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## Village of Belle Terre v. Boraas, 94 S. Ct. 1536 (1974)

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## CASE COMMENTS

**Constitutional Law—FOURTEENTH AMENDMENT—MUNICIPALITY ZONED EXCLUSIVELY FOR SINGLE-FAMILY DWELLINGS PROMOTES VALID COMMUNITY OBJECTIVES AND DOES NOT INTERFERE WITH RIGHT TO TRAVEL.—*Village of Belle Terre v. Boraas*, 94 S. Ct. 1536 (1974).**

Edwin and Judith Dickman own a house in the Village of Belle Terre, located on Long Island, New York, approximately eight miles from the State University of New York at Stony Brook.<sup>1</sup> Zoned exclusively for single-family dwellings, Belle Terre encompasses less than a square mile and is inhabited by about 700 people living in 220 homes.<sup>2</sup> The Dickmans leased the house to student Michael Truman for a term of eighteen months; Truman was joined later by five other students.<sup>3</sup> On June 8, 1972, the students were denied residents' beach passes because they were considered "illegal residents"—they were not a "family" within the meaning of Belle Terre's "one-family dwelling" requirement. The word "family" is defined by the zoning ordinance to mean:

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

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1. The village is located on Long Island's north shore and is entirely surrounded by the town of Brookhaven, which, according to the 1970 Federal Census, has a population of 245,000. Belle Terre is immediately adjacent on the northeast to Port Jefferson, a town of 5500 persons. 1 U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION: CHARACTERISTICS OF THE POPULATION pt. 34, § 1, at 33 (1973). Because people now are willing to travel farther to their jobs, Belle Terre could be considered a suburb of New York City.

2. Belle Terre, N.Y., Building Zone Ordinance, art. II, § DT-1.0 (1971), provides that the entire village will consist of one "A" residential district. The building lots in Belle Terre are zoned for a minimum size of one acre and a height restriction of three stories. The saturation population level is considered to be 1400. NASSAU-SUFFOLK REGIONAL PLANNING BOARD, ZONING: INVENTORY AND ANALYSIS 96 (1970).

3. Bruce Boraas, one of the other five students, became a colessee with Michael Truman. Anne Parish paid for a month's rent with a check drawn on her account. These three tenants joined the Dickmans as plaintiffs in the case. The group of six inhabitants maintained a "house" checking account and set up a single housekeeping unit, each member sharing household duties and expenses. *Boraas v. Village of Belle Terre*, 367 F. Supp. 136 (E.D.N.Y. 1972).

4. Belle Terre, N.Y., Building Zone Ordinance, art. I, § D-1.35a (1971). Cf. 2 PENSACOLA, FLA., CODE § 164-2 (1968) (persons related by blood or marriage, or no more than four unrelated persons); 2 TALLAHASSEE, FLA., CODE ch. 37, art. II, § 2.2(42) (1957) (persons living as a single housekeeping unit); GAINESVILLE, FLA., CODE § 29-3(18)

On July 31, the Dickmans were served with an "Order to Remedy Violations," which notified the owners and students that they would become liable for violation of the zoning ordinance on August 3, unless the illegal condition was corrected by that time.<sup>5</sup> On August 2, 1972, plaintiffs commenced suit<sup>6</sup> seeking an injunction against enforcement of the ordinance and a declaration that the restriction against occupancy by more than two unrelated persons was unconstitutional.<sup>7</sup>

The District Court for the Eastern District of New York upheld the ordinance, finding that the community's affirmative interest in protecting the traditional family can be a "proper zoning consideration."<sup>8</sup> The Second Circuit reversed, holding that the ordinance did not have any rational connection with permissible zoning objectives.<sup>9</sup> On appeal the Supreme Court reversed the decision of the Second Circuit, holding that, since the ordinance is reasonable, not arbitrary and bears "a rational relationship to a [permissible] state objective," it is constitutional.<sup>10</sup>

This comment will explore two issues: the effect *Belle Terre* is likely to have on (a) a challenge to land use regulations based upon the

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(1960) (persons related by blood, marriage or adoption maintaining a single housekeeping unit).

Gainesville's definition may be unconstitutional. One of appellees' allegations was that Belle Terre's definition of "family" violated their right of association, in that the ordinance "reeks with an animosity to unmarried couples who live together." 94 S. Ct. at 1541. The Court found no evidence of this. It was able to distinguish *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), where the Court held invalid a federal law which excluded from participation in the food stamp program any household containing an individual unrelated to any other household member. The Court, based on this distinction, may be willing to invalidate a definition of "family" that requires all members of a household to be related. If this is the case, the ordinances of Gainesville and other localities, under which all members of the housekeeping unit must be related by blood, marriage or adoption, may be vulnerable to a constitutional attack.

5. The ordinance provides that failure to correct an illegal condition within 48 hours after receiving notice to remedy constitutes a violation. *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 138 (E.D.N.Y. 1972).

6. The suit was brought against the Mayor and Trustees of Belle Terre under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). Jurisdiction was grounded on 28 U.S.C. §§ 1331(a), 1343, 2201 (1970). *Boraas v. Village of Belle Terre*, 476 F.2d 806, 809-10 (2d Cir. 1973); see note 3 *supra*.

7. The ordinance was alleged to violate, among others, the right to travel, the right to privacy and the right to migrate to and settle within a state. *Village of Belle Terre v. Boraas*, 94 S. Ct. 1536, 1538, 1540 (1974).

8. *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 149 (E.D.N.Y. 1972).

9. *Boraas v. Village of Belle Terre*, 476 F.2d 806, 818 (2d Cir. 1973).

10. *Village of Belle Terre v. Boraas*, 94 S. Ct. 1536, 1540 (1974), quoting from *Reed v. Reed*, 404 U.S. 71, 76 (1971). The permissible state objectives that the Court found were "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." *Id.* at 1541.

right to travel and (b) the limits of governmental authority with regard to zoning and land use planning.

### A. Land Use Regulations and the Right To Travel

Recently it has been argued<sup>11</sup> that land use regulations may violate an individual's constitutional right to travel,<sup>12</sup> since such regulations may preclude persons from migrating to and settling in certain areas of a state. One argument raised by the *Belle Terre* appellees was that the restrictive zoning ordinance at issue impinged upon that constitutional right.<sup>13</sup> The Court rejected this argument with the observation that the ordinance was "not aimed at transients."<sup>14</sup>

The constitutional right to travel from one state to another was first recognized by the Supreme Court in *Crandall v. Nevada*.<sup>15</sup> In that case the Court invalidated a special state tax levied on railroads and stage companies for every passenger carried out of the state.<sup>16</sup> In *Shapiro v. Thompson*<sup>17</sup> this right to travel doctrine was expanded to encompass the freedom to migrate to and settle in any state of a person's choice.<sup>18</sup>

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11. See Comment, *The Right to Travel and Its Application to Restrictive Housing Laws*, 66 Nw. U.L. REV. 635 (1971); Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972).

12. A detailed history and analysis of the right to travel is beyond the scope of this comment. It is, however, necessary to consider the doctrine briefly so that *Belle Terre's* influence may be properly appreciated. For an indepth study of the right to travel see Boudin, *The Constitutional Right To Travel*, 56 COLUM. L. REV. 47 (1956); Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972).

13. 94 S. Ct. at 1540.

14. *Id.*

15. 73 U.S. (6 Wall.) 35 (1867). This was the first majority opinion to recognize the right, although it had been recognized in the dissenting opinion by Chief Justice Taney in *The Passenger Cases*, 48 U.S. (7 How.) 283, 491-92 (1849). The first recognition of the right by a lower court had occurred in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (No. 3230) (E.D. Pa. 1823). The right may be traced to chapter 42 of the Magna Carta, which gave every free man the right to leave England, except in wartime. See Boudin, *The Constitutional Right To Travel*, 56 COLUM. L. REV. 47 (1956).

Other cases recognizing the right to travel from state to state include *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *United States v. Guest*, 383 U.S. 745 (1966); *Edwards v. California*, 314 U.S. 160 (1941); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870).

16. *Cf. Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), in which the Court allowed the airport authority to charge emplaning passengers a fair approximation of the cost of the facilities used.

17. 394 U.S. 618 (1969). In *Shapiro* the Supreme Court invalidated state welfare provisions that denied assistance to persons meeting all eligibility qualifications except for a one year residency requirement. See also *Cole v. Housing Auth.*, 435 F.2d 807 (1st Cir. 1970).

18. *Shapiro* has since been followed in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Graham v. Richardson*, 403 U.S. 365 (1971); *Oregon v. Mitchell*, 400 U.S. 112, 237, 285 (1970) (concurring opinions).

The test formulated in *Shapiro* did not completely preclude regulation of travel. Rather, a regulation impeding the right to travel could be upheld if it promoted a "compelling state interest."<sup>19</sup> The Court left open the question of what factual basis was necessary to show that the right to travel had been impinged.<sup>20</sup>

In the case of *Memorial Hospital v. Maricopa County*<sup>21</sup> the Supreme Court attempted to clarify the application of the compelling state interest test to legislation challenged as infringing the right to travel. The Court formulated a two-fold analysis that considered: (1) whether the regulation allegedly impinging upon the right to travel would deter migration<sup>22</sup> and (2) the extent to which the regulation would *penalize* the exercise of the right to travel.<sup>23</sup> Thus, restrictions on the right to travel are not per se unconstitutional;<sup>24</sup> to be invalid they must deter migration and penalize the individual for exercising that right.

Applying the *Maricopa* analysis to the *Belle Terre* factual setting, it appears that the Belle Terre zoning ordinance should have been invalidated. It seems unquestionable that by allowing only single-family dwellings the village will deter the migration of tenants such as the *Belle Terre* appellees, since their residence there as a group would be illegal under the zoning ordinance. Secondly, groups of tenants attempting to migrate to and settle in Belle Terre will be penalized in two ways: (1) if they comply with the ordinance their right of association will be limited by the village's definition of "family"<sup>25</sup> and (2) if more than two unrelated tenants move into a single-family dwelling

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In an earlier case, it was implied that a right to migrate to and settle in another state could be found in the *Crandall* right to travel doctrine. See *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); cf. *Truax v. Raich*, 239 U.S. 33 (1915).

19. 394 U.S. at 638 n.21. See *Vlandis v. Kline*, 412 U.S. 441 (1973).

20. The lower courts have found this aspect of the test perplexing. See *Cole v. Housing Auth.*, 435 F.2d 807 (1st Cir. 1970). Some lower courts have stricken laws that merely touch on the right to travel. See, e.g., *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974). Others have required a more serious interference. See, e.g., *Richardson v. Graham*, 313 F. Supp. 34 (D. Ariz. 1970), *aff'd*, 403 U.S. 365 (1971); *Hall v. King*, 266 So. 2d 33 (Fla. 1972).

21. 415 U.S. 250 (1974). In *Maricopa* the Supreme Court relied on the right to travel doctrine to invalidate an Arizona statute that required an indigent to have resided in a county for one year before he could receive nonemergency hospital care at county expense.

22. *Id.* at 257.

23. *Id.*

24. See *Vlandis v. Kline*, 412 U.S. 441 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 638 n.21 (1969).

25. The village ordinance definition of "family" restricted to two the number of nonrelated persons that could live in a single-family dwelling. See note 4 and accompanying text *supra*.

in the village they will be subject to criminal prosecution for violation of the zoning ordinance. The Court, however, rejected appellees' right to travel argument, stating that the zoning ordinance is "not aimed at transients."<sup>26</sup> Apparently the Court has added a third element to the right to travel analysis articulated in *Maricopa*. Before a statute will be invalidated because it impedes the right to travel it now must be "aimed at transients." By reading the right to travel doctrine so narrowly, the Court seems to have intimated an intent to nullify only simple-minded, clumsy attempts to curtail individuals' ability to migrate to a certain area.<sup>27</sup> Unfortunately, legislation not specifically "aimed at transients" may have a significant impact on one's freedom to travel.<sup>28</sup>

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26. 94 S. Ct. at 1540.

27. Compare the attitude of the *Belle Terre* Court, see 94 S. Ct. at 1540, with the attitude expressed in *Lane v. Wilson*, 307 U.S. 268 (1939), where the Court stood ready to "nullify sophisticated as well as simple-minded" discriminatory schemes. *Id.* at 275.

The impact of *Belle Terre* on the right to travel doctrine as applied to land use planning may be limited by the unique factual setting of the case. As previously mentioned, although *Belle Terre* was zoned entirely for single-family dwellings, the village land mass was less than one square mile. Since the neighboring communities offered land uses that would have permitted the students to live together as a family, it would have been but a short trip for the *Belle Terre* tenants to secure other accommodations. If, however, *Belle Terre* were twenty or so miles square, or if all communities in the *Belle Terre* area were zoned for single-family dwellings, the Court might have been more likely to find a violation of the right to travel. Such a result was suggested in the trial court opinion by Judge Dooling. *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 144-49 (E.D.N.Y. 1972). The *Dickmans* and the student-tenants had argued that if the *Belle Terre* ordinance were valid, every other community could adopt a similar ordinance to prevent groups such as the student-tenants from residing in one-family dwelling districts. Judge Dooling acknowledged this possibility, but felt that the likelihood of such future community action was not a relevant factor in deciding the case before him:

There is no present threat that exclusion from *Belle Terre* would deny to the plaintiff students the right to live as the group that they are. It may be that, as plaintiffs suggest, other villages, and the Town of Brookhaven, might move in the direction of adopting such a definition of family as *Belle Terre* has adopted. Should that occur then plainly the facts will have changed and a different case will have been presented than is now presented.

*Id.* at 147-48.

28. The recent decision in *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), decided about one month after the Supreme Court's decision in *Belle Terre*, suggests that dismissal of a litigant's right to travel argument against land use regulations may not be automatic. In *Petaluma* the court held in violation of the right to travel a plan adopted to limit the number of housing starts within the city, and thereby to limit the population growth of the city. The court found that the city had a carrying capacity for significantly more persons than currently resided within its boundaries, and decided that if *Petaluma* were allowed to limit its population by limiting the number of housing starts, other communities would have to provide not only for the area's natural population growth but also for the excess population that otherwise would have settled in *Petaluma*. Compare 375 F. Supp. at 587 with *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 147-48 (E.D.N.Y. 1972). The *Petaluma* court framed the issue as whether "a municipality capable of supporting a natural population

If *Belle Terre* is not limited to its facts, and if the Court did intend to circumscribe the right to travel principle, the decision may have far-reaching implications. For example, *Belle Terre* might breathe new life into the controversial concept of imposing a tax on new residents of Florida,<sup>29</sup> as a means of discouraging migration into the state. While a direct impact fee probably would be unconstitutional,<sup>30</sup> tax lawyers should be able to devise a levy sufficiently indirect to pass constitutional muster under *Belle Terre*. If such a tax were not construed to be "aimed at transients" it might be upheld; evidently, the fact that such a tax might penalize new residents would no longer dictate its nullification.

### B. Land Use Regulations and the Limits of Governmental Power

Only rarely does the Supreme Court agree to hear a zoning case. Since *Village of Euclid v. Ambler Realty Co.*,<sup>31</sup> which was heard in 1926, the Court had decided only five zoning cases prior to *Belle Terre*.<sup>32</sup> The power of governments to zone land has not been in dis-

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expansion [may] limit growth simply because it does not prefer to grow at the rate which would be dictated by prevailing market demand." 375 F. Supp. at 583. The court answered this question in the negative, not taking notice of the sweeping language in *Belle Terre* that allows preservation of community values to be a valid zoning objective. See note 10 and accompanying text *supra*.

The *Petaluma* court distinguished the Supreme Court's decision in *Belle Terre*, arguing that the latter involved a "zoning regulation which prohibited groups of unmarried persons from living together in the village," whereas the *Petaluma* plan had as its "very reason for being" the exclusion of persons from the city and the abridgement of their right to travel. 375 F. Supp. at 584 n.1. But "virtually all zoning schemes limit the manner in which people move about in one way or another." *Id.* at 583. The question is where to draw the line. The *Petaluma* court suggests that historically acceptable land use planning techniques, such as zoning regulations, will not be subject to a right to travel challenge, but that more revolutionary land use planning techniques, such as a housing-start cap, will be vulnerable to such an attack.

29. A bill entitled "Florida Impact Fee Law," Fla. H.R. 2705-SF (Comm. Substitute 1974), which would have allowed placement of fees on all new construction was considered in the 1974 session of the Florida Legislature. See FLA. H.R. JOUR. 1025 (1974). The bill died in the House Committee on Community Affairs. See LEGISLATIVE INFORMATION DIVISION, JOINT LEGISLATIVE MANAGEMENT COMMITTEE, HISTORY OF LEGISLATION—1974 REGULAR SESSION FLORIDA LEGISLATURE, History of House Bills 223 (undated).

30. Such a tax would most certainly be "aimed at transients." Moreover it would clearly act to deter migration, because a person would be hesitant to incur the expense of moving into Florida, and it would penalize those persons who had recently moved in interstate travel. A state may not restrain "the transportation of persons and property across its borders." *Edwards v. California*, 314 U.S. 160, 173 (1941). Cf. *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

31. 272 U.S. 365 (1926).

32. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Zahn v. Board of Pub. Works*, 274 U.S. 325 (1927). Cf. *Berman v. Parker*, 348 U.S. 26 (1954), which was a "taking" case.

pute since *Euclid*: at issue ever since has been the scope of this power. When do land use regulations cease to regulate, and instead become a "taking" requiring compensation under the fifth and fourteenth amendments?<sup>33</sup> While lower courts have grappled with this problem,<sup>34</sup> the Supreme Court has not recently reviewed the issue. *Belle Terre*, the first land use case before the Supreme Court in twelve years, offers some insight into this continuing controversy.

The power to enact zoning ordinances has been construed as a necessary element of the police power of the state.<sup>35</sup> In order to pass constitutional muster a zoning ordinance must bear a "substantial relation to the public health, safety, morals, or general welfare."<sup>36</sup> If an ordinance fails to meet this test, it may be found an unnecessary and unreasonable restriction on private property.<sup>37</sup> The courts, however, will not substitute their judgment for that of the legislature when it is "fairly debatable" whether the zoning ordinance is an unreasonable exercise of the police power.<sup>38</sup> Historically, therefore, considerable deference has been accorded to legislative zoning determinations.

In *Euclid* the Court delineated examples of the valid exercise of the police power to enhance the general welfare through zoning: "to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and [to exclude] from residential sections offensive trades, industries and structures likely to create nuisances."<sup>39</sup> Most state courts, however, have adopted a broad interpretation of the "public welfare," and have not limited zoning regulations and the police power to such obvious examples.<sup>40</sup> Florida courts have accepted this broad interpreta-

33. For a detailed analysis and criticism of the law in this area see F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973).

34. See, e.g., *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908 (N.D. Cal. 1970), *aff'd*, 487 F.2d 883 (9th Cir. 1973); *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

35. 272 U.S. at 387.

36. *Id.* at 395.

37. See, e.g., *State ex rel. Tampa Co. of Jehovah's Witnesses, North Unit, Inc. v. City of Tampa*, 48 So. 2d 78 (Fla. 1950); *Brandon v. Board of Comm'rs*, 11 A.2d 304 (N.J. Sup. Ct.), *aff'd*, 15 A.2d 598 (N.J. Ct. Err. & App. 1940). See also 10A G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* §§ 5355-57 (1957).

38. See, e.g., *Zahn v. Board of Pub. Works*, 274 U.S. 325 (1927); *City of Miami Beach v. Prevatt*, 97 So. 2d 473 (Fla. 1957), *cert. denied sub nom. Wags Transp. Sys., Inc. v. Prevatt*, 355 U.S. 957 (1958); *Morgan v. City of Chicago*, 18 N.E.2d 872 (Ill. 1938).

39. 272 U.S. at 388.

40. See, e.g., *Associated Home Builders v. City of Walnut Creek*, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (upholding mandatory dedication); *Golden v. Planning Bd.*, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972) (upholding developmental timing ordinance); *Reid v. Architectural Bd. of Review*, 192 N.E.2d 74 (Ohio 1963) (upholding requirement of board certification of plan); *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Ore. 1969) (upholding public rights to beach land); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972) (upholding shoreline regulation that includes wetlands protection).

tion for quite some time,<sup>41</sup> and in *Belle Terre* it was approved by the Supreme Court.<sup>42</sup>

The Supreme Court already had accepted a broad reading of "public welfare" in relation to eminent domain proceedings.<sup>43</sup> In *Berman v. Parker* the Court sanctioned an urban redevelopment project in the District of Columbia that had required condemnation of private property in order to "develop a better balanced, more attractive community."<sup>44</sup> The Court stated:

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . .

. . . The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.<sup>45</sup>

The *Belle Terre* Court based its decision in large measure on *Berman v. Parker*.<sup>46</sup> It is arguable, however, that this reliance was misplaced: the limit of police power and the limit of the power to take under eminent domain are not one and the same.<sup>47</sup> Just compensation is required where a taking occurs, while no compensation is afforded when a land owner is only precluded from using his property in a

41. See *City of Miami Beach v. Weiss*, 217 So. 2d 836 (Fla. 1969) (consideration of future growth and development, adequacy of drainage and storm sewers, public streets, pedestrian walkways, and density of population); *City of Miami Beach v. Lachman*, 71 So. 2d 148 (Fla. 1953) (to protect the public's right of access to the beaches, to promote the economic welfare of the city, and to properly time hotel and apartment development); *City of Miami v. Zorovich*, 195 So. 2d 31 (Fla. 3d Dist. Ct. App.), cert. denied, 201 So. 2d 554 (Fla. 1967) (to promote integrity of neighborhood and preserve residential character).

42. 94 S. Ct. at 1539.

43. See *Berman v. Parker*, 348 U.S. 26 (1954).

44. *Id.* at 31; see *id.* at 33. The property was not being taken for a traditional "public use," since it was not to be used for a highway or a park; rather it was to be redeveloped as part of a planned community by private developers. One issue was whether such a project, which was for the "benefit of the public," came within the fifth amendment limitation that private property be taken only for a "public use." The Court upheld the act, equating "benefit of the public" with "public use." *Id.* at 31.

45. *Id.* at 32-33.

46. See 94 S. Ct. at 1539.

47. See *Smith v. State Highway Comm'n*, 346 P.2d 259, 267-68 (Kan. 1959). See also 5A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2575 (1957); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

certain way.<sup>48</sup> As a matter of policy, courts should allow a taking in cases where they might not allow regulation. Since the owner suffering a taking is compensated for his troubles, he is, therefore, somewhat better off than the landowner who merely loses the opportunity to use his property in a particular manner because of governmental restrictions. In spite of this distinction, *Belle Terre* treats the two powers as though they were one and applies to zoning regulations the broad public benefit standard adopted in *Berman*.<sup>49</sup>

By failing to draw any distinction between different governmental actions affecting land use, the *Belle Terre* Court's analysis appears to sanction indiscriminately many types of restrictive land use controls—some good, some bad. The Court noted that passage of comprehensive statewide land use statutes, such as the one enacted by the Vermont legislature,<sup>50</sup> probably would be upheld as valid efforts to protect the general welfare.<sup>51</sup> In addition to suggesting approval of such statutes, the Court's analysis seems to condone the adoption of exclusionary zoning ordinances—a minimum lot size for the erection of a dwelling,<sup>52</sup> control of developmental pace and sequence,<sup>53</sup> a minimum floor area for a dwelling,<sup>54</sup> exclusion of all multiple-family dwellings from a

48. There is a limit to which use can be restricted without becoming a "taking." See *Arverne Bay Constr. Co. v. Thatcher*, 15 N.E.2d 587 (N.Y. 1938). If that limit is exceeded, compensation must be paid. See *Goldman v. Crowther*, 128 A. 50 (Md. 1925).

49. Indeed, the Court cites *Berman* for the proposition that it "refused to limit the concept of public welfare that may be enhanced by zoning regulations." 94 S. Ct. at 1539. It is questionable whether a strict reading of *Berman* would require this result. *Berman* was not a challenge to any zoning regulation; use of the property at issue conformed with the applicable zoning regulations. See *Record* at 2, *Berman v. Parker*, 348 U.S. 26 (1954).

50. VT. STAT. ANN. tit. 10, ch. 151 (1973), as amended, (Supp. 1974).

51. 94 S. Ct. at 1539 n.3. The Court noted the Vermont statute as an example of an enhancement of the public welfare through zoning regulation. *Id.* A similar comprehensive planning act proposed for Florida by the Environmental Land Management Study (ELMS) Committee was passed by the Florida House of Representatives during the 1974 session, but died on the Senate calendar. See Fla. H.R. 2884 (Comm. Substitute 1974); LEGISLATIVE INFORMATION DIVISION, JOINT LEGISLATIVE MANAGEMENT COMMITTEE, HISTORY OF LEGISLATION—1974 REGULAR SESSION FLORIDA LEGISLATURE, HISTORY OF HOUSE BILLS 259 (undated).

52. *Cf. Simon v. Town of Needham*, 42 N.E.2d 516 (Mass. 1942) (upholding one-acre minimum lot size); *Fischer v. Bedminster*, 93 A.2d 378 (N.J. 1952) (upholding five-acre requirement for construction of residences). *But see* *Appeal of Kit-Mar Builders*, 268 A.2d 765 (Pa. 1970) (holding invalid two-acre requirement for lots along existing roads and three-acre requirement for interior lots); *Board of County Supervisors v. Carper*, 107 S.E.2d 390 (Va. 1959) (holding invalid two-acre lot requirement).

53. *Cf. Golden v. Planning Bd.*, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972) (upholding developmental timing ordinance). See generally Bosselman, *Can the Town of Ramapo Pass a Law To Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234 (1973). *But cf. Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974) (holding invalid a plan to limit the number of housing starts within the city).

54. *Cf. Lionshead Lake, Inc. v. Wayne Township*, 89 A.2d 693 (N.J. 1952), *appeal*

municipality,<sup>55</sup> and adoption of a restrictive definition of "family."<sup>56</sup> The *Belle Terre* Court recognized that the latter device is a permissible exercise of the police power to enhance the general welfare.<sup>57</sup>

The Court mentioned only in passing that *Belle Terre* is zoned solely for single-family residences. The Court apparently intended to sanction sub silentio the power of municipalities to exclude multi-family dwellings. A majority of court decisions, in Florida<sup>58</sup> and elsewhere,<sup>59</sup> have upheld the power of municipalities to allow only single-family residences within their boundaries. While many courts have approved a municipality's power to zone itself exclusively residential, most have stressed the nature of the geographic area and the nature of the town within that area in upholding the ordinance against constitutional attack.<sup>60</sup> These courts have looked to determine whether the needs of the people of the town were satisfied by the other areas of the region.<sup>61</sup> Very few courts have asked the logical corollary to this question; that is, whether the exclusionary zoning of a single municipality should be prevented when *regional needs* are not promoted by that zoning.<sup>62</sup>

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*dismissed*, 344 U.S. 919 (1953). *But cf.* Appeal of Medinger, 104 A.2d 118 (Pa. 1954) (holding invalid minimum floor area requirement of 1800 square feet).

55. *But cf.* Appeal of Girsh, 263 A.2d 395 (Pa. 1970) (holding unconstitutional the failure of township's zoning scheme to provide for multiple-family dwellings).

56. *Cf.* Palo Alto Tenants Union v. Morgan, 487 F.2d 883 (9th Cir. 1973) (upholding for purposes of single-family residence zones a definition of "family" that limited to four the number of unrelated persons living together as a single housekeeping unit).

57. 94 S. Ct. at 1536.

58. *See, e.g.*, Blank v. Town of Lake Clarke Shores, 161 So. 2d 683 (Fla. 2d Dist. Ct. App. 1964); Gautier v. Town of Jupiter Island, 142 So. 2d 321 (Fla. 2d Dist. Ct. App. 1962).

59. *See, e.g.*, Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955); Cadoux v. Planning & Zoning Comm'n, 294 A.2d 582 (Conn.), *cert. denied*, 408 U.S. 924 (1972); City of Richlawn v. McMakin, 230 S.W.2d 902 (Ky.), *cert. denied*, 340 U.S. 945 (1950).

60. *See* cases cited in notes 58 & 59 *supra*. The *Belle Terre* Court did not stress this element.

61. *See* Valley View Village, Inc. v. Proffett, 221 F.2d 412, 418 (6th Cir. 1955), where the court said:

It would appear contrary to the very purposes of municipal planning to require a village such as Valley View to designate some of its area for business or industrial purposes without regard to the public need for business or industrial uses. The council of such a village should not be required to shut its eyes to the pattern of community life beyond the borders of the village itself. We think that it is not clearly arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character, so long as the business and industrial needs of its inhabitants are supplied by other accessible areas in the community at large.

(Emphasis added.) *See also* Comment, *The Validity of Zoning an Entire Municipality Exclusively Residential*, 1974 URBAN L. ANNUAL 304.

62. *See generally* Walsh, *Are Local Zoning Bodies Required by the Constitution To*

There are two reasons why the latter question is appropriate. First, subdivisions of a state are granted the power to zone either by a state enabling act or by the state constitution.<sup>63</sup> If a court looks to whether the housing needs of individuals are provided for in other communities in the region in order to determine whether a local government properly may prohibit multi-family dwellings, it is basing the power to zone on what a community's neighbors have done and not on the state enabling act. In such a situation the first town to zone solely for single-family residences has the power to do so, while the third or fourth town attempting similar regulation does not—even though all towns are acting pursuant to the same enabling act. Obviously this is not a desirable result.

A second argument against basing zoning decisions on the needs of a particular municipality, instead of the wider region, raises a public policy issue.<sup>64</sup> Zoning decisions always have been required in some manner to comport with a comprehensive plan.<sup>65</sup> But why should a comprehensive plan extend only to the artificial municipal boundaries that in many cases were promulgated years ago under completely different conditions? A few enabling acts require local government to consider the welfare of the region or of the state in formulating zoning regulations.<sup>66</sup> Florida does not have a zoning enabling act,<sup>67</sup> so the public policy of this state must be gleaned from other statutes.<sup>68</sup> By passing the Florida Environmental Land and Water Management Act of 1972,<sup>69</sup> the legislature has suggested that public policy requires local governments to consider regional needs when exclusionary zoning ordinances having an extraterritorial effect are proposed. The Act requires a local zoning commission to consider the regional impact of any large development that is of a type designated as a "development

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*Consider Regional Needs?*, 3 CONN. L. REV. 244 (1971); Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107, 118-21.

63. Florida's zoning enabling act, Fla. Laws 1939, ch. 19539, was included in FLA. STAT. ch. 176 (1971). Repeal of the law, Fla. Laws 1973, ch. 73-129, § 5, was a recognition of municipalities' constitutional powers under the FLA. CONST. art. VIII, § 2(b); it was not meant to restrict this power, but left the exercise of the zoning power to the discretion of the local government.

64. See *Beshore v. Town of Bel Air*, 206 A.2d 678, 687 (Md. 1965); *Borough of Cresskill v. Borough of Dumont*, 104 A.2d 441 (N.J. 1954).

65. See generally 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* ch. 9 (3d ed. 1972); Note, *Comprehensive Land Use Plans and the Consistency Requirement*, 2 FLA. ST. U.L. REV. 766 (1974).

66. COLO. REV. STAT. ANN. § 106-2-14 (1963); UTAH CODE ANN. § 17-27-13 (1953).

67. See note 63 *supra*.

68. See *Davis v. Strine*, 191 So. 451, 452 (Fla. 1939), where Chief Justice Terrell stated that "[p]ublic policy or what constitutes public policy is a matter of legislative determination."

69. FLA. STAT. §§ 380.012-.10 (1973).

of regional impact."<sup>70</sup> If zoning commissions must consider the regional impact of such developments, it would seem appropriate for Florida courts to consider the extraterritorial impact of exclusionary zoning ordinances whenever the question arises. Further evidence exists to suggest that this is indeed the public policy of Florida. The legislature has authorized the establishment of regional planning councils to aid local governments in regional, metropolitan, county and municipal planning matters.<sup>71</sup> The legislature has also authorized the establishment of regional transportation systems and facilities.<sup>72</sup> Because of this public policy, Florida courts should consider the needs of the region when reviewing exclusionary zoning ordinances that have a substantial extraterritorial effect, even though the *Belle Terre* Court apparently did not consider this aspect of the question.

Americans increasingly have voiced concern about the quality of the environment. The Supreme Court is sensitive to such public sentiment and has mirrored this concern in *Belle Terre*. The Court has refused to limit the scope of the government's power to regulate the use of land; rather it has suggested that broad land use and planning statutes, such as that enacted in Vermont<sup>73</sup> and the proposed federal legislation,<sup>74</sup> would be held constitutional if the question were before the Court. While this environmental concern should be applauded, the language of *Belle Terre* does not necessarily limit the decision's effect to such noble ideals. The Court's decision appears to allow communities to adopt exclusionary zoning techniques as a method of limiting population density without consideration of the impact of the zoning ordinances on the entire region. While the Court might distinguish *Belle Terre* from subsequent cases on the basis of the village's size and rural setting, the facts belie such a distinction.<sup>75</sup>

In view of the Supreme Court's disinclination to consider zoning cases,<sup>76</sup> *Belle Terre* may stand for quite some time as a guidepost in this turbulent area of the law. But land use planning today is not what it was only several years ago. Today there is an increasing demand for

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70. FLA. STAT. § 380.06 (1973). See Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URBAN L. ANNUAL 103, 125-33.

71. See FLA. STAT. §§ 160.01-.02 (1973).

72. See FLA. STAT. §§ 163.565-72 (1973).

73. VT. STAT. ANN. tit. 10, ch. 151 (1973), as amended, (Supp. 1974).

74. See SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, LAND USE POLICY AND PLANNING ASSISTANCE ACT, S. REP. NO. 93-197, 93d Cong., 1st Sess. (1973).

75. See note 1 *supra*. This glossing over of facts is not new in zoning cases. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Court ignored the trial court's finding that the true purpose of the zoning ordinance was to segregate the people of the community according to their wealth and station in life. See *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924).

76. See note 32 and accompanying text *supra*.

curtailing growth, especially among small communities on the fringe of urban sprawl, and for the development of comprehensive land use planning to protect the environment. This interest suggests that the courts will be called upon more frequently to consider the constitutional questions raised by local ordinances designed to meet these ends. Thus, while *Belle Terre* gives a green light to increased governmental control of land use, it also extends the constitutionally acceptable boundary of zoning regulation. But the decision does not delineate this boundary; that will have to await another case.

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**Federal Jurisdiction—WATER POLLUTION CONTROL—FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 REACH POLLUTING ACTIVITIES OCCURRING ABOVE MEAN HIGH-WATER LINE.—*United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974).**

Without a federal permit Langston Holland and his associates were filling mangrove wetlands and man-made canals in preparation for future development of a 281 acre tract known as Harbor Isle, adjoining Papy's Bayou on Tampa Bay.<sup>1</sup> The United States, through the Environmental Protection Agency, alleged that this operation violated both the Federal Water Pollution Control Act Amendments of 1972<sup>2</sup> and the Rivers and Harbors Act of 1899,<sup>3</sup> and sought an order pro-

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1. The Court detailed the inter-tidal nature of the area:

2. For the purposes of the preliminary injunction hearing the Court accepted defendants' determination that the mean high water line is one foot above sea level.

3. Tide data, visual observation and classification of vegetation established that a substantial number of tides exceed two feet above sea level.

(a) The United States Geological Survey tide gauge data indicated that 50-100 tides exceed two feet in the subject water each year.

4. The parties stipulated to the accuracy of a land survey introduced by defendants. . . .

(a) Most of the property is interlaced with artificial mosquito canals containing water.

(b) The water in the mosquito canals is connected to Papy's Bayou.

(c) The elevation of much of the property is less than two feet.

. . . .

6. Defendants would continue to discharge sand, dirt, dredged spoil and biological materials until the fill created has effectively displaced tidal waters, thereby eliminating the normal ebb and flow of tides over the subject property.

*United States v. Holland*, 373 F. Supp. 665, 667 (M.D. Fla. 1974).

2. 33 U.S.C.A. § 1311(a) (Supp. 1974).

3. 33 U.S.C. §§ 403, 407 (1970).