ZONING LAW—GROWTH CONTROLS—NINTH CIRCUIT DENIES CONSTRUCTION INDUSTRY AND LANDOWNERS STANDING TO ASSERT MUNICIPALITY’S GROWTH CONTROL PLAN AS INFRINGEMENT OF THIRD PARTIES RIGHT TO TRAVEL—Construction Industry Ass’n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 96 S. Ct. 1148 (1976).

INTRODUCTION

The United States Court of Appeals for the Ninth Circuit recently reaffirmed the legitimacy of a municipality’s zoning regulation which provided for an orderly pace and pattern of its urban growth. In Construction Industry Ass’n v. City of Petaluma,¹ the Ninth Circuit reversed a district court decision which had determined that such growth control legislation was an unconstitutional limitation upon the right to travel.² Reinstating Petaluma’s growth control device, the Court of Appeals refused to grant standing on that basis and, therefore, did not reach the merits of the right to travel claim. Instead, the court recognized that the determination of the need for and the scope of zoning regulation is traditionally a legislative function not subject to intensive judicial investigation.³

In so deciding, the court conformed its decision to current cases and concepts which would broaden a city’s authority to regulate through zoning and, thereby, its capacity for self-determination. However, inasmuch as the court limited its review, the alleged infringement of such growth control plans upon a right to travel remains a viable challenge to such civic authority, in both Petaluma and other communities with legislation designed to organize and control urban sprawl.

1. 522 F.2d 897 (9th Cir. 1975), cert. denied, 96 S. Ct. 1148 (1976).
3. 522 F.2d at 906.

Traditionally, the role of the judiciary in the interpretation of a municipality’s zoning regulations is a limited one. Courts are often reluctant to interfere with a local plan designed to correct local problems or maintain local standards. See, e.g., D.R. Mandelker, The Zoning Dilemma 11 (1971), which states:

Presumptions of constitutionality allow the court to avoid admitting that it is favoring one land use allocation over another, especially as the presumption is not conclusive and courts do and will intervene to upset local zoning judgments when they consider them erroneous. . . . Generally, however, the courts have left zoning agencies relatively free of judicial control, and the ad hoc nature of their decisions when they do intervene leaves those affected with very little in the way of guidance for future cases.
CREIGHTON LAW REVIEW

MUNICIPAL CONTROL OF URBAN SPRAWL

Petaluma, California is not unlike many American jurisdictions seeking solutions to the problems caused by unrestricted urban growth.¹ Throughout the city's developmental years and into the 1960's, the citizenry failed to recognize population growth and physical expansion as potentially harmful problems. Instead, a "growth for growth's sake" philosophy prevailed⁵ and because of this attitude planners and legislators were slow to respond with potentially objectionable municipal controls over land use.⁶

Enthusiasm for the "growth is good" ethic began to wane, both nationally and in Petaluma, when citizens began to doubt the logic and feel the effects of unregulated expansion.⁷ In response

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4. D.R. MANDELKER, THE ZONING DILEMMA 179 (1971), reflects the increasing tendency toward restraining growth:

American planning agencies at the regional level have at least considered the problem of containing urban growth. Their policies on containment, moreover, reflect an urban aesthetic which places a high value on concentration, and on the need for clean distinctions between the concentrated and less concentrated segments of metropolitan areas.


6. As early as 1962, city officials estimated that if growth occurred at the predicted rate, Petaluma would be a city of 77,000 residents by 1985 and the 'rural' character would be lost.

Note, Constitutional Law—The Right to Travel as a Limitation Upon the Exercise of the Zoning Power, 36 OHIO S. L. J. 128, 132 (1975). However, it was not until 1972 that the city council enacted growth legislation; relying on the results of a 1971 survey of 10,000 of the city's residents which revealed an opposition to continued urbanization.

7. See Comment, The Right to Travel and Community Growth Controls, 12 HARV. J. LEGIS. 244, 247 (1975), which relates that:

[The city of] Petaluma [was] a sleepy exurb of San Francisco in 1960 [which] experienced the typical boom in fringe housing development during the subsequent decade and, by the early 1970's, was anxious about the implications of uncontrolled growth.

See also, Note, Constitutional Law—The Right to Travel as a Limitation upon the Exercise of the Zoning Power, 36 OHIO S. L. J. 128, 131 (1975). The court, noting the extent of Petaluma's growth, said:

The increase in the city's population, not surprisingly, is reflected in the increase in the number of its housing units. From 1964 to 1971, the following number of residential housing units were completed:
to this growing concern, the city created a plan [the Plan], designed to curb the city's burgeoning population growth and comply with the wishes of the citizenry "to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."8

**THE PETALUMA PLAN**

The multi-faceted Plan, while generally devised to facilitate realization of the aforementioned community goals, was specifically aimed at residential housing developments. Control of both the number and the placement of housing units which were part of a development scheme, was the means by which the Plan hoped to attain its desired results.9 In order to obtain this control, the enactment of the Plan fixed a long range housing unit development limit which was "below the reasonably anticipated market demand for such units."10 Construction was limited to approximately 500 dwelling units per year for a five year period, or 2500 units maximum.11 Permits for development construction were awarded to builders on the basis of merit, determined by employing an intricate point system of procedures and criteria.12

The Plan also created an "urban extension line," positioned around the city to delineate the boundary beyond which the city

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<th>Year</th>
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In 1970 and 1971, the years of the most rapid growth, demand for housing in the city was even greater than above indicated. Taking 1970 and 1971 together, builders won approval of a total of 2000 permits although only 1482 were actually completed by the end of 1971.

522 F.2d at 900.
8. 522 F.2d at 909.
9. Id. at 901.
10. Id. at 902.
11. The court noted, however, that this was not a totally inflexible limit, allowing an annual variance of 10% below or above 500 units. 522 F.2d at 901, n.2. Further, the court stated that:

   The 500-unit figure is somewhat misleading, however, because it applies only to housing units...that are part of projects involving five units or more. Thus, the 500-unit figure does not reflect any housing and population growth due to construction of single-family homes or even four-unit apartment buildings not part of any larger project.

Id. at 901.
12. Id. at 901. Factors considered in awarding the permits were: (a) conformity of the project with the city's general plan; (b) architectural and environmental design; and (c) provisions for housing low and moderate income level families.
would not be allowed to grow. Additional facets of the growth control program were the division of permits between the east and west parts of the city, and a provision for “infilling” or requiring undeveloped properties close to the city’s center to be developed first.

**The District Court Opinion—Plan Violates Right to Travel**

Challenging the constitutionality of the Plan and seeking to enjoin the enforcement of its provisions, the Construction Industry Association of Sonoma County [Association] brought suit against the City of Petaluma in the United States District Court for the Northern District of California. The district court determined that the municipality’s plan tended to inhibit natural population expansion and was an impermissible violation of the right to travel. The district court required the city to show a compelling state interest which would support its plan, as the constitutionally required antidote to the denial of a fundamental right, such as the right to travel. Interests asserted by the city were found to fall short of this constitutional requirement and the district court enjoined the city from enforcing its plan. In so doing, the

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13. Id. at 901.
14. This provision of the Plan was included in order to curb the eastward sprawl of the city. The court found that:

[T]he bulk of recent development ... occurred in the eastern portion of the City, causing a large deficiency in moderately priced multi-family and apartment units on the east side.

Id. at 900.
15. Id. at 901.
18. 375 F. Supp. at 582-83. The city asserted three such interests on behalf of its plan: (a) inadequate sewer facilities; (b) inadequate water supply; and, (c) desire to preserve its small town character. Relying upon Sheldon v. Tucker, 364 U.S. 479 (1960), the court dismissed the first two interests saying that there were less burdensome alternatives available to the city. The third asserted interest was held not compelling and inconsistent with the right to travel.
district court ignored or attempted to distinguish other cases based upon current, similar plans,\(^{20}\) and fueled fears that the right to travel claim would inhibit growth control.\(^{21}\)

**COURT OF APPEALS DECISION**

**Standing to Assert Right to Travel Denied**

Critics of the district court opinion were temporarily mollified when, on appeal to the Ninth Circuit, the decision was reversed.\(^{22}\) While the district court has based its decision upon the claim that the city's growth policy infringed the constitutional right to travel,\(^{23}\) the Court of Appeals refused to recognize the standing of the parties attempting to assert that right.\(^{24}\) Holding that the Association and the individual landowners were not arguably within the zone of interests to be protected by the constitutional guarantee in question\(^{25}\) and were not authorized to assert that right on behalf of

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\(^{21}\) See Note, Growth Restriction v. The Right to Travel: The Petaluma Plan, 35 La. L. Rev. 676, 681-82 (1975). See also, Note, Constitutional Law—The Right to Travel as a Limitation Upon the Exercise of Zoning Power, 36 Ohio S.L.J. 128, 139 (1975), which states:

The right to travel has generally been viewed as a personal right of the individual, to be protected against infringement by the state and federal governments. This is evidenced by the fact that most cases dealing with the subject have arisen because an individual challenged the treatment he or she received on the ground that it infringed upon his or her right to travel.

The district court, however, extended this right beyond individuals to third parties acting on behalf of potentially injured individuals. Further, the district court's decision extended the doctrine of Shapiro v. Thompson, 394 U.S. 618 (1969), beyond its guarantee that a right to travel includes the right to move to any state. The district court in Petaluma extended this principal to smaller units of government, saying that the right to migrate to the municipality of one's choice is also incorporated in the right to travel. That municipality, according to the court, may not limit growth simply because it does not prefer to grow at the rate which would be dictated by prevailing market demand. 375 F. Supp. at 583.

\(^{22}\) 522 F.2d at 908-09.

\(^{23}\) 375 F. Supp. at 581.

\(^{24}\) 522 F.2d at 905.

\(^{25}\) The court utilized the traditional two-step test to determine if the claimant had standing sufficient to "ensure the requisite concreteness of facts and adverseness of parties", and thereby satisfy the case or controversy requirement of the Constitution's Article III. Relying upon recent caselaw, the 9th Circuit required the Association to show both (a) a personal stake in the outcome of the case or an injury-in-fact, Baker v. Carr, 369 U.S. 186 (1962); and (b) that the interest they sought to have protected was within the zone of interest to be protected by the constitutional guarantee in question, Association of Data Processing Service Organizations, Inc.
third parties not present to the action, the court successfully shifted the focus of the decision away from the requirement that the city show a compelling interest in defense of its plan. Instead, since standing to assert the fundamental rights of third parties was denied, the Association was forced to rely on other constitutional claims which the city could refute by a simple showing of a rational relationship between the Plan and a legitimate state interest. The court, therefore, did not treat the merits of the right to travel contention, and left unanswered the question as to whether that right may be used to define the outer limits of the broad planning function.

Treatment was accorded, however, to the additional claims directed by the Association against the Petaluma Plan. Assertions that the Plan was “arbitrary and thus violative of . . . due process rights” and that the Plan constituted an exclusionary zoning

v. Camp, 397 U.S. 150 (1970). While the court found that the economic injury suffered by the claimants was sufficient to fulfill the first standing requirement, the court ruled that this economic interest was “undisputedly outside the zone of interest to be protected by any purported constitutional right to travel.” Id. at 904.

26. In reaching this conclusion, the court quoted from a recent Supreme Court case, saying:

even when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights of third parties. Warth v. Seldin, U.S., 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

The court noted that although exceptions to this rule do exist in the form of (a) congressional grant of standing; (b) Supreme Court grant of standing when a criminal statute would affect the rights of third parties; or (c) where there exists a special, on-going relationship between a party to the action and a third party, none of those exceptions were applicable to the Association. 522 F.2d at 904.

27. The city’s inability to show a compelling state interest to support its plan was a major focus of the district court’s opinion. See n.18, supra. When the Court of Appeals refused to grant standing on that ground to the Association, the city was only required to meet a rational basis test standard. See 522 F.2d at 906. However, the court managed to keep alive a potential clash between the right to travel and growth control plans, requiring a compelling state interest. The court left open the availability of a fundamental rights challenge by saying, “those individuals whose mobility is impaired may bring suit on their own behalf and on behalf of those similarly situated.” 522 F.2d at 904.

28. The Association further contended that the Plan was arbitrary and violative of due process rights, and that it imposed an unreasonable burden upon interstate commerce. 522 F.2d at 905.

29. 522 F.2d at 906.
30. Id. at 904-05.

32. Due process challenges are often asserted by parties seeking to overturn municipal zoning ordinances. See, e.g., Village of Belle Terre, su-
device, \(^\text{32}\) were disposed of by the court in line with the traditional analysis applicable to other zoning law. \(^\text{34}\) Since no claim remained involving the violation of a fundamental right, the court simply analyzed the Plan to determine if its purpose and effect bore a rational relationship to legitimate state interests. \(^\text{35}\) Recognizing that in interpreting zoning regulations the state interest is manifested in some aspect of the police power exercised for the benefit of the public, \(^\text{36}\) the court looked to the city’s avowed purposes for implementing the Plan: “the preservation of Petaluma’s small town character and the avoidance of the social and environmental problems caused by an uncontrolled growth rate.” \(^\text{37}\) The court sought to determine if these were valid justifications for the exercise of the police power.

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\(^\text{32}\) Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974); Berman v. Parker, 348 U.S. 26 (1954) [hereinafter cited as Berman]; Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) [hereinafter cited as Euclid]. The due process argument grows out of the constitutional guarantee that no one shall be deprived of property without due process of law. This guarantee encompasses both those who already own property and are allegedly deprived of a more beneficial or profitable use by a zoning restriction, e.g., Ramapo, supra \(^\text{n.20}\), and to those attempting to obtain property who are prohibited from doing so by an existing zoning ordinance. See, e.g., Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 1151, 336 A.2d 713 (1975); National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

Due process is utilized by present landowners in order to prevent an unconstitutional “taking” or a deprivation of property without just compensation. D.R. MANDELER, THE ZONING DILEMMA 12 (1971). On the other hand, individuals seeking land ownership utilize the due process argument as a means of assuring that the zoning ordinance will not be used as an exclusionary zoning device. See \(^\text{n.33}\), infra.

See also Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 8 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964).

\(^\text{33}\) The court explained that an exclusionary zoning device is one which operates to exclude low income persons from residential and suburban areas of a city. As an inevitable concomitant thereof, the court concluded, exclusionary zoning operates to exclude members of racial minorities. See Bigham & Bostick, Exclusionary Zoning Practices: An Examination of the Current Controversy, 25 Vand. L. Rev. 1111 (1972); Note, Exclusionary Zoning and Equal Protection, 84 Harv. L. Rev. 1645 (1971).

\(^\text{34}\) The court, relying upon standards established in Euclid and in Berman, agreed with Justice Marshall’s dissent in Village of Belle Terre which reiterated these standards:

[Local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance. ... And it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purpose.

\(^\text{416}\) U.S. at 13-14, 94 S.Ct. at 1543 (Marshall, J., dissenting).

\(^\text{35}\) 522 F.2d at 906.

\(^\text{36}\) Id.

\(^\text{37}\) Id.
GROWTH CONTROL VALID USE OF CITY'S POLICE POWER

The court concluded that Petaluma's desire to maintain its small town character was a legitimate governmental interest and a valid exercise of the police power to ensure the public welfare. No longer does planning merely represent passing laws in order to avoid something unpleasant. Positive planning, or restrictive zoning, in order to insure the preservation of something desirable, is fast becoming a vital tool in American zoning law. If this positive plan is a valid exercise of the police power delegated to the city, and the means of attaining the goals enumerated by the plan are reasonably related to it, then courts will not disturb the legislative function of providing for the public welfare.

In making this determination, the court analyzed the Plan itself, and while agreeing that the ordinance operated with an exclusionary purpose and effect, found this fact not dispositive of the plan's validity. The court stated that the issue is not whether the Plan is exclusionary but rather, it is whether that exclusion

38. Id. at 908-09.
39. D.R. MANDELKER, THE ZONING DILEMMA 175 (1971), illustrates the fact that zoning law has progressed beyond traditional efforts designed to avoid the unpleasant aspects of urban living, by saying:
Zoning had its origins in nuisance law, and was at first limited to the adjustment of land use incompatibilities and the prevention of harmful land use externalities at the neighborhood scale. But zoning, especially as it implements the planning process, has moved beyond mere externality prevention.

40. Zoning with an eye for the continuance of positive aspects of a community has been recognized judicially as a legitimate governmental function. See, e.g., Berman, supra n.32, the holding of which has been repeatedly upheld in later cases, which noted:
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.

348 U.S. at 33.

The Supreme Court, having agreed that zoning could operate to provide for the aesthetic interests of its populace, again upheld such an ordinance in Village of Belle Terre, by saying that "[t]he police power is not confined to elimination of filth, stench, and unhealthy places." 416 U.S. at 9.

Cities across the country took hold of the judicially authorized planning scheme and began to introduce legislation which would assure maintenance of community standards which extended beyond nuisance avoidance. One of the most common ways in which a community responded was to institute a growth control program along the same lines as that devised in Petaluma. For a current list of these communities, see Freilich, 6 URBAN LAW. at 312-14.

41. See Village of Belle Terre, supra n.20; Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).
42. 522 F.2d at 906.
itself bears a reasonable relationship to legitimate municipal interests. These interests, the court noted, have been extended beyond traditional, Euclidian philosophy of mere nuisance avoidance. Today, by virtue of recent caselaw, a city is authorized to provide for its more ethereal values. The fact that such plans may work to exclude something or someone in a quest to attain the desired results on behalf of the public welfare does not render the plan unreasonable.

The court noted that the Petaluma Plan tended to exclude certain individuals and developers from the city of Petaluma. By excluding certain parties, the city hoped to control the tempo and direction of the city's growth. The exclusion, then, was essential to the working of the Plan and rationally related to the legitimate exercise of the police power for which the Plan stood. In light of this determination, the court refused to disturb such a legislative judgment. Petaluma, like other towns before it, could plan positively without offending constitutional guarantees.

CONCLUSION

Positive zoning is fast becoming a popular remedy to potentially harmful or undesirable situations in American communities. The problems inherent in positive zoning have yet to be fully discovered. The concept is relatively new and has not yet been the subject of much analysis. In the Petaluma case, the Ninth

43. Id. at 907-08.
44. See n.41 supra.
45. Modern judicial and legislative means of zoning beyond nuisance avoidance are discussed in HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 254-263 (1971).
46. 522 F.2d at 906.
47. Id. at 908.
48. The court likewise determined that the exclusion, as a rational exercise of the municipality's authority, did not subvert or prove unreasonably burdensome to interstate commerce. While the district court felt that "curtailment of residential growth in Petaluma [would] cause serious dislocation to commerce," the 9th Circuit disagreed, saying:

[A] state regulation validly based on the police power does not impermissibly burden interstate commerce where the regulation neither discriminates against interstate commerce nor operates to disrupt its required uniformity.

Id. at 909. See also Huron Cement Co. v. Detroit, 362 U.S. 440 (1960).
49. Id.
50. Id.
51. However, the court in Petaluma did express reservations as to the ramifications of such a plan were it to become a popular model for control on a regional or statewide basis. Recognizing, as did the district court, the need for adequate housing in substantial numbers throughout California, the Ninth Circuit alluded to the fact that plans may have to be altered if
Circuit avoided the much maligned basis and the regressive result of the district court's opinion, which if left untouched would have severely frustrated the implementation of modern planning philosophy. The Petaluma Plan comported with modern philosophy; specifically, with concepts developed in other jurisdictions designed to curb rapid growth trends.

The Court of Appeals opinion, while sustaining the validity of the Plan, leaves a potentially harmful issue yet to be tried. The court stated that a party alleging first-hand exclusion by a program such as the one considered in Petaluma might successfully challenge that program on right to travel grounds. The basis with which the case was decided at the district court level remains as a threatening limit to the amount of planning a community might do on behalf of its citizens.

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prospective residents are faced with similar exclusion from all cities in one region. Id. at 909, n.17.

52. For criticism of the district court's decisional basis, see Note, Population Control in Metropolitan Areas—Municipal Ordinances Limiting the Number of Building Permits for the Purpose of Restricting Population Growth Held Unconstitutional Infringement on Right to Travel, Where There is No Shortage of Municipal Facilities to Serve the New Residents, 3 FORDHAM URB. L.J. 137 (1974); Note, Growth Restriction v. The Right to Travel: The Petaluma Plan, 35 LA. L. REV. 676 (1975); Note, Constitutional Law—The Right to Travel as a Limitation upon the Exercise of the Zoning Power, 36 OHIO S.L.J. 128 (1975); Comment, The Right to Travel and Community Growth Controls, 12 HARV. J. LEGIS. 244 (1975).

53. For information concerning modern concepts developed in various jurisdictions, see Deutsch, Land Use Controls: A Case Study of San Jose and Livermore, California, 15 SANTA CLARA LAWYER 1, 2 (1975). See also Freilich and Ragsdale, Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Direction for Land Use Controls in the Minneapolis-St. Paul Region, 58 MINN. L. REV. 1009 (1974); Note, Time Controls on Land Use: Prophylactic Law for Planners, 57 CORNELL L. REV. 827 (1972).

A summary of jurisdictions which have recently followed Petaluma's example by implementing growth controls of their own may be found in Omaha World Herald, Mar. 17, 1976, at 34, col. 1.

54. 522 F.2d at 905.