

ASSOCIATED HOME BUILDERS OF THE GREATER EASTBAY, INC., Plaintiff and
Respondent,
v.
CITY OF LIVERMORE et al., Defendants and Appellants
S.F. No. 23222.
Supreme Court of California.
December 17, 1976.

CASE SUMMARY

An association of persons interested in residential construction in a general law city brought suit to enjoin enforcement of an initiative ordinance, enacted by the voters of the city, prohibiting issuance of further residential building permits until local educational, sewage disposal, and water supply facilities complied with specific standards. The association contended that no compelling state interest justified the ordinance's infringement upon nonresidents' right to migrate to the city, and that the ordinance was in excess of the municipal police power.

The Supreme Court, overruling its 1929 decision, reversed the judgment, and remanded the cause for further proceedings. *** With regard to the alleged infringement of nonresidents' right to migrate to the city, the ordinance was subject, not to the strict scrutiny standard of judicial review and a showing of a compelling state interest, but to review under the more liberal standards traditionally used for testing land use restrictions enacted under the municipal police power. In this connection, if a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but also upon the welfare of the surrounding region. In the instant case, however, the record was limited to the pleadings and stipulations, and was devoid of evidence concerning the probable impact and duration of the ordinance's restrictions, which the association had the burden of documenting; until it met that burden, the ordinance retained its presumption of constitutionality. (Opinion by Tobriner, J., with Wright, C. J., McComb, Sullivan and Richardson, JJ., concurring. Separate dissenting opinions by Clark and Mosk, JJ.)

TOBRINER, J.

We face today the question of the validity of an initiative ordinance enacted by the voters of the City of Livermore which prohibits issuance of further residential building permits until local educational, sewage disposal, and water supply facilities comply with specified standards. [FN1] Plaintiff, an association of contractors, subdividers, and other persons interested in residential construction in Livermore, brought this suit to enjoin enforcement of the ordinance.

The superior court issued a permanent injunction, and the city appealed.

... we reject plaintiff's suggestion that we sustain the trial court's injunction on the ground that the ordinance unconstitutionally attempts to bar immigration to Livermore. Plaintiff's contention symbolizes the growing conflict between the efforts of suburban communities to check disorderly development, with its concomitant problems of air and water pollution and inadequate public facilities, and the increasing public need for adequate housing opportunities. We take this opportunity, therefore, to reaffirm and clarify the principles which govern validity of land use ordinances which substantially limit immigration into a community; we hold that such ordinances need not be sustained by a compelling state interest, but are constitutional if they are reasonably related to the welfare of the region affected by the ordinance. Since on the limited record before us plaintiff has not demonstrated that the Livermore ordinance lacks a reasonable relationship to the regional welfare, we cannot hold the ordinance unconstitutional under this standard.

1. Summary of proceedings.

The initiative ordinance in question was enacted by a majority of the voters at the Livermore municipal election of April 11, 1972, and became effective on April 28, 1972. The ordinance, set out in full in the margin, states that it was enacted to further the health, safety, and welfare of the citizens of Livermore and to contribute to the solution of air pollution. Finding that excessive issuance of residential building permits has caused school overcrowding, sewage pollution, and water rationing, the ordinance prohibits issuance of further permits until three standards are met:

“1. Educational Facilities - No double sessions in the schools nor overcrowded classrooms as determined by the [California Education Code](#). 2. Sewage - The sewage treatment facilities and capacities meet the standards set by the Regional Water Quality Control Board. 3. Water Supply - No rationing of water with respect to human consumption or irrigation and adequate water reserves for fire protection exist.”

On the limited record before us, plaintiff cannot demonstrate that the Livermore ordinance is not a constitutional exercise of the city's police power.

Plaintiff contends that the ordinance proposes, and will cause, the prevention of nonresidents from migrating to Livermore, and that the ordinance therefore attempts an unconstitutional exercise of the police power, both because no compelling state interest justifies its infringement upon the migrant's constitutionally protected right to travel, and because it exceeds the police power of the municipality.

The ordinance on its face imposes no absolute prohibition or limitation upon population growth or residential construction. It does provide that no building permits will issue unless standards for educational facilities, water supply and sewage disposal have been met, but plaintiff presented no evidence to show that the ordinance's standards were unreasonable or unrelated to their apparent objectives of protecting the public health and welfare. Thus, we do not here confront the question of the constitutionality of an ordinance which limits or bars population growth either directly in express language or indirectly by the imposition of prohibitory standards; we adjudicate only the validity of an ordinance limiting building permits in accord with standards that reasonably measure the adequacy of public services.

As we shall explain, the limited record here prevents us from resolving that constitutional issue. We deal here with a case in which a land use ordinance is challenged solely on the ground that it assertedly exceeds the municipality's authority under the police power; the challenger eschews any claim that the ordinance discriminates on a basis of race or wealth. Under such circumstances, we view the past decisions of this court and the federal courts as establishing the following standard: the land use restriction withstands constitutional attack if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare.

For the guidance of the trial court we point out that if a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region.

We turn now to consider plaintiff's arguments in greater detail. Seeking to capitalize upon the absence of an evidentiary record, plaintiff contends that the challenged ordinance must be subjected to strict judicial scrutiny; that it can be sustained only upon a showing of a compelling interest, and that the city has failed to make that showing.

Many writers have contended that exclusionary land use ordinances tend primarily to exclude racial minorities and the poor, and on that account should be subject to strict judicial scrutiny. (See, e.g., Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls* (1971) 22 *Syracuse L.Rev.* 509; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent* (1969) 21 *Stan.L.Rev.* 767; Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 *Stan.L.Rev.* 585, 597, fn. 45 and authorities there cited; *602 Note, *The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge* (1971) 81 *Yale L.J.* 61.) These writers, however, are concerned primarily with ordinances which ban or limit less expensive forms of housing while permitting expensive single family residences on large lots. The Livermore ordinance is not made from this mold; it impartially bans all residential construction, expensive or inexpensive. Consequently plaintiff at bar has eschewed reliance upon any claim that the

ordinance discriminates on a basis of race or wealth.

Plaintiff's contention that the Livermore ordinance must be tested by a standard of strict scrutiny, and can be sustained only upon a showing of a compelling state interest, thus rests solely on plaintiff's assertion that the ordinance abridges a constitutionally protected right to travel. As we shall explain, however, the indirect burden imposed on the right to travel by the ordinance does not warrant application of the plaintiff's asserted standard of "compelling interest."

Both the United States Supreme Court and this court have refused to apply the strict constitutional test to legislation, such as the present ordinance, which does not penalize travel and resettlement but merely makes it more difficult for the outsider to establish his residence in the place of his choosing. [FN21]

Most zoning and land use ordinances affect population growth and density. (See *Construction Ind. Ass'n, Sonoma Cty v. City of Petaluma*, supra, [522 F.2d 897, 906](#); Note, op. cit., supra, 26 Stan.L.Rev. 585, 606-607, fn. 91.) As commentators have observed, to insist that such zoning laws are invalid unless the interests supporting the exclusion are compelling in character, and cannot be achieved by an alternative method, would result in wholesale invalidation of land use controls and endanger the validity of city and regional planning. (See Note, op. cit., supra, 26 Hastings L.J. 849, 854.) "Were a court to ... 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." (Comment, *Zoning, Communes and Equal Protection*, 1973 Urban L. Ann. 319, 324.)

We conclude that the indirect burden upon the right to travel imposed by the Livermore ordinance does not call for strict judicial scrutiny. The validity of the challenged ordinance must be measured by the more liberal standards that have traditionally tested the validity of land use restrictions enacted under the municipal police power.

This conclusion brings us to plaintiff's final contention: that the Livermore ordinance exceeds the authority conferred upon the city under the police power. The constitutional measure by which we judge the validity of a land use ordinance that is assailed as exceeding municipal authority under the police power dates in California from the landmark decision in [Miller v. Board of Public Works \(1925\) 195 Cal. 477 \[234 P. 381, 38 A.L.R. 1479\]](#). Upholding a Los Angeles ordinance which excluded commercial and apartment uses from certain residential zones, we declared that an ordinance restricting land use was valid if it had a "real or substantial relation to the public health, safety, morals or general welfare." ([195 Cal. at p. 490](#).) A year later the United States Supreme Court, in the landmark case of *Euclid v. Ambler Co.* (1926) [272 U.S. 365 \[71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016\]](#), adopted the same test, holding that before a

zoning ordinance can be held unconstitutional, “it must be said ... that [its] provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” (272 U.S. at p. 395 [71 L.Ed. at p. 314].) Later California decisions confirmed that a land use restriction lies within the public power if it has a “reasonable relation to the public welfare.” ([Lockard v. City of Los Angeles \(1949\) 33 Cal.2d 453, 461 \[202 P.2d 38, 7 A.L.R.2d 990\]](#); [Hamer v. Town of Ross \(1963\) 59 Cal.2d 776, 783 \[31 Cal.Rptr. 335, 382 P.2d 375\]](#); see [Town of Los Altos Hills v. Adobe Creek Properties, Inc., supra, 32 Cal.App.3d 488, 508-509](#) and cases there cited.)

In deciding whether a challenged ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor. ([Lockard v. City of Los Angeles, supra, 33 Cal.2d 453, 460.](#)) “The courts may differ with the zoning authorities as to the ‘necessity or propriety of an enactment,’ but so long as it remains a ‘question upon which reasonable minds might differ,’ there will be no judicial interference with the municipality’s determination of policy.” ([Clemons v. City of Los Angeles \(1950\) 36 Cal.2d 95, 98 \[222 P.2d 439\]](#).) In short, as stated by the Supreme Court in [Euclid v. Ambler Co., supra](#), “If the validity ... be fairly debatable, the legislative judgment must be allowed to control.” ([272 U.S. 365, 388](#)

We therefore reaffirm the established constitutional principle that a local land use ordinance falls within the authority of the police power if it is reasonably related to the public welfare. Most previous decisions applying this test, however, have involved ordinances without substantial effect beyond the municipal boundaries. The present ordinance, in contrast, significantly affects the interests of nonresidents who are not represented in the city legislative body and cannot vote on a city initiative. We therefore believe it desirable for the guidance of the trial court to clarify the application of the traditional police power test to an ordinance which significantly affects nonresidents of the municipality.

When we inquire whether an ordinance reasonably relates to the public welfare, inquiry should begin by asking *whose welfare must the ordinance serve*. In past cases, when discussing ordinances without significant effect beyond the municipal boundaries, we have been content to assume that the ordinance need only reasonably relate to the welfare of the enacting municipality and its residents. But municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.

These considerations impel us to the conclusion that the proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects. If its impact is limited to the city boundaries, the inquiry may be limited accordingly; if, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region.

As far back as *Euclid v. Ambler Co.*, courts recognized “the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.” (272 U.S. 365, 390 [71 L.Ed. 303, 311].) More recently, in *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541 [99 Cal.Rptr. 745, 492 P.2d 1137], we stated that “To hold ... that defendant city may zone the land within its border without any concern for [nonresidents] would indeed ‘make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning.’” (P. 548.) The New Jersey Supreme Court summed up the principle and explained its doctrinal basis: “[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state’s citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.” (So. *Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel*, *supra*, 336 A.2d 713, 726.)

We explain the process by which a trial court may determine whether a challenged restriction reasonably relates to the regional welfare. The first step in that analysis is to forecast the probable effect and duration[?] of the restriction. In the instant case the Livermore ordinance posits a total ban on residential construction, but one which terminates as soon as public facilities reach specified standards. Thus to evaluate the impact of the restriction, the court must ascertain the extent to which public facilities currently fall short of the specified standards, must inquire whether the city or appropriate regional agencies have undertaken to construct needed improvements, and must determine when the improvements are likely to be completed.

The second step is to identify the competing interests affected by the restriction. We touch in this area deep social antagonisms. We allude to the conflict between the environmental protectionists and the egalitarian humanists; a collision between the forces that would save the benefits of nature and those that would preserve the opportunity of people in general to settle. Suburban residents who seek to overcome problems of inadequate schools and public facilities to secure “the blessing of quiet seclusion and clean air” and to “make the area a sanctuary for people” (*Village of Belle Terre v. Boraas*, *supra*, 416 U.S. 1, *609 9 [39 L.Ed.2d 797, 804]) may assert a vital interest in limiting immigration to their community. Outsiders searching for a place to live in the face of a growing shortage of adequate housing, and hoping to share in the perceived benefits of suburban life, may present a countervailing interest opposing barriers to immigration.

Having identified and weighed the competing interests, the final step is to determine whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests. We do not hold that a court in inquiring whether an ordinance reasonably relates to the regional welfare, cannot defer to the judgment of the municipality’s legislative body. *But judicial deference is not judicial abdication.* The ordinance must have a real and substantial relation to the public welfare.

We must presume that the City of Livermore and appropriate regional agencies

will attempt in good faith to provide that community with adequate schools, sewage disposal facilities, and a sufficient water supply; plaintiff, however, has not presented evidence to show whether the city and such agencies have undertaken to construct the needed improvements or when such improvements will be completed. Consequently we cannot determine the impact upon either Livermore or the surrounding region of the ordinance's restriction on the issuance of building permits pending achievement of its goals.

With respect to the competing interests, plaintiff asserts the existence of an acute housing shortage in the San Francisco Bay Area, but presents no evidence to document that shortage or to relate it to the probable effect of the Livermore ordinance. Defendants maintain that Livermore has severe problems of air pollution and inadequate public facilities which make it reasonable to divert new housing, at least temporarily, to other communities but offer no evidence to support that claim. Without an evidentiary record to demonstrate the validity and significance of the asserted interests, we cannot determine whether the instant ordinance attempts a reasonable accommodation of those interests.

In short, we cannot determine on the pleadings and stipulations alone whether this ordinance reasonably relates to the general welfare of the region it affects. The ordinance carries the presumption of constitutionality; plaintiff cannot overcome that presumption on the limited record before us. Thus the judgment rendered on this limited record cannot be sustained on the ground that the initiative ordinance falls beyond the proper scope of the police power.

5. Conclusion.

The judgment of the superior court is reversed, and the cause remanded for further proceedings consistent with the views expressed herein.