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Ninth Circuit Review—Standing, the Right to Travel, and Exclusionary Zoning

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STANDING, THE RIGHT TO TRAVEL, AND EXCLUSIONARY ZONING

Exclusionary zoning,[1] once called "snob zoning" and assailed for its elitist foundations,[2] has now attained some degree of respectability in America.[3] Under the rubric of "growth control," exclusionary zoning is seen to have an environmental basis.[4] While zoning for racially discriminatory purposes is unquestionably illegal,[5] not all forms of exclusionary zoning have been held unconstitutional.[6] One such form which has apparently escaped Supreme Court scrutiny is that which has no effect other than the establishment of an artificial limit on population ingress.[7] The recent proliferation of this mode of land use control raises significant constitutional questions, especially in light of one's "right to travel."[8]

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1. "Exclusionary zoning" is a phrase popularly used to describe suburban zoning regulations which have the effect, if not also the purpose, of preventing the migration of low and middle-income persons. Since a large percentage of racial minorities fall within the low and middle income brackets, exclusionary zoning regulations may also effectively wall out racial minorities.

Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 905 n.10 (9th Cir. 1975).

2. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 781-82 (1969). *See also* Note, *Snob Zoning: A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYR. L. REV. 507 (1964).

3. *See* Note, *The Right to Travel and Community Growth Controls*, 12 HARV. J. LEGIS. 244 (1975) [hereinafter cited as *Right to Travel*].

4. *Id.*

5. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291 (9th Cir. 1970).

6. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Most exclusionary zoning cases involve challenges to so-called traditional zoning devices. *See* Note, *The Right to Travel and Exclusionary Zoning*, 26 HASTINGS L.J. 849 (1975) [hereinafter cited as *Exclusionary Zoning*]; Note, *Freedom of Travel and Exclusionary Land Use Regulations*, 84 YALE L.J. 1564, 1572 n.28 (1975) [hereinafter cited as *Freedom of Travel*].

7. In the most recent Supreme Court pronouncement on zoning, the Court had the opportunity to pass on the constitutionality of an ordinance which had the effect of limiting population, but declined to do so by deciding the case on different grounds. *See* Warth v. Seldin, 422 U.S. 490 (1975) (plaintiffs denied standing to challenge exclusionary zoning); note 23 *infra*. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the Court was confronted with a zoning ordinance which restricted land-use to single family dwellings but did not put a ceiling on the number of such dwellings and consequently did not absolutely limit the population. *See Freedom of Travel, supra* note 6, at 1574 n.36. *But see* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 907 (9th Cir. 1975).

8. The so-called constitutional right to travel has a controversial and murky basis. A recent law review article noted:

In *Construction Industry Association of Sonoma County v. City of Petaluma*,[9] the Ninth Circuit Court of Appeals upheld, against constitutional attack, an exclusionary zoning ordinance, the sole effect of which was to impose such an artificial limit on population growth.[10] In finding that the ordinance did not violate either the due process[11] or commerce clauses[12] of the United States Constitution, the circuit court refused to consider the plaintiffs' claim that the zoning ordinance violated any right to travel, on the ground that the plaintiffs lacked standing to assert such a claim.

The court's holding with regard to plaintiffs' standing has far reaching implications, both as to the legality of exclusionary zoning and the nature and extent of the constitutional right to travel. The position of the court may foreshadow a policy of judicial restraint in reviewing exclu-

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[I]t is possible to find at least six distinct sources for the right to travel in the opinions of the Supreme Court: the "penumbra" of the first amendment, the equal protection clause, the due process clauses, the commerce clause, the privileges and immunities clause of Article IV, and the privileges and immunities clause of the fourteenth amendment.

Comment, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A.L. REV. 1129, 1140-41 (1975) [hereinafter cited as *Strict Scrutiny*]. Nor is it certain that the right to travel must have a basis in a constitutional clause in order to give it constitutional effect. The Supreme Court, in Shapiro v. Thompson, 394 U.S. 618 (1969), stated: "We have no occasion to ascribe the source of this right . . . to a particular constitutional provision." *Id.* at 630. In Oregon v. Mitchell, 400 U.S. 112 (1970), Justice Harlan referred to the right as a "nebulous judicial construct." *Id.* at 216. *See* Sosna v. Iowa, 95 S. Ct. 553 (1975); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring). *See also Right to Travel, supra* note 3; *Exclusionary Zoning, supra* note 6; Comment, *The Right to Travel and Its Application to Restrictive Housing Laws*, 66 NW. U.L. REV. 635 (1971) [hereinafter cited as *Housing Laws*]; *Freedom of Travel, supra* note 6.

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

10. Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 581 (N.D. Cal. 1974), *rev'd on other grounds*, 522 F.2d 897 (9th Cir. 1975). Nowhere in the Circuit Court opinion was this finding disputed. Quite the contrary, in its analysis of the zoning ordinance on due process grounds, the Ninth Circuit referred to this finding, and stated that their task was to "determine . . . whether the *exclusion* bears any rational relationship to a *legitimate state interest*." 522 F.2d at 906. *See* notes 29-37 *infra* and accompanying text.

While an allegation of racial discrimination would have invoked a strict scrutiny standard and perhaps thereby produced a different result (*see* Warth v. Seldin, 95 S. Ct. 2197, 2203 n.3 (1975); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 906 n.11 (9th Cir. 1975); Ybarra v. Town of Los Altos Hills, 503 F.2d 250, 253-54 (9th Cir. 1975)) the absence of such an allegation in this case made it unnecessary to consider the Petaluma Plan's effect other than as imposing an artificial ceiling on population growth.

11. 522 F.2d at 905-09.

12. *Id.* at 909.

sionary zoning, requiring only that such enactments be justified by showing a "rational relationship" to a legitimate state interest. At the very least, when juxtaposed against the district court opinion, which had found that the zoning ordinance violated the right to travel, the ruling is another indication that the courts view the right to travel as less than "fundamental."[13]

The City of Petaluma, a commuting distance of forty miles from the San Francisco Bay Area, "was drawn into the metropolitan housing market as people . . . became willing to commute longer distances to secure relatively inexpensive housing available [in Petaluma]."[14] In response to the rapid expansion of its population, the city instituted a moratorium on housing development and subsequently devised the Petaluma Plan (the Plan) to control and regulate future growth, and to "protect the small town characteristics" of the city. The Plan limited developmental growth to a rate of 500 dwelling units per year for five years, but exempted all projects of four units or less.[15] It was assumed that this limitation was less than the "reasonably anticipated market demand for such units and that absent the Petaluma Plan, the city would grow at a faster rate."[16]

The Plan was challenged on constitutional grounds by two classes of plaintiffs: the Builders Association of Sonoma County, an association of builders and developers, and two individual landowners, whose property was not entirely within the boundaries of Petaluma. The district court, finding that the Plan had infringed upon the right to travel,[17] demanded

13. *See* Sosna v. Iowa, 95 S. Ct. 553 (1975); text accompanying notes 38-50 *infra.*

14. 522 F.2d at 900.

15. *Id.* at 902.

16. *Id.* The circuit court noted that the Plan would allow the population of Petaluma to increase at a rate of 1500 persons, or six per cent per year. *Id.* at 908 n.15. Furthermore, while slowing the growth rate, the Plan "replace[d] the past pattern of single-family detached homes with an assortment of housing units, varying in price and design." *Id.* at 905 n.10.

17. Although the district court relied solely on the right to travel claim for invalidating the Petaluma Plan, the circuit court, by denying standing, declined to reach this issue. But, the court did state that the "Plan is not aimed at transients, nor does it penalize those who have recently exercised their right to travel." 522 F.2d 897, 907 n.13, *citing* CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 330-32, 118 Cal. Rptr. 315, 332-34 (1974). However, *CEEED*, like *Petaluma*, involved the issue of the right to travel intrastate, and as the *CEEED* court recognized, "the Supreme Court has not yet decided whether the right [to travel] encompasses intrastate travel." 43 Cal. App. 3d at 331, 118 Cal. Rptr. at 333.

By its statement regarding the right to travel and its citation to *CEEED*, the Ninth Circuit seems to acknowledge the proposition that the right to travel applies to intrastate as well as to interstate travel. Such a result has been reached by the Second Circuit in

that the local government show a compelling state interest to justify the enactment of the ordinance. The city officials had alleged that both the limited water supply and sewage facilities required the artificial ceiling on land development and population growth. The district court responded by stating that the city could, as reasonable alternatives to population control, increase the supply of water and improve the sewage system.[18]

In reversing, the appellate court held that the plaintiffs had no standing to assert a right to travel claim as it relates to zoning.[19] Initially the court recognized that the test of standing involved a two-fold inquiry. First, it had to be determined whether the plaintiff had met the "case or controversy" limitation imposed by article III. The court stated that this constitutional requirement is satisified by showing either that one "has a 'personal stake in the outcome of the controversy,'"[20] or "has suffered 'some threatened or actual injury resulting from the putatively illegal action.'"[21] Second,

> the plaintiff must satisfy the additional court-imposed standing requirement that the "interest sought to be protected by the complainant is arguably within the *zone of interests* to be protected or regulated by the statute or constitutional guarantee in question."[22]

As to this latter requirement, the court found that the plaintiffs had not sustained their burden. The Court relied on *Warth* v. *Seldin*,[23]

King v. New Rochelle Municipal Housing Auth., 442 F.2d 646, 648 (1971). For purposes of this note, it will be assumed that the right to travel encompasses both intrastate and interstate travel.

18. The defendants contended that in order to increase both water and sewage systems a bond sale must be approved by the electorate and consequently the court is without power to dictate the results of such a referendum. The court responded simply: "Neither Petaluma city officials, nor the local electorate may use their power to disapprove bonds at the polls as a weapon to define or destroy fundamental constitutional rights." 375 F. Supp. at 583.

19. The court summarily disposed of the defendant's objections to the district court's jurisdiction to entertain a suit for injunctive relief brought against city officials. The Court stated:

> [A] city official is a "person" within the meaning of § 1983 and . . . a district court has jurisdiction under 28 U.S.C. § 1343 over an action to enjoin him from enforcing an unconstitutional statute.

522 F.2d at 903 *citing*, Ybarra v. Town of Los Altos Hills, 503 F.2d 250, 253 (9th Cir. 1974). The court also noted that jurisdiction was proper under the general federal question statute. *Id.*

20. *Id.* at 903, *quoting* Baker v. Carr, 369 U.S. 186, 204 (1962).

21. *Id., quoting* Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

22. *Id., quoting* Association of Data Processing Service Org., Inc. v. Camp, 397 U.S. 150, 153 (1970) (emphasis added).

23. 422 U.S. 490 (1975). In *Warth*, the City of Penfield, New York, enacted a zoning ordinance which had the effect of limiting the construction of low-cost housing. The ordinance was attacked on several constitutional grounds, including the right to

wherein it was stated that "the plaintiff . . . must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[24] The *Petaluma* court concluded that the right to travel was

> asserted not on the [plaintiffs'] own behalf, but on behalf of a group of unknown third parties allegedly excluded from living in Petaluma. Although [the plaintiffs] are admittedly adversely affected by the Petaluma Plan, their economic interests are undisputedly outside the zone of interest to be protected by any right to travel. Accordingly, [plaintiffs'] right to travel claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves."[25]

While the court recognized that several exceptions to this general rule exist, it held that the plaintiffs did not fall within any of them. Specifically, the plaintiffs could not rely on any congressional statute authorizing them to assert the rights of others;[26] nor was there any "special ongoing relationship between [plaintiffs] and those whose rights allegedly [were] violated which militate[d] in favor of granting standing";[27] nor did the plaintiffs show that "their prosecution of the suit [was] neces-

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travel. The plaintiffs consisted of: (1) a non-profit corporation whose purposes were to foster action to alleviate the housing shortage for low-and-moderate income persons in the Rochester [New York] area (*id.* at 494); (2) several individual Rochester taxpayers (*id.*); and (3) several Rochester residents of low-and-moderate incomes who allegedly were precluded from moving into Penfield because the zoning ordinances prevented the construction of housing easily affordable to low-and-moderate income persons (*id.*).

The individual taxpayers alleged that refusal to allow low-income residency in Penfield put an undue burden upon the taxpayers of Rochester, thereby producing an injury in fact. However, the Court held that these taxpayers had failed to overcome the case or controversy barrier and were denied standing. After thus denying standing, the Court went on to state that even if an injury in fact had been sustained, prudential considerations would bar standing to litigate the issue. *Id.* at 509-10.

The corporate plaintiff claimed standing for its members who were excluded from Penfield as well as nine percent of its members who lived in Penfield and were "deprived of the benefits of living in a racially and ethnically integrated community." *Id.* at 512. Standing was denied for the corporation's Penfield members because no racial discrimination was alleged. The failure to allege racial discrimination, the Court held, made inapplicable the principle that would allow residents of housing projects "an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." *Id.* at 513 *citing* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). The complaint in *Petaluma* was similarly devoid of any allegation of racial discrimination. *See also* note 10 *supra*; notes 33 & 36 *infra.*

24. 422 U.S. at 499, *quoted in* 522 F.2d at 903.

25. 522 F.2d at 904, *quoting* Warth v. Seldin, 422 U.S. 499, 509.

26. *Id., citing* Doe v. Bolton, 410 U.S. 179, 188-89 (1973); Griswold v. Connecticut, 381 U.S. 479, 421 (1965).

27. *Id., citing* NAACP v. Alabama, 357 U.S. 449, 458-60 (1958).

sary to ensure protection of the rights asserted."[28]

Having determined that the plaintiffs lacked standing to assert a violation of the right to travel, the court then considered the plaintiffs' claim that "the plan [was] arbitrary and unreasonable and, thus, violative of the due process clause of the Fourteenth Amendment."[29] In its analysis the Court applied the principle established by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*,[30] wherein it was stated that a zoning ordinance would not be judicially overturned unless it could be shown that it was not *rationally related* to any of a broad range of police power objectives.[31]

At the outset it was recognized that the Plan's purpose was to preserve "Petaluma's small town character" and to avoid "the social and environmental problems caused by an uncontrolled growth rate."[32] It was further noted that while the present zoning ordinance had an exclusionary effect, all zoning to some extent excludes certain persons.[33] Thus, the Court focused on whether the exclusion had any rational relationship to a legitimate state interest.

In view of the Ninth Circuit's prior decision in *Ybarra v. Town of Los Altos Hills*[34] it was virtually a foregone conclusion that the Petaluma Plan would be sustained against a due process attack. In *Ybarra*, a zoning ordinance,[35] which admittedly had the effect of preventing low income individuals from residing within the municipality, was upheld over challenges both on equal protection[36] and due process grounds. In

28. *Id., citing* Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969); NAACP v. Alabama, 357 U.S. 449, 459 (1958); Barrows v. Jackson, 346 U.S. 249, 257 (1953). See text accompanying notes 52-64 *infra.*

29. 522 F.2d at 905.

30. 272 U.S. 365 (1926).

31. *See Exclusionary Zoning, supra* note 6, at 850.

32. 522 F.2d at 906.

33. *Id.* In so stating, the court made clear that it was not confronted with the issue of discriminatory zoning:

> Our inquiry here is not unlike that involved in a case alleging denial of equal protection of the laws. The *mere showing* of some discrimination by the state is not sufficient to prove an invasion of one's constitutional rights. Most legislation to some extent discriminates between various classes of persons, business enterprises, or other entities. However, absent a suspect classification or invasion of fundamental rights, equal protection rights are violated only where the classification does not bear a rational relationship to a legitimate state interest.

Id. n.11 (emphasis added). See note 10 *supra.*

34. 503 F.2d 250 (9th Cir. 1974).

35. The ordinance provided "that a housing lot shall contain not less than one acre and that no lot shall be occupied by more than one primary dwelling unit." 503 F.2d at 252.

36. Although the plaintiffs in *Ybarra* did not assert that the ordinance discriminated on the basis of race, they contended that it discriminated against the poor, thereby

Petaluma, as in *Ybarra*, the court concluded that "the concept of the public welfare is sufficiently broad to uphold [a city's] desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."[37]

These cases underscore that, in the Ninth Circuit, an exclusionary zoning ordinance challenged on due process grounds, will not be invalidated as long as it fosters *some* legitimate state interest. The fact that preservation of Petaluma's and Los Altos' rural environments was found to be such an interest makes it difficult, if not impossible, to successfully challenge exclusionary zoning on any ground which invokes a "rational

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requiring the town to "show a compelling interest to justify the ordinance." *Id.* at 253. In rejecting this contention, the court relied on San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), wherein it was stated:

> The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.

Id. at 20.

In applying this "two-part" test in *Ybarra*, the Ninth Circuit found that while the plaintiffs met the first criterion in that their poverty prevented them from living in Los Altos, they did not meet the second criterion, by failing to show that

> they had no "meaningful opportunity" to obtain low-cost housing. The evidence showed that no poor people live or work in Los Altos. Appellants failed to show that adequate low-cost housing was unavailable elsewhere in Santa Clara County in areas accessible to appellant's jobs and social services. In these circumstances the town need not show a compelling interest to justify a zoning ordinance which discriminates against the poor.

503 F.2d at 254. Thus, within the Ninth Circuit, it appears that unless county-wide zoning provides for low cost housing, these plaintiffs, and others similarly situated, will be denied a "meaningful opportunity to enjoy" the benefits derived from living in a particular area.

Compare the *Ybarra* court's reasoning with that of the district court in *Petaluma* that " 'local police power may [not] be used to shift the burden of providing housing to other cities in a metropolitan region which have their own problems.'" 375 F. Supp. at 587, *quoting* Brief for Plaintiff at 7. Note also the statement of the Supreme Court in *Warth v. Seldin* that there is no right for the taxpayers of one city to "be free of action by a neighboring municipality that may have some incidental adverse effect . . . ." 422 U.S. at 509. For an examination of the type of problems involved with extra-municipal zoning, see Comment, *Land-Use Control, Externalities, and the Municipal Affairs Doctrine: A Border Conflict*, 8 LOY. L.A.L. REV. 432 (1975).

Further, the *Ybarra* court may have foreshadowed the *Petaluma* court's reluctance to accept an infringement of the right to travel in zoning cases. In construing CAL. GOV'T CODE ANN. § 65302 (West 1970), "which requires towns to adopt housing plans" that adequately provide "for the housing needs of all economic segments of the community," the court stated:

> We believe that the section requires a town to provide housing for its residents but does not require it to provide housing for non-residents, even though the non-residents may live in the broader urban community of which the town is a part.

503 F.2d at 254.

37. 522 F.2d at 908-09.

relation" test. Therefore, plaintiffs contesting exclusionary zoning ordinances must allege the violation of constitutional rights reviewed under standards stricter than the due process "rational relation" test.

The right to travel which the *Petaluma* plaintiffs attempted to assert would appear to invoke this standard of review. In *Shapiro v. Thompson*,[38] *Dunn v. Blumstein*,[39] and *Memorial Hosptial v. Maricopa County*,[40] the Supreme Court formulated the test to be applied in cases involving an infringement of the right to travel. The Court indicated that the state must establish the existence of a *compelling interest* to justify such infringement.[41] Two subsequent cases, however, appear to have refined this standard.

In *Village of Belle Terre v. Boraas*,[42] a zoning ordinance restricted land use to single family dwellings or to occupancy by not more than two unrelated persons. The Court passed over the plaintiffs' right to travel claim because "Belle Terre's interference with free settlement was trifling . . . ."[43] In upholding the ordinance the Court "continued to reject implications which might have been drawn from cases such as *Shapiro* or *Dunn* that *any* interference with settlement requires strict scrutiny."[44] Thus, the Court's language, if not its decision, seems to indicate that it will look to the extent of the infringement in determining what standard of review will be applied.

In *Sosna v. Iowa*,[45] the Supreme Court reviewed the validity of a durational residency requirement imposed as a prerequisite to obtaining a marital dissolution. The Court acknowledged that *Shapiro, Dunn,* and *Maricopa* involved more than an infringement upon the right to travel.[46] In each case an individual had been denied some benefit related to another right.[47] Consequently the *Sosna* Court concluded that only

38. 394 U.S. 618 (1964).
39. 405 U.S. 330 (1972).
40. 415 U.S. 250 (1974).
41. The district court in *Petaluma,* relying on *Dunn,* recognized the right to travel as fundamental, without seriously questioning the plaintiffs' standing to assert it. As such, the court demanded a showing of a compelling interest to justify the ordinance. 375 F. Supp. at 574.
42. 416 U.S. 1 (1974).
43. *Exclusionary Zoning, supra* note 6, at 869.
44. *Id.*
45. 95 S. Ct. 553 (1975).
46. *Id.* at 560-61.
47. The penalty imposed upon those exercising the right to travel has varied: Shapiro v. Thompson, 394 U.S. 618 (1964), involved denial of welfare benefits; Dunn v. Blumstein, 405 U.S. 330 (1972), involved denial of right to vote; and Memorial Hosp. v.

insofar as the state action infringed upon another right would a compelling state interest be required as justification.[48] When exclusionary zoning infringes solely on the right to travel, the only benefit denied is the ability to obtain housing in the zoned area. However, since the right to housing has not been accorded the same protection[49] as the other rights in *Shapiro*, *Dunn*, and *Maricopa*, an infringement on the right to travel which only denies access to housing will not invoke the compelling state interest test. Nonetheless, the Court, in dealing with a durational residency requirement in *Sosna*, focused on the state interest necessary to justify an action infringing solely on the right to travel. The Court's analysis indicates that it still requires more than a mere rational relationship.[50]

To the extent that a violation of one's right to travel invokes a standard more stringent than a rational relationship, plaintiffs who can

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Maricopa County, 415 U.S. 250 (1974), involved denial of medical care. In all three cases, the benefits were denied to those who had recently exercised their right to travel.

48. *See* 95 S. Ct. at 561, 562.

49. Lindsey v. Normet, 405 U.S. 56, 74 (1972).

50. In discussing the state interest necessary to justify the Iowa residency requirement the Court noted that the state was not relying solely on "budgetary or record keeping considerations." 95 S. Ct. at 561. A divorce decree, according to the Court, involves more than the specific relief requested by a plaintiff. It also affects both property rights and possible minor children outside the forum state. Consequently, a state interest sufficient to justify the infringement on the right to travel existed in the form of "avoiding officious intermeddling in matters in which another state has a paramount interest, and in minimizing the susceptibility of its own divorce decree to collateral attack." *Id.* To the extent the *Sosna* Court was not relying solely on "budgetary and record keeping considerations" to justify the residency requirement, it can be inferred that the Court invoked a standard of review stricter than that of a mere rational relationship.

Furthermore, the Court cited Kahn v. Shevin, 416 U.S. 351 (1974), for support of its statement that the "residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience." *Id. Kahn* involved a challenge on equal protection grounds to a state tax exemption accorded to individuals on the basis of sex. The Court upheld the exemption as not violative of equal protection in that, unlike its earlier decision in Frontiero v. Richardson, 411 U.S. 677 (1973), the special consideration was not based solely on administrative reasons. 416 U.S. at 355. It has been recognized that the Court's approach when dealing with charges of sex discrimination involves a "middle-ground" test, *i.e.*, enactments that discriminate on the basis of sex are examined in light of a standard falling somewhere between a rational relationship and a compelling state interest test. See, Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on A Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L.J. 163; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). The use of *Kahn* for support in *Sosna* would indicate that the Court is using a like standard in examining infringements on the right to travel.

successfully allege a violation of their right to travel might be able to challenge a zoning ordinance which only excludes individuals from the zoned area. However, the circuit court opinion in *Petaluma*, when analyzed with *Warth* may foreclose any such challenge. If so, exclusionary zoning may never be subject to more than a rational relation test and, therefore, would rarely, if ever, be invalidated.[51] An examination of the *Petaluma* court's reasoning with regard to standing leads one to believe that an almost insurmountable barrier faces a plaintiff seeking to assert a violation of the right to travel in exclusionary zoning cases.

A preliminary discussion of the district court's view of standing to assert the right to travel illustrates the problem inherent in the circuit court analysis. The district court stated simply that "it was not necessary . . . that the plaintiffs' introduce any evidence relating to any individual who was actually excluded by the plan."[52] Thus, the plaintiffs were granted standing on the mere allegation that the Plan infringed on the "people's right to travel."[53]

In support of its opinion, the district court relied on *Shapiro, Dunn*, and *Maricopa*. In those cases the Supreme Court held that the standing requirements were not a bar to challenges to durational residency requirements that infringed on the right to travel, even though the plaintiffs were not deterred from traveling. Under the authority of those cases, a plaintiff subject to a durational residency requirement is allowed to assert an infringement of his right to travel notwithstanding the fact that he has already moved into the area, provided he has suffered some "penalty" in the exercise of his right.[54] The use of the "penalty criterion"

51. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974); Steel Hill Development Inc. v. City of Sanborton, 469 F.2d 956 (1st Cir. 1972). *See also* notes 29-37 and accompanying text *supra*. But note the pronounced predilection of the state courts to strike down exclusionary zoning ordinances on the basis of the rational relationship standard of review under the due process clause. *See Freedom of Travel, supra* note 6, at 1576. In the district court decision in *Petaluma*, Judge Burke cited several Pennsylvania cases holding that not only was the state's reliance on the zoning power misplaced, but use of zoning in such an exclusionary manner was simply not in the general welfare. 375 F. Supp. 586. *See* Appeal of Kit Mart Builders, 268 A.2d 765 (Pa. 1970); National Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1966); Bilbar Const. v. Board of Adjustment, 141 A.2d 851 (Pa. 1958). Simply stated, the position of the Pennsylvania courts is that "[z]oning 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." National Land & Inv. Co. v. Kohn, 215 A.2d 597, 610 (Pa. 1966).

52. 375 F. Supp. at 581.

53. *Id.*

54. *See* note 47 *supra*. In *Shapiro, Dunn* and *Maricopa*, the Supreme Court rejected standing arguments that would have barred the plaintiffs from challenging durational

is thus an easing of the standing requirements. The district court in *Petaluma* utilized this penalty criterion in granting standing and found there is "no meaningful distinction between a law which penalizes the exercise of a right and one which denies it altogether."[55]

The trial court was mistaken, however, in its application of the penalty criterion. In *Shapiro, Dunn,* and *Maricopa* the issue was never raised as to whether the plaintiffs had met the zone of interest requirement. Since each of the plaintiffs already had moved, the issue in those cases involved the first test of standing, *i.e.*, an injury in fact. Generally, the Supreme Court found a "lesser" showing of infringement on the plaintiffs' "in-migration" was sufficient to meet this test. In *Petaluma,* however, there was no showing of *any infringement* upon the plaintiffs' right to travel; thus, the plaintiffs did not fall within the zone of interests.[56] The failure to recognize this critical factual distinction gave rise to a misunderstanding by the district court of the penalty analysis. The circuit court therefore may have been correct in reversing the district court decision. However, its own analysis may also be faulty, and the end result erroneous.

The crux of the divergence between the two decisions is whether the zone of interest rule is applicable when a plaintiff seeks to assert a violation of another's right to travel. The circuit court found that none of the recognized exceptions to the zone of interest rule applied.[57] It can be assumed that the court was correct in its statements that no statute granted plaintiffs standing to assert the rights of others, and that no sufficient relationship existed between plaintiffs and those whose rights were abridged.[58] However, its conclusion that the plaintiffs need not bring suit to ensure protection of the rights asserted is less certain.

The circuit court relied on *Sullivan v. Little Huntington Park,*[59]

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residency requirements. As pointed out by the Court in *Dunn,* "none of the litigants had themselves been deterred" from traveling because of the challenged statute, but the Court also noted that the need to make such an allegation to obtain standing "represents a fundamental misunderstanding of the law." 405 U.S. at 340, 339.

55. 375 F. Supp. at 582. One commentator has mirrored this reasoning by stating that "[k]eeping outsiders out altogether must be considered at least as constitutionally suspect as letting them in but treating them worse for a while." *Right to Travel, supra* note 6, at 263.

56. Thus, a "correct" analysis of the penalty rule would say that the zone of interest requirement can be met only if the plaintiff's right to travel is deterred or penalized.

57. *See* text accompanying note 26-28 *supra.*

58. *See* note 54 *supra.*

59. 396 U.S. 229 (1969).

NAACP v. Alabama,[60] and *Barrows v. Jackson*.[61] Each of these cases stands for the proposition that prudential standing considerations, mere "rule[s] of practice,"[62] will not act as a bar to plaintiffs seeking to assert the rights of others if such rights would not otherwise be vindicated. Thus, the validity of the court's analysis depends on the correctness of its assumption that in *Petaluma* "those individuals whose mobility is impaired may bring suit on their own behalf and on behalf of those similarly situated."[63]

It is questionable whether in fact these individuals could assert a violation of their right to travel. Under *Petaluma* and *Warth*, the only persons who can meet the zone of interest test, when challenging exclusionary zoning ordinances as violative of their right to travel, are those who can establish a causal relationship between the zoning ordinance and their alleged exclusion. Similarly, such a casual link is the sole mode of establishing any injury in fact.

The *Petaluma* circuit court's failure to comment on the district court's decision is an implicit rejection of any application of the *Dunn* penalty analysis in establishing an injury in fact. This may be explained by the fact that even though exclusionary zoning may simply act to preclude migration into an area, once a person has obtained residency in the zoned area his right to travel is not infringed in any way. In each case where the penalty analysis has been applied, the plaintiffs, after moving, had been denied some benefits accorded to others within the same area. Exclusionary zoning, if it works as a penalty, does so only in the sense of preventing one from moving into the area in the first instance.[64]

That the circuit court's reasoning in *Petaluma* is shared by the Supreme Court is implicit in *Warth*. There, the court refused to allow standing to persons who alleged that they had been excluded by the ordinance. The Court held that a mere allegation of harm in the complaint, which should be deemed true for pleading purposes,[65] was insufficient "to support an actionable causal relationship between [the]

60. 357 U.S. 449 (1958).

61. 346 U.S. 249 (1953).

62. *Id.* at 257. "[W]e believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect . . . fundamental rights . . . ." *Id.*

63. 522 F.2d at 904.

64. This view was adopted by the *Petaluma* district court. See text accompanying note 55 *supra*.

65. 422 U.S. at 502.

zoning practices and the petitioner's asserted injury."[66] *Warth* rejected as sufficient the alleged desire and attempt of those excluded individuals to obtain housing in the zoned area. Stating instead that the plaintiffs

> must allege facts from which it reasonably could be inferred that, absent the . . . restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease . . . and that if the court affords the relief requested, the asserted inability of petitioners will be removed.[67]

In construing this language, the Ninth Circuit stated:

> Although *Warth v. Seldin* denied standing to a group of low-income and minority-group plaintiffs challenging exclusionary zoning practices, the case is no bar to a suit against the City brought by a proper group of plaintiffs. The Court in *Warth v. Seldin*, left open the federal court doors for plaintiffs who have some interest in a particular housing project and who, but for the restrictive zoning ordinances, would be able to reside in the community.[68]

Under this analysis, the determinative question is what interest is sufficient. Traditionally, standing to challenge zoning ordinances lies only in those who have a property interest affected by the ordinance.[69] Consequently, it has been held that one who is deterred from settling does not suffer the requisite injury in fact unless he is a party to a contract for the sale of land affected by the ordinances.[70] And it follows that such a contractual relationship will be effectively precluded by a zoning ordinance prohibiting building or migration. Thus, under this standard, the only person who would have standing is one who was a contract-vendee for the purchase of land prior to the enactment of the ordinance.

There is language in *Warth*, however, indicating that standing will be accorded to those who, although not having a "contractual interest in a particular project,"[71] can demonstrate that "he personally would benefit in a tangible way from the court's intervention."[72] Insofar as this provides standing to persons who would not be granted standing under the traditional rules, *Warth* might represent a relaxation of the requirements

66. *Id.* at 507.
67. *Id.* at 504.
68. 522 F.2d at 904-05.
69. Note, *Towards Liberalizing Requirements for Standing in Zoning Litigation—Approximation of the Public Welfare*, 5 MEMPHIS ST. U.L. REV. 251, 254-55 (1974).
70. *Id.* at 255.
71. 422 U.S. at 508 n.18.
72. *Id.* at 508.

for plaintiffs seeking to challenge zoning ordinances. However, the practical import of such a relaxation is lost by the Court's refusal to "identify in the abstract"[73] exactly what allegations would suffice to establish that the plaintiff would benefit from the court's intervention.

CONCLUSION

Petaluma represents the first case in which the right to travel as developed in *Shapiro, Dunn*, and *Maricopa* was attempted to be applied to exclusionary zoning.[74] The Ninth Circuit decision, however, has virtually precluded judicial consideration of whether an infringement on the right to travel will invalidate exclusionary zoning ordinances. An individual excluded from a zoned area seeking to invalidate the zoning ordinance by asserting a deprivation of his right to travel, is required to show either an additional infringement on some judicially protected right,[75] or an absolute causal relationship between the ordinance and the deprivation of the right to travel. However, until such time as the *Warth* standard is clarified, such an individual cannot be certain what allegations, if any, will establish that requisite causal relationship.[76] Consequently, in the interim, a due process rational relation standard of review will continue to uphold virtually all exclusionary zoning ordinances challenged in federal court no matter what may be their incidental social effects.

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73. *Id.* at n.18.

74. *See Right to Travel, supra* note 6, at 247.

75. *See* text accompanying notes 38-50 *supra. See also* notes 10, 23, 33, & 36 *supra.*

76. Interestingly, the Ninth Circuit has allowed liberal standing in environmental suits. The court has allowed plaintiffs standing upon a singular showing of a "sufficient geographical nexus . . . to the project", thereby making immaterial the showing of an economic or quantifiable injury. *See* City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975). It is questionable, therefore, whether a more stringent standing requirement should be imposed in exclusionary zoning cases on the theory that the court would otherwise subject itself to inundation by these cases.