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ZONING, COMMUNES AND EQUAL PROTECTION

Does the Constitution require municipalities to treat experimental living groups and traditional families without distinction (*i.e.* to admit communes into single-family precincts) in the application of their zoning ordinances? This interesting and timely question was raised in the recent California case of *Palo Alto Tenants Union v. Morgan*.¹

The suit involved a challenge to Palo Alto's "single-family residential" (R-1) zoning ordinance brought by a commune consisting of more than four unrelated persons desiring to live together in an R-1 neighborhood. That ordinance defines "family" as "one person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons living as a single housekeeping unit."² Plaintiffs argued that since the enactment allows families of any size to live in R-1 areas, the provision for not more than four unrelated persons was arbitrary, unreasonable and a violation of plaintiffs' rights of free association and equal protection of the laws. The Federal District Court for the Northern District of California rejected plaintiffs' arguments and upheld the constitutionality of Palo Alto's ordinance.³

The court concluded that the act was reasonably related to the protection of public health, safety and welfare and was, therefore, constitutionally valid and within the city's legislative competence. It cited the likelihood that unrelated living groups will (1) have more cars per unit than families, causing parking and traffic problems; (2) make more noise; (3) have more wage earners per unit (with the possibility that this would upset the neighborhood rent structure and force traditional families out of the neighborhood); and (4) increase the population density in residential neighborhoods. Since the average traditional family in the United States has fewer than four members, the city's cut-off number was not considered arbitrary. Additionally, the city pointed out that communes were free to estab-

1. 321 F. Supp. 908 (N.D. Cal. 1970).

2. PALO ALTO, CAL., MUNICIPAL CODE §§ 18.04.210, 18.88.050 (1972).

3. 321 F. Supp. 908 (N.D. Cal. 1970).

lish themselves in other areas; thus, the court was not faced with a situation where communes of more than four persons were completely excluded from the city. The ordinance did not prohibit communal living as such; it merely regulated the areas where this could be practiced.⁴

Moreover, the court made it clear that the state has a strong and legitimate interest in preserving the integrity of stable family units. Traditional families, according to the court, perform unique and valuable social functions in raising and educating young people and providing for the emotional and physical needs of family members. Unrelated living groups may or may not perform the same functions voluntarily; but, they do so only voluntarily and without the persuasion of law or tradition. Also, they may form and disband at will. Therefore, a classification by the state based upon traditional family ties is not unreasonable and does not violate the equal protection clause.⁵

The general rule regarding the validity of zoning ordinances has not changed since 1926 when it was pronounced by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*⁶: municipal zoning ordinances are constitutional in principle as a valid exercise of the police power of a state when they are reasonably related to the health, safety, morals or welfare of the community.⁷ State enabling statutes characteristically grant to local governments wide authority to zone for the good of the community.⁸ The traditional judicial test for zoning ordinances and zoning discriminations has been one of reasonableness: an act will be upheld if it is fairly debatable that it is related to the health, safety, morals or welfare of the community.⁹ Provided zoning ordinances are within the scope of the enabling act,¹⁰

4. *Id.* at 912-13.

5. *Id.* at 911-12.

6. 272 U.S. 365 (1926).

7. *Id.* at 390.

8. *See, e.g.*, CAL. GOV'T. CODE § 65800 (Deering Supp. 1972).

9. D. HAGMAN, J. LARSON & G. MARTIN, CALIFORNIA ZONING PRACTICE 494-95 (1969).

10. *See, e.g.*, *City of Des Plaines v. Trottnor*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966), where an ordinance defining "single-family" to exclude four unrelated persons was held to be beyond the scope of the enabling act. There is dictum in this case to the effect that a definition of "family" based on marriage or consanguinity might not be constitutionally reasonable.

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there is a strong presumption of validity.¹¹ Courts have been extremely reluctant to strike down such laws as arbitrary or unreasonable unless the arbitrariness is clear.¹²

In the half century since *Village of Euclid*, the establishment of residential enclaves has been universally accepted as a legitimate exercise of the police power.¹³ The classification "single-family" residential has been held reasonable and related to the police power in the regulation of population density, traffic, noise, building sizes and similar matters affecting the community welfare.¹⁴ Some commentators have concluded that single-family zoning is the highest use to be made of a community's land.¹⁵

The Palo Alto ordinance is not atypical.¹⁶ It is similar to the recommendation of the American Society of Planning Officials, which defines "family" in the zoning sense to be:

[O]ne or more persons occupying a single dwelling unit, provided that unless all members are related by blood or marriage, no such family shall contain over five persons, but further provided that domestic servants employed on the premises may be housed on the premises without being counted as a family or families.¹⁷

That definition is the product of experience and drafting sophistication. The ambiguity of early statutes with regard to the meaning of "family" opened the door for litigation by fraternities, dormitories, large groups of in-laws and other such units.¹⁸ In the absence of

11. *See, e.g.*, *Zahn v. Board of Pub. Works*, 195 Cal. 497, 234 P. 388 (1925), *aff'd*, 274 U.S. 325 (1927).

12. *Id.*

13. 1 ANDERSON, *THE AMERICAN LAW OF ZONING* §§ 8.27-28, at 635 (1968).

14. *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 P. 381 (1925), *aff'd mem.*, 273 U.S. 781 (1926). *See also* *City of Newark v. Johnson*, 70 N.J. Super. 381, 175 A.2d 500 (Essex County Ct. 1961).

15. ANDERSON, *supra* note 13.

16. *See, e.g.*, ST. LOUIS, MO., REV. CODE § 2201.2 (1960).

17. F. BLAIR & E. BARTLEY, *TEXT OF A MODERN ZONING ORDINANCE* § 18, at 70 (3d ed. 1966).

18. *See, e.g.*, *Village of Riverside v. Reagan*, 270 Ill. App. 355 (1933) (a widow, her 12 children, the husbands of three daughters and three grandchildren living in one house constituted a single family); *Neptune Park Ass'n v. Steinberg*, 138 Conn. 357, 84 A.2d 687 (1951) (four different biological families occupying one large house and sharing kitchen facilities constituted a single family within the meaning of the local ordinance); *Application of LaPorte*, 2 App. Div. 2d 710, 152 N.Y.S.2d 916 (Sup. Ct. 1956), *aff'd mem.*, *LaPorte v. City of New Rochelle*,

specific definitions, courts have construed "family" and "single-family" in ways which are often at odds with the statutory objectives.¹⁹ The cut-off number of unrelated persons is necessary to prevent an equal protection challenge. One "single-family" statute which provided merely for a single housekeeping unit, without stipulating a number of unrelated persons as constituting a family, was held to violate the fourteenth amendment since it permitted any number of persons to occupy a house ostensibly as a "family" and allowed division of housekeeping expenses provided only that they live as a solitary housekeeping unit, while the very same number of persons could not live in one house in several housekeeping units.²⁰

The constitutional issues raised by zoning ordinances which exclude non-families were considered by two New Jersey courts in *Kirsch Holding Company v. Manasquan*.²¹ In that case a state appellate court upheld an ordinance passed by a seacoast town to prevent groups of unrelated persons from living together anywhere within the municipality. The ordinance, providing that no dwelling unit could be used or rented by a group or collection of unmarried persons not qualifying as a "family," was enacted to prevent "[n]oise, obscene and profane language, wild parties, immorality, lewd conduct, drunkenness, parking and traffic congestion, . . . destruction of the peace and quiet."²² In response to the allegation that the ordinance was arbitrary, unreasonable and a violator of plaintiff's constitutional rights, the court declared that the question must be considered with regard to the offensive character of the conduct sought to be regulated. In view of the stated purposes, the definition of "family" in the ordinance was found to be neither unreasonable nor arbitrary.²³

2 N.Y.2d 921, 141 N.E.2d 917, 161 N.Y.S.2d 886 (1957) (60 students of a religious order, living together as a single housekeeping unit, did constitute a family within the meaning of the zoning ordinance).

19. *Id.*

20. *Harmon v. City of Peoria*, 373 Ill. 594, 27 N.E.2d 525 (1940).

21. 111 N.J. Super. 359, 268 A.2d 333 (Super. Ct. 1970), *rev'd*, 59 N.J. 241, 281 A.2d 513 (1971).

22. 111 N.J. Super. at 363, 268 A.2d at 335.

23. 59 N.J. 241, 247, 281 A.2d 513, 516 (1971). "Family" is defined as:

one or more persons related by blood or marriage occupying a dwelling unit and living as a single, non-profit housekeeping unit [or a] collective number of individuals living together in one house under one head, whose relationship is of a permanent and distinct character, and cooking as a single housekeeping unit. This definition shall not include any society, club, fraternity, sorority, association, lodge, combine, federation, group, coterie, or

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This holding was reversed by the New Jersey Supreme Court.²⁴ That court noted that the conduct of many rental groups was undeniably obnoxious and immoral. However, it held that since the ordinance banned innocent and innocuous group renting as well, it was arbitrary, unreasonable and violative of the property owners' rights of substantive due process.²⁵ The court stated that "[z]oning ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct in dwelling situations" and suggested that effective police regulations are the appropriate way to curb offensive behavior.²⁶

The *Palo Alto* court, by contrast, affirmed the propriety of using zoning ordinances to control or regulate potentially offensive behavior—although that case can be distinguished since the Palo Alto ordinance made no attempt to exclude unrelated living groups from the municipality entirely. The court reaffirmed the presumption of validity of zoning ordinances and the traditional judicial restraint in declining to strike down zoning ordinances that reasonable men might debate.²⁷ Traditional biological families have always been favored by zoning laws, and the propriety of excluding non-family living units from single-family areas has been established in American law. The *Palo Alto* case supports the conclusion that this kind of discrimination is not unreasonable, whatever the outcome might be in a *Kirsch Holding Company* situation where total exclusion is the statute's objective.

The novel question presented in the *Palo Alto* case was whether the interest of a group of persons wishing to experiment with new communal life styles is so fundamental and vital that this group should be entitled to invoke the special test of the equal protection clause which has been held applicable to racial, religious and political groups, as well as to indigents in the criminal process—that any discrimination must not merely be reasonable, but must be justified by a compelling state interest. The petitioners relied upon the Supreme

organization, which is not a recognized religious order, nor include a group of individuals whose association is temporary and resort-seasonal in character or nature.

Id.

24. 59 N.J. 241, 281 A.2d 513 (1971).

25. *Id.*

26. *Id.* at 253-54, 281 A.2d at 520.

27. 321 F. Supp. 908 (N.D. Cal. 1970).

Court's holding in *Shapiro v. Thompson*²⁸ that the right of indigents to move between states is fundamental and must be unimpeded by discriminatory state welfare laws absent a showing of compelling state interest. The petitioners in *Palo Alto* read *Shapiro* as an extension of the concept of "basic" and "fundamental" rights to include all constitutionally protected rights, and specifically rights of free movement, free association and privacy.²⁹ The *Palo Alto* court refused to read *Shapiro* so broadly. It interpreted *Shapiro* as merely adding the right of indigents to move freely from state to state to the list of fundamental and specially protected rights.³⁰ Therefore, *Shapiro* is not applicable to the present case since it did not involve any interests which other cases had found to be fundamental (*e.g.*, the interests of racial, religious and political groups).³¹

The *Shapiro* decision has been vigorously attacked, and it is questionable whether even its narrow holding will stand unaltered. It is highly unlikely that any lower court will construe it in its broadest sense without a clear mandate from an appellate court or the Supreme Court itself.³² Were a court to find the *Shapiro* doctrine applicable in such a case, and hold that an inferred right of any group to live wherever it chooses might not be abridged without some compelling state interest, the law of zoning would be literally turned upside down: presumptions of validity would become presumptions of invalidity and traditional police powers of a state would be severely circumscribed by new and vague notions of substantive equal protection.³³

28. 394 U.S. 618 (1969).

29. *See* 394 U.S. at 659 (Harlan, J., dissenting): "Today the list [of fundamental rights] apparently has been further enlarged to include classifications based upon recent interstate movement, and perhaps those based upon the exercise of any constitutional right."

30. 321 F. Supp. at 911.

31. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

32. *See Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

33. Courts may be more willing to question the constitutionality of statutory definitions of "family" in cases which do not involve zoning ordinances. *See, e.g.*, *Moreno v. USDA*, 345 F. Supp. 310 (D.C. Cir. 1972), where the court held that a provision of the Food Stamp Act of 1964, 7 U.S.C. §§ 2011 *et seq.* (1970) defining "household" to include only groups of related persons was a violation of equal protection.

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It may be concluded that *Palo Alto Tenants Union v. Morgan* reaffirms the constitutional reasonableness of excluding non-families from single-family neighborhoods and rejects an attempt to change the standard of review of zoning ordinances by extending the doctrine of substantive equal protection to communal living groups.

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