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# Exclusionary Zoning As a Reasonable Exercise of the Police Power

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## ZONING: Exclusionary Zoning as a Reasonable Exercise of the Police Power

*Construction Industry Association v. City of Petaluma*<sup>1</sup> illustrates the federal judiciary's acquiescence in the practice of exclusionary zoning by local communities.

In the early 1950's, the town of Petaluma, with a population of approximately ten thousand, was a relatively isolated rural community situated roughly forty miles north of San Francisco. Petaluma, a self-sufficient community, was known primarily for its dairy and poultry resources. But as San Francisco grew, the inflated urban cost of living forced her residents to relocate. The exodus from the Bay Area created a demand for housing in outlying areas: Petaluma saw her population mushroom from 10,315 in 1950 to a staggering 30,500 in 1972. In addition, the growth rate was accelerating,<sup>2</sup> with a rapidly increasing demand for even more housing.<sup>3</sup> "To limit Petaluma's demographic and market growth rate in housing and in the immigration of new residents,"<sup>4</sup> the town council in 1972 adopted several resolutions known as the Petaluma Plan.<sup>5</sup>

The Plan fixed a housing development rate of five hundred units per year<sup>6</sup> for a five-year period,<sup>7</sup> "prevent[ing] the con-

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1. 522 F.2d 897 (9th Cir. 1975).

2. If the growth pattern had continued, by 1985 the city would have had a population of 77,000 and would have ceased to be a rural community. *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574, 575 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975).

3. From 1964 to 1971, the following numbers of housing units were completed:

1964 . . . . .	270	1968 . . . . .	379
1965 . . . . .	440	1969 . . . . .	358
1966 . . . . .	321	1970 . . . . .	591
1967 . . . . .	234	1971 . . . . .	891

522 F.2d at 900.

4. 375 F. Supp. at 576.

5. Petaluma, Cal., Petaluma City Council Res. No. 6126 N.C.S., Sept. 5, 1972; Petaluma, Cal., Petaluma City Council Res. No. 6113 N.C.S., Aug. 21, 1972; Petaluma, Cal., Petaluma City Council Res. No. 6008 N.C.S., Mar. 27, 1972; Petaluma, Cal., Petaluma City Council Res. No. 2929 N.C.S., Mar. 5, 1962.

6. The 500-unit figure refers to only those housing projects of five units or more and does not apply to construction of single family homes or four-unit apartment buildings. 522 F.2d at 901.

7. The district court found official attempts were made to perpetuate the Plan through 1990, at least. 375 F. Supp. at 577.

struction of approximately one-half to two-thirds of the housing units that market and demographic growth forces would have demanded for Petaluma during the 1973-1977 period."<sup>8</sup> To determine how to award the limited number of building permits, the council devised an intricate point system whereby prospective developers had to submit an application to an evaluation board which was then rated on such bases as conformity with the general plan and architectural design. Applicants with the highest scores won the building permits.<sup>9</sup> Of the housing units approved, 8 to 12 percent were allocated for low and moderate income housing. In addition, the Plan provided for a "green belt" around the city to delimit further urban expansion.<sup>10</sup>

Two landowners and the Construction Industry Association of Sonoma County brought an action<sup>11</sup> claiming that the Petaluma Plan was unconstitutional; the plaintiffs couched their allegations in terms of denial of the right to travel, violation of the due-process clause and infringement of interstate commerce. Never reaching the latter two contentions, the district court held<sup>12</sup> that, because the population limitation policies at issue were not supported by any compelling governmental interest, the exclusionary aspects of the Petaluma Plan were in violation of the right to travel.<sup>13</sup> The court permanently en-

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8. *Id.*

9. Clark & Grable, *Growth Control in California: Prospects for Local Government Implementation of Timing and Sequential Control of Residential Development*, 5 PAC. L.J. 570, 598 & n.126 (1974).

10. The assistance of the county was sought to prohibit growth outside the urban extension line with the ultimate result of inhibiting growth, not only in Petaluma, but also in its surrounding areas. 375 F. Supp. at 576.

11. The plaintiffs sought relief under 42 U.S.C. § 1983 (1974) (Every person who under color of any ordinance deprives any citizen of any rights, privileges, or immunities secured by the United States Constitution shall be liable to the injured party in an action at law or equity); and 28 U.S.C. § 1343 (1962) (The district court has original jurisdiction under 42 U.S.C. § 1983); and 28 U.S.C. § 1331 (1966) (The district court has original jurisdiction of a controversy arising under the United States Constitution if the amount in controversy exceeds \$10,000).

12. For a discussion of the district court's decision and its various ramifications, see Smith, *Does Petaluma Lie at the End of the Road from Ramapo?* 19 VILL. L. REV. 739 (1974); Note, *Freedom of Travel and Exclusionary Land Use Regulations*, 84 YALE L.J. 1564 (1975); 6 SETON HALL L. REV. 207 (1974).

13. 375 F. Supp. at 586.

joined Petaluma from enforcing any ordinance or resolution which might effectively limit the number of persons permitted to enter the City of Petaluma in order to establish residence.<sup>14</sup>

The question posed is whether the township can stand in the way of the natural forces which send out growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities cannot be held valid.<sup>15</sup>

On review, the Court of Appeals for the Ninth Circuit did not decide the question of whether the Plan violated the right to travel, maintaining instead that the plaintiffs lacked the requisite standing.<sup>16</sup> The challenged ordinances posed a sufficient threat of personal injury, first to the landowner-plaintiffs in the form of impaired marketability (reduced land values) and second to the builder-plaintiffs in the form of lost revenues. But the right-to-travel claim was asserted, not on the plaintiffs' own behalf, but on behalf of unknown third parties allegedly excluded from living in Petaluma.<sup>17</sup> Under the requirements of *Warth v. Seldin*,<sup>18</sup> the plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the rights or interests of third parties. After rejecting the challenge to the

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14. *Id.* at 588.

15. *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1966), as cited in *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574, 585 (N.D. Cal. 1974).

16. 522 F.2d at 905.

17. The district court held it was not necessary for "standing" purposes that the plaintiffs introduce any evidence relating to any individual who was actually excluded by the Plan. 375 F. Supp. at 581, *citing* *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257 (1974).

18. 95 S. Ct. 2197 (1975). The case dealt with exclusionary zoning and held that individuals with low and moderate incomes who tried to obtain housing in the city, but who could not do so allegedly due to the exclusionary ordinance, lacked standing because they failed to show that they probably would have found housing "but for" the ordinance. The builder lacked standing because he was unable to refer to a specific project currently precluded by the zoning ordinance. The Court held that the inhibitive effect of the zoning ordinance on prior attempts to build moderate and low income housing did not afford the petitioners with "present" or "imminent" injury requisite to establish standing. The Court's decision was handed down June 25, 1975, subsequent to the district court's decision, Apr. 26, 1974. Note 17 *supra*.

Plan on right-to-travel grounds, the court held that the Plan was not invalid under either the commerce clause or the due-process clause.

The contention was that the Plan constituted exclusionary zoning,<sup>19</sup> arbitrarily and unreasonably impeding the migration of low and middle income persons, and as such was in violation of the due-process clause. To be valid, such exclusions must bear a rational relationship to a legitimate state interest.<sup>20</sup> Relying on *Village of Belle Terre v. Boraas*<sup>21</sup> and *Ybarra v. City of the Town of Los Altos Hills*,<sup>22</sup> the court concluded that the concept of public welfare was "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."<sup>23</sup>

Extending the concept of a reasonable exercise of police power, *Village of Belle Terre* upheld a restricted land use to one-family dwellings as a legitimate governmental function aimed at the preservation of quiet family neighborhoods.<sup>24</sup> In accord was *Town of Los Altos Hills*, where a minimum lot size

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19. See generally Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234 (1973); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigents*, 21 STAN. L. REV. 767 (1969); Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971); Symposium on *Exclusionary Zoning*, 22 SYRACUSE L. REV. 465 (1971); Note, *Constitutional Law — Equal Protection — Zoning — Snob Zoning: Must a Man's Home Be a Castle?* 69 MICH. L. REV. 339 (1970).

20. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Ybarra v. City of the Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Vickers v. Township Com.*, 37 N.J. 232, 181 A.2d 129 (1962).

21. 416 U.S. 1 (1974).

22. 503 F.2d 250 (9th Cir. 1974).

23. 522 F.2d at 909.

24. The Supreme Court held:

" . . . A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of a quiet seclusion and clean air make the area a sanctuary for people."

*Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). See generally Duhamel, *Exclusionary Zoning: A Question of Balancing Due Process, Equal Protection & Environmental Concerns*, 8 SUFFOLK U.L. REV. 1190 (1974); Goldstein, *Belle Terre v. Boraas*, 23 CLEV. ST. L. REV. 354 (1974) [hereinafter cited as Goldstein].

of one acre was upheld as being rationally related to preserving the town's rural environment.<sup>25</sup> On this basis, the court felt the Petaluma Plan was neither arbitrary nor unreasonable, nor contrary to the due-process clause. In addition, the court upheld it against attacks based on the commerce clause, concluding that a "state regulation validly based on the police power does not impermissibly burden interstate commerce . . . nor operate to disrupt its required uniformity."<sup>26</sup> Consequently, the court allowed the restriction on building permits to five hundred units per year as a valid regulation based on the municipality's police power.

Although freedom of travel has long been recognized as a fundamental right,<sup>27</sup> its use as a ground for invalidating exclusionary zoning ordinances is now, at best, dubious. Prior to *Petaluma*, commentators indicated that because the primary purpose of exclusionary zoning was to limit population growth, the doctrine of freedom of travel ought to have been applied to protect the ability of individuals to settle and abide in new communities.<sup>28</sup> Between 1965 and 1970, the Pennsylvania Su-

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25. 503 F.2d at 254.

26. 522 F.2d at 909, citing *Brotherhood of Locomotive Firemen v. Chicago, R. I. & Pac. R.R.*, 393 U.S. 129 (1968); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 441 (1960); and *Breard v. Alexandria*, 341 U.S. 622 (1951).

27. Although the ARTICLES OF CONFEDERATION art. IV (1781) provided that "the people of each state shall have full ingress and regress to and from any other state," the right to travel finds no explicit mention in the Constitution. However, the right was early recognized as either contained in the privileges and immunities, due process or equal protection clauses of the United States Constitution. *Williams v. Fears*, 179 U.S. 270 (1900); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C. Pa. 1823). Today, however, the cases decline to ascribe the right to interstate travel to any particular constitutional provision, concluding it occupies a position fundamental to the concept of our Federal Union. *Graham v. Richardson*, 403 U.S. 365 (1971); *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966). Travel apparently means migration with the intent to settle and abide, not mere movement; *Cole v. Housing Authority*, 435 F.2d 807 (1st Cir. 1970); and has been interpreted as referring not only to interstate but also to intrastate migration. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646 (2d Cir. 1971); *Wellford v. Battaglia*, 343 F. Supp. 143 (D. Del. 1972).

28. E.g., Fielding, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972); Comment, *The Right to Travel and Its Application to Restrictive Housing Laws*, 66 NW. U.L. REV. 635 (1971); Note, *Freedom of Travel and Exclusionary Land Use Regulation*, 84 YALE L.J. 1564 (1975).

preme Court implicitly applied the travel doctrine to local restrictive zoning. Although resting their decisions of due-process grounds, *National Land & Investment Co. v. Kohn*,<sup>29</sup> *Appeal of Girsh*<sup>30</sup> and *Appeal of Kit-Mar Builders, Inc.*,<sup>31</sup> all contained statements of the right of people to move about freely; zoning ordinances, the primary purpose of which are to prevent entrance of newcomers, cannot be valid. "Communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels."<sup>32</sup> However, the Supreme Court has cast grave doubts on whether the right to travel can be used as an effective device to challenge exclusionary zoning.

In *Village of Belle Terre v. Boraas*,<sup>33</sup> the right to travel challenge was rebuffed with the simple statement that the ordinance was not aimed at transients and, therefore, did not violate this right. "If the fundamental right to travel can be circumscribed by not aiming an ordinance at transients, then it is not a very useful right in zoning challenges."<sup>34</sup> Even if an ordinance is aimed at transients, challengers are now met with very difficult standing requirements which preclude the vast majority of transients from bringing actions.

Although *Warth v. Seldin*<sup>35</sup> dealt with exclusionary zoning and not specifically with the right to travel, the *Petaluma* court adopted the *Warth* standing doctrine and applied it to right to travel. In so doing, the court severely impeded zoning challenges based on right-to-travel grounds. In applying *Warth*, the court asserted that although the economic interests of the builders, the Construction Association and the landowners were adversely affected by the Petaluma Plan, these economic interests were not protected by the constitutional right to travel. The right to travel is an individual right; it may be asserted only by one whose right has been violated. The court assumed, *arguendo*, that if the right to travel applied to a case

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29. 419 Pa. 504, 215 A.2d 597 (1966).

30. 437 Pa. 237, 263 A.2d 395 (1970).

31. 439 Pa. 466, 268 A.2d 765 (1970).

32. *Id.* at 469, 268 A.2d at 768.

33. 416 U.S. 1, 7 (1974).

34. Goldstein, *supra* note 24, at 362.

35. 95 S. Ct. 2197 (1975). For a discussion of the *Warth* standing doctrine, see note 18, *supra*.

such as this, *Warth* would not preclude those persons whose mobility was impaired from bringing suit on their own behalf. For the plaintiffs to have standing to challenge exclusionary zoning on right-to-travel grounds, they would have to have some interest in a particular housing project and, but for the restrictive zoning, would be able to reside in the community.<sup>36</sup> Practically, this amounts to an insurmountable burden of proof. Exclusionary zoning schemes, similar to the Petaluma Plan, prohibit new housing projects. Therefore, plaintiffs could not show the required particular interest in a housing project needed to fulfill standing requirements for right-to-travel claims.

The district court, by invalidating Petaluma's zoning regulations on right-to-travel grounds, set a new precedent apart from the usual attack of unreasonable exercise of police power.<sup>37</sup> The reversal of the holding by the court of appeals for lack of standing not only sets up a strict standard making it almost impossible to bring an action based on right-to-travel grounds, but also leaves serious doubts as to whether the right to travel could ever be used to invalidate zoning ordinances. There are no dicta indicating when or how the doctrine would apply if the requisite standing were present; nor is there any indication that the district court took the correct approach by balancing the infringement of the right to travel against the presence of any compelling governmental interest.<sup>38</sup>

The trend in recent years has been to invalidate exclusionary zoning as contrary to the due process clause and an unreasonable exercise of the police power.<sup>39</sup> The decision in *Petaluma* is

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36. 522 F.2d at 905.

37. Previously, the Pennsylvania Supreme Court had only implicitly applied the travel doctrine to local restrictive zoning, while basing its decision on due process. *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1966).

38. Concerning the "balancing-means test," see 375 F. Supp. at 586; Note, *Freedom of Travel and Exclusionary Land Use Regulations*, 84 YALE L.J. 1564 (1975).

39. *Kavanewsky v. Zoning Bd. of Appeals*, 160 Conn. 397, 279 A.2d 567 (1971); *Lakeland Bluff, Inc. v. County of Will*, 114 Ill. App. 2d 267, 252 N.E.2d 765 (1969); *Bristow v. City of Woodhaven*, 35 Mich. App. 205, 192 N.W.2d 322 (1971); *Oakwood at Madison, Inc. v. Town of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971); *Molino v. Mayor & Council*, 116 N.J. Super. 195, 281 A.2d 401 (L. Div. 1971); *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d



a step backward from this trend. The holding in effect condones municipal planning with the express purpose of minimizing population expansion.<sup>40</sup> Prior to *Petaluma*, *Belle Terre* and *Town of Los Altos Hills*, cases held that "a zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there,"<sup>41</sup> and zoning which did so was invalid as exclusionary zoning. By simply ignoring the housing needs of the surrounding areas and trying to isolate itself through its zoning power, a city will have exceeded its police power authority. Any regulation not designed to meet the housing needs of the region is not for the general welfare and thereby invalid.<sup>42</sup> Although the court of appeals recognized the pressing housing needs in metropolitan areas like the San Francisco Bay Area, it concluded that the federal courts were not the proper forum for resolving resultant problems.<sup>43</sup>

The *Petaluma* decision reflects the hesitancy of the federal courts to review municipal zoning ordinances, even if they preclude growth and arbitrarily exclude outsiders. Through the doctrine of *Warth v. Seldin*<sup>44</sup> the federal courts will deny access to their tribunals by strict application of the standing requirement. To deny standing to the petitioners in *Warth* or *Petaluma* was only

. . . [A]n indefensible determination by the Court to close the doors of the federal courts to claims of this kind. Understandably, today's decision will be read as revealing hostility to breaking down even unconstitutional zoning barriers that

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597 (1965); *Town of Gloucester v. Olivo's Mobile Home Court, Inc.*, 300 A.2d 465 (R.I. 1973); *Board of County Sup'rs v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

40. *Accord*, *Village of Belle Terre v. Boraas*, 416 U.S. 1, (1974); *Ybarra v. City of the Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *see note 24 supra*.

41. *Board of County Sup'rs v. Carper*, 200 Va. 653, 658, 107 S.E.2d 390, 396 (1959), *citing* *Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942).

42. *Oakwood at Madison, Inc. v. Town of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971); *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1966).

43. 522 F.2d at 909 n.17.

44. 95 S. Ct. 2197 (1975).

frustrate the deep human yearning of low-income and minority groups for decent housing they can afford in decent surroundings.<sup>45</sup>

By imposing such a stringent standing requirement as adopted in *Petaluma*, the federal courts can relieve themselves of most of the burden of deciding zoning cases based on exclusionary zoning or right-to-travel challenges.

Even if standing is established, the federal courts can sustain the ordinance as a legitimate function of the municipality under *Ybarra v. City of the Town of Los Altos Hills*<sup>46</sup> and *Village of Belle Terre v. Boraas*.<sup>47</sup> Any exclusionary zoning ordinance or no-growth statute may have as its main purpose the maintaining of a "quiet place where yards are wide, people few, and motor vehicles restricted,"<sup>48</sup> or "preserving the town's rural environment."<sup>49</sup> Both were declared legitimate objectives in land-use projects in *Belle Terre* and *Town of Los Altos Hills*.

*Construction Industry Association v. City of Petaluma* indicates that the federal courts have adopted a "hands-off" position toward city zoning policies. The battle against exclusionary zoning and no-growth policies will have to be won in state courts, providing they also do not choose to follow the precedent set by *Petaluma*. If state courts also adopt the federal courts' "hands-off" policy, there could very easily be no "constitutional protections against a single small city's passing laws to keep people away, to maintain 'small town character' at the expense of depriving people of mobility, their right to travel, and of decent housing or perhaps any housing at all."<sup>50</sup>

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45. *Id.* at 2220 (Brennan, J., dissenting).

46. 503 F.2d 250 (9th Cir. 1974).

47. 416 U.S. 1 (1974).

48. *Id.* at 9.

49. 503 F.2d at 254.

50. 375 F. Supp. at 587.

