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OPINION	:	No. 80-312
	:	
of	:	<u>July 1, 1980</u>
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SUBJECT: RELOCATABLE, RENTAL HOUSING UNITS—A city or a county has authority, by appropriate amendments to its zoning ordinance, to permit the temporary placement of relocatable, rental Units in the backyards of single-family residences. They may not restrict the inhabitants of these rental units to the parents or grandparents of the owner or occupier of the single-family residence.

The Honorable Carol Hallett, Assemblywoman, Twenty-Ninth District, has requested an opinion on the following questions:

1. May a city or county, by appropriate amendments to its zoning ordinance, permit the temporary placement of relocatable, rental housing units in the backyards of single-family residences?
2. May a city or county restrict the inhabitants of relocatable, rental housing units placed in the backyards of single-family residences to the parents or grandparents of the owner or occupier of the single-family residence?

CONCLUSIONS

1. A city or county has authority, by appropriate amendments to its zoning ordinance, to permit the temporary placement of relocatable, rental units in the backyards of single-family residences.

2. A city or county may not restrict the inhabitants of relocatable, rental housing rentals placed in the backyards of single-family residences to the parents or grandparents of the owner or occupier of the single-family residence.

ANALYSIS

A plan has been presented with the objective of providing housing for the elderly and at the same time providing family togetherness and privacy for all members of the family. According to this plan, grandparents or parents of the owners or occupiers of single-family residences would be housed in separate, relocatable, self-contained, rental housing units placed temporarily in the backyards of the single-family residence. It is suggested that new housing financial assistance legislation (Stats. 1979, chs. 1042–1044) is designed in part to test and evaluate this type of housing.¹ We have assumed that the housing units involved would be either mobilehomes, as defined in Health and Safety Code section 18008 or a form of factory-built housing as defined in Health and Safety Code section 19971.² Since most cities and counties have strict zoning requirements which

¹ It is not suggested, nor do we conclude, that this legislation itself requires or authorizes cities or Counties to amend their zoning ordinances to permit such housing to be added in areas zoned for single-family residences or in any way preempts local zoning authority.

² Health and Safety Code section 18008 provides:

“‘Mobilehome,’ for the purposes of this chapter, is a structure transportable in one or more sections, designed and equipped to contain not more than two dwelling units to be used with or without a foundation system. Mobilehome does not include a recreational vehicle, commercial coach, or factory-built housing, as defined in Section 19971.”

Health and Safety Code section 19971 provides:

“‘Factory-built housing’ means a residential building, dwelling unit, or an individual dwelling room or combination of rooms thereof, or building component, assembly, or system manufactured in such a manner that all concealed parts or processes of manufacture cannot be inspected before installation at the building site without disassembly, damage, or destruction of the part, including units designed for use as part of an institution for resident or patient care, which is either wholly manufactured or is in substantial part manufactured at an offsite location to be wholly or partially assembled onsite in accordance with building standards published in the State Building Standards Code and other regulations adopted by the commission

would preclude the addition of a separate housekeeping unit, as proposed, on lots in areas zoned for single-family residences, the question presented is first whether a city or county could amend its zoning ordinance to permit such housing units and second whether occupation of such housing units could be restricted to the parents or grandparents of the owner or occupier of the single-family residence. We conclude that cities and counties do have the authority to zone for such units, provided such authority is exercised reasonably, uniformly and not arbitrarily. We also conclude that under the federal Constitution, as interpreted by the United States Supreme Court, a clearly enunciated policy of a city or county to provide low-cost housing for the elderly and to promote family togetherness would permit the city or county to restrict occupation of such housing units to the parents or grandparents of the owner or occupier of the single-family residence.

A recent California Supreme Court case, however, leads us to conclude that such a restriction would probably violate the guarantee of the right to privacy contained in the California Constitution and would thus be invalid.

1. Zoning Authority

It has been recognized for many years that the police power of the state extends to regulation of land use by zoning. (*Miller v. Board of Public Works* (1925) 195 Cal. 477, 485–487; error dism. 273 U.S. 781.)

“ . . . ‘The constitutionality of the principle of zoning is no longer an open question, and a restrictive regulation in this field pursuant to a municipality’s comprehensive and systematic plan of community development, when reasonable in object and not arbitrary in operation, will be sustained as within the legitimate exercise of the police power [Citations.]’ . . .” (*Hill v. City of Manhattan Beach* (1971) 6 Cal. 3d 279, 285.)

Cities and counties, either through their constitutional powers (Cal. Const., art. XI, § 7) or statutory authorization (Gov. Code, § 65800 *et seq.*), have broad discretion in the exercise of this power. (*Hein v. City of Daly City* (1958) 165 Cal. App. 2d 401, 405–406.) These agencies may not, however, act unreasonably or arbitrarily, nor may they discriminate against particular property in the exercise of their zoning powers. (*Hill v. City of Manhattan Beach, supra*; *Wilkins v. City of San Bernardino* (1946) 29 Cal. 2d 332, 337; *Reynolds v. Barrett* (1938) 12 Cal. 2d 244, 251.)

pursuant to Section 19990. Factory built housing does not include a mobilehome, as defined in Section 18008, mobile accessory building or structure, as defined in Section 18010, a recreational vehicle, as defined in Section 18010.5 or a commercial coach, as defined in Section 18012.”

The statutory authority for cities and counties to permit zoning allows restriction of an area (a zone) to single-family residences. Government Code section 65850(c) provides that a city or county may, by ordinance:

“(c) Regulate location, height, bulk, number of stories and size of buildings and structures; the size and use of lots, yards, courts and other open spaces; the percentage of a lot which may be occupied by a building or structure; the intensity of land use.”

Restricting land use to single-family residences has regularly been upheld by courts under both general authority and this particular statute. (*Miller v. Board of Public Works*, *supra*; *Seebrist v. Municipal Court* (1976) 64 Cal. App. 3d 737, 743; *Schroeder v. Municipal Court* (1977) 73 Cal. App. 3d 841, 849; *Cf. Van Sicklen v. Browne* (1971) 15 Cal. App. 3d 122, 127–128; see generally Williams, Cal. Zoning Practice (Cont.Ed.Bar 1969) chs. 6 and 7, pp. 189–315; *id.* (Cont.Ed.Bar Supp. 1978) chs. 6 and 7, pp. 119–157; Longtin, Cal. Land Use Regulations (1977) ch. 2.) Zoning which restricts occupancy in an area zoned for single-family residences to either legally related persons or a single-housekeeping unit have also been upheld. (*Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 9; *Palo Alto Tenants Union v. Morgan* (N.D. Cal. 1970) 321 F. Supp. 908, *affd.* (9th Cir. 1973) 487 F.2d 883, *cert. den.* 417 U.S. 910 (1974); *Brady v. Superior Court* (1962) 200 Cal. App. 2d 69, 77.)

Although we do not have any particular ordinance or proposed amendment under consideration here, there are some limitations on the zoning authority of cities and counties that are pertinent to the proposed plan. First, the zoning ordinance or any amendment to it must be consistent with city’s or county’s general plan. (Gov. Code, § 65860; 58 Ops. Cal. Atty. Gen. 21 (1975); 56 Ops. Cal. Atty. Gen. 404 (1973).) Each city and county, including charter cities (Gov. Code, § 65700), must prepare and adopt a general plan. (Gov. Code, § 65300.) One of the elements of the general plan is to be:

“A housing element, to be developed pursuant to regulations established under section 50459 of the Health and Safety Code, consisting of standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community. Such element shall consider all aspects of current housing technology, to include provisions for not only site-built housing, but also manufactured housing, including mobilehomes and modular homes.” (Gov. Code, § 65302(c).) Thus, a zoning ordinance amendment allowing relocatable, rental units to be placed on a single-family lot must be consistent with the general plan of the city or county.

Secondly, in the area of building standards for all types of housing including mobilehomes and factory-built housing units, state law is applicable, although it generally reserves zoning of land use to cities and counties. Thus the State Housing Law (Health & Saf. Code, § 17910), which establishes minimum housing construction standards for all housing except mobilehomes, mobilehome parks, and factory-built housing (Health & Saf. Code, § 17911), would supersede any lesser local regulation in the area. (Health & Saf. Code, § 17958.5.) Zoning, however, is specifically reserved to local jurisdictions. (Health & Saf. Code, § 17922(b).) The construction standards applicable to mobilehomes specifically supersede local ordinances (Health & Saf. Code, § 18020), as do the state regulations of mobilehome parks. (Health & Saf. Code, § 18300(a).) These regulations, however, do not limit city or county authority to restrict the use of mobilehomes to certain zones. (Health & Saf. Code, § 18300(g) (1).) Similarly, although state construction standards are applicable to all factory-built housing (Health & Saf. Code, §§, 19980, 19992) zoning authority is reserved to local jurisdictions. (Health & Saf. Code, § 19993.) We perceive that the proposed plan relates to an amendment to a zoning ordinance as reserved to cities and counties, but that the relocatable housing units would comply with the state housing standards as required by the above statutes.

Finally, there is the requirement of uniformity.

“All such [zoning] regulations shall be uniform for each class or kind of building or use of land through each zone, but the regulations in one type of zone may differ from those in other types of zones.” (Gov. Code, § 65852.)

This, of course, is a concomitant of the requirement that a zoning ordinance not be arbitrary or discriminate against particular property. (*Miller v. Board of Public Works, supra*; *Wilkins v. City of San Bernardino, supra*.) As we perceive the proposed plan, either an amendment to the zoning ordinance would provide that relocatable, rental housing would be a permissible use in areas zoned for single-family residences, or a conditional use permit³ mechanism would allow such housing units in areas zoned for single-family

³ It has been suggested that a variance system could be used. We do not concur. The statutory authority for variances provides:

“

Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the

residences. Such relocatable units would only be allowed for the period during which they were occupied according to the standards set forth in the zoning ordinance. In this abstract sense, we have no hesitancy in concluding that cities and counties do have authority to permit the temporary placement of relocatable, rental housing units in the backyards of single-family residences. We turn now to the more difficult question of whether occupancy of such housing units may be limited to those of a particular family relationship.

2. Restriction of Occupancy to Family Members.

a. United States Constitution

As we noted above, courts have upheld zoning which restricts use in a single-family residence unit to persons who are legally related. (*Village of Belle Terre v. Boraas, supra*; and see cases collected in Annot. (1976) 71 A.L.R. 3d 693.) There are limits, however, on such restrictions. In *Moore v. East Cleveland* (1977) 431 U.S. 494, an ordinance, in its definition of family, limited the permissible relatives to spouses, unmarried children, and parents.⁴ The United States Supreme Court held that the ordinance was unconstitutional

adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

“A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. The provisions of this section shall not apply to conditional use permit.” (Gov. Code, § 65906.)

These statutory requirements must be satisfied, or the city or county has no authority to grant a variance. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 521.) We do not perceive in the proposed plan any special circumstances applicable to a particular piece of property which would justify the granting of a variance for the location of temporary housing units in the backyard of a lot zoned for single-family residential use.

In contrast, the conditional use permit system contemplates either that the desired use is, by ordinance, made permissible but only upon the granting of a conditional use permit by the appropriate authority, or that sufficient standards and criteria governing when such permits may be granted are set forth in the zoning ordinance. (*Tustin Heights Assn. v. Bd. of Supervisors* (1959) 170 Cal. App. 2d 619, 626–627.) For the distinction between a variance and a conditional use permit see Continuing Education of the Bar, *California Zoning Practice, supra*, sections 7.15–7.67; Longtin, *California Land Use Regulations, supra*, sections 2.111 and 2.112. Assuming the validity of the proposed plan discussed herein, a conditional use permit system might well be appropriate with a zoning ordinance which set forth the criteria as to when and under what circumstances a conditional use permit would be granted for relocatable, rental housing units to be allowed in the backyard of a single-family residence lot.

⁴ The ordinance in question defined family as follows:

as applied. Mrs. Moore lived in a house with her son and two grandchildren. Only one grandchild was the son of Mrs. Moore's son who lived with her, and she was convicted of violating the zoning ordinance because of the presence of the other grandchild. The court distinguished the less restrictive ordinance in its *Village of Belle Terre* case⁵ on the grounds that the East Cleveland ordinance "... [o]n its face ... selects certain categories of relatives who may live together and declares that others may not." (431 U.S. at 498–499.) The court then held that such an intrusive regulation of the family can only be upheld if the state demonstrates the importance of the governmental interests allowed and how such interests are served by the regulation. (431 U.S. at 499.) The *Village of Belle Terre* case noted, however, that zoning directed to families' needs is a legitimate exercise of the police power. (416 U.S. at 9.) As presented, the proposed plan of allowing relocatable, rental units to be placed in the backyards of single-family residences would be based on a family determination, namely, that such units could be occupied, on a temporary basis, only by parents or grandparents of the owner or occupier of the lot. Under the *East Cleveland* case, the city or county involved would have the burden of showing that a legitimate state interest is involved in so limiting family relationships and that this mechanism legitimately promotes that end. A given factor in the plan, and we assume it would be spelled out in

"'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse or the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

"(e) A family may consist of one individual.'" (431 U.S. at 496, fn. 2.)

⁵ As described by the court in the *Village of Belle Terre* case (416 U.S. at 2):

"... The word 'family' as used in the ordinance means, '[o]ne 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.'"

the zoning ordinance amendment, is that its purpose is to promote family relationships and harmony and at the same time to provide adequate affordable housing for the elderly. These are unquestionably legitimate objectives. (See *Moore v. East Cleveland*, *supra*, 431 U.S. at 503 on the interest in protection of the family; see Stats. 1979, chs. 1042–1045 on the interest of providing affordable housing.) The mechanism chosen would also, in our judgment, seem to serve these objectives. Although not entirely free from doubt (see particularly concurring opinion of Stevens, J. in *Moore v. East Cleveland*, *supra*, 431 U.S. at 513–521), we believe a properly drafted and administered zoning ordinance could overcome the objections noted in the *East Cleveland* case. We conclude, therefore, that as far as the United States Constitution is concerned, a city or county does have authority, through an amendment to its zoning ordinance, to allow the placement of relocatable, rental housing units in the backyards of single-family residence lots on a temporary basis for occupation by the parents or grandparents of the owner or occupier of the single-family residence.

b. California Constitution

A recent decision of the California Supreme Court (*City of Santa Barbara v. Adamson* 27 Cal. 3d, 123 (May 15, 1980)) on the question of restricting single-family residences to occupation by legal families leads to a different result than under the United States Supreme Court cases. The court in *Adamson* examined a requirement of the zoning ordinance of the City of Santa Barbara⁶ which restricts occupancy in a particular zone to members of a family.⁷ The defendants were three residents of a house in a single-family zone where the minimum lot size is one acre. The defendants and others formed a group of 12 adults who lived in a 24-room, 10-bedroom, 6-bathroom house owned by defendant Adamson. None were related by blood, marriage, or adoption and thus did not meet the definition of family in the zoning ordinance.

The Supreme Court examined this restriction on occupancy limited to family

⁶ The dissent in *Adamson* noted that the invalidating of the provision of the Santa Barbara ordinance under review by the court also invalidates identical provisions in zoning ordinances of 37 other cities (*City of Santa Barbara v. Adamson*, *supra*, 27 Cal. 3d at 123, footnote 1 (Slip Opin., Dissent pp. 1–2).)

⁷ Family was defined in the Santa Barbara ordinance as:

“28.04.230 *Family*.

“1. An individual, pr twp (2) or more persons related by blood, marriage or legal adoption living together as a single housekeeping unit in a dwelling unit . . .

“2. A group of not to exceed five (5) persons, excluding servants, living together as a single housekeeping unit in a dwelling unit.” (*City of Santa Barbara v. Adamson*, *supra*, 27 Cal. 3d at 123 (Slip Opin., p. 2).)

members, as defined, against the provision of the California Constitution guaranteeing the right of privacy.

“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property and pursuing and obtaining safety, happiness, *and privacy*.” (Cal. Const., art. I, § 1; emphasis added.)

The court held that a restriction that prevented unrelated persons from living together (described by the court as an “alternate family” (*City of Santa Barbara Adamson, supra*, 27 Cal. 3d at 123, (Slip Opin., p. 9).), was an invasion of those persons’ constitutional right of privacy, and that such invasion can only be upheld when there is a compelling public need: The majority of the court did not find that compelling need in zoning matters, and reversed the preliminary injunction granted by the trial court against the living arrangements in the Adamson household.

We must, then examine a proposed restriction on occupancy of relocatable housing units in the backyards of single-family residences to parents or grandparents against the court’s privacy test in *Adamson*. As we noted, such a restriction would have two objectives. First would be the public desire. to prove low-cost housing for the elderly. It is obvious, however, that such a need would rarely if ever be limited to the family relationship under consideration. We thus cannot conclude that the means meeting that need, restricting the eligibility to the family relationship, is sufficiently related to that need to overcome the right of privacy as enunciated by the *Adamson* court.

The second objective of the proposed plan, that of promoting family harmony and togetherness, is suspect under the *Adamson* case. As the court stated:

“ . . . *In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users. . . .*” (27 Cal. 3d at 123 (Slip Opin., p. 14); court’s emphasis.)

The court also cited and quoted out of state cases:

“Some courts, confronting restrictions similar to the rule-of-five here, have redefined ‘family’ to specify a concept more rationally and substantially related to the legitimate aim of maintaining a family style of living. For example, in New Jersey a valid regulation of single-family dwellings would be ‘a reasonable number of persons who constitute a *bona fide* single housekeeping unit.’ (*Berger v. State N.J.* 1976) 364 A. 2d 993, 1003; see also *State v. Baker, supra*, 405 A. 2d 368, 371–372: ‘The fatal flaw in attempting

to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many uses which defeat that goal. . . . As long as a group bears the “generic character of a family unit as a relatively permanent household,” it should be equally as entitled to occupy a single family dwelling as its biologically related neighbors. *City of White Plains [v. Ferraiolo]* (1974) 34 N.Y.2d 300, 306].’ *Cf. Incorp. Village of Freeport v. Association, etc.*, (N.Y. 1977) 406 N.Y.S.2d 221, 223.)” (27 Cal. 3d at 123 (Slip Opin., p. 14–15); court’s footnote omitted.)

There is a possible distinction. Zoning ordinances restricting single-family residence occupancy to legal families are frequently defended on the basis of promoting quiet and stability in the neighborhood. In the proposed plan under consideration here, the objective would be to promote family, not neighborhood, stability. This may well be a proper governmental objective, but in light of the court’s strong requirements as enunciated in *Adamson* of a compelling public need to allow an invasion of the privacy of non-related “families,” we have doubt as to whether this objection is a compelling public need. We must coincide, therefore, that the proposed restriction to limit occupancy of relocatable housing units to parents or grandparents of the owner or occupier of the adjoining single-family residence probably would be held invalid in California.
