on the Executive Level*, 12 B.C. IND. & COM. L. REV. 541 (1970-71).
17. MINN. STAT. ANN. ch. 116B.01 (Supp. 1975-76).
18. MINN. STAT. ANN. ch. 116B.02 (Supp. 1975-76).

damage to "the environment and biosphere," enrich the understanding of "ecological systems and natural resources," and discourage "ecologically unsound" practices. Here the Minnesota legislature declared its policy in terms of study of the "impact of man's activities—including population growth and high density urbanization—on all components of the natural environment" with the objective of fulfilling "social, economic and other requirements of present and future generations." Although the language refers to social factors and consequences, the policy statement clearly states that these factors are to be evaluated in terms of their impact on the *natural* environment.[19]

The Minnesota statute is representative of legislation which refers frequently to the physical or natural environment, to the quantitative people pollution concept, and occasionally alludes to related social considerations. Since the term "environment" is definable in terms of both social and natural factors, the emphasis in this legislation on the physical environment gives that statute a somewhat confined scope: the legislation allows consideration of social factors insofar as they affect the physical environment, but it does not measure environmental damage in terms of adverse effects on the social environment.

2. *Judicial Decisions.* Housing discrimination and environmental issues often meet in cases involving traditional exclusionary tactics such as restrictive zoning regulations. Where these issues coincide, many decisions appear to turn on the substance and quality of the physical or scientific evidence which purports to support the claimed harm to the natural environment. Courts validate or invalidate the ordinance in issue, in part at least, on the basis of this evidence.

In *Salomar Builder's Corp. v. Tuttle*,[20] a declaratory judgment action that attacked a zoning ordinance which had increased the developer's cost per lot, the court found that evidence supported the claimed environmental protection motive. Noting that the rezoning was part of a comprehensive land use scheme which reflected factors such as local land conditions, the court wrote:

19. This point is further emphasized by the fact that a prima facie case may be made upon a showing of "(1) a protectable natural resource, and (2) pollution, impairment or destruction of that resource." County of Freeborn v. Bryson, 297 Minn. 218 at 228, 210 N.W.2d 290 at 297 (1973).

20. 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (1971).

> The testimony introduced was uncontradicted by the landowner and established that the threat of pollution to both local wells and the entire water basin was real and required affirmative steps in the form of pollution control.
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> Here the requirement of larger parcels was designed in the hope of reducing the number of septic tanks and thus allowing for sufficient land area to prevent the effluent from the septic tanks from seeping into the water source of the home owner or draining into the reservoir serving the New York City area, and would indeed tend to minimize the danger of pollution.[21]

The evidence which established a scientific basis for the environmental defense was sufficient to validate the zoning ordinance and to overcome the plaintiff's claim.

Similarly, in *Nattin Realty v. Ludewig*[22] the court upheld the town's action denying a building permit to the realtor-plaintiff. The court referred to testimony by local chemistry and geology professors which established to the court's satisfaction that the new dwellings had been planned without providing for adequate sewage disposal and that this would have adverse ecological consequences. The court concluded that the town was "prompted by ecological considerations, based not on whim or fancy but upon scientific findings."[23] Thus, in these cases an ecological motivation behind potentially exclusionary zoning ordinances or permit-granting policies was sufficient to bar new housing developments when there was evidence which supported the claims of environmental harm.

Decisions such as these illustrate the legitimate use by neighborhoods and informed evaluation by courts of an environmental protection claim or defense. Ideally, resistant neighborhoods offer specific allegations of an adverse effect on the natural environment, supported by evidence and uncomplicated by the threat of newcomers who are unwelcome because of their social characteristics. On such facts, a decision prohibiting new housing may be justified as an environmental protection measure. As the court observed in *Nattin Realty:* "[I]t appears that courts must consider a new criterion in reviewing zoning legislation: the factor of ecology."[24]

21. *Id.* at 227, 275 N.E.2d at 589, 325 N.Y.S.2d at 939.
22. 67 Misc.2d 828, 324 N.Y.S.2d 668 (Sup. Ct. 1971).
23. *Id.* at 832, 324 N.Y.S.2d at 672.
24. *Id.* at 831, 324 N.Y.S.2d at 671.

B. *Environmental Claims and Defenses Designed to Maintain Neighborhood Status Quo*

Municipalities have long and legitimately used their zoning and permit-granting powers to regulate community size and social character.[25] Policies which have been challenged as exclusionary have been justified nevertheless as "necessary to preserve the character of the community."[26] Occasionally, this type of neighborhood preservation objective has been expressly related to an exclusionary aim. For example, in *Kavanewsky v. Zoning Board of Appeals of the Town of Warren,* a Connecticut court observed that the challenged zoning amendment had been enacted "in demand of the people to keep Warren a rural community with open spaces and keep undesirable businesses out."[27]

Recently, the new "factor of ecology" has been utilized to justify long-familiar neighborhood preservation objectives. In an ever-increasing number of lawsuits, scientific and legal principles developed originally in connection with the natural environment have been offered to legitimate policies which are exclusionary in origin and which, except for the interposition of environmental protection issues, are indistinguishable from more familiar practices designed to "preserve the character of the community" by excluding unwanted social groups. The environmental claims are generally phrased in terms of quantitative people pollution effects; often, however, qualitative people pollution factors are central issues.

1. *Neighborhood Preservation Objectives Treated As Valid Environmental Issues.* Many courts have validated zoning and land use regulations in the face of exclusionary challenges on the theory that the restrictive policy was a reasonable environmental protection measure and that the alleged exclusionary effects were incon-

25. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding that under the zoning power a local government may regulate land use without violating the owner's property rights); Berman v. Parker, 348 U.S. 26 (1954) (upholding congressional legislation affecting land use in the District of Columbia against a property owner's due process claims). In *Berman* the Supreme Court wrote:

> It is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

348 U.S. at 33.

26. Fischer v. Town of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952) (validating a minimum acreage zoning ordinance).

27. 160 Conn. 397 at 403, 279 A.2d 567 at 570 (1971) (validating a zoning regulation which increased minimum lot size).

sequential, non-existent or irrelevant. One case in which an environmental protection rationale, a restrictive zoning policy, and the neighborhood preservation factor were joined was *Steel Hill Development, Inc. v. Town of Sanbornton*,[28] a declaratory judgment action in which a private developer who planned a cluster development of seasonal homes challenged a restrictive zoning ordinance in the rural New Hampshire town. After learning of the developer's plans, the Sanbornton Town Planning Board had rezoned the land to prohibit the development. The town defended the ordinance by claiming, among other things, that the planned development would produce "immeasurable ecological harm."[29] The First Circuit Court of Appeals found itself "caught up in the environmental revolution"[30] and validated the ordinance, in part at least, on the basis of ecological factors:

> We recognize, as within the general welfare, concerns relating to the construction and integration of hundreds of new homes which would have an irreversible effect on the area's ecological balance, destroy scenic values, decrease open space, significantly change the rural character of this small town, pose substantial financial burdens on the town for police, fire, sewer, and road service, and open the way for the tides of weekend "visitors" who would own second homes.[31]

The unwelcome social group in this case consisted of Bostonians planning vacation homes. Even though wealthy vacationers are not usually objects of housing discrimination, the district court had specifically commented on the potential for exclusion by noting that "there was no evidence that the new zoning law was prompted by discrimination of any sort . . . [or that] the amendments constitute either snob zoning or exclusionary zoning."[32] This disclaimer notwithstanding, the zoning ordinance operated to exclude a specific social group, but was nevertheless upheld on environmental grounds.

In the *Sanbornton* case, the town had enacted a restrictive ordinance to bar a specific housing development. Other decisions

28. 469 F.2d 956 (1st Cir. 1972).
29. *Id.* at 960.
30. *Id.* at 959.
31. *Id.* at 961. *See also* notes 49-54 and accompanying text *infra*.
32. 338 F. Supp. 301 at 306 (D. N.H. 1972).

involve long-term, more generally restrictive land use plans. In *Golden v. Planning Board of the Town of Ramapo*[33] the New York Court of Appeals dealt with similar issues which developed in connection with an 18-year master plan upon which the town based its resistance to the development of low-income and senior-citizen housing. In validating the restrictive regulations the New York court, like the court in *Sanbornton,* acknowledged the potential for discrimination and disclaimed any willingness to allow exclusionary policies. The court emphasized instead the town's stated growth-controlling motive:

> What we will not countenance, then, under any guise, is community efforts at immunization or exclusion. But, far from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land. The restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth.
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> In sum, Ramapo asks not that it be left alone, but only that it be allowed to prevent the kind of deterioration that has transformed well-ordered and thriving residential communities into blighted ghettoes . . . .[34]

Construction Industry Association of Sonoma County v. City of Petaluma[35] is similar. Petaluma, a small town 50 miles from San Francisco, had enacted a 5-year growth-limiting plan " '[i]n order to protect its small town character and surrounding open space.' "[36] The plaintiffs alleged that the plan had been enacted primarily "to limit Petaluma's demographic and market growth rate in housing and in the immigration of new residents."[37] Citing decisions upholding zoning regulations designed to allow "the preservation of quiet family neighborhoods" and the "preservation of a rural en-

33. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed,* 409 U.S. 1003 (1972).

34. *Id.* at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152-53. *See also* notes 44-47, 55-56 and accompanying text *infra.*

35. 522 F.2d 897 (9th Cir. 1975).

36. *Id.* at 902.

37. 375 F. Supp. 574 at 576 (N.D. Cal. 1974), *rev'd,* 522 F.2d 897 (9th Cir. 1975).

vironment,"[38] the Ninth Circuit Court of Appeals reversed a district court decision holding that the city's growth-limiting plan unconstitutionally infringed the right to travel and ruled instead that Petaluma's plan was a proper exercise of the police power in the interest of the public welfare.

In each of the foregoing decisions restrictive zoning and permit-granting policies were justified as environmental protection measures in the face of challenges alleging that the measures were effectively discriminatory. In the *Sanbornton* case a specific zoning regulation excluded wealthy, vacationing Bostonians; in the *Ramapo* and *Petaluma* cases land use policies operated to limit immigration by urban residents and others seeking new places to live. In each case the court acknowledged but disclaimed or did not examine possible exclusionary effects because of the presumed legitimacy of environmental protection claims which were phrased in terms of quantitative people pollution effects. These results are consistent with the established validity of environmental protection measures, with the general practice of judicial deference to local legislatures on land use issues, and with constitutional principles which permit discrimination in housing if there is no express racial discrimination. Such factors tend to legitimate this use of an environmental protection rationale. However, *Sanbornton, Ramapo* and *Petaluma* take on another hue when considered in the light of other cases, and of case facts which the courts did not fully explore and which suggest that qualitative people pollution concerns were factors in these decisions.

2. *Neighborhood Preservation Objectives Viewed As Qualitative People Pollution. United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*[39] illustrates the use of local restrictions, grounded at least in part on environmental protection legislation, to exclude specific social groups. The plaintiffs in this case were black and brown farmworkers who had purchased land for a union housing project and who found "their efforts . . . stymied by the refusal of the City to permit the proposed project to tie into the

38. 522 F.2d at 907-08. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) the Supreme Court upheld an ordinance which allowed only one family dwellings; in Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) the court rejected the equal protection claims of Mexican-Americans who challenged a large lot ordinance. *See also* notes 57-58 and accompanying text *infra*.

39. 493 F.2d 799 (5th Cir. 1974).

City's existing water and sewer system."[40] The city acknowledged that it had the capacity to serve the plaintiffs but claimed that it served only annexed areas in the county pursuant to provisions of Florida's Regional Plan under the Federal Water Pollution Control Amendments of 1972.[41] In ruling in favor of the farmworkers, the court enumerated facts which indicated that racial discrimination was a factor in the city's refusal to issue the necessary permits. First, the court observed that the city's policy against serving unannexed areas was not rigid since it had made exceptions for a white subdivision, a separately incorporated white town, a separately incorporated club, and a mobile home park. The court also noted that a city council member had "stated several times . . . that the City should not provide services to 'those people' because they would be 'undesirable' residents."[42] The court considered these factors and clearly framed the distinction between valid and invalid environmental protection rationales:

> And we do not in any way intend to minimize the importance of land use planning or Master Plans. On the contrary, we recognize that the protection and controlled use of our environment is of great importance. We would suggest, however, that a city's claim of land use planning is hardly credible where the city denies a minority group's request for municipal services if under the same circumstances it would have granted such a request to an all-white group. To paraphrase Justice Frankfurter, there comes a point where this court should not be ignorant as judges of what we know as men. The City's annexation and land use policies presented only a facade of propriety. Under that facade, the City practiced unjustified racial discrimination. That the Constitution forbids.[43]

40. *Id.* at 801.

41. 33 U.S.C. §§ 1251-1376 (Supp. III, 1973).

42. 493 F.2d 799 at 804.

43. *Id.* at 813. In an earlier case involving ethnic exclusion and an environmental defense, Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971), the court upheld a zoning ordinance which had been applied to deny a variance to construct low-income, high-density housing for Mexican-Americans in a low-density district. The court supported the objectives of precluding "urban blight and ghettoes" and preserving and enhancing " 'the natural amenities which form the environment of the City of Morgan Hill'." 324 F. Supp. at 896. Although the court emphasized environmental and aesthetic considerations, this case is distinguishable from similar cases on several points: the zoning restrictions in issue pre-dated the plaintiffs' attempts to secure a variance; the ordinance limited high-density housing only in certain areas of the city; and the plaintiffs had alleged income discrimination but not ethnic discrimination.

The *United Farmworkers* case represents a litigation strategy in which environmental protection legislation was used to enforce a land use policy which was discriminatory as applied by the municipal defendant: the town had enforced the Water Pollution Control Amendments to bar minority facilities but had authorized exceptions to the same regulations to permit new developments for non-minority organizations and residents. The town thus had relied on an environmental protection measure to justify its refusal to allow minority organizations the necessary permits for new housing.

Other decisions similarly illustrate the juxtaposition between environmental protection language and the long-standing idea of maintaining neighborhood status quo by excluding unwanted social groups. In deciding many of these cases courts have specifically noted that the so-called environmental protection claims are often unsupported by evidence or lack credibility with respect to a natural environmental protection motive. For example, *Fletcher v. Romney*[44] was a federal court case on issues growing out of the on-going controversy surrounding the Ramapo growth-limiting plan. After losing in New York state courts,[45] neighborhood residents attempted to enjoin commitment and dispersal of Housing and Urban Development funds for low-income and senior-citizen housing. In rejecting the residents' claims, the court described their motive as an attempt to "preserve the present character of the land and to prevent the higher population density which the Airmont and

44. 323 F. Supp. 189 (S.D.N.Y. 1971).

45. The housing development and zoning ordinance in issue here has had a long and complex history of litigation. The initial suits were Matter of Farrelly v. Town of Ramapo, 35 App. Div. 2d 957, 317 N.Y.S.2d 837 (2d Dep't 1970), and Greenwald v. Town of Ramapo, 35 App. Div. 2d 958, 317 N.Y.S.2d 839 (2d Dep't 1970). In these actions residents challenged, but the court upheld, the Town Board's decision to grant zoning variances for the housing development in question. In Marino v. Town of Ramapo, 68 Misc.2d 44, 326 N.Y.S.2d 162 (Sup. Ct. 1971), the court dismissed a resident's attempt to set aside the town's contract with the developer. In Golden v. Planning Board of Town of Ramapo, 37 App. Div. 2d 236, 324 N.Y.S.2d 178 (2d Dep't 1971), the appellate division invalidated the town's zoning ordinance amendment which precluded the new development in an action brought by the developers and landowners; the Court of Appeals reversed. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). *See* notes 33-34 and accompanying text *supra;* notes 55-56 and accompanying text *infra.* Fletcher v. Romney, 323 F. Supp. 189 (S.D.N.Y. 1971), was an action in which residents sought and failed to enjoin dispersal of HUD funds for the development. *See* notes 46-47 and accompanying text *infra.*

Hillcrest projects will to some extent produce."[46] Like the Sanbornton residents, the Ramapo residents defined an environmental threat in terms of generalized neighborhood changes and quantitative people pollution effects; but the court concluded in the *Fletcher* case that such allegations lacked merit as environmental protection claims:

> As to adverse effects on the "living environment" of plaintiffs (complaint, para. 6), it is exceedingly difficult to determine such an issue, since it is so largely a matter of personal taste. Those who testified for plaintiffs expressed a desire to have the area remain just as it is, without any more people. This is entirely understandable, perhaps natural. But there is no constitutional right to have things remain as they are and by any objective test plaintiffs failed to prove that the environment would be harmed.[47]

Here again are mixed allegations which imply neighborhood concern about quantitative people pollution effects, but where the motivating factor is resistance to change in general rather than because of an environmental effect discernible to the court. Similarly, in *National Land Investment Co. v. Easttown Township Board of Adjustment,* the court rejected an environmental defense and noted that the township engineer's "bald statement that he felt there was a danger of pollution"[48] was vague and unconvincing.

3. *Sanbornton, Ramapo and Petaluma Revisited.* The merging, blending and obscuring of environmental and exclusionary objectives through the undifferentiated use of the term "environment" suggests that a re-examination is warranted of cases in which exclusionary policies have been upheld on environmental protection grounds. For example, in the *Sanbornton* decision[49] the court upheld a restrictive zoning ordinance, implying that quantitative peo-

46. 323 F. Supp. at 191.

47. *Id.* at 194-95. *But see* Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), *cert. denied,* 421 U.S. 948 (1975], a case in which residents of a predominantly white New York City neighborhood successfully blocked low- and middle-income housing by making undifferentiated allegations of generalized environmental harm. The district court described the residents' concern "with rapid population growth and subsequent over-taxing of community facilities, [and] about the expanding number of high-rise apartment buildings which they viewed as detracting from their environment." 362 F. Supp. 651 at 655-56 (S.D.N.Y. 1973).

48. 419 Pa. 504 at 525, 215 A.2d 597 at 609 (1965).

49. *See* notes 28-32 and accompanying text *supra.*

ple pollution effects and other ecological factors were a primary consideration:

> Several witnesses testified that not only would the town's rural character be destroyed by Steel Hill's massive plans, which would, in effect, double the town's population [from 1000 to 2000 residents], but there would be immeasurable ecological harm.[50]

Quantitative people pollution effects were not the only factor, however. The town's desire to avoid social change per se is seen in the town's wish to preserve its "rural character" and its "charm as a small New England Town."[51] In addition, and more importantly, the existence of qualitative people pollution considerations is suggested by the court's derisive characterization of the unwanted newcomers as "wealthy residents of Megalopolis"[52] and as "droves of touring urbanites."[53]

In view of these facts it is particularly significant that the court noted that the town had presented its proof in a "most crude manner" and suggested a possible relationship between the exclusion issue and the absence of proof of environmental harm:

> We are disturbed by the admission here that there was never any professional or scientific study made [as to the validity of the zoning change in environmental protection terms] . . . . [W]e have serious worries whether the basic motivation of the town meeting was not simply to keep outsiders . . . out of town. We cannot think that expansion of population, even a very substantial one . . . is by itself a legitimate basis for permissible objection.[54]

Thus, the town defended a potentially exclusionary ordinance as necessary for environmental reasons without presenting adequate evidence in support of this claim. The court accepted these mere allegations of environmental harm in the face of possible discriminatory results. The court's express recognition that there was no evidentiary support for the environmental claims reduces the actual basis for the decision to concern for the social changes which necessarily attend an increase in population size and the advent of a new social group.

50. 469 F.2d at 960.
51. *Id.* at 959.
52. *Id.* at 961.
53. *Id.* at 958.
54. *Id.* at 962.

Furthermore, in the *Ramapo* decision[55] Judge Breitel enumerated case facts in his dissenting opinion which indicated to him that the ordinance in issue operated as an exclusionary device which should have been struck down:

> [These cases involve] vital constitutional issues and, most important, policy issues trenching on grave domestic problems of our time, without the benefit of a legislative determination which would reflect the interests of the entire State. The policy issues relate to needed housing, planned land development under government control, and the exclusion in effect or by motive, of walled-in urban populations of the middle class and the poor. The issues are raised by a town ordinance, which . . . reflect[s] a parochial stance without regard to its impact on the region or the State, especially if it becomes a valid model for many other towns similarly situated.[56]

This is a decision, then, in which the court majority accepted the neighborhood's quantitative people pollution theory while the dissenting judge stressed that the ordinance in issue operated to exclude urban residents who might wish to live in Ramapo.

Similarly in *Petaluma,* the town had claimed that the plan related not to the exclusion of newcomers, but rather to the availability of sewage and water facilities. The district court had refused to accept this contention and invalidated the regulations, emphasizing instead the regional implications and exclusionary potential of such growth limitations:

> The aggregate effect of a proliferation of the "Petaluma Plan" throughout the San Francisco region would be a decline in the regional housing stock quality, a loss of the mobility of current and prospective residents and a deterioration in the quality and choice of housing available to income earners with real incomes of $14,000 per year or less.[57]
>
> . . . .
>
> Where a municipality purposefully limits the quantity of any particular commodity available, then seeks to justify a population limitation based upon an alleged inadequacy of that commodity, it has not stated a compelling interest which supports the limitation.[58]

Like the *Petaluma* district court and Judge Breitel's dissent to *Ramapo,* the *Sanbornton* court had also considered the regional

55. *See* notes 33-34 and accompanying text *supra.*
56. 30 N.Y.2d at 383, 285 N.E.2d at 305, 334 N.Y.S.2d at 156.
57. 375 F. Supp. at 581.
58. *Id.* at 583.

consequences of the ordinance but had upheld the ordinance on ecological grounds:

> Where there is natural population growth it has to go somewhere, unwelcome as it may be, and in that case we do not think it should be channeled by the happenstance of what town gets its veto in first. But, at this time of uncertainty as to the right balance between ecological and population pressures, we cannot help but feel that the town's ordinance, which severely restricts development, may properly stand for the present as a legitimate stop-gap measure.[59]

Thus, the towns of Ramapo, Sanbornton and Petaluma are towns which got their environmental "vetoes in first" and effectively limited new housing for urban residents.

The foregoing decisions demonstrate that courts deciding cases in which exclusionary and environmental issues are joined often reach different results on very similar facts. In *Ramapo*, *Sanbornton*, and *Petaluma* litigants challenged restrictive land use schemes on the ground that the plans were exclusionary with respect to urban residents generally or with respect to specific groups such as senior citizens or vacationing Bostonians. The towns defended the plans on environmental grounds, alleging or implying, but not proving, that population increases would be environmentally harmful, and the courts acquiesced in this approach. The mixed character of the ostensible "environmental" issues is evident from judicial references to the social characteristics of the unwanted newcomers and to neighborhood preservation objectives, as well as to ecological factors, as aspects of the environment. Other judges have stressed instead the relationship between the lack of demonstrable threats to the environment and case facts which indicated that neighborhoods sought to preserve their particular social characteristics by excluding unwanted social groups.

The variable judicial results in these cases suggest a need for principles to guide the courts in dealing with nominal environmental protection claims in cases where qualitative people pollution effects may also be a factor. In cases such as *Sanbornton* and *Ramapo* the courts, consistent with the principle of judicial deference to local authorities on land use issues, accepted without adequate examination the environmental protection claims and de-

59. 469 F.2d at 962.

fenses offered to support an exclusionary policy. Other courts looked beyond the environmental allegations and recognized the spurious character of unsupported claims of environmental threats when such claims were joined with an exclusionary policy. The judicial approach in these latter decisions, together with that of federal courts deciding similar questions under NEPA discussed below, suggest principles which may serve as a guide to courts ruling on these questions in the future.

IV. The Applicability of NEPA for Exclusionary Purposes

Since the enactment in 1969 of the National Environmental Policy Act,[60] residents and officials of several towns and cities have attempted to utilize NEPA's environmental impact statement requirement to delay or stop federal actions which would lead to an inflow of newcomers to business and residential neighborhoods. In some cases the newcomers were to be residents of housing for low- or moderate-income families,[61] or for Navy personnel;[62] in other cases the newcomers were to be transient visitors such as hospital personnel and patients,[63] or postal employees and patrons,[64] or prisoners and parolees.[65] Stated simply, the environmental protection theory advanced in these cases was that persons drawn to the neighborhood by the proposed federal project would harm the environment in the sense that the social status or condition of the newcomers would adversely affect the socio-economic character of the neighborhood.

60. 42 U.S.C. §§ 4321-47 (1970).

61. *See, e.g.*, Nucleus of Chicago Homeowners Ass'n. v. Lynn, 372 F. Supp. 147 (N.D. Ill. 1973); Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d (5th Cir. 1973). *See* notes 95-98 and accompanying text *infra.*

62. *See, e.g.*, Town of Groton v. Laird, 353 F. Supp. 344 (D. Conn. 1972). *See* notes 99-100 and accompanying text *infra.*

63. *See, e.g.*, Clinton Community Hosp. Corp. v. Southern Maryland Medical Center, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975). *See* notes 104-05 and accompanying text *infra.*

64. *See, e.g.*, Maryland-National Capital Park and Planning Comm'n. v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973). *See* notes 101-03 and accompanying text *infra.*

65. *See, e.g.*, First National Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973); Hanly v. Kleindeinst. 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). *See* notes 82-83, 89, 92-94 and accompanying text *infra.*

It is certainly arguable that new and large populations of poor people or Navy families or prisoners may affect the socio-economic character of a neighborhood, that the effect may be detrimental, and that the more the newcomers differ from the existing residents the greater the effect may be. But the NEPA challenges raise the question of whether this particular type of neighborhood change —that is, change in the number and social character of residents or regular transients—is the kind of environmental threat contemplated by the Act. Resolution of this question depends first on whether the existing socio-economic character of a neighborhood is an "environmental value" entitled to protection within the meaning of NEPA, and second on whether the impact statement requirement allows or mandates federal agency consideration of the ethnic character or the social or economic status of people whom existing residents perceive and characterize as an environmental threat because of social, economic or ethnic differences between the newcomers and the neighborhood residents.

A. *NEPA: Social and Economic Factors*

Towns and neighborhoods seeking to bar unwanted housing under NEPA initiate their challenge to federal agency action by demanding agency compliance with the NEPA impact statement requirement.[66] This demand is based on the NEPA provisions which require that the federal government use all practicable means "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and

66. In Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), a case of first impression on NEPA, the court described the statute's essential mandate as follows:

> [NEPA] takes the major step of requiring all federal agencies to consider values of environmental preservation in their spheres of activity, and it prescribes certain procedural measures to ensure that those values are in fact fully respected.

Id. at 1111. The functional significance of the impact statement was summarized in Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972), where the court wrote:

> The impact statement provides a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance . . . for the proposed project with the environmental risks presented by the alternative course of action.

Id. at 833. The statute thus requires "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned." *Id.* at 836.

other requirements of present and future generations of Americans," and which mandate the preparation of environmental impact statements by federal agencies and departments to effectuate this broad purpose.[67]

Environmental policy is, of course, the Act's central concern. The impact statement requirement becomes operative whenever a major federal action will significantly affect the quality of the human environment,[68] and NEPA's language and legislative history refer repeatedly to congressional concern for "environmental amenities and values"[69] and for the "environmental consequences" and "environmental impact"[70] of federal action. In view of these facts and the fact that the term "environment" has multiple meanings, it is some-

67. 42 U.S.C. § 4331(a) (1970). Impact statement preparation is essentially a two-stage process. The first stage or threshold determination involves an agency decision as to whether the proposed project requires an impact statement at all. Here the agency decides if the project (1) is a "major Federal action" and (2) "significantly affects the human environment." This determination requires agency production of a reviewable record which may be the basis for deciding that the project does not require an impact statement; this is the so-called "negative impact statement." Alternatively, when the threshold determination reveals the need for an impact statement, the agency proceeds to the second stage which involves preparation of an impact statement and agency evaluation of the conclusions therein for compliance with environmental protection standards. *See* note 68 *infra*.

68. 42 U.S.C. § 4332 (C) (1970).

Like the term "environment," the term "significantly" is not defined in the Act. A court examined this question in a case involving the construction of prison facilities in Manhattan by the GSA. Hanly v. Kleindeinst, 471 F.2d 823 (2d Cir. 1972). The GSA acknowledged that the project was a "major Federal action" but had not prepared an impact statement on the ground that the project did not "significantly" affect the environment. Upon review, the Second Circuit criticized the agency's failure to consider all relevant factors and remanded for production of a reviewable record short of an impact statement, thus obligating the preparation of a "negative impact statement." Referring to the term "significantly," the court said:

> In the absence of any Congressional or administrative interpretation of the term, we are persuaded that in deciding whether a major federal action will "significantly" affect the quality of the human environment the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.

Id. at 830-31.

69. 42 U.S.C. § 4332 (B) (1970).

70. 115 CONG. REC. 40415-27 (1969).

what surprising that the term "is not defined in the Act itself nor in the C.E.Q. Guidelines."[71] However, in construing the term "environment," the courts have given it the widest possible meaning, concluding that "the sweep of NEPA is extraordinarily broad, compelling consideration of *any* and *all* types of environmental impact of federal action,"[72] and that Congress was "not only concerned with just adverse effects but with *all* potential environmental effects that affect the quality of the human environment."[73] Such sweeping judicial language suggests a possible basis for neighborhood claims that federal projects which may attract unwanted people require agency evaluation of the impact of these persons on the neighborhood.

Absent a precise statutory definition of "environment," federal environmental protection legislation, like the Minnesota legislation discussed in the preceding section, could conceivably accomplish its objectives with an emphasis similarly limited to the natural environment. And, indeed, the Council on Environmental Quality (CEQ) guidelines do stress natural factors. For example, section 1500.1(a) notes in part:

> Underlying the preparation of such environmental statements is the mandate [citations omitted] that all Federal agencies . . . direct their policies, plans and programs to protect and enhance environmental quality. Agencies are required to view their actions in a manner calculated to encourage productive and enjoyable harmony between man and his environment, to promote efforts preventing or eliminating damage to the environment and biosphere and stimulating the health and welfare of man, and to enrich the understanding of the ecological systems and natural resources important to the Nation. The objective of [the environmental impact statement requirement] and of these guidelines is to assist agencies in implementing these policies.[74]

Despite this stress on natural environmental factors, various congressional, administrative and judicial sources indicate that NEPA

71. Jones v. Lynn, 354 F. Supp. 433 at 442 (D. Mass.), *vacated and remanded*, 477 F.2d 885 (1st Cir. 1973).

72. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 at 1122 (emphasis added).

73. Hiram Clarke Civic Club v. Lynn, 476 F.2d 421 at 427 (5th Cir. 1973) (remanding for preparation of an environmental impact statement in connection with a HUD low- and moderate-income housing project).

74. 40 C.F.R. § 1500.1(a) (1975).

defines the term "environment" more broadly. At the outset, the statement of congressional policy and purpose includes among its goals certain social objectives such as

> [to] assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings . . . [to] preserve important historic, cultural, and natural aspects of our national heritage . . . [and to] achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities . . . .[75]

In this way, the Act recognizes aesthetic, social and economic factors as elements which contribute to the character of the environment.

The Council on Environmental Quality's administrative guidelines implement this comprehensive purpose through regulations instructing federal agencies to consider social factors in their deliberations on environment-related matters:

> In particular, agencies should use the environmental impact statement process to explore alternative actions that will avoid or minimize adverse impacts and to evaluate both the long- and short-range implications of proposed actions to man, his physical and *social surroundings,* and to nature.[76]

The inclusion of "social surroundings" as an aspect of the environment clearly indicates that social factors are relevant environmental considerations. This conclusion is reinforced by the requirement that agencies "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and environmental design arts. . . ."[77] In addition, the CEQ guidelines, like many judicial opinions, stress a broad construction of NEPA's mandate:

> The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed . . . . Proposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases.[78]

75. 42 U.S.C. § 4331 (1970).
76. 40 C.F.R. § 1500.2(b) (1975) (emphasis added).
77. 42 U.S.C. § 4332(A) (1970).
78. 40 C.F.R. § 1500.6(a) (1975).

Some courts, ruling on impact statement issues, have also specifically required agencies to consider social factors. In remanding a highway construction project for another hearing, the Fourth Circuit Court of Appeals ruled that the agency "must . . . seek information about the social effects of the proposed location."[79] Similarly, a federal district court concluded that NEPA required the Department of Housing and Urban Development (HUD) to develop an impact statement in connection with the sale of land to a residential developer, and stressed that NEPA required consideration of social, economic, aesthetic and recreational factors as well as the effects of the proposed sale on wildlife habitats, soil, and plant and animal life.[80]

Since population density, ethnic and economic differences, and other factors which define the social environment are more likely to become issues in an urban context, NEPA decisions on the urban environment are particularly pertinent. In this regard, courts ruling on impact statement issues have required federal agencies to develop information as to the consistency of a highway construction project with a "community's urban planning goals."[81] Courts have also designated as environmental factors such clearly urban social issues as crime, drugs and traffic congestion. For example, in *Hanly v. Mitchell*,[82] an action challenging a General Services Ad-

79. Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 at 1337 (4th Cir. 1972). NEPA directs that courts construe federal legislation in accord with its policy, 42 U.S.C. § 4331 (1970), and the court in *Arlington Coalition* so construed § 128(a) of the Federal Highway Act of 1968, 23 U.S.C. § 128(a) (1970), in regard to the information which must be elicited at public meetings.

80. Scenic Rivers Ass'n of Okla. v. Lynn, 382 F. Supp. 69 (E.D. Okla. 1974), *aff'd in part, rev'd in part*, 520 F.2d 240 (10th Cir. 1975).

81. 458 F.2d at 1337.

82. 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

Hanly v. Mitchell, in subsequent litigation *Hanly v. Kleindeinst*, has been before the Second Circuit Court of Appeals three times. Neighborhood residents and businessmen sought to enjoin construction of a federal prison facility on the ground that the GSA had failed to consider properly the environmental impact of the project as NEPA requires. In an unreported memorandum, the district court judge denied the injunction. The Second Circuit Court of Appeals affirmed in part and reversed in part, granting an injunction pending GSA evaluation of all relevant factors. Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972). On remand the district court again denied the injunction. The Court of Appeals elaborated factors requiring agency consideration and ruled that the GSA must investigate several issues which it had not considered previously. Hanly v. Kleindeinst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 903 (1973). On remand, the district court again denied the injunction, and the Court of Appeals

ministration site selection for a federal prison in Manhattan, the court enumerated some of the factors to be assessed in evaluating the impact of proposed federal actions in the urban environment. Referring to NEPA, the court said:

> The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, over-burdened mass transportation systems, crime, congestion and even the availability of drugs all affect the urban "environment" and are surely results of the "profound influences of . . . high density urbanization [and] industrial expansion."[83]

In *First National Bank of Chicago v. Richardson*,[84] a similar action challenging the location of a federal prison facility near Chicago's Loop, the court considered the applicability of NEPA, not only to urban areas, but in terms of its specific relation to the urban poor and inner city residents. The court said:

> Unfortunately, the environmental problems of the city are not as readily identifiable as clean air and clean water. The Council on Environmental Quality has noted:
>
> "Life in the inner city embraces a range of environmental problems, some starkly evident, some disguised, some acknowledged as environmental, some wearing other labels . . . .
>
> ". . . [In the inner city] many of our most severe environmental problems interact with social and economic conditions which the Nation is also seeking to improve.
>
> ". . . [T]here is growing evidence that among the urban poor—those with the most to gain from environmental improvement—are some who have decided to embrace environmentalism in their own distinct way. Their use of the term environment is broader than the traditional definition. Their concept embraces not only more parks, but better housing; not only cleaner air and water, but rat extermination.
>
> . . . .
>
> "The variety of environmental problems of the inner city and the absence of simple answers to these problems make it particularly important that efforts to overcome them be tailored to the needs and priorities of each locality."[85]

affirmed in a brief per curiam opinion. 484 F.2d 448 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

83. 460 F.2d at 647.

84. 484 F.2d 1369 (7th Cir. 1973).

85. *Id.* at 1377-78.

Thus, the CEQ and the court in the *First National Bank* case acknowledged the special social character of environmental problems arising in cities, and NEPA's applicability in this regard.

The judicial decisions and administrative regulations make it clear that, unlike legislation designed to deal only with pollution of the natural environment, NEPA recognizes that the social environment is subject to adverse effects and mandates that federal agencies consider social factors in determining whether a proposed project will harm the environment.

B. *NEPA: People Pollution*

The foregoing discussion establishes that social factors generally and social factors arising specifically in connection with urban environmental protection issues come within NEPA's purview for impact statement purposes. As it has been shown, some courts deciding local law issues have upheld actions which excluded specific socio-economic groups ostensibly in the interest of protecting the environment, social or natural. These decisions, together with NEPA's statutory provisions appear to validate the general practice of adapting environmental protection theory and legislation to prevent socio-economic changes in neighborhoods. Consequently, it is significant that courts ruling on the people pollution issue in connection with the federal impact statement requirement tend to distinguish between quantitative and qualitative population factors: where increasing numbers of people are alleged to threaten the environment, the courts tend to construe this change as an environmental factor requiring an impact statement; but where the socio-economic status of people is alleged to be an environmental threat, the courts tend to find that environmental changes of this type do not require an impact statement.

Congress, the CEQ guidelines and several courts have specifically designated some quantitative population factors as environmentally significant considerations. For instance, NEPA lists population density as a potentially degrading environmental effect:

> The Congress finds . . . that population increases and urban concentration contribute directly to pollution and the degradation of our environment.[86]

86. 42 U.S.C. § 4321(a)(3) (1970).

Further, in outlining factors to be included in the impact statement, section 1500.8(a)(1) of the CEQ guidelines directs, among other things, that:

> Agencies should also take care to identify, as appropriate, population and growth characteristics of the affected area and any population and growth assumptions used to justify the project. . . .[87]

In *Save Our Ten Acres v. Kreger*[88] the court ordered consideration of the effect of an increase in the number of people using an area due to the construction of a new federal office building, and in *Hanly v. Kleindeinst*[89] and *Schicht v. Romney*[90] the courts referred to urban congestion as a factor to be considered in assessing the impact of a project on a locality. These cases establish that quantitative people pollution factors are environmentally significant within the meaning of NEPA.

The qualitative characteristics of anticipated newcomers to a neighborhood have been alleged to cause environmental harm in several contexts, and some government sources seem to acknowledge the legitimacy of the existing residents' concern. For example, the Department of Housing and Urban Development's special Environmental Clearance Worksheet for rehabilitation projects requires consideration not only of physical factors such as noise, sewers and other municipal services, but also of social and economic factors, specifically including " 'the socio-economic and racial characteristics of the community.' "[91] Further, some courts have stressed that neighborhood "sensibilities" and psychological impact are factors to be considered. Litigants have advanced this theory primarily in cases involving challenges under NEPA to the selection of urban residential and business areas for prisons and detention facilities. The NEPA challenges were grounded in part on the criminal character of the newcomers. In *First National Bank of Chicago v. Richardson,* the prison case discussed above, the court agreed that "the impact upon the quality of life of a structure designated as a jail is none the less real because psychological."[92]

87. 40 C.F.R. § 1500.8(a)(1) (1975).
88. 472 F.2d 463 (5th Cir. 1973).
89. 471 F.2d 823 (2d Cir. 1972).
90. 372 F. Supp. 1270 (E.D. Mo. 1974).
91. Wilson v. Lynn, 372 F. Supp. 934 at 937 (D. Mass. 1974), *citing* HUD Cir. 1390.1, 38 Fed. Reg. 19182 (1973). *See also* note 98 *infra.*
92. 484 F.2d at 1375.

However, despite the concern for neighborhood reaction to the qualitative character of the newcomers, the courts in most cases have refused, on the basis of *this* factor, to order preparation of an impact statement. In *Hanly v. Kleindeinst* and *First National Bank of Chicago v. Richardson* the Second and Seventh Circuit Courts of Appeals refused to find that the influx of criminals as a result of the construction of a prison was the type of environmental impact contemplated by Congress. In *First National Bank of Chicago v. Richardson* the court wrote:

> [T]he "sensibilities" of the neighborhood have been a factor which the plaintiffs have asserted relates to the environmental impact of the project. As the court in *Hanly II* observed, "[i]t is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement." [citation omitted]. As regards public "sensibilities" aroused by criminal defendants, we question whether such factors, even if amenable to quantification, are properly cognizable in the absence of clear and convincing evidence that the safety of the neighborhood is in fact jeopardized.[93]

The Court of Appeals in the *First National Bank* case cited with approval the district court's conclusion that in spite of the presence in the neighborhood of "probationers, parolees and other persons subject to [criminal process] . . . the General Services Administration did not err in concluding that this situation is not a significant environmental concern."[94] In both cases, where prisoners were the unwelcome newcomers, two U.S. Courts of Appeals affirmed district court refusals to enjoin the projects pending development of impact statements. The social character of the unwanted newcomers to business and residential neighborhoods was not alone sufficient to activate a full-scale environmental impact analysis.

Nucleus of Chicago Homeowners Association v. Lynn,[95] another case founded on qualitative people pollution concepts, illustrates the adaptation of environmental protection theory and the impact statement requirement for purposes of excluding low-income persons from a residential neighborhood. The plaintiffs were residents of a Chicago neighborhood which had been designated as a site for

93. *Id.* at 1380, n.13.
94. *Id.* at 1376.
95. 372 F. Supp. 147 (N.D. Ill. 1973).

federally-assisted low-income housing. Claiming that the social characteristics of the prospective tenants would lead to aesthetic and economic decline of the neighborhood and that this would be an adverse environmental effect within the meaning of NEPA, neighborhood residents sued to enjoin site acquisition by HUD, pending the filing of an environmental impact statement. In refusing to require an impact statement, the court rejected the claim that people polluted an environment by reason of their social characteristics. The court stated:

> At the outset, it must be noted that although human beings may be polluters (i.e., may create pollution), they are not themselves pollution (i.e., constitute pollution). Environmental impact in the meaning of the Act cannot be reasonably construed to include a class of persons *per se*. The provisions of the Act concern actions which harm or affect the environment. Therefore, the social and economic characteristics of the potential occupants of public housing as such are not decisive in determining whether an impact statement is required under the Act. The relevant consideration is whether acts or actions resulting from the social and economic characteristics will affect the environment.[96]

The environmental protection theory which the plaintiffs advanced was based in part on behavioral and sociological data purporting to document the environmental threat presented by low-income persons. The court examined this data and the plaintiffs' theory and concluded:

> Prognosticating human behavior and analyzing its consequences on the environment is an especially difficult, if not impossible, task.
> . . . .
> It is the court's conclusion that the evidence [statistical data, sociological treatises and theories] does not support the proposition that prospective tenants of public housing will significantly affect the environment. The evidence does not support the allegation in the complaint of differing socio-economic characteristics of the plaintiffs as contrasted with prospective tenants of public housing. There is no evidence to support plaintiffs' allegations that prospective tenants of public housing are more likely to engage in anti-social conduct than present community residents. Indeed, there is little, if any, evidence of the social characteristics of the individual plaintiffs, none having testified.[97]

96. *Id.* at 149.
97. *Id.* at 150.

Thus, the court rejected behavioral and sociological data offered in support of an impact statement demand and held that NEPA was not applicable.[98]

Other courts deciding NEPA issues have pointed to the apparent interchangeable use of exclusionary zoning and environmental protection claims as legal devices for maintaining neighborhood status quo. In these cases resistant neighborhoods relied in part on local zoning laws and alleged that federal action inconsistent with local regulations adversely affected the environment. In some cases the residents sought impact statements in situations where the prospective newcomers were seemingly more benign than the criminals who concerned the plaintiffs in the prison cases. For example, plaintiffs in *Town of Groton v. Laird*[99] were residents who attempted to enjoin, pending the development of an impact statement, construction of a Navy housing and business complex. Noting that the area was zoned for housing and that the Navy's use was thus consistent with the town's use limitation, the court suggested that the plaintiffs' action was an abuse of NEPA's purpose and policy.

> NEPA is not a sort of meta-zoning law. It is not designed to enshrine existing zoning regulations on the theory that their viola-

98. In other low-income housing cases courts have found that HUD adequately complies with NEPA requirements by following its Environmental Clearance Worksheet. For example, in Hiram Clarke Civic Club v. Lynn, 476 F.2d 421 (5th Cir. 1973), the court emphasized that it would examine the merits of the project only upon a showing that the project raised substantial environmental issues, and that it would take evidence concerning the project's environmental impact only upon a showing of "an inadequate evidentiary development before the agency." *Id.* at 425. Similar complaints have been dismissed without remand to HUD on the basis of compliance with the Worksheet. *See* Schicht v. Romney, 372 F. Supp. 1270 (E.D. Mo. 1974); Wilson v. Lynn, 372 F. Supp. 934 (D. Mass. 1974). Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971), is a housing decision in which the court did remand for impact statement preparation. Residents challenged a high-rise apartment building in an Oregon town. The court based its decision on the fact that the new building would be the only high-rise in the neighborhood, and thus would change the character of the neighborhood and contribute to "eye pollution" because of the loss of view. Although the residents of the proposed building would have been students, possibly regarded by some as undesirable newcomers, nothing in the court's opinion indicates that the residents were seeking to exclude students as a class. Also, it is notable that HUD in this case had not independently evaluated the prospective site. The case, then, is not necessarily an exception to the general tendency of the courts to refuse to require impact statements when the social character of newcomers is alleged as an adverse environmental effect.

99. 353 F. Supp. 344 (D. Conn. 1972).

> tion presents a threat to environmental values. NEPA may not be used by communities to shore up large lot and other exclusionary zoning devices that price out low and even middle income families.[100]

Similarly, in *Maryland-National Capital Park and Planning Commission v. United States Postal Service*,[101] a neighborhood organization attempted to enjoin construction of a postal facility on environmental grounds. The court concluded that although a non-conforming federal use did not alone constitute a "significant environmental effect," it might require special scrutiny.

> When local zoning regulations and procedures are followed in site location decisions by the Federal Government, there is an assurance that such "environmental" effects as flow from the special uses of land—the safety of the structures, cohesiveness of neighborhoods, population density, crime control and esthetics—will be no greater than demanded by the residents acting through their elected representatives.
>
> When, on the other hand, the Federal Government exercises its sovereignty so as to override local zoning protections, NEPA requires more careful scrutiny.[102]

Since in this case a non-conforming use was proposed, the court accorded the claimed objectionable features the required special scrutiny, and found that the plaintiffs' objections were based mainly on economic, social and otherwise aesthetic factors. The court noted that not all things having an aesthetic impact lend themselves to environmental impact analysis and rejected the plaintiffs' claims as to socio-economic factors, but remanded for reconsideration of physical factors. Referring specifically to the co-joined environmental and exclusion issues in the case, the court stressed that a factor motivating the lawsuit was "the prospect of an influx of low-income workers" and said:

> Concerned persons might fashion a claim, supported by linguistics and etymology, that there is an impact from people pollution on "environment," if the term be stretched to its maximum. We think this type of effect cannot fairly be projected as having been within the contemplation of Congress.[103]

100. *Id.* at 350.
101. 487 F.2d 1029 (D.C. Cir. 1973).
102. *Id.* at 1036-37.
103. *Id.* at 1037.

This principle was affirmed and broadened in dictum in *Clinton Community Hospital Corp. v. Southern Maryland Medical Center.*[104] The plaintiff hospitals sought to enjoin construction of a competing hospital and claimed jurisdiction under NEPA because of defendant's failure to file an impact statement. Although the claim was dismissed for lack of standing, the court suggested that the term "environment" had limits:

> The term "environment" is not defined in the Act, but there are indications that it does not include human beings . . . . It would be an egregious and unwarranted extension of the scope of NEPA to require that any "major Federal action" which would affect people—thus encompassing virtually every government program—be suspended until an environmental impact statement is prepared.[105]

Thus it is seen that a number of recent decisions limit the potentially broad scope of the term "environment" as it applies to people as environmental factors. In reviewing the impact statement requirement, courts have recognized that social and economic factors may be considered in assessing environmental impact for NEPA purposes. They have, however, carved out an important exception which restricts indiscriminate use of the term environment: non-conforming social characteristics of potential newcomers to a neighborhood are not environmentally significant factors which require preparation of an environmental impact statement. Thus, in spite of the "extraordinarily broad sweep" of NEPA and the impact statement requirement, the courts have tended to limit consideration of designated classes of people as environmental threats.

V. SUMMARY AND IMPLICATIONS

The foregoing discussion demonstrates that environmental protection claims and defenses have been presented in numerous recent lawsuits to justify or subserve neighborhood attempts to exclude housing or other facilities intended for unwelcome social groups. In these cases environmental protection legislation has been utilized in place of judicially invalidated exclusionary devices such

104. 510 F.2d 1037 (4th Cir.), *cert. denied,* 422 U.S. 1048 (1975).

105. 374 F. Supp. 450 at 457 (D. Md. 1974), *aff'd,* 510 F.2d 1037 (4th Cir.), *cert. denied,* 422 U.S. 1048 (1975).

as restrictive covenants and racially-restrictive voter referenda, or an environmental protection rationale has been applied to legitimate otherwise questionable practices such as exclusionary zoning regulations or restrictive permit-granting policies. This conclusion is based in part on the identity between the fact patterns in the new environmental protection suits and the traditional housing discrimination cases. In each group of cases neighborhoods have tried to prevent the influx of people who are unwelcome because of race, ethnic origin, income or other social characteristics. This conclusion is further supported by facts in the cases which indicate that exclusion was a stated neighborhood objective or was a necessary and unavoidable consequence of the policy or practice in issue.

Some things are clear. The Constitution does not absolutely prohibit discriminatory housing policies. Environmental protection statutes such as NEPA and some environmental protection concepts embrace social, as well as natural, environmental factors. Land use planning and pollution protection are necessary, valid and meritorious objectives and practices. At issue is the question of whether particular social groups can or should be excluded from a neighborhood on an *environmental protection theory.* In this regard, the "people pollution" concept and the broad definition of the term "environment" tend to support the view that socio-economic changes in residential neighborhoods are environmental issues, and this, in turn, appears to validate the environmental claims at issue here. Such interpretation carries important implications, some relating to residential exclusion practices, and others relating to environmental issues.

With respect to residential exclusion, case facts which indicate that environmental law is being used for the sole and express purpose of promoting housing discrimination, together with a long history of neighborhood attempts to exclude different socio-economic and ethnic groups, make this use of environmental protection legislation questionable. Courts must ask whether the purported environmental protection claims involve neighborhood interest in *any* aspect of the environment, natural or social, other than the social class of potential new neighbors. If, as in many of the cases cited, facts establish that the factor motivating neighborhood resistance to new housing is the social class of the newcomers, it should be recognized that environmental protection principles have

been adopted and adapted for the express purpose of excluding specified socio-economic and ethnic groups.

The broader implications of this use of environmental law relate to the environmental protection concept itself. The use of environmental law in the interest of ethnic and socio-economic discrimination reduces the credibility and utility of environmental protection principles generally. Clearly, there are situations where new housing may threaten the natural or social environment and where, for this reason, environmental protection laws should be applied to prevent the new development. It is equally certain that some situations of this type may involve housing intended for unwanted newcomers. In such a case, if the use of environmental protection legislation is generally questionable because of an established pattern of use for exclusionary purposes, then its application in environmentally meritorious situations may be challenged as discriminatory, entailing unnecessary litigation, delay and perhaps even environmentally unsound judicial decisions.

In addition, broad recognition of any and all social changes as environmentally significant creates precedent for still broader use of environmental protection principles. For example, can "adult-entertainment" newsstands and movie theatres be excluded from an area on an *environmental protection theory?* Certainly, patrons of such businesses may have cultural and aesthetic values different from the patrons of other businesses in the neighborhood. Similar reasoning might be applied to other businesses and people such as chronic disease hospitals and patients, half-way houses and residents, old-peoples' homes and orphanages. The new residents or visitors in each case may be socially different from the surrounding neighbors; they may be undesirable and unwelcome. But should they be barred on an environmental protection theory? This is a logical extension of the qualitative people pollution concept, but, like that concept, it would not seem to promote environmental protection objectives as they are generally understood. Further, this use of environmental protection theory not only denigrates the theory, but is superfluous in view of judicial acceptance of other devices for blocking unwanted housing and businesses, such as exclusionary zoning and voter referenda based on factors other than race.

Finally, in addition to environmental protection, our country has a fundamental commitment to ensuring equality of opportunity

for minority Americans. Any practice which threatens that equality must be sanctioned only after the greatest scrutiny and thought.

Thus, even though NEPA recognizes social and economic changes as environmentally significant for impact statement purposes and in spite of the broad meaning of the term environment, recent decisions which refuse to apply environmental protection laws and principles for the sole and express purpose of excluding unwanted social groups are environmentally sound and socially responsible.

Dorothy E. Patton