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Zoning -- Petaluma: A New Land Use Ordinance in Search of a New Judicial Standard of Review

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Zoning—Petaluma: A New Land Use Ordinance in Search of a New Judicial Standard of Review

Nearly fifty years have elapsed since the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*,[1] affirmed the power of local governments to regulate land development and established the lenient judicial standard of "mere rationality" for reviewing local land use regulations.[2] In contrast with traditional Euclidian land regulations, modern land use regulations reflect an increasing concern for protecting environmental quality[3] and preserving the physical[4] and social character of the locality.[5] These newer, innovative regulations,[6] however, limit individual mobility[7] and increase housing costs.[8] In order to reconcile individuals' desires to migrate and settle freely with localities' concerns for their environment and quality of life, departure from the *Euclid* standard of judicial review and the establishment of a new, more rigorous standard of judicial scrutiny are required. Unfortunately, few recent areas of constitutional law have enjoyed the unquestioning loyalty of the federal judiciary for as long as has the *Euclid* judicial standard of mere rationality.[9]

Dissatisfaction with application of the old *Euclid* minimal standard to innovative land use regulations is revealed by the decision of *Construction Industry Association of Sonoma County v. Petaluma.*[10] In *Petaluma* the federal courts were asked for the first time to decide the constitutionality of a local land use plan that attempted to "control [a town's] future rate and distribution of growth."[11] Both the district court and the Ninth Circuit Court of Appeals departed from the *Euclid* standard of review, and each developed its own more rigorous stan-

1. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
2. *Id.* at 390; *see* text accompanying notes 21-25 *infra.*
3. Steel Hill Dev., Inc. v. Sanbornton, 469 F.2d 956, 961 (1st Cir. 1972).
4. Ybarra v. Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974).
5. Belle Terre v. Boraas, 416 U.S. 1, 6, 9 (1974).
6. Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA LAWYER 183 (1972).
7. Bosselman, *The Right to Move: The Need to Grow*, in II MANAGEMENT & CONTROL OF GROWTH 271 (R. Scott ed. 1975) [hereinafter cited as MANAGEMENT & CONTROL]; Franklin, *Legal Dimensions to Controlling Urban Growth*, in II MANAGEMENT & CONTROL 216, 226-30; Fielding, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations*, 39 U. CHI. L. REV. 612 (1972).
8. L. SAGALYN & G. STERNLIEB, ZONING AND HOUSING COSTS (1972).
9. *See* text accompanying notes 29-34 *infra.*
10. 522 F.2d 897 (1975), *rev'g* 375 F. Supp. 574 (N.D. Cal. 1974).
11. 375 F. Supp. 574, 576 (N.D. Cal. 1974).

dards.[12] An examination of the two opinions reveals, however, that neither standard adopted in the *Petaluma* case by the federal courts is adequate for reconciling the competing interests of individuals and localities.

Like many other rural communities during the 1960's, Petaluma was in the path of urban expansion, becoming a growth center for the San Francisco metropolitan region.[13] Between 1960 and 1970 its population increased from approximately 14,035 to 24,870,[14] and by November 1972 Petaluma's population was 30,500, an increase of almost twenty-five percent in a little over two years.[15] Petaluma's maldistributed growth created serious spatial and social consequences for the city, since after 1965 almost ninety-five percent of the new construction was confined to the east side of Petaluma.[16] Moreover, during the 1960's eighty-eight percent of the housing permits in Petaluma were issued for single family homes.[17]

The "Petaluma Plan," the subject of the lawsuit, was intended to correct these spatial and social problems. Central to the plan was Petaluma's innovative attempt to preserve its rural character by limiting its future annual residential building permits to approximately six percent of the existing housing stock or five hundred units per year.[18]

12. *See* text accompanying notes 40-62 *infra.*

13. 375 F. Supp. at 579. Between 1960 and 1970 Petaluma was just one of twenty-nine communities in the San Francisco metropolitan region that sustained a residential construction rate in excess of sixty percent of its existing housing stock. Throughout the decade, these communities accounted for 54.7 percent of the housing permits issued in the entire San Francisco metropolitan region. Gruen, *The Economics of Petaluma: Unconstitutional Regional Socio-Economic Impacts*, in II MANAGEMENT & CONTROL 173, 177.

14. BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, Table 7 Population of Incorporated Places of 10,000 or More 1900 to 1970 Calif. 6-19 (1970).

15. Construction Indus. Ass'n v. Petaluma, No. 74-2100 at 1 (9th Cir., Aug. 13, 1975).

16. Gray, *The City of Petaluma: Residential Development Control*, in II MANAGEMENT & CONTROL 149, 155.

17. 522 F.2d at 900.

18. *Id.* at 902. There is some uncertainty concerning the extent and duration of the residential building permit program. The plan itself exempts requests involving four or less housing units from the permit quota. *Id.* at 901 n.2. However, for purposes of its analysis, the court of appeals did not consider the impact, if any, the exempted units would have on the housing market. *Id.* at 902. Similarly, although the "Petaluma Plan" on its face limits the restrictions to a five year period (1972-1977), *id.* at 901, the district court held that official attempts had been made to perpetuate the plan through 1990. 375 F. Supp. at 576.

The "Petaluma Plan" did not rely solely on a fixed residential building permit quota to achieve its objectives. The plan contained two other devices for managing the city's growth. First, like some other communities attempting to manage growth, the "Petaluma Plan" established an urban extension line to delineate the outer limits of the city's

Through allocation of these permits, the plan encouraged multi-family, spatially balanced, and low and moderate income development.[19]

The *Petaluma* case was initiated by two landowners and an association of county builders, claiming that the restrictions imposed on the housing market by the "Petaluma Plan" were unconstitutional. The district court ruled that the limitations on residential building permits below projected market levels unconstitutionally abridged the right to travel.[20] On appeal, the Ninth Circuit Court of Appeals reversed the district court and upheld the constitutionality of the "Petaluma Plan."[21]

Before evaluating the courts' decisions, and particularly their standard of judicial review, it is necessary to examine briefly the standard of review generally applied in land use cases. The seminal case in the field is the United States Supreme Court decision of *Village of Euclid v. Ambler Realty Co.*[22] In *Euclid* the constitutional right of localities to regulate lot size, building height, and land use through zoning was challenged. The landowner principally alleged that the mere existence of the ordinance adversely affected property values and thus constituted an unconstitutional taking.[23] The Supreme Court, recognizing that zoning

expansion for twenty or more years. 375 F. Supp. at 576. *See generally* Einsweiler, Gleeson, Ball, Morris & Sprague, *Comparative Description of Selected Municipal Growth Guidance Systems*, in II MANAGEMENT & CONTROL 283, 292 (1975). Secondly, Petaluma limited expansion of its municipal facilities. For example, Petaluma purposefully limited its water contract with the county water agency for only enough water through 1990 to supply its needs under the reduced growth called for under its plan. *Id.* at 577.

19. Specifically, Petaluma allocated 255 permits for multi-family housing and 245 permits for single family housing. The permits were divided evenly between the west and east side of Petaluma. *See* Gray, *supra* note 15, at 152. To encourage low and moderate cost housing, eight to twelve percent of the allowed housing units are reserved for low and moderate income persons. 522 F.2d at 901.

20. 375 F. Supp. at 581.

21. 522 F.2d at 908-09.

22. 272 U.S. 365 (1926).

23. Besides the property interest of the landowner, in all land use regulations there are some exclusionary consequences. 522 F.2d at 906. Recently, the exclusionary aspects have dominated the concerns of commentators and judges. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, 724 (1975); R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970's (1973). But the matter was first considered in *Euclid*. In plaintiff's brief it was argued that if the village of Euclid were lawfully empowered to remain rural and restrict the normal industrial and business development of its land, then other comparable communities would pursue a similar policy that would inevitably restrict and divert industrial development throughout the Cleveland metropolitan region. 272 U.S. at 374. The district court, concerned about the social exclusionary consequences of land use regulation, wrote that, "In the last analysis, the result to be accomplished [by land use regulations] is to classify the population and segregate them according to their income or situation in life." 297 F. 307, 316 (1924). Justice Sutherland writing for the Supreme Court was also aware that the effect of land regulation was to divert natural development and warned that in "Cases where the general public interest would so far outweigh the interest of the municipality . . . the municipality would not be allowed to stand in the way." 272 U.S.

ordinances and all similar regulations find their justification in the police power,[24] rejected the landowner's contention. To test the constitutionality of land use regulations, the Court formulated its "minimal rationality" standard. Under this standard, the courts invalidate land use regulations only when: (1) the regulations fall outside permissible governmental police powers, or (2) the regulations are clearly arbitrary and unreasonable, having no substantial relation to a permissible governmental police power.[25] The adopted standard underscores the Court's willingness to subordinate the monetary detriment of property owners to localities' needs for land development regulation. The localities' ability to manage land development is further strengthened by the *Euclid* case through the Supreme Court's correlative principle that even when the validity of the regulation is debatable, the legislative judgment must be allowed to control.[26]

The constitutionality of land use planning having been affirmatively decided in the 1920's, courts in subsequent years have struggled to define what constitutes a permissible exercise of the police power. Gradually, the police power concept has expanded beyond the traditional public health, safety, and general welfare concerns.[27] A major impe-

at 390. However, because the exclusionary aspect was incorporated into the landowner's taking claim, *id.* at 380, the Court never adequately resolved the issue. Fifty years later, finding a suitable plaintiff still remains the primary obstacle that prevents the courts from resolving the exclusionary issue first raised in *Euclid*. *See* Warth v. Seldin, 95 S. Ct. 2197 (1975).

24. 272 U.S. at 387.

25. *Id.* at 395. The problem with the due process test is that it chiefly concerns the municipality and the landowner protecting his property; it only tangentially recognizes the interest of the outsider who may be excluded by the land use regulation. *See* note 22 *supra*. Therefore, litigants have attempted to raise the interests of excluded nonresidents and heighten judicial scrutiny in land cases by alleging alternative theories. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969). The problem with this approach, however, is that stringent standing rules applied to land use cases make it difficult to argue these issues. Warth v. Seldin, 95 S. Ct. 2197 (1975). The most widely advocated doctrine for increasing judicial scrutiny is the equal protection doctrine, Sager, *supra*, but except for cases involving racial discrimination, United States v. Black Jack, 508 F.2d 1179 (8th Cir. 1974), the courts have tested allegedly unlawful land regulation classifications by a rationality standard. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). Essentially, the rationality standard used for equal protection analysis is identical to the *Euclid* standard; the only real difference between the two tests is that cases involving equal protection claims require an additional finding that similarly situated persons or property are being treated differently. Feiler, *Zoning: A Guide to Judicial Review*, 47 J. OF URBAN L. 319, 328 (1969). Consequently, for purposes of this note the two claims are treated under the *Euclid* standard described above.

26. 272 U.S. at 388. This judicial deference to local enactments has been a major factor in limiting the success of due process challenges to zoning legislation. Comment, *Exclusionary Use of the Planned Unit Development: Standards for Judicial Scrutiny*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 384, 401-403 (1973).

27. *E.g.*, Maher v. New Orleans, 371 F. Supp. 653 (E.D. La. 1974).

tus for this development was the United States Supreme Court decision in *Berman v. Parker*.[28] In the *Berman* case, Justice Douglas, writing for a unanimous Court, said:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[29]

In *Village of Belle Terre v. Borass*[30] the Court held that preserving family values is a permissible concern under the police power.[31] The *Belle Terre* case was significant because, unlike *Euclid* and *Berman* which involved geographic line drawing, the local zoning ordinance in *Belle Terre* involved distinctions between individuals. Nonetheless, a zoning ordinance that specifically excluded more than two unrelated persons from occupying a residence in Belle Terre was upheld. The Court rejected plaintiffs'[32] contention that the ordinance abridged fundamental constitutional rights.[33] In reaching its decision, the Court reversed the attempt of the Second Circuit to infuse the rationality test with a higher standard of judicial scrutiny.[34] Instead, the Court adhered to the minimal rationality standard announced in *Euclid*.[35]

28. 348 U.S. 26 (1954). The *Berman* case involved a fifth amendment challenge to a federal urban renewal statute authorizing eminent domain. Although the police power and the right of eminent domain authorize different activities, the Supreme Court treated their relation to the public welfare coextensively. *Id.* at 32. Arguably, the judicial deference accorded to a congressional redevelopment scheme reviewed in *Berman* may be higher than the deference accorded legislative determinations of less representative legislatures; however, subsequent cases do not make this distinction. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

29. 348 U.S. at 33.

30. 416 U.S. 1, 8 (1974).

31. *Id.* at 8.

32. By the time the *Belle Terre* case reached the Supreme Court, the excluded tenants were no longer living in Belle Terre, and the only plaintiff to argue the case before the Court was a landowner. In a dissenting opinion, Justice Brennan stated that he would have denied the landowner standing to raise the constitutional rights of the tenants, and he argued that the case was moot. *Id.* at 10-12. But this contention was rejected by the Court. *Id.* at 9.

33. The constitutional rights allegedly violated were: right to travel, right to privacy, and freedom of association. *Id.* at 7.

34. Essentially, the test used by the Second Circuit Court of Appeals is derived from Gunther's analysis of the 1971 Supreme Court term. Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* 86 HARV. L. REV. 1 (1972). As formulated by the Second Circuit, the validity of local land use classifications depends on whether the legislative classification is in fact substantially related to a permissible objective. 476 F.2d 806, 814 (1973).

35. 416 U.S. at 3-4. Even in dissenting, Justice Marshall adhered to the *Euclid* standard: "I therefore continue to adhere to the principle of *Euclid v. Ambler Realty Co.*, that deference should be given to governmental judgments concerning proper land-

In some state courts there is a growing awareness that modern expansive interpretations of the police power give developing municipalities almost boundless freedom to regulate land use.[36] In these states, localities' power to regulate land development in a way that curtails individual mobility is being limited by new, more rigorous standards of judicial review. The first of these cases was *National Land and Investment Co. v. Easttown Township Board of Adjustment*.[37] In *National Land* the Pennsylvania Supreme Court rejected the contention of the township that a four-acre minimum lot size was rationally related to preserving its rural character.[38] The Pennsylvania court, in adopting a regional perspective, held that although orderly growth is a permissible objective, avoidance of increased economic responsibilities and burdens, which time and natural growth invariably bring, cannot be the primary consideration of the town's zoning policies.[39] In *Southern Burlington County NAACP v. Mount Laurel*, a case involving a multiplicity of exclusionary land use devices, the Supreme Court of New Jersey held that each developing municipality had an affirmative duty to enact land use regulations that reflected the municipality's fair share of the present and prospective *regional* need for housing.[40]

The critical factor in resolving the constitutionality of the "Petaluma Plan" was the selection of the appropriate standard of judicial review. The district court was concerned with whether a municipality capable of supporting a natural population expansion[41] could legally limit growth because it preferred not to grow at the rate dictated by prevailing market demand.[42] In reaching its decision the court engrafted the state regional welfare approach of *National Land* onto the federally

use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms." *Id.* at 13 (citations omitted).

36. Vickers v. Township Comm., 37 N.J. 232, 252, 181 A.2d 129, 140 (1962) (Hall, J., dissenting).

37. National Land and Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965).

38. *Id.* at 529, 215 A.2d at 610.

39. *Id.* at 528, 532, 215 A.2d at 610, 612.

40. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, 724 (1975).

41. 375 F. Supp. at 583. Judge Burke found that the public facilities of Petaluma, in place, under construction, or capable of being augmented by new capacity, were adequate at all times for anticipated real demographic and market demands. *Id.* at 578. For example, the sewerage capacity of Petaluma at the time of trial could serve approximately 6,000 to 12,000 more persons. *Id.* at 578. Thus reference by Petaluma to alleged inadequacies was held to be an excuse intended to justify the "Petaluma Plan" after its adoption. *Id.* at 577.

42. *Id.* at 583.

protected constitutional right to travel.[43] It held that the "Petaluma Plan" violated the right to travel and that the exclusion of additional residents, *in any degree*, is neither a compelling interest, nor a permissible purpose within the muncipality's power to protect the public welfare.[44]

Aside from the questionable propriety of incorporating state constitutional principles into the federal Constitution, the decision of the district court was needlessly broad. If preserving the city's rural character is not a legitimate exercise of the governmental power to protect the public welfare,[45] then the court should have held that the "Petaluma

43. *Id.* at 584. The right to travel doctrine is not mentioned in the Constitution, yet the courts have long recognized the right to travel as a constitutional right. Corfield v. Coryell, 6 F. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823). The first Supreme Court decision to recognize the doctrine was Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43-44 (1868). Since *Crandall*, the fourteenth amendment privileges and immunities clause, Williams v. Fears, 179 U.S. 270 (1900), the due process clause of the fifth amendment, Kent v. Dulles, 357 U.S. 116 (1958), and the commerce clause of article I, Edwards v. California, 314 U.S. 160 (1941), have been proffered to support the right of travel. In Aptheker v. Secretary of State, 378 U.S. 500 (1964), the United States Supreme Court found that the right was closely related to first amendment freedoms. As a penumbral first amendment right, infringements on the right to travel must be justified by a compelling governmental interest. Shapiro v. Thompson, 394 U.S. 618, 642-44 (1969) (concurring opinion). The right to travel doctrine is generally applied by the courts when the exercise of mobility penalizes some other fundamental constitutional right. Dunn v. Blumstein, 405 U.S. 330 (1972). Occasionally, when deterence to the right to travel itself is onerous, the courts will invalidate the restrictive legislation. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). The district court opinion in the *Petaluma* case is significant because it is the first case to apply the right to travel doctrine to land use regulations.

44. 375 F. Supp. at 584. The expected impact the "Petaluma Plan" would have on mobility and the housing market within both Petaluma and the San Francisco region was the primary basis for the court's holding. Within the city of Petaluma, the court determined that during the 1973-1977 period the plan prevented the construction of approximately one-half to two-thirds of the housing units demanded by market and demographic growth forces. *Id.* at 577. Regionally, the court believed that if the "Petaluma Plan" were enacted by other growth centers in the San Francisco Bay area, it would increase the cost of regional housing, impede the mobility of current and prospective residents, and diminish the choice of housing available to income earners with real incomes less than $14,000 per year. *Id.* at 581.

45. *Id.* at 586. Another fact which reveals that the decision of the district court was overbroad concerns its failure to consider a statutory basis for its decision. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). At least two statutory bases for invalidating the "Petaluma Plan" are possible: first, the numerical restriction on building permits may not have been authorized by the California zoning enabling legislation. *Cf.* Albrecht Realty v. Town of New Castle, 8 Misc. 2d 255, 256, 167 N.Y.S.2d 843, 844 (Sup. Ct. 1957). Secondly, preserving the rural character of Petaluma may not have been authorized by the California zoning enabling legislation. *Cf.* Kavanewsky v. Zoning Bd. of Appeals, 160 Conn. 397, 403, 279 A.2d 567, 570-71 (1971). The recent decisions by the Ninth Circuit in both Ybarra v. Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974) and *Petaluma*, 522 F.2d at 908 are not contrary to *Kavanewsky;* for in those cases the Ninth Circuit only decided that preserving a town's rural character is within the constitutional authority of the police power. It is still

Plan" failed to satisfy the first requirement of the *Euclid* rationality test and should have declared the ordinance unconstitutional on that basis alone.

Furthermore, in applying a compelling interest test, the district court drastically reduced local governmental power that was previously presumed valid unless clearly arbitrary. Under the standard applied by the court, infringements of the right to travel must be justified by a compelling state interest.[46] This justification, however, too stringently impairs the city's ability to enact land use regulations, for as Chief Justice Burger has noted:

> [L]ines must be drawn. To challenge such lines by the "compelling state interest" standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.[47]

Because all land use regulations affect demographic and market forces in some degree, if the holding by the district court is applied literally, all land use regulation will give rise to a compelling state interest standard, and all will be found invalid.[48] Consequently, the absolute standard used by the district court is actually no standard at all. Unlike the *Mount Laurel* decision, the district court decision in *Petaluma* provided no meaningful standard for distinguishing between unlawful and lawful interferences with the market force.[49]

The district court's reliance on demographic projections was misguided. Demographic projections are not the foundation from which

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possible to argue that under the California enabling legislation localities are delegated less than plenary constitutional authority.

46. *See* note 43 *supra.*

47. Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

48. *See* note 22 *supra.* The striking down of the urban extension line as a substantial deterrent to travel illustrates the broad impact the *Petaluma* standard adopted by the district court might have even for traditional local land use regulations. 375 F. Supp. at 576. Court interference with local planning is inevitable whenever the courts analyze the substance of land use plans. Court interference, however, can be diminished and individuals' interest in mobility protected if the courts limit their analysis to the planning process instead of the plan's substance. Under this form of analysis the courts would apply a first amendment, least-adverse-alternative approach whenever first amendment rights such as travel were impeded. *Cf.* Shelton v. Tucker, 364 U.S. 479, 488 (1960). In the *Petaluma* factual context, if this approach were applied, the court's inquiry would be limited to determining whether the town in formulating its land use plan considered alternative land use plans which did not impede mobility. If the town failed to consider less adverse alternatives, the court would enjoin the implementation of the plan until the town demonstrated that no other feasible land use plan was capable of achieving the objectives of the town. Thus, it was unnecessary for the district court in the *Petaluma* case to consider the substance of the "Petaluma Plan."

49. *See* text accompanying note 39 *supra.*

fundamental constitutional rights ought to be constructed. They are too variable and subject to manipulation to be entrusted with protecting basic constitutional rights.[50] Slavish reliance on demographic projections will result in anti-planning. The purpose of planning is multi-faceted, and its precise meaning is undefinable; but, since *Euclid*, land use planning has meant more than unquestioning devotion to market forces.[51]

Implicit in the duty to plan for market forces is the obligation to provide the urban infrastructure of roads, sewers, and schools which urbanization demands. In this respect, the opinion of Judge Burke failed to adequately consider the financial concerns of Petaluma and was, therefore, contrary to *James v. Valtierra*,[52] in which the Supreme Court recognized the legitimacy of fiscal concerns as reasons for public policies.

Not surprisingly, the district court decision was reversed by the Ninth Circuit Court of Appeals.[53] In reaching its decision, the court of appeals announced two important holdings. First, it concluded that neither the association of county builders nor the landowners were within the zone of interest protected by the right to travel and that therefore both groups lacked standing to bring the constitutional claim on behalf of the excluded persons.[54] Consequently, the court of appeals

50. The difficulty of making accurate population projections is recognized by the experts. The United States Census Bureau warns that "since the Second World War, fertility trends have been characterized by wide fluctuations, and as a result, accurate predictions of fertility, and more generally of total population, have proved extremely difficult." BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, FERTILITY INDICATORS: 1970 Series P-28 No. 36, at 47 (1971). To overcome this difficulty, the Census Bureau uses four different fertility assumptions in making its population projections. BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION ESTIMATES AND PROJECTIONS, DEMOGRAPHIC PROJECTIONS FOR THE UNITED STATES Series P-25 No. 476, at 4 (1972). In a ten year period, depending on which series is used the population variances can range as high as 37.8 percent. *Id.* Clearly, then for the district court to consider the 77,000 projected population for Petaluma as final was erroneous.

51. *See* text accompanying notes 21-25 *supra.*

52. 402 U.S. 137 (1971).

53. No. 74-2100.

54. *Id.* at 7-12. The procedural issue centers on *jus tertii*, the discretionary power of the court to allow injured litigants to raise the constitutional rights of third parties. The court of appeals, after considering: (1) the existing relationship between plaintiffs and potential housing consumers, and (2) the practicability that other right to travel claims attacking the "Petaluma Plan" would be brought by individuals whose rights were in fact impeded by the plan, denied plaintiffs standing to assert the right to travel of third parties. The decision, however, is contrary to *Belle Terre*. *See* text accompanying notes 31-32 *supra*. In the *Belle Terre* case, a landowner lacking any present relationship with tenants or purchasers whose rights were allegedly infringed by the ordinance was nevertheless allowed to raise the right to travel claim on their behalf. *See* text accompa-

did not decide the right to travel issue.[55] Secondly, it held that preserving a small town character and avoiding uncontrolled rapid growth are constitutionally sanctioned objectives.[56] To reach the latter conclusion, the opinion of the Ninth Circuit ostensibly relied on expansive interpretations of the police power sanctioned in *Berman* and *Belle Terre*[57] and applied the traditional Euclidian standard of review.[58] In doing so, the court eschewed any suggestion that it was evaluating the wisdom of the "Petaluma Plan."[59]

However, in examining the decision of the Ninth Circuit, it is evident that the court tested the "Petaluma Plan" by an unannounced balancing test. The court of appeals decision contains numerous references to Petaluma's attempt to "provide for variety in densities and building types and wide ranges in prices and rents."[60] At one point, the court characterized the "Petaluma Plan" as "inclusionary," since it offered new opportunities to minorities and low and moderate income persons.[61] Since courts do not formulate a rule of constitutional law broader than is required by the precise facts in the case,[62] consideration of the inclusionary aspects of the "Petaluma Plan" must have been related to the constitutional standard of review applied by the Ninth Circuit. There was no reason under the traditional test for the court to devote so much time to characterizing the "Petaluma Plan," for if preserving the rural character of Petaluma was a permissible exercise of the police power, then it was irrelevant whether Petaluma's plan was inclusionary or exclusionary.[63] Apparently, the Ninth Circuit was un-

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nying notes 31-32 *supra*. Moreover, the factors considered by the Court did not compel a denial of standing. The test is impracticability of third party suits, not impossibility. *Cf.* Pierce v. Society of Sisters, 268 U.S. 510, 534-36 (1925). The "Petaluma Plan" reduces the practicability that third party suits can be brought in two respects. First, it reduces housing construction, thus reducing the opportunity to establish the type of relationship the court deems necessary for standing. 522 F.2d at 908. Secondly, the plan, by restricting the number of residential projects, greatly reduces the opportunities to show an interest in a project and thus establish standing under Warth v. Seldin, 95 S. Ct. 2197, 2209 (1975). Therefore since the "Petaluma Plan" itself reduces the opportunity for third party suits, the court of appeals should have allowed the landowners to bring the right to travel claim.

55. 522 F.2d at 906-07 n.13.

56. *Id.* at 906-09.

57. *See* text accompanying notes 27-34 *supra*.

58. 522 F.2d at 906-09.

59. *Id.* at 906.

60. *E.g., id.* at 901 & n.4, 905 n.10, 908 & n.16.

61. *Id.* at 908 & n.16.

62. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

63. *See* text accompanying notes 21-25 *supra*.

willing to permit innovative, restrictive land use regulations without balancing the existence of these restrictions against the inclusion of some low and moderate cost housing.

Conceptually, a balancing approach allows the courts to assess the broad policy implications presented in the case. But unless there are clearly defined standards to indicate which factors are important, the approach vests too much discretion in the courts. A major problem with the Ninth Circuit's decision is its lack of guidance for future cases. The decision failed, for example, to indicate how much inclusion is necessary to sustain restrictive land use ordinances; thus localities will be unsure how to develop their land use programs. Consequently, despite Judge Choy's attempts to limit the court's role in land use matters,[64] the Ninth Circuit's standard of judicial review is likely to increase judicial supervision of local land use regulations.

Whatever the conceptual merits of the balancing test, its application in the *Petaluma* case was irrevocably undermined when the court denied plaintiffs standing to raise the right-to-travel argument.[65] By so holding, the court disposed of the most important issue of the case and precluded any meaningful balancing. No one can deny that the "Petaluma Plan" appears reasonable when viewed by itself. But the dispositive issue is whether Petaluma can remain isolated. The court of appeals did not deny that the "Petaluma Plan" will prevent the construction of approximately one-half to two-thirds of the anticipated housing units needed during the 1973-1977 period, nor that the plan increases the cost of housing;[66] however, the Ninth Circuit chose not to hear these aspects of the *Petaluma* case.[67]

Individuals' desires to migrate and settle freely are basic to our society.[68] Affirming land use regulations that impede mobility without even considering the concerns of individuals produces neither good land use planning nor good judicial decisions. Ultimately, a judicial standard that reconciles localities' concerns for environmental protection and individuals' desires for mobility must be developed by the Supreme Court.

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64. No. 74-2100 at 13 & n.12.
65. *See* text accompanying notes 53-54 *supra.*
66. *See* note 43 *supra.*
67. *See* text accompanying notes 53-54 *supra.*
68. *See* note 42 *supra.*