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ZONING AND POPULATION CONTROL—COURTS ARE REACTING TO NEW PROBLEMS IN OLD WAYS

Florida, like other states, has severe growing pains. Housing, water, waste disposal, aesthetics, and overcrowding pose critical problems as cities sprawl into surrounding areas. In some areas, recurrent crises have required the use of water rationing as land use exceeds carrying capacity. As a result, a number of communities have enacted local ordinances to alleviate or avoid growth-related problems.¹ Such attempts, however, necessarily restrict the freedom to travel—interstate and intrastate—and inevitably limit access to housing, particularly among low-income groups.

Initially, this note will outline how courts have traditionally responded to zoning problems. It will then analyze two recent innovative attempts to control growth, the "Petaluma Plan" (Petaluma, California) and the "Boca Cap" (Boca Raton, Florida), in light of recent cases and a variety of constitutional challenges. This note, however, does not address the potential impact of the Florida Environmental Land and Water Management Act of 1972,² the Local Government Comprehensive Planning Act of 1975,³ or related legislation. Nevertheless, attorneys working in the land use field should be aware of the existence and importance of such legislation.

Essentially, this note will attempt to show the futility of attacking growth control ordinances as violative of a federal right to travel or

1. See generally Bosselman, *Growth Management and Constitutional Rights Part II: The States Search for a Growth Policy*, 11 URB. L. ANN. 3 (1976); Williams and Doughty, *Studies in Legal Realism: Mount Laurel, Belle Terre and Berman*, 29 RUTGERS L. REV. 73 (1975); Note, *General Welfare and "No-Growth" Zoning Plans: Consideration of Regional Needs by Local Authorities*, 26 CASE W. RES. L. REV. 215 (1975).

2. FLA. STAT. ch. 380 (1975). Although chapter 380 stresses the desirability of local implementation of land use planning objectives, the state has retained significant control over "areas of critical state concern," § 380.05, and "developments of regional impact," § 380.06. In *Cross Key Waterways v. Askew*, No. Y-362 (Fla. 1st Dist. Ct. App. Aug. 10, 1977), the First District Court of Appeal invalidated, "as violative of Article II, Section 3, Florida Constitution, the Act's delegation of power [to the Governor and Cabinet] to designate areas of critical state concern by criteria expressed in Section 380.05(2)(a) and (b)." Slip op. at 16-17.

3. FLA. STAT. §§ 163.3161-3211 (1975), entitled the Local Government Comprehensive Planning Act of 1975, empowers and obligates counties, municipalities, and certain special districts to formulate comprehensive plans by July 1, 1979. The act provides that once a comprehensive plan is adopted, future development must be consistent with the plan.

Interestingly, § 163.3177(6)(f)4 provides that a comprehensive plan shall include "[t]he provision of adequate sites for future housing, including housing for low- and moderate-income families and mobile homes, with supporting infrastructure and community facilities . . ." Thus chapters 163 and 380 may prove to be a double-edged sword: local communities may exercise significant power over land use, yet their plans must meet state requirements and their actions must be consistent with their plans.

right to housing, despite exclusionary or discriminatory effects of the ordinances. Recent United States Supreme Court decisions make it clear that challenges to such ordinances will be successful in state court under an appropriate state constitutional theory—or not at all.⁴ Finally, this note will show that many of the objectionable qualities of a growth cap may be avoided by making specific provision in local ordinances for low- and middle-income housing.

I. TRADITIONAL JUDICIAL RESPONSES TO ZONING PROBLEMS

Historically, federal courts have balanced judicial and legislative authority when deciding zoning cases. The test for determining whether zoning ordinances are valid was first set out in 1926 in the Supreme Court's opinion in *Village of Euclid v. Ambler Realty Company*: "[I]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."⁵ Zoning must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" before it can be declared unconstitutional.⁶

Just two years after the *Euclid* decision, the United States Supreme Court clarified the *Euclid* test in *Nectow v. City of Cambridge*.⁷ The Court found a zoning ordinance of Cambridge, Massachusetts, unconstitutional as applied, holding that a landowner's right to determine the character of his property cannot be abrogated absent "a substantial relation to the public health, safety, morals, or general welfare."⁸

Since *Euclid*, the United States Supreme Court has expanded the scope of the traditional categories of public health, safety, morals, and general welfare, concomitantly expanding the reach of the state's police power. In *Berman v. Parker*,⁹ the concept of the public welfare was found broad enough to include values which were "spiritual as well as physical, aesthetic as well as monetary."¹⁰ A legislature constitutionally can implement its determination that a community should be beautiful, spacious, and well-balanced.

In *Village of Belle Terre v. Boraas*,¹¹ the police power was not

4. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

5. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), citing *Radice v. New York*, 264 U.S. 292, 294 (1924).

6. *Id.* at 395.

7. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

8. *Id.* at 188, citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 395.

9. 348 U.S. 26 (1954) (exercise of power of eminent domain, necessary for urban renewal in Washington, D.C., held constitutional).

10. *Id.* at 33.

11. 416 U.S. 1 (1974).

restricted to the narrow categories of public health and safety, but rather was held "ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."¹² The scope of the police power was interpreted broadly in *Belle Terre*, yet it has been expanded even further in some jurisdictions. In *Ybarra v. City of Los Altos Hills*,¹³ the United States Court of Appeals for the Ninth Circuit upheld a zoning ordinance, shown to discriminate against the poor, because it was "rationally related to preserving the town's rural environment."¹⁴ The ordinance was judged by the rational basis test rather than given strict scrutiny, because poverty is not a suspect classification. In *Construction Industry Association v. City of Petaluma*,¹⁵ it was held that "the concept of the public welfare is sufficiently broad to uphold Petaluma'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."¹⁶ Finally, in the recent case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,¹⁷ the United States Supreme Court upheld a zoning scheme which arguably had a greater impact on racial minorities than on whites. The Court held that zoning ordinances would not be overturned solely on a showing of "racially disproportionate impact"; proof of "intent or purpose" to discriminate on the basis of race was required.¹⁸

Other courts have responded to demographic pressures and aesthetic deterioration in varied ways. Many cases are consistent with the holdings in *Arlington Heights*, *Belle Terre*, and *Petaluma*;¹⁹ in

12. *Id.* at 9.

13. 503 F.2d 250 (9th Cir. 1974) (upheld single-family, one-acre zoning provision which precluded low-cost housing for Mexican-Americans).

14. *Id.* at 254.

15. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (five-year plan limiting building permits to 500 per year found constitutional—the plan was a reasonable exercise of the police power, did not violate due process rights of builders and landowners, and was not an unreasonable burden on interstate commerce).

16. *Id.* at 908-09.

17. 97 S.Ct. 555 (1977).

18. *Id.* at 563. The Supreme Court relied primarily on *Washington v. Davis*, 426 U.S. 229 (1976). It indicated that courts would examine legislation more closely when there is proof that a discriminatory purpose was a "motivating factor" in the legislative decision. 97 S. Ct. at 566.

19. *See, e.g.*, *Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972) (three- and six-acre minimum); *LaSalle Nat'l Bank v. City of Evanston*, 312 N.E.2d 625 (Ill. 1974) (no buildings over 35 feet high); *Wilson v. Town of Sherborn*, 326 N.E.2d 922 (Mass. App. Ct. 1975) (two-acre minimum); *County Commissioners v. Miles*, 228 A.2d 450 (Md. 1967) (five-acre minimum for 6.7% of county); *Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771 (Mo.), *appeal dismissed*, 344 U.S. 802 (1952) (three-acre minimum); *Riverview Park, Inc. v. Town of Hinsdale*, 313 A.2d 733 (N.H. 1973) (limit of 350 mobile home permits in an area of 20 square miles); *Taxpayers*

other instances, courts have refused to uphold restrictive zoning ordinances at the expense of rights protected under the federal and state constitutions.²⁰

In Florida courts and in federal courts, zoning laws have generally been upheld; zoning is considered a legislative, rather than judicial, function.²¹ Comprehensive zoning codes are presumed to be valid, and the plaintiff has the burden of proving the invalidity of the ordinance under attack.²² In other words, if it is "fairly debatable" whether the ordinance serves the public interest, it will be held valid.²³

This does not mean zoning ordinances are always valid; to serve the public interest, an ordinance must promote some substantial aspect of the general welfare.²⁴ Therefore, upon sufficient showing that an ordinance does not promote a substantial aspect of the general welfare,

Ass'n of Weymouth Township, Inc. v. Weymouth Township, 364 A.2d 1016 (N.J. 1976) (permitted age discrimination in favor of the elderly in housing in accordance with a comprehensive municipal code); *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972) (growth problems justified phased growth plan); *Zelvin v. Zoning Bd. of Appeals*, 306 A.2d 151 (Conn. C.P. Hartford County 1973) (no apartments beyond 1500 units).

20. *See, e.g., Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (moratorium on new subdivisions and rezoning of proposed subdivision land to open space and park categories held racially discriminatory); *Mayor and City Council of Baltimore v. Mano Swartz, Inc.*, 299 A.2d 828 (Md. 1973) (aesthetics alone do not justify use of the police power); *Nickola v. Township of Grand Blanc*, 232 N.W.2d 604 (Mich. 1975) (restricting trailer parks to 23 of 23,040 acres is exclusionary); *Padover v. Township of Farmington*, 132 N.W.2d 687 (Mich. 1965) (20,000 square feet minimum is exclusionary as specifically applied to plaintiffs' property); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.), *appeal dismissed*, 423 U.S. 808 (1975) (environmental reasons are insufficient excuses for limiting housing to single-family dwellings on large lots); *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975) (zoning board must consider the needs of the region as well as the city with respect to housing); *Township of Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466 (Pa. 1975) (allowing apartments in only 80 of 11,589 acres is exclusionary); *Town of Gloucester v. Olivo's Mobile Home Court, Inc.*, 300 A.2d 465 (R.I. 1973) (allowing only 30 mobile homes to a park regardless of acreage is unconstitutionally exclusionary); *Board of Supervisors v. Allman*, 211 S.E.2d 48 (Va.), *cert. denied*, 423 U.S. 940 (1975) (one-acre minimum lot size is arbitrary and discriminatory).

21. *Stone v. City of Maitland*, 446 F.2d 83, 88 (5th Cir. 1971); *accord, Watson v. Mayflower Property, Inc.*, 223 So. 2d 368, 373 (Fla. 4th Dist. Ct. App. 1969).

22. *City of St. Petersburg v. Aikin*, 217 So. 2d 315, 316 (Fla. 1968); *City of Miami Beach v. Wiesen*, 86 So. 2d 442, 444 (Fla. 1956), *quoting City of Miami Beach v. Silver*, 67 So. 2d 646, 647 (Fla. 1953).

23. *City of St. Petersburg v. Aikin*, 217 So. 2d at 317; *City of Miami Beach v. Wiesen*, 86 So. 2d at 444, *citing City of Miami Beach v. Lachman*, 71 So. 2d 148 (Fla. 1953).

24. *City of Miami Beach v. Lachman*, 71 So. 2d at 150; *Davis v. Sails*, 318 So. 2d 214, 217 (Fla. 1st Dist. Ct. App. 1975) (reversed zoning board's denial of a request for rezoning from agricultural to low density multiple units where restrictive ordinance was not "substantially related" to general welfare).

it may be said to be no longer "fairly debatable" that the public interest is being served, in which case further enforcement would be "arbitrary, unreasonable or confiscatory."²⁵ But even when zoning laws are invalidated, the courts will not take it upon themselves to rezone.²⁶ Rather, the function of the court is to determine at what point zoning restrictions become arbitrary.²⁷

A zoning ordinance is constitutional only when a rational relationship exists between the ordinance and some aspect of the police power. The state's police power, however, encompasses a wide range of legitimate public interests.²⁸ Therefore, the purposes for which a city may employ zoning tools are extremely broad. Zoning involves the consideration of future growth and development, in addition to consideration of the adequacy of drainage and storm sewers, public streets, pedestrian walkways, and density of population.²⁹ An additional function of zoning is to protect an owner's enjoyment of his home from the encroachment of commercial development.³⁰ Finally, the enhancement of aesthetic appeal through zoning has been held to be a valid exercise of the police power in the interest of the public welfare.³¹ As a result, some personal and property rights must give way in the interest of public welfare.³² But an owner will not be required to sacrifice his rights absent a substantial public need.³³ In sum, if a zoning ordinance is arbitrary and unreasonable and has no reasonably debatable relation to the general public welfare, it will be held invalid.³⁴

25. *City of St. Petersburg v. Aikin*, 217 So. 2d at 316; *Rural New Town, Inc. v. Palm Beach County*, 315 So. 2d 478, 480 (Fla. 4th Dist. Ct. App. 1975) (court reversed zoning board where developer had been denied rezoning from agricultural to residential).

26. *City of Miami Beach v. Weiss*, 217 So. 2d 836, 837 (Fla. 1969) (trial court order rezoning residential property found violative of the separation of powers doctrine).

27. *Burritt v. Harris*, 172 So. 2d 820, 823 (Fla. 1965) (since property adjacent to an airport was unsuitable for a classification more restrictive than an industrial classification, owner was entitled to rezoning).

28. *Stone v. City of Maitland*, 446 F.2d 83, 87 (5th Cir. 1971).

29. *City of Miami Beach v. Weiss*, 217 So. 2d at 837-38; *Watson v. Mayflower Property, Inc.*, 223 So. 2d 368, 373 (Fla. 4th Dist. Ct. App. 1969) (court willing to employ zoning tools to protect the economic value of existing land uses).

30. *Watson v. Mayflower Property, Inc.*, 223 So. 2d at 373.

31. *Stone v. City of Maitland*, 446 F.2d at 89 (elimination of abandoned gas stations); *Sunad, Inc., v. City of Sarasota*, 122 So. 2d 611, 614 (Fla. 1960) (commercial signs); *Merritt v. Peters*, 65 So. 2d 861, 862 (Fla. 1953) (commercial signs); *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364, 367 (Fla. 1941) (motels and apartments rather than businesses).

For recent discussions of aesthetics in zoning, see Uddo, *Land Use Controls: Aesthetics, Past and Future*, 21 LOY. L. REV. 851 (1975); 4 FLA. ST. U.L. REV. 163 (1976); 11 URB. L. ANN. 295 (1976).

32. *City of Miami Beach v. Wiesen*, 86 So. 2d at 445.

33. *Burritt v. Harris*, 172 So. 2d at 823.

34. *City of Miami v. Weiss*, 217 So. 2d at 838, *accord*, *Stone v. City of Maitland*,

II. TWO APPROACHES TO GROWTH-RELATED PROBLEMS

An analysis of two attempts to control or halt growth, comparing the so-called "Petaluma Plan" (Petaluma, California) with the "Boca Cap" (Boca Raton, Florida) may give some insight into the limits on the zoning power.

The Petaluma Plan,³⁵ enacted for a period of five years, fixes the number of new building permits to be issued at 500 per year and requires that they be divided evenly between the east and west sections of town and between single-family units and multiple residential units. The Plan also imposes a 200-foot wide greenbelt around the city, beyond which city facilities cannot be extended for five to fifteen years. Other innovative aspects of the Plan include the Residential Development Control System, an intricate point system whereby a builder accumulates points for conformity to the plan, for aesthetic design, or for providing low- or moderate-income housing. Significantly, the Plan requires that eight to twelve percent of all approved housing be for low- and moderate-income persons.³⁶

The Boca Cap limits housing development in the City of Boca Raton, Florida, to a total of 40,000 dwelling units.³⁷ The ordinance was initially brought before the electorate of Boca Raton pursuant to the initiative and referendum section of the city charter.³⁸ Impetus for the Boca Cap arose because the local citizens were greatly concerned about the already rapid growth of Boca Raton and the possible adverse effect of major proposed developments,³⁹ and because the citizens did

446 F.2d at 87, citing *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) ("substantial" relation to public welfare required).

35. In 1971 the City of Petaluma, California, alarmed by its accelerated rate of growth, the increased demand for housing, and the problem of urban sprawl, enacted a temporary "freeze" on development. During the "freeze," the city council formulated the Petaluma Plan which was adopted in 1972. *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 900-01 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).

36. *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d at 900-01.

37. The Boca Cap was an amendment to article XII of the city charter of Boca Raton, Florida, setting a limitation on the number of dwelling units in the city. Section 12.09 reads:

The total number of dwelling units within the existing boundaries of the City is hereby limited to forty thousand (40,000). No building permit shall be issued for the construction of a dwelling unit within the City which would permit the total number of dwelling units within the City to exceed forty thousand (40,000).

Boca Villas Corp. v. Pence, 45 Fla. Supp. 65 (Cir. Ct. Palm Beach County 1976).

38. *Id.* at 71.

39. *Id.* at 70. Boca Raton's population grew from 992 in 1950 to 28,506 in 1970 and to 43,000 in 1974. *Id.* at 69. It was on this basis that two major developers, Behring and Arvida, contemplated building approximately 25,000 housing units in the unincorporated western section of Boca Raton, which was annexed prior to adoption of the Cap. *Id.* at 69.

not trust the city council to make the all-important decision about optimum city size.⁴⁰ On November 2, 1972, in a storm of controversy, the Boca Cap was adopted as an amendment to the city charter by a vote of 7,722 to 5,626.⁴¹

Almost immediately after the enactment of the Boca Cap, the city council imposed a building moratorium.⁴² Still later, the voters rejected, by a margin of two to one, a city council proposal which would have increased the growth ceiling from 40,000 to 44,000 units.⁴³ With this inescapable mandate from the people, the city council enacted a series of across-the-board density reductions; implementation was completed on March 26, 1974, when the council permanently enacted a fifty percent across-the-board density reduction and repealed the prior temporary measures.⁴⁴

Since the enactment of the Boca Cap, three plaintiffs have filed suit seeking its invalidation.⁴⁵ Arvida Corporation, a major developer, filed suit in the United States District Court for the Southern District of Florida.⁴⁶ The district court abstained in order to allow Florida's courts to interpret the Boca Cap in light of state statutes and the Florida Constitution, thereby avoiding Arvida's federal fourteenth amendment claim. In so doing, the district court expressly recognized the need to defer to Florida courts in light of Florida's evolving growth policy.⁴⁷

On June 7, 1974, Arvida filed the same claim against Boca Raton in Florida circuit court,⁴⁸ alleging that the Boca Cap violated the United States and Florida Constitutions. Arvida further alleged that Boca Raton was estopped from repealing by referendum zoning variances which allowed density increases for Arvida's property. The constitu-

40. *Id.* at 80-81. This air of distrust grew out of the city council's decision to grant Arvida Corporation zoning variances which increased population density. These variances were passed on February 8, 1972, over vehement citizen protest. Petitions were circulated almost immediately by citizens seeking to initiate a referendum. As a result, the ordinances were repealed. City's Post-Trial Brief at 10-11.

41. Boca Villas Corp. v. Pence, 45 Fla. Supp. at 71.

42. Plaintiff's Trial Brief at 8.

43. City's Post-Trial Brief at 12.

44. Boca Villas Corp. v. Pence, 45 Fla. Supp. at 73. It is important to note, however, that on May 4, 1974, the city council enacted City Ordinance No. 1966, which requires review of the Boca Cap and reevaluation by the electorate at two-year intervals. City's Post-Trial Brief at 14.

45. Arvida Corporation, Boca Villas Corporation, and Keating-Meredith Properties, Inc. are large developers with extensive Boca Raton properties, on which they want to build high density dwellings.

46. Arvida Corp. v. City of Boca Raton, No. 72-2006 (S.D. Fla. April 3, 1974).

47. *Id.*, slip op. at 2-3. The district court, however, retained jurisdiction pending resolution of state issues in state courts. *Id.* at 8.

48. Letter from Gerald F. Richman, counsel for Arvida, to Joe G. Dykes, Jr. (Sept. 3, 1976).

tional issues were severed for trial at a later time, and the claim of equitable estoppel was rejected.⁴⁹ The circuit court stated that the citizens of Boca Raton had reserved final decision on the density issue through the referendum process and had exercised it in a timely fashion.⁵⁰

Additional lawsuits were filed by Boca Villas Corporation and Keating-Meredith Properties, Inc.⁵¹ These actions were consolidated for trial on the merits. Plaintiffs alleged that the Boca Cap violated the right to travel, increased housing pressure in surrounding communities, excluded low-income groups, and was unnecessary.⁵² In addition, both plaintiffs alleged that the adoption of the Boca Cap by referendum was violative of procedural due process.⁵³

The circuit court did not reach these issues because it found the Boca Cap and its implementing ordinances violative of substantive

49. *Arvida Corp. v. City of Boca Raton*, No. 74-1431, slip op. at 14 (Fla. Cir. Ct. Palm Beach County, Aug. 18, 1976). In rejecting Arvida's claim of equitable estoppel, the court found that Arvida could not meet the test for equitable estoppel in zoning cases as set out by *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15-16 (Fla. 1976), citing *Salkolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963). The test requires that the property owner "(1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired." *Arvida Corp. v. City of Boca Raton*, slip op. at 11.

50. *Arvida Corp. v. City of Boca Raton*, slip op. at 14. The court relied on *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), which apparently provides the basis to resolve a conflict of authority in Florida. *Andover Development Corp. v. City of New Smyrna Beach*, 328 So. 2d 231 (Fla. 1st Dist. Ct. App. 1976) and *City of Coral Gables v. Carmichael*, 256 So. 2d 404 (Fla. 3d Dist. Ct. App. 1972) represent the divergent positions regarding the validity of referendum approval of city ordinances.

The United States Supreme Court in *Eastlake* adopted essentially the same position as that set forth in *Carmichael*. According to this interpretation, a referendum is not a delegation of power to the people; it is a valid reservation of power which might have been otherwise delegated to a legislative body. But if a referendum action is arbitrary, capricious, and without relation to the police power, its result will be invalid regardless of the wishes of the voters. Quoting its own earlier opinion in *Hunter v. Erikson*, the *Eastlake* court asserted: "The sovereignty of the people is itself subject to [federal] constitutional limitations . . ." *Hunter v. Erikson*, 393 U.S., at 392." 426 U.S. at 676. Absent such a situation, "the referendum process does not, in itself, violate . . . the Fourteenth Amendment . . ." *Id.* at 679 (footnote omitted). The Court pointed out, however, that the reasonableness of the referendum result "is open to challenge in state court, where the scope of the state remedy available . . . would be determined as a matter of state law, as well as under Fourteenth Amendment standards." *Id.* at 677.

51. Boca Villas Corporation filed suit on January 15, 1973, and Keating-Meredith Properties, Inc. filed suit on March 22, 1973. Letter from Gerald F. Richman, counsel for Arvida, to Joe G. Dykes, Jr. (Sept. 3, 1976).

52. *Boca Villas Corp. v. Pence*, 45 Fla. Supp. at 66-67.

53. *Id.* at 67; see note 50 *supra*. For further discussion of the validity of referenda in the zoning process, see 9 AKRON L. REV. 175 (1975); 64 CAL. L. REV. 74 (1976); 24 CLEV. ST. L. REV. 635 (1975); 44 U. CIN. L. REV. 859 (1975).

due process and equal protection.⁵⁴ Specifically, the court found the Boca Cap to be irrational,⁵⁵ arbitrary, and discriminatory,⁵⁶ and without sufficient "substantial benefit" to the public welfare of Boca Raton "as to completely override private property rights."⁵⁷

Next, the court weighed costs against benefits. It found that any minimal benefit resulting from the Cap was clearly outweighed by the city-wide \$50,000,000 diminution of property values and by the city council's "implementation fiasco," which imposed density reductions solely on multi-family housing.⁵⁸ Plaintiffs were prevented from beneficially using their property; therefore, the implementing ordinances were held to be confiscatory as applied to plaintiff's property.⁵⁹

Because the circuit court found the Boca Cap to be an unconstitutional taking, it declined to address the question of whether Florida recognizes a constitutional right to adequate housing. But the court noted that other state courts have required expanding communities to share with communities in their particular region the impact of housing demands⁶⁰ and found that the Boca Cap eliminated the possibility of private construction of low- and moderate-income housing.⁶¹ In sum, impact on housing was only one factor in the court's assessment of the Boca Cap's rationality, rather than the primary means by which it was held to be unconstitutional.⁶² The court chose to remain within the traditional framework of federal constitutional law, refusing to apply available alternative theories to invalidate the Boca Cap.⁶³

54. *Boca Villas Corp. v. Pence*, 45 Fla. Supp. at 81. The circuit court's decision has been appealed. *City of Boca Raton v. Boca Villas Corp.*, No. 76-2322 (Fla. 4th Dist. Ct. App., filed Nov. 1, 1976).

55. *Boca Villas Corp. v. Pence*, 45 Fla. Supp. at 74. The court found the Boca Cap to be irrational because it imposes an unknown burden on taxpayers in that they may eventually have to buy land which is vacant because of the Cap, and because it inhibits reasonable and needed reclassification of land use. *Id.* at 74-75.

56. *Id.* at 75. According to the court, the Boca Cap is arbitrary and discriminatory in that it imposes a 50% density reduction solely on multi-family housing without attempting to determine the reasonableness of the densities imposed. *Id.* at 75.

57. *Id.* at 76.

58. *Id.* at 78.

59. *Id.* at 80.

60. *Id.* See, e.g., *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.), *appeal dismissed*, 423 U.S. 808 (1975); *In re Kitmar Builders, Inc.*, 268 A.2d 765 (Pa. 1970). For recent discussion of the problems of housing and exclusionary zoning, see Ackermen, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1; Williams, *On From Mount Laurel: Guidelines on the "Regional General Welfare,"* 1 VT. L. REV. 23 (1976); 45 U. CIN. L. REV. 115 (1976); 30 U. MIAMI L. REV. 475 (1976); 21 VILL. L. REV. 701 (1976); 16 WASHBURN L.J. 176 (1976).

61. *Boca Villas Corp. v. Pence*, 45 Fla. Supp. at 79.

62. *Id.* at 81.

63. The circuit court relied primarily upon *Nectow v. City of Cambridge*, 277 U.S.

III. CONSTITUTIONAL ANALYSIS

Property owners and developers have frequently sought to have zoning ordinances invalidated on one of two grounds: that the ordinance constitutes a taking of property without just compensation; or that it violates the constitutional right to travel or the (yet uncertain) right to housing. As we shall see below, the Petaluma Plan fares better under any attack than does the Boca Cap.

A. *The Taking Question*

Clearly, the issue of whether a zoning ordinance effects a taking of property without due process of law is a significant challenge to attempts to control or limit population growth. Generally, however, courts will interfere only when the actions of a city council are "so unreasonable and unjustified as to amount to confiscation of property."⁶⁴ Zoning ordinances, to be valid, must not be confiscatory.⁶⁵ Nor can the constitutional right to property be curtailed by unreasonable restriction under the "guise of the police power."⁶⁶

The difficulty is to determine at what point a regulation of property becomes a taking of property. In *Pennsylvania Coal Company v. Mahon*,⁶⁷ the United States Supreme Court stated "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"⁶⁸ The Florida Supreme Court requires that zoning be necessary for the public welfare; if it is not necessary, zoning will constitute an unlawful taking.⁶⁹ Further, if an ordinance deprives an owner of the beneficial use of his property by preventing all uses or the only use for which it is fit, it is invalid regardless of the public welfare.⁷⁰

183 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

64. *City of Miami Beach v. Wiesen*, 86 So. 2d 442, 445 (Fla. 1956).

65. *Forde v. City of Miami Beach*, 1 So. 2d 642, 646 (Fla. 1941); *Watson v. Mayflower Property, Inc.*, 223 So. 2d 368, 373 (Fla. 4th Dist. Ct. App. 1969).

66. *Burritt v. Harris*, 172 So. 2d 820, 823 (Fla. 1965).

67. 260 U.S. 393 (1922).

68. *Id.* at 415.

69. *Burritt v. Harris*, 172 So. 2d at 822.

70. *Forde v. City of Miami Beach*, 1 So. 2d at 645 (reversed zoning which restricted land use to single-family dwellings rather than hotels); *Watson v. Mayflower Property, Inc.*, 223 So. 2d at 373; *City of Miami v. Zorovich*, 195 So. 2d 31, 35 (Fla. 3d Dist. Ct. App. 1967), quoting *Ford v. City of Miami Beach*, 1 So. 2d at 645.

For an arguably contrary view, see *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972). There the court upheld an injunction against filling a swamp and denied the landowner compensation, holding that land regulation may be valid even if it restricts an owner to "natural [though unprofitable] uses" of the land. This result was reached under a legislative scheme similar to, but not as broad as, FLA. STAT. ch. 380 (1975). See WIS. STAT. ANN. §§ 59.971, 144.26 (Supp. 1976).

It was essentially for these reasons that the Boca Cap was invalidated. Although the issue of necessity was hotly debated, it was uncontroverted that Boca Raton had more than adequately accommodated—without a cap—the existing population, and with it problems of water supply, air quality, sewage treatment and fiscal resources.⁷¹ Proponents of a plan like the Petaluma Plan would face similar problems of demonstrating need for population control. The Petaluma Plan, however, seems to be a less drastic alternative for limiting growth than the Boca Cap.

At present, the Boca Cap would not completely deprive plaintiffs of the use of their property. It will, however, diminish their property's value to the extent that they cannot recover their original investment.⁷² But a zoning ordinance is not void solely because it causes an increase or decrease in property values.⁷³ Nor is an ordinance necessarily void because it deprives an owner of his property's most advantageous use.⁷⁴ Finally, it has been held that depriving an owner of *all* use of his property is not confiscatory when total deprivation is preceded by an "amortization" period.⁷⁵

At some point, however, 40,000 dwelling units will have been constructed in Boca Raton; at that time, under the Boca Cap, property owners holding undeveloped land will be deprived of virtually all possible uses. But the Petaluma Plan places no fixed limit on growth; it merely limits the rate of growth.⁷⁶ In merely controlling the growth rate, the Petaluma Plan has attempted to plan for the future, not deny it as Boca Raton has done.

B. *The Right To Travel, or Alternatively, the Right to Housing*

Another method by which a plaintiff may induce a court to invalidate restrictive zoning is to demonstrate that such zoning violates the constitutional right to travel.⁷⁷ Although the United States Supreme

71. *Boca Villas Corp. v. Pence*, 45 Fla. Supp. at 76-78.

72. *Id.* at 80.

73. *City of Miami Beach v. Wiesen*, 86 So. 2d at 445.

74. *Watson v. Mayflower Property, Inc.*, 223 So. 2d at 373; *City of Miami v. Zorovich*, 195 So. 2d at 36.

75. *E.B. Elliot Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1155 (5th Cir.), *cert. denied*, 400 U.S. 805 (1970) (upheld ordinance prohibiting advertising signs near expressways in attempt to preserve highway safety and aesthetics).

76. This is not to say that restricting an owner's use of his property to a greenbelt for 15 years is not a significant interference with his property rights; it is, but this alternative is still less intrusive than an absolute limit on growth.

77. For recent discussion of the right to travel and zoning cases, see Carmichael, *Land Use Controls and the Right to Travel*, 6 CUM. L. REV. 541 (1976); Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145 (1975); Note, *Durational Residence Requirements From Shapiro Through Sosna*:

Court has not yet agreed upon the constitutional source of the right to travel, it has repeatedly affirmed its existence.⁷⁸ "The right to travel" . . . is a virtually *unconditional* personal right . . ."⁷⁹ In *Memorial Hospital v. Maricopa County*,⁸⁰ the Supreme Court stated: "[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."⁸¹ Most classifications which penalize the fundamental right to travel will trigger the "compelling state interest" test.⁸²

Thus, at some point attempts to limit or control population growth through zoning may be impermissibly violative of the constitutional right to travel.⁸³ And this is precisely what the district court held in *Petaluma*.⁸⁴ The United States Court of Appeals for the Ninth Circuit, relying on *Warth v. Seldin*,⁸⁵ ruled, however, that the county

The Right to Travel Takes A New Turn, 50 N.Y.U. L. REV. 622 (1975); Note, *Freedom of Travel and Exclusionary Land Use Regulations*, 84 YALE L.J. 1564 (1975).

78. *E.g.*, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (durational residency requirements for free hospital care unconstitutional); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (durational residency requirements to vote void); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (durational residency requirements for welfare benefits void).

79. *Shapiro v. Thompson*, 394 U.S. at 643 (citations omitted).

80. 415 U.S. 250 (1974).

81. *Id.* at 261.

82. *Shapiro v. Thompson*, 394 U.S. at 634; *accord*, *Makres v. Askew*, 500 F.2d 577 (5th Cir. 1974) (six-month residence requirement for obtaining divorce upheld); *Hall v. King*, 266 So. 2d 33, 34 (Fla. 1972) (statute requiring registration of real estate broker be revoked if he has become nonresident denied equal protection to broker who moved from state). *Contra*, *Sosna v. Iowa*, 419 U.S. 393 (1975) (one-year residency requirement for obtaining a divorce did not violate federal constitutional right to travel).

83. Assuming arguendo that zoning infringes the right to travel interstate, there is a split of authority as to whether *intrastate* travel is also a constitutionally protected right. In *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971), the United States Court of Appeals for the Second Circuit held that the right to travel applies to intrastate as well as interstate activity. *Accord*, *Cole v. Housing Auth.*, 435 F.2d 807 (1st Cir. 1970). *Contra*, *Wardwell v. Board of Educ.*, 529 F.2d 625, 627 (6th Cir. 1976).

84. 375 F. Supp. at 586.

85. 422 U.S. 490 (1975). In *Warth*, the Supreme Court denied standing to a host of plaintiffs seeking to invalidate exclusionary zoning by requiring, with certain narrow exceptions, that they allege actual injury and assert their own rights. *But see* *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 97 S. Ct. at 563, in which the Court granted standing to a potential buyer to contest the racially discriminatory nature of a particular zoning scheme. The Court also granted standing to a developer to assert its own economic rights, but left open the question of whether it could assert the rights of third parties not present.

In Florida, the standard may not be so rigid, at least with respect to state claims. Any person having a legally recognizable interest which is adversely affected by a proposed zoning action will have standing to sue. The interest may be one shared in common with a number of people (for example, where an entire neighborhood is affected), but the plaintiff must have an interest beyond that shared with the whole

Construction Industry Association and the landowners lacked standing to contest the Petaluma Plan as violative of third parties' right to travel.⁸⁶ Since the Ninth Circuit did not reach the question of whether the Petaluma Plan violated the right to travel, the utility of the right-to-travel argument in zoning litigation is still uncertain.

In *Maricopa County*, however, the Supreme Court held that durational residency requirements for free medical care created an "invidious classification" which violated newcomers' right to travel by denying them the "basic necessities of life."⁸⁷ Such a classification is valid only upon a showing of compelling state interest.⁸⁸ Furthermore, in *Maricopa County*, the Court recognized shelter as one of the "basic necessities of life."⁸⁹ Some state courts have gone even further and have required local governments to provide for a variety of housing in their land use plans, thereby insuring adequate housing for all income groups within the particular region.⁹⁰ In the words of the Court of Appeals of New York:

While the people of New Castle may fervently desire to be left alone by the forces of change, the ultimate determination is not solely theirs. . . . Until the day comes when regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the locality has done.⁹¹

Thus, zoning ordinances which proscribe the construction of low- and

community. Factors to consider include proximity to property being rezoned, character of the neighborhood, and type of change proposed. *Renard v. Dade County*, 261 So. 2d 832, 837 (Fla. 1972).

For further discussion of standing to sue in zoning cases, see Note, *Standing to Sue under the Model Land Development Code*, 9 U. MICH. J.L. REF. 649 (1976); Note, *Alternatives to Warth v. Seldin: The Potential Resident Challenger of an Exclusionary Zoning Scheme*, 11 URB. L. ANN. 223 (1976); 42 BROOKLYN L. REV. 390 (1975); 9 CREIGHTON L. REV. 817 (1976); 9 SUFFOLK U.L. REV. 944 (1975).

86. *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d at 905.

87. 415 U.S. at 269.

88. *Id.*

89. *Id.* at 254, citing *Shapiro v. Thompson*, 394 U.S. 618 (1969). But the Supreme Court has refused to guarantee a *particular quality* of housing. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

A constitutional right to housing is further disparaged by the holding in *Arlington Heights*, where the Supreme Court suggested in a footnote that there was no reason for "stringent review" merely because the case involved plaintiffs' interest in acquiring housing. 97 S. Ct. at 560 n.5.

90. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.), *appeal dismissed*, 423 U.S. 808 (1975); *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975); *Township of Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466 (Pa. 1975).

91. *Berenson v. Town of New Castle*, 341 N.E.2d at 243.

moderate-income housing arguably violate the right to travel and the right to shelter as well.

The Boca Cap and its implementing ordinances would potentially have a far greater impact on regional housing supplies than the land use plans rejected by the courts of New Jersey, New York or Pennsylvania.⁹² By comparison, the Petaluma Plan provided specifically for low- and moderate-income housing. Further, although Petaluma failed to provide its share of regional housing, it did not, like Boca Raton, impose an absolute limit beyond which it would not grow.

In Florida, growth control plans face additional challenges, although these are not as persuasive as the confiscation, right to travel, or right to housing arguments. Although some restriction of interstate commerce,⁹³ deprivation of due process,⁹⁴ and denial of equal protection⁹⁵ may be within the permissible exercise of the state's (and thus a municipality's) police power, zoning must not *unreasonably* discriminate.⁹⁶ Any scheme to control or halt population growth must overcome these legal obstacles.

At each point, the Petaluma Plan is a more defensible alternative than the Boca Cap. The Petaluma Plan, although limiting building permits to 500 per year, includes quality control for housing, a greenbelt, timed extension of city services, and a requirement that at least eight to twelve percent of approved new construction be for low-cost

92. "[T]he Cap imposes an unnecessary low and moderate income housing burden on neighboring communities and Boca Raton's neighbors are presently unable to fulfill this demand." *Boca Villas Corp. v. Pence*, 45 Fla. Supp. at 79-80.

93. A state may impinge upon interstate commerce in order to promote the welfare of its citizens, provided that it does not impose an unreasonable burden and that the ordinance does not arbitrarily discriminate against interstate commerce. *R. G. Indus., Inc. v. Askew*, 276 So. 2d 1, 2 (Fla. 1973); *Joe Hatton, Inc. v. Conner*, 240 So. 2d 145, 147 (Fla. 1970).

94. If there is a reasonable relation between the zoning ordinance and some valid aspect of the general welfare, the requirements of the due process clause of the fourteenth amendment are satisfied. See *Stone v. City of Maitland*, 446 F.2d 83, 87-88 (5th Cir. 1971); *E.B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1151 (5th Cir.), *cert. denied*, 400 U.S. 805 (1970).

95. *Stone v. City of Maitland*, 446 F.2d at 88 (equal protection goes no further than protection against "invidious discrimination"); *E.B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d at 1153 (it is sufficient for equal protection that an ordinance promotes a reasonable state interest and is not arbitrary).

Note, however, that the circuit court decision in *Boca Villas* was based in part on equal protection. The court found that the 50% across-the-board density reductions were arbitrary and discriminatory in that they were imposed solely against multi-family housing without analysis of the impact of each individual development. *Boca Villas Corp. v. Pence*, 45 Fla. Supp. at 74, 81.

96. *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 813 (5th Cir. 1974) (refusal to permit a proposed low-income housing project to tie into a city's existing water and sewer systems was racially discriminatory). *Accord*, *State ex rel. S.A. Lynch Corp. v. Danner*, 33 So. 2d 45, 47 (Fla. 1947).

housing. The Boca Cap, on the other hand, imposes an absolute limit on growth of 40,000 housing units. Implementing ordinances effect a fifty percent across-the-board density reduction solely on multi-family housing, the type generally most accessible to low-income groups in a rapidly developing community and, significantly, make no provision for low-income housing.⁹⁷ Absent a compelling state interest, such a burden should not be shifted to the already overcrowded surrounding communities.

IV. CONCLUSION

Although the Palm Beach circuit court held the Boca Cap to be an unconstitutional taking,⁹⁸ in general Florida courts are notably reluctant to invalidate zoning ordinances.⁹⁹ They are equally reluctant to completely deprive an owner of the use of his property.¹⁰⁰ In resolving the conflict between residents and development interests, however, Florida courts have been willing to substantially diminish property rights, short of promoting confiscation, in the interest of the public welfare.¹⁰¹

It is possible that Florida courts will find both growth-controlling (the Petaluma Plan) and growth-limiting (the Boca Cap) schemes constitutional, if confronted with severe problems of crowding and environmental degradation. At some point problems of sewage treatment, waste disposal, overcrowding, and water rationing can become so severe as to create a compelling state interest in population control and land use. If this occurs, a critical question still remains: will Florida courts require compensation for landowners who have been deprived of the use of their property, or simply limit them to the "natural uses" of their land without compensation?¹⁰² The answer may well depend upon the constitutional analysis used to justify the land use scheme.

But rights other than a property owner's right to compensation are at stake when a city attempts to limit growth. In *Dunn v. Blumstein*,¹⁰³ the United States Supreme Court held that a state must always employ the least intrusive means to a legitimate end when fundamental

97. *Boca Villas Corp. v. Pence*, 45 Fla. Supp. 65.

98. *Id.* at 80.

99. *City of Miami Beach v. Wiesen*, 86 So. 2d 442 (Fla. 1956).

100. *Forde v. City of Miami Beach*, 1 So. 2d 642 (Fla. 1941).

101. *City of Miami Beach v. Wiesen*, 86 So. 2d 442 (Fla. 1956).

102. *See Just v. Marinette County*, 201 N.W.2d 761, 767-68 (Wis. 1972); FLA. STAT. chs. 163, 380 (1975).

103. 405 U.S. 330 (1972) (durationsl residency requirement to vote was unconstitutionally violative of the right to travel).

rights are infringed upon.¹⁰⁴ Applying *Dunn* to the problem of population control, a system of planned or timed growth would seem to be required in place of a system which denies growth altogether, unless a compelling state interest justifies the latter. The "least intrusive means" test might not preclude the use of drastic population control measures such as a cap. In the words of the trial judge in *Boca Villas*: "If a reduction in Boca Raton's overall residential densities to 40,000 units would rationally promote public welfare without unnecessary and unreasonable consequences to private property rights, the city could legally utilize a variety of techniques, including a form of Cap [to control growth]."¹⁰⁵

Population control measures such as the Boca Cap or the Petaluma Plan are relatively recent innovations, and, as yet, courts have been reluctant to resolve related issues other than by relying on established precedent. The right to housing, recognized by a minority of state courts, has yet to be considered in Florida. The scope of the right to travel has not yet been defined for want of a plaintiff with standing. In the Boca Cap litigation, such theories were before the circuit court, but the court chose to rely primarily on *Nectow* and *Pennsylvania Coal* to find the Boca Cap unconstitutional.¹⁰⁶ The result was correct but the reasoning strained.

The better course is for Florida courts to follow the lead of the highest courts of New Jersey, New York, and Pennsylvania—holding as a matter of state constitutional law that growing communities in Florida must provide in their comprehensive plans for low- and moderate-income housing.¹⁰⁷ The need to base such decisions on state law is particularly important in light of recent United States Supreme Court decisions such as *Arlington Heights* and *Warth v. Seldin*, which suggest the Court's unwillingness to become involved in local housing problems.¹⁰⁸

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104. *Id.* at 343.

105. 45 Fla. Supp. at 68.

106. *Id.* at 17.

107. Florida courts could conceivably find a constitutional right to travel or to housing in Article I of the Florida Constitution—the Declaration of Rights—which provides:

Section 1. Political power.—All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Section 2. Basic rights.—All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property

108. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 97 S. Ct. 555

(1977); *Warth v. Seldin*, 422 U.S. 490 (1975). Note that the New Jersey Supreme Court avoided United States Supreme Court review of its decision in *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.), *appeal dismissed*, 423 U.S. 808 (1975), by holding that access to housing was a right as a matter of state constitutional law. For an excellent discussion of the relationship between state and federal constitutional law, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).