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Judicial Responses to Comprehensively Planned No-Growth Provisions: Ramapo, Petaluma, and Beyond

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As population, pollution, and the problems of progress increase, many citizens of suburban and rural municipalities see their present way of life endangered. In response to this perceived threat they have turned to zoning or other restrictive measures to limit or prohibit growth and thus preserve the character of their communities. Unfortunately, there may be serious side effects to this cure.

Exclusionary zoning ordinances are not a new phenomenon. For many years cities and towns utilized them with little or no judicial interference. Recently, however, some courts have shown an unwillingness to routinely sustain local zoning decisions in the face of constitutional challenges. As this trend continues, future restrictions are likely to move beyond simple zoning and adopt a different form. Instead of relying on minimum lot size, floor space, or density requirements, municipalities wanting to stop population expansion will enact a variety of “no-growth” provisions tied to comprehensive planning programs. The major concern of this article is to examine these “no-growth” provisions and the possible responses to them by the judiciary.

The first section briefly sets out the constitutional principles upon which challenges to the provision will most likely be based. As these issues have been analyzed in detail by other articles, they are mentioned here only to help construct the framework. In response to a challenge, the zoning authority will almost undoubtedly have to provide a justifying rationale. Section II will set out the most frequently used “interests” advanced by cities and towns. Included therein will necessarily be a short discussion of many exclusionary techniques. Section III examines the judiciary’s response to the strategies adopted by two municipalities to severely limit growth in their respective communities. Although the Supreme Court has long
refrained from deciding the merits of zoning cases, several of its recent opinions may give some insight into the Court’s probable response to no-growth. In addition, the final section will make recommendations for a solution which will attempt to strike a balance between the need for communities to assume their fair share of the burdens of growth and the need for protecting the natural beauty and character of the environment to the fullest extent possible.

I. CONSTITUTIONAL BASES OF CHALLENGES TO NO-GROWTH PROVISIONS

Almost all legal attacks upon the enactments of local zoning authorities have been based upon one of three constitutional theories—the Due Process Clause, the Equal Protection Clause, or the right to travel. The use of each has distinct advantages and disadvantages depending upon the peculiarities of the specific fact situations involved in the zoning challenge.

Zoning regulations are generally presumed to be valid and any plaintiff trying to overturn them has a difficult burden. The early challenges were almost exclusively brought by landowners claiming that the zoning ordinance unconstitutionally deprived them of their property—or at least the free enjoyment or full economic potential thereof—without due process of law. At least in challenges before the United States Supreme Court, the chances of setting such ordinances aside on these grounds are very slim.

State courts also have been reluctant to grant relief in this area unless the plaintiff can show that the “taking” amounts to a complete restriction on all beneficial uses of the property. Failing this, the plaintiff faces the nearly impossible burden of showing that the enactment is “clearly arbitrary and unreasonable” and is therefore an abuse of the police power. Moreover, even if the Due Process Clause were a more viable weapon to attack no-growth enactments, only individual landowners, and not those denied access to the community, would be able to sue.

The interests of those excluded by the operation of a no-growth provision would seem better suited to the protection offered by the Equal Protection Clause. The “new equal protection” test utilizes a two-tier standard. If the challenged law invidiously discriminates against a suspect classification or if it hinders the enjoyment of a fundamental right, that enactment must meet the strict scrutiny of the “compelling interest” test. Otherwise, the court will demand only that there be a “rational basis” behind it. In the vast majority of cases, the success or failure of the suit is determined by which
standard the court sees fit to employ. Thus, plaintiffs will try to convince the court that the enactment includes them within a sus­pect classification or impingases upon a fundamental right.

Both the “compelling interest” and “rational basis” standards focus upon the interests of the municipality in the ordinance or by­law. Emphasizing the reasons behind the plan is a constructive approach. However, there are also major difficulties with using the equal protection doctrine. The Supreme Court has had little prob­lem with situations in which it could ascertain an intent to discrimi­nate by race; and for a while it seemed that the Court might extend protection against snob zoning to the indigent; but it is now unlikely that this will develop in the near future. 8 At the present time, plain­tiffs would find it difficult to come up with the recognized classifica­tion necessary to mount a successful Equal Protection challenge. Nor does it seem likely that the Court will expand the list of funda­mental rights for equal protection purposes. 10 If and when municipal boundaries are de-emphasized and zoning is done on a regional basis, the Equal Protection Clause may become a much more potent weapon. But until then, only an activist court is likely to use it to strike down no-growth provisions. 11

Another approach is to claim the ordinance impinges upon plain­tiff’s rights of association and travel, both of which are considered “fundamental” by the Supreme Court. Thus, their infringement can be justified only upon a showing of a compelling governmental interest, a test rarely met. In 1941, the United States Supreme Court, in Edwards v. California, 12 forcefully declared that no state may impose a penalty or set unjustified restrictions upon the migra­tion of residents into a state. It is also clear that this protection extends to intrastate as well as interstate travel. 13 The right to travel and its application to exclusionary zoning has been extensively ex­amined elsewhere 14 and will be analyzed below in connection with Construction Industry Association of Sonoma County v. Petaluma. 15 It will suffice to note here that application of the “right to travel” concept has great potential for use against “no-growth” provisions, especially since the concept is well-suited to a balancing test be­tween the interests of the municipality on one hand and those of excluded persons and other potential plaintiffs on the other. 15.1

II. JUSTIFICATION FOR EXCLUSIONARY DEVICES OFFERED BY MUNICIPALITIES

Courts have often proclaimed that they will not act as a super zoning authority and therefore will overturn only flagrant abuses of
power. Where a plaintiff has presented a claim of infringement upon a fundamental right, however, the municipality will have to put forth its reasons to legitimatize the exclusion.

In defending against an attack based upon one of the above theories, sometimes it is not sufficient for the defendant to show that the ordinance furthers even a substantial governmental interest. In pursuing that important interest, it cannot choose means that unnecessarily burden or restrict constitutionally protected activity. If there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected rights, a governmental body may not choose the path of greater interference. "If it acts at all; it must choose less drastic means." The inquiry into the importance of the governmental interest is well highlighted in many situations. The following subsections discuss a number of justifications that have been offered by defendant municipalities in support of various exclusionary devices.

A. Preservation of a Town's Character.

One of the most common justifications advanced by a zoning authority is that it is merely trying to protect the town's homogeneity and character in accordance with the perceived needs of the community. This often seems little more than another means of arguing that an ordinance should be granted a great presumption of validity. There are a number of cases in which a landowner, wishing to use his land for commercial purposes, has challenged action which zoned the whole community as residential. To uphold such an ordinance many variations of this theory have been employed. In City of Richlawn v. McMakin, the Kentucky Court of Appeals found that because an overwhelming majority of the town's residents had left the noise and pollution of the big city and desired to keep their community quiet, safe, and residential, a sufficient interest to uphold the ordinance had been demonstrated. Some courts have held that a township could bar all commercial uses, so long as they were available nearby, if such action was needed to preserve the town's character.

However, the preceding cases dealt with ordinances restricting the use to which a landowner could put his land. No-growth provisions, by comparison, should be viewed from a very different perspective—since they not only regulate land use but bar people as well. "The "character of a town" justification avoids the question of balancing altogether, and focuses merely on the desires of a given municipality as articulated by its zoning board. The effects upon
other communities and on the general public are largely ignored. The desire to preserve its character should be considered insufficient, standing alone, to justify a no-growth provision.

B. Preservation of Land Values

In addition to citing preservation of its character, a city or town may defend its restrictive zoning enactment with the argument that it is merely maintaining land values. The residents of a town may regard the preservation of their property values as the most important function of their elected officials. Increased population or development is often seen by them as a threat to the exclusivity or the desirability of their town as a place to live, and hence destructive to the prices which their properties will command.

It is an accepted principle that a municipality may prohibit a landowner from utilizing his land in the most profitable manner. The law has recognized situations in which the greater good of the community has outweighed the cries of diminution of property value. A current example of this is the furor which often surrounds the location of a "halfway house" in a community. Just as the interests of the town as a whole may be advanced to the detriment of an individual landowner, the interests of the larger regional community should be preferred over the interests of a single town. Moreover, a reduction in a town's land values is often a temporary and highly subjective determination. This is not to imply that the diminution of property values should not be considered in weighing the validity of zoning ordinances but rather that such considerations should not be the sole criteria for evaluation. This is particularly true of no-growth plans which should be justified in terms of the general welfare of the community at large.

C. Aesthetic Considerations

The "town character" and "land value" interests are often advanced in conjunction with a third: preservation of the natural beauty of the surroundings. Many state statutes authorizing localities to enact zoning laws are explicitly designed, among other purposes, "... to conserve the value of land and buildings; ... and to preserve and increase its [the municipality's] amenities." Although all zoning enactments can be said, in a sense, to promote the attractiveness of the community, aesthetics are considered here only when specifically advanced as a governmental interest. A majority of jurisdictions hold that aesthetics are insufficient to justify a zoning prohibition, but this conclusion is undergoing some change
in the direction of recognizing aesthetics as an important governmental "interest."28 However, it is still the generally accepted view that a municipality must show that the challenged zoning ordinance serves the public health, safety, or welfare, and may not rely solely on general aesthetics.27 Cases so holding have invalidated aesthetically motivated bans on everything from gas stations,28 front-yard fences,29 and billboards,30 to minimum lot sizes.31 The rationales of these decisions range from a belief that the police power must be based only upon necessities32 to a simplistic statement that aesthetic considerations may vary greatly with taste and culture, defy universal definition, and are therefore inappropriate objectives of police power regulation.33

The newer trend, which has been accepted primarily in Wisconsin and New York, argues that aesthetic considerations are not a mere luxury, but rather an integral part of the concept of general welfare,34 and are sufficient to uphold a restrictive zoning ordinance. A nation's beautiful places are among its natural resources.35 Between these two positions is the belief that aesthetic considerations are merely one factor to be weighed in the decision to allow a town to opt for a no-growth policy. Preserving the aesthetic appeal of a particular community benefits not only that community, but also the surrounding region.

D. Public Health and Municipal Services

The next group of "interests" relied on to validate "no-growth" legislation focuses upon the strain that population growth would put on a local government's ability to render services. These services are broken up into two main groups: those which relate to the public health and safety, such as water supply, sewers, garbage collection, police, and fire protection; and those pertaining to other municipal responsibilities like schools, transportation, and roads. Both groups include those functions which are commonly thought of as being inherently under local control.

In the majority of cases to date, if the basis behind zoning laws were examined at all, all the town need do to pass judicial scrutiny was allege that the particular exclusion was necessary to the public health, safety or welfare. In Josephs v. Town Board of Clarkstown,36 a typical case, the New York Supreme Court (Rockland County) held that the duty of a municipality to supply necessary facilities as its population expands will not bar it from its normal right to regulate and control population density to avoid unnecessary hardships to taxpayers and further the public welfare. Applying this
rationale, the court upheld as reasonable and valid an ordinance which required the town to find, before any building permit would be granted, that existing facilities were adequate to provide for the needs of present and future residents and that the health, safety and welfare of the town would not be adversely affected. Most courts have recognized that alleviating the tax burden and reducing harmful school congestion are permissible zoning purposes, if done reasonably and in furtherance of a comprehensive plan.37

While this position is followed in the great majority of jurisdictions, a new trend is developing especially with regard to zoning enactments explicitly prohibiting or severely limiting growth. It has been held that the mere allegation that services would be overburdened is insufficient to uphold the ordinance. The defendant municipality will be forced to present evidence, including expert witnesses, to support its claims.38 Some courts go even further. In Lakeland Bluff Inc. v. County of Will,39 while striking down an ordinance prohibiting trailer parks, the Illinois Appellate Court stated that “[the fact that] development would possibly cause an increase in local government costs for schools, roads, and other facilities . . . could not be a justifiable basis for rejecting an otherwise appropriate use of plaintiff’s property.”40 While the regulation of municipal expenditures is one of the major responsibilities of local governments, there must be some limit to a municipality’s power to take action justified only by its fiscal duties. Admittedly, if a town limits future development to commercial or industrial enterprises, there will be more tax money without the addition of any school children, and thus the fiscal position of the school board will be strengthened; but only at the cost of circumventing the “raison d’etre” of the schools.41 This reasoning is applicable to other services besides schools, reinforcing the viewpoint that fiscal zoning per se is an impermissible purpose for zoning enactments.42

The Pennsylvania Supreme Court has been in the forefront of the trend against exclusionary zoning ordinances.43 It has dealt with the claim of overburdening of municipal facilities by dismissing the town’s argument as makeweight. As the reasoning of its cases makes clear, a town with only one bus cannot justify its exclusionary zoning scheme by refusing to buy a second bus. Nor may a town point to a road network suitable only for the present population; new roads must be built to accommodate new people.44 Progress means sewers must be enlarged, new schools must be built, and facilities expanded.45 "Zoning provisions may not be used . . . to avoid the increased responsibilities and economic burdens which time and
natural growth invariably bring."

The judicial trend opposing the "fiscal zoning" rationale is based on the assumption that it is physically and economically possible for a town to expand its facilities. Where this is shown to be impossible, such "fiscal" justifications for a zoning ordinance may be entirely reasonable and proper, subject only to the qualification that a less-drastic alternative may be feasible. However, the vast majority of claims that growth would overburden municipal facilities occurs in situations where the defendant municipality is physically able to meet the demands of growth.

E. Temporary Moratorium

For reasons closely related to the theory that a no-growth provision is justified by the inability to expand municipal services, a town may initiate a temporary moratorium on all building to allow for emergency planning to prevent the destruction of the town by rapid, uncontrolled growth. A dramatic example of this "interest" occurred in the recent case of Steel Hill Development, Inc. v. Town of Sanbornton. Sanbornton has a permanent population of about 1000 persons occupying 330 homes. The plaintiff developer planned to build more than 500 seasonal family units arranged in clusters to be occupied almost exclusively as second homes. In response, the town zoning board dramatically enlarged the minimum lot size in the districts in which all of plaintiff's 510 acres were situated from approximately ¾ acre to three and six acre lots. In ruling on the plaintiff's challenge to this zoning amendment, the New Hampshire Federal District Court upheld both the three and the six acre requirements. Citing the town planning board's determination that the soil and topographical conditions posed severe problems for sewerage disposal, drainage and erosion, the three acre requirement was justified on public health grounds. The six acre requirement was found reasonably related to the promotion of the general welfare in light of the likely pollution of lakes, interference with smelt spawning, and traffic problems which would be caused by the proposed development.

On appeal, the First Circuit affirmed, holding that the District Court opinion could not be deemed clearly erroneous. In so ruling, the court recognized

... as within the general welfare, concerns relating to the construction and integration of hundreds of new homes which would have an irreversible effect on the area's ecological balance, destroy scenic values, de-
crease open space, significantly change the rural character of this small town, pose substantial burdens on the town for police, fire, sewer and road service.\textsuperscript{51}

The potentially broad impact of this holding was extremely qualified however. The court read the ordinance as an effort to provide for orderly and logical growth of the unspoiled areas of the town in order to combat fears of premature or unwise development. Acknowledging that the town may have been motivated by the desire to exclude outsiders altogether—which would have been impermissible—the court, nevertheless, gave the municipality the benefit of the doubt in order to let it plan for the future. Moreover, Sanbornton was clearly forewarned that it must quickly begin that planning in a concrete fashion since the court explicitly viewed the drastic increases in minimum lot size as only a temporary solution.\textsuperscript{52}

\textbf{F. Comprehensive Planning}

The language of a majority of state zoning enabling acts, from which municipalities derive their authority to enact and enforce zoning laws, is similar to that of § 3 of the Standard State Zoning Enabling Act: "zoning regulations shall be made in accordance with a comprehensive plan."\textsuperscript{53} Thus, as traditional municipal "interests" are either closely examined or held insufficient to support restrictive zoning laws, it is likely that zoning authorities will come more and more to depend upon their planning powers for justification. This should not imply, however, that all a city or town need do to defeat a challenge to a zoning ordinance is to come into court and utter the magic words, "comprehensive plan." While producing a plan does imply that the zoning board has acted pursuant to a valid purpose and in a responsible and reasonable manner, these implications can be challenged.

If challenged, it is reasonable to require the defendant municipality to prove that the comprehensive plan was based upon a detailed strategy drawn up by professional planners, and that the zoning ordinance in question is reasonably calculated to fulfill the plan's goals. In \textit{Albrecht Realty Co. v. Township of New Castle}, the New York Supreme Court (Westchester County) struck down the defendant township's amendment to its zoning law which severely limited the rate of building in the township. The court first noted that nothing in the New York Town Laws gives a town the power to regulate the rate of its growth.\textsuperscript{54} Furthermore, the law positively requires that zoning regulations be made "in accordance with a comprehensive plan... to facilitate the adequate provision of...
schools . . . and other public requirements." There was no suggestion in the case that the ordinance under attack had been drawn in accordance with any plan to facilitate the adequate provision of schools, much less any comprehensive plan. All of the evidence indicated that the ordinance was enacted solely to relieve a certain school district of the necessity to provide additional school facilities.

The plaintiff may also challenge a zoning ordinance as not in accordance with a comprehensive plan if he can show that the purpose of the plan is to unreasonably resist increased population and the concurrent increased demand for governmental services. A comprehensive plan may be used to allow a community to plan for, but not to deny, the future. In Oakwood at Madison, Inc. v. Township of Madison, the town's plan stressed orderly growth and preservation of open space in contrast to explosive growth on a patchwork basis. Plaintiffs were able to show, however, that three of the planning firm's specific recommendations for growth had not been adopted, while the exclusionary limitations were. While the facts of this case are not typical, the use of expert planning testimony and the careful scrutiny given to the plan are worth noting.

Courts should make every effort to preserve a comprehensive plan when it is developed in good faith and is reasonable as a whole with regard to the needs of the local and general communities. In examining it, all of the other "interests" discussed above should be taken into account. By putting the focus clearly on a master plan the court does not have to deal with a zoning ordinance in isolation but can make an interpretation, confident that it comprehends it in the context of the totality of the municipality's efforts. For this reason alone, shifting the "battle" to examination of a comprehensive plan is beneficial.

III. No-Growth Provisions and the Comprehensive Plan

The judicial trend toward emphasizing the master plan, and examining the "lesser interests" through it, does not change the central question that underlies all exclusionary zoning devices: to what degree can a community prohibit or severely limit population growth? Two recent cases, each arising in a densely populated state, have addressed this query.

A. Golden v. Planning Board of the Town of Ramapo

In Golden v. Planning Board of the Town of Ramapo, after the plaintiffs had submitted subdivision plans for their tract of land, which was zoned "rural residential", the town amended its ordi-
nances to require that any residential developer obtain a special permit from the town board prior to subdivision development. In order to eliminate premature subdivision and urban sprawl the amendments set out a plan tying issuance of the special permit to the availability of proposed municipal services such as sewers, parks, schools, roads, and fire protection. To be approved, a site was required to collect a specified number of development points computed upon a sliding scale of values. The point system was closely tied to the town's 18 year capital improvements plan under which, at the end of the period, all of the town's land would be available for development. Thus unless the developer was able to provide such services at his own expense, he would be forced to wait for a period of up to 18 years.

Plaintiffs brought suit in the New York Supreme Court (Rockland County) to invalidate these requirements on the grounds that they exceeded the authority delegated to the town by the state zoning enabling act, particularly New York Town Law §§ 261 and 263, and that the ordinance operated to destroy the value and marketability of their premises, thus constituting an unconstitutional "taking" of their property.

The trial court rejected these arguments and upheld the ordinance. Appeal was taken to the Supreme Court, Appellate Division, which reversed and granted summary judgment for the plaintiffs, holding that the primary purpose of the ordinance was to control or regulate population growth within the town and as such was not within the authorized objectives of New York's zoning enabling legislation. In the course of their opinions, the Appellate Division justices discussed many of the relevant legal, economic, and social considerations of the case and noted that other constitutional grounds were available. The New York Court of Appeals reversed by a 5-2 vote and upheld Ramapo's plan. Unfortunately, the majority in Golden regarded its holding as inevitable and patterned its opinion accordingly.

In making its first assumption, the Court of Appeals went a long way towards reaching its decision to uphold Ramapo's permit plan. Noting that plaintiff did not contest the town's allegation that present facilities were inadequate to service increasing demands, the majority concluded that "... we must assume, therefore, that the proposed amendments, both as to their nature and extent, reflect legitimate community needs and are not veiled efforts at exclusion" — thus distinguishing the Pennsylvania cases previously discussed in this article. This premise, which is by no means as axio-
matic as is implied, put the case in the posture of an emergency situation in which a beleaguered town must stop population growth or else face drastic consequences. Furthermore, the majority explicitly found that the defendant's purpose was "undisputably laudatory," and decided that the method chosen to further that purpose was reasonable. In the court's view, the effect of these integrated efforts in land-use planning and development was to provide for orderly growth through a developmental policy based upon the progressing availability of adequate services and facilities. Moreover, any resulting "restraint upon property use [was] to be of a temporary nature." Only after these beneficial purposes and effects are set out, does the court ask if the manner in which those ends are to be achieved is valid. The Appellate Division had held that the primary purpose of the town's plan was to regulate population growth, and was, therefore, not within the authorized objectives of the zoning enabling legislation. By contrast, a majority of the Court of Appeals held that although there was no specific authorization for the "sequential" and "timing" controls, they must be measured against the statutory scheme taken as a whole to further a viable policy of land use and planning. Looking at §§ 261 and 263 of the New York Town Law which set out the delegated powers and the permissible purposes of zoning, the majority found that the amendments were a valid exercise of proper zoning techniques. The court held that the Planning Board had the power to regulate and control the density of population—and therefore the demand for municipal services—for the enumerated purposes of preventing "the undue concentration of population" and providing for adequate "transportation, schools, water, and other public requirements." The power to "restrict and regulate" gives the town board the power to direct the growth of population and to determine the lines along which local development will proceed, so long as it acts in furtherance of the statutory purposes under the auspices of a comprehensive plan.

The Court cited the subdivision control statutes, New York Town Law §§ 276 and 277, as reflecting a legislative judgment that rural development shall be tied to the provision of essential facilities. These sections were read as complementing other land use restrictions which, when taken together, seek to implement a broader, comprehensive plan for community development. In response to plaintiff's argument that the effect of the timing controls amounted to an unauthorized blanket interdiction against subdivision, the court held that the essence of the defendant's action was to
condition subdivision rights— not deny them. The fact that it was the town itself, and not the developer (as usually is the case in subdivision control controversies), which was required to make the improvements, does not change the analysis. The argument advanced in the lower court that a town might delay improvements, and thus, by failing to adhere to its own schedule, place further impediments on the "patient owner" was summarily dismissed in a footnote. The town's good faith and its adherence to the planned program must be assumed; the owner will be able to come into court only if and when the town defaults on its assumed obligations.

Current zoning enabling legislation places the regulation of land use and development in the hands of local governments. Even the majority opinion in Golden conceded that community autonomy in this area is an antiquated notion which hinders regional and statewide efforts to tackle many serious contemporary problems and ignores issues of broader public interest. Some states have begun to act on this problem. While New York provides for regional planning, the resulting planning recommendations are not binding, and the power to zone remains totally in the hands of cities and towns. The Golden majority noted the effects upon the rights of long-term residents, the restrictions on free mobility, and the past history of municipalities' utilization of exclusionary zoning devices to avoid growth under the guise of planning, but found that these are outweighed by "accumulated evidence, scientific and social, pointing circumspectly at the hazards of undirected growth." Since a single municipality cannot solve these problems alone and the legislature has yet to act, the Golden court saw no alternative but to adhere to the plain statutory delegation as it now stands, and ultimately held that phased growth is well within the ambit of existing zoning enabling legislation. Several broad outlines for development at a regional level, which were put forth by various groups, were noted in the majority's opinion, but none of them have yet been enacted by the legislature. While regional planning may be a better solution, a town should not have to wait until the efforts of groups such as the State Office of Planning Coordination or the American Law Institute bear fruit. The Court concluded that land use planning is an area in which the judiciary should acknowledge its lack of expertise and exercise self-restraint. The zoning authority's decisions should be given the usual presumption of validity, and the burden of proving their invalidity falls upon the challenger.

The court next proceeded to examine plaintiff's claim that the town had gone further than providing reasonable restrictions on
development to advance the public welfare, and had, in effect, sought to avoid the responsibilities of natural growth. The court distinguished the line of Pennsylvania cases which held that " zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future." Noting that all zoning regulations by their very nature limit, to some extent, the forces of natural growth, the Golden court concluded that those regulations which are necessary to promote the ultimate good of the municipality and are reasonable must be sustained.

On a case-by-case basis, the line between permissible and impermissible restrictions ultimately depends upon a court's perception of the purpose of the restrictions and their effect on the community and the general public interest. Presuming Ramapo's good faith, the Golden majority found that the effect of the subdivision control restriction was to provide a "balanced, cohesive community dedicated to efficient utilization of land" in conformance with its comprehensive plan and "the long-range maximization of population density consistent with orderly growth." As the exclusion was temporary, and for "noble purposes", the existence of less restrictive alternatives did not persuade the court to substitute its judgment for that of the town in deciding how best to proceed "to obviate the blighted aftermath which the initial failure to provide needed facilities so often brings."

The dissent disagreed with almost every conclusion drawn in the majority opinion. In the area of land use, a municipality only has powers which are expressly delegated or necessarily implied. The local zoning boards are given the authority to control density and protect preferred uses. Nowhere are they given the right to impose a moratorium on land development which would postpone growth. In the dissent's view, the enabling acts should be strained to include a town's ingenious means of restricting growth if, and only if, clearly demanded by policy reasons.

According to the dissent, the legal, economic, political, and social considerations which formed the basis of the Appellate Division's opinion should not have been so lightly brushed over. The situation must be viewed in terms of the continuing conflict between the evils of uncontrolled urban sprawl on the one hand, and the attempts of suburban and rural communities to avoid their natural share of population growth through exclusionary zoning devices on the other. The right of potential residents to move freely is important. The impact of the challenged ordinance on the region as a whole should also be deemed crucial. Characterizing Ramapo's stance as "par-
the dissent noted that it would lead to economic and demographic disaster if it became the model for similarly situated, nearby communities. As the great majority of state legislatures have yet to provide for mandatory regional planning, the burden has fallen on the judicial system. The courts in other states had not shirked their duty and had “in every instance uncovered, . . . struck down . . . [exclusionary] efforts as unconstitutional or as invalid under enabling acts much like those in this state.”

According to the dissent, Ramapo’s action was in opposition to nascent efforts to provide regional planning and end exclusively local control of land use.

The dissent does not deny that there is an urgent need to control the tempo and sequence of land development, and they remarked that various techniques are available to help effectuate that goal. For example, the use of minimum lot requirements, while fraught with danger due to their exclusionary nature, may be done validly.

Similarly, the governmental purchase of “development rights” or a time-limited easement which compensates the landowner (but which still ignores the interests of potential settlers) are possibilities. Another possibility would be the adoption of regional “holding zones” in which development is delayed, subject to agency regulation, for a period limited to a short, reasonably necessary time span. Some methods, however, were condemned as unconstitutional because of their side-effects. For example, a plan to control growth by placing a moratorium on the issuance of building permits for an unspecified period is not valid.

Echoing the Pennsylvania cases, the dissent pointed out that avoiding the responsibilities of the future cannot be accomplished under the guise of planning.

While agreeing that the legislature is best suited to end “snob zoning” and provide for regional planning, the dissenting opinion strongly urges that the Ramapors of the state be required to solve their problems as best they can without infringing upon constitutional rights and without an enlargement of existing zoning and subdivision law. Ramapo’s wish to have public services precede development, while landatory, is unrealistic. It is unlike the way in which most communities in this nation were built. Ramapo cannot be allowed to decide by itself when and how to allow for population growth, when its decision may adversely affect the whole area.

B. Construction Industry Association of Sonoma County v. City of Petaluma

Another manner of approaching the problem is provided in
Construction Industry Association of Sonoma County v. City of Petaluma, a recent decision of the U.S. District Court for the Northern District of California. In striking down as unconstitutional a series of city ordinances which limited growth, the court relied primarily upon the fundamental right to travel. The City of Petaluma is within commuting distance of San Francisco. Although it is part of the Bay Area Metropolitan Region, until recently, Petaluma was unarguably rural. In fact, it was known for its dairy and poultry resources. The area's rapid expansion, however, did not pass over Petaluma. Although in 1962, growth was regarded as a positive development, the city officials began to study growth patterns. The number of housing units completed each year in the city rose from 270 in 1964 to 891 in 1971, and there were strong indications at that time that the total would soon pass the 1000 unit figure. Estimates concluded that by 1985 the population would equal 77,000 and Petaluma would have lost its rural character. Citing growing citizen concern, city officials began to seriously question their earlier judgments about the desirability of growth and openly began to formulate plans to severely limit that trend.

With the aid of professional planners, an official development policy was adopted by the city council in June, 1971. The preamble of the "Petaluma Plan" unequivocally asserted: "In order to protect its small town character and surrounding open spaces, it shall be the policy of the City to control its future rate and distribution of growth ..." Two of the major methods utilized to carry out the desired results were ordinances limiting new housing units to 500 per year (at least through 1977) and the creation of an "urban extension line" (i.e., an ultimate boundary to mark the outer limits of the city's expansion for 20 or more years). In addition, the city purposefully limited the availability of certain municipal facilities, such as sewerage and water supply. Through these methods, Petaluma hoped that it would be able to stop growth at a proposed population of 55,000 persons.

In its opinion, the district court presented a fairly detailed synopsis of the probable effects of this growth limitation program, especially those effects that would be likely to occur if such a policy were to spread to the remaining municipalities of the San Francisco metropolitan region. Accepting the premise that the region is generally self-contained and has a unitary housing market, it follows that persons excluded from one suburb will seek housing in other suburbs in the area. The suburbs which are thereby forced to absorb a larger share of the population growth might well be inclined to retaliate.
by adopting exclusionary devices of their own. This proliferation would have several negative results.

Limiting the housing supply would tend to keep people in the center cities from moving out to the suburbs. It would also increase the cost of private housing and change the rent structure of tenant housing. The relative decrease in supply would result in substandard and obsolete housing remaining on the market, which should, and otherwise most likely would be replaced in a balanced market. Thus the overall quality of the area's housing would decline. In addition the mobility of current and prospective residents would be inhibited. These consequences were, in the court's view, particularly severe in the case of Petaluma since the city is a "growth center" for the region—an area having unused capacity which can be tapped or the ability to augment capacity to serve new residents. According to the court, it would not be feasible to force housing out of growth centers into either the center city or rural areas.

The opinion then turns from these factual findings to its principal conclusion of law. A plan which leads to the exclusion of a substantial number of people who would otherwise immigrate into Petaluma, is in violation of the fundamental right to travel guaranteed by the Constitution. Therefore Petaluma can defend its growth limitations if and only if they further a compelling state interest and are the least restrictive of all alternative solutions.

The first "interest" offered by Petaluma—the limited sewerage facilities available—was held invalid, since the present facilities were deemed fully capable of meeting the demands of an expanding population. At trial, the town introduced evidence to prove that the growth curbs were imposed because of the insufficiency of the city's water and sewage treatment facilities and not to prevent immigration. In the Findings of Fact, these assertions of alleged inadequacies were dismissed as excuses intended to justify the Petaluma Plan after its adoption. Furthermore, even if the facilities were insufficient, a less restrictive alternative would be to increase their capacity. The fact that this might be expensive or might necessitate voter approval was not determinative of the issue; a municipality need not choose this course, but can still be precluded from adopting another.

Next, the city cited the limited water supply as a justification for its plan. This "interest" was also held invalid. The court found that the city had determined how much water would be needed to fulfill the demands of the "artificially limited" population, and then contracted for only that amount. It seems obvious that a municipality
can not pass the "compelling interest" test by purposefully limiting its supply of a resource and then justifying its exclusionary zoning regulation by the unavailability of that resource. Again, less drastic alternative means could be utilized.

The city's final argument was that a municipality has "an inherent right to 'control its own rate of growth' and that its citizens' desires to protect their 'small town character' are sufficiently compelling . . ."96 Thus the ultimate issue centers around a municipality's right to accede to its residents' desires and limit growth to a rate well below its natural expansion rate. The court acknowledged, as the city pointed out, that virtually all zoning ordinances limit the manner in which people live and move about in some way. Furthermore, zoning authorities have traditionally been given wide latitude and have rarely been overturned by the judiciary.97 But these arguments do not signal an end to judicial inquiry—especially where fundamental rights are at issue.

The U.S. Supreme Court, in Edwards v. California,98 expressly denied to a state the right to isolate itself from present or potential problems by means of immigration restrictions. The logic of that case seems equally applicable to cities and towns within a state, especially if the retaliatory reaction of surrounding towns—found likely to occur by the court—is expanded in concentric waves to include the whole state. A state cannot authorize its subdivisions to do that which it may not do itself. While the decision prohibiting Petaluma from excluding potential residents is explicitly based on the individual's right to travel, much of the reasoning stems from the inequities and problems which will occur if one town is allowed to shift its share of the burden of population growth onto neighboring communities. The court expressly adopts the reasoning and language employed in the series of Pennsylvania cases discussed previously in this article.99

After finding that the Petaluma Plan is unsupported by any compelling state interests and is therefore unconstitutional, the court emphasized that the decision is restricted to invalidating legislation which is aimed at preventing immigration and growth. The court concluded by characterizing Petaluma's efforts as

... anti-planning—the refusal of a city to come to grips with the fact that it has joined a metropolitan complex and is no longer the sleepy small town it once was. In a world in which nothing is as unchanging as change, Petaluma wants to stay the same. The means to that end is to draw up the bridge over the moat and turn people away . . . The prospective resident turned away at Petaluma does not disappear into the
hinterland, but presents himself in some other suburb of the same me­
troplex . . . By this means, Petaluma legislates its problems into prob­lems for Napa, Vallejo, or Walnut Creek.100

The District Court opinion in Construction Industry explicitly declared that "the issue here has not been whether or not local government may engage in any number of traditional zoning efforts . . . such as providing for a certain density of population in a given neighborhood, or standards for the type and quality of construction, etc. The only issue presented here, for the first time, was whether or not a municipality may claim the specific right to keep others away."101 The holding was based on two major considerations: 1) a town may not maintain its "small town character" by adopting a policy which will deprive people of their right to travel, their mobil­ity, and their right to decent housing; and 2) no town has the right to shift the burden of providing housing onto other municipalities in a metropolitan region because it wishes to prohibit or severely limit growth.

The Ninth Circuit Court of Appeals' decision102 reversing the lower court, largely ignored these considerations, and treated the case primarily as a standing problem. While voicing agreement that one local entity's unilateral land use decisions may affect the needs and resources of a much larger region, the court refused to recognize the right of builders and landowners of the town to challenge the Petaluma Plan on this ground and directed plaintiffs to seek a legis­lative solution. The town's right to act in its own interest under the broadly delegated zoning power was deemed to be beyond question, and the effect of the Plan on surrounding towns or the municipal housing market was considered irrelevant.103 Potential residents who will be barred may be able to bring a suit based on the right to travel,104 but the landowners and builders lack standing to allege a violation of that right.105

With the dismissal of the right to travel attack, the plaintiffs were left with the difficult task of proving that the proposed Plan was arbitrary or unreasonable under the Due Process Clause of the Four­teenth Amendment. To succeed, plaintiffs had to convince the court to utilize a geographically broad interpretation of the "public wel­fare." The Court of Appeals refused to consider the general welfare of surrounding towns or the region as a whole. The police power, upon which zoning regulations are based, asserted for the health, safety, and welfare of the public, reaches beyond "the regulation of noxious activities or dangerous structures," but only within the municipality's limits.106
Under these premises, the plaintiff's challenge was doomed. While noting that the probable effect of the Plan would be to exclude many would-be residents, the court relied on the oft-used argument that "practically all zoning restrictions have as a purpose and effect the exclusion of some activity or type of structure or a certain density of inhabitants." The court then examined whether the Plan bore any rational relationship to a legitimate governmental interest. Since preservation of its small town character and rural attributes were deemed to be legitimate state interests which were obviously furthered by the zoning regulation, the Petaluma Plan was upheld. The court stated that it was not within its jurisdiction to ask if the Plan was necessary to the avowed ends; it will not question the wisdom of the Plan. A Due Process analysis does not involve the weighing of the competing interests — it merely requires a threshold determination of the governmental right to take the action in question. The Court of Appeals, however, went beyond the traditional Due Process test to look at the degree of exclusion brought about by the Plan and then to judge its reasonableness. Its conclusions in these areas arguably are relevant to the no-growth issue.

In this regard, the court views two recent cases, Village of Belle Terre v. Boraas and Ybarra v. City of Los Altos Hills (hereinafter Boraas and Ybarra), as being dispositive. In the former, the United States Supreme Court rejected challenges to an ordinance restricting land use to one-family dwellings, declaring that the prohibition of multi-family dwellings was reasonable and within the scope of protecting the public welfare. Following Boraas, the Ninth Circuit upheld Los Altos Hills' one acre minimum lot requirement against an Equal Protection attack despite the obvious effect it had of restricting the access of lower classes to the town. The preservation of the town's rural environment was accepted as a sufficient interest to which the regulation was found to bear a rational relationship.

After discussing the exclusions permitted in the above two cases, the court found that the Petaluma Plan was markedly less restrictive and therefore must be considered not to be arbitrary or unreasonable. The Court stressed that the Plan allowed for some growth —albeit well below projected free market growth—and also included some provision for low and middle class housing so that no particular minority or socio-economic class would be barred. The Plan therefore survived the plaintiff's challenge.

In addition to taking only a superficial look at the relationship of
the Plan to the defendant's governmental interests, dismissing the negative ramifications which the Plan will have on the metropolitan housing situation, and ignoring the exclusion of potential residents from Petaluma, the Court of Appeals overlooked crucial distinctions between Construction Industry on the one hand, Boraas and Ybarra on the other. First, the plaintiffs and the type of challenge they were asserting differed. The latter cases dealt with municipalities' attempts to solve a specific problem which lead much more indirectly, if at all, to a no-growth situation, whereas Petaluma's explicit purpose was to bar people. The zoning regulations of Belle Terre and Los Altos Hills, while they may arguably have had the effect of limiting population growth, were not promulgated for that purpose. Belle Terre is a tiny village with total land area of approximately one square mile. In actuality, the ordinance under attack there was aimed at, and challenged for, keeping out a certain type of person. Belle Terre was not worried about new construction and the attendant influx of newcomers, and the case did not concern itself with no-growth issues. Plaintiffs in Ybarra were Mexican-Americans who challenged a one acre minimum lot requirement under the Equal Protection Clause. Unable to show racial discrimination, plaintiffs were forced to allege an economic classification, and were doomed to failure. Also, one acre is not an extremely large lot size in relation to those found in contemporary American suburban communities. At least in that light, the town's ordinance was not unreasonable or arbitrary. Moreover, the availability of low-cost housing in the neighboring communities of Santa Clara County was deemed relevant to the final decision. Neither of these two suits challenged ordinances for attempting to keep people out in general but rather for attempting to exclude certain people. The Petaluma Plan, in both purpose and effect, was markedly different from the Ybarra and Los Altos Hills plans, if for no other reason than the different place which each municipality holds in its respective region.

Nowhere did the Ninth Circuit's opinion address itself to the problems of no growth. The decision of the New York Court of Appeals in Golden came to the same conclusion, but it addressed itself to Ramapo's good faith attempt to achieve planned growth at a gradual pace, with particular attention to the town's specific problems, such as overburdening of municipal facilities and resources. In reversing Construction Industry, the state of Petaluma's facilities and resources, which were major factors in the lower Court's decision, were completely ignored. The two opinions — the District Court's and the Ninth Circuit's — did not seem to
analyze the same aspect of the municipal plan.\textsuperscript{115} The former deals with the Plan as an explicit method of keeping people out, while the latter appears to analyze the Plan as it would any traditional zoning device. As this article is concerned with the judicial response to a town’s attempt to severely limit or prohibit its natural population expansion, the District Court’s opinion will be considered in the remainder of the article.

C. Reconciliation and Comparison

While the \textit{Golden} and \textit{Construction Industry}\textsuperscript{116} cases reach directly opposite conclusions regarding the acceptability of restrictive zoning enactments, they are not necessarily incompatible. The two courts ask different questions and those questions go a long way toward predetermining the answers that are reached. Also, there are differences between the respective findings of fact. A majority of the \textit{Golden} court found that Ramapo’s present facilities were inadequate to accommodate more residents and that the proposed plan was a good faith attempt to cure the inadequacy. It is not clear what that court would have done if faced with findings of fact similar to those in \textit{Construction Industry}, but it seems that the decision would have been a much harder one to reach. Similarly, it is difficult to conclude that the District Court in \textit{Construction Industry}, if presented with findings of fact like those in \textit{Golden}, would have found a sufficiently compelling governmental interest to save the Petaluma Plan.

A major factor in \textit{Construction Industry} was that Petaluma was guilty of “anti-planning”—the use of planning to limit services and exclude people rather than to accommodate them. While that decision might well have remained the same without this finding of bad faith, the New York opinion seems dependent to a large extent upon the presumption of Ramapo’s good faith. The difficult determination of whether a municipality’s plan was drawn to help it prepare for the future or whether it is an example of “anti-planning” must be addressed on a case-by-case basis by the court. However, such fact determinations are traditionally within the competence of the judiciary. Relevant criteria that may be utilized include the presence of a professional planner, evidence that his advice was followed (selective choice of his suggestions may not pass muster), evidence that regional side-effects were considered, an effort to get input from neighboring communities and statewide agencies, the absence of evidence showing bad faith, and perhaps inferences or presumptions to assist the finder of fact.
Another important distinction is that Ramapo's plan carefully avoided the explicit mention of a specific number of newcomers or a set number of new buildings which would be allowed each year. Instead, it carefully tied future development to the availability of future services. On the other hand, Petaluma began its plan with a specified maximum population and a specified number of housing units per year. Future services were then limited to justify these development figures. While the net results of the two plans may be quite similar, the difference in approach is not merely one of form. Growth can continue in Ramapo, if a private developer is willing to provide services. Even if private development of municipal services proves infeasible in Ramapo, however, there may be other means of accelerating the growth of facilities and thus of population. Finally, if Ramapo's plan is utilized to exclude people, then the court can always step back in.  

Ultimately, however, the two courts are dealing with very similar issues. The differences between the cases seem to be less in the respective fact situations than in the results finally reached by each court. Distinguishing features appear to be relatively minor if the cases are viewed from a broad perspective. In each, the town government, presumably following their citizen's desires, initiated a plan to severely limit future growth and used (or attempted to use) the finiteness of the town's facilities and resources to justify the plan before the court.

IV. THE JUDICIAL RESPONSE TO NO-GROWTH PLANS

The prevention of urban sprawl and the preservation of open spaces and natural resources are best dealt with at a regional level. Political realities are such, however, that state legislatures will not be likely to adopt regional planning programs which would remove from the municipalities the power to control decisions over their own futures. Thus cities and towns have been left to their own devices. It is natural that municipal authorities will take protective actions and the chances are great that these actions will precipitate court challenges. It appears certain that the second half of the 1970's will see much legal confrontation over local governments' right to limit or prohibit population growth.

As the wide divergence in result between Construction Industry and Golden shows, it is by no means clear how the courts will ultimately decide the issue. The U.S. Supreme Court dismissed the appeal in Golden citing the lack of a substantial federal question. Construction Industry, one of the first major decisions by a federal
court to deny a city the power to restrict growth, before being reversed by the Ninth Circuit Court of Appeals, is likely to be submitted to the Supreme Court. As the issue is one of national significance that will almost undoubtedly repeatedly arise in the future, it is possible that the Supreme Court will decide to hear it.

In *Village of Euclid v. Ambler Realty Co.*, the United States Supreme Court set forth the proposition that deference should be given to local judgments concerning proper land-use allocation. Until recently this rule was followed almost without exception in all jurisdictions. In fact, the Supreme Court has refused to even consider almost all non-racial zoning cases since 1926. But even strict adherence to *Euclid* does not preclude judicial review of no-growth provisions. In *Euclid* the Court expressly did not “exclude the possibility of cases where the general public interest [in overturning the ordinance] would so far outweigh the interest of the municipality [in retaining it], that the municipality would not be allowed to stand in the way.”

Perhaps in conformity to that sentiment, the Supreme Court granted certiorari in a zoning case last term. Justice Douglas, writing for the majority in *Village of Belle Terre v. Boraas*, upheld a village by-law which restricted occupancy of residences in the community to no more than two unrelated persons. His opinion sweeps broadly in holding that a town may “lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make this area a sanctuary for people.”

Because of the paucity of Supreme Court pronouncements concerning zoning in recent years, as soon as *Boraas* was handed down, commentators attempted to discover its ramifications and scope. While voicing dismay at the decision, opponents of exclusionary zoning claim that it is not particularly significant to the no-growth dilemma. *Boraas* is distinguishable on two major grounds. First the ordinance under attack in that case did not attempt to limit or even to slow down growth. And more importantly, the Court specifically found that there was no infringement upon fundamental personal rights nor upon the welfare of the general public. Thus, the Court employed the more lenient “rational relationship” test in upholding the ordinance in the face of an Equal Protection challenge. Therefore, it remains unclear what the Court will do when faced with a zoning ordinance which is not deemed so benign.

While Justice Douglas’s opinion, however, fails to grapple with the difficult underlying questions of no-growth enactments, the thrust of the decision seems clear: local land-use and zoning deci-
Exclusionary zoning has been defined as "the complex of zoning practices which result in denying suburban housing and land markets to low and moderate income families." No-growth limitations are just one form of exclusionary zoning practice. Except for the right to travel, no-growth provisions do not seem to infringe upon constitutional rights any more than other exclusionary zoning devices. Thus, if a challenge to no-growth provisions does not prevail on that ground, it is unlikely that it will prevail at all, unless the Supreme Court dramatically departs from its prior line of decisions.

While several years ago there may have been reason to believe that the right to travel could be utilized to strike down no-growth provisions, that is no longer true today. With the decision in Shapiro v. Thompson, invalidating a one year residency requirement for welfare recipients, the Supreme Court reached the high-water mark of that right's applicability. Two years later, in James v. Valtierra, a challenge to a California constitutional amendment which permitted communities to exclude low-income housing projects was rebuffed. While the right to travel was not mentioned in the opinion, it would seem to have been highly relevant and its non-use worthy of note. It should also be noted that the racial discrimination which many feel underlay the James case would have made it much easier for the Court to find for the plaintiff there, than in a non-racial no-growth case. The right to travel is not a new weapon in the constitutional arsenal. There seems to be no indication, however, that the Burger Court will use it—or any other device—to attack zoning ordinances, unless perhaps those ordinances are particularly flagrant. Thus future challenges to no-growth provisions will most likely be contested in the state courts.

Judicial hesitancy to take the forefront in an area which seems to be better suited to legislative decision-making is understandable. But due to the self-imposed shackling of most state legislatures, the courts will often find themselves in a situation where they are the only available arbiters. No-growth provisions potentially have a great impact on landowners, would-be residents, and neighboring communities. But the problems which lead to the enactment of no-
growth restrictions often pose very real and crucial difficulties for communities which will only be exacerbated by delay. As population growth and expansion away from the center cities continues, it will become even more important that the courts not shirk this responsibility.

Both the nature of the controversy and the balancing of competing interests that its solution demands are well within the judiciary’s zone of competence. To be as effective as possible, the courts should articulate standards to avoid having to deal piece-meal with each case as it arises. Furthermore, the development of an approach to confront these issues would provide guidance to local zoning authorities.\(^\text{140}\) In addition to the constitutional rights of landowners and potential residents and the needs of municipalities to protect themselves from the multitude of problems brought by growth, there is another consideration which should be added to the balance. Many commentators feel that sooner or later some sort of regional planning will be adopted in most states. Until then, however, steps should be taken to prevent cities and towns from enacting ordinances which will hinder the eventual adoption of a more rational scheme.\(^\text{141}\)

At least one state, while not yet ready to enact compulsory regional planning, has recognized the importance of being able to veto some restrictive local zoning enactments. In this respect, Massachusetts’ anti-snob zoning law\(^\text{142}\) is a compromise measure. It sets up a state-wide Board of Zoning Appeals to hear challenges to municipal zoning enactments which have negative effects on the general welfare of the region or hinder further regional planning decisions. In addition to overseeing restrictive zoning laws, such a board could be empowered to veto a local zoning decision which allows construction that is deemed to have a detrimental impact on the regional environment.

Whether the competing interests are weighed by an administrative agency or by the courts, the results should be the same. The important thing is that the standards be articulated. On the other hand, one of the positive attributes of judicial intervention is the potential for flexibility, and therefore strict guidelines should be avoided. But it is possible to note several of the factors to be weighed in assessing the validity of a no-growth plan without tying the courts’ hands or prejudging the result.\(^\text{143}\)

Any balancing test must look at the applicable legislative enactments, the problems they attempt to confront, their effectiveness in terms of solving those problems, alternative solutions, as well as the
individual rights that are infringed—the degree of infringement and the fundamentality of those rights. One central concern should be the general welfare of the overall community. If local interests conflict with it, the locality must yield. Therefore the first factor to be put into the balance is the effect of the plan on the region (weighed both by severity and likelihood). Demographic studies to show the current density and estimated future population figures are essential at both the municipal and regional levels. Also, the reason for the increased immigration may be relevant. If the newcomers are building second homes (as in Sanbornton) the municipality should be granted greater leeway. The problems which led to the municipality's adoption of the no-growth plan must be carefully examined and analyzed. The imminence, severity, and long-term effects of these problems may also be crucial factors. The quality and quantity of any resource or service shortage must be scrutinized. While a court may not be able to order a town to build or enlarge a facility or sign a contract, it can forbid the town from dealing with its problems by limiting population. The practicality of the plan and the alternatives must be examined to see how well they solve the problem. Also relevant is the impact of the plan on individuals including residents, landowners, and potential residents. One suggestion for accomplishing these goals might be for the court to request each party to draw up a regional "impact statement" which would include all relevant data regarding the plan and its side-effects.

CONCLUSION

This article has attempted to look at one form of municipal action, which is likely to become more popular in the near future, and provide a framework for judging it in relation to the public welfare. While Ramapo-type plans, tying development to the availability of services, should not be permitted to serve as a clever means of bypassing real judicial scrutiny, the expanding pressures of population growth must be controlled and the nation's environment and natural resources protected to the greatest extent possible.

Presently exclusionary zoning devices are regarded basically as environmentally oriented. But insofar as they further a piece-meal approach to land use decision making and the allocation of resources, they may, in the long run, hinder effective efforts to bring about environmental protection. Cities and towns cannot ultimately solve their problems by pushing them off upon neighboring communities.
Numerous writers in this area have cited the necessity for legislative action to enable cities and towns to plan for the future in a rational, coordinated and effective manner. To be effective, regional planning boards must be able to exercise real power. But it may be many years before states are ready and able to accept that premise and act upon it. Judicial action to control the proliferation of no-growth programs in the interim may be of extreme importance, because the taking of definitive steps by the legislature may well be postponed until a crisis situation is already underway.

Footnotes

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1 "No-growth" provisions refer to an enactment or set of enactments promulgated by a municipality to prohibit population expansion above a specific numerical figure by controlling either the rate or timing of growth or both. The plans adopted by Ramapo, Petaluma, Sanbornton, and other towns discussed herein vary somewhat in technique, but all restrict their community's "natural" expansion rates. In addition to zoning ordinances, no-growth programs may take other forms such as limitation on the availability of building permits. A distinction is to be drawn between no-growth provisions and more traditional exclusionary devices such as large lot zoning, restrictions against multiple dwellings, and floor space, frontage, or density requirements. While these methods may be less direct than no-growth provisions, their practical effects may be as all encompassing as the latter technique. For example, requiring a 4 acre lot in a small town of 20,000 acres can keep the growth level down to the same extent as a prohibition of building more than 5000 houses without special permit. Here the difference would be little more than semantical, but usually a no-growth plan does substantially differ, both in tone and result, from the "traditional" devices.


3 This was true even in the heyday of substantive Due Process when the Supreme Court was much more willing to substitute its wisdom for that of a legislative body. The last time the Court found for a plaintiff in a zoning challenge was in Nectow v. City of Cambridge, 277 U.S. 183 (1928).

4 While no-growth provisions may be challenged by landowners who are prohibited from subdividing their tracts, both excluded would-be immigrants and the residents of surrounding communities
lack the property interest necessary to a Due Process challenge. Thus, unless a suit alleging some deprivation of liberty could be fashioned—which is unlikely—the use of the Due Process clause has inherent disadvantages for no-growth provisions.


Warth v. Seldin, 95 S.Ct. 2196 (1975), denied several plaintiffs standing to challenge a zoning ordinance which effectively prohibited the construction of low-income housing within a municipality. Landowners, potential builders, and minority-group potential residents were found to lack the requisite injury in fact to support an Equal Protection attack. The (5-4) decision treated each plaintiff separately. The potential residents failed to allege facts to support an actionable causal relationship between the zoning practices and their alleged injury. To obtain standing, a plaintiff must allege specific, concrete facts demonstrating that such practices harm him or her individually and that he or she would personally benefit in a tangible way from judicial intervention, i.e., if it were not for the zoning restrictions there is a substantial probability that plaintiff would have been able to reside in the town. The Court overlooked that the past history of barring projects under the zoning practices in question was primarily responsible for the lack of a current concrete building proposal, and distinguished prior cases in which standing had been found to exist on the ground that they challenged zoning restrictions as applied to particular projects for which plaintiffs would have been eligible. A specific plan to focus on the particular municipality may be enough to give a builder-plaintiff standing if administrative remedies have been first exhausted. While the opinion does not close the door on all suits by potential residents, it does indicate the tenor of the Court's view and places definite stumbling blocks in plaintiff's path.


At this time, the U.S. Supreme Court has recognized the following "suspect classifications": race - Loving v. Virginia, 388 U.S. 1, 10 (1967); national origin - Korematsu v. U.S., 323 U.S. 214 (1944); and perhaps, legitimacy - Levy v. Louisiana, 391 U.S. 68 (1968).
Also, four of the nine justices would have added sex to the list in Frontiero v. Richardson, 411 U.S. 677 (1973).


11 See Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970). Therein the 9th Circuit declared that the city could not institute land-use planning to improve the quality of life of only some of its citizens. But note that Union City was decided before the above-mentioned Supreme Court cases which seem to drastically undermine it. See Note, supra note 5, at 790-92.

12 314 U.S. 160 (1941).

13 See Cole v. Housing Authority of the City of Newport, 435 F.2d 807 (1st Cir. 1970) and King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971) cert. denied, 404 U.S. 863 (local residency requirements for admission into a federally assisted housing project declared unconstitutional).


15.1 But see, Warth v. Seldin, 95 S. Ct. 2196 (1975).


18 See, e.g., Cadoux v. Planning and Zoning Commission of the Town of Weston, 162 Conn. 425, 294 A.2d 583 (1972), cert. denied, 408 U.S. 924 (1972); Blank v. Town of Lake Clarke Shores, 161 So.2d 683 (Fla. Dist. Ct. App. 1964); McDermott v. Village of Calverton
Park, 454 S.W.2d 577 (Mo. 1970); and Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955).


20 Often these are explicitly linked. See Connor v. Township of Chanhassen, 249 Minn. 205, 211, 81 N.W.2d 789, 795 (1959).


22 Nicholson v. Connecticut Half-way House, Inc., 153 Conn. 507, 218 A.2d 383 (1966). The above case, a nuisance case, presents a situation where an individual is denied compensation or an injunction in his efforts to resist the placing of a resource deemed to be important to the welfare of his town. An analogous situation exists where a town is prohibited from taking action which may increase (or at least resist diminution of) the property values of its residents’ property because of considerations going to the welfare of the surrounding region.


24 MASS. GEN. LAWS ch. 40A, § 3 (1975).


26 See generally Annot., 21 A.L.R.3d 1222 (1968) and cases cited therein.


28 Standard Oil Co. v. City of Bowling Green, 244 Ky. 362, 50 S.W.2d 960 (1932).


30 Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956).


See, e.g., Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971) where a restriction on the development of a particularly charming area of a city was permitted because of aesthetic and environmental concerns. See also County Commissioners of Queen Anne’s County v. Miles, 246 Md. 355, 228 A.2d 450 (1967) which upheld a 5 acre minimum lot requirement pursuant to a long range plan to preserve an unusually beautiful county estate section along a river.


See, e.g., Gruber v. Mayor and Township Committee of Raritan Tp., 39 N.J. 1, 186 A.2d 489 (1962) where an ordinance which rezoned to encourage new industry in order to alleviate a heavy tax burden was upheld.

Cf., e.g., Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); and Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970).


Id. at 278, 252 N.E.2d at 770.


The following cases are representative of the Pennsylvania line:

(a) Bilbar Construction Co. v. Easttown Township Bd. of Adjustment, 339 Pa. 62, 141 A.2d 851 (1958) upholding a one acre minimum lot requirement.

(b) National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) striking down a 4 acre minimum lot requirement as clearly unreasonable and explicitly rejecting the aesthetic argument.

(c) Kit-Mar Builders, Inc. v. Township of Concord, 439 Pa. 466, 268 A.2d 765, 48 A.L.R.3d 1190 (1970), striking down 2 and 3 acre minimum lot requirements enacted to avoid potential sewerage problem.


Where a municipality is a logical place for development to take place, it may not, via zoning, refuse to bear its rightful part of the burden of population growth.


Id. at 474, 268 A.2d at 768. In addition to basing its conclusion
on the due process rights of the landowner whose property had been adversely zoned, the Pennsylvania Supreme Court explicitly acknowledged "the rights of other people desirous of moving into the area in search of a comfortable place to live" and cites the article by Sager, note 5 supra.


47 This interest differs subtly from a moratorium to allow a town­ship to "catch its breath." See Oakwood at Madison, Inc. v. Town­ship of Madison, 117 N.J. Super, 11, 14, 283 A.2d 353, 355 (1971).

48 469 F.2d 956 (1st Cir. 1972).


50 Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 960 (1st Cir. 1972).

51 Id. at 961.

52 Id. at 962. "... [I]n effect the town has bought time for its citizens not unlike the time taken in referendum by the city of Boulder, Colorado to restrict growth on an emergency basis until an adequate study can be made of future needs. 60 Georgetown Law Journal 1363 (1972)."

53 Several different definitions exist for the term "comprehensive plan." For the purpose of this article, it will refer to a detailed scheme devised by professional planners to control and direct the use and development of a municipality's property. Other definitions found in 40 A.L.R.3d 372 include: a) "an integrated product of a rational process revealing a physical partition of the municipality, reasonably designed to produce a homogeneous pattern of location and uniform development of variant land uses." Ward v. Mongom­ery Tp., 28 N.J. 529, 147 A.2d 248 (1959); b) a general plan to control and direct the use and development of property in a munici­pality into districts according to the present and potential uses of the property. Bishop v. Bd. of Zoning Appeals, 133 Conn. 614, 53 A.2d 659 (1947); c) a scheme or formula of zoning that reasonably relates the regulation and restriction of land uses and the establish­ment of land uses therefor to the health, safety, and welfare of the public. Hadley v. Harold Realty Co., 97 R.I. 403, 198 A.2d 149, rearg. denied 97 R.I. 413, 199 A.2d 121 (1964). See generally Annot., 40 A.L.R.3d 372 (1971). See also Haar, "In Accordance with a Comprehensive Plan," 68 HARV. L. REV. 1154 (1955) and Note, Comprehensive Land Use Plans and the Consistency Requirement, 2 FLA. ST. U. L. REV. 765 (1974).
These typical facts included population growth from 7366 in 1950 to 48,715 in 1970 while a professional planner testified that the township potentially could hold 200,000 people. Madison wished to restrict its growth to less than 200 two-bedroom units per year up to a total of 700 new units and wanted to keep 30% of its land vacant.


Golden v. Planning Bd. of Ramapo, 37 App. Div. 2d 236, 324 N.Y.S.2d 178 (1971) and a companion case, Rockland County Builders Assn. v. Town Bd. of Ramapo, 37 App. Div. 2d 738, 324 N.Y.S.2d 190 (1971) were combined by the Court of Appeals.

Concurring opinion of Appellate Division Justice Hopkins, 37 App. Div. 2d at 244-46, 324 N.Y.S.2d at 187-89 noted in the dissenting opinion of the Court of Appeals, 30 N.Y.2d at 391, 334 N.Y.S.2d at 163, 285 N.E.2d at 309.


See note 43 supra.


Id. at 367, 334 N.Y.S.2d at 143, 285 N.E.2d at 295.


Id. at 374, 334 N.Y.S.2d at 148, 285 N.E.2d at 299.


75 Id. at 371-72, n.6, 334 N.Y.S.2d at 146-47, 285 N.E.2d at 297.

76 Id. at 376, 334 N.Y.S.2d at 150, 285 N.E.2d at 300.


79 The dissent distinguishes Golden from the Pennsylvania cases which are discussed at note 43 supra.


83 See Albrecht Realty Co. v. Township of New Castle, 8 Misc.2d 255, 167 N.Y.S.2d 843 (1957).

84 See note 43 supra.

85 The dissent's historical argument has obvious weaknesses. Merely because mistakes were made in the past is no justification for repeating them in the future. In fact, the very purpose of historical analysis is to allow people to learn from past mistakes.


88 Id. at 581-82. The court expressly dismissed the standing question. Quoting from Memorial Hospital v. Maricopa County, 415 U.S. 250, 257 (1974), "Shapiro [v. Thompson] did not rest upon a
finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. But see Warth v. Seldin, 95 Sup.Ct. 2196 (1975); Construction Industry Ass’n v. City of Petaluma, No. 74-2100 (9th Cir., Aug. 13, 1975).


90 Id. at 576. The "Official Statement of Developmental Policy for the City of Petaluma" as found in Finding of Fact 7.

91 Id. at 576. Finding of Fact 9(b).

92 Id. at 579. Finding of Fact 14(d). The racial ramifications of this point were not explored in the decision and will not be specifically confronted in this article. Also the discrimination against the poor that would be likely to follow from the plan was not examined by the court.

93 Id. at 480. Finding of Fact 14(j) and (k).


95 Construction Industry Ass’n of Sonoma County v. City of Petaluma, 375 F. Supp. at 578. The city did not establish that any of its facilities were in any way threatened by the projected residential growth. The court found that Petaluma faced no immediate, serious, or unusual difficulty in using or expanding the capacity of its public facilities to serve existing demographic and market growth rates in housing. The city could have continued to meet the demands on such facilities made by the anticipated growth rate trends without unusual strain via facilities now in place, under construction, or capable of being augmented by new capacity.

The court's opinion included specific findings of fact on the sewerage and water facilities which substantiated the above conclusion. Finding of Fact 13(e) and (k).

96 Id. at 585.

97 This basic premise, articulated in Euclid, discussed in text accompanying note 107 infra, and accepted throughout the country, is being re-examined in a growing number of courts in the nation's most important states. While still accepted by only a small minority, the trend seems to have great potential.

98 314 U.S. 160, 173-74 (1941). As Mr. Justice Cardozo said, "The Constitution was framed . . . upon the theory that the people of the several states must sink or swim together . . . " As quoted in Construction Industry Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. at 584.

Id. at 587 quoting from pps. 7-8 of Plaintiff's Trial Brief.

Construction Industry Ass'n v. City of Petaluma, No. 74-2100 (9th Cir., Aug. 13, 1975).

Id. at 5.

Id. at 9, where Warth v. Seldin, 95 S.Ct. 2196 (1975), is distinguished. But see also Construction Industry Ass’n v. City of Petaluma, No. 74-2100, at 12 n.13 (9th Cir., Aug. 13, 1975), where the court questioned the merits of a right to travel challenge of an ordinance “not aimed at transients.”

The standing issue is by no means clear. The District Court opinion used “right to travel” cases such as Shapiro v. Thompson, 394 U.S. 618 (1969), to obviate the need for finding an actual deterrence to travel but passed over any examination of whether suit can be brought only by potential travelers or by anyone who suffers injury in fact. Assuming that the builders and landowners alleged the requisite economic harm to show injury in fact under the Supreme Court’s standing test, they still must establish that the harm is arguably within the zone of interest protected by the right or statute upon which the suit is based. The Ninth Circuit seems correct in concluding that the alleged harm to the builders and landowners is not within the zone of interest protected by the right to travel and migrate and that this case does not fall within one of the recognized exceptions to the rule that plaintiffs cannot assert the rights of third parties. In the interests of judicial economy, however, (about which the Court of Appeals states it is concerned) the rights of potential residents should have been considered. Members of that class could easily be formed to bring suit and, more importantly, the requisite adverseness and concrete interest in the issues were present. Moreover, it seems likely that Warth v. Seldin, 95 S.Ct. 2196 (1975), will not bar potential residents from showing the requisite injury in fact under the facts in this case, as builders with a specific and tangible interest are currently available. See supra, notes 5 and 104, and infra, note 138.

Construction Industry Ass’n v. City of Petaluma, No. 74-2100, at 12 (9th Cir., Aug. 13, 1975).

Id. at 11.

The District Court’s cogent balancing of the competing inter-
ests is dependent upon the existence of an infringement upon a fundamental right (in this case, the right to travel). The Court of Appeals decision, by dismissing plaintiffs’ right to travel attack for a lack of standing, left plaintiffs with only the Due Process challenge.

110 503 F.2d 250 (9th Cir. 1974).
111 Construction Industry Ass’n v. City of Petaluma, No. 74-2100, at 12 (9th Cir., Aug. 13, 1975).
112 Id. at 14-15, n.10.
113 The Ninth Circuit’s opinion declared that “the purpose of the Plan is much disputed in this case” [Id. at 4] but the District Court’s findings in this matter seem conclusively to show that Petaluma’s explicit purpose was to severely limit its population by drastically reducing the rate of immigration. See supra, notes 89 and 90.

The Ninth Circuit also stated that “both the Belle Terre ordinance and the Los Altos Hills regulation had the purpose and effect of permanently restricting growth” [Id. at 14]. A close reading of those cases casts much doubt upon the validity of that categorical conclusion, especially in light of the Court’s findings as to Petaluma’s purpose.

114 The Ninth Circuit dismissed the specific findings as to the availability of municipal resources facilities and the city’s bad faith in this regard, documented at length in the District Court opinion, as irrelevant. Construction Industry Ass’n v. City of Petaluma, No. 74-2100, at 4 n.5 (9th Cir., Aug. 13, 1975).
115 The two opinions came to different conclusions as to the Plan’s purpose and effect. Much of the scientific data relied upon by plaintiffs and the District Court was summarily dismissed by the Ninth Circuit. Construction Industry Ass’n v. City of Petaluma, No. 74-2100, at 11 n.12 (9th Cir., Aug. 13, 1975).
116 The reference here, and in the rest of the article, is to the District Court’s opinion in Construction Industry, supra note 87, 375 F. Supp. 574 (N.D. Cal. 1974).
118 This proposition has been advanced by numerous commentators. See, e.g., Note, The Regional Approach to Planning, 50 Iowa L. Rev. 582 (1969); Weinberg, Regional Land Use Control: Prerequisite for Rational Planning, 46 N.Y.U.L. Rev. 786 (1971); and Vestal, Planning for Urban Areas: The Fight for Coherency, 56 Iowa L. Rev. 19 (1970).
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119 See Note, supra note 5 at 777-78. Also note the various laws which New York legislators have attempted to pass that are mentioned in Golden v. Planning Bd. of Ramapo, 30 N.Y.2d at 375 n.8, 334 N.Y.S.2d at 163, 285 N.E.2d at 309. Also see Huber, Allocation of Rights In Land: Preliminary Considerations, 50 IOWA L. REV. 279 (1969).

120 See Lawson, No Vacancy—Civil Libertarians Join Developers to Oppose Cities’ Growth Curbs, Wall Street Journal, January 31, 1975, at 1, col. 1 (hereinafter cited as Lawson), where it is pointed out that this “issue is being thrashed out in dozens of communities in hundreds of lawsuits.” In addition to Petaluma, the author lists Fairfax County, Va., Boulder, Colo., Livermore, Calif., and Boca Raton, Fla.

121 409 U.S. 1003 (1972).

122 272 U.S. 365 (1926).

123 Id. at 390. Williams and Norman, Exclusionary Land Use Controls: The Case of North-Eastern New Jersey, 22 SYR. L. REV. 475, 500-01 (1971).


125 Id. at 9.


127 The court in Construction Industry Ass'n v. City of Petaluma, 375 F. Supp. at 585, expressly noted Mr. Justice Douglas’ dismissal of the right to travel as irrelevant under the facts of Belle Terre.

128 Note that in using Boraas to reverse the District Court in Construction Industry, the Ninth Circuit came to different conclusions in regard to these distinguishing grounds. See Construction Industry Ass'n v. City of Petaluma, No. 74-2100, at 13 (9th Cir., Aug. 13, 1975); supra, note 113.

129 Despite the opinion of the court in this contention, the village’s ordinance does seem to impinge upon the rights of Association, Privacy, and Travel—especially as those rights have been viewed as the right to migrate and settle. See Comment, supra note 14, at 633.

130 One Justice of the Supreme Court has given his answer. Mr. Justice Marshall, dissenting in Belle Terre, relies primarily on the infringement of the rights of association and privacy; but interestingly he quotes from Appeal of Girsch, 437 Pa. 237, 245, n.4, 263 A.2d 395,99, regarding the need for regional planning, and the ef-

131 See, Thomas, Boca Raton: Economic Disneyland With the Real World Shut Out, Boston Globe, March 17, 1975, at 1, col. 1. Boca Raton’s decision to put an absolute cap on population possibly is so unsubtle as to fall into that category.

132 The Ramapo Plan, designed by University of Missouri Law School Professor Robert H. Frelich, has been essentially copied in Fairfax County, Minneapolis-St. Paul, and Honolulu. Duanne Searles, attorney for the National Assn. of Home Builders, estimated that development in Ramapo has been slowed down by as much as 75%. See Lawson, supra note 105, at 21. See also Frelich, Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: Analysis of the New Directions for Land Use Control in The Minneapolis-St. Paul Metropolitan Region, 58 MINN. L. REV. 1009 (1974).

133 Davidoff and Davidoff, Opening the Suburbs: Towards Inclusionary Land Controls, 22 SYR. L. REV. 509, 519 (1971).


136 Overturning the exclusion of the poor in James would logically follow from Shapiro. Also see Dandridge v. Williams, 397 U.S. 471 (1970), supra note 10.

137 See Note, The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge, 81 YALE L.J. 51, 74-75 (1971); Margolis, supra note 111, at 101-03.

138 See Warth v. Seldin, 95 S. Ct. 2196 (1975), (Justices Douglas and Brennan, dissenting). Brennan points out the circular logic of the majority. A potential resident-plaintiff, needing a specific project which would be built in the municipality, is therefore dependent upon a builder’s willingness and ability to litigate. Builders, however, cannot allege the constitutional rights of others, so that while they can meet the injury in fact portion of the standing test they fail to pass the zone of interest portion. This method of segregating the plaintiffs, and the viewing of their status separately may effectively prevent any suit at all.


140 A special master might be appointed to hear the expert planning testimony if it promised to be very complex.


Professor Frelich contends that his plan [Ramapo] is more than a device to outwit the courts while keeping a lid on population. He argues that his plan can and should include provisions for low-income housing, and that ultimately regional planning is preferable to a local government's decisions. But . . . with the evidence of the appalling consequences of urban sprawl all around us, the need to control that sprawl is an urgent one that cannot wait for an almost mythical, hoped-for intervention by state or federal authorities.