REMOVING THE BAR OF EXCLUSIONARY ZONING TO A DECENT HOME

The people in the slums are the symptoms of the urban problem, not the cause. They are virtually imprisoned in slums by the white suburban noose around the inner city, a noose that says "Negroes and poor people not wanted."[1]

Recently a group of churches planned to build an integrated middle-income apartment project in the Black Jack area of suburban St. Louis. Confronted with the prospect of an integrated housing project, the residents of Black Jack, which is nearly all white, promptly incorporated themselves as a town and, as an incorporated entity, passed a zoning ordinance which excluded all multiple family dwellings.[2]

In January, 1969, the Southern Alameda Spanish Speaking Organization (SASSO) obtained an option to purchase property in Union City, California for the purpose of constructing thereon a 280 unit, federally funded, low-and moderate-income housing project.[3] Although the land purchased was zoned as agricultural-single family residential, SASSO successfully obtained a variance permitting multiple family residential use on the subject land from the City Council. However, the ordinance permitting the variance never went into effect because community opponents of the proposed housing project commenced a referendum proceeding which eventually resulted in the rejection of the ordinance by the voters.

In May, 1967, Columbia Square, Inc., a de facto corporation operating under the auspices of the Catholic Church, sought rezoning of a parcel of land in Lawton, Oklahoma, so that multiple family dwellings for low- and moderate-income families could be erected thereon.[4] The subject land for which rezoning was sought was located in the midst of a much larger tract of land which was zoned predominately for high density apartment

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[1] NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 1 (1968) [hereinafter cited as DOUGLAS COMMISSION].

[2] The Wall Street Journal, Jan. 15, 1971, at 6, cols. 1, 2.

[3] Southern Alameda Spanish Speaking Organization (SASSO) v. City of Union City, 314 F. Supp. 967 (N.D. Cal. 1970), *aff'd* 424 F.2d 291 (9th Cir. 1970). Quite similar to the fact situation presented in *SASSO* is the fact pattern of Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich. 1969), *rev'd* 417 F.2d 321 (6th Cir. 1969). In *Ranjel* the City of Lansing together with HUD selected a site in a predominately white, single family residential neighborhood on which it was proposed to build multiple family units for low-income families. Since subject land was zoned for single family residences, it was necessary to seek rezoning for multiple family dwellings. As in *SASSO* the local governmental unit approved the rezoning, and then the local citizenry sought to repeal the ordinance authorizing the rezoning via a referendum. At this time, although only slightly more than 10% of the Lansing residents were Black or Mexican American, approximately 65% of these two groups were concentrated in a ghetto containing only 11% of Lansing's total population. 293 F. Supp. at 303.

[4] Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd* 425 F.2d 1037 (10th Cir. 1970).

use. Notwithstanding the existence of compatible adjoining uses,[5] the proposed rezoning was rejected by both the Lawton Metropolitan Area Planning Commission and the Lawton City Council. It is significant that of the numerous people who signed petitions opposing the rezoning and who attended the public meetings at which the proposed rezoning was considered,[6] there were no Negroes or persons of other minority groups.

The above cases epitomize the impact of exclusionary zoning[7] and serve as an introduction to this note, the thrust of which will be threefold. First, it will examine the problem of exclusionary zoning viewed in the light of our national housing shortage and the actual existence of zoning regulations which bar low-cost housing from the amenities of the suburbs. Emphasis will be placed upon the reasons why communities enact exclusionary zoning regulations and the effect of these regulations on the cost per housing unit. Second, the traditional judicial approach to the resolution of zoning disputes will be considered together with the results of decided cases. Third, a new judicial approach to the resolution of zoning disputes will be explored—an approach apparently taken, at least in part, by the Pennsylvania Supreme Court in *Appeal of Kit-Mar Builders, Inc.*[8]

I. THE PROBLEM

A. *The Need for Housing*

> *The need for more decent housing in American cities is so great, so pressing, and so obvious that much larger and more vigorous efforts to meet it are urgently needed.*[9]

Indeed, the need for more adequate housing is both pressing and obvious. This fact has been well documented by both the Douglas Commission[10] and the Kaiser Commission.[11] In a report to the Kaiser Commission, TEMPO, General Electric's Center for Advanced Studies found that

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[5] The trial court in *Dailey* found:

> [N]o other person in the entire area, owning property therein, has his property zoned, with minor exceptions, except as R-4 zoning, a zoning classification which plaintiff seeks .... 296 F. Supp. at 268.

[6] Over 250 or more people opposing the proposed rezoning attended the meetings of the Lawton Area Metropolitan Planning Commission and the Lawton City Council. *Id.* at 268.

[7] Exclusionary zoning:

> [Z]oning that raises the price of residential access to a particular area, and thereby denies that access to members of low-income groups. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969) [hereinafter cited as Sager].

Exclusionary zoning can take many forms. It includes large-lot zoning, minimum floor-area requirements, exclusion or strict limitation of multifamily dwellings and exclusion or strict limitation of mobile homes.

[8] Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970).

[9] DOUGLAS COMMISSION at 69.

[10] DOUGLAS COMMISSION.

[11] PRESIDENTS COMMITTEE ON URBAN HOUSING, A DECENT HOME (1968) [hereinafter cited as KAISER COMMISSION].

some nine million people occupied substandard housing units in the United States in 1960.[12] In another report to the Commission, where a different test was employed for determining what constituted substandard housing,[13] it was found that there were some 15 million substandard housing units in 1960.[14] This number was equal to a full one-quarter of the total housing inventory in the United States at the time.[15]

While the physical condition of the housing inventory is one indicator of its adequacy, it is not the sole factor to be considered. Another factor of considerable significance is the crowding of existing housing. While the Kaiser Commission did not expressly state the number of households living in crowded conditions in substandard housing units, it did indicate that about four million households in 1960 were living in crowded conditions in *standard* housing units. Furthermore, the Commission revealed the rather alarming figures that "*three out of ten nonwhite households were crowded in 1960, and one out of ten white households.*"[16]

As could be expected, the nation's poor people are the hardest hit by the inadequate supply of standard, non-crowded housing.

> A seven-city . . . staff study [for the Douglas Commission] showed that there were 103,000 large poor families in the seven cities who could not afford to rent standard housing of a suitable size at market rents. In these seven cities only 20,000 units with three or more bedrooms in publically assisted housing of any kind was available to these families. The gap between the need and the units available was, therefore, 83,000 units, or over 80 percent.[17]

Both the Douglas Commission[18] and Kaiser Commission,[19] to cope with

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[12] KAISER COMMISSION at 43.

[13] TEMPO only called "substandard" those units which the Census takers had found to be dilapidated or lacking adequate plumbing faculities. The other report also added deteriorated units in arriving at its total of substandard units. *Id.* It is felt that the latter method produces the more realistic figure with which to work when determining future housing needs, since the time gap between deteriorated and dilapidated housing would probably be shorter than the time gap between the planning and occupancy stages of housing—especially public housing.

[14] *Id.*

[15] *Id.* The Douglas Commission reported that there were at least 11 million substandard and overcrowded dwelling units in the United States in 1968; a figure which represented 16 percent of the total housing inventory at that time. DOUGLAS COMMISSION at 9. The difference between the figures arrived at by the two commissions may stem from the definition used in determining what constitutes substandard housing as well as the great difficulty in obtaining adequate housing data.

[16] KAISER COMMISSION at 44. As could be expected, the bulk of the crowded households, 58 percent, were located in metropolitan areas. *Id.*

[17] DOUGLAS COMMISSION at 10.

[18] The Douglas Commission recommended that the nation should build 2 to 2¼ million new housing units a year. *Id.* at 11.

[19] In a report to the Kaiser Commission, TEMPO found that the Nation:

> [M]ust build and rehabilitate 26 million houses and apartments in the next decade to provide for all the new households forming, to allow enough vacancies for our increasingly mobile population, to replace houses destroyed or demolished, and to eliminate all substandard housing. KAISER COMMISSION at 39-40.

this "pressing and obvious" need for adequate housing, charted an ambitious home building course for the nation establishing a goal of between 2.0 to 2.6 million new housing units per year.[20] This figure is to be compared with the then current annual rate of housing units built of 1.5 million units per year.[21] Moreover, according to the recommendation of the Douglas Commission, a significant portion of this new housing should be specifically reserved for people in the lower income brackets.[22]

With more jobs shifting to locations outside the central city,[23] it is apparent that the logical location for the bulk of any new housing is in the suburbs. Low- and moderate-income families would benefit from living closer to jobs,[24] to shopping and recreational facilities, and living in lower density housing not adjacent to unattractive non-residential uses, as

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[20] It is significant to note that:

> An important byproduct of building more dwelling units will be increased jobs—about 165,000 a year to construct the homes and about 330,000 a year in related supplier industries. These combined new workers could make a big dent in urban unemployment, especially among the young and minority groups. DOUGLAS COMMISSION at 11.

Additionally, now that the Nation's priorities are apparently being restructured so that defense is relegated to a lesser priority than it possessed in the sixties, the housing industry could utilize a part of those technically trained men and women who had formerly been funneled into the defense industry. That same technical ingenuity that created the Polaris missle system and F-4 Phantom aircraft could then be directed at providing adequate, low-cost housing for everyone.

[21] KAISER COMMISSION at 40. The Douglas Commission reported that the rate of homes built over the six years prior to the Commission's report was 1.45 million per year, not counting mobile homes, and that in only one year since World War II, 1950, had the Nation even approached the annual rate of 2 million new units built per year. DOUGLAS COMMISSION at 11.

[22] The Douglas Commission recommended that 500,000 units of new housing be specifically reserved for people in the lower income brackets. Of this figure, it was further recommended that:

> [A] fair breakdown would be to designate 100,000 a year for the abject poor (incomes up to $2,200 a year for families of four); 100,000 for the poor (incomes up to $3,300); 100,000 for the near poor (incomes up to $4,500); and 200,000 units for families with incomes over $4,500 but who still cannot afford to buy or rent decent housing in the private market. DOUGLAS COMMISSION at 11.

For comparison and to illustrate a still unsolved problem, it is significant to note that Congress, in the Housing Act of 1949, recommended that 135,000 new public housing units be built a year for each of the following 6 years. This would have created 810,000 new public housing units in a 6 year period. At the time the Douglas Commission made its report (1968), only 500,000 units of public housing had been built since 1949. Thus, what had been a noble 6 year goal had not seen fulfillment after a period of nearly 20 years. *Id.* at 14.

[23] [T]here has been a massive movement of employment activities to the suburbs and outlying areas. Between 1960 and 1967, for example, 62 per cent of all industrial buildings and 52 per cent of all commercial buildings were constructed outside the central cities of metropolitan areas. . . . Consequently, central city residents are finding that new job opportunities are farther and farther away from them than ever. Brooks, *Exclusionary Zoning*, PLANNING ADVISORY SERVICE REPORT NO. 254 2 (Feb. 1970) [hereinafter cited as Brooks]. (footnotes omitted).

See DOUGLAS COMMISSION at 47.

[24] By locating homes near where jobs are to be found, the employed man or woman would save a considerable portion of the cost of commuting as well as the time involved. Furthermore, since many transit systems do not provide an adequate link between the suburban job site and the central city and since many employable central city dwellers cannot afford cars, the location of new housing units for the present central city dwellers in the suburbs would open up new opportunities for employment. *See* DOUGLAS COMMISSION at 48.

often is the case.[25] It would follow that placement of public housing units in suburbia, instead of in the disparaging conditions of the central city would better promote the concept of the general welfare, which is closely associated with most zoning decisions.[26]

B. *The Existence of Exclusionary Zoning Regulations*

> *If there are no zoning changes, the vacant land in the New York region . . . may not be sufficient to hold the projected growth of that region's population to 1985.*[27]

While it is evident that the bulk of this nation's new housing should be placed in the suburbs, it is equally evident that local governments which control the suburbs' growth do not want all of this new housing. As a result, there exists a wide variety of exclusionary zoning regulations.[28] The most prominent regulation is probably the requirement for a minimum lot size.[29] For example, "25 percent of metropolitan area municipalities of 5,000-plus permit *no* single-family houses on lots of less than one-half acre";[30] "48 percent of the vacant land zoned for residential use in the New York City region, excluding the city itself, required lots of one acre or more";[31] "[i]n Connecticut, more than half of the vacant land zoned for residential use in the entire State is for lots of 1 to 2 acres";[32] "67 percent of the vacant land zoned for single-family development in the core county of the Cleveland SMSA [Standard Metropolitan Statistical Area] is zoned for minimum lots of one-half acre of [sic] more";[33] and a 1964 study of the State of New Jersey indicated "that over 75 percent of the total zoned land in the state was zoned for single family residences on lots greater than one-half acre in size . . . ."[34] Moreover, it is alarming to note that many zoning requirements for minimum lot size are the result of recent changes in local zoning regulations.[35]

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[25] *See* Sager at 781.

[26] *See* Williams and Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 WISC. L. REV. 827, 839 [hereinafter cited as Williams and Wacks].

[27] KAISER COMMISSION at 140.

[28] *See* DOUGLAS COMMISSION at 211-16.

[29] *See* Becker, *The Police Power and Minimum Lot Size Zoning* Part I: *A Method of Analysis*, 1969 WASH. L. Q. 263, 265 (1969) [hereinafter cited as Becker].

[30] DOUGLAS COMMISSION at 214. The Douglas Commission further reported that "Of these same governments, 11 percent have some two-acre zoning; 20 percent have some one-to-two-acre zoning; 33 percent have some one-half-to-one-acre zoning; and more than 50 percent have some one-fourth-to-one-half-acre zoning." *Id.*

[31] KAISER COMMISSION at 140.

[32] DOUGLAS COMMISSION at 215. The Douglas Commission also noted that "In Greenwich, Conn., a community of about 65,000 within mass-transit commuting distance of New York City, more than four-fifths of the total undeveloped area is zoned for minimum lots of 1 acre or more—39 percent for 4 acres, 25 percent for 2 acres, and 17½ percent for 1 acre." *Id.*

[33] *Id.*

[34] Note, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 HARV. J. LEGIS. 246, 249 n.17 (1970) [hereinafter cited as *Snob Zoning: Developments*].

[35] The Douglas Commission reported:

Another technique of exclusionary zoning is the total prohibition or severe restriction of land zoned for apartments. While most local governments do not go to the extreme that the town of Black Jack, Missiouri[36] did in totally excluding multiple family dwellings, many local governments severely restrict the amount of land available for apartments[37] so that, as a result, the supply of apartments does not meet the demand; or they permit apartments only if a special exception is granted.[38]

The same techniques which are used to exclude apartments are also used to exclude mobile homes.[39] Additionally, many local zoning codes prescribe that single housing units have a minimum floor area which is conveniently set above the amount of living space contained in most mobile homes.[40] The net effect of this restriction is that mobile homes are as effectively barred from the excluding community as if the zoning code were written to expressly prohibit them.

The impact of minimum floor area requirements is, of course, not limited merely to mobile homes; it also extends to the typical single-family residence. In fact, one town has used this technique to impose a 1,700 square-foot minimum floor area requirement.[41]

Although the imprimatur of exclusionary zoning is clearly evident in many local zoning codes throughout the United States, there does not seem to be any single reason[42] why a community will adopt an exclusionary zoning

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> For five of the counties in the metropolitan areas [surrounding New York], the average lot size increased from 9,000 square feet in 1950 to 19,000 square feet in 1957. . . . Since 1960, major protions of Monmouth, Suffolk, and Orange Counties have been rezoned from one-fourth acre and one-eighth acre lots to one-half and 1-acre lots. DOUGLAS COMMISSION at 214-15.

[36] *See* the text accompanying note 2 *supra.*

[37] DOUGLAS COMMISSION at 215. For example, "[o]f the undeveloped land zoned for residential purposes in the New York metropolitan area . . . 99.2 percent is restricted to single-family dwellings." *Id.*

[38] By using a special exception which does not permit apartments outright, the local government can force the developer to negotiate. Then the local government can attempt to bid up the price or cost of the apartment structure or limit the apartment development to one bedroom units or efficiencies, so that poor people and large families are excluded. *See id.* at 216.

[39] The Douglas Commission reported:

> A study in 1964 showed that in New York State, of 237 zoning ordinances reviewed, over half excluded mobile homes either explicitly or by imposing minimums relating to floor area, height or other factors which mobile homes could not meet. Only 82 communities permitted mobile homes on individual lots, as distinguished from mobile home parks; and in all but 12 of these communities such lots had to be in areas zoned for industrial or commercial uses. Only 11 communities permitted mobile home parks to locate in residentially zoned areas. *Id.*

Locally, the City of Columbus prohibited "Trailer camps and courts," COLUMBUS ZONING CODE § 3387.01 (1967), until the Zoning Code was amended to permit a Mobile Home Park District, COLUMBUS ZONING CODE § 3385.28, on January 18, 1971.

[40] *See* note 37 *supra.*

[41] The town of Bloomington, Minnesota, an affluent suburb of the Twin Cities, required the 1,700-square-foot minimum floor area at a time when the *construction cost* of building the smallest home permitted was $26,894.00. DOUGLAS COMMISSION at 215.

[42] *See* DOUGLAS COMMISSION at 214.

regulation. Instead, there seems to be a mixing of fiscal[43] and non-fiscal[44] factors which do not apply with equal force to any given community.[45] As a result, if the popular stereotype of the Deep South is true, a community in Southern Mississippi might adopt an ordinance requiring a minimum lot size of two acres in order to exclude black men and women, while a community in New Jersey might adopt the same minimum lot size requirement

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[43] The fiscal objective behind many exclusionary zoning ordinances stems primarily from the antiquated system of property taxation used by many local communities as their chief revenue source. Although not approving "fiscal zoning" two writers sum the syllogism supporting it quite well:

> Under the quainte olde American system of financing schools and other major public services primarily from local real estate taxes, growing communities may obtain major financial advantages by encouraging those land uses (non residential development, expensive housing, and perhaps efficiency apartments) which bring in substantial local tax revenues and require relatively less in public services, and conversely by discouraging those land uses (particularly inexpensive housing) which bring less in local tax revenues and require larger expenditures for public services. Williams and Wacks at 829. (footnotes omitted).

Accordingly:

> [T]he Parkway School District [in St. Louis County, Missouri] has calculated that any home costing less than $26,274 does not pay its own way in educational costs. On this basis, district officials oppose any change in zoning to permit lots of less than a quarter-acre, below which they believe housing costing less than this amount can be built. DOUGLAS COMMISSION at 214.

However, the validity of this reasoning has been subjected to critical analysis by one writer:

> Proponents of such restrictions have stressed that they increase tax revenues while reducing costs of government services. This argument holds only in rural areas where few community services are now provided. If such services are provided, larger lot size may increase the costs to the homeowner or renter because employment, community services and schools are farther away and the owner must bear the effect of these increased transportation costs. The trade-off is between the increased cost for street and water improvements at densities of 3,000 persons or less per square mile and the necessity of providing sewers and schools at higher densities. However, for municipalities with a population of from 25,000 to 100,000 and a basic capital plant for water, sewer and school services, reduction of large lot size and concomitant restrictions is not likely to change the cost of services to the extent that any increase will not be offset by new tax revenue. Such new revenue would arise from an increased assessment of the property due both to its division into a smaller number of units and to the often ignored interrelationship between residential density and revenue from commercial and industrial centers. In addition, the municipality gains added revenue from an increase in intergovernmental transfer payments for education, health and welfare. *Snob Zoning: Developments* at 250-51. (footnotes omitted).

For "fiscal zoning" *see generally* DOUGLAS COMMISSION at 19; Aloi, Goldburg, and White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?* 1969 U. TOL. L. REV. 65, 79; Becker at 283-85.

[44] The non-fiscal factors behind exclusionary zoning regulations are not capable of easy identification. In some instances, they might be desires to preserve the rural character of a community or its open space. In other cases, they might be racial and snobbish attitudes, which unite in a desire to keep out "incompatible" people, lower-income groups and minorities. DOUGLAS COMMISSION at 214. One commentator aptly described the sum of all of these factors as "life style":

> What is at stake is a community's *life style* . . . . That which it regards as burdensome or offensive, whether it be the intrusion of blue collar workers, Negroes, homes costing under $20,000 or designed by Frank Lloyd Wright, becomes a real threat to its *way of life* . . . . Becker at 296. (emphasis added).

[45] For a discussion of the factors behind the exclusion of apartments and mobile homes *see* DOUGLAS COMMISSION at 215-16.

to exclude high density development which would place a greater fiscal burden on the community's already limited resources.

Whatever a community's reasons for adopting an exclusionary zoning ordinance, the result of that ordinance will be significant—a discriminatory chain reaction. The initial event in this chain reaction is the increase in cost per housing unit. For example, where a large minimum lot size is required, several results, each of which will increase the cost per housing unit, are possible and may occur either singularly or in combination. First, by increasing the minimum lot size, the number of housing sites will be decreased. In the face of a strong demand, "this restriction of the supply of housing sites will increase residential land costs generally."[46] By the same token, restrictions on land zoned for apartments, which result in demand exceeding supply, increase the cost of appropriately zoned land and, in turn, each apartment unit. Second, when "a zoning ordinance requires lot sizes larger than consumers demand, the market for land is distorted and lot costs per unit are shifted unnecessarily upward."[47] Third, "the increase in the total house-and-lot price may be [even] greater than the increase in land price caused by large-lot zoning,"[48] since "some builders will simply not build the same house on a large lot that they will on a smaller lot . . . ."[49] Fourth, "large-lot zoning generally results in added costs for land improvements"[50] —streets, sidewalks, gutters, sewers and water lines.

With the increased cost per housing unit established, the next event in the discriminatory chain reaction is the exclusion of low-income groups[51] from the amenities of the excluding communities. This is so simply because these groups cannot afford the increased cost per housing unit, whether it is in the form of an increase in the price of a new home or an increase in monthly rent of an apartment. This in turn "automatically brings about

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[46] DOUGLAS COMMISSION at 214; *see* Brooks at 8.

[47] KAISER COMMISSION at 142. For example, given the same ratio of supply to demand a ¼ acre lot might cost $2500 and a 1 acre lot might cost $8,000; however, if the number of 1 acre lots is increased at the expense of ¼ acre lots, the price of the ¼ acre lots will increase (for example, to $3,500) while the price of 1 acre lots will decrease (for example, to $7,000).

[48] DOUGLAS COMMISSION at 214.

[49] *Id.*

[50] *Id.* It should be noted, however, that the Kaiser Commission found that:

> [B]ecause larger lots do not require the same proportion of site improvement, increases in lot sizes, especially at the higher levels, actually cause surprisingly little increase in total lot costs. KAISER COMMISSION at 142.

While this may be true, if it is also true that builders "observe a rule of thumb that the price of a lot should be some specified percentage of the total price of house and lot, e.g., 20 percent," DOUGLAS COMMISSION at 214, then an increase in the price of a lot from $3,500.00 to $5,000.00 to accommodate an increase in the minimum lot size from ¼ acre to ½ acre would result in an increase in the price of the house and lot combination from $21,000.00 to $30,000.00. As can be seen, the increase in lot price is magnified, so that what might be an affordable $1,500.00 becomes an unaffordable $9,000.00.

[51] *See* DOUGLAS COMMISSION at 7-8; Aloi, Goldberg, and White at 77; Becker at 303; Sager at 781; Williams and Wacks at 838; Note, *Zoning: Closing the Economic Gap*, 43 TEMP. L. Q. 347, 353 (1970).

a large degree of racial segregation as well."[52] Thus, a large class of potential residents 1) who desire to escape the central cities, 2) who could afford to pay subsidized rent in publically supported housing projects or could afford to purchase new homes under the FHA-235 program,[53] and 3) many of whom are from minority groups, are "virtually imprisoned in the slums by the white suburban noose around the inner city . . . that says 'Negroes and poor people not wanted.' "[54]

Unfortunately, the chain reaction does not stop here. "[T]he poor [are forced] to remain in the big cities, and to continue to live predominately in unhealthy housing, located far from the better new jobs and good public services."[55] Employables become unemployeds and finally unemployable because there is no transportation link between the suburban job site and the central city. Finally, there may be an explosion—an individual rebelling against his environment, or perhaps the entire ghetto convulsing in reaction to its frustration over the quality of life within its borders.

II. THE TRADITIONAL APPROACH.

> *One who challenges the constitutionality of a zoning ordinance has no light burden and it is settled that before a zoning ordinance can be declared unconstitutional it must be shown that its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. If the validity of the legislative judgment is fairly debatable, the legislative judgment must be allowed to control . . . .*[56]

With the problem in mind, it is time to examine the courts' traditional approach to the resolution of zoning cases which involve exclusionary zoning techniques.

A. *The Presumption of Constitutionality*

As a legislative act, a zoning regulation is normally entitled to a "presumption of constitutionality."[57] While it has been generally said that this

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[52] Williams and Wacks at 830. One commentator has further pointed out that:

> In 1968, 95 percent of the inhabitants of the suburban rings of metropolitan areas of one million or more were white. The remaining 5 per cent of the suburbanites who were black comprised only 19 per cent of all blacks living in metropolitan areas of one million or more, while the 95 per cent of the surburbanites who were whites comprised 62 per cent of all whites living in these metropolitan areas. The movement of white families . . . is on the rise. In 1960, for example, only 55 per cent of the white population in metropolitan areas of one million or more lived in the suburbs. If present trends continue, the possibility of predominately black central cities surrounded by predominately white suburbs is not unlikely. Brooks at 2.

[53] *See* Coan, *The Housing and Urban Development Act of 1968: Landmark Legislation for the Urban Crisis*, 1 URBAN LAWYER 1, 16-19 (1969).

[54] DOUGLAS COMMISSION at 1.

[55] Williams and Wacks at 839.

[56] Appeal of Girsh, 437 Pa. 237, 248-49, 263 A.2d 395, 400-01 (1970) (Jones, J., dissenting).

[57] *See* Bilbar Construction Co. v. Board of Adjustment of Easttown Township, 393 Pa. 62,

presumption is rebuttable,[58] the burden which the opponent of a zoning regulation must carry is quite formidable. To illustrate, it is generally said that the plaintiff must prove by either clear and convincing evidence[59] or beyond a reasonable doubt[60] that the challenged zoning regulation bears no substantial relation to the public health, safety, morals, or welfare, or if the question presented is "fairly debatable"[61] the zoning regulation must stand. The reason for this heavy burden is quite clear. It rests squarely upon the approach mandated by the United States Supreme Court some forty-five years ago in *Euclid v. Ambler Realty Co.*[62] where Mr. Justice Sutherland stated:

> If the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control. (emphasis added).[63]

and

> [I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[64]

This approach has not been seriously altered by the Court since *Euclid.* In fact, since *Euclid*, the Court has only decided one zoning case.[65]

Accordingly, the lower courts have almost exclusively used the traditional approach and cast the heavy burden on the person attacking a zoning ordinance. The opponent of an exclusionary zoning regulation, therefore, has found himself in the same boat as the person attacking a regulation which restricted the commercial or industrial use of property. For the most part,[66] the results have been very discouraging to persons seeking relief from an exclusionary zoning regulation. When a zoning regulation prescribing a two acre minimum lot size in the Village of Sands Point, New York was attacked, the New York Court of Appeals needed a scant two pages to

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71, 141 A.2d 851, 856 (1958); Vickers v. Committee of Gloucester Township, 37 N.J. 232, 242, 181 A.2d 129, 134 (1962); 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.14 (1968).

[58] 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.14, at 69 (1968).

[59] *Id.* § 2.17.

[60] *Id.* § 2.18.

[61] Simon v. Town of Needham, 311 Mass. 560, 564, 42 N.E.2d 516, 518 (1942); Vickers v. Committee of Gloucester Township, 37 N.J. 232, 242, 181 A.2d 129, 134 (1962); Bilbar Construction Co. v. Board of Adjustment of Easttown Township, 393 Pa. 62, 71, 141 A.2d 851, 856 (1958); 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.16 (1968).

[62] Euclid v. Ambler Realty Co., 272 U.S. 356 (1926).

[63] *Id.* at 388.

[64] *Id.* at 395.

[65] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[66] Some cases have resulted in the zoning regulation, which might have had an exclusionary effect, being struck down even when the traditional approach was ostensibly used. *See, e.g.*, Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964); Lakeland Bluff, Inc. v. County of Will, 114 Ill. App.2d 267; 252 N.E.2d 765 (1969).

find the regulation valid.[67] When the Supreme Court of New Jersey was faced with a zoning regulation which totally prohibited mobile homes in a township of 23 square miles, the regulation was upheld.[68] Earlier, the New Jersey Supreme Court even found a regulation requiring a minimum of five acres valid,[69] and in an unrelated case upheld a regulation which prescribed minimum floor areas of 768 feet for one story homes, 1000 feet for two story homes without garages, and 1200 feet for two story homes with garages.[70] On the west coast, the California Supreme Court upheld a zoning ordinance which excluded multiple family dwellings from over 99% of a town's area.[71] And in Missouri, the Supreme Court of that state upheld a zoning ordinance requiring a minimum of three acres on the outskirts of the rapidly growing St. Louis area.[72] It probably cannot be said that the results in these cases stemmed solely from the presumption of constitutionality, since there were other factors present. However, it is submitted that without the presumption of constitutionality, or if the presumption had favored the person attacking the regulation, there is a strong possibility that many, if not all, of these cases would have resulted in a different decision.

B. *Zoning Laws Must Be in The General Welfare*

Among the other factors considered by the courts in the above cases were the economic harm to the property owner,[73] the harmful effects of overcrowding,[74] and aesthetics.[75] If these factors are subjected to close examination in the context in which they arose, it is evident that they all were confined to the community which enacted the zoning regulation. Thus, the economic harm to the property owner meant the economic harm to the individual whose property was subject to regulation, the harmful effects of overcrowding meant overcrowding within the immediate area of the land whose zoning was questioned and within the enacting community, and aesthetics meant the beauty of solely the enacting community. While there is a strong body of precedent which would indicate that "general welfare" does

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[67] Levitt v. Village of Sands Point, 6 N.Y.2d 269, 160 N.E.2d 501, 189 N.Y.S.2d 212 (1959).

[68] Vickers v. Committee of Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962).

[69] Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952).

[70] Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed* 344 U.S. 919 (1953). This case has received considerable comment in the law reviews. *See* Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L .REV. 1051 (1953); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); Williams and Wacks.

[71] Hamer v. Town of Ross, 59 Cal.2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963).

[72] Flora Realty & Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952), *appeal dismissed* 344 U.S. 802 (1952).

[73] *See, e.g., id.* at 1037, 246 S.W.2d at 776-77.

[74] *See, e.g.*, Simon v. Needham, 311 Mass. 560, 563, 42 N.E.2d 516, 518 (1942).

[75] *See, e.g.*, Vickers v. Committee of Gloucester Township, 37 N.J. 232, 247, 181 A.2d 129, 137 (1952).

refer "solely to the needs of the area doing the zoning,"[76] it is not clear that "general welfare" should have such a restricted meaning. In fact, contrary to the body of precedent which restricts the concept of "general welfare", there is case law which would indicate that a community must consider factors beyond its municipal limits when enacting zoning regulations.[77] Furthermore, an examination of the decision in *Euclid* reveals that the parochial interest of a community, as embodied in its zoning regulations, is subordinate to the general welfare. As Mr. Justice Southerland stated:

> [T]he village [of Euclid], though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions . . . . *It is not meant by this, however, to exclude 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,* (emphasis added).[78]

Thus, it appears that while there is a sizable body of precedent which would restrict the application of the concept of "general welfare" to the enacting community, there is also precedent for not giving it such a restricted interpretation. Moreover, the less restrictive interpretation would seem to be grounded in the better reasoning. It is easy to imagine the results which could follow if each community were left to its own devices without any regard for its neighbors and other factors beyond its municipal limits. For example, a hospital could be built on appropriately zoned land in Community X, and Community Y would be free to zone adjoining land within its municipal limits for heavy industrial use.

Where exclusionary zoning is involved, the concept of "general welfare" becomes crucial. If "general welfare" is restricted "solely to the needs of the area doing the zoning,"[79] it should be clear that the interests of third parties living outside the enacting community and neighboring communities (extraterritorial factors) need not be considered. Accordingly, a community would be able to enact zoning regulations which would exclude newcomers who would not bring with them a sufficient tax base to be self supporting, since the interests of the enacting community would be furthered by such action. However, it has become increasingly clear that a community cannot avoid the tide of the outward population expansion from our larger cities. Rather, a community in the path of this tide must accept its share

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[76] Note, *Constitutional Law—Equal Protection—Snob Zoning: Must a Man's Home Be a Castle?* 69 MICH. L. REV. 339, 355 (1970).

[77] Township of River Vale v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968), 83 HARV. L. REV. 679 (1970); Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954).

[78] 272 U.S. 365, 389-90.

[79] *See* note 76 *supra.*

of the burdens created by increased population,[80] and a "zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid."[81] In short, where exclusionary zoning is at issue a community cannot turn its back on extraterritorial factors.

C. *Interests of Third Parties*

If consideration is given to extraterritorial factors, it should follow that the interests or rights of third parties living outside the enacting community must be considered. Unfortunately, there has been little judicial discussion of these interests.[82] This may in part stem from the fact that the zoning cases which have reached the United States Supreme Court[83] dealt primarily with commercial and industrial zoning, and as a result there was no reason for the Court to consider these interests. But more probably, this absence of judicial discussion stems from the fact that the parties who have sought to overturn exclusionary zoning regulations were builders, developers, or land speculators who were merely attempting to vindicate their own economic interests, and who did not argue in support of the interests of third parties. Accordingly, absence of judicial discussion should not be interpreted as meaning these interests are unworthy of consideration. Instead, the better reasoned analysis would indicate that these interests were not properly before the courts. This, of course, raises the question as to what should be the judicial reaction when these interests are properly raised. More pointedly, should the presence of these interests have an impact on the traditional presumption of constitutionality?

III. A Consideration of the Presumption of Constitutionality

The power to zone is derived from the police powers of each state. As indicated earlier, when this power is exercised and zoning legislation is passed, the resulting zoning ordinance is normally entitled to a "presumption of constitutionality." Notwithstanding the "presumption of constitutionality", a zoning ordinance will be struck down as unconstitutional if it does not bear a substantial relationship to the public health, safety, morals, or

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[80] *See* Appeal of Kit-Mar Builders, 439 Pa. 466, ——, 268 A.2d 765, 768-69 (1970); Appeal of Girsh, 437 Pa. 237, 244-45, 263 A.2d 395, 398-99 (1970).

[81] National Land and Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965).

[82] *But see* Appeal of Kit-Mar Builders, 439 Pa. 466, ——, 268 A.2d 765, 768 n. 6 (1970); Vickers v. Committee of Gloucester Township, 37 N.J. 232, 265-66, 181 A.2d 129, 147 (1962) (Hall J. dissenting).

[83] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1928).

general welfare. Therefore, "[i]n practice, the question of validity turns on the extent to which a court will regard the legislative decision as determinative of the public interest supporting the legislation and hence to what extent and for what purposes the court will itself examine the facts."[84] Largely, because of the decision in *Nectow v. City of Cambridge*,[85] where the Supreme Court looked to the facts in declaring a zoning ordinance of the City of Cambridge invalid, courts in most jurisdictions have been willing to examine the facts in zoning cases. Accordingly, the presumption of constitutionality is generally not conclusive. However, this reliance on *Nectow* may be misplaced because the United States Supreme Court's treatment of the presumption of constitutionality where social and economic issues are involved has changed radically since its decision in *Nectow*. At that time, the Court was in transition from its position taken in *Lochner v. New York*[86] and *Coppage v. Kansas*,[87] which was tantamount to a presumption of invalidity,[88] to its present position articulated in *Day-Brite Lighting, Inc. v. Missouri*[89] and *Williamson v. Lee Optical Co.*,[90] which is tantamount to a conclusive presumption of constitutionality. Accordingly, *Nectow* applied neither a presumption of invalidity nor a conclusive presumption of constitutionality. Rather, there the Court used a rebuttable presumption of constitutionality. It would appear that subsequent zoning cases would not necessarily apply this standard[91] but would instead utilize the most current test. For recent cases, this would entail an application of a near conclusive presumption of constitutionality.

It should be clear that the above analysis is very generalized. While a majority of zoning cases may fall within its scope and therefore would be subject to a near conclusive presumption of constitutionality, others do not for various reasons. For example, it is clear that there would be no conclusive presumption of constitutionality or even a rebuttable presumption of constitutionality where zoning regulations were expressly based on race.[92] This raises the question whether this analysis and its resulting near conclusive presumption of constitutionality should be applicable where exclusionary zoning is at issue. If it is not, then should a presumption which can be rebutted by clear and convincing evidence or a presumption of invalidity similar

84 Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 13 (1958) [hereinafter cited as Hetherington].

85 277 U.S. 183 (1928); *see* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.11 (1968).

86 Lochner v. New York, 198 U.S. 45 (1905).

87 Coppage v. Kansas, 236 U.S. 1 (1915).

88 *See* Hetherington at 22.

89 Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

90 Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

91 Where zoning disputes are based on state due process, the courts of each state would, of course, be free to determine ther own test notwithstanding federal decisions which are interpretative of due process.

92 *See* Buchanan v. Warley, 245 U.S. 60 (1917); Hetherington at 14-15; *cf.* Loving v. Virginia 388 U.S. 1, 11 (1967).

to that which, in effect, the Supreme Court used in *Lochner* and *Coppage* be applicable? It seems that the above questions can be answered by considering the reason for the apparent shift in the Supreme Court's judicial stance in moving from *Lochner* to *Williamson v. Lee Optical* together with the traditional reasons for the recognition of presumptions. The reason for the Court's shift is not easily found; however, it has been stated that "[t]he nearest thing to an explanation is perhaps to be found in Mr. Justice Frankfurter's concurrence in *American Federation of Labor v. American Sash & Door Co.*, where he argued that 'the judiciary is prone to misconceive the public good' and that matters of policy, depending as they do on imponderable value issues, are best left to the people and their representatives."[93] This contention finds reinforcement in *Williamson v. Lee Optical*[94] where Mr. Justice Douglas speaking for the Court stated:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U. S. 113, 134, "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[95]

Thus, while the following rationale may be subject to dispute,[96] it appears that the reason for the Court's shift was predicated upon recognition that matters over which the legislature exercises control should generally be corrected by the voters at the polls and not by the courts.

The traditional reasons for the recognition of presumptions have been concisely outlined by Professor McCormick. They are 1) probability, 2) procedural convenience, 3) fairness in allocating the burden of producing evidence upon the party who has superior means of access to the proof, and 4) notions, usually implicit rather than expressed, of social and economic policy.[97]

Considering first the reason for the Supreme Court's shift in thinking, it is apparent that the reason cannot serve as a justification where exclusionary zoning is at issue. This is clear since people excluded from a community can not turn to the polls and remove the councilman of the community who voted to enact the exclusionary zoning regulation. If these third parties are to have a remedy, it must be a judicial one since their path to the polls would be barred by residency requirements. Furthermore, if there is to be an effective judicial remedy, it is apparent that either a near conclusive presump-

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[93] McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUPREME COURT REVIEW 34, 44 [hereinafter cited as McCloskey].

[94] 348 U.S. 483 (1955).

[95] *Id.* at 488.

[96] It could be contended that the Court's shift was a reaction to the threat of Court packing.

[97] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 309, at 641 (1954).

tion or a presumption of constitutionality would be inappropriate, since in both instances the ability of the courts to look at the facts would be severely restricted. This has been recognized in the areas of free speech[98] and legislative apportionment[99] where any attempt to limit the process of self government will be met with increased judicial supervision.[100] Similarly, where exclusionary zoning is at issue, there should also be increased judicial supervision.

A. *The Presumption of Invalidity*

Increased judicial supervision can best be achieved by recognizing a presumption of invalidity[101] when it is alleged[102] that a zoning regulation is exclusionary. It is believed there is a sound basis for this approach in terms of the reasons previously articulated for the recognition of presumptions.[103]

1. *Probability*

Considering probability, it is clear that the probability of a residential zoning ordinance being exclusionary is great. This follows from the fact that higher densities will generally yield lower costs per housing unit. As a result, any residential zoning regulation which bars higher density housing will most certainly be exclusionary[104] since people who can afford the higher density housing and cannot afford the housing authorized by the zoning regulation are precluded from living in the local area.

However, it must be recognized that density regulation is a proper function of the police power.[105] It is only when density zoning is used primarily to prevent the entrance of newcomers that it is invalid. Therefore, it is apparent that the previous analysis begs the real question which must be answered. This question is whether more exclusionary zoning regulations are

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98 *See* McCloskey at 45-47.

99 Baker v. Carr, 369 U.S. 186 (1962); Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REVIEW 252, 287.

100 *Cf.* McCloskey at 47.

101 The allegation that a residential zoning regulation is exclusionary would give rise to a presumption of invalidity. In order to sustain the zoning regulation, the local government would have to show by a preponderance of the evidence that the zoning regulation bears a substantial relationship to the public health, morals, and welfare. Note, *Zoning, Closing the Economic Gap*, 43 TEMP. L. Q. 347, 355-56 (1970).

102 There are two logical points at which the burden could shift to the excluding community—upon a *showing* that a zoning regulation has an exclusionary effect or upon an *allegation* that a zoning regulation has an exclusionary effect. The former choice, of course, presupposes the adequacy of information necessary to show the exclusionary effect. However, it was the finding of the Douglas Commission that:

> [T]he factual information needed to show the significance of exclusionary practices simply does not exist in most areas, and the cost to a private litigant of obtaining it would prove prohibitive. DOUGLAS COMMISSION at 217.

103 *See* text accompanying note 97 *supra.*

104 *See* note 1 *supra.*

105 1 R. ANDERSON, AMERICAN LAW OF ZONING § 7.06, at 486 (1968).

enacted primarily to prevent the entrance of newcomers or for reasons which might be considered valid. Unfortunately no empirical information is available to answer this question. Furthermore, an analysis of the relevant cases would be inaccurate since most of these cases were decided using the traditional presumption of constitutionality. As a result, in spite of what judicial notice might be taken of the findings of the Douglas and Kaiser Commissions this reason should drop out because the degree of subjectivity involved precludes any quantitative analysis. Therefore, the basis for the presumption of invalidity must be found among the remaining three reasons.

2. *Procedural Convenience*

The imposition of a presumption of invalidity would not result in so great a procedural inconvenience as to outweigh the other affirmative reasons for recognizing this presumption. This is partially evident from the fact that the presumption of invalidity would not apply to the entire spectrum of zoning. Only that segment which regulates housing would be touched. The broad and complex areas of zoning which deal with industrial and commercial uses would not be involved.

3. *Fairness in Allocating the Burden*

Closely related to procedural convenience is the fairness in allocating the burden of producing evidence upon the party who has superior means of access to the proof. It is abundantly clear that of the parties involved, the community should have the superior means of access to the proof since the information necessary to sustain the challenged zoning regulation would, at least in theory, have been used in the formulation of the community's comprehensive plan.[106] The comprehensive plan would, of course, include the zoning regulation as an integral part. While in practice this might not be the case, the equities of the situation surely favor placing the burden on the community who should have the requisite information available if it is doing an adequate and proper planning job. As can be seen, a premium would be placed on good planning, a highly desirable end in itself.

4. *Consideration of Social or Economic Policy*

Any consideration of social or economic policy should favor a presumption of invalidity since this would further our national housing policy as articulated in the Housing and Urban Development Act of 1968:

> The Congress finds that the supply of the Nation's housing is not increasing rapidly enough to meet the national housing goal, established in the Housing Act of 1949, of the "realization as soon as feasible of the goal of

[106] For a discussion of "comprehensive plan" *see id.* § 5.02.

> a decent home and a suitable living environment for every American family." The Congress reaffirms this national housing goal and determines that it can be substantially achieved within the next decade by the construction or rehabilitation of twenty-six million housing units, six million of these for low and moderate income families.[107]

The recognition of a presumption of invalidity would have the direct effect of increasing the number of housing starts. Zoning regulations which effectively barred the construction of low-and medium-cost housing would lose their protective shield with the demise of the presumption of constitutionality. Accordingly, absent an affirmative showing of the reasonableness of the exclusionary regulation, construction of desperately needed housing could begin in the suburbs where previously barred by parochial interests.

However, it might be contended that this recognition of a presumption of invalidity would produce results directly in conflict with zoning and planning's policy of comprehensive rationality.[108] Indeed, this approach might produce some "incremental decision-making [which] is the antithesis of zoning and planning's emphasis on comprehensive rationality."[109] But it must be remembered that the presumption of invalidity would be limited; it would only apply to that segment of the zoning spectrum which regulates housing. Furthermore, if this produces bad decision making which is to some extent the "antithesis of zoning and planning's emphasis on comprehensive rationality," it should be apparent that it is decision making which furthers the national policy by increasing housing starts. Moreover, if truly "comprehensive rationality" is present in the first instance, the exclusionary zoning regulation would probably be upheld. Incremental decision making by the bench would probably only exist where there has been incremental decision making without a rational basis by the legislatures and administrative bodies which control the local zoning process.

An additional policy consideration might be the ability of the courts to hear and intelligently decide zoning cases. At least one commentator[110] is highly skeptical of the courts' ability to hear and decide zoning cases where the question of reasonableness is raised, and the courts themselves are apparently skeptical of their own abilities.[111] However, an examination of zoning cases reveals that some courts have already under-

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[107] 42 U.S.C. § 1441 (a) (Supp. V 1970); *see* 42 U.S.C. § 1441 (Supp. V 1970) for the congressional declaration of national housing policy made in the Housing Act of 1949.

[108] Washburn, *Apartments in the Suburbs: In re Appeal of Joseph Girsh*, 74 DICK. L. REV. 634, 651 (1970).

[109] *Id.*

[110] *See id.*

[111] *See* National Land and Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504, 521, 215 A.2d 597, 606-07 (1965).

taken a highly sophisticated factual analysis.[112] Upon close consideration, it would appear unlikely that much greater sophistication would be required to resolve zoning disputes arising under a presumption of invalidity. Furthermore, it would seem that a court which could determine whether a movie or book was "immoral" or determine reapportionment would be able to decide whether the requisite reasonableness was proved by a community whose zoning regulation was alleged to be exclusionary.[113]

In summation, the normal recourse for redress of legislative abuse is the polls. However, where redress is not possible, the courts should exercise increased judicial supervision of the legislative enactment which creates an alleged abuse. As has been shown, when exclusionary zoning is in issue, the means of political redress are not available to the aggrieved third parties, and there is reason and need for increased judicial supervision. The best way to achieve this is by recognizing a presumption of invalidity. Such recognition would be grounded in the traditional reasons for the recognition of presumptions. Furthermore, such recognition would not be without judicial precedent. The Pennsylvania Supreme Court apparently recognized this presumption in deciding *Appeal of Kit-Mar Builders, Inc.*.[114]

B. *Appeal of Kit-Mar Builders, Inc.*

Kit-Mar involved an attack upon a zoning regulation which prescribed a two acre minimum lot size along existing roads and three acres in the interior. The dispute came before the Pennsylvania Supreme Court after the court of common pleas had reversed the Board of Adjustment by holding the zoning ordinance invalid.[115] In affirming the lower court's decision, the majority of the court totally disregarded the traditional presumption of constitutionality. Instead, the court emphasized that: "Absent some extraordinary justification, a zoning ordinance with minimum lot sizes such as those in this case is completely unreasonable."[116] This apparent and radical departure caused one dissenting justice to remark:

> In all previous zoning cases, the Court has put the burden of proof on the challenger of the legislation involved. By the present decision *the Court appears to reverse the burden*, and says that "Absent some extraordinary justification, a zoning ordinance with minimum lot sizes such as those in this case is *completely unreasonable*" (emphasis added).[117]

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[112] *See, e.g.*, Lakeland Bluff, Inc. v. County of Will, 114 Ill. App. 2d 267, 252 N.E.2d 765 (1969); National Land and Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965).

[113] *Cf.* McCloskey at 52-53.

[114] 439 Pa. 466, 268 A.2d 765 (1970).

[115] *Id.* at ——, 268 A.2d at 766.

[116] *Id.* at ——, 268 A.2d at 767.

[117] *Id.* at ——, 268 A.2d at 779 (Pomeroy, J., dissenting).

Indeed, the dissenting justice appears to be correct. The reason for this shift of the burden is made appropriately clear throughout the opinion and finds support in the previously decided case of *Appeal of Girsh*.[118]

The common theme of *Kit-Mar* and *Girsh* is that as "people are attempting to move away from the urban core areas, relieving the grossly over-crowded conditions that exist in most of our major cities,"[119] the local communities "must deal with the problems of population growth,"[120] created by this migration. "They may not refuse to confront the future by adopting zoning regulations that effectively restrict the population to near present levels."[121] This theme had been articulated by the same court in its earlier decision of *National Land and Investment Co. v. Easttown Township Board of Adjustment*[122] where the court had applied the traditional presumption of constitutionality. Why then did the Court in *Kit-Mar* abruptly shift the presumption? Apparently, the reason for the Court's action was its recognition of the "rights of other people [those living outside the excluding community] desirous of moving into the area in search of a comfortable place to live."[123] Although the Court in *Kit-Mar* apparently reached its decision to reverse the burden on equal protection grounds,[124] *Kit-Mar* is still important to the analysis attempted earlier because of its express recognition of the rights of third parties which is essential to any finding of a need for increased judicial supervision.

IV. The Community and the Presumption of Invalidity

If an allegation that a residential zoning regulation is exclusionary gives rise to a presumption of invalidity, the resulting burden placed upon the enacting community should not be impossible to discharge. In fact, if a community does an adequate planning job and considers and gives effect to regional as well as local needs, it should be able to rebut the presumption of invalidity. The following discussion will briefly consider this problem of rebuttal and based on *Girsh* attempt to outline tests for deciding whether a community has met its burden by establishing a reasonable basis for its zoning regulations.

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118 Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

119 *Id.* at 244, 263 A.2d at 398.

120 439 Pa. 466, ——, 268 A.2d 765, 678 (1970); *see* Appeal of Girsh, 437 Pa. 237, 244-45, 263 A.2d 395, 300 (1970).

121 439 Pa. 466, ——, 268 A.2d 765, 768 (1970); *see* Appeal of Girsh, 437 Pa. 237, 244-45, 263 A.2d 395, 399 (1970).

122 National Land and Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965).

123 439 Pa. 466, n. 6, 268 A.2d 765, 768 n. 6 (1970); *see* Appeal of Girsh, 437 Pa. 237, ——, 263 A.2d 395, 398 (1970).

124 439 Pa. 466, 244, n. 2, 268 A.2d 765, 768 (1970).

In *Girsh*, the message is clear that a community must accept "its rightful part of the burden"[125] created by the population expansion outward from major cities. Implicitly, then, a community need not accept more than "its rightful part of the burden." Thus, the Pennsylvania court has, in effect, issued an ultimatum to the communities within its jurisdiction to consider regional planning and to accept their share of the regional burdens if they want to see their residential zoning regulations upheld. As a result, several tests are discernable. First, absent any consideration of the regional needs, the presumption of invalidity is not rebutted. Second, if a community has given consideration to regional planning but has not accepted "its rightful part of the burden," the presumption of invalidity is not normally rebutted. Third, if a community has given consideration to regional planning and has accepted "its rightful part of the burden," the presumption of invalidity is rebutted.

The second test would appear subject to the exception that a community which has considered regional planning and has not accepted "its rightful part of the burden," may nevertheless rebut the presumption of invalidity upon a showing of extraordinary justification for its regulation.[126] It is difficult to visualize what would be extraordinary justification. Probably, the presence of soil conditions that would not support high rise apartments or other high density dwellings would qualify as an extraordinary justification. Similarly, certain soil conditions might justify a larger lot size in order to ensure the adequacy of on-site sewerage. However, in both cases it is emphasized that the burden would be upon the enacting community to prove the extraordinary justification. Absent adequate proof, the regulation would be invalid. Finally, it is noted that aesthetics alone would probably not be "sufficient justification for an exclusionary zoning technique."[127]

V. Conclusion

As has been seen, there is a serious need in this country for more adequate housing, especially for low-and middle-income families. The servicing of this need is severely hampered by exclusionary zoning regulations which drive up the cost of each housing unit, and force the poor to remain in the ghettos separated by an economic barrier between them and the jobs and amenities of the suburbs.

The traditional approach to zoning, which may be appropriate when the recognized interests are those of the property owner and the community, is no longer adequate when the interests of people living outside the community are drawn into focus. Because of these third parties and

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[125] 437 Pa. 237, 245, 263 A.2d 395, 399 (1970).

[126] *See* text accompanying note 116 *supra.*

[127] Appeal of Girsh, 437 Pa. 237, 244, 263 A.2d 395, 398 (1970).

their inability to seek political redress, it is apparent that there is a need for increased judicial supervision. The best way to achieve this supervision is by recognizing a presumption of invalidity. Such recognition would find a solid basis in the traditional reasons for the recognition of presumptions. Furthermore, the presumption would not place an inordinate burden on any community, for a community which considered and gave effect to regional as well as local needs in drawing up its comprehensive plan and enacting its zoning regulations would probably be able to rebut the presumption of invalidity.

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