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The Petaluma Decision: Another Indication that Federal Courts Want to Avoid Land Use Litigation

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entitled to fifth amendment protection. As such documents are in reality more in the nature of business records than private papers, they deserve no more protection than the former have historically been afforded.

The failure to deal adequately with the privacy issue may effectively preclude fifth amendment protection to virtually all documents. It is to be hoped, however, that the Court will deal more fully with the privacy issue when the documents in question are sufficiently private to be protected. Until the Court has such an opportunity, *Fisher* should not be read as signaling the end of the protection long provided private papers.

III. CONCLUSION

Cases prior to *Fisher* indicated that the fifth amendment protected individuals from being forced to produce incriminating documents when such documents dealt purely with matters of private interest. What has been held to constitute private interest, however, has been narrowed over the years to exclude most collective and business-like entities. In *Fisher* the Supreme Court held that an accountant's work papers in the possession of a client would not be protected by the fifth amendment. Consequently, if the taxpayer delivered those papers to his attorney, they would not be entitled to protection under the attorney-client privilege. Although the Court reached the proper conclusion, the opinion in *Fisher*, which virtually ignores an important privacy issue, endangers fifth amendment protection heretofore accorded to private papers.

Brian M. Lidji

The Petaluma Decision: Another Indication that Federal Courts Want To Avoid Land Use Litigation

In 1972 Petaluma, California, a rapidly growing city¹ forty miles north of San Francisco, implemented a growth control program² which limited the number of building permits issued through 1977, and established a 200-foot-wide greenbelt which served as a boundary for urban expansion. The Petaluma Plan prevented the construction of approximately one-half to two-thirds of the housing units which would otherwise have been built in response to the normal market demands. Two Petaluma landowners and an association of builders and developers filed suit in federal court alleging that the Petaluma

1. In November 1972 the population was 30,500 and increasing at the rate of over 10% per year.

2. The city council adopted an official development policy in June 1971 which reflected the desire of Petaluma to limit its growth: "In order to protect its small town character and surrounding open spaces, it shall be the policy of the City to control its future rate and distribution of growth" *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574, 576 (N.D. Cal. 1974). Petaluma also cited inadequate water and sewage treatment facilities as additional reasons for the building limitation, but denied that a primary motive was to keep others from moving into Petaluma. *Id.* at 576-77.

Plan was unconstitutional. The district court invalidated the plan upon a finding that it violated a constitutionally protected right to travel interstate. The city of Petaluma appealed. *Held, reversed*: A builders' association and landowners have no standing to assert the right to travel of third parties, and the Petaluma Plan does not impermissibly burden interstate commerce. *Construction Industry Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976).

I. THE LEGAL FRAMEWORK

Standing is a major element of the broader concept of justiciability³ by which the jurisdiction of federal courts is defined. Standing, which has been labeled an "amorphous" concept,⁴ is contained within the framework of article III of the Constitution which restricts judicial power to "cases" and "controversies."⁵ The Supreme Court, in the absence of a statute conferring standing, has interpreted the article III limitation to require federal plaintiffs to allege a threatened or actual injury to themselves before court jurisdiction may be invoked.⁶

An allegation of an injury in fact, however, is not sufficient to overcome the prudential rule which denies standing to assert the constitutional rights of third parties, the *jus tertii* claim.⁷ An analysis of the Supreme Court cases in which standing to assert *jus tertii* has been granted shows that once either a plaintiff or defendant has established an injury in fact, the Court considers three factors which, taken together, determine whether or not standing to assert *jus tertii* will be allowed:⁸ (1) the nature of the constitutional right asserted;⁹ (2) the nature of the relationship between the assailant and the third party whose rights are being asserted;¹⁰ and (3) whether it is practicable for the

3. The concept of justiciability is best defined by the question: "Should federal judicial power be employed to hear this challenge by this litigant at this time?" Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 480 (1972).

4. *Flast v. Cohen*, 392 U.S. 83, 98-99 (1968); see Lewis, *Constitutional Rights and the Misuse of "Standing"*, 14 STAN. L. REV. 433, 434 (1962); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 n.1 (1973); Note, *Standing To Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

5. *United States v. Richardson*, 418 U.S. 166, 171 (1974); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 151 (1970).

6. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *accord*, *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972).

7. A party attempting to assert a *jus tertii* claim must be harmed himself before the court will consider allowing standing to assert the *jus tertii* claim. *Compare, e.g.*, *Tileston v. Ullman*, 318 U.S. 44 (1943) (standing denied to physician seeking declaratory judgment that criminal statute prohibiting dissemination of advice concerning use of contraceptives deprived patients of life without due process), *with* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (doctor criminally prosecuted under anti-contraception statute given standing to assert the rights of his patients). See Scott, *supra* note 4, at 649 n.14; Sedler, *Standing To Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 600 (1962); Note, *supra* note 4, at 429-31.

8. The discussion of the three factors is based largely upon Sedler, *supra* note 7, at 626-48.

9. The nature of the right can be placed into five categories, some of which are given a higher status than others, depending upon a court's values: (1) expression; (2) life, liberty, and privacy; (3) procedural rights; (4) property and contractual rights; and (5) equal protection. For example, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a private school challenged an Oregon statute which required all children in a certain age group to attend public schools. The Court, in permitting the *jus tertii* claim, held that the nature of the right asserted was a "fundamental theory of liberty" guaranteed by the fourteenth amendment which prohibited a state from forcing children into public schools.

10. The several possible relationships, with varying degrees of importance to a court, are (1) professional relationships, (2) race or class relationships, (3) commercial relationships, (4) the

third party to assert its own rights.¹¹ In the latest major standing case, *Warth v. Seldin*,¹² the Court denied standing to low income persons allegedly excluded by a zoning ordinance.¹³ The Court defined a two-part injury in fact test which was not met by the persons claiming to have been excluded: (1) absent the restrictive zoning, those alleging exclusion must be able to purchase or lease, and (2) if the court afforded the relief requested, those claiming exclusion must be able to move into the town.¹⁴ In order to satisfy this strict injury in fact requirement, the *Warth* Court indicated that those allegedly excluded would have to challenge the zoning restrictions as applied to particular housing projects within their means, and of which they were intended residents.¹⁵

In much the same state as the concept of standing, the current authority construing the commerce clause of the United States Constitution is confused.¹⁶ Apparently, both federal and state courts are applying either a two-step "reasonableness" analysis or a three-step balancing approach. The two-step test was established in *South Carolina State Highway Dep't v. Barnwell Bros.*,¹⁷ in which the Court upheld a state law setting size and weight limits for trucks using state highways. The Court inquired whether the state legislature had acted pursuant to a legitimate end and, if so, whether the statute was reasonably adapted to that end.¹⁸ The three-step balancing test is best exemplified by *Southern Pacific Co. v. Arizona*¹⁹ in which an Arizona law limiting the length of trains was declared unconstitutional. The Court first applied the *Barnwell* two-step analysis, but then went a step further by

relationship between a defendant and others also affected by a statute or process, and (5) the relationship between an association and its members. *NAACP v. Alabama*, 357 U.S. 449 (1958), points out the importance of the nature of the relationship. The Court held that an association, which had been found in contempt of court for refusing to supply a membership list, had standing to assert the rights of its members. The nature of the relationship between the association and its members was strong because the members and the association were in a sense identical and the association was the medium through which the members expressed their views. *Id.* at 458-59.

11. Sedler's analysis of *jus tertii* cases shows the practicability of third parties asserting their own rights to be the most important of the three factors, although not itself controlling. Sedler, *supra* note 7, at 628, 647; see Note, *supra* note 4, at 425. A *jus tertii* claim was permitted in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), in which the claimant, who had been prosecuted for distributing contraceptives to an unmarried woman, asserted that a law prohibiting the prescription of contraceptives to unmarried persons violated the equal protection clause. The Court found that persons denied access to contraceptives were not subject to prosecution, and, therefore, were denied an opportunity to assert their own rights, thus "diluting" the rights of third parties. *Id.* at 446.

12. 422 U.S. 490 (1975). For a full discussion of the case see Note, *Constitutional Law—Standing To Sue in Exclusionary Zoning Litigation: Catch-22 Revisited*, 54 N.C.L. REV. 449 (1976); Note, *Standing To Sue—Injury in Fact Guidelines for Constitutional Challenges of Zoning Ordinances by Nonresidents*, 9 SUFFOLK U.L. REV. 944 (1975).

13. Although the case is not an important *jus tertii* case, the injury in fact requirements are significant to the *Petaluma* decision. See notes 30-32 *infra* and accompanying text.

14. 422 U.S. at 504.

15. *Id.* at 507.

16. For an excellent analysis of the evolution of commerce clause cases see D. ENGAHL, *CONSTITUTIONAL POWER: FEDERAL AND STATE* 260-94 (1974); Note, *Use of the Commerce Clause to Invalidate Anti-Phosphate Legislation: Will It Wash?*, 45 U. COLO. L. REV. 487 (1974).

17. 303 U.S. 177 (1938). For an analysis of cases decided since *Barnwell* see D. ENGAHL, *supra* note 16, at 283-86.

18. 303 U.S. at 190.

19. 325 U.S. 761 (1945). For other cases applying the balancing test see *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (transportation); *Parker v. Brown*, 317 U.S. 341 (1943) (trade); *New York Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346 (1939) (trade).

balancing the effectiveness of the safety measure against its interference with interstate commerce.²⁰

The current confusion in the case law was aggravated by opinions in two recent Supreme Court cases. One clearly rejected balancing and applied the *Barnwell* test,²¹ while the other used somewhat hazy balancing language.²² It remains unclear in both federal²³ and state²⁴ courts whether judicial scrutiny should defer to local legislation under the *Barnwell* approach, or whether a stricter scrutiny and an active balancing test should apply.

II. CONSTRUCTION INDUSTRY ASS'N V. CITY OF PETALUMA

The circuit court found that both the builders' association and the landowners were injured in fact.²⁵ The Court held, however, that the right to travel claim fell within the prudential standing rule that bars parties from asserting the rights or legal interests of others in order to obtain relief for themselves.²⁶ Consequently, appellees had standing to assert only those rights *personal to them*: that the plan posed an unreasonable burden on interstate commerce and was violative of their due process rights.²⁷

20. 325 U.S. at 775-76.

21. *Brotherhood of Locomotive Firemen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129 (1968) (Arkansas "full-crew" train law upheld in deference to legislative judgment of elected representatives).

22. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (Arizona fruit packing regulation imposed greater burden on interstate commerce than resulting local benefits).

23. *See, e.g., Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975). *But see Soap & Detergent Ass'n v. Clark*, 330 F. Supp. 1218, 1221-22 (S.D. Fla. 1971).

24. *Hackensack Meadowlake Dev. Comm'n v. Municipal Sanitary Landfill Authority*, 68 N.J. 451, 348 A.2d 505 (1975), *prob. juris. noted*, 44 U.S.L.W. 3564 (U.S. Apr. 6, 1976) (No. 1150). Here the court recognized the two possible tests, but elected to apply a balancing test to uphold a state law prohibiting the disposal of out-of-state solid waste in New Jersey. *But see American Can Co. v. Oregon Liquor Control Comm'n*, 15 Ore. App. 618, 517 P.2d 691 (1973) (court refused to apply balancing in upholding ban on non-returnable beverage containers).

25. 522 F.2d at 903. The builders contributed dues to the association in a sum that was proportionate to the amount of business done in the area. Therefore, the court found that the building restrictions arguably caused economic injury to the association, thus satisfying injury in fact. *See note 6 supra* and accompanying text. The allegation by the two landowners that the building restrictions adversely affected the value and marketability of their land was sufficient to establish a personal stake in the litigation. 522 F.2d at 903-04.

26. *Id.* at 904.

27. *Id.* at 905. The circuit court dealt with three major areas of constitutional law in upholding the Petaluma Plan: standing, the commerce clause, and due process. For a discussion of due process challenges of land use regulation see Comment, "*Takings*" Under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances, p. — *supra*.

The decision to deny standing to the developers to assert the right to travel was the key holding as it permitted the court to shift from the compelling interest test used by the lower court to a reasonableness test, a shift enabling the court to uphold the plan. In the most recent cases concerning a right to travel the Supreme Court has held that the right is a fundamental one which may be abridged only upon a showing of compelling state interest. These cases have held that a denial of a basic necessity of life which penalizes the exercise of the right to travel denies equal protection in the absence of a compelling state interest. Hospitalization and welfare payments are necessities of life, but divorce and education are not. *Compare, e.g., Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974) (durational residency requirement as a condition to an indigent's receiving non-emergency hospitalization violated equal protection clause), *and Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (durational residency requirement as a condition to receiving welfare payments violated equal protection clause), *with Sosna v. Iowa*, 419 U.S. 393, 405-09 (1975) (state residency requirement for divorce upheld), *and Starns v. Malkerson*, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971) (requirement of one-year domicile for residence eligibility of out-of-state student upheld).

In reaching the decision to bar the *jus tertii* claim, the circuit court found the appellees' claims met none of the exceptions which permit *jus tertii* standing. In particular, there existed no special relationship between appellees and those allegedly excluded,²⁸ nor had the association and landowners shown that those allegedly excluded could not assert their own rights.²⁹ The circuit court's conclusions seem well-founded in the light of the earlier *jus tertii* cases,³⁰ and in concert with the Supreme Court's orientation toward standing and zoning challenges as evidenced by *Warth*.

Unlike *Warth*, in *Petaluma* no persons allegedly excluded from Petaluma were parties to the suit. The *Warth* standing requirement is important, however, as it indicates what degree of relationship must exist between third parties and those attempting to assert *jus tertii* claims. The association was required by the *Warth* decision to allege that the Petaluma Plan interfered with a specific housing project of an association member and that a specific, intended buyer or lessee was prevented, thereby, from moving into Petaluma to reside in that particular project. Thus, the association's general claim that the plan denied the right to travel, insofar as the plan tended to limit the natural population growth of the area, did not establish the degree of relationship necessary under *Warth*.

The most important factor in allowing *jus tertii* claims is a showing that the third party cannot assert its own rights.³¹ An analysis of *Warth* indicates the weakness of the association's *jus tertii* claim in *Petaluma*. In *Warth* the several persons allegedly excluded did assert their own rights and interests. There was no reason why those actually excluded from Petaluma could not have done the same.³²

Although the Court in *Petaluma* reached the proper *jus tertii* decision, it seemed at one point to confuse the *jus tertii* issue with a line of cases dealing with the zone of interest requirement.³³ The zone of interest requirement is of

The city of Petaluma claimed three compelling interests to support the dwelling unit limitation, the most significant of which was the desire of its citizens to protect the "small town character" of Petaluma. *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574, 583 (N.D. Cal. 1974). The district court adopted the reasoning of the Pennsylvania Supreme Court to deny that preserving the character of a city can ever be a compelling interest. *Id.* at 584-86. See *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1966) (zoning restrictions requiring minimum area per residential building lot cannot be used to avoid the sewage, traffic, and overcrowding caused by natural growth); Note, *The Right To Travel as a Limitation upon the Exercise of the Zoning Power*, 36 OHIO ST. L.J. 128, 134-37 (1975).

The exact parameters of the right to travel have not been determined in the equal protection field. The important point is that the district court applied the right to travel in a zoning context for the first time; it had been raised only once in a zoning case heard by the Supreme Court, but the Court did not discuss the issue to any extent. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). See also Note, *Construction Indus. Ass'n of Sonoma County v. City of Petaluma: Constitutional Limitations Placed on Controlled Growth Zoning*, 5 GOLDEN GATE L. REV. 485 (1975); Note, *Freedom of Travel and Exclusionary Land Use Regulations*, 84 YALE L.J. 1564, 1574-75 (1975).

28. 522 F.2d at 904.

29. *Id.*

30. See notes 7-11 *supra* and accompanying text.

31. See note 11 *supra*.

32. 522 F.2d at 904-05.

33. *Id.* at 904. The zone of interest requirement arose in two earlier cases. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970) (competitor's interest against national banks entering data processing field was within zone of interest of statutory protection); *Barlow v. Collins*, 397 U.S. 159 (1970) (tenant farmers who were eligible to receive cotton program payments were within zone of interest and could challenge statute which permitted assignment of payments to secure tenant rent).

uncertain importance at this time in the law of standing.³⁴ Whatever its relevance, the zone of interest test is at most an additional requirement to injury in fact and has little to do with the law of *jus tertii* claims with which the *Petaluma* case was primarily concerned.

The circuit court ignored the current dissension surrounding the proper commerce clause test. The district court found that the housing in *Petaluma* was constructed from goods and services which had moved in interstate commerce, and that the curtailment of residential growth by the plan would cause a serious burden on interstate commerce.³⁵ The court dismissed the commerce clause claim with no analysis, and, furthermore, did not deal with the trial court's finding of fact that the plan unreasonably burdened interstate commerce.³⁶ Rather than analyze the commerce claim, the court quoted the language of *Huron Cement Co. v. Detroit*,³⁷ a case in which the Supreme Court apparently applied the *Barnwell* two-step reasonableness test, and stated that it was beyond its authority "to review state legislation by balancing reasonable social welfare legislation against its incidental burden on commerce."³⁸ Ironically, the circuit court rejected the balancing approach as though there were no question as to its demise or inapplicability in *Petaluma*, but cited a Seventh Circuit case which admitted the uncertainty as to whether the *Barnwell* approach or the balancing approach should be used.³⁹

The foregoing arguments only serve to emphasize what many authorities have suggested: the state courts are the better forum for challenges to land use regulation.⁴⁰ The *Petaluma* decision may encourage this attitude. State courts will scrutinize the local plans with reference to regional needs, taking into account the particular economic and social facts of an entire region and mandating that local plans promote the regional welfare. This level of stricter scrutiny in state courts will primarily focus on suitable housing for all classes of people, and invalidate growth control plans which do not provide low and moderate income housing.⁴¹ Thus, in state courts developers, associations,

34. In *Association of Data Processing Serv. Organizations v. Camp* the Court added a second requirement for standing by requiring a complainant seeking standing to be arguably within the zone of interests to be protected by the statute or constitutional right in question. 397 U.S. at 153.

35. *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574, 577-81 (N.D. Cal. 1974).

36. 522 F.2d at 909.

37. 362 U.S. 440 (1960). The Court in *Huron* stated "that a police power does not impermissibly burden interstate commerce where the regulation neither discriminates against interstate commerce nor operates to disrupt its required uniformity." 362 U.S. at 448.

38. 522 F.2d at 909, citing *Brotherhood of Locomotive Firemen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129, 136 (1968).

39. *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975). The court in *Petaluma* apparently ignored the uncertainty expressed in *Procter & Gamble* in order to apply only a reasonableness test. This treatment of the commerce clause issue was consistent with the denial of standing to assert the right to travel which, if allowed and deemed a fundamental interest, would have required a test of strict scrutiny.

40. First, state courts have greater experience in dealing with local land use regulation. Secondly, standing is more readily attained in state courts where the plaintiffs are not confronted with the constitutional "case" or "controversy" requirement which, after *Warth*, makes it extremely difficult for those claiming to have been excluded to gain standing. Finally, and perhaps most important for those challenging the regulations, state courts may impose a stricter test than the federal courts' reasonableness standards. See Hall, *Planners Alerted to Coming Increase in Land Use Litigation in Four Types of Cases*, 10 A.I.P. NEWSLETTER, Nov.-Dec. 1975, at 9.

41. The leading state case on the concept of regional welfare is *Southern Burlington County*

and landowners will not be forced to assert *jus tertii* claims in order to place a challenged ordinance under a stricter scrutiny than the reasonableness tests applied by federal courts.

III. CONCLUSION

The *Petaluma* decision was neither surprising nor novel. This decision again evidences the basic unwillingness of federal courts to become involved in local land use regulation. The effect of cases such as *Petaluma* may be to force those challenging local land use regulations to bring suit in state, not federal courts.

Michael D. Wortley

NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (local zoning ordinance invalidated on ground that it did not promote regional welfare as it provided for no range of housing types). See Williams & Doughty, *Studies in Legal Realism: Mount Laurel, Belle Terre and Berman*, 29 RUTGERS L. REV. 73 (1975).

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