SO YOU WANT TO MOVE TO THE SUBURBS: POLICY FORMULATION AND THE CONSTITUTIONALITY OF MUNICIPAL GROWTH-RESTRICTING PLANS

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Introduction

Municipalities recently have begun to question the wisdom and necessity of development-oriented land use policies. During the 1950's and 1960's suburban and rural communities often pursued rapid-growth policies that welcomed new residents and encouraged industrial and commercial expansion. These communities hoped to achieve a balance whereby industry and commerce would provide both jobs for residents and a tax base for the necessary expansion of public facilities.[1] Changes in attitudes toward land—primarily recognition of land as a finite resource possessing aesthetic values—in addition to economic stagnation, and an influx of urban problems, however, generally have reversed the priorities of municipal land use policies.[2]

Representative of these changing attitudes are such cities as Ramapo, New York and Petaluma, California. Both cities entered the 1970's facing a rising demand for new residential housing. Fearful that an influx of newcomers would overburden existing city facilities and threaten self-perceived small town characteristics, both cities enacted sophisticated temporary land use regulations designed to curb present rates of growth. In subsequent litigation these regulations

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1. *See, e.g.*, Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145, 146 at n.7 (1975). Some of the simplest methods of growth promotion include incorporation of cities and annexation of land. The municipality simply makes more land available for development and hopes that a proper mix of housing and industry will result. If insufficient industrial development occurs fiscal problems arise. More residents are present but the anticipated job opportunities are lacking. Demand for municipal services increases but not the industrial tax base to absorb these costs. Consequently municipal taxes rise at a rate unforeseen during promulgation of the expansion plans.

2. *Id.* at 146-47. *See generally* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 3 (1973).

were unsuccessfully attacked as violative of the state zoning laws and the due process, equal protection, and commerce clauses of the Constitution, and as beyond the auspices of the police power.[3]

This note probes the legitimacy of growth-restricting land use policies such as those enacted by Ramapo and Petaluma. The central issue is whether a city may impose temporary restrictions that directly or indirectly limit its rate of expansion and ultimate population, or must it accommodate the housing needs of those desiring to reside within its borders. Accordingly, land use restrictions are analyzed from the perspective of the cities, with an emphasis on municipal obligations that arise from population pressures. Next discussed is the individual's perspective in land use planning, with a focus on the constitutional issues of due process, equal protection, and the right to travel. Recent decisions redefining standing are also examined to determine their effect on land use litigation. The note then explores the correct balance between municipal and individual interests that often compete for development of finite areas of land. After an analysis of the *Ramapo* and *Petaluma* decisions, considerations for evaluating the legitimacy of growth-restricting plans are proposed.

I. Land Use Policy Formulation

A. Authority to Enact Land Use Ordinances

Throughout history, governments and citizens have grappled over the control and use of land.[4] In medieval England the King owned land and granted possession to those whom he favored. Gradually possession turned to ownership, subject to regulation by the sovereign. The colonies adopted a similar posture but emphasized regulation for the benefit of the community as a whole. As a fledgling nation, the United States recognized that all freemen had the right to own and possess land; in accord with common law principles, that right was subject to governmental regulation. Although governmental regulatory policies were generally passive restraints on private uses arising from the maxim *sic utere tuo ut alienum non laedas*,[5] the advent of the indus-

3. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976).

4. *See generally* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 53-104 (1973). Although an historical perspective is not a prerequisite to an understanding of current land use problems, it does provide an insight into the nature of the problem, the interests involved, and common policy underpinnings. Significantly, an historical perspective permits one to recognize that some of the problems, policies, and rules concerning the use of land date back to the Magna Carta.

5. "Use your own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1551 (4th ed. 1968).

trial revolution marked a change in attitudes. Mass industrialization, development of large urban and commercial areas, and suburban expansion increased the need for land use policies that would permit technological advancements while still protecting the sanctity of the home.

Land use regulations in the form of municipal zoning therefore met widespread acceptance as a means of protecting the suburbs from rapid and unsettling changes in the urban scene while still permitting industrial expansion.[6] Pioneer planners "undertook to cure the overcrowding and arrest the blight [of the cities] through a system of regulation which established a hierarchy of uses, provided spaces for all legal uses of land, and sought to separate incompatible uses."[7] *Village of Euclid v. Ambler Realty Co.*[8] represented the institution of this methodology into policy. Rather than relying on common law nuisance doctrines, Euclid, Ohio, adopted an ordinance that established comprehensive building restrictions and divided the village into use districts segregating industry from homes and commerce. The Supreme Court upheld the ordinance, stating that zoning was a valid exercise of the municipal police power unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[9]

Although Euclid, like most cities enacting zoning ordinances in the 1920's, was primarily concerned with protecting the single-family residence, the doctrine of *Euclid* was rapidly extended to encompass and guide the entire realm of urban planning development. Multiple-unit residences, housing many American families, also needed to be insulated from commerce and industry. Health and safety demanded that commerce be protected from industry. Light industry was distinguished from heavy industry. Soon a pattern of distinct, although not necessarily coherent, gradations, termed zones or use districts, was established.[10]

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6. R. BABCOCK, THE ZONING GAME 3 (1966) [hereinafter cited as THE ZONING GAME].

7. Anderson, *Introduction* to *Symposium: Exclusionary Zoning*, 22 SYRACUSE L. REV. 465 (1971). The power to institute such policies arises out of the police power. See notes 23-46 and accompanying text *infra*.

8. 272 U.S. 365 (1926).

9. *Id.* at 395. Interestingly, the federal district court, in an opinion by Judge Westenhaver, had held Euclid's plan unconstitutional, concluding: "The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life." Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924). Thus the possibility of abuse in land use regulation is not a new phenomenon.

10. *See* THE ZONING GAME, *supra* note 6, at 5. For a detailed discussion of zoning,

The theoretical rigidity of zoning, however, has been ameliorated by a variety of legislative enactments designed to provide flexibility in the development of land. To protect the individual landowner who experienced hardship from the system of districts, the variance was introduced in the 1930's as a tool to permit an exception to the land use scheme approved by *Euclid*.[11] Although zones and districts remained the norm, the guidelines were not strictly enforced. The special use permit[12] and the floating zone[13] granted broad discretionary power to local zoning bodies. More recently, the planned unit development[14]—providing for the mixture of uses, alteration of densities, and control of open space—has highlighted the transformation of zoning from a mild form of regulation to a complex, comprehensive, and systematic proscription on the way we live.

Many would argue that an intricate system of regulation is appropriate, but problems arise because of the dearth of Supreme Court decisions delineating the proper scope of zoning authority, and from the multiplicity of dissimilar opinions emanating from jurisdictions acting in the absence of such guidelines. Since 1926 the Court has directly limited *Euclid* only by the Fifth Amendment's requirement of just compensation for the taking of private property.[15] Other limitations, orig-

see 1 R. ANDERSON, AMERICAN LAW OF ZONING (1968) [hereinafter cited as AMERICAN LAW OF ZONING].

11. *See* 1 AMERICAN LAW OF ZONING, *supra* note 10. The origin of the variance as a flexible land use tool comes from the Standard State Zoning Enabling Act, which described the variance as designed "[t]o authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done." U.S. DEP'T OF COMMERCE, STANDARD STATE ENABLING ACT § 3 (1926).

12. The special use permit is a means to partially circumvent the strict designation of zones. Upon discretionary approval by local administrative zoning bodies, certain uses that would not otherwise be permitted within the zone are allowed. *See* THE ZONING GAME, *supra* note 6, at 7.

13. "[The floating zone] differs from the traditional 'Euclidean' zone in that it has no defined boundaries. . . . [It] is a special detailed use district of undetermined location in which the proposed kind, size and form of structures must be preapproved. It is legislatively predeemed compatible with the area in which it eventually locates if specified standards are met and the particular application is not unreasonable." Sheridan v. Planning Bd. of Stamford, 159 Conn. 1, 16, 266 A.2d 396, 404 (1969).

14. A planned unit development is an instrument of land use control that augments existing master plans and zoning ordinances, and permits a mixture of land uses on the same tract. Rudderow v. Township Comm. of Mount Laurel, 121 N.J. Super. 409, 297 A.2d 583 (1972). The California Court of Appeal described a planned unit development as "a tract of land absolved from conventional zoning to permit clustering of residential uses and perhaps compatible commercial and industrial uses, and permitting structures of differing heights." Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 768, 772, 90 Cal. Rptr. 88, 90 (1970).

15. Nectow v. City of Cambridge, 277 U.S. 183 (1928). Viewed another way,

inating in the state courts, have had minimal influence in providing uniform national standards.[16] The large degree of state and local autonomy in zoning is not inherently dangerous and can be quite beneficial in providing local bodies the flexibility to determine local destinies. As a result of the absence of doctrinal guidelines and objectives, however, the zoning mechanism has become a dubious method for regulating the land we live on.

The power of municipalities to zone remains much the same as that enunciated in *Euclid*; the permissible purposes, however, have changed. State enabling legislation typically grants municipalities the power to restrict the use of land, delineating the main objectives and purposes of zoning as follows:

> [T]o lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewage, schools, parks and other public requirements.[17]

The constraints on a city's authority to restrict land use come from both constitutional and statutory sources. The nation's long history of personal liberty, as well as its material prosperity, stems largely from the constitutional protections encouraging private ownership and development of land and its resources. The Constitution guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[18] These broad constraints on government action are further refined when applied to states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[19] These four clauses of the Constitution—the due process clauses of the Fifth and Fourteenth Amendments, the just

Nectow is merely an extension of *Euclid*'s ruling that regulation must be reasonable. In *Nectow*, a regulation establishing an exclusive district, in which no practical use could be made of the plaintiff's land, was held to be an unconstitutional taking of the plaintiff's property.

16. See notes 57-74 and accompanying text *infra*.

17. U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 3 (1926). Some states go further and accord to the municipalities virtually unlimited authority to zone. California's enabling legislation, for example, contains no specific provisions that limit the permissible purposes of a zoning ordinance. Section 65850 of the Government Code delineates the types of ordinances that a legislative body of any city or county may use. CAL. GOV'T CODE § 65850 (West 1976). Section 65800 expresses the purpose as an "intention [by the legislature] to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." CAL. GOV'T CODE § 65800 (West 1976).

18. U.S. CONST. amend. V.

19. U.S. CONST. amend. XIV.

compensation clause, and the equal protection clause—traditionally operate as shields against government excesses in regulating privately owned land.[20] Excessive regulation is controlled by the doctrine of inverse condemnation and the constitutional mandate of just compensation. Thus, a property owner may recover damages for the injury he suffers from excessive regulation.[21]

Traditionally, courts have deferred to the zoning determinations of local governments.[22] This deference derives from the parallel scope of municipalities' broad police and public welfare powers,[23] from the state constitutional structure of power providing that real property be subject to local control,[24] and from the persistent notion that actions regarding land are inherently local in nature and primarily affect the immediate area of the city. State statutory provisions impose only slight limitations on the exercise of municipal zoning authority. Gener-

20. In *Euclid*, for example, the plaintiff alleged violation of the Fourteenth Amendment due process clause, arguing that the Village's use districts were " 'unreasonable and confiscatory.' " 272 U.S. at 386. One year later in Zahn v. Board of Pub. Works, 274 U.S. 325 (1927), the plaintiff augmented the due process attack with the just compensation clause, again to no avail. A plaintiff finally prevailed on due process grounds in Nectow v. City of Cambridge, 277 U.S. 183 (1928). Plaintiffs unsuccessfully argued violation of both the due process clause and the just compensation clause in Berman v. Parker, 348 U.S. 26, 31 (1954). Contemporary litigation involving land use regulations, however, often utilizes a diverse. arsenal of constitutional guarantees, including the four traditional clauses as well as the right of association, the right of privacy, and the right to travel. For the most recent Supreme Court case involving this multifaceted attack on zoning, see Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *See also* Frame & Scorza, *Village of Belle Terre v. Boraas: Property Rights, Personal Rights, and the Liberal Regime*, 2 HASTINGS CONST. L.Q. 935 (1975); Margolis, *Exclusionary Zoning: For Whom Does Belle Terre Toll?*, 11 CALIF. WEST. L. REV. 85 (1974).

21. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 571, 89 Cal. Rptr. 897, 905 (1970).

22. "The Supreme Court abandoned the supervision of zoning four decades ago." Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 783 (1969) [hereinafter cited as Sager]. A more accurate explanation of the dearth of Supreme Court cases dealing with zoning, even in the highly charged Warren years of scrutiny into personal rights, may be that the justices saw zoning as a particularly local endeavor in which the Court would only muddle. For example, Justice Marshall in 1974 voted in dissent to invalidate an ordinance that restricted land use to single family dwellings, thereby burdening the fundamental rights of association and privacy between tenants. He nonetheless embraced the traditional Supreme Court attitude toward zoning: "I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life . . . . Our role is not and should not be to sit as a zoning board of appeals." Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

23. See text accompanying note 27 *infra*.

24. See note 17 *supra*.

ally these provisions permit municipalities to exercise broad, comprehensive control over local development, provided that the cities comply with general plans.[25] Once a city's zoning ordinances are brought into compliance with the development policies embodied in its general plan, the land use restrictions are rarely struck down.

B. Permissible Police Power Objectives of Land Use Ordinances

While enabling legislation and constitutional provisions delineate the authority for municipal zoning, the scope of this authority is dependent upon judicial interpretations of the breadth of the police power. In an early description of the municipalities' police power to zone, the California Supreme Court in *Miller v. Board of Public Works*[26] wrote:

> [T]he police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. In brief, "there is nothing known to the law that keeps more in step with human progress than does the exercise of this power."[27]

Historically, municipalities have had the power to regulate reasonably the use of land for health, safety, and general welfare purposes. Most litigation involving attacks on land use policies centers on the construction of the terms "health," "safety," and "general welfare" in order to determine the reasonableness of ordinances allegedly promoting these ends.[28] The terms "health" and "safety" logically present minimal interpretation difficulties. Separation of noxious uses, adequate light and air provisions, regulations restricting population concentration, and regulations requiring adequate recreational facilities and open space fall within the ambit of zoning for the health of the community. Likewise, traffic control and building height limitations that ensure adequate fire protection represent valid exercises of police power in the promotion of safety. Even large lot size requirements and stringent floor size regulations arguably promote health and safety concerns. Although the relationship between the danger and the remedy often is quite tenuous, a correlation exists between density and health, and between congestion and safety. Statistics reveal an opti-

25. *E.g.*, CAL. GOV'T CODE §§ 65300, 65860(a) (West Cum. Supp. 1976).

26. 195 Cal. 477 (1925).

27. *Id.* at 485.

28. *See, e.g.*, City of Eastlake v. Forest City Enterprises, 44 U.S.L.W. 4919 (U.S. June 21, 1976); Berman v. Parker, 348 U.S. 26 (1954); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

mum ratio of land space per person.[29] Additionally, much of the crime in the central cities has been attributed to crowded conditions and lack of adequate recreational areas.[30]

The concept of general welfare, however, can present major interpretation difficulties. General welfare is best defined in terms of inclusion and exclusion. It includes, *inter alia*, lot size and floor area requirements, population density controls, and separated districts designed to attain homogeneous zones of development.[31] Historically it has excluded zoning for the purposes of preserving property values,[32] of reducing tax burdens,[33] or of promoting aesthetics.[34] These objectives, particularly the promotion of aesthetics, have received approval only as incidental benefits arising from legislation that is justifiable on "health" or "safety" grounds. Changed attitudes toward land, however, have altered this historical conceptualization, and judicial decisions have evidenced this change. In the early 1930's the Indiana Supreme Court sounded the warning in *General Outdoor Advertising Co. v. Indianapolis*[35] by holding that general welfare was sufficiently broad to include aesthetic concerns as an auxiliary consideration. Subsequent state court decisions espoused similar beliefs.[36] It was not until the 1950's, though, that a broad and powerful doctrine was enunciated.

In *Berman v. Parker*[37] the Supreme Court was confronted with the claim that urban renewal projects in the District of Columbia violated the due process and just compensation clauses of the Fifth Amendment in that property was being taken "merely to develop a better balanced, more attractive community."[38] The Court sustained the project, refusing to limit the belief that public welfare may be enhanced by zoning regulations:

> 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.[39]

29. *See, e.g.*, Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).

30. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT (1968). Inadequate housing was among the factors listed as prominent causes of racial unrest. *Id.* at 4.

31. 1 AMERICAN LAW OF ZONING, *supra* note 10, at §§ 7.12-.33.

32. *Id.* § 7.29.

33. *Id.* § 7.31.

34. *Id.* §§ 7.12-.24.

35. 202 Ind. 85, 172 N.E. 309 (1930).

36. *See generally* 1 AMERICAN LAW OF ZONING, *supra* note 10, at § 7.22.

37. 348 U.S. 26 (1954).

38. *Id.* at 31.

39. *Id.* at 33 (citations omitted).

Although many state courts are still reluctant to construe general welfare as broadly as Justice Douglas did in *Berman*, an increasing number of jurisdictions are moving in that direction. In New York, *People v. Stover*[40] held that aesthetics were a valid subject of legislative concern and that reasonable legislation designed to promote these ends was a valid application of the city's police power. In *Oregon City v. Hartke*,[41] the Oregon Supreme Court upheld total exclusion of a "junkyard" from a municipality, basing its decision on aesthetics. California, as well, has extended the concept of general welfare to include aesthetics, defining the term broadly to include preservation of property values, maintenance of tax revenues, retention of economic stability, and promotion of a pleasant community.[42]

Greater appreciation of the inherent values of land, rising concern about our environment, and powerful lobbying groups have been significant factors in expanding the scope of general welfare. And despite periods of economic depression and high unemployment, municipalities are enacting, and courts are sustaining, legislation that primarily seeks to preserve environmental and aesthetic values. New techniques of zoning designed to reconcile the need for orderly municipal growth with social and economic desires represent the continued viability of a broader conceptualization of the general welfare. Variation within zones, planned unit developments, conditional use permits, variances, and density transfers allow uses to be mixed instead of strictly separated.[43] Subdivision exactions permit benefits to be derived from developers who otherwise might heedlessly overburden the city and then leave.[44] Preferential tax assessments are designed to preserve open spaces.[45] Increased intergovernmental cooperation and the crea-

40. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963).

41. 240 Ore. 35, 400 P.2d 255 (1965).

42. *See generally* D. HAGMAN, CALIFORNIA ZONING PRACTICE §§ 5.16-.20 (Supp. 1975); URBAN LAND INSTITUTE, MANAGEMENT & CONTROL OF GROWTH (1975) (a landmark three volume work on land use planning).

43. See notes 11-14 *supra*.

44. The California Supreme Court upheld dedications of land from a developer to a city as a condition of approval for a lot subdivision under the Subdivision Map Act, CAL. GOV'T CODE §§ 66410-499.37 (West Cum. Supp. 1976), in Ayers v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949). The state court more recently affirmed land dedication exactions of park land in Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

45. California provides tax benefits to owners who desire to devote their land to either agricultural or open space uses. The land is taxed at its actual value rather than its speculative value, thereby relieving a tax burden on undeveloped land that otherwise would tend to encourage subdivision. California Land Conservation Act of 1965 (*Williamson* Act), CAL. GOV'T CODE §§ 51200-95 (West Cum. Supp. 1976) and CAL. REV. & TAX. CODE §§ 421-32 (West Cum. Supp. 1976).

tion of regional planning agencies both indicate that land is increasingly viewed as a commodity and a finite resource.[46]

Still, each municipality perceives differently the factors that are significant in achieving the balance between development and preservation interests. While expanding the permissible objectives to be attained by land use regulations, judicial decisions continue to treat each municipality as the repository of the general welfare. General welfare is still largely equated with municipal interests. The result is that municipalities may enact land use regulations for a variety of purposes while remaining responsible only to those individuals residing within their borders. General welfare, then, is broad as to purposes but narrow as to obligations.

C. General Welfare Within the Context of Municipal Obligations

Commentators have suggested that general welfare should be expanded to reflect the effects of local legislative action in an "interdependent metropolitan society."[47] Recognizing that strong home rule traditions would resist such a change, some activist courts are gradually imposing more stringent requirements on municipalities whose actions are inconsistent with the larger area affected by their policies. The most striking manifestation of this changing conceptualization of the breadth of zoning authority has occurred within the realm of municipal obligations to house new residents.

Historically, municipalities were entities physically isolated from each other and owing obligations only to their present inhabitants. They were communities in the true sense of the word—geographically and fiscally independent, and often culturally homogeneous. Zoning was one of the means used to preserve these attributes.[48] Such municipal status however, was shortlived. Advances in transportation and communication rendered suburban communities less isolated. Open

46. The California Government and Public Resources Codes provide for comprehensive regional planning agencies in addition to municipal land use control. *E.g.*, CAL. GOV'T CODE §§ 65060-85 (West Cum. Supp. 1976) (regional land use and transportation planning); CAL. PUB. RES. CODE §§ 22000-80 (West Cum. Supp. 1976) (Ventura-Los Angeles Mountain and Coastal Study Commission); CAL. GOV'T CODE §§ 66600-61 (West Cum. Supp. 1976) (San Francisco Bay Conservation and Development Commission); CAL. GOV'T CODE §§ 66801, 67000-130 (West Cum. Supp. 1976) (Tahoe Regional Planning Agency); CAL. PUB. RES. CODE §§ 27000-650 (West Cum. Supp. 1976) (California Coastal Zone Conservation Commission). Of particular importance for the greater San Francisco Bay Area, of which Petaluma is a part, is the Association of Bay Area Governments, a federation of local governments that has instituted broad planning directions for the area, but has no legislative authority to implement the policies.

47. THE ZONING GAME, *supra* note 6, at 176.

48. See notes 7-8 and accompanying text *supra*.

growth policies allowed municipalities to expand their borders and annex neighboring land. Seeking to broaden their tax base, communities promoted industrial and commercial development. Thus many municipalities are no longer self-contained units but rather are interdependent entities deriving benefits from neighboring cities and imposing policies that affect those beyond their borders.[49] In this light, the issue becomes whether municipalities whose basic foundations have been largely altered owe greater responsibilities to those beyond their borders. While the answer is not yet definitive, a pattern is emerging.

For purposes of analysis, two broad types of municipalities are considered: those that remain unitary housing markets, physically and socially isolated from the expanding urban setting; and those that, although politically independent, are mere extensions of a larger housing market.

1. *Unitary Housing Markets*

Unitary housing markets have little responsibility to those beyond their borders. They experience little or no population pressure and their policies have minimal impact outside municipal limits. They do not borrow size from nor are they part of a larger metropolitan region. The concept of the public welfare, construed narrowly or broadly, provides ample justification for sustaining local legislation designed to preserve small town character and rural environments in nonmetropolitan communities.

Exemplary of an analysis that imposes minimal obligations on nonurban communities are *Village of Belle Terre v. Boraas*[50] and *Ybarra v. Town of Los Altos Hills*.[51] In *Belle Terre* the Supreme Court sustained an ordinance restricting land use to single family dwellings, thus ensuring that the population of the village would remain at approximately 700. Although the ordinance was attacked as violative of the constitutional rights of association, privacy, and travel, within the

49. This concept, characterized as "borrowed size," occurs when a "small city or metropolitan area exhibits some of the characteristics of a larger one if it is near other population concentrations. A statistical measure called population potential, which measures the accessibility from a given location to other centers of population, behaves very much like population in statistical analysis. For instance, per capita income in a place is as strongly associated with this measure as with its actual population. This makes sense if one considers that the essential reason why income and population levels are associated is that population is a rough index of the number of opportunities for interaction available in that place. . . . In simple terms, while [smaller areas] retain many of the advantages of smaller size, such as lower levels of congestion, they enjoy the advantages of larger size through their easy access to other centers." Alonso, *Urban Zero Population Growth*, DAEDELUS 191, 200 (Fall, 1973).

50. 416 U.S. 1 (1974).

51. 503 F.2d 250 (9th Cir. 1974).

context of a small, rural community the restrictions were deemed reasonable exercises of police power.[52] In *Los Altos Hills* the questioned regulation provided a minimum lot size of one acre. Los Altos Hills, California, like Belle Terre, New York, is a town relatively unpressured by the problems of urban development. Therefore, even though the regulation limited growth and promoted environmental preservation, it served a legitimate governmental interest without creating an appreciable impact beyond the town's borders.[53]

Belle Terre and Los Altos Hills are not, however, representative of a large number of American municipalities in the 1970's. While all cities desire "[a] quiet place where yards are wide, people few, and motor vehicles restricted,"[54] many have opted for industrial expansion and urbanization. Others have merely been drawn into a situation in which they are borrowing size and deriving benefits from neighboring municipalities. These cities are not the secluded retreats protected by *Belle Terre* and *Los Altos Hills*, but rather represent the communities described by Justice Hall in his dissent in *Vickers v. Gloucester*[55] as falsely assuming that they possess an "almost boundless freedom . . . to erect exclusionary walls on their boundaries, according to local whim or selfish desire, and to use the zoning power for aims beyond [their] legitimate purposes."[56] These municipalities, which experience population pressures, derive social and economic benefits from their neighbors, and pursue policies affecting those neighbors, should have their land use regulations evaluated pursuant to a standard of general welfare different from that used for more isolated communities.

2. *Municipalities with Population Pressures*

The ability and inclination of each zoning entity to designate its desired objectives, and to enact ordinances to achieve those ends regardless of the social realities that surround it, have led an increasing number of courts to redefine the breadth of the general welfare. Whereas municipalities experiencing minimal population pressures can legitimately claim that their borders enclose the area to which they are obligated, municipalities on the urban fringe cannot as easily assert this claim. The latter directly benefit from the social and municipal services that neighboring communities provide; logically they owe a concomitant duty to provide their fair share of these services. Recognizing that city or county borders are frequently mere artificial designations

52. 416 U.S. at 9.
53. 503 F.2d at 254.
54. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).
55. 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963).
56. *Id.* at 252, 181 A.2d at 140.

that do not necessarily represent the true sphere of the community, some courts are viewing land use regulations in a broader context, encompassing the area that will in fact be affected by the legislation in question.

Redefining the obligations of a municipality involves due process considerations. California, for example, has extended the due process guarantees of adequate notice and hearing to property owners who live outside a municipality, holding that nonresident land owners have standing to challenge zoning ordinances that adversely affect their land.[57] Thus municipal boundaries have been expanded to provide a forum for all individuals who may foreseeably be aggrieved by a local ordinance.

The Pennsylvania Supreme Court significantly expanded the obligations that metropolitan communities must incur in *National Land & Investment Co. v. Kohn*,[58] which invalidated an ordinance that zoned for minimum lot sizes of four acres. The township claimed, *inter alia*, that strained city services necessitated a low density and that it had no responsibility to accommodate "those who are pressing for admittance to the township unless such admittance will not create any additional burdens upon government functions and services."[59] Thus, any increase in population would, in effect, have to pay for itself. As to the first claim, the court found that city services were not in fact overburdened. Rejecting the second argument, the court spoke in broad terms of the township's obligation to assume its share of the development pressures that surrounded it:

> The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not.[60]

The court would not condone the exclusion of segments of the general population merely because the city refused to extend facilities to meet a future demand; zoning could not be used "to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring."[61]

The doctrine that a city owes certain obligations to its region has

57. *E.g.*, Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972); *see* Note, *Judicial Limitations on Parochialism in Municipal Land Use Decisions: Scott v. City of Indian Wells*, 25 HASTINGS L.J. 739 (1974).

58. 419 Pa. 504, 215 A.2d 597 (1965).

59. *Id.* at 532, 215 A.2d at 612.

60. *Id.*

61. *Id.* at 528, 215 A.2d at 610. The Pennsylvania Supreme Court in another case made clear its intent: "If expansion is required, then it should be accomplished." Delaware County Community College Appeal, 435 Pa. 264, 270, 254 A.2d 641, 644 (1969).

been extended in Pennsylvania into what might be called a regional-fair share approach to resolution of challenges to exclusionary ordinances.[62] Parochial legislation that purposefully *or* inadvertently creates "an effective barrier to socioeconomic dispersion throughout [an] entire region"[63] will be subject to judicial analysis as to whether the municipality has failed to absorb its fair share of regional needs and whether alternative methods of accommodation are available.[64] The test to a certain extent merely balances the equities. Since municipal services must be provided somewhere, suburban communities cannot escape their fair share of the burden. The contention that general welfare stops at each municipal boundary or does not encompass the housing needs of those outside its borders is rejected, and the court imposes upon municipalities the obligation to broaden their perspectives when dealing with the right of people to live on land.

Such a regional conceptualization of land use policies is consistent with the prevailing view that development plans should take into consideration specified economic and social data and should seek to regulate physical expansion.[65] Whereas traditional developmental approaches concentrated on the proper long term location and intensity of activities that use land and on the accommodation of facilities serving these activities, contemporary planners view municipalities as societal systems in which land use plans seeking solely to regulate physical development are not sufficient.[66]

The strongest application of the regional-fair share approach has been made in New Jersey, where regional conceptualization had previously been employed to sustain local legislative zoning determinations.[67] The seminal case of *Southern Burlington County NAACP v. Township of Mount Laurel*[68] involved the housing obligations of all New Jersey cities not yet completely developed and in the path of inevitable future growth. Mount Laurel was such a city—a natural area for growth, subject to population pressure, and on the urban

62. *See* Willistown Township v. Chesterdale Farms, Inc., 7 Pa. Commw. Ct. 453, 300 A.2d 107 (1973); Appeal of Kit Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

63. Comment, *Zoning: Closing the Economic Gap*, 43 TEMP. L.Q. 347, 348 (1970).

64. *See* National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

65. *See* I. Heyman, *Commentary on Article 3 of A Model Land Development Code, ALI Proposed Official Draft No. 1*, at 128-30 (1974).

66. *Id. See* H. FRANKLIN & D. FALK, IN-ZONING (1974).

67. *See* Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949). *See generally* Feiler, *Metropolitanization and Land Use Parochialism —Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971) [hereinafter cited as Feiler].

68. 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

fringe. Ostensibly in an effort to attract industry and thereby keep taxes low, thirty percent of the township was noncumulatively zoned for industrial use only. A myriad of sophisticated techniques effectively made the remainder of the township exclusively single-family residential.[69] The township contended that although exclusionary, its "policies and practices [were] in the best present and future fiscal interest of [its] inhabitants and [were] legally permissible and justified."[70]

The New Jersey Supreme Court traced the regional approach it had attributed to the meaning of general welfare and concluded that *every* municipality in the path of inevitable growth must affirmatively make "realistically possible the opportunity for an appropriate variety and choice of housing" at least to the extent of " 'the municipality's fair share of the present and prospective regional need therefore.' "[71] Although zoning power had been delegated by the state to the local governments, state constitutional considerations required that when local regulations had a "substantial external impact," the welfare of those state citizens beyond the local borders must be "recognized and served."[72] In answer to the city's contention that it owed the duty of fiscal responsibility to its present inhabitants, the court emphasized that municipalities must zone "primarily for the living welfare of people and not for the benefit of the local tax rate."[73]

69. The zoning ordinance provided for the following: (1) 29.2% of all land was zoned for industry of light manufacturing, research, distribution of goods, and offices. Less than 1% was actually occupied by industrial uses. (2) 1.2% was zoned for retail business. (3) The balance was zoned for residential uses in the following manner: (a) 33% was allotted to R-1, which required a minimum of 9,375 square feet and a floor area of 1,100 square feet. These requirements would realistically allow only middle income dwellings; this district was approximately 80% developed. (b) 1% was R-2, which required 11,000 square feet minimum lot size and 900 square feet floor area, and which was completely occupied. (c) 50% was R-3, which required 20,000 square foot lots and 1,100 square foot dwelling floor areas. Additionally there were planned unit developments providing for mixtures of uses and a residential zone of clustered dwellings. These latter two categories, however, were designed to accommodate only upper-income families without children. Approval of developments sharply limited the number of bedrooms and required the developer to pay school tuition and costs. Thus, Mount Laurel had "acted affirmatively to control development and to attract a selective type of growth and that through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing and the opportunity to secure the construction of subsidized housing, and has used . . . resources solely for the betterment of middle and upper income persons." Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

70. *Id.* at 161, 336 A.2d at 718.

71. *Id.* at 188, 336 A.2d at 731.

72. *Id.* at 189 n.22, 336 A.2d at 732-33 n.22.

73. *Id.* at 188, 336 A.2d at 732. This language resembles that used by the Pennsylvania Supreme Court when dealing with the exclusion of new residents. See notes 59-65 and accompanying text *supra*.

The New Jersey courts, then, will consider the location of the municipality, existing external pressures, and the present permitted mix of uses. Any facial showing that the municipality has not fulfilled its regional obligations will eradicate any presumption of validity and will impose upon the municipality the burden of establishing superseding reasons for its action and inaction.[74] This test is fair inasmuch as the municipality has access to information used to promulgate its land use measures and, therefore, should be able to show the reasonableness of any policy. Theoretically, only a fair share of regional needs need be absorbed. Inasmuch as already developed communities are not affected by the decision, developing communities may be required to absorb more than their fair share.[75]

D. Judicial Remedies

The question of adequate remedies for municipal exclusion of potential residents has haunted the courts, both state and federal. The usual court order leaves open the city's options after the court declares the existing land use provisions unconstitutional. Courts have rarely required a city to formulate comprehensive new housing plans to be approved by the court. In *Mount Laurel* the trial court's order requiring such a plan was reversed as a premature and excessive exercise of the court's equity power.[76]

The Supreme Court, however, has restricted the municipal freedom to formulate future land use policies when either racial or economic imbalances are apparent. *Hills v. Gautreaux*[77] upheld a federal

74. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975). Although the court could not require regional planning, it strongly urged it as a concomitant to its decision. Moreover, given the court's definition of general welfare and its recognition of cities' obligations to absorb all uses of land to accommodate their fair share of regional needs, intermunicipal cooperation would be quite difficult to avoid.

75. The concurring opinion of Justice Pashman in *Mount Laurel* suggests a remedy for this problem. He stated that the approach of the judiciary in relation to municipal fair-share obligations should be a four step process: "(1) identify the relevant region; (2) determine the present and future housing needs of the region; (3) allocate these needs among the various municipalities in the region; and (4) shape a suitable remedial order." *Id.* at 215-16, 336 A.2d at 747 (Pashman, J., concurring). He further stated that developed suburban municipalities, "which have availed themselves of the land use controls permitted by statute and which have not provided sufficient opportunities for development of low and moderate income housing to meet their fair share of regional needs, have both a negative obligation not to use zoning and subdivision controls to obstruct the construction of such housing and an *affirmative duty to plan and provide for such housing* insofar as these obligations can be carried out without grossly disturbing existing neighborhoods." Id. at 217-18, 336 A.2d at 748 (Pashman, J., concurring) (emphasis added).

76. *Id.* at 151, 336 A.2d 713.

77. 425 U.S. 284 (1976).

court order compelling the Department of Housing and Urban Development (HUD), in cooperation with the Chicago Housing Authority (CHA), to implement a remedial housing plan in the Chicago metropolitan area to cure past racial discrimination in the construction and leasing of public housing. HUD had argued that *Milliken v. Bradley*[78] precluded a federal court remedy beyond the city boundaries of Chicago, but the Court in *Gautreaux* distinguished *Milliken*, stating:

> The critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution. . . . [U]nlike the desegregation remedy found erroneous in *Milliken*, a judicial order directing relief beyond the boundary lines of Chicago will not necessarily entail coercion of uninvolved governmental units, because both CHA and HUD have the authority to operate outside the Chicago city limits.[79]

Gautreaux, then, appears to serve notice that federal courts may look beyond municipal boundaries when fashioning remedies for housing discrimination that involves the federal government. The broad involvement of HUD and other federal agencies in helping to finance local housing developments increases the potential impact of *Gautreaux* on land use regulations.

While a regional planning perspective gives the judiciary more power to invalidate suspect plans, it would do so only in the absence of inter-municipal cooperation. Even an activist role would probably be largely abandoned if regional planning were instituted.[80] Decisions such as *Mount Laurel* and *Gautreaux* may warn the boroughs and townships of the country that their long-standing authority to determine their own destinies will be considerably restricted unless they plan in cooperation with, rather than in derogation of, neighboring communities.

II. Equal Protection

Litigants challenging exclusionary zoning policies generally rely on the equal protection and due process clauses of the Fifth and Fourteenth Amendments.[81] Equal protection claims are usually adjudicated on

78. 418 U.S. 717 (1974). *Milliken* held that absent a showing of racial segregation in suburban school districts surrounding Detroit, the federal district court could not order an interdistrict school busing plan to achieve integration.

79. 425 U.S. 284, 297-98 (1976). Since the Supreme Court decision, HUD has agreed to subsidize housing in white suburbs of Chicago for 400 minority families. The subsidies are the first step in what is expected to be a court-approved comprehensive plan to remedy the many years of discrimination in federally-funded public housing. Wall St. J., June 8, 1976, at 1, col. 3 (Pac. Coast ed.).

80. *See generally* THE ZONING GAME, *supra* note 6, at 166-85.

81. *See generally* Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Feiler, *supra* note 67; Sager, *supra* note 22; Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645

one of two standards developed by the Supreme Court.[82] Traditionally the Court has applied a rationality test, focusing the inquiry on whether a rational relationship exists between a legislative classification and a permissible state objective. Under this test the party challenging the legislation must show that it is arbitrary or unreasonable, with virtually no possible grounds of justification. Failure to bear this burden results in the court upholding the legislation without necessarily approving the methods employed. If legislation creates a constitutionally suspect class or infringes upon a fundamental interest, however, it is subject to a more demanding review. Under this "strict scrutiny" test, the Court will invalidate the legislation unless there is a clear showing that any burdens imposed are necessary to protect compelling and substantial governmental interests that cannot be protected by less onerous methods.[83] Determination of the standard to be applied is generally conclusive. A constitutional dichotomy has emerged:

> The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned, with minimal scrutiny in theory and virtually none in fact.[84]

The absence of cases in which the party bearing the burden has prevailed indicates that the compelling state interest burden weighs heavily.[85]

The courts usually apply the reasonableness standard in land use litigation because of the presumption of validity attached to zoning ordinances. The vitality of equal protection challenges in land use adjudication depends, therefore, on whether the opposed legislation can be shown to create a suspect classification or to abridge a fundamental interest.[86] While many land use regulations have been invalidated

(1971) [hereinafter cited as *Exclusionary Zoning*]; Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61 (1971).

82. Equal protection analysis was greatly affected in the late 1940's by an article that introduced a substantive aspect into traditional equal protection. Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). *See generally* Sager, *supra* note 22; *Exclusionary Zoning*, *supra* note 81.

83. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

84. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Since Chief Justice Warren's retirement, the Court has in some instances altered equal protection analysis by applying an intermediate test that focuses on the relationship between the permissible objectives of legislation and the reasonableness of the means to achieve the objectives. *E.g.*, Mathews v. Lucas, 44 U.S.L.W. 5139 (U.S. June 29, 1976); Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971).

85. Although Korematsu v. United States, 323 U.S. 214 (1944), is an exception to the statement in the text, the emergency situation during World War II probably best explains the result.

86. *E.g.*, Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974);

under equal protection standards, they have generally involved racial classifications; independent grounds for invalidation have not been explicitly recognized. Thus, reliance on equal protection in land use cases is in reality a search for a suspect classification or a fundamental interest. The most promising possibilities would be the judicial recognition of wealth as a suspect classification or housing as a fundamental interest.

A. Wealth as a Suspect Classification

Zoning ordinances such as those requiring a minimum lot size or floor size raise the cost of housing and therefore serve to limit poor peoples' access to housing. Further, such ordinances frequently serve to preclude the poor from living near their sources of employment. Cumulatively such ordinances may operate to exclude the poor from entire regions.[87] Thus, such statutes might be attacked on the ground that they unfairly discriminate against the poor.

Although the Supreme Court has never explicitly held wealth to be a suspect classification, it has intimated in a few cases that it would extend strict scrutiny protection to classifications based on wealth. For example, in *Douglas v. California*,[88] the Court held that indigent criminal defendants are entitled to counsel at public expense for a first appeal. *McDonald v. Board of Election Commissioners*,[89] while holding that unsentenced defendants awaiting trial were not constitutionally entitled to absentee ballots, stated that wealth was a factor "which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[90] While the Court in these cases was primarily interested in protecting the substantive and procedural rights of criminal defendants, ability to pay was one of the factors considered by the Court. Thus, the Court seems to indi-

Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Southern Alameda Spanish Speaking Organizations v. City of Union City, 424 F.2d 291 (9th Cir. 1970).

87. For a discussion of the phenomenon of exclusionary zoning in relation to low income groups, see Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End*, 1971 URBAN L. ANN. 9; Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040 (1963); Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 WIS. L. REV. 370; Feiler, *supra* note 67; Sager, *supra* note 22; Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?*, 3 CONN. L. REV. 244 (1971); *Exclusionary Zoning, supra* note 81; Note, *Snob Zoning: Must a Man's Home Be a Castle?*, 69 MICH. L. REV. 339 (1970).

88. 372 U.S. 353 (1963).

89. 394 U.S. 802 (1969).

90. *Id.* at 807.

cate that it will subject a classification based on wealth to strict scrutiny if that classification is incidental to a favored interest.[91]

Certain characteristics of poverty make it difficult to apply strict scrutiny to classifications based on wealth. Although the effects of wealth discrimination are often as pervasive and injurious as those of racial discrimination, the differences have been considered significant enough to justify disparate judicial treatment. Unlike race, poverty is regarded as a temporary circumstance, remediable over time. Additionally, the poor are not easily distinguishable as a class; whereas members of a particular race are usually readily identifiable, there are varying degrees of poverty. Finally, classifications based on wealth are accepted in our society as normal and natural.[92] These characteristics of poverty do not however, compel the conclusion that "burdens on the poor are less invidious than those placed on blacks"[93] or other racial minorities. First, present social realities demonstrate that poverty does not generally prove to be remediable; rather, it is a continuous cycle from which few escape. Education and employment are necessary to remove the constraints of poverty, yet neither can be obtained without financial resources. Second, while the poor might not be as distinct a class as racial minorities, this is no reason to avoid dealing with clear cases of discrimination based on wealth. Finally, racial classifications were at one time in our history accepted as normal and natural; just as that attitude has been discredited, so can be the acceptance of wealth based classifications. Racial classifications usually prompt immediate and intense judicial scrutiny. Wealth classifications that perpetuate the burdens of poverty could logically be adjudicated with the same degree of scrutiny.

B. Housing as a Fundamental Interest

Various commentators have posited that equal access to housing may be worthy of status as a fundamental interest.[94] Adequate dwellings may be as important as voting and other fundamental rights. The Warren Court, taking note of contemporary social and economic

91. *See,* e.g., Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), in which the Supreme Court prohibited the use of state imposed poll taxes because they disproportionately infringed the poor's fundamental right to vote. Ability to pay was significant because the discrimination involving the right to vote primarily affected the less wealthy. Similarly, where welfare recipients were required to attain one year's residency in the District of Columbia before applying for any benefits, it was the constitutionally protected right to travel, in addition to the fact that the prospective recipients were poor, that ultimately called for the application of strict scrutiny. Shapiro v. Thompson, 394 U.S. 618 (1969).

92. Sager, *supra* note 22, at 786.

93. *Exclusionary Zoning, supra* note 81, at 1660.

94. See note 81 *supra.*

priorities, intimated that equal access to housing was a fundamental right. In *Shelley v. Kraemer*[95] the Court invalidated racially restrictive covenants enforced by state courts, declaring that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own, and dispose of property. Later, *Reitman v. Mulkey*[96] invalidated an amendment to California's constitution that would have protected property owners' rights to discriminate when selling land. Aside from the racial implications, *Reitman* intimated that urban housing may be associated with the public interest.[97] Many observers hoped that despite the racial aspects of these cases, the contention that "[e]qual access to housing . . . is regarded by the court as a matter of the most serious social and constitutional concern"[98] would prevail even absent an obviously suspect classification.

Two decisions of the present Court, however, indicate an unwillingness to recognize a right to housing. In *James v. Valtierra*,[99] the Court upheld a state requirement of local referendum approval of any public housing projects, notwithstanding affirmative federal housing legislation. Because there was no evidence of racial classification, the legislation was within the constitutional bounds of acceptable state action. More recently, *Lindsey v. Normet*[100] explicitly concluded that housing per se is not a fundamental interest. Justice White noted that "the Constitution does not provide judicial remedies for every social and economic ill."[101]

Thus, it seems unlikely that claims based either on classifications of wealth or on impediments to housing access will prompt strict scrutiny by the courts. This is not to say, however, that courts will not give preferential treatment to these claims when they are made in conjunction with claims based on other constitutionally protected interests. The continued vitality of the right to travel indicates that quite the opposite may be true.

III. The Right to Travel and Zoning

As early as 1823 the existence of what is now a fundamental right to travel was judicially acknowledged.[102] Its source has variously been

95. 334 U.S. 1 (1948).
96. 387 U.S. 369 (1967).
97. *Id.* at 385 (Douglas, J., concurring).
98. Sager, *supra* note 22, at 790.
99. 402 U.S. 137 (1971).
100. 405 U.S. 56 (1972).
101. *Id.* at 74.
102. Corfield v. Coryell, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823). Frederick Jackson Turner, in THE FRONTIER IN AMERICAN HISTORY 2 (1920), provides a colorful

attributed to the commerce clause,[103] the privileges and immunities clause of Article IV,[104] the privileges and immunities clause of the Fourteenth Amendment,[105] and the due process clauses of the Fifth and Fourteenth Amendments.[106] Its existence, however, is now beyond question.

The nature of the right is the ability to move, migrate, and settle in any state, because "[w]e are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption."[107] State actions that unreasonably burden those exercising the right to travel—actions that seek to "isolate [a state] from difficulties common to all of them by restraining the transportation of persons and property across its borders"[108]—will be struck down under strict judicial scrutiny.

A. Development of the Right

The right to travel has two doctrinal aspects: The recognition that a federal system must guarantee free travel between the states, and the protection of migration and travel as fundamental personal interests. The first aspect dictates that state action discriminating against the movement of citizens between the states cannot be tolerated.[109] Similarly, attempts by states to isolate themselves from the burdens which all must bear run counter to the underlying concepts

analysis of American infatuation with moving on. Historians, sociologists, and the courts "[a]ll have agreed that the right exists." United States v. Guest, 383 U.S. 745, 759 (1966). Americans appear to be moving about with fervor. A mobility survey conducted by the Department of Housing and Urban Development and the Department of Commerce indicates that roughly 20% of all families moved once during the year ending October, 1973. San Francisco Chronicle, Dec. 11, 1975, at 18, col. 1. This note does not focus on a detailed analysis of the right to travel, but merely examines its application to land use doctrines that affect a city's authority to restrict growth. For a more complete analysis of the right to travel, which increasingly appears in litigation, see Z. CHAFFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956); Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?* 17 ARIZ. L. REV. 145 (1975); Note, *The Right to Travel and Exclusionary Zoning*, 26 HASTINGS L.J. 849 (1975); Note, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972); Note, *Freedom of Travel and Exclusionary Land Use Regulations*, 84 YALE L.J. 1564 (1975).

103. *E.g.*, Edwards v. California, 314 U.S. 160 (1941).

104. *E.g.*, United States v. Wheeler, 254 U.S. 281 (1920).

105. *E.g.*, Colgate v. Harvey, 296 U.S. 404 (1935).

106. *E.g.*, Zemel v. Rusk, 381 U.S. 1 (1965).

107. Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, J., dissenting), *quoted with approval* in Shapiro v. Thompson, 394 U.S. 618, 630 (1969); United States v. Guest, 383 U.S. 745, 758 (1966).

108. Edwards v. California, 314 U.S. 160, 173 (1941).

109. *See, e.g.*, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) (relying on the privileges and immunities clause).

of a federal union.[110] Without the ability to enter neighboring states and to carry on the activities fundamental to national interests, the independent state rivalries existing during our early history would again flourish. Due to the national aspects of citizenship, the traveler is accorded protection from state action, but only to the extent necessary to promulgate national unity.[111] When national interests are minimal, or state interests significant, the protection accorded travelers does not need to be as great. In effect, then, the assertion of the right to travel derives from a balance of national interests against state interests.[112] The individual benefits only as a result of the interests inherent in federalism. The second aspect of the right to travel arose later in our history, but is much more significant for purposes of land use cases. Whereas concerns for national solidarity marked the first half of of our history, rising concern for the rights of the individual has evolved during the second half.[113] Now, protection of the right to travel largely arises not from a national interest in unity but rather from the national interests in the individual. Inasmuch as it has been judicially determined that the right to travel is a fundamental interest, infringement of the right prompts the court's strict scrutiny and requires a compelling governmental interest to uphold the restriction.[114]

These two aspects of the right to travel create a constitutional protection of interstate migration with perhaps a concomitant right to move intrastate.[115] This broad formulation has been refined, however,

110. Edwards v. California, 314 U.S. 160, 173-74 (1941).

111. *See* Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872), where the Court characterized the right to travel as national in scope and as owing its "existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79.

112. *See, e.g.*, Williams v. Fears, 179 U.S. 270, 274-75 (1900) (holding that if the incidence of travel is only remotely affected, the state's interests will generally prevail).

113. *See* Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145, 148-54 (1975).

114. The primary significance of this approach is that it accords litigants attacking exclusionary zoning policies the opportunity to have their cases judged on the merits rather than virtually denying access to the courts with presumptions of validity.

115. The dictum of Kent v. Dulles, 357 U.S. 116, 126 (1958), the first of the *Passport Cases*, illustrates the reasoning for according intrastate travel constitutional protection: "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." Justice Douglas' concurrence in Bell v. Maryland, 378 U.S. 226, 255 (1964), stated: "The right of any person to travel interstate irrespective of race, creed, or color is protected by the Constitution. Certainly [a citizen's] right to travel intrastate is as basic." *Id.* (citation omitted). A footnote in Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 n.9 (1974), recognized the inconsistency of protecting interstate travel while disregarding intrastate travel simply because of a political boundary existing in one and not in the other. Lower federal and state court decisions dealing with welfare programs, housing, and education have all recognized

by a string of residency requirement cases that apply a test of searching for a penalty on the right to travel in legislative action. The Supreme Court in *Shapiro v. Thompson*[116] stated: "[I]n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[117] Federal courts have applied strict scrutiny to residency requirements abridging both the right to travel and other substantial individual interests such as voting,[118] health care,[119] welfare benefits,[120] and equal access to federal housing projects.[121] The rationality test of the equal protection doctrine has been applied in other situations to actions infringing upon interests perceived as relatively less important—airplane travel,[122] state tuition reductions,[123] divorce,[124] and eligibility for state election candidacy.[125]

Justices Douglas and Rehnquist have concluded that the penalty analysis is excessively burdensome for any state to carry. The two justices suggested in their respective concurring and dissenting opinions in *Memorial Hospital v. Maricopa County*[126] that a restraint on travel that is merely "incidental and remote" rather than a "real and purposeful barrier" to movement should not be struck down as long as the state can come forward with persuasive reasons for the enactment.[127] The "purposeful barrier" criterion now appears to have been approved

protection for intrastate travel where state legislation discriminates against recent residents (who are usually poor or are members of an ethnic minority). King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); Wellford v. Battaglia, 343 F. Supp. 143, 147 (D. Del. 1972); Josephine County School Dist. No. 7 v. Oregon School Activities Ass'n, 15 Ore. App. 185, 515 P.2d 431, 437 (1973).

116. 394 U.S. 618 (1969).

117. *Id.* at 634.

118. Dunn v. Blumstein, 405 U.S. 330 (1972).

119. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

120. Shapiro v. Thompson, 394 U.S. 618 (1969).

121. Cole v. Housing Authority of the City of Newport, 435 F.2d 807, 811 (1st Cir. 1970). Similar results were reached in King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971).

122. Evansville-Vandenburgh Airport v. Delta Airlines, 405 U.S. 707 (1972).

123. Vlandis v. Kline, 412 U.S. 441 (1973); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Kirk v. Board of Regents, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970).

124. Sosna v. Iowa, 419 U.S. 393 (1975).

125. Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973). The residence requirement was upheld despite the strong federal policy against such requirements for federal elections, as expressed in the 1970 amendments to the Voting Rights Act, 42 U.S.C.A. § 1973a-bb (1970), *amending* 42 U.S.C.A. § 1973 (1965), which were approved in Oregon v. Mitchell, 400 U.S. 112 (1970).

126. 415 U.S. 250 (1974).

127. *Id.* at 270-76 (Douglas, J., concurring); *id.* at 285 (Rehnquist, J., dissenting).

in *Sosna v. Iowa*,[128] which upheld Iowa's residency requirement for obtaining a divorce, emphasizing the fact that the state statute did not irreversibly foreclose the plaintiff from obtaining a divorce.[129] The opinion thus utilized the rationality test rather than strict scrutiny.

The Court appears, then, to be backing away from its right to travel penalty analysis to focus on two additional questions: what personal interests are being penalized, and upon whom do the restrictions fall most heavily? The rationale approaches the "spectrum of standards" under equal protection analysis identified by Justice Marshall in his *San Antonio Independent School District v. Rodriguez* dissent.[130] The right to travel cases present no clear continuum of judicial attitude. Courts appear to assess almost intuitively the impact of travel restrictions while measuring the social value attached to the affected activity. Restrictions that harshly affect the poor and racial minorities prompt a tougher review not necessarily because of the right to travel analysis but very likely because the Court is protective of those categories of people. The potential for invoking the strict scrutiny of the courts, however, makes the right to travel an innovative legal tool to be tested on municipal restrictions.

B. The Right to Travel and Land Use Controls

The right to travel includes migration between states, and most likely within a state, but its application in the choice of regional area, specific city, and precise housing development is open to question. Moreover, municipalities relying on their delegated zoning authority arguably may impose restrictions on the number and kind of people moving within their borders. Open-growth advocates would contend that no restrictions are permissible. Municipal residency requirements for civil servants, however, have generally been upheld despite right to travel attacks.[131] Additionally, state land use controls requiring

128. 419 U.S. 393 (1975).

129. *Id.* at 406.

130. "I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

131. The California Supreme Court dispensed with a broad conceptualization of the right to travel in Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal.

development permits under the interim power of the California Coastal Zone Conservation Commission withstood right to travel arguments, which a California court stated had no support in law or reason.[132]

Housing has been recognized as a sufficient personal and national interest to invalidate residency restrictions on eligibility of federal low-income housing projects.[133] These cases, however, involved existing housing developments from which people were excluded rather than the construction of new projects to accommodate individuals from outside the area. Presently the federal courts do not appear to recognize a right to occupy housing or an interest of people to "live on land," as found by the Pennsylvania Supreme Court in *National Land & Investment Co. v. Kohn.*[134] The degree of judicial scrutiny of housing as a individual interest should fluctuate according to the population pressures on municipalities to accommodate new residents. Small towns enjoy the absence of growth demands, whereas municipalities such as Mount Laurel and Petaluma experience the accelerating needs of people for housing outside the urban cores. The Supreme Court has heard the right to travel argument applied only to a town with minimal growth pressures in *Village of Belle Terre v. Boraas;*[135] it utilized the purposeful barrier analysis to dispense quickly with the right to travel attack by saying the ordinance "is not aimed at transients."[136] The right to travel argument found no judicial acceptance and stirred no strict scrutiny within the zoning context of *Belle Terre.*

Rptr. 849 (1973), *cert. denied,* 415 U.S. 935 (1974), a case involving a residency requirement imposed on municipal workers as a condition of employment. The plaintiff desired to live outside the city while maintaining his municipal employment in Torrance, California. The court recognized a greater municipal interest in employing its own residents than the employee's desire to travel, that is, a right to commute. The United States Supreme Court upheld a residency requirement for city employees in McCarthy v. Philadelphia Civil Service Comm'n, 44 U.S.L.W. 3530 (U.S. March 22, 1976), and has since denied petitions for writs of *certiorari* in two cases involving residency requirements for civil servants in Youngstown, Ohio and Lansing, Michigan. Hunter v. Fraternal Order of Police, 44 U.S.L.W. 3532 (U.S. March 22, 1976); Park v. Lansing School District, 44 U.S.L.W. 3545 (U.S. March 29, 1976). The short opinion in *McCarthy* focused on the city's interest in continuing residency as a requirement for city employment rather than residency as a threshold criterion for new employees. The lower federal courts in these cases did not apply strict scrutiny to municipal employee residency requirements.

132. CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974). "We fail to see how the Coastal Initiative interferes with the fundamental right to travel. It is not discriminatory; it imposes no durational residence requirement; it exacts no penalty for exercising the right to travel or to select one's place of residence. In short, it has no chilling effect on an individual's freedom of movement." *Id.* at 332, 118 Cal. Rptr. at 333.

133. See note 121 *supra.*

134. 419 Pa. 504, 215 A.2d 597 (1965).

135. 416 U.S. 1 (1974). See notes 58-64 and accompanying text *supra.*

136. *Id.* at 7. Even the vigorous dissent by Justice Marshall did not mention the

Explicit growth restrictions can overtly accomplish what traditional zoning attempted covertly to achieve. Restriction of residential land use to single family dwellings obviously limits the number of people who can move to the community. Yet both *Belle Terre* and *Ybarra v. Town of Los Altos Hills*[137] upheld such restrictions as valid tools in preserving a town's quiet rural atmosphere. Neither of the towns, however, experienced population pressures sufficient to compel a stricter scrutiny of their land use restrictions. Cities that are alarmed by a growth rate far exceeding that of the state or region may desire to place restrictions, not permanent barriers, on the number of incoming people. These restrictions do not irreversibly foreclose opportunity for housing or other sustenance, as did the restrictions in *Shapiro v. Thompson*.[138]

The right to travel analysis, however, may be abused when applied to municipal ordinances that restrict growth in a nondiscriminatory, balanced manner. The California Supreme Court warned against the excessive use of right to travel arguments:

> The critical question whether a legislative act is to be denied the presumption of validity and subjected to strict judicial scrutiny does not turn on the ingenuity of counsel in conceiving remotely possible ways in which the act might affect those rights.[139]

The right to travel, therefore, is not generally applicable to land use regulations. Until a fundamental right to housing is judicially recognized, reasonable restrictions on the rate of municipal growth do not violate a federal interest in free movement between the states; nor do they infringe a personal interest in migration.

IV. Standing In Land Use Litigation

If a category of persons can assert that its exclusion from a community is unlawful on the theory of land use discrimination or infringement of the right to travel, it must nevertheless demonstrate that it is comprised of the proper litigants to raise the issue. Courts have recently

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words travel or migration, but instead focused on First Amendment rights of association and privacy to urge striking down the town's so-called "Hippie Ordinance." Justice Marshall joined the majority in according deference to land controls, even those aimed at "restricting uncontrolled growth." *Id.* at 13. For two articles suggesting that *Belle Terre* rested on First Amendment foundations rather than on the constitutional dimensions of zoning, see Frame & Scorza, *Village of Belle Terre v. Boraas: Property Rights, Personal Rights, and the Liberal Regime*, 2 HASTINGS CONST. L.Q. 935 (1975), and Margolis, *Exclusionary Zoning: For Whom Does Belle Terre Toll?*, 11 CAL. WEST. L. REV. 85 (1974).

137. 503 F.2d 250 (9th Cir. 1974).

138. 394 U.S. 618 (1969).

139. Ector v. City of Torrance, 10 Cal. 3d 129, 136, 514 P.2d 433, 437, 109 Cal. Rptr. 849, 853 (1973), *cert. denied*, 415 U.S. 935 (1974).

made this threshold question of standing an extremely restrictive concept in land use cases.[140]

The Supreme Court confirmed the restrictive trend in land use litigation concepts of standing in *Warth v. Seldin*.[141] The jury requirement for standing includes a component of causation and the plaintiff is required to allege injury and the exact manner in which the city's land use restrictions causes the alleged harm. The Court held that low-income and minority group plaintiffs in *Warth* did not meet the standard of identifiable injuries from the municipality's land use restrictions. The relatively simple statement of the Court's holding belied its significance:

> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention.[142]

The strongly-worded dissent by Justice Brennan accused the Court of utilizing standing as an excessively high barrier to reach the merits, saying that the majority's opinion "tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, [and] can be explained only by an indefensible hostility to the claim on the merits."[143]

Standing to sue in federal courts emanates from Article III, section 2 of the Constitution, which limits the judicial power to Cases and Controversies. The plaintiff must at least allege that some identifiable statutory or constitutional protection has been abridged, and that he is "arguably within the zone of interests to be protected or regulated. . . ."[144] Derivative standing arises from the relationship between the plaintiff and those people actually injured, but their relationship must insure identical presentation of the issues.[145] Identical presentation of

140. Without probing the present morass of law surrounding the issue of standing, it is sufficient to note that the courts have further obfuscated an already confusing and difficult field of the law. The traditional standing components are well set out in United States v. Richardson, 418 U.S. 166 (1974). *See generally* Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

141. 422 U.S. 490 (1975); Note, *Warth v. Seldin: The Substantial Probability Test*, 3 HASTINGS CONST. L.Q. 485 (1976).

142. *Id.* at 508.

143. *Id.* at 520 (Brennan, J., dissenting).

144. Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 153 (1970).

145. NAACP v. Alabama, 357 U.S. 449, 459 (1958). This case is something of an anomaly in that it allowed the organization to assert violations of the personal rights of its members. The substantial reputation of the NAACP as an advocate of black peoples' rights perhaps can explain this exception to the usually rigid standing criteria. Justice Douglas's spirited dissent in Sierra Club v. Morton, 405 U.S. 727 (1972), urged that inanimate natural objects receive court-appointed guardians ad litem for purposes of

issues rarely arises because courts prefer to deal with the actual parties allegedly injured by the defendant.

State court requirements for standing are generally more lenient. The preeminent and successful state exclusionary zoning attacks involved particularized allegations of housing deprivation. The cases also rested, however, on an initial receptivity of the courts to the charges of exclusionary zoning. The prophetic language of the Pennsylvania Supreme Court eleven years ago in *National Land & Investment Co. v. Kohn*[146] typified the growing concern in the state courts toward abuses of land use planning:

> Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and can not be used by those officials as an instrument by which they shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future.[147]

Standing is a logical component of any judicial system that prefers to deal with real cases and controversies rather than with generalized claims concerning unidentified people. Allegations of infringement of countless unnamed persons' right to travel due to a municipal zoning ordinance involve greater standing problems than does the more concrete assertion of exclusion from a community because of unreasonably large minimum lot sizes. In either situation, however, the plaintiff must allege sufficient facts to show an unconstitutional abuse of the zoning authority by a community.

V. Balancing the Competing Interests In Development

The previous sections analyzed the municipal interest in maintaining a pleasant community through local control of development, which often competes with the individual interests of free migration and access to decent housing. The municipal obligation to house new residents should largely be, but rarely is, determined by the population pressures for development. All these factors should be balanced in the land use planning process.

An inherent component of our system of government is that the judi-

satisfying the standing requirement for litigation. *Id.* at 741-52. *See* Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Plaintiffs amassed comprehensive data that successfully demonstrated the discriminatory effects of municipal zoning ordinances in Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975). Such well-documented attacks in the state courts should be compared to the relatively less successful cases in federal courts, represented by *Warth*, notes 141-43 and accompanying text *supra*.

146. 419 Pa. 504, 215 A.2d 597 (1965).

147. *Id.* at 527-28, 215 A.2d at 610.

ciary is not an overseer of all functions of government, but an equal branch with designated functions. Standing requirements manifest a judicial reluctance to deal with all conceivable cases and controversies; likewise the existence of elected legislative bodies, whose function is to promulgate social and economic policies ostensibly for the public interest, limits the ability of courts to intervene in every worthy cause. Therefore, courts presume the validity of legislative enactments; they look at the reasonableness and constitutionality of the legislation only as a check on usurpation of power by the legislature. The subjective wisdom of the enactment is left ultimately to the people who elect their representatives.[148]

Recognition of a presumption of validity is particularly important for those individuals who seek to invalidate a zoning regulation that is accorded the presumption; the courts will defer to the legislative judgment unless those people challenging the ordinance rebut the presumption by showing its arbitrary or unreasonable nature. The difficulty is that not all legislative actions take into consideration all of the factors from which the presumption of validity arises; different levels of legislative action represent different levels of legislative competency.[149] Incumbent upon legislators, advocates, and judges is the need to distinguish between presumptions accorded to state legislative enactments and those attaching to local legislation.[150]

Most courts, however, continue to rely on a presumption of validity when dealing with local land use regulations and consequently defer to the legislative judgment. Legislative acts are not easily invalidated because it is assumed that the legislative body studiously weighs and balances the merits of a proposal before adoption. While such an assumption is probably well-founded in the case of federal or state legislatures, it is not as valid in connection with local legislative action. Municipalities are often homogeneous entities whose elected bodies represent one dominant viewpoint. Other municipalities, though diverse in composition, do not require elected officials to represent a given district. Thus, divergent perspectives are not necessarily represented. Moreover, in many cities and towns public service is only a part-time job, and elected officials can devote neither the time nor the effort necessary to consider alternative policies adequately. The presumption of validity is therefore less applicable to local legislative actions than to state legislative action.

148. *Cf.* THE ZONING GAME, *supra* note 6, at 104-05, 107.

149. *Id.*

150. This problem is somewhat ameliorated when an administrative body such as a planning board or commission prescribes the policy. Administrative action is not insulated from judicial inquiry by the separation of powers doctrine which protects legislative acts. Consequently, the courts can pursue a more detailed study of the underlying motives and justifications behind a given policy. *Cf. id.* at 104-06.

Some jurisdictions appear to recognize the dissimilar nature of state and local legislative action and to erode the presumption more readily when dealing with municipal enactments. Infringement by the municipality of a so-called preferred institution can result in a shifting of the burden to the municipality to show the reasonableness of its legislation. When certain uses are recognized as favored, courts have eradicated the presumption of validity, shifted the burden of going forward onto the municipality, or even shifted the burden of proof of reasonableness to the zoning municipality.[151]

Such logic was employed in *Bristow v. City of Woodhaven*[152] to invalidate an ordinance that allowed mobile home courts only by special permit and then limited them to seventy-five sites per court. In invalidating the ordinance the court reiterated the familiar presumption of validity, but recognized that due to the nature of the use such a standard was inappropriate. The court proposed a general rule:

> [W]here it is shown that local zoning exists at odds with the general public welfare rather than in furtherance of it, there can be no presumed validity attaching to that portion . . . which conflicts with the public interest.[153]

The effect is that by reason of the favored status of the use, the proponent of such use need only establish a prima facie case.[154] The presumption fades and the burden shifts to the municipality to justify its regulation.

A similar result was reached in Pennsylvania in *Exton Quarries, Inc. v. Zoning Board of Adjustment*.[155] The issue was the validity of an ordinance that prohibited the quarrying of rock within the township. The court held that total prohibition requires a "more substantial relationship to the public health, safety, morals and general welfare."[156] Although ordinarily presumed valid, the municipal police

151. Feiler, *supra* note 67, at 689.

152. 35 Mich. App. 205, 192 N.W.2d 322 (1971).

153. *Id.* at 210, 192 N.W.2d at 324.

154. A prima facie case is defined as "' one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced on the other side.'" Binkowski v. Township of Shelby, 46 Mich. App. 451, 461, 208 N.W.2d 243, 248 (1973). This becomes particularly significant in light of the most recent Supreme Court pronouncement on standing, Warth v. Seldin, 422 U.S. 490 (1975). If standing requires merely that those injured in fact be properly identified with sufficient data showing their injury, the standing issue will not present a major stumbling block to exclusionary zoning litigation. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975). See notes 68-74 and accompanying text *supra*. The Supreme Court has intimated more is required, however. Such a standard, if true, may exclude many litigants in this field from the federal courts. *See* notes 140-47 and accompanying text *supra*.

155. 425 Pa. 43, 228 A.2d 169 (1967).

156. *Id.* at 60, 228 A.2d at 179.

power " 'does not extend to an arbitrary, unnecessary or unreasonable intermeddling with . . . property, even though such acts be labeled for the preservation of health, safety and general welfare.' "[157]

The basic premise is that occasionally local interests must succumb to a broader, state defined conceptualization of the general welfare. In *Certain-Teed Products Corp. v. Township of Paris*[158] it was in the public interest to encourage manufacturing and mining, which was protected despite the allegation that the proposed uses would be injurious to residential purposes. Similarly *Board of Zoning Appeals v. Jehovah's Witnesses*[159] protected houses of worship, balancing the welfare and safety of the residents of the neighborhood against the right to freedom of worship and assembly.

The existence of a favored use creates an obligation for the courts to assess the relevant factors, balancing general public interests and considerations against local community concerns to determine whether a broader interest is adversely affected. If the municipality demonstrates to the court the necessity for the proposed regulation and that it expresses the interests of general public policy, the regulation will remain in effect. However, if the municipality has merely enacted the ordinance in question under the general guise of promoting the general welfare without offering the requisite evidence to support such a conclusion, the ordinance will no longer be clothed in a presumption of validity.[160]

VI. Sequential and Numerical Limitations On Municipal Growth

A. Golden v. Planning Board of Ramapo

In *Golden v. Planning Board of Ramapo*[161] a sequential growth ordinance of the Township of Ramapo met with judicial approval, the court holding that "where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth.' "[162] Situated ap-

157. *Id.* at 58, 228 A.2d at 178.

158. 351 Mich. 434, 88 N.W.2d 705 (1958).

159. 233 Ind. 83, 117 N.E.2d 115 (1954).

160. The viability of the preferred status concept has been eroded somewhat by the recent case of Kropf v. City of Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974), where the court used a rebuttable presumption test. *Id.* at 155-56, 215 N.W.2d at 186. Active judicial review, however, still thrives. Tocco v. Atlas Township, 55 Mich. App. 160, 222 N.W.2d 264 (1974).

161. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

162. *Id.* at 383, 285 N.E.2d at 304, 334 N.Y.S.2d at 156.

proximately thirty miles northwest of New York City, and "experiencing the pressures of an increase in population and the ancillary problem of providing municipal facilities and services,"[163] Ramapo adopted an eighteen year capital budget improvement program subjecting residential development to the availability of public services. Those desiring to develop land for residential purposes were required to obtain a special permit, which issued only on the accumulation of a minimum number of developmental points. Points were issued based on the availability of five essential services: (1) sewers; (2) drainage facilities; (3) improved public parks or recreational facilities, including schools; (4) public roads; and (5) firehouses.[164] A landowner had the choice, in obtaining the necessary points, of providing services at his own expense or waiting for the township to provide the services. The program insured that all landowners would accumulate sufficient developmental points for special permit issuance within eighteen years.[165] The plan

163. *Id.* at 366, 285 N.E.2d at 294, 334 N.Y.S.2d at 142.

164. The ordinance provided the following standards for special permit issuance:

	Points
(1) Sewers	
(a) Public Sewers	5
(b) Package Sewage Plants	5
(c) County approved septic tanks	3
(d) all others	0
(2) Drainage: Percentage of Required Drainage Capacity Available	
(a) 100% or more	5
(b) 90% to 99.9%	4
(c) 80% to 89.9%	3
(d) 65% to 79.9%	2
(e) 50% to 64.9%	1
(f) less than 50%	0
(3) Improved Public Park or Recreational Facility Including Public School Site	
(a) Within ¼ mile	5
(b) Within ½ mile	3
(c) Within 1 mile	1
(d) Further than 1 mile	0
(4) State, County or Town Major, Secondary, or Collector Roads Improved with Curbs and Sidewalks	
(a) Direct Access	5
(b) Within ½ mile	3
(c) Within 1 mile	1
(d) Further than 1 mile	0
(5) Fire House	
(a) Within 1 mile	3
(b) Within 2 miles	1
(c) Further than 2 miles	0

Fifteen developmental points were needed for special permit issuance. RAMAPO, N.Y., TOWN LAW §§ 261, 263.

165. 30 N.Y.2d at 379-80, 285 N.E.2d at 301-03, 334 N.Y.S.2d at 152-53. The initial six year period was governed by a capital budget in order to provide for maximum orderly, adequate and economical provision of transportation, water, sewage, drainage, parks and recreation, schools, municipal facilities and structures, and other public requirements. The remaining twelve years were governed by a capital plan delineating two general orders of priority for facilities to be provided in years 7-12 and those to be provided during years 13-18.

resulted from an exhaustive study of the "existing land uses" and of other factors pertinent to municipal planning, and proposed a capital improvements program for the purpose of eliminating "premature subdivision and urban sprawl."[166]

In reversing a lower court ruling that the plan was unconstitutional and exclusionary,[167] the Court of Appeals of New York noted that New York law did not proscribe sequential controls. Although regional planning would be a "salutory" solution, phased growth was "well within the ambit of existing enabling legislation."[168] With respect to the exclusionary contentions, the court noted that all land use regulations to some degree circumscribe natural growth, but that where manifest developmental problems exist, a community's good faith efforts to confront those problems in an orderly, rational manner will not readily be subjected to judicial invalidation.[169]

Undoubtedly the court was persuaded by some of the tangential aspects of the Ramapo plan as well as by the apparent incapacity to handle growth. The plan was viewed as temporary; within eighteen years special permits would issue to all,[170] and this date would be advanced for the landowner who supplied facilities.[171] Additionally, variances could be issued upon application.[172] Finally, preferential tax treatment would be provided in the form of reduced value assessments for those parcels of land unable to be presently developed.[173]

166. *Id.* at 367, 285 N.E.2d at 295, 334 N.Y.S.2d at 143. "The plan's preparation included a four-volume study of the existing land uses, public facilities, transportation, industry and commerce, housing needs and projected population trends." *Id.* at 366, 285 N.E.2d at 294, 334 N.Y.S.2d at 142.

167. 37 App. Div. 2d 236, 324 N.Y.S.2d 178 (1971), *rev'd*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

168. 30 N.Y.2d at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150. The dissenters, however, could find neither statutory nor constitutional authorization to impose a moratorium on growth. Relying on the "settled doctrine that a municipality has only those powers . . . delegated or necessarily implied," and on the exclusionary effects of such parochial land use policies, the dissenters would have affirmed the lower court. *Id.* at 383-93, 285 N.E.2d at 305-11, 334 N.Y.S.2d at 156-65 (Breitel, J., dissenting in an opinion joined by Jasen, J.).

169. *Id.* at 374-78, 285 N.E.2d at 298-302, 334 N.Y.S.2d at 148-52.

170. However, this would not necessarily be due to the capital improvement program. See note 165 and accompanying text *supra.*

171. See note 165 *supra.* The cash outlay necessary to supply such facilities, however, would undoubtedly be exhorbitant.

172. 30 N.Y.2d at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144. Variances are theoretically reserved for cases involving special circumstances. Historically, variances have been granted with little or no showing of hardship. *See, e.g.*, Allen v. Humboldt County Board of Supervisors, 241 Cal. App. 2d 158, 50 Cal. Rptr. 444 (1966). *But see* Topango Ass'n v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974). See CAL. GOV'T CODE § 65906 (West 1975), for the statutory determination of when variances should issue.

173. 30 N.Y.2d at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155-56. Most lands

Left unresolved by the decision were the justifications for certain features of the plan and for its overall relation to proper police power objectives. Specifically, the five developmental criteria are somewhat arbitrary, especially if already developed parcels of land within the town do not meet the minimum point requirement.[174] The asserted physical need for sequential growth is somewhat minimized by the automatic qualification of all property for special permit issuance after eighteen years regardless of the actual existence of facilities otherwise necessary to accumulate points.[175] Moreover, the provision that particular landowners can supply facilities to attain the minimum developmental points may be unrealistic given the already high cost of building a residence.[176] Finally, the exclusionary aspects of the plan are not as minimal as the court intimates. While it is true that all zoning regulations to some extent circumscribe growth, not all do so as severely as those in Ramapo. Furthermore, many are related to health and safety concerns and accordingly are less vulnerable to judicial invalidation than those based on general welfare.[177]

Essentially, the *Ramapo* court refused to expand the obligations imposed on municipalities enacting ordinances under the guise of the general welfare. Insofar as most communities on the urban fringe experience Ramapo-like problems, all would have credible arguments for instituting similar ordinances. Natural population forces could be restricted from an increasingly large area. The court recognized the exclusionary dangers of "community efforts at immunization or exclusion" and emphasized that exclusionary plans "under any guise" would not be countenanced.[178] The court, however, was constrained to resolve the issues according to largely antiquated conceptions of zoning as a purely local governmental function. It seems highly improbable

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are taxed at their full developmental value. To avoid contentions that they are taking land without just compensation, municipalities and states occasionally reduce their tax assessments when development potential is restricted. *See, e.g.*, California Land Conservation Act of 1965 (*Williamson Act*), CAL. GOV'T CODE §§ 51200-95 (West Cum. Supp. 1976) and CAL. REV. & TAX CODE §§ 421-32 (West Cum. Supp. 1976).

174. Additionally, the Ramapo plan applies only to residential uses. Industry generates the same problems and often in larger proportions; however, due to the tax benefits that accrue to the city from industry, that growth is not phased. In the end, such phased growth policies may be merely sophisticated fiscal zoning techniques.

175. See notes 164-65 *supra.*

176. This aspect of the plan is similar to land exactions and dedications. However, municipalities can exact fees from developers only in proportion to the development's future needs and to the present burden on existing facilities. Developers cannot be required to pay for services that for the most part benefit the city at large and permit the city to avoid its responsibilities. *See, e.g.*, Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *cert. denied*, 404 U.S. 878 (1971). CAL. BUS. & PROF. CODE §§ 66477, 66479 (West 1976).

177. See notes 17-46 and accompanying text *supra.*

178. 30 N.Y.2d at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

that a court constrained to view the general welfare so narrowly could impose sanctions on municipalities pursuing policies in accordance with such a judicial determination. Since such policies are often exclusionary only in effect rather than in purpose, the municipality is merely zoning for the general welfare and judicial approval must follow.

The merits of sequential growth are not at issue; rather the issue is the proper role of the judiciary when confronted with such policies. Adjudication pursuant to traditional standards can lead to form taking precedence over substance, alleged purpose over-shadowing apparent effect. While in fact Ramapo's plan might be appropriate for its particular situation, other municipalities should be made to realize that this plan is not a panacea for the ills of all developing communities. Not only must "communities confront the challenge of population growth with open doors,"[179] they must not close the door in the same motion with innovation plans based on somewhat arbitrary and unrealistic criteria.

B. Construction Industry Association v. City of Petaluma

The growth-restricting plan adopted by Petaluma presented issues similar to those raised by the Ramapo plan. Situated approximately forty miles north of the Golden Gate Bridge, Petaluma for many years was a rural community physically isolated from the large urban areas of San Francisco to the south and Oakland to the southeast. Major transportation improvements in the late 1950's mitigated the physical isolation and Petaluma actively sought to expand. In 1962 the city's general plan projected a population increase from 17,000 to 77,000 by 1985.[180] Subsequent development proved this long-term population projection essentially correct although not in the balanced manner originally envisioned. Most of the new residential development was tract housing constructed in the eastern portion of the city and represented a serious threat to the small town characteristics of Petaluma. Additionally, a rising demand for housing resulted in an increase in applications for and approval of residential construction. As a result of these development patterns, the inhabitants of Petaluma became disenchanted with unrestricted growth.[181]

179. *Id.* at 379, 285 N.E.2d at 302, 334 N.Y.S.2d at 153. *See, e.g.*, National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). See notes 58-76 and accompanying text *supra.*

180. There appears to be considerable confusion, both in the court proceedings and the voluminous literature concerning the case, regarding the area encompassed by the 1962 Master Plan. The 62 square miles upon which the population projections were based represents an area eight times as large as the existing city, well beyond the challenged plan's urban extension line. Under revised projections, by 1990 55,000 residents would be housed in less than one-half the area protected by the 1962 Master Plan.

181. The rapid construction of dwellings east of the freeway was, according to the

In late 1970 and early 1971 the planning commission and city council held meetings resulting in resolutions that established moratoriums on rezoning of land within the city and on annexation of land surrounding the city. Soon thereafter, in response to a questionnaire and public hearings, the inhabitants strongly indicated that they favored a significantly slower rate of growth. In rapid succession came a series of resolutions delineating the official developmental policy of the city and the means to implement that policy.[182]

The plan established five important planning components: (1) Environmental Design Plans; (2) Petaluma Housing Element; (3) Residential Development System and an administrative Board; (4) an allocation of approximately 500 residental units (restricted to subdivisions of five or more units) per year over the five years of the plan's operation; and (5) an urban extension line beyond which the city would refuse to annex land or to connect utilities. Building permits would be allocated only once a year, at which time subdivision contractors would compete with one another to offer housing that best met the city's development criteria.[183] Permits would be granted to balance future construction between single family homes and multi-family dwellings and to spread the growth both east and west of the freeway. Also adopted was a policy that eight to twelve percent of future residential units would be constructed for low and moderate income people.[184] The overall purpose was stated by one of the resolutions: "In order

city planning director, "splitting the city into two camps—'them' and 'us.' To add to this sociological division, almost 75% of the households east of the freeway were living in Petaluma, yet commuting to work outside the city." F. B. Gray, Rationale, Operation, and Evaluation of Residential Development Control in the City of Petaluma, California, at 14.

182. Petaluma, Cal., Resolution 5760 N.C.S., Adopting a Development Policy for the City of Petaluma, June 7, 1971; Petaluma, Cal., Resolution 6008 N.C.S., Adopting the Environmental Design Plan and Text, March 27, 1972; Petaluma Cal., Resolution 6028 N.C.S., Policy Respecting Residential Construction and Population Growth and Reaffirming the Cessation of the Zoning Moratorium, April 17, 1972; Petaluma, Cal., Resolution 6113 N.C.S., Establishing a Residential Development Control System, August 21, 1972; and Petaluma, Cal., Resolution 6126 N.C.S., Modifying the General Plan By Adding Thereto a Housing Element, September 5, 1972. Copies of these resolutions and accompanying analysis by Petaluma city officials are on file in the offices of the HASTINGS CONSTITUTIONAL LAW QUARTERLY.

183. Competition was basically in three stages. The first involved application to a "residential evaluation board" that rejected or accepted proposals on the basis of their conformity with the city's general plan and its environmental design plan. The latter two stages were as follows: (1) thirty points were assigned for sewer mains, drainage channels, fire protection, streets, and schools. Twenty-five points were required for issuance of a permit. (2) eighty points were allocated for design excellence, open space and trail links, inclusion of low cost housing, and necessary public facilities. Fifty points were required in this group.

184. Petaluma, Cal., Resolution 6126 N.C.S., Modifying the General Plan by Adding Thereto a Housing Element, September 5, 1972; Petaluma Housing Element at 18-19.

to protect its small town character and surrounding open spaces, it shall be the Policy of the City to control its future rate and distribution of growth."[185]

The plan sought to ensure that "development in the next five years would take place in a reasonable, orderly, attractive manner, rather than in a completely haphazard and unattractive manner."[186] More substantial problems existed, however. City planners doubted the ability of public services to keep pace with population increases. The quality of municipal services generally suffers, and at a relatively higher per capita expense, when a city's growth rate is high.[187] Furthermore, the inherent time lag in the planning process hampers the efforts of local officials to respond to influxes of new residents. While eventually the city would have had to deal with these issues, the continuous spiral of growth that Petaluma was experiencing brought these problems to the point of confrontation much sooner than was anticipated.

1. *Litigation in the District Court*

The Petaluma plan was attacked by the Construction Industry Association of Sonoma County and by landowners both inside and outside the city as violative of the due process clause of the Fourteenth amendment, the commerce clause, and the right to travel. In a lengthy and detailed decision the federal district court held that the plan violated the fundamental right to travel insofar as it restricted natural population growth of the area.[188]

185. Petaluma, Cal., Resolution 5760 N.C.S., Adopting a Development Policy for the City of Petaluma, June 7, 1971.

186. Petaluma, California Environmental Design Plans, Introduction at 1 (adopted by Petaluma, Cal., Resolution 6008 N.C.S., March 27, 1972).

187. "Economic studies have demonstrated for example, that per capita outlays for education, police, administration and highways increase significantly with higher growth rates; the more rapid the growth rate the more likely it will lead to a decrease in quality of a majority of urban services. Brief for California Attorney General as *Amicus Curiae* at 53-54, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (1975) (citations omitted). For more extensive data on municipal services as affected by growth, see CALIFORNIA COUNCIL ON INTERGOVERNMENTAL RELATIONS, LOCAL AGENCY FORMATION COMMISSIONS (California State Printing Office 1971); 1 URBAN LAND INSTITUTE, MANAGEMENT & CONTROL OF GROWTH (1975); REAL ESTATE RESEARCH CORPORATION, THE COSTS OF SPRAWL; ENVIRONMENTAL AND ECONOMIC COSTS OF ALTERNATIVE RESIDENTIAL DEVELOPMENT PATTERNS AT THE URBAN FRINGE (U.S. Gov't Printing Office, 1974).

188. Construction Indus., Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974). "Since the population limitation policies . . . are not supported by any compelling governmental interest the exclusionary aspects of the 'Petaluma Plan' . . . are hereby declared in violation of the right to travel and, hence, are unconstitutional." *Id.* at 586.

The logic of the decision was premised on the diverse sociological, demographic, and economic data presented by the plaintiffs showing the plan's adverse effect upon the availability of housing within both the city and a wider region. The court focused on a market demand analysis,[189] which theoretically embodies the interaction of free market forces affecting purchasers of new homes, and found that Petaluma's unilateral restrictions on housing to an average of 500 subdivision units per year for five years would exclude approximately one-third to one-half of the population projected by a demographic and market demand analysis of the 1970-1971 period.[190] Rather than accommodating its fair share of the regional market for new homes, Petaluma's plan actually threatened to encourage a region-wide attempt to control city growth artifically. Consequently, the court stated:

> If such growth centers curtail residential growth to less than demographic and market rates, as has been attempted in the present case, serious and damaging dislocation will occur in the housing market, the commerce it represents, and in the travel and settlement of people in need and in search of housing.[191]

Application of the right to travel flowed easily from the court's determination that the Petaluma plan excluded substantial numbers of potential residents. Application of the right to travel invoked the court's strict scrutiny.[192] The court routinely dismissed the city's belated allegations of sewage treatment inadequacies and water supply problems,[193] and boldly held that a municipality capable of supporting a natural population expansion may not limit its growth simply because it prefers not to grow at the rate that would be dictated by prevailing market demand.

In determining that the Petaluma plan impermissibly infringed the right to travel the district court relied heavily on the series of exclusionary zoning cases from Pennsylvania that recognized a personal right of people to live on land.[194] Most importantly, the court adopted the posture of the Pennsylvania courts that a zoning ordinance whose primary purpose is to prevent the entrance of newcomers in

189. The market factors of the price of land and constructed homes, proximity to work areas, degree of choice in the quality of homes, availability of financing, reputation of schools, and the highly subjective "city atmosphere" apparently coalesced within Petaluma to create a desirable community in which people sought to purchase new homes.

190. 375 F. Supp. at 576.

191. *Id.* at 579.

192. "Inasmuch as there is no meaningful distinction between a law which 'penalizes' the exercise of a right and one which denies it altogether, it is clear that the growth limitation under attack may be defended only insofar as it furthers a compelling state interest." 375 F. Supp. at 582 (citation omitted).

193. See note 204 and accompanying text *infra.*

194. See notes 58-66 and accompanying text *supra.*

order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities cannot be held valid.[195] Thus, despite the rule that a federal district court must apply substantive state law,[196] and despite the prior Supreme Court determination that housing was not a fundamental interest,[197] the Petaluma plan was ruled unconstitutional.

2. Appeal

Notwithstanding the conclusiveness of the detailed findings of fact, the district court's decision was reversed.[198] The court of appeals agreed that the plaintiffs could show injury in fact in relation to their due process argument. The allegation that plaintiffs suffered monetary damages as a result of the restricted construction of housing presented a *personal* injury and easily fell within traditional standing criteria. The allegation that the plan violated the right to travel of unnamed third parties, however, was an assertion of injuries not personal to the plaintiffs. Their standing to assert the right to travel argument was derivative, allegedly arising out of a close relationship between the plaintiffs and those people excluded from Petaluma. Under the relatively stringent requirements for standing via association,[199] the court of appeals held that there was "no special, on-going relationship between appellees and those whose rights allegedly are violated."[200] The association could show no persuasive nexus between its activities in constructing housing and the identities, whereabouts, or description of classes of people likely to purchase future dwellings in Petaluma. While the doors of the federal courts would be open to plaintiffs who could allege exclusion from Petaluma and denial of housing, the Con-

195. "[W]e find the reasoning of the Pennsylvania Supreme Court persuasive and sound. . . . A zoning regulation which has as its purpose the exclusion of additional residents in any degree is not a compelling governmental interest, nor is it one within the public welfare." 375 F. Supp. at 586.

196. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). A federal district court sitting in California should apply California substantive law, which has not heretofore adhered to the fair-share, regional philosophy. It is not surprising, then, that the appellate court reversed. To have done otherwise would also have entailed ignoring the recent Supreme Court decision on standing in Warth v. Seldin, 422 U.S. 490 (1975), as well as questioning the Ninth Circuit's own position on legitimate purposes of the police power. Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974). As a matter of tactics, it might have been wiser for the plaintiffs to have initiated their suit in the state courts with an eye toward changing the substantive law. However, had they pursued this course they might not have had as strong an argument concerning the right to travel. *See* CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974).

197. See notes 99-101 and accompanying text *supra.*

198. 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 96 S. Ct. 1148 (1976).

199. See notes 140-43 and accompanying text *supra.*

200. 522 F.2d at 904.

struction Industry Association could not vicariously represent the interests of those people. Without the critical ingredient of standing, the court would not entertain the right to travel argument, and because the Petaluma plaintiffs had relied exclusively on this argument on appeal, they could not then raise arguments in order to show injury and standing.

Even had the plaintiffs demonstrated standing, the court of appeals intimated that the right to travel was inapplicable to the Petaluma plan. Noting the Supreme Court's rejection of the right to travel argument in *Village of Belle Terre v. Boraas*[201] as not penalizing transients, the court of appeals stated in a footnote "the Petaluma Plan is not aimed at transients, nor did it penalize those who have recently exercised their right to travel."[202] Consequently the court concluded that "the concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."[203] Restricting uncontrolled growth thus became another permissible objective of municipal zoning ordinances, and traditional deference to localities was again upheld.

3. Analysis of Unresolved Issues

On nearly every major controversy raised by the Petaluma litigation the two court opinions either diverge on theory or confront different issues. For example, the district court easily found that the plaintiffs had standing to assert the right to travel of third parties, and thereby reached the merits of the allegation to find that the plan violated the right of people to travel and settle; whereas the court of appeals not only concluded that plaintiffs had no standing, but strongly suggested that even if standing existed, the right to travel was inapplicable to the plan's restrictions. Moreover, the district court failed to rule on the due process and commerce clause arguments, yet the court of appeals in the interest of judicial economy decided both of these unnecessary issues in Petaluma's favor. The district court employed strict scrutiny because of the right to travel *penalty* analysis, but the court of appeals rejected strict scrutiny and invoked the time-honored rationality test applied to zoning cases. The district court found that the essence of the plan was to keep people out, whereas the court of appeals decided that the plan was reasonably designed to achieve a temporary planning respite from the strains of community growth.

201. 416 U.S. 1 (1974). See notes 50, 52, and 135-36 and accompanying text *supra.*

202. 522 F.2d at 906-07 n.13.

203. 522 F.2d at 908-09.

The extensive findings of fact made by the district court, which could only be set aside by the court of appeals if found to be clearly erroneous,[204] revolved around the central theory that the plan excluded substantial numbers of people. These facts were important not only for the right to travel issue, but also addressed the due process considerations of whether the zoning measure was reasonable under the circumstances to achieve some legitimate objective of the municipal police power. The district court utilized the facts to focus on the means and effect of the Petaluma plan; the court of appeals emphasized traditionally legitimate municipal purposes.

The district court did address Petaluma's major justifications for enacting a growth-restricting plan and found them all to be without merit. Discussing the city's contention that sewage treatment facilities and water supply were inadequate, the court stated: "The city's reference to such alleged inadequacies is no more than an excuse intended to justify the 'Petaluma Plan' after its adoption."[205] Specifically, the court found that the city had purposefully planned the expansion of city services to accommodate an optimum population of only 55,000 by 1990, as opposed to the 1962 General Plan projection of 77,000 by 1985. City officials had contracted for only enough water and additional sewage capacity, according to the district judge, to meet the artificially restrained population under the plan's limit of 500 subdivision units per year. Rather than justifications for restricting growth, sewage capacity and water supply problems were self-fulfilling prophecies designed to support the plan's overt limits on city expansion. Under either a rationality test or the strict scrutiny test actually applied, the city's contentions of infrastructural incapacity would not justify its plan.[206]

The court of appeals did not address the district court's findings of fact, but rather focused on the validity of Petaluma's desire to preserve its small town character. Finding no constitutional impediments to prevent a city from enacting a growth-restricting plan, the court relied on *Belle Terre* and *Los Altos Hills* to declare that preservation of small town character was within the auspices of the police power.

Significantly, the court of appeals did not distinguish the towns of Belle Terre and Los Altos Hills, which were relatively sedate communi-

204. FED. R. CIV. P. 52.

205. 375 F. Supp. at 577.

206. If the municipal concern over adequately providing public services were well-founded, however, restrictions on the sequence and number of new dwellings could more readily be upheld. *See* Golden v. Planning Board of Ramapo, 30 N.Y.2d 359, 285 N.E. 2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 STAN. L. REV. 585 (1974). *See also* notes 164-81 and accompanying text *supra*.

ties without substantial growth pressures, from Petaluma, which was a "growth center" better able to accommodate new housing. Petaluma's problems and city attitudes are more closely akin to those of Mount Laurel and Ramapo—communities faced with significant demand for new housing. The court warned, however, that its decision was not a permanent endorsement of the plan's validity; rather, the crises of housing inadequacies were better resolved by legislative action.[207]

The undesirable yet perhaps inevitable result of the *Petaluma* case is that other cities in regional housing markets may interpret the decision as granting carte blanche power to restrict growth. No interpretation could be more dangerous. *Petaluma* is best viewed narrowly, as upholding a temporary growth-restricting plan, without discriminatory purpose or effect, whose valid objective of preserving town atmosphere outweighed the restrictions on personal mobility. Other cities cannot assume that what Petaluma may enact for five years will be valid for all communities. Courts should apply a battery of considerations for determining the validity of future growth-restricting plans.

VII. Considerations for Evaluating the Validity of Growth-Restricting Plans

Essential to any policy pursued in a complex society are plans that take into account all possible contingencies and maintain the flexibility to adapt when new factors are encountered. Incumbent on those who formulate such plans is the necessity to articulate the desired ends and to diligently research the possible means for achieving those ends. The presumption of validity that attaches to legislative enactments is largely derived from such a philosophy. Legislation is accorded the presumption because it is assumed that the legislature has reasonably arrived at its decision via an informed analysis of the alternatives. Courts usually do not judge the wisdom of enactments because they assume that the legislature has done so. However, as has been noted, legislatures do not always act from an informed posture, nor can they always be expected to act in a comprehensive manner. Logically, different standards of judicial review should be applied depending on the nature of the legislature. Pursuant to the belief that land use policies are often formulated without adequate planning and research, and are adjudicated without differentiation between the types of legislatures involved, this note suggests methods by which local legislatures may enact

207. "The controversy stirred up by the present litigation, as indicated by the number and variety of *amici* on each side, and the complex economic, political, and social factors involved in this case are compelling evidence that resolution of the important housing and environmental issues raised here is exclusively the domain of the legislature." 522 F.2d at 909 n.17.

doctrinally sound legislation and standards by which the courts may adjudicate the validity of such legislation.

1. *Each municipality should clearly define and articulate its present desired objectives.*

A common feature of legislation that reaches the courts is the lack of a clearly stated purpose. In such cases the judiciary must often guess the legislative purpose and adjudicate pursuant to such a supposition. While often this works in favor of sustaining the questioned legislation, particularly where the courts adjudicate pursuant to a rational basis analysis, the underlying motivation of the legislation is frequently impermissible and the legislation should be invalidated. A clearly defined statement of policy thus permits future adjudication on the merits. Moreover, a clearly articulated policy statement permits:

(a) evaluation by all concerned (citizens, legislators, and judges) as to whether the ends articulated are clearly the objectives desired;

(b) evaluation of whether the ends as stated are reasonable; and

(c) determination of the best means available to achieve the stated goals.

2. *Evaluate the reasonableness of the ends.*

The desire of a municipality to preserve its small town character is largely incongruous with the desire to achieve a strong industrial-commercial tax base. Similarly, a rapidly-expanding city's desire to slow its present rate of growth does not necessarily justify setting population limits and refusing to expand public facilities. The end cannot be pursued merely because it is desirable. Rather, the objectives to be attained must be evaluated in terms of the:

(a) geographic location of the community;

(b) past history of growth within the municipality;

(c) type of growth that has historically prevailed within the city (e.g., commercial growth, multi-dwelling developments, low income housing developments, subdivision developments);

(d) prospects for future growth within the municipality;

(e) burdens that will be imposed on neighboring communities; and

(f) benefits derived from neighboring communities.

3. *Determine the best means to achieve the stated objectives.*

Apparent from the discussion of the current state of land use affairs is the fact that communities are frequently not the isolated towns and boroughs of mid-twentieth century America. Therefore, should

the city's objectives be reasonable, it must still choose the best possible means rather than merely the most expedient. In determining the most appropriate means, the following factors should be considered:

(a) the geographic location of the community;

(b) the past history of growth and the current prospects for future growth;

(c) the types of growth which have historically been attained;

(d) the burdens which will be imposed on neighboring communities and the benefits that are derived from these communities;

(e) the current carrying capacity of the city and the ability of the city to expand this capacity (for example, infrastructural capacity such as ability to absorb waste and to supply water); and

(f) the existence of a regional planning authority.

Additionally, any growth-restricting plan should include the following components:

(a) detailed supporting findings of municipal growth problems and express objectives for limiting city expansion;

(b) a relatively short period of growth restrictions to avoid charges that the plan is unreasonable and arbitrary;

(c) a restricted growth rate that is not lower than the rate at which the region is growing;

(d) extensive public involvement in formulating the development policies;

(e) specific policies that provide for proportionate low and middle income housing to accommodate the area's needs;

(f) priority of residential control on a competitive basis, with large developments having a significant impact on the city's growth being subject to far greater control than construction on single lots; and

(g) whenever possible, compliance with regional housing projections.

Conclusion

Perhaps it is unfortunate that cities can no longer be the sole governors of their individual destinies. Because land is becoming a scarce resource, however, many municipalities must sacrifice their historical autonomy and formulate their land use polices in light of the social realities that surround them. Should they be reluctant to do so, it is incumbent upon the courts to impose such an obligation. Municipalities experiencing minimal population pressures, whose policies largely do not affect neighboring communities, will have relatively few obligations imposed upon them. Those municipalities that are part of a larger

housing market, who borrow from and lend size to neighboring communities, necessarily will incur greater obligations.

Petaluma will not be the last city to utilize its zoning power to restrict the rate at which new residents are housed. Some of the future growth restricting plans will undoubtedly be unreasonable and arbitrary, falling under the constitutional prohibitions of the due process and equal protection clauses. As in New York, Pennsylvania, and New Jersey, courts will find discriminatory zoning practices lurking behind city land use policies. Still, local governments will continue to be the main arena of land use policy formulation. Perhaps state legislatures will decide to establish regional zoning authorities either to replace or to augment the present local focus. But until that time the courts will have to grapple with the conflicting desire of municipalities to control the manner in which they grow and the desire of individuals to have unrestricted access to comfortable communities. The conflicts are numerous and defy easy solutions. While litigation of municipal ordinances is one method of testing the bounds of zoning authority, incisive policy formulation and planning procedure are necessary for reasonably guiding municipal growth.