

1974

Belle Terre v. Boraas

Stewart Goldstein

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Recommended Citation

Case Comment, Belle Terre v. Boraas, 23 Clev. St. L. Rev. 354 (1974)

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ON APRIL 1, 1974, THE SUPREME COURT announced its opinion in the first zoning case of constitutional dimensions that the Court had decided in the last forty-six years.¹ In sustaining the ordinance of the Village of Belle Terre, with its restrictive definition of "family," the Court reaffirmed its respect for the lines drawn by legislatures in the area of zoning and equal protection.² The *Belle Terre* decision reaffirmed the validity of one municipality's mechanism for preserving the style of life of its inhabitants, free from exposure to one element of the counterculture, the voluntary cooperative association of unrelated persons: the commune. What effects the *Belle Terre* case will have on similar uses of zoning ordinances to protect the citizens of a community from persons with modes of living different from their own, including other races, the poor, the young, the old, the unmarried, former prison inmates, and those undergoing rehabilitation from mental illness or addiction to alcohol or narcotics, remains to be seen.

Summary of the Decision

The Village of Belle Terre is a community of seven hundred persons and approximately two hundred twenty homes in Suffolk County, New York. It is zoned exclusively for one-family dwellings³ excluding lodging, boarding, fraternity, sorority, and multiple dwelling houses. A village ordinance defines "family" as:

One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family.⁴

On December 31, 1971, appellees Edwin and Judith Dickman leased their house in Belle Terre to Michael Truman. Later five other students from the nearby State University of New York at Stony Brook moved into the house. On July 31, 1972, the Dickmans received an "Order to Remedy Violations" of the ordinance from the village.

¹ A. CASNER AND W. LEACH, *CASES AND TEXT ON PROPERTY* 1207 (2d ed. 1969); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 *STAN. L. REV.* 767, 783 (1969).

² *Belle Terre v. Boraas*, _____ U.S. _____, 94 S.Ct. 1536 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

³ A one-family dwelling is defined as, "A detached house consisting of or intended to be occupied as a residence by one family only . . ." *BUILDING ZONE ORDINANCE OF THE VILLAGE OF BELLE TERRE*, ART. I, § D-1.34a (1971).

⁴ *BUILDING ZONE ORDINANCE OF THE VILLAGE OF BELLE TERRE*, Art. I, § D-1.35a (June 8, 1970).

Appellees then brought an action under the federal Civil Rights Act of 1871⁵ against the mayor and trustees of the Village of Belle Terre asking for an injunction against enforcement of the ordinance and a declaratory judgment invalidating the definition of "family" as unconstitutional.⁶

The District Court upheld the ordinance,⁷ but the Court of Appeals reversed.⁸ The Supreme Court reversed the Court of Appeals,⁹ holding that the case dealt with economic and social legislation through which legislatures have historically drawn lines which the Court respects against charges of violation of the equal protection clause if the law is "reasonable, not arbitrary"¹⁰ and bears "a rational relationship to a (permissible) state objective."¹¹ The Court recognized that every line which a legislature draws leaves some out who could have been included, and that the exercise of discretion is a legislative function, not a judicial one. Here the ordinance, which involved no fundamental right guaranteed by the Constitution, was a valid land-use regulation.¹²

Mr. Justice Douglas, in delivering the opinion of the Court, pointed out that the case brought to the Court a different phase of zoning regulations from those it had previously considered. He went on to discuss two of the Supreme Court's previous land use decisions.¹³

In *Euclid v. Ambler Realty Company*¹⁴ the Court sustained a zoning ordinance, stating: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."¹⁵

Mr. Justice Douglas pointed out that the essence of *Euclid* to the Court in 1926 was the exclusion of apartments and industries from residential sections, and in relation to this the 1926 Court

commented on the desire to keep residential areas free of "disturbing noises"; "increased traffic"; "the hazard of mov-

⁵ 42 U.S.C. § 1983 (1970).

⁶ Appellees included three of the students who had occupied the house.

⁷ *Boraas v. Belle Terre*, 367 F.Supp. 136 (E.D.N.Y. 1972).

⁸ *Boraas v. Belle Terre*, 476 F.2d 806, 810 (2d Cir. 1973).

⁹ *Belle Terre v. Boraas*, _____ U.S. _____, 94 S.Ct. 1536, 1540 (1974).

¹⁰ *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

¹¹ _____ U.S. _____, 94 S.Ct. 1536, 1540 (1974), quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971).

¹² *Belle Terre v. Boraas*, _____ U.S. _____, 94 S.Ct. 1536, 1540 (1974).

¹³ *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Berman v. Parker*, 348 U.S. 26 (1954).

¹⁴ 272 U.S. 365 (1926).

¹⁵ *Id.* at 388.

ing and parked automobiles"; the "depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities."¹⁶

The Court in *Belle Terre v. Boraas*, returned to these and similar traditional zoning justifications when it upheld the definition of "family" in the Belle Terre zoning ordinance.¹⁷

The Court also relied on *Berman v. Parker*¹⁸ for its conclusion that "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs."¹⁹

Berman v. Parker,²⁰ a land-use case but not a zoning case, upheld the validity of certain sections of the District of Columbia Redevelopment Act of 1945. In respecting the constitutional attack on the Act, the Court declined to define an outer limit of the police power on which zoning ordinances are based.

The Court in *Belle Terre* used the two-level²¹ approach to equal protection and applied the minimal scrutiny test.²² The Court succinctly disposed of all of the challenges proffered by the appellees and any thought of applying the strict scrutiny test in a few short sentences:

It [the ordinance] is not aimed at transients. It involves no procedural disparity inflicted on some but not on others such as was presented by *Griffin v. Illinois* It involves no "fundamental" right guaranteed by the Constitution, such as voting, . . . ; the right of association, . . . ; the right of access to the court, . . . ; or any rights of privacy, (cases omitted).²³

¹⁶ _____ U.S. _____, 94 S.Ct. 1536, 1539 (1974), quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

¹⁷ *Belle Terre v. Boraas*, _____ U.S. _____, 94 S.Ct. 1536, 1540-41 (1974). See note 24 *infra*.

¹⁸ 348 U.S. 26 (1954).

¹⁹ *Belle Terre v. Boraas*, _____ U.S. _____, 94 S.Ct. 1541 (1974).

²⁰ 348 U.S. 26 (1954). Mr. Justice Douglas delivered the opinion of the Court in *Berman*.

²¹ The two levels being minimal scrutiny and strict scrutiny.

The use of this two-level approach during the Warren Court has been described by one commentator in the following way. "Some situations evoked the aggressive 'new' equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and virtually none in fact." Gunther, *The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

²² *Belle Terre v. Boraas*, _____ U.S. _____, 94 S.Ct. 1536, 1540 (1974). The test being, is the law reasonable, not arbitrary, and does it bear a rational relationship to a permissible state objective.

²³ *Id.*

The ordinance was found to be valid using the traditional justifications for zoning.²⁴

Mr. Justice Brennan dissented and would have vacated the judgment and remanded to the District Court for further proceedings, feeling that no case or controversy existed.

Mr. Justice Marshall also dissented and would have held the ordinance unconstitutional as a violation of the tenants' fundamental rights of association and privacy, guaranteed by the first and fourteenth amendments. Because of the involvement of these "fundamental" rights, he applied the strict scrutiny test and found that the Village of Belle Terre failed to show a compelling governmental interest²⁵ and also failed to show that if there was a compelling governmental interest that no less intrusive means could protect that interest.

Mr. Justice Marshall, throughout his opinion, expressed a basic agreement with the statements of majority in the Court's opinion.²⁶ His dissent stems from his belief that while zoning officials may concern themselves with the use of the land, it is not their proper concern who the people are who are using it, or what their beliefs are, or how they choose to live.²⁷ This "social preference" zoning²⁸ formed the basis of the decision of the District Court in this case.²⁹

The District Court had refused to uphold the ordinance on traditional zoning grounds,³⁰ but did uphold it as a "lawful exercise of a 'legally protectable affirmative interest'" in traditional families.³¹ The Court of Appeals, Second Circuit, held that the ordinance could not be sustained on such "social preferences"³² that had no relevance

²⁴ *Id. See, e.g.,* N.J. STAT. ANN. 40:55-32, *Purposes of zoning; essential considerations:*

Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, flood, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population . . . (West 1967).

²⁵ *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

²⁶ *Belle Terre v. Boraas*, _____ U.S. _____, 94 S.Ct. 1536, 1542 (1974) (Marshall, J., dissenting). At one point he states that he sees nothing unconstitutional with a town limiting the density of residential areas as long as they do not use suspect criteria to do the limiting. *Id.* at 1545.

²⁷ *Id.* at 1544.

²⁸ *Note, Excluding the Commune from Suburbia: The Use of Zoning for Social Control*, 23 HASTINGS L. J. 1459 (1972).

²⁹ *Boraas v. Belle Terre*, 476 F.2d 806, 810 (2d Cir. 1973).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 813, 814.

to the public health, safety, and welfare.³³ It also agreed with the District Court that traditional zoning justifications could not support the ordinance, but instead of applying the minimal scrutiny test, (or for that matter the strict scrutiny test), it applied an "intermediate scrutiny" equal protection test.³⁴

While there is certainly confusion as to what the test consists of,³⁵ and what to call it,³⁶ there is general agreement that it exists.³⁷ But Judge Timbers in his dissent in the Court of Appeals best measured the pulse of the Supreme Court when he expressed doubt that the Supreme Court would invoke the newer equal protection test in "traditional 'hands-off' areas of legislative activity."³⁸

Village of Belle Terre and Exclusionary Zoning

With the Court's failure to find any fundamental right involved³⁹ and its use of the minimal scrutiny test⁴⁰ the question must

³³ *Id.*

³⁴ *Id.* at 819 (dissenting opinion); see Gunther, *The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972).

³⁵ For example in the Court of Appeals case, *Boraas v. Belle Terre*, 476 F.2d 806 (2d Cir. 1973), one can choose from the enunciation of the majority, at 815, or the interpretation of that enunciation by the dissenting judge, at 819-22, or the majority's own interpretation of its enunciation, at 815 n. 8. The test applied appears to be whether the legislative classification in fact, rather than hypothetically, has a substantial relationship to a lawful objective. For thoughts by other courts on this "newer equal protection test" see note 37 *infra*.

³⁶ While the majority of the Court of Appeals, Second Circuit, has apparently attempted to avoid calling it anything, Judge Timbers in his dissent accepted the challenge and referred to it at various places as the "intermediate scrutiny" test, the "new means scrutiny equal protection standard", and the "new rationality test". *Boraas v. Belle Terre*, 476 F.2d 806, 819-24 (2d Cir. 1973).

Gunther, supra note 34, refers to it as an "invigorated old equal protection scrutiny" and a "means-oriented scrutiny" test.

Elsewhere it has been identified as a "means-evaluation" or "sliding scale" test. *Note, Up the Down-Sliding Scale: Boraas v. Village of Belle Terre and Equal Protection Assault on Restrictive Definitions of "Family" in Zoning Ordinances*, 49 NOTRE DAME L. REV. 428 (1973).

³⁷ Since the Supreme Court has never articulated the new test, just how viable it is at any point in time is questionable. Arguments that there is a new test claim to find support in such cases as *James v. Strange*, 407 U.S. 128 (1972); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971).

Yet in even more cases the Court has continued to apply the traditional two-level approach to equal protection. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Hurtado v. United States*, 410 U.S. 578 (1973); *McGinnis v. Royster*, 410 U.S. 263 (1973); *Jefferson v. Hackney*, 406 U.S. 435 (1972); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971).

One district court classified the new test as just a stricter version of the "minimal scrutiny" test. *Spart v. New York*, 361 F.Supp. 1048 (E.D.N.Y. 1973). A second district court thought that the Supreme Court's decision in *Rodriguez, supra*, would preempt the *Boraas* formulation of the Second Circuit. *Lawrence v. Oakes*, 361 F.Supp. 432, 440 (D. Vt. 1973).

³⁸ *Boraas v. Belle Terre*, 476 F.2d 806, 822 (2d Cir. 1973) (Timbers, J., dissenting).

³⁹ *Belle Terre v. Boraas*, _____ U.S. _____, 94 S.Ct. 1536, 1540 (1974).

⁴⁰ *Id.*; see note 22 *supra*.

be asked whether this decision represents a green light to exclusionary zoning.⁴¹

It first must be pointed out that the definition of "family" in and of itself is not an exclusionary device, using the commonly accepted definitions of "exclusionary zoning."⁴² If it were to be established that more minorities or poor people form voluntary families than other segments of the population, then the definition of "family" could be considered an exclusionary device, even if not the most useful one.

Rather than as an exclusionary device the Court viewed the ordinance as promoting family values and protecting the environment so that the zone could be a "sanctuary for people."⁴³ The courts and legislatures have long recognized the special significance of the family in American life.⁴⁴ While there is certainly evidence that this significance is extending beyond the traditional "blood, marriage, adoption" family, it has not gone so far as to include communes or other large voluntary families.⁴⁵ But wherever the community can validly zone single-family it can, according to this decision, exclude voluntary families of more than two.⁴⁶ The use of arguments for preservation

⁴¹ Davidoff and Davidoff define exclusionary zoning as:

... the complex of zoning practices which results in closing suburban housing and land markets to low-and moderate-income families. Davidoff and Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYR. L. REV. 509, 519 (1971).

⁴² *Id.* See generally Note, *Excluding the Commune from Suburbia: The Use of Zoning for Social Control*, 23 HAST. L. J. 1459 (1972); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Constitutional Law — Equal Protection — Zoning, Snob Zoning: Must a Man's Home be a Castle?* 69 MICH L. REV. 339 (1970).

⁴³ *Belle Terre v. Boraas*, ____ U.S. ____, 94 S.Ct. 1536, 1540 (1974).

⁴⁴ See, *Recent Decisions, Constitutional Law — Equal Protection*, 40 BROOKLYN L. REV. 226 (1973); *Comments, All in the "Family": Legal Problems of Communes*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 393 (1972).

⁴⁵ See *Williams v. Wohlgenuth*, 366 F.Supp. 541 (W.D. Pa. 1973); *Hurley v. Van Lare*, 365 F.Supp. 186 (S.D. N.Y. 1973). Cf. *Moreno v. Department of Agriculture*, 413 U.S. 528 (1973). *But cf.* *Norton v. Weinberger*, 364 F.Supp. 1117 (D. Md. 1973).

⁴⁶ The extent of the limitation is not as clear as it seems. For example is a household consisting of a mother, her child, and an unrelated man a household of "persons . . . not exceeding two . . . not related by blood adoption or marriage . . ."? Would two unrelated adults who are caring for a legally assigned foster child qualify? Or one adult with two foster children?

A statute like N.J. STAT. ANN. 10: 5-12(h) (1) (1970) that prohibits refusing rental to someone or some group because of "marital status or sex" would solve some of the problems. See *Zahorian v. Russell Fitt Real Estate Agency*, 62 N.J. 399, 301 A.2d 754 (1973). The proposed equal rights amendment might eliminate some of the problems, and prevent an even narrower definition of "family". Cf. *The Legality of Homosexual Marriage*, 82 YALE L. J. 573, 583-588 (1973).

In *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) the Court found a regulation that prevented even two unrelated people living together from receiving food stamps to be unconstitutional. The Court found the classification "not only 'imprecise', [but also] . . . wholly without any rational basis." That presumably would be the fate of any zoning ordinance that tried to limit the number of unrelated persons in its definition of "family" to less than two.

of the environment to support density and housing type restrictions is a legitimate argument if it is remembered that it is only one part of the environment that is being protected, not the environment itself.⁴⁷

If the definition of "family" is not an exclusionary device, the use of single-family zoning may be.⁴⁸ Everything else being equal it is just more expensive to build a single-family home than a multiple dwelling unit, on a per family basis.⁴⁹ And even though the entire Village of Belle Terre⁵⁰ was zoned for single-family dwellings, the Court's decision should not be interpreted as approving such zoning for all communities. The issue of zoning an entire community single-family was apparently not raised by the appellees. In any case, while the justifications for the definition of "family" and the use of single-family zoning are similar, Mr. Justice Douglas was careful to speak of "zones" and "a land use project" and not of cities, villages, and other political subdivisions.⁵¹ There is nothing in the Court's decision that should even give it pause if it were to decide that a political subdivision could not zone completely single-family.⁵²

While it cannot be doubted that the *Belle Terre*⁵³ is a strong reaffirmation of the doctrine of *Euclid v. Ambler Realty*,⁵⁴ it does not follow that this is the death knell to challenges to exclusionary zoning. Those challenges that succeeded, succeeded despite *Euclid*, and would probably succeed despite *Belle Terre*. What this decision does do is offer little, if any, hope to those many challenges that have failed.⁵⁵ The Court had the opportunity to give the courts a more active role in the scrutiny of zoning ordinances and declined to take it.

The key, as in most equal protection challenges, is the selection of the test to be applied.⁵⁶ Here the Court failed to find the involve-

⁴⁷ R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING 122 (1973).

⁴⁸ *Id.* at 17. Davidoff and Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYR. L. REV. 509, 520-522 (1971).

⁴⁹ R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING 8 (1973).

⁵⁰ A land area of less than one square mile.

⁵¹ *Belle Terre v. Boraas*, _____ U.S. _____, 94 S.Ct. 1536, 1540 (1974).

⁵² For example, single use zoning is not invalid per se in Missouri. *United States v. Black Jack*, No. 71 C 372 (1) (E.D. Mo. March 20, 1974); *Bosch v. Uplands Park*, 494 S.W.2d 339 (Mo. 1973); *McDermott v. Calverton Park*, 454 S.W.2d 577 (Mo. *en banc* 1970).

Some other states have "fair share" policies that force each city or town to accept its "fair share" of unpopular types of housing. *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); see R. BABCOCK and F. BOSSELMAN, EXCLUSIONARY ZONING 102-104 (1973).

⁵³ _____ U.S. _____, 94 S.Ct. 1536 (1974).

⁵⁴ 272 U.S. 365 (1926).

⁵⁵ See e.g., *United States v. Black Jack*, No. 71 C 372 (1) (E.D. Mo. March 20, 1974); *Mobil Oil Corp. v. Rocky River*, 38 Ohio St. 2d 23, 309 N.E.2d 900 (1974).

⁵⁶ See note 21 *supra*.

ment of any fundamental right⁵⁷ and essentially disposed of all the challenges to the ordinance in one sentence: "We find none of these reasons in the record before us."⁵⁸ Along with this it completely ignored the equal protection test used by the Court of Appeals.⁵⁹ While it may have been a great disappointment to the advocates of opening up the suburbs, the decision is nothing more than maintenance of the status quo. That is, unless discrimination on the basis of race,⁶⁰ or possibly wealth,⁶¹ can be demonstrated, a challenge to a zoning ordinance on constitutional grounds will probably fail.

Some observers may view *Belle Terre*⁶² as signaling the end of the "effect" doctrine⁶³ but this is surely a pessimistic view since race was not an issue here. Perhaps a more important concept to be concerned with is the right to travel. The right to travel has been advocated as a "fundamental" right ever since *Shapiro v. Thompson*,⁶⁴ but was conspicuously absent from the *Belle Terre* Court's list of those fundamental rights found not to be involved.⁶⁵ Instead, Mr.

⁵⁷ *Belle Terre v. Boraas*, _____ U.S._____, 94 S.Ct. 1536, 1540 (1974).

⁵⁸ *Id.*

⁵⁹ See notes 34-37 *supra*.

⁶⁰ But discrimination on the basis of race, even with the "effect" doctrine, is difficult to prove. In *United States v. Black Jack*, No. 71 C 372 (1) (E.D. Mo. March 20, 1974), the unincorporated area of Black Jack, Missouri, faced with a proposed low and moderate income multi-unit development, incorporated and passed a zoning ordinance which excluded all new multiple-family dwellings. While one of the reasons put forward for incorporation was unhappiness over the proposed development, traditional zoning objectives were given as the reason for the unhappiness and were used to support the zoning ordinance. Allegations of racial "intent", motivation, and purpose were made but were not proven since it is seldom that authorities nowadays will express a racial intent.

Much statistical evidence was then used to try to prove a racially discriminatory effect of the zoning ordinance in that more blacks than whites would be served by the development and that the development would contain a greater percentage of blacks to whites than Black Jack previously had.

The court found only one statistic relevant to the first argument, and that was that the development was designed for the income range that contained 32% of the blacks and 29% of the whites in the SMSA. The effect of excluding this class was not found to be racially discriminatory. As to the second argument, the court accepted the government's statistic that the development would contain a higher percentage of blacks than previously existed in Black Jack. Along with that they used the statistic that a higher percentage of blacks of all incomes rent. The conclusion that the court came to was that if they accepted the government's argument, then the zoning ordinance would be invalid against all multiple-dwelling developments until a proper "racial mix" was achieved since they all would result in greater integration. The court pointed out that Congress refused to remove federally-subsidized housing from local zoning control, and that this court would not take the step to remove all multi-family dwellings from local control in "disproportionate" cities.

⁶¹ Particularly since *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), it is questionable whether wealth might be a suspect class but in many areas it would seem to be difficult to discriminate against the poor without discriminating against blacks as well.

⁶² *Belle Terre v. Boraas*, _____ U.S._____, 94 S.Ct. 1536 (1974).

⁶³ See note 61 *supra*.

⁶⁴ 394 U.S. 618 (1969).

⁶⁵ *Belle Terre v. Boraas*, _____ U.S._____, 94 S.Ct. 1536, 1540 (1974). *But c.f.*, *Construction Industry Ass'n of Sonoma County v. Petaluma*, _____ F.Supp._____ (N.D. Cal. 1974).

Justice Douglas addressed himself to the right to travel challenge with the simple statement that "It [the ordinance] is not aimed at transients."⁶⁶ If the fundamental right to travel can be circumscribed by not aiming an ordinance at transients, then it is not a very useful right in zoning challenges.

With approximately one out of every eight American families unable to afford standard housing⁶⁷ any issue that affects the quantity or quality of housing is of great concern. And land-use controls, such as a restrictive definition of "family," single-family zoning, large lot zoning, and minimum house sizes, certainly affect both the cost of housing and the supply and demand of housing.⁶⁸ If these devices are having a serious effect on these house-poor families⁶⁹ why did the Court pass up its chance in *Belle Terre* to reverse the presumption of constitutionality⁷⁰ that exists with zoning ordinances? The answer can only be that the Court recognized the vital importance of local zoning. Even Mr. Justice Marshall in his dissent did so when he said:

It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.⁷¹

With the *Belle Terre* decision it is apparent that the Court is satisfied with the present state of zoning law with its local control and its presumption of constitutionality. If this is any indication, and it seems to be one, it will be a few more years before the Supreme Court decides another zoning case.

Stewart Goldstein†

⁶⁶ *Id.*

⁶⁷ REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING: A DECENT HOME 7 (1968).

⁶⁸ R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING 17 (1973).

⁶⁹ It is not universally accepted that exclusionary zoning devices hurt the low income urban residents. In fact it has been asserted that they are more beneficial than harmful in that they actually keep the moderate income blacks and whites in the urban area and not the poor, who could not afford suburbia even if there was no zoning at all. If the moderate income residents fled the city, municipal services would decline (with the decline in city tax income) to such an extent that it would more than offset any temporary gain through the "filtering-down" of middle income housing. This would cause a further decline in property values and thus property tax income. Bergin, *Price-Exclusionary Zoning: A Social Analysis*, 47 ST. JOHN'S L. REV. 1 (1972).

Clearly a great majority of law review articles at least find that exclusionary zoning hurts the low-income urban resident. See note 42 *supra*. But other factors, not closely related to zoning, have just as great an effect on housing in America. Factors such as the cost of money, inflation, the changing locations of employment, the availability of federal funds to developers, building codes, and the difficulty in building successful low income housing in sufficient quantity will all remain even if all exclusionary zoning devices are eliminated.

⁷⁰ 1 ANDERSON, AMERICAN LAW OF ZONING § 2.14 (1968).

⁷¹ *Belle Terre v. Boraas*, ----- U.S. -----, 94 S. Ct. 1536, 1543 (1974).

† Law Review Candidate; second year student, The Cleveland State University College of Law.