

Louisiana Law Review

Volume 35 | Number 3

Highlights of the 1974 Regular Session: Legislative

Symposium

Spring 1975

Growth Restriction v. The Right to Travel: The Petaluma Plan

Dowell R. Fontenot

Repository Citation

Dowell R. Fontenot, *Growth Restriction v. The Right to Travel: The Petaluma Plan*, 35 La. L. Rev. (1975)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol35/iss3/14>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

The majority in *Edelman* determined that abrogation of the eleventh amendment by the federal courts is not an acceptable method of coping with state violation of a Congressional directive. Congress, if it so desires, has the power to tie waiver of the amendment's bar to acceptance of federal funds.³⁰ There may be shortcomings with the majority's approach, as Justice Marshall noted in dissent:

Without a retroactive-payment remedy, we are indeed faced with 'the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them.'³¹

Nevertheless, the decision to leave this aspect of the delicate balancing process between private rights and federal-state comity to Congress is wise. By placing the onus upon Congress to determine when a state must submit to suit in federal court, flexibility is afforded to evaluate, in light of potential strains on the federal system, the importance of the private interest at stake and the extent it will be infringed. If the *Edelman* dissenters' fears prove to be well founded, Congress is at liberty to remedy the problem by including appropriate provisions in its welfare legislation.

Robert Emerson Eatman, Jr.

GROWTH RESTRICTION V. THE RIGHT TO TRAVEL: THE PETALUMA PLAN

Petaluma, a suburban California community experiencing rapid growth, implemented a five year land-use program which restricted

30. See, e.g., *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959). The commission was formed under a compact authorized by Congress. The authorization provided that the commission would have authority to sue and be sued. The Court held that formation of the commission waived the states' constitutional immunity. The Court may reach a different result in an appropriate case if an individual constitutional right, rather than a statutory right, is involved. *Edelman* was a 5-4 decision. Perhaps the Court may distinguish the case if the argument that individual constitutional rights should stand on equal footing with those of a state prevails. See *Louisiana State Bd. of Education v. Baker*, 339 F.2d 911, 914 (5th Cir. 1964): "The time may even have come when it would be well to admit the realities, face up to the fact that in these actions against a state agency or public official the party at interest is the State, and hold that the Eleventh Amendment does not contemplate a suit based on state action contrary to the United States Constitution."

31. 415 U.S. at 692 (Marshall & Blackmun, JJ., dissenting) (citation omitted). The two Justices placed a high value on the deterrent effect of the retroactive remedy. Their views on the necessity of keeping a tight rein on state action are analogous to those expressed in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The majority, on the other hand, seems willing to assume good faith administration on the part of the state, and consequently believes the deterrent not worth the cost. Cf. *Younger v. Harris*, 401 U.S. 37 (1971).

the number of new housing permits to a level below projected demand.¹ Plaintiff, a building contractors association, filed suit in federal district court contending that the restriction violated the right to travel of persons who wanted to move into the community. The city's defense that its plan was a valid interim measure to provide time for long-term planning and municipal facility development was rejected and the court rendered judgment for the plaintiff. *Construction Industry Association v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974).²

While the Petaluma Plan's use of a temporary numerical limitation policy may be novel, the legitimacy of local regulations designed to meet the ever-growing problems of urbanization has long been recognized by the United States Supreme Court. Almost fifty years ago, in the landmark decision of *Village of Euclid v. Ambler Realty Co.*,³ the Court approved the notion that government-imposed land use controls may justifiably restrict private development.

[W]ith the great increase and concentration of population, problems have developed, and are constantly developing, which require, and will continue to require additional restriction in respect to the use and occupation of private lands in urban communities.⁴

Years later an unanimous Court in *Berman v. Parker*⁵ emphasized the broad nature of the police power upon which land regulation rests when it upheld a Washington, D.C. redevelopment plan. Although *Berman* involved planning at a higher level of government

1. The essential elements of the challenged Petaluma Plan were: (a.) A five year period (1972-77) during which residential developments were limited to 2500, at the rate of approximately 500 per year. (b.) Residential developments of four units or less were exempted from the numerical limitations. (c.) All those who wished to build residential developments of over four units were required to obtain a permit from the city. (d.) The city, employing a predetermined set of criteria, granted permits on the basis of the relative merit of proposed developments. Among the factors included in the merit determination were the capacity of the local municipal facilities in the area, the quality of the site, the building and landscape architectural design and the provision for open space. (e.) Permits were to be allocated among the geographical sections of the city, and between single family dwellings and multiple residential units. Moderate and low income housing was also encouraged. (f.) If all of the permit allocations for one year were not used, they could be carried over into the next year. Petaluma, Cal., Resolutions No. 6008NCS (Mar. 27, 1972), No. 6113NCS (Aug. 21, 1972), on file in offices of *Louisiana Law Review*.

2. *Appeal pending*, No. 74-2100 (9th Cir., filed Sept. 30, 1974).

3. 272 U.S. 365 (1926).

4. *Id.* at 386.

5. 348 U.S. 26 (1954).

than *Petaluma*, the Court spoke without equivocation of the legislative role in land-use regulation:

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.⁶

Viewing the legislature as the main guardian of the public needs to be served by this type of legislation, the Court characterized the judiciary's role as "extremely narrow" and considered the legislative determination of the public interest as "well-nigh conclusive."⁷

However, the United States Supreme Court had never considered what restrictions the right to travel might place on local planners until that issue was raised in the recent case of *Village of Belle Terre v. Boraas*.⁸ In *Boraas*, the Court found no problem with the challenged ordinance which restricted the number of non-related persons who could live in a dwelling while placing no such limitation on households composed of related persons. The ordinance, said the Court, "involves no 'fundamental' right guaranteed by the Constitution."⁹ Even Mr. Justice Marshall's dissent recognized the propriety of actions by local zoning authorities designed to restrict uncontrolled growth.¹⁰

The *Petaluma* court, although taking note of *Boraas*, attempted to distinguish it from the instant case by declaring that the *Petaluma* restriction, unlike that in *Boraas*, was enacted primarily to keep people out of the community.¹¹ Rejecting the city's claim that its plan was merely an interim measure, the court applied the compelling interest test to evaluate what it viewed as a denial of the right to travel.

From the premise that the decision where to live is solely an individual prerogative not to be usurped by any governmental unit, the district court concluded that the city of *Petaluma* had acted outside its authority by attempting to make that decision for individuals. Although the court noted the incredible rate of growth *Petaluma* was experiencing, it rejected the city's land-use program because

6. *Id.* at 33.

7. *Id.* at 32.

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

9. *Id.* at 7.

10. Justice Marshall would have invalidated the *Boraas* ordinance as an unconstitutional attempt to regulate lifestyles. *Id.* at 15-20. (Marshall, J. dissenting.)

11. *Construction Industry Ass'n v. City of Petaluma*, 375 F. Supp. 574, 584 (N.D. Cal. 1974).

[i]nterstate, intrastate, and foreign travel would be seriously inhibited as people trying to move into the region found housing either economically unavailable, or simply non-existent in reasonable quality.¹²

In holding the plan to violate the fundamental right to travel, the court seemed to find new meaning in that right. All the United States Supreme Court pronouncements, including those cited by the court,¹³ finding a violation of the right, involved a regulation which on its face singled out for disadvantageous treatment those who had recently traveled to move into an area.¹⁴ The district court failed to show how such discrimination resulted from the Petaluma Plan. Instead, it was content to find a violation of the right to travel in the reduction of available housing units, although both new and old residents would be affected by the ordinance's restrictions.

The *Petaluma* court also relied on a line of recent Pennsylvania supreme court cases which struck down exclusionary zoning techniques designed to limit the population growth of communities.¹⁵ The Pennsylvania plans were of the type that tended to limit for an indefinite period the population of certain districts. For example, in *Appeal of Kit-Mar Builders, Inc.*¹⁶ it was the attempt to completely avoid growth problems by prohibiting sales of lots smaller than a required minimum size that troubled the Pennsylvania court. In another case,¹⁷ the court overturned an ordinance which included no provision for multi-unit housing, stating, "Nether Providence Township may not permissibly choose to only take as many people as can live in single-family housing, in effect freezing the population at near present levels."¹⁸

12. *Id.* at 580-81.

13. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down durational residency requirement for voting); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating durational residency requirements for welfare recipients).

14. *See Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (residency requirement to receive medical services); *Edwards v. California*, 314 U.S. 160 (1941) (legislation to keep unemployed and impoverished from entering state); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) (one dollar tax on persons leaving Nevada); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (tax on alien passengers landing at state ports).

15. In addition to the cases discussed in the text, see *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965) (minimum lot requirement). *But see Bilbar Constr. Co. v. Board of Adjustment*, 393 Pa. 62, 141 A.2d 851 (1958) (one acre minimum lot requirement upheld).

16. 439 Pa. 466, 268 A.2d 765 (1970). The court found the minimum lot restriction not required for any valid building purpose.

17. *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

18. *Id.* at 244, 263 A.2d at 398.

The Petaluma Plan differed significantly from those found unacceptable by the Pennsylvania courts. No indefinite lid on population growth was intended;¹⁹ rather, the city was using a short-term measure to provide time for formulation of long-range land-use plans. This was evidenced by the plan's non-applicability to housing developments of less than four units and the short five-year duration of the restrictions.²⁰

A plan more closely resembling that adopted by Petaluma was analyzed by the New York Court of Appeals in *Golden v. Planning Board*.²¹ In that case, the court approved a scheme which conditioned the use of building permits upon the presence of municipal facilities, although, by the city's own time-table, certain areas would remain undevelopable for eighteen years unless the developer personally provided the needed facilities. In approving this system of timed and sequential growth,²² the court stated that it would

only require that communities confront the challenge of population growth with open doors. Where in grappling with that problem, the community undertakes, by imposing temporary restrictions upon development, to provide required municipal services in a rational manner, courts are rightfully reluctant to strike down such schemes.²³

Of course, there may be instances when land-use regulations run

19. The Environmental Design Plan (Petaluma, Cal., Resolution No. 6008NCS, Mar. 27, 1972) included a statement of the city's purpose in adopting the Petaluma plan: "Five years is a suitable time period for strategic planning. It assumes that the City can and should control its short range future since it can foresee with reasonable assurance what its problems are and how much growth it can accommodate while maintaining an adequate level of public service and good environment. Since 500 dwelling units annually is pretty close to the city's average during the past decade, neither the adopted policy statement nor the Environmental Design Plan actually will arrest Petaluma's growth. . . . The Environmental Design Plans have the sole purpose of contributing to Petaluma's future welfare by insuring that development within the next five years will take place in a reasonable, orderly, attractive manner, rather than in a completely haphazard and unattractive manner."

20. See Petaluma, Cal., Resolution No. 6113NCS, (Aug. 21, 1972) discussed in note 1 *supra*.

21. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, appeal dismissed, 409 U.S. 1003 (1972) (lack of federal question).

22. See, e.g., Note, 47 N.Y.U.L. REV. 723 (1972); Note, 26 STAN. L. REV. 585 (1974).

23. *Golden v. Planning Bd.*, 30 N.Y.2d 359, 379, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 153 (1972). See also *Westwood Forest Estates v. Village of South Nyack*, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969); *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *National Land & Inv. Co. v. Kohn*, 414 Pa. 504, 215 A.2d 597 (1965).

afoul of due process, or exhibit such a discriminatory intent as to bring equal protection guarantees into play;²⁴ Petaluma's plan seemed to avoid both of these constitutional pitfalls. Once it is determined that the right to travel is not properly invoked against plans like Petaluma's, minimal rather than strict scrutiny would ordinarily provide the proper standard in assessing challenges on either basis.²⁵ As to due process objections, it can hardly be contended that the preservation of the environment and the protection of finite land resources have "no substantial relation to the public health, safety, morals or general welfare."²⁶

Equal protection arguments have been used to invalidate many local ordinances which attempted to exclude certain ethnic or economic groups.²⁷ The Petaluma Plan, however, went beyond mere non-discrimination and affirmatively encouraged low-income housing: the system under which permits were granted for new housing units favored projects which contributed to the provision of units to meet

24. See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917) (ordinance restricting blacks to a certain area in a city). The following cases involved plans which were invalidated because they were designed to exclude low-income housing projects: *Kennedy Park Homes Ass'n, Inc. v. Lackawanna*, 436 F.2d 108 (2d Cir.), *cert. denied*, 401 U.S. 1010 (1971); *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291 (9th Cir. 1970); *In re Lee Sing*, 43 F. 359 (N.D. Cal. 1890). Cf. *James v. Valtierra*, 402 U.S. 137 (1971), where the Court upheld an article of the California Constitution requiring that no low-rent housing project be developed, constructed, or acquired by any state public body without the majority approval of those voting in a community election. However, the mandatory referendum procedure was not limited to proposals involving low-cost housing.

25. See text at notes 13-14 *supra*.

26. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974): "The police power is not confined to the 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."; *Berman v. Parker*, 348 U.S. 26 (1954); *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 460, 202 P.2d 38, 42, *cert. denied*, 337 U.S. 939 (1949); *Miller v. Board of Public Works*, 195 Cal. 477, 488, 234 P. 381, 385 (1925), *appeal dismissed*, 273 U.S. 781 (1927). See also Federal Clean Air Act, 42 U.S.C. §§ 1857-58 (1967); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47.

27. *Buchanan v. Warley*, 245 U.S. 60 (1917); *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291 (9th Cir. 1970); *In re Lee Sing*, 43 F. 359 (N.D. Cal. 1890). *But cf.*, *Lindsey v. Normet*, 405 U.S. 56 (1972). The Court did not require the state to demonstrate a compelling reason to uphold an ordinance which infringed upon the right to occupy a home: "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality. . . . Absent constitutional mandate, the assurance of adequate housing . . . [is a] legislative not [a] judicial [function]." *Id.* at 73-74.

the city's policy goal of 8% to 12% low and moderate income dwelling units annually.²⁸

The decision in the instant case renders questionable land-use plans which have the purpose of causing less housing to be produced than would be forthcoming in response to unregulated marked demand.²⁹ There are striking similarities between the Petaluma Plan and the more conventional zoning techniques. Virtually all traditional zoning practices, such as height and density restrictions, single family zones or use zones, have the effect, like the Petaluma Plan, of reducing the number of housing units to be built in a given area. The supportable population is thus reduced, ultimately altering the forces of the market place. For quite some time courts have realized that land-use restrictions "circumscribe the course of growth within a particular town or district, and to that extent invariably impede the forces of natural growth."³⁰ If planning devices did not to some extent change the number or type of units developable under unregulated conditions, planning would indeed be a futile exercise. Affirmance of the district court's decision would thwart governmental efforts to preserve the environment and control the waste of unregulated urban development by denying planning authorities their most effective tools.³¹ Therefore, restoration of the traditional parameters of the right to travel by reversal of the district court's ruling seems the wisest and most realistic course to assure governmental competence to meet future planning needs.

Dowell R. Fontenot

28. Petaluma, Cal., Resolution No. 6113 NCS (Aug. 21, 1972) *discussed in note 1 supra*.

29. The trial court's holding was "intended to encompass, not only the outright numerical limitations upon the issuance of the building permits, but also any and all features of the plan which, *directly or indirectly*, seek to control population growth by any means other than market demands." *Construction Industry Ass'n v. City of Petaluma*, 375 F. Supp. 574, 586 (emphasis added).

30. *Golden v. Planning Bd.*, 30 N.Y.2d 359, 377, 285 N.E.2d 291, 301, 334 N.Y.S.2d 138, 151, *appeal dismissed*, 409 U.S. 1003 (1972).

31. CHAPIN & WEISS, *URBAN GROWTH DYNAMICS* 467 (1962): "We commonly think of economic allocations handled through the market place, but . . . we cannot depend solely upon the resource allocating functions of the market which may be largely unsuited for rapid and comprehensive change. Also, there is no single dominant center outside governments for making major resource-allocating decisions." Many states have already enacted legislation to increase their power to control growth. *See* 9 DEL. CODE ANN. §§ 4801-17 (Supp. 1968); HAWAII REV. STATS. ch. 205 (1968); MAINE REV. STATS. ANN. tit. 12, §§ 683-85 (Supp. 1970); 10 VERMONT STATS. ANN. § 6001-91 (Supp. 1970).