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Zoning - Validity of Zoning Regulations - Right to Travel and Municipal Growth Restrictions

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RECENT CASES

ZONING—VALIDITY OF ZONING REGULATIONS—RIGHT TO TRAVEL AND MUNICIPAL GROWTH RESTRICTIONS

The city of Petaluma, California, located in the San Francisco Bay Area metropolitan region, enacted a plan to limit the growth of the city in order to preserve its small-town character.[1] By restructuring its land use regulations, the city effectively was able to restrict new housing starts and immigration of new residents to levels well below those projected by demographic and market rates.[2] As a result, Californians and other out-of-state residents were forced to turn to other areas within the region for accommodation.[3] The United States District Court of the Northern District of California *held* that, in the absence of any compelling governmental interest, the exclusionary aspects of the "Petaluma Plan" were in violation of the fundamental right to travel and hence unconstitutional. *Construction Industry Association of Sonoma County v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974).

The significance of this case is twofold. It appears to be the first case to explicitly apply a right to travel analysis in striking down a local land use regulation.[4] The broad use of such a right

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1. The City of Petaluma in 1965 was a small dairy and poultry community of 19,000 located 40 miles north of San Francisco. The rising costs of building around San Francisco and othed factors caused a dramatic increase in the Petaluma population. By 1971 the population had increased to 30,000 with 5,000 of this increase coming in the last two years. STANFORD ENVIRONMENTAL SOCIETY, A HANDBOOK FOR CONTROLLING LOCAL GROWTH 109 (1973).

2. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 576 (N.D. Cal. 1974).

The "Petaluma Plan" was found by the court to have the following effects:

1. The city limited housing starts from one-third to one-half of the demographic and market demand of the 1970-71 period.

2. The city created an "urban extension line" to mark the outer limits of the city's expansion for twenty or more years. Density limitations and other techniques were used to set a maximum population for the city at approximately 55,000 as against the projection of 77,000 by 1985.

3. The area within the urban extension line was not sufficient to allow new housing starts at market and demographic rates. The effect of the urban extension line was to limit the population. Even if the limitation on housing starts was removed, the urban extension line would still restrict population and act as a substantial deterrent to travel and commerce.

4. The city refused for a period of 15 years or more to extend city facilities outside the urban extension line. The city also sought aid from the county to prohibit residential growth outside the extension line.

5. Permits for the building of the limited number of housing units are granted by a residential evaluation board.

Id.

3. *Id.* at 577.

4. A series of Pennsylvania decisions have invalidated the excessive use of several exclusionary land use regulations on due process grounds. The language of these decisions suggests that an unarticulated right to travel was being relied on. *See* Appeal of Kit-Mar

has been suggested by a number of commentators to deal with perceived abuses of exclusionary land use regulations.[5]

Secondly, this is the first federal case to confront the issue of community-enacted growth limitations.[6] Since the invalidation of the growth restrictions in this case rested on a constitutional basis, the analysis used could have a significant impact on state approaches to problems presented by urban sprawl and the rising costs of providing municipal services. In North Dakota, this is of particular significance to communities faced with rapid growth because of expected coal development.

Although there is little agreement either as to the constitutional source[7] of the right to travel or its precise contours,[8] the Supreme

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Builders, 439 Pa. 466, 268 A.2d 765 (1970) (minimum lot sizes); Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970) (prohibition on apartments); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (minimum lot sizes).

5. *See generally* Comment, *The Right to Travel and Its Application to Restrictive Housing Laws*, 66 NW. U.L. REV. 635 (1971); Comment, *The Right to Travel: Another Constitutional Standard for Land Use?* 39 U. CHI. L. REV. 612 (1972).

6. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 584 (1974).

7. A right to travel, although not mentioned anywhere in the Constitution, has long been recognized by the Supreme Court. The right has been attributed to a number of different sources. Ward v. Maryland, 79 U.S. (12 Wall. 418, 430 (1871)) (privileges and immunities clause of article IV, section 2); Edwards v. California, 314 U.S. 160 (1941) (commerce clause used by majority while four Justices concurred on the privileges and immunities clause of the Fourteenth Amendment); Kent v. Dulles, 357 U.S. 116 (1952) (due process clause of the Fifth Amendment); Justice Douglas has referred in one case to travel as a peripheral right under the First Amendment. Zemel v. Rusk, 381 U.S. 1, 23 (1965) (dissenting opinion). There have also been suggestions by some commentators that the right to travel be given independent status under the Ninth Amendment.

The recent right to travel cases have simply indicated that the right exists without agreement being reached as to its source. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 331 (1972).

8. The status of the right to travel in relation to other rights is not entirely clear. It has been used sparingly by the courts in the past. The latest uses have almost exclusively dealt with durational residency requirements in equal protection settings. One principal reason for much of the indefiniteness surrounding the right is the failure on the part of the courts to come to any agreement as to its source. For example, one undecided question is whether the right to travel applies to intra- as well as to interstate travel. If the right is viewed as a privilege and immunity of national citizenship, then an argument could logically be made that it should apply only to interstate travel. On the other hand, if the right is viewed as being a part of personal liberty, then the argument would not be so persuasive. *See* Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

What appears to be the emerging view concerning the status of the right is the position taken by Justice Stewart in his concurring opinion in Shapiro v. Thompson, 394 U.S. 642, 655 (1969) (Stewart, J., concurring). He stated that the right to travel was not a mere liberty subject to regulation and control under either the due process or equal protection clauses. Rather, he characterized the right as being similar to the right of association, a virtually unconditional personal right. *Id.* at 643. He further asserted that any infringement on this independent fundamental right could only be justified by a showing of a compelling state interest. This level of scrutiny was applicable whether the impinging law was to be tested against the equal protection clause or the due process clause. *Id.* at 644. *See also* Oregon v. Mitchell, 400 U.S. 238, 281 (1970) (Stewart, J., separate opinion). In a footnote to his earlier majority opinion in *Guest v. United States*, Justice Stewart indicated that it is the Constitution itself which is the source of the right to travel. Guest v. United States, 383 U.S. 745, 754 n.17 (1966). There has not been complete agreement on Stewart's approach, however, as pointed out in the concurring and dissenting opinions of the latest right to travel decisions.

Recent majority opinions have characterized the right as fundamental and, thus, requiring the compelling interest test. These cases have not clearly indicated whether Stewart's position is in fact being adopted. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 331 (1972); Oregon v. Mitchell, 400 U.S. 112 (1970).

Court has recognized the right to travel as a "fundamental" right.[9] Protection under this right extends to travel in the sense of movement[10] and also, to migration and settlement.[11] The latter interpretation has more potential import in the area of land use policy. The Supreme Court has further stated that the right can be violated not only if travel is completely inhibited, but also if it is "penalized."[12]

Probably the most significant effect the introduction of the right to travel would have in the area of land use policy is that it would raise the level of judicial scrutiny applied to such regulations. Traditionally land use policies are subject to constitutional attack if they are shown to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[13] The district court held in this case that, since the right to travel is a fundamental right, it could only be infringed if supported by a compelling state interest.[14] The court further required that any infringement, even if supported by compelling state interests, could only be tolerated if there were no less-restrictive alternatives.[15] Under the compelling interest test, the burden falls on the state to show that such interests exist.[16]

It is this higher level of scrutiny which some commentators feel is the answer to dealing with abuses arising from exclusionary land use techniques.[17] Often the practical effect of these regulations

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9. *E.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 331 (1972).

10. *See, e.g.*, United States v. Guest, 383 U.S. 745 (1966); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

11. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250, 255 (1974); Dunn v. Blumstein, 405 U.S. 331, 338 (1972).

12. Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974); Dunn v. Blumstein, 405 U.S. 331, 340 (1972).

13. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); *see also* Village of Belle Terre v. Borras, 94 S. Ct. 1536 (1974).

The power to zone is derived from the police power. Traditionally, constitutional attacks on comprehensive zoning schemes are upheld only if the zoning body acted in an arbitrary and unreasonable manner. The burden of proof is on the challenger and is a heavy one. It has been commonly stated that, where the issue of constitutionality is fairly debatable, the courts should not substitute their judgement for that of the legislature. *See generally* R. ANDERSON, AMERICAN LAW OF ZONING §§ 3.01-3.19 (1968).

14. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 582 (1974).

15. *Id.* at 582.

16. Dunn v. Blumstein, 405 U.S. 331, 343 (1972).

17. Some of the more common of these techniques are minimum lot size and building size requirements, frontage requirements, ordinances excluding mobile homes, bedroom restrictions, land improvement requirements, living density requirements, prohibition of multiple dwellings, etc. *See* Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?* 1971 URBAN L. ANN. 9.

The use of the new equal protections doctrine of "suspect" classifications and fundamental rights has been suggested by some as one possible method of subjecting exclusionary land use practices to a higher level of scrutiny. In order to find this approach applicable, a right to housing would have to be declared fundamental and/or wealth be considered a suspect classification. Race, already considered a suspect classification, may be difficult to use since racial minorities are affected by exclusionary land use techniques primarily because of inadequate financial resources. *See generally* Note, *The Equal Protections Clause and Exclusionary Zoning After Valtierra and Danderidge*, 81 YALE L.J. 61 (1971).

is to exclude certain classes of people, most often the poor and racial minorities, by raising the costs of housing.[18] It is felt by some that excessive use of exclusionary land use techniques would not be able to survive the rigid scrutiny applied by the compelling interest test.[19] In order to find the right to travel applicable for striking down exclusionary land use ordinances, it would first have to be shown that the right is at least "penalized" by these techniques, and secondly that the governmental interests supporting them are not sufficient to withstand the level of scrutiny applied.[20]

The Petaluma case, however, does not answer the question of whether the right to travel could be applied broadly to cover all types of exclusionary land use techniques. The "Petaluma Plan" was exclusionary in the sense that its effect was to keep all people out of the city, while most exclusionary techniques have the effect of only excluding certain groups of people such as the poor.[21] The court in this case held the "Petaluma Plan" unconstitutional precisely because it completely inhibited the exercise of the right to travel.[22] It did not face the issue of whether exclusionary land use

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It has also been suggested that the two-tiered level of review which calls for the use of either minimum rationality or strict scrutiny be abandoned for an even newer model of equal protections. Under this model, variable levels of scrutiny would be applied on a sliding scale. The more a particular classification can be considered suspect and the more the right it impinges approaches the level of being fundamental, the higher the level of scrutiny applied. *See generally* Gunther, *The Supreme Court*, 1971 *Term: Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

The Supreme Court, however, has refused to elevate a right to housing to the fundamental category or to consider classifications based on wealth to be suspect. It has also refused to apply a variable level of scrutiny to classifications based on an interaction of these elements on a sliding scale. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56 (1972).

18. The impact of exclusionary zoning practices is especially heavy on the poor and minorities living in the central cities. The effect of most of these practices is to raise the costs of housing in the suburbs which prevents the poor from leaving the inner cities. The result is that many cities are becoming segregated along racial and economic lines. This pattern is reinforced by the fact that often the higher paying jobs and better schools are located in the suburbs. *See generally* Aloi & Goldberg, *supra* note 17; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protections, and the Indigent*, 21 STAN. L. REV. 767 (1969).

19. *See, e.g.*, Sager, *supra* note 18; Note, *Low-Income Housing and the Equal Protections Clause*, 56 CORNELL L. REV. 343 (1969); Note, *The Equal Protections Clause and Exclusionary Zoning After Valtierra and Danderidge*, 81 YALE L.J. 61 (1971).

20. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 331 (1972).

21. The distinction lies in the use of the term exclusionary. The term is used to refer to those regulations which are exclusionary in that they do not allow all people who wish to settle in an area to do so. It is also used to refer to those regulations which act to exclude certain groups of people.

Many of these regulations, alone or used together, can be exclusionary in both senses of the term. For example, minimum lot size requirements may have the effect of excluding lower income groups because of their impact on housing costs. If, however, these requirements are set extraordinarily high, the effect would be to exclude all people from moving into an area.

The burden of the "Petaluma Plan" undoubtedly fell harder on the lower income groups in the San Francisco region than upon other groups. The court, however, did not consider constitutional attacks on this basis. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 586 (1974). Only those aspects of the plan, which were exclusionary in the sense that not all people who wished to live in Petaluma were allowed to do so, were declared to be in violation of the right to travel. *Id.* at 582.

22. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 582 (1974).

regulations would be unconstitutional if they merely penalized the right by raising the costs of migrating and settling.[23] The court specifically stated that the opinion should not be interpreted to mean that a local government could not engage in traditional zoning efforts.[24]

It may be very difficult, however, to differentiate when a group of regulations act to totally exclude all people or just certain groups.[25]

Conceptually, of course, the exercise of the right to migrate and settle is only completely denied when no one is willing to move out of an area governed by absolute growth restrictions.

23. Not all regulations which raise the costs of migrating and settling are necessarily unconstitutional. *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974). The Memorial Hospital case dealt with the constitutionality of a one year durational residency requirement as a condition to an indigent receiving non-emergency hosptalization at county expense. The Court held that this requirement penalized the right to travel. The majority reasoned that an indigent person might be precluded from moving, by knowing that if he did move, he would have to wait to get medical care at county expense. The Court noted, however, that not all durational residency requirements which raise the costs of migrating and settling would be held to "penalize" the right to travel. *Id.* For example, the Court has refused to strike down state residency requirements for lower tuition costs at state institutions. Vlandis v. Kline, 412 U.S. 441 (1973).

In *Memorial Hospital*, the Court attempted to formulate a rule for when an infringement of the right to travel would "penalize" the right and invoke the compelling interest test. The Court held that an infringement would penalize the right when it results in the deprivation of some other fundamental right or a denial of one of the basic "necessities of life." A denial of nonemergency care was considered to be a denial of a necessity of life. Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974).

It would seem that housing is as much a necessity of life as nonemergency medical care. On this basis alone, it would seem that some exclusionary land use practices, which act to raise the costs of housing and thus deny it to certain groups, might "penalize" the right.

There is, however, a basic destinction which goes to the heart of the Memorial Hospital case. In that case, the regulation in question was directed entirely at the indigent. Only their right to travel was penalized; only they were deprived of medical care. Most land use techniques, on the other hand, raise the costs of obtaining housing for everyone. Although such techniques will deprive some people of housing as the costs are pushed above their purchasing power, the regulations may or may not be designed to achieve such a result.

Wealth may have been as important a factor in Memorial Hospital as the right to travel, if not more so. In any event, the success of using a *Memorial Hospital* analysis to strike down exclusionary land use techniques may depend upon the nature of the group excluded, the types of techniques used, their perceived purpose, and the facts of the particular case. The analysis used in Memorial Hospital has only been used in durational residency requirement cases in equal protection settings. Its broader applicability has not yet been tested. *See* note 8 *supra*. Note also the amount of deference given to municipalities with respect to zoning in Village of Belle Terre v. Boraas, 94 S.Ct. 1536 (1974). *See* discussion in note 24 *infra*.

24. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 587 (1974).

In the latest Supreme Court case to deal with zoning, the Court apparently gave communities great latitude in dealing with land use problems. The village zoning ordinance in question restricted the occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons. The Court rejected the use of the compelling interest test finding attacks based on equal protections and the rights of travel, association, and privacy not applicable. Village of Belle Terre v. Boraas, 94 S.Ct. 1536 (1974).

In sweeping dicta, the Court in Belle Terre seemed to cast some doubt on possible challenges to some exclusionary land use techniques.

> 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. This goal is a permissible one. . . . 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 quiet seclusion, and clean air make the area a sanctuary for people.

Id. at 1541.

25. *See* discussion in note 21, *supra*.

The Pennsylvania courts have for some time engaged in line drawing on just this

At the very least, this case stands for the proposition that a community cannot structure its land use regulations so as to completely inhibit the exercise of the right to travel and exclude all people from migrating and settling. Whatever the ultimate use of the right in dealing with exclusionary land use regulations, this decision may mark the outer contours of its application.

The defendants in this case asserted three compelling interests to justify the city's infringement on the right to travel. Two were rejected as having no factual basis.[26] The third interest asserted was that a community by virtue of its zoning powers has the right to control its rate of growth and protect its small-town character.[27] The court rejected this argument and held unconstitutional "all features of the plan which directly or indirectly seek to control population growth by any means other than market demands."[28]

In support of this position, the court cited a series of Pennsylvania cases dealing with minimum lot size requirements and restrictions on the building of apartments.[29] The Pennsylvania Supreme Court declared as a violation of due process the use of these techniques when their effect is to keep people away for the purposes of avoiding the problems of growth.[30] These cases emphasized that conceptually three groups of people are being adversly affected by the use of such techniques—the landowner whose property possibly has been regulated adversly to his interest, people desirous of moving into the community, and people living outside the area upon whom

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basis. Minimum lot size requirements of one acre have been upheld while those of four acres, for example, have been held unconstitutional. *Compare* National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) *with* Bilbar Const. Co. v. Easttown Twp. Bd. of Adj., 393 Pa. 62, 141 A.2d 851 (1958). "At some point along the spectrum, however, the size of lots ceases to be a concern requiring public regulation and becomes simply a matter of private concern." National Land & Inv. Co. v. Kohn, 419 Pa. 504, ——, 215 A.2d 597, 608 (1965). This point is reached apparently when the purpose of the regulations becomes one of avoiding the problems of growth. *Id.* at ——, 215 A.2d at 612. The Pennsylvania court further emphasized that the determination of where the line should be drawn will vary depending upon the type of land involved and the circumstancs of each case. *Id.* at ——, 215 A.2d at 602.

26. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 583 (1974).

The municipality asserted as two of its compelling interests for limiting growth that their sewage facilities and water supply were not adequate to serve an uncontrolled population. The court rejected these arguments finding as a matter of fact that the facilities and water supply were adequate to meet a higher growth rate. *Id.*

27. *Id.* at 583.

28. *Id.* at 586.

29. *See generally* Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970) (minimum lot sizes); Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970) (prohibition on apartments); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (minimum lot sizes).

Pennsylvania is one of only a few states to deal extensively with the constitutionality of such devices when used to control growth.

30. National Land & Inv. Co. v. Kohn, 419 Pa. 504, ——, 215 A.2d 597, 610 (1965).

> 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 these officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a government body can plan for the future—it may not be used as a means to deny the future.

Id.

the problems of growth are placed by the use of such regulations.[31] The findings of fact in the Petaluma case set forth in detail what the impact would be if all the suburbs of the San Francisco region adopted policies similar to those of Petaluma.[32]

One question left open by these Pennsylvania decisions is whether a community may delay its growth until a time at which it is able to provide the proper facilities and services to properly accommodate it.[33] The New York high court has upheld timed or sequential growth[34] in *Golden v. Planning Board of Town of Ramapo*.[35] Under the *Ramapo* approach, subdivision of undeveloped areas of the town is only permitted when a certain minimum of essential services and facilities are available. These undeveloped areas, however, cannot be indefinitely frozen. The city must provide all the areas with the essential services and facilities within a specified period of time.[36] Moreover, the *Ramapo* plan permits a developer to speed up the subdivision process if he is willing to provide at his own expense those services and facilities necessary to meet the requisite minimum.[37] Timed or phased growth according to the New York court

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31. *See* Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

32. The San Francisco metropolitan region is generally self-contained and has a unitary housing market. Persons excluded from one suburb do not leave the region but seek housing elsewhere in the area. Where suburbs not practicing exclusionary growth limitation are forced to absorb not only their "share" of the population, but also the excluding suburb's as well, they tend to retaliate by adopting exclusionary measures of their own. It is appropriate to measure the potential effects that the exclusion practiced by Petaluma would have if it proliferated throughout the region itself.

Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 578-79 (1974).

33. *See* National Land & Inv. Co. v. Kohn, 419 Pa. 504, ——, 215 A.2d 597, 612 (1965).

34. Phased zoning is the use of any number of land use techniques to halt or delay growth in certain areas until they become ready for development. It may involve simply the use of holding zones or complicated and comprehensive plans such as those employed by Petaluma and Ramapo. Generally, the constitutionality of phased zoning has not been conclusively determined. If phased zoning is to be found constitutional at all, it probably will only be those plans which are comprehensive in scope and which appear to make a positive commitment to deal with the problems of growth. *See generally* STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 1.

35. Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

36. The *Ramapo* plan requires that a developer acquire several special permits before subdivision of undeveloped areas can occur. The standards for issuance of the permits are based on the availability of the following:

1. public sanitary sewers or an appropriate substitute;
2. drainage facilities;
3. improved public parks or recreational facilities;
4. state, county, or town roads;
5. firehouses.

The availability and proximity of each of the above factors to the development area in question is rated on a sliding five point scale. Development is only permitted when 15 points are accumulated. The total program requires the city to provide all land within *Ramapo* with the minimum facilities within an eighteen year period. Therefore, there may be some areas of the town which may remain undevelopable for the entire eighteen year period. *Id.* at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143.

37. *Id.* at 369, 285 N.E.2d at 295, 334 N.Y.S.2d at 144.

The plans also provides a variance procedure for those unable to obtain permits in cases of extreme hardship. Further, *Ramapo* reduces the real property assessments and taxes to reflect the availability of land for development. *Id.* These additional provisions undoubtedly made the plan more palatable to the court.

differs from the exclusionary regulations in the Pennsylvania decisions in that it does not permanently act to exclude growth. The *Ramapo* approach was characterized as a plan which would maximize growth through the efficient use of land.[38] Timed growth is hailed by some as an effective approach in dealing with urban sprawl and other related problems.[39]

The constitutionality of the *Ramapo* plan would seem to be questionable under the analysis presented in the *Petaluma* case. The defendants in *Petaluma* asserted as two compelling interests that the sewage and water facilities could not meet the demands of uncontrolled growth.[40] These were rejected by the court as having no factual basis.[41] Therefore, the *Petaluma* case does not provide a *Ramapo* type situation where a city is attempting to slow its growth to relieve the burden of overtaxed facilities. However, the court clearly stated that restricting growth below market demands was a violation of the right to travel.[42] It then went on to suggest that even if these compelling interests did have a factual basis, expanding the facilities to meet market demands would be a less-restrictive alternative.[43]

There may be serious questions as to the effectiveness of a right to travel analysis in dealing with problems resulting from commu-

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38. Perhaps even more importantly, timed growth, unlike the minimum lot requirements recently struck down by the Pennsylvania Supreme Court as exclusionary, does not impose permanent restrictions upon land use. . . . Its obvious purpose is to prevent premature subdivision absent essential municipal facilities and to insure continuous development commensurate with the Town's obligation to provide such facilities. They seek, not to freeze population at present levels but to maximize growth by the efficient use of land, and in doing so testify to the community's continuing role in population assimulation.

Id. at 378-79, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

39. *See generally* STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 1.

40. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 583 (1974).

41. *Id.*

42. [T]he exclusionary aspects of the "Petaluma Plan" must be, and are hereby declared in violation of the right to travel. . . . Such holding is intended to encompass . . . all features of the plan which, directly or indirectly, seek to control population growth by any means other than market demands.

Id. at 586.

The use of this language by the court must be placed in context with the rest of the decision since almost all land use regulations would to a degree impede market growth rates. The court stated elsewhere that traditional zoning efforts were not affected by the decision. *Id.* at 587. Yet, it would seem that timed growth plans would be a direct attempt to control growth by means other than market demands.

43. *Id.* at 583.

The defendants, in an interesting argument, asserted that increasing the capacity of the facilities was not a reasonable alternative. Syllogistically, they asserted that the erection of new facilities was expensive. Secondly, they argued that the funding would have to be approved by the electorate. They then asserted that the ultimate conclusion would be that the Court would have to stand ready to order the citizens of Petaluma to vote for the funding. *Id.*

The court replied, however, that the prime issue is whether or not people have the right to immigrate into Petaluma. The court then stated, "If so, relief will be granted and their rights enforced; after which the natural burdens that the exercise of those rights places upon the municipality falls within the discretion of city officials, or within the city electorate." *Id.*

nity-enacted growth restrictions.[44] The traditional question of whether the legislatures and Congress might be better equipped to handle the problems of growth needs to be seriously considered. The right to travel may simply be too abstract to be effective in coping with all of the complexities of urban reality.[45]

CHARLES S. MILLER JR.

COMMERCE—CONSTITUTIONAL LAW—VALIDITY OF A "BOTTLE BILL" ENCOURAGING THE USE OF STANDARD-SIZED RETURNABLE BOTTLES.

On October 1, 1972,[1] Oregon became the first state[2] to regulate the use of non-returnable beverage containers.[3] The legislative purpose of the so-called "Bottle Bill" was two fold: 1) to force beverage packagers to use uniform, returnable, multiple-use bottles,

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44. For example, the *Ramapo* type of approach, possibly unconstitutional under the analysis in Petaluma, may be a desirable method for dealing with the problems of growth and urban sprawl. Also, planning done on a regional or state level could minimize many of the adverse effects resulting from restrictions on growth and yet, allow them to be employed by communities within the planned area. However, under this decision, the constitutionality of growth limitations used within a regional context might be questionable. In probably the most interesting, if potentially not the most problem raising, paragraph of the decision, the court stated:

> In essence, the plaintiffs contend that the question of where a person should live is one within the exclusive realm of that individual's perogative, not within the decision making power of any governmental unit. Since Petaluma has assumed the power to make such decisions on the individual's behalf, it is contended that the city has violated the people's right to travel. Considering the facts of the case, we agree.

Id. at 581.

45. It has been suggested that the right to travel may be too abstract to deal effectively with the competing interests involving the use of durational residency requirements. *See generally* the dissenting opinions to Oregon v. Mitchell, 400 U.S. 112 (1970); Shapiro v. Thompson, 394 U.S. 618, 644 (1969). Any merit in this argument would seem to especially apply to the use of the right in the area of land use policy. The courts have traditionally, in this area, given deference to the legislatures because of the nature of the problems involved.

1. Ch. 745, § 12, [1971] Ore. Laws 2018.

2. The Vermont Bottle Bill, which became effective on September 1, 1973, is not as broad in scope as the Oregon legislation. The statute does not prohibit pull-top cans but does allow a three-cent, non-refundable handling charge on each returnable bottle. Com ment, *Beverage Container Legislation: A Policy and Constitutional Evaluation*, 52 TEXAS L. REV. 351, 354 (1974).

3. The Oregon statutes require that:

> (a) Beverage dealers must accept from consumers any beverage container "of the kind, size, and brand sold by the dealer" which indicates the statutory refund value required on all beverage containers sold in Oregon. ORE. REV. STAT. § 459.830(1) (1974).
>
> (b) Beverage distributors must then reimburse the dealer for the refund value of all such containers when they are transferred to the distributor. ORE. REV. STAT. § 459.830(2) (1974).
>
> (c) The statutory refund value is set at five cents per container. However, if a container is "certified" by the Oregon Liquor Control Commission as being suitable for universal use by all beverage packagers, the refund is reduced to two cents per container. ORE. REV. STAT. § 459.820 (1974).
>
> (d) Pull-top cans are prohibited. ORE. REV. STAT. § 459.850(3) (1974).