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Apartments in the Suburbs: In re Appeal of Joseph Girsh

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On February 13, 1970, the Pennsylvania Supreme Court decided *In re Appeal of Joseph Girsh.*[1] The court, reasoning that

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1. 437 Pa. 237, 263 A.2d 395 (1970). For ease of reference, the ap-

suburban municipalities cannot employ zoning techniques to avoid the burdens of population expansion, held unconstitutional a zoning code which excluded apartment houses. Since this holding goes beyond the traditional property rights analysis and approaches the argument of equal protection in land use decisions, it will have an impact far beyond the borders of Pennsylvania.

This Article will review the *Girsh* decision and analyze it within the context of prior exclusionary zoning cases in Pennsylvania. It will also examine some implications of the decision concerning the future of suburban land development and urban-suburban resource allocation.

I. The Girsh Case — Background

A. *The Facts*

On July 13, 1964, Joseph Girsh, an experienced home and apartment builder, contracted to purchase 17.7 acres of vacant land, known as the Duer Tract, in Nether Providence Township, Delaware County, Pennsylvania. The land is located at the intersection of Turner Road and the Penn-Central Railroad commuter line, and is adjacent to the railroad's Wallingford Station. The tract was zoned R-1 Residential, which permits single-family homes on minimum lots of 20,000 square feet.[2] The purchase price was to be $120,000 if the zoning remained unchanged and $140,000 if the tract were rezoned to permit apartments.

Nether Providence, a township of the first class, contains 13,000 persons in an area of 4.64 square miles. It is located 12 miles from downtown Philadelphia and is bordered by Swarthmore on the east, Chester on the south, and Media on the northwest. Although the predominant land use is single-family homes, the township also contains scattered shopping areas, some industrial and manufacturing uses, and two apartment developments totalling 54 units.[3] The zoning code had provided for "multiple dwelling"

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pellant is hereinafter referred to as "Girsh," and the appellees, including Nether Providence and the intervenors, are hereinafter referred to as the "Township."

2. Nether Providence, Pa., Zoning Ordinance art. III (1963).

3. One group of apartments is a small garden apartment development built by the federal government as defense housing during World War II. It was built without the necessity of conforming to local codes. A 1959 amendment to the Nether Providence Zoning Ordinance constituted these apartments a special district to prevent the "unconscionable economic waste" of demolishing or relocating the non-conforming structures. Nether Providence, Pa., Ordinance 351, May 21, 1959; Nether Providence, Pa., Zoning Ordinance art. V-b (1963). The other apartments are duplexes

as a permitted use, but this provision was deleted by amendment in 1952.

The topography of the Duer Tract is rought and rocky, with a fifty foot drop in elevation, steep grades, two streams, and a two or three acre swampy area. After deciding that it was economically infeasible to build single-family homes in accordance with the existing zoning,[4] Girsh applied for building permits for two nine-story luxury apartment buildings, each having 280 dwelling units. Girsh later agreed to reduce the number of units to 216 per building. The plan called for first floor shops, parking for 1,000 automobiles, 500 of which would be underground, and a total land coverage of 40%.

In February 1967, the building inspector refused to issue the permits because the Nether Providence zoning ordinance contained no provision for apartment uses. Girsh appealed to the zoning board of adjustment which held hearings and affirmed the building inspector's decision.

In July 1967, Girsh filed an appeal in the Delaware County Court of Common Pleas. Nether Providence Township, various civic associations, and several private citizens intervened. Judge E.E. Lippincott II held hearings in September and November of 1967. The bulk of the testimony concerned (1) the effect of an apartment development on municipal roads and services, and (2) whether the topography of the tract prevented profitable single-family home development. Judge Lippincott's decision, rendered in September 1968, upheld the zoning board.[5]

The Pennsylvania Supreme Court allowed the appeal under Rule 68½[6] on October 30, 1968. Argument was held in May 1969, and the decision[7] was rendered on February 13, 1970.

B. *The Decision*

The Pennsylvania Supreme Court reversed the court of common pleas, holding unconstitutional the Nether Providence zoning code's failure to provide for apartments. The majority opinion was written by Justice Roberts, joined by Justices Eagen and O'Brien. Chief Justice Bell concurred[8] with the majority. Justices Cohen and Pomeroy joined in a dissenting opinion[9] written by Justice

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which were constructed under a variance. Reply Brief for Appellant at 3-4, *In re* Appeal of Joseph Girsh, 437 Pa. 237, 263 A.2d 395 (1970); Brief for Appellees at 17, *In re* Appeal of Joseph Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

4. This fact was disputed by appellees, who claimed that Girsh at no time intended to construct single-family homes. Brief for Appellees at 2-5, *In re* Appeal of Joseph Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

5. Girsh Zoning Case, 56 Del. Co. Rep. 132 (C.P. Pa. 1968).

6. PA. SUP. CT. R. 68½.

7. *In re* Appeal of Joseph Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

8. *Id.* at 246, 263 A.2d at 399 (concurring opinion).

9. *Id.* at 248, 263 A.2d at 400 (dissenting opinion).

Jones.

1. *The Majority Opinion*

Justice Roberts' majority opinion begins with the general proposition that an individual should be able to utilize his land as he sees fit, subject only to reasonable police power regulations such as zoning. The rest of the opinion deals with the extent of the reasonable exercise of this power.

As a preliminary matter, Justice Roberts rejected the Township's contention that, rather than prohibiting apartments, the zoning code merely failed to provide for them and that apartments were, therefore, a permitted use available by securing a variance.[10] Justice Roberts held that failure to provide for apartments, except on the narrow grounds justifying a variance, was legally tantamount to a prohibition.

The crux of the decision is that no township can zone to avoid bearing its share of the natural population expansion produced by urban out-migration. The decision is based on the following rationale. Suburban homeowners left the city to escape urban congestion and to enjoy the freedom, open space, leisure life, and growing job opportunities of the suburbs. Although first in time, existing residents are not first in right; they cannot exclude others who seek the same advantages. Since Nether Providence is a logical area for population growth, an attempt to exclude that growth by prohibiting apartments is an unconstitutional exercise of the police power.

Justice Roberts rejected the Township's argument that the prohibition was reasonably necessary to prevent overburdening of municipal services and facilities, particularly roads.[11] Without analyzing the Township's specific contentions, Justice Roberts held that municipal service problems can be controlled by reasonable regulation of apartment location, set-back, height, and other factors. According to Justice Roberts, the Township must plan in advance to service expected growth and not use zoning to prevent burdens on its services and facilities.

Nether Providence argued that apartments would clash with the existing single-family residential form of development. The majority held that factors such as aesthetics and the character of the community are insufficient to justify exclusionary zoning.

Justice Roberts concluded by allaying fears that the decision

10. *Id.* at 240, 263 A.2d at 396.
11. *Id.* at 243, 263 A.2d at 398.

requires municipalities to provide for all types of land uses. This is not a logical result of *Girsh* because the decision is restricted to residential expansion, what Justice Roberts calls "the right of people to live on land."[12]

2. *The Concurring Opinion*

Consistent with past opinions,[13] Chief Justice Bell emphasized the importance of private property rights unencumbered except by closely restricted police power regulations. Zoning and nuisance standards, according to Chief Justice Bell, should not be so broadly construed as to deny rights in private property. Chief Justice Bell reasoned that, while apartments can be regulated, they cannot be totally prohibited without violating private property rights. Althought the Chief Justice said that "whether an ordinance which makes no provision for, or authorization of, apartment houses is equivalent to a total prohibition thereof raises (at least, for me) a difficult question,"[14] he found the instant ordinance to be a prohibition in practical effect.

3. *The Dissent*

Justice Jones, in his dissent, refused to equate the failure to provide for a use with a total prohibition. He considered the ordinance to be constitutionally valid since a developer could seek a variance to construct apartments.

The dissent argued that the mere lack of a provision in a zoning ordinance for a particular land use does not make the ordinance unconstitutional per se. Rather, the restriction must be gauged by traditional police power standards. To hold otherwise would require municipalities to provide for all types of high-density residential land uses. The dissent considered it improper for the court to act as "a super board of adjustment" or "planning commission of last resort"[15] by forcing municipalities to accept inappropriate uses.

Even if the ordinance had contained a total prohibition, Justice Jones would have affirmed the lower court's holding that Girsh failed to establish that apartments are a suitable land use in Nether Providence. The dissent considered apartments to be unsuitable because not in harmony with the sparsely populated residential character of the community and because the population

12. *Id.* at 245, 263 A.2d at 399.

13. *E.g.*, Key Realty Co. Zoning Case, 408 Pa. 98, 102, 104-05, 182 A.2d 187, 190, 190-91 (1962) (concurring opinion); Colligan Zoning Case, 401 Pa. 125, 131, 162 A.2d 652, 654 (1960); Medinger Appeal, 377 Pa. 217, 221, 104 A.2d 118, 120 (1954); Lord Appeal, 368 Pa. 121, 125-26, 81 A.2d 533, 535 (1951).

14. 437 Pa. at 247, 263 A.2d at 400 (concurring opinion).

15. *Id.* at 251, 263 A.2d at 402 (dissenting opinion).

increase would tax municipal services. Since the evidence supported these two findings, the dissent held that the exclusion bore a constitutionally reasonable relationship to public health, safety, morals and general welfare.

The majority decision did not reach Girsh's final argument that, since it is economically infeasible to build single-family houses, the ordinance was arbitrary and discriminatory as applied to the Duer Tract and, therefore, constituted a taking of property. The dissent, however, considered the large amount of conflicting evidence on this point and decided that sufficient evidence existed to support the lower court finding that houses could profitably be constructed on the site.

II. The Analytical Framework

A. *The Suburban Ethic*

This analysis will begin with a brief examination of the social considerations pertinent to the location of apartment houses in the suburbs.[16] To a large extent, this was the real issue before the Pennsylvania Supreme Court in *Girsh*. The residents who spoke against Girsh's proposal at the zoning board hearing and who intervened in the lower court did so not out of a concern for the legal doctrine involved, but primarily to protect their community from the intrusion of what they considered to be a socially and economically undesirable use.[17] It was to this attitude that the Township government was responding when it failed to provide for apartments in the zoning code.

Inner-city high-density living is symptomatic of much that is undesirable in urban life. Many people associate the economic,

16. *See generally* American Society of Planning Officials, Apartments in the Suburbs (1964); American Society of Planning Officials, Planning for Apartments (1960); National Comm'n on Urban Problems, Building the American City 215 (1968); M. Neutz, The Use of Urban Land and the Suburban Apartment Boom (1966); Raymond & May Assoc., Zoning Controversies in the Suburbs: Three Case Studies 26-47 (Research Report No. 11, National Comm'n on Urban Problems, 1968) [hereinafter cited as Raymond & May Assoc.]; L. Syracuse, Arguments for Apartment Zoning (N.A.H.B. Information Bulletin No. 1, 1968); Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. Pa. L. Rev. 1040 (1963) [hereinafter cited as Babcock & Bosselman]; Melamed, *High Rise Apartments in the Suburbs*, 20 Urban Land 1 (1961) [hereinafter cited as Melamed].

17. To the suburbanite, apartments frequently represent poor or black neighbors. Several market studies of middle and moderate income black households, however, found a preference for single-family homes in the suburbs rather than apartments. The Potomac Institute, Inc., Housing Guide to Equal Opportunity 20 (1968).

cultural, social and physical deprivation of the slum with high-density, noisy, dirty tenement houses. What those making this comparison fail to realize, however, is that the only similarity between inner-city tenements and luxury suburban apartment houses is that both house more than one family.

In many cases, inner-city tenements were not constructed as middle income apartment houses, but were built to house poor immigrant labor. Most of them were built before housing and building codes existed. They were never designed to be beautiful, to have clean and spacious living quarters, or to have adequate sanitary and kitchen facilities. As the urban population grew and changed in character, the amount of overcrowding and deterioration increased. To house the increased population, that brand of landlord known as the slumlord did convert and overcrowd some once-fashionable buildings, but more frequently he merely maintained the generally substandard condition of existing tenements.

Even in the suburbs it is possible for the combined pressures of rent control, rising taxes, operating and maintenance costs, absentee ownership, deliberate blockbusting by realtors, and local apathy to reduce a luxury high-rise to a tenement.[18] However, there is little danger of this pattern becoming commonplace in the suburbs. High land, financing, and construction costs produce high rentals which insure that new residents are economically homogeneous with existing residents. Strict building, housing and land use controls prevent the erection of tenement-like buildings or the conversion of luxury buildings to tenements. While physical deterioration and code violations are not visible in a large city, they are readily detectible in the suburbs, and correction and compliance are more easily obtained. The surrounding homeowners are more vigilant and vociferous in protecting their environment than are neighboring tenement owners in the city.

It is dangerous to attempt to analyze the suburban mentality;[19] however, one can discern what might be called the suburb's snob appeal in the frequent restrictions against multi-family and small lot single-family zoning, and in the stated zoning rationales of preserving the community's character or its historic or rural identity.[20] Suburbanites may feel that they have struggled to be able to escape the city and obtain the advantages of suburban life, and they may wish to preserve that life style against urban encroachment. Single-family suburban homeownership is a wholesome way of life compared to the densely populated city. The dislike or fear of apartment houses may thus be based on the

18. RAYMOND & MAY ASSOC., *supra* note 16.

19. An excellent attempt is made by Babcock & Bosselman, *supra* note 16, at 1061-72. *See also* Note, *The Battle for Apartments in Benign Suburbia*, 59 NW. U.L. REV. 345, 345-49 (1964).

20. RAYMOND & MAY ASSOC., *supra* note 16, at 27, 34; Babcock & Bosselman, *supra* note 16, at 1046, 1072.

"ideological" ground that the suburbanite left the city to avoid the ills which apartment houses represent. In addition, many people consider the purchase of a home as an investment: they expect the property value to appreciate over time. The intrusion of a discordant use is felt to involve economic as well as social harm.

These arguments may not be unreasonable. No one would argue that the $40,000 house sited on one acre must accept a ten story, one family per room tenement next door. It is, however, a different proposition to say that a municipality containing large-lot expensive houses is justified in rejecting all other residential uses which have higher densities. Such housing, if well serviced, designed, and landscaped,[21] need not offend the "character of the community" or depreciate property values.

Building type and lot size are, however, the easy issues. The more difficult question involves the type of people who will live in smaller, less expensive homes or in apartments.[22] The emphasis Americans place on homeownership[23] renders renters second-class citizens. Since renters do not make the financial commitment that owners do, it is thought that they will be transient and lack a serious interest in the community. The question remains, however, whether suburban residents have the right to restrict entry to persons of the same socio-economic class as themselves. Justice Roberts' rationale that suburbs cannot zone to exclude population expansion does not answer this question.

The issue may, however, be a false one. Due to market factors, the "type" of people suburbanites fear will normally not be able

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21. These considerations go to the essence of Justice Roberts' comment that a municipality can "protect its attractive character by requiring apartments to be built in accordance with (reasonable) set-back, open space, height, and other light-and-air requirements. . . ." *In re* Appeal of Joseph Girsh, 437 Pa. 237, 245, 263 A.2d 395, 399 (1970).

Girsh's proposed buildings covered only 2.7 acres of the 17.7 acre tract (40% of the tract when parking areas are included), were located far back from the road and adjacent homes, and were screened by existing high trees.

22. At a zoning hearing in a New York suburb, apartments were objected to for both structural reasons (height, density, noise, overcrowding of municipal facilities, lack of parking, road congestion, and inharmonious character) and on racial grounds. One opponent accused the developer of "letting the nigger out of the woodpile." Police were necessary to avert a fistfight. RAYMOND & MAY ASSOC., *supra* note 16, at 34.

23. Babcock & Bosselman, *supra* note 16, at 1046 n.50. This attitude has been an historical trend. *See generally* PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP, HOUSING OBJECTIVES AND PROGRAMS 1-5, 161-62 (1932); PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP, HOME OWNERSHIP, INCOME AND TYPES OF DWELLINGS, 1-6, 29-30 (1932).

to afford suburban home prices or apartment rentals. Girsh's proposal, for example, was for a high-rise "luxury" apartment. It is therefore probable that the occupants of Girsh's proposed structure would be socio-economically compatible with existing residents. Many suburban apartment dwellers are older persons. They previously lived in single-family homes in the community, but when their children matured and moved away, they found the home too large for their needs and too difficult to maintain. Desiring to remain in the same community, these older persons seek apartment accommodations. Another large group of potential residents is young, newly married couples who want the benefits of suburban life without being able to afford a home. As their income rises and they have children, they can be expected to seek a house in the same or an adjacent community. Both these groups of residents can hardly be labelled transient or uninterested in the community.[24]

Suburbanites are, therefore, probably not justified in expect- an influx of low-income or black residents. If federal housing subsidy programs move beyond reliance on local initiative to a strategy of direct federal intervention, suburbanites may have more to fear than they do from the present efforts of private developers who build within market constraints.

The interrelationship between type of building and type of occupant is a complex one. Some authors observe that most of the anti-apartment arguments relate to the occupant and not to the building type.[25] However, as Girsh's brief points out,[26] the same arguments logically apply, but are seldom made, against individuals who seek to rent a single-family home. Similarly, suburban residents would be expected to resist a high-rise condominium even though the occupant owns his unit. Since modern condominia are extremely expensive, condominium owners are economically comparable to existing residents and are probably less transient than renters of single-family homes. The explanation for these different observations may be that suburbanites fear encroachment by unaesthetic building types, undesirable residents or any use which might harm their social or economic investment.

B. *General Welfare Analysis and the Population Exclusion Rationale*

Pennsylvania law begins with the general prescription that zoning classifications are constitutionally valid whenever they bear a reasonable relation to public health, safety, morals and

24. Brief for Appellant at 19, *In re* Appeal of Joseph Girsh, 437 Pa. 237, 263 A.2d 395 (1970); Babcock & Bosselman, *supra* note 16, 1057-58; Melamed, *supra* note 16, at 3.

25. Babcock & Bosselman, *supra* note 16, at 1062-72.

26. Brief for Appellant at 50, *In re* Appeal of Joseph Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

general welfare.[27] Health and safety were the primary standards in the early cases;[28] general welfare became the major criterion in 1958.[29] The relationship between the general welfare analysis and zoning codes which prohibit or severely restrict various uses has experienced a checkered career. In cases involving exclusionary zoning, the Pennsylvania Supreme Court customarily analyzes the reasonableness of the relationship of the zoning to the general welfare,[30] and has adopted the rationale that a total prohibition must bear a more substantial relationship to the general welfare than an ordinance which merely segregates uses into distinct districts.[31] The *Girsh* case breaks with this tradition by holding that zoning adopted with an exclusionary intent is unconstitutional[32] without examination of the relationship to the general welfare.

1. *From Bilbar to Kit-Mar*

In several early cases, the Pennsylvania Supreme Court relied on the general welfare analysis to uphold residential restrictions such as one acre minimum lot size zoning,[33] prohibition of row houses,[34] and 20,000 square foot minimum lot size zoning.[35] In a

27. *E.g.*, Exton Quarries, Inc. v. Zoning Bd. of Adj., 425 Pa. 43, 228 A.2d 169 (1967); National Land & Inv. Co. v. Easttown Twp. Bd. of Adj., 419 Pa. 504, 215 A.2d 597 (1965); Best v. Zoning Bd. of Adj., 393 Pa. 106, 141 A.2d 606 (1958); Lord Appeal, 368 Pa. 121, 81 A.2d 533 (1951); White's Appeal, 287 Pa. 259, 134 A. 409 (1926).

The health, safety, morals, or general welfare standard will be generically referred to throughout this Article as the "general welfare analysis."

28. *E.g.*, Lord Appeal, 368 Pa. 121, 81 A.2d 533 (1951); White's Appeal, 287 Pa. 259, 134 A. 409 (1926).

29. Best v. Zoning Bd. of Adj., 393 Pa. 106, 141 A.2d 606 (1958); Bilbar Const. Co. v. Board of Adj., 393 Pa. 62, 141 A.2d 851 (1958). For an excellent discussion of the development of zoning standards in Pennsylvania, see Key Realty Co. Zoning Case, 408 Pa. 98, 102, 111-19, 182 A.2d 187, 190, 194-98 (1962) (concurring opinion). *See also* Note, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 HARV. J. LEGIS. 246, 252-56 (1970).

30. *In re* Appeal of Kit-Mar Builders, Pa. , A.2d (1970); Exton Quarries, Inc. v. Zoning Bd. of Adj., 425 Pa. 43, 228 A.2d 169 (1967); National Land & Inv. Co. v. Easttown Twp. Bd. of Adj., 419 Pa. 504, 215 A.2d 597 (1965); Archbishop O'Hara's Appeal, 389 Pa. 35, 131 A.2d 587 (1957); *cf.* Rolling Green Golf Club Case, 374 Pa. 450, 97 A.2d 523 (1953).

31. Exton Quarries, Inc. v. Zoning Bd. of Adj., 425 Pa. 43, 59-60, 228 A.2d 169, 179 (1967).

32. This reasoning will be referred to as the "population exclusion rationale."

33. Bilbar Const. Co. v. Board of Adj., 393 Pa. 62, 141 A.2d 851 (1958).

34. Dunlap Appeal, 370 Pa. 31, 87 A.2d 299 (1952). *See also* Swade v. Zoning Bd. of Adj., 392 Pa. 269, 140 A.2d 597 (1958).

35. *In re* Volpe's Appeal, 384 Pa. 374, 121 A.2d 97 (1956).

case involving a non-residential use,[36] the court went so far as to say:

> That brings us to appellants' contention that the zoning ordinance is invalid because it makes no provision for industrial use of property within the Township. But, that circumstance does not, *ipso facto*, constitute a legal defect. . . . The exclusion of industrial use involves an exercise of legislative discretion under the existing facts and circumstances.[37]

The first important case holding an exclusion to be unconstitutional was *Archbishop O'Hara's Appeal*[38] which involved a zoning code excluding a parochial school. General welfare considerations dominated the opinion. The township sought to uphold the restriction on the ground that a school would change the residential character of the neighborhood, depreciate real estate values, and increase traffic necessitating the widening of streets and the installation of sidewalks and streetlights. The Pennsylvania Supreme Court decided that the first two objections were irrelevant to the proper exercise of the zoning power, and held that the traffic issue did not bear a sufficient relation to general welfare to support the exclusion. Although the court relied on the general welfare analysis, its reasoning foreshadowed the *Girsh* opinion:

> *Any* traffic increase with its attendant noise, danger and hazards is unpleasant, yet, such increase is one of the "inevitable accompaniments of suburban progress, and of our constantly expanding population" which, *standing alone*, does not constitute a sufficient reason to refuse a property owner the legitimate use of his land. . . .[39]

Since *any* use of the site would require some public improvements, municipal expense in widening the streets and providing sidewalks and lighting was held to bear an insufficient relation to general welfare.

An early case involving a residential restriction was *Schmalz v. Buckingham Township Zoning Board of Adjustment*[40] in which a fifty foot building set-back requirement in an agricultural district

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36. Mutual Supply Co. Appeal, 366 Pa. 424, 77 A.2d 612 (1951).

37. *Id.* at 430, 77 A.2d at 615. *See also* Peterson v. Zoning Bd. of Adj., 412 Pa. 582, 195 A.2d 523 (1963); Mignatti Appeal, 403 Pa. 144, 168 A.2d 567 (1961); Catholic Cemeteries Ass'n Zoning Case, 379 Pa. 516, 190 A.2d 537 (1954).

38. 389 Pa. 35, 131 A.2d 587 (1957).

39. *Id.* at 54, 131 A.2d at 596 (emphasis in original), quoting from Rolling Green Golf Club Case, 374 Pa. 450, 456, 97 A.2d 523, 526 (1953). In *Rolling Green*, a golf course had been prevented from constructing a driveway through property it had purchased in a residential district. The court held that the club had a lawful right to construct the driveway on its own land unless it would be detrimental to the residential neighborhood. Although nearby residents objected to increased traffic, noise, dirt and hazards, the court held that "these unpleasant burdens are some of the inevitable accompaniments of suburban progress and of our constantly expanding population." 374 Pa. at 456, 97 A.2d at 526.

40. 389 Pa. 295, 132 A.2d 233 (1957).

was held to be unreasonable. The Pennsylvania Supreme Court discussed police power justifications such as traffic congestion, fire, panic, health, light and air, overcrowding of land, population concentration, conservation of property values, and provision of transportation, sewage, water, and other public services. The court concluded that since the set-back bore no reasonable relationship to the public good, it was an improper exercise of the police power.

In *Eller v. Board of Adjustment*,[41] a similar although non-residential case, the court held the set-back regulations imposed on mushroom houses were so great that the mushroom business would be economically infeasible. The court noted that prevention of odors and sanitation problems were the general welfare underpinnings of the regulation. Significantly, the court did not discuss the general welfare justifications, but held the regulation to be unreasonable because tantamount to a blanket prohibition.

One year later in *Norate Corp. v. Zoning Board of Adjustment*,[42] the court extended the *Eller* doctrine that a total prohibition is too broad and, therefore, patently unreasonable. The zoning provision in *Norate* prohibited all off-site advertising signs. Although the court used general welfare language, it again did so without analysis and with no real bearing on the actual holding that the total prohibition was patently unreasonable. *Norate* was followed the next year in *In re Appeal of Ammon R. Smith Auto Co.*,[43] a case involving a prohibition of flashing and intermittent lights on signs. The township claimed that the ordinance protected motorists who might be distracted by flashing signs. In holding the prohibition patently unjustifiable, the court did not analyze this contention.

In *National Land & Investment Co. v. Easttown Township Board of Adjustment*,[44] the Pennsylvania Supreme Court first came to grips with a zoning classification (four acre minimum residential lot size) which had the direct effect of restricting population growth. The township relied on four general welfare arguments to support the restriction: (1) proper sewage disposal, (2) protection of water from pollution, (3) inadequacy of the road system and the difficulty of providing fire protection over narrow and congested roads, and (4) preservation of the character of the township—open space, rural atmosphere, historic sites, and settings of older homes. All four arguments were discussed at length. The

41. 414 Pa. 1, 198 A.2d 863 (1964).
42. 417 Pa. 397, 207 A.2d 890 (1965).
43. 423 Pa. 493, 223 A.2d 683 (1966).
44. 419 Pa. 504, 215 A.2d 597 (1965).

court decided the testimony on points one and two was not convincing, since most homes in the township, even on smaller lots, had on-site sewage and the water supply was assured by the Philadelphia Suburban Water Company. On point three, the court examined the township's road capacity and found it adequate. Point four was held to be irrelevant as a zoning consideration.

Although *National Land* analyzed and found lacking the necessary general welfare relationship, the crux of the holding was that a township cannot use zoning to shirk responsibilities imposed by population growth. The court noted that Easttown was in the path of natural population expansion from Philadelphia on the east and from the King of Prussia-Valley Forge area on the north. The court said:

> Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and cannot be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future. . . . Zoning provisions may not be used . . . to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.[45]

Although *National Land* analyzed health, safety, morals, and general welfare issues, its primary holding was that zoning is invalid if its principle purpose is to impede the entrance of newcomers so that the township can avoid future burdens.

In *Exton Quarries, Inc. v. Zoning Board of Adjustment*,[46] the court held a zoning code to be unconstitutional to the extent that it excluded quarrying. Although it held that the prohibition must be examined with "particular circumspection," it discussed the general welfare considerations at length, and did not declare the exclusion unconstitutonal per se on the authority of *Eller*, *Norate*, and *Smith*. The Exton court analyzed six general welfare aspects which the township claimed justified the restriction: (1) excessive truck traffic, (2) disturbance of underground water supply, (3) danger to children, (4) air pollution from dust, (5) noise and vibration from blasting, and (6) aesthetics. After examining the testimony, the court decided against the municipality on each point. Since the restriction bore no reasonable relation to general welfare, it was held to be an unjustifiable prohibition of a "legitimate business."

Finally, eleven days after the *Girsh* holding, the Pennsylvania Supreme Court decided *In re Appeal of Kit-Mar Builders*.[47] The

45. *Id.* at 527-28, 215 A.2d at 610.

46. 425 Pa. 43, 228 A.2d 169 (1967).

47. Pa. , A.2d (1970). *Kit-Mar* is factually similar to the *National Land* decision, and was based squarely on it. For that reason, this Article will discuss *Kit-Mar* only as it relates to the issues raised by the *Girsh* case.

tract in question was zoned to require two acre minimum lots along existing roads and three acre minimum lots in the interior. Justice Roberts, writing for the majority, examined the township's contention that the lot size was necessary for proper sewage disposal, but found the claim to be "patently ridiculous" and a "sheer fantasy."[48] The court invalidated the classification, specifically following *National Land* and indicating that "a scheme of zoning that has an exclusionary purpose or result is not acceptable in Pennsylvania."[49]

2. *Girsh and Precedent*

It is difficult to rationalize these cases. *Eller*, *Norate*, and *Smith* held that the prohibition was patently unreasonable without further examination. *National Land* seemed to reject the patently unconstitutional argument by holding that since "every zoning case involves a different set of facts and circumstances . . . it is impossible for us to say that any minimum acreage requirement is unconstitutional."[50] Similarly, in *Kit-Mar*, Roberts wrote that "we do not intend to say, of course, that minimum lot size requirements are inherently unreasonable."[51] *Girsh*, however, contains no such language; its failure to discuss the general welfare implies that it accepted the *Eller-Norate-Smith* reasoning.

On the other hand, *O'Hara*, *National Land*, *Exton*, and *Kit-Mar* examined the parameters of the reasonableness of the relationship to the general welfare, whereas *Eller*, *Norate*, and *Smith* did not. *National Land* and *Kit-Mar* went beyond the *O'Hara-Exton* general welfare analysis to discuss the exclusionary intent and effect of the restriction. The court in *National Land* and *Kit-Mar* could have invalidated the zoning classification after refuting the general welfare points, but instead it went further and held that the zoning was unconstitutional because it had been adopted with the intent to exclude population expansion.

National Land and *Kit-Mar* are the only cases involving restrictions on housing. A logical conclusion is that the population exclusion argument is the preferred rationale in cases involving restrictions on residential uses. This is emphasized by *Girsh*

48. Pa. at , A.2d at . The relationship of sewage disposal to the proper exercise of the zoning power is explored in Delaware County Community College Appeal, 435 Pa. 264, 254 A.2d 641 (1969).

49. Pa. at , A.2d at .

50. National Land & Inv. Co. v. Easttown Twp. Bd. of Adj., 419 Pa. 504, 523, 215 A.2d 597, 607-08 (1965).

51. *In re* Appeal of Kit-Mar Builders, Pa. , , A.2d , (1970).

when it specifically distinguishes "the right of people to *live on land*,"[52] from industry, billboards or quarries.

Although there is a functional relationship between population expansion and business expansion, the population exclusion rationale has appeared only in cases involving residential restrictions. Housing is the *raison d'etre* of suburban areas. While general welfare arguments may support an intended business or industrial restriction,[53] municipalities apparently cannot adopt an ordinance intended to avoid population expansion, regardless of the general welfare considerations. To do so is a denial of the suburb's basic function.

The *O'Hara* decision supports this hypothesis. Business and employment opportunities are not necessary to service population growth. The mobility of the suburbanite allows him to travel by automobile to work or shop in nearby areas. However, schools are as immediately necessary to population growth as is housing. A restriction on schools is thus more of a tool to avoid population growth than is a restriction on business or industry.[54] *O'Hara*, therefore, has closer logical affinity to *National Land*, *Kit-Mar* and *Girsh* than to the business-industry cases. This relationship is reflected in *O'Hara's* rationale that traffic increase is a necessary concomitant of population expansion.[55] Thus the only other case involving a use functionally related to population expansion contains language analogous to the population exclusion rationale.

If the cases are analyzed in the above manner, *Girsh* is consistent with precedent, although it does represent an extension. *Girsh* involved housing and was decided on the *O'Hara-National Land-Kit-Mar* rationale that a municipality cannot zone to avoid population expansion rather than on the rationale of *Exton*, *Eller*, *Norate*, and *Smith*. In fact, the court distinguished these latter cases by saying that *Girsh* deals with "the crucial problem of population, not with billboards or quarries."[56]

The departure from precedent in *Girsh* involved the lack of a general welfare analysis. Although *National Land* and *Kit-Mar* were based on the population exclusion rationale, they nevertheless analyzed the municipalities' contentions that the exclusion was reasonably related to health, safety, morals, and general welfare.

52. *In re* Appeal of Joseph Girsh, 437 Pa. 237, 245, 263 A.2d 395, 399 (1970) (emphasis in original).

53. Under the doctrine of Exton Quarries, Inc. v. Zoning Bd. of Adj., 425 Pa. 43, 228 A.2d 169 (1967), that a township cannot exclude a "legitimate business," municipalities will be hard pressed to justify such exclusions. See discussion at notes 117-21 and accompanying text *infra*.

54. It is notable that the applicant in another recent case involving restrictive zoning was an educational institution. Delaware County Community College Appeal, 435 Pa. 264, 254 A.2d 641 (1969).

55. Note 39 and accompanying text *supra*.

56. *In re* Appeal of Joseph Girsh, 437 Pa. 237, 243, 263 A.2d 395, 398 (1970).

While *Girsh* adopted the population exclusion rationale, it did not analyze the general welfare issues. In so doing, the *Girsh* court relied on *Exton's* holding that prohibitory ordinances must be regarded with "particular circumspection." However, the *Exton* court interpreted this to mean that such provisions must bear a more substantial relationship to health, safety, morals, and general welfare than a code which merely segregates uses by location.[57] In *Exton*, extended examination of the general welfare contentions led to the conclusion that the requisite relationship was not met. The court in *Girsh* neither required the relationship to be more substantial nor examined the general welfare issues. In following the population exclusion rationale alone, the court in *Girsh* violated the traditional practice of examining general welfare issues.

While the failure of *Girsh* to examine general welfare considerations produced the same result as *Eller*, *Norate* and *Smith*, *Girsh* did not adopt the rationale utilized by those cases that total prohibitions are patently unconstitutional. The reliance by the dissenters in *Girsh* on *Lofmer, Inc. v. Board of Adjustment of Easttown Township*[58] is therefore misplaced. Contrary to *Eller*, *Norate* and *Smith*, the *Lofmer* decision held that failure of a code to provide for a given use does not make the ordinance ipso facto unconstitutional. The *Girsh* court, however, did not hold that the ordinance was ipso facto unconstitutional because it failed to provide for apartments, but rather that it was unconstitutional because it had been adopted with an exclusionary intent.

3. *General Welfare v. Population Exclusion*

By emphasizing the population exclusion rationale over the general welfare analysis, the majority in *Girsh* avoided the necessity of making an extended examination of the relationship of the exclusion to health, safety, morals or general welfare. In so doing, the court may have abandoned the balancing of burden and benefit in favor of a possibly uncritical response to present-day necessity. Both appellee's and appellant's briefs contained considerable discussion of the reasonableness of the restriction vis-a-vis general welfare.[59] Rather than analyze this issue, the court

57. Exton Quarries, Inc. v. Zoning Bd. of Adj., 425 Pa. 43, 59-60, 228 A.2d 169, 179 (1967). The genesis of this doctrine can be found in Archbishop O'Hara's Appeal, 389 Pa. 35, 131 A.2d 587 (1957). The court said that traffic increase, standing alone, did not validate the exclusion of a parochial school, implying that it required a higher safety and general welfare standard. Note 39 and accompanying text *supra*.

58. 11 Ches. Co. Rep. 66 (C.P. Pa. 1963).

59. Brief for Appellees at 12-13, 34-40, *In re* Appeal of Joseph Girsh,

responded to the current impetus to leave the congested urban core. This approach vests a right in potential suburbanites who cannot afford or do not desire single-family homes without considering the corresponding burdens on the community.

Justice Roberts relied upon the future effectiveness of regional planning and zoning to distribute public benefits and burdens more equitably.[60] Until that time, however, the court should not disregard the effects of its decisions on municipalities. It is a very real possibility that the impact of apartments on a municipality might be so severe that the only reasonable regulation is prohibition. Under *Girsh* such zoning would be unconstitutional even if a proper balancing of private rights and general welfare would support it.

Girsh and *Kit-Mar* held that any zoning classification adopted for the purpose or with the result of impeding future growth is unconstitutional. If this be true, then any code provision or municipal regulation adopted for that purpose would be unconstitutional, whether or not prohibitory. For instance, in *National Land* and *Kit-Mar*, limitations which were not prohibitions were invalidated. In *Girsh*, however, Justice Roberts reserved for municipalities the right to regulate or restrict uses, so long as such regulation or restrictions are reasonable.[61] If a municipality uses this right in an unreasonable manner to restrict a use to a very small or a topographically unusable site, such regulation should be unconstitutional as a total prohibition because adopted with the intent or result of excluding population. For a court to mediate the bounds of what is reasonable in such a situation involves drawing extremely fine lines and requires inquiry into the motives of public officials. Since *Kit-Mar* invalidates a provision when the intent *or result* is exclusionary, the court must decide, ex post facto, that a zoning provision is unconstitutional because it has the effect of stunting population growth, even though that was not the intent when the provision was first adopted. The relationship between the purpose and the effect of a public action is a complex one requiring a type of examination which may be unsuited for the judiciary.[62]

It should not be the judiciary's function to supervise the system to the extent of prescribing the location and lot size of various

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437 Pa. 237, 263 A.2d 395 (1970); Brief for Appellant at 13-15, 20-23, 37-51, *In re* Appeal of Joseph Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

60. *See* note 107 and accompanying text *infra*.

61. *See* notes 122-26 and accompanying text *infra*.

62. "Under the facts of this case we do not believe that the question of motivation for the referendum (apart from a consideration of its effect) is an appropriate one for judicial inquiry." Southern Alameda Spanish Speaking Organization v. Union City, F.2d (9th Cir. 1970) (see text accompanying note 100 *infra*). The court felt inquiry into the voters' motives would involve an "intolerable invasion of the privacy that must protect an exercise of the franchise." *Id.* at .

uses. The court cannot function properly in such a supervisory role since it must rely on private litigants to bring disputes into court. This type of incremental decision-making is the antithesis of zoning and planning's emphasis on comprehensive rationality.

In departing from the general welfare analysis, the court is not protecting municipal rights to limit its own development,[63] nor the landowner's right to use his property as he sees fit. Rather, the court is protecting the right of those "nameless thousands of potential suburban apartment dwellers"[64] who either cannot afford or do not desire to live in a single-family home. The real party in interest in the *Girsh* case is the future suburban apartment resident. Justice Roberts recognized that "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"[65] and that "most jobs that are being created in urban areas . . . are in the suburbs."[66] The court is thus looking beyond the interests of the particular tract of ground or the particular municipality. It is looking at the larger issue of the relationship of suburban restrictions to urban problems and has adopted a policy of requiring suburban municipalities to plan for and to service that part of the population explosion which desires to live within its borders.[67]

That the court is considering this larger picture is underscored by the fact that in both *Girsh* and *Kit-Mar* Justice Roberts expressed the hope that regional planning and zoning might someday settle, without the necessity for judicial intervention, questions of allocating population growth and the land uses necessary to accommodate that growth. The encouragement of regional zoning may be the prime justification for abandoning the general welfare rationale in favor of larger considerations.[68]

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63. *See* PA. STAT. ANN. tit. 53, § 10604 (Supp. 1970).
64. Babcock & Bosselman, *supra* note 16, at 1059.
65. *In re* Appeal of Joseph Girsh, 437 Pa. 237, 244, 263 A.2d 395, 398 (1970).
66. *Id.*
67. In the absence of a clear indicator, the court will depend on the market to tell it when a municipality's time has come:

> The simple fact that someone is anxious to build apartments is strong indication that the location of this township is such that people are desirous of moving in, and we do not believe Nether Providence can close its doors to those people.

In re Appeal of Joseph Girsh, 437 Pa. 237, 245, 263 A.2d 395, 399 (1970). While the court may rely on the market to indicate *when* a township must accept additional population, the question of *how much* population growth must be left initially within municipal discretion.
68. Discussed at notes 106-16 and accompanying text *infra.*

C. *The Question of Remedies*

To state that municipalities cannot zone to exclude population growth raises the question of remedies. In both *Girsh* and *Kit-Mar* the Pennsylvania Supreme Court held the zoning code to be unconstitutional. For the court to do more, that is, to specify the location of apartment buildings, the number of units they should contain, the proper lot size, or the building height, set-back and other regulations, would cast the court as a "super board of adjustment" or a "planning commission of last resort."[69] Justice Roberts set the boundaries of judicial intervention by defining the court as "a judicial overseer, drawing the limits beyond which local regulation may not go, but loathing to interfere, within those limits, with the discretion of local governing bodies."[70] Declaring the code unconstitutional was thus the only proper relief the court could have granted.

Several federal courts, when faced with questions of due process and equal protection in housing cases, have granted much broader and more specific relief. In *Norwalk CORE v. Norwalk Redevelopment Agency*,[71] the Second Circuit Court of Appeals suggested that the redevelopment agency was required to take affirmative action to assure nonwhite displacees of adequate relocation housing. A mandatory injunction, ordering the city to issue building permits for multi-family low-income housing, was granted in *Dailey v. City of Lawton.*[72] A federal district court in *Gautreaux v. Chicago Housing Authority*[73] went even further. The order divided Cook County into a racially-impacted area and a non-ghetto area. The court prohibited construction of public housing in the former until the construction of 700 units had been commenced in the latter, and thereafter for every one unit constructed

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69. National Land & Inv. Co. v. Easttown Twp. Bd. of Adj., 419 Pa. 504, 521, 215 A.2d 597, 607 (1965). The dissent in *Girsh* felt that the majority had already gone too far, even without more detailed regulation:

> By concluding that the township must provide for high-rise apartments, the majority also impliedly holds that every possible use, having no greater detrimental effect, must also be allowed. In my opinion, this decision places us in the position of a "super board of adjustment" or "planning commission of last resort," a position which we have heretofore specifically rejected.

437 Pa. at 251, 263 A.2d at 402 (dissenting opinion).

70. National Land & Inv. Co. v. Easttown Twp. Bd. of Adj., 419 Pa. 504, 521, 215 A.2d 597, 607 (1965). On the propriety of judicial intervention in local zoning decisions, *compare* Robinson v. City of Bloomfield Hills, 350 Mich. 425, 86 N.W.2d 166 (1957), *with* Vickers v. Township Comm'n of Gloucester Twp., 37 N.J. 232, 252, 181 A.2d 129, 140 (1962) (dissenting opinion), *appeal dismissed*, 371 U.S. 233 (1963).

71. 395 F.2d 920 (2d Cir. 1968).

72. 296 F. Supp. 266 (W.D. Okla. 1969).

73. 296 F. Supp. 907 (N.D. Ill. 1969) (Judgment Order entered at 304 F. Supp. 736 (N.D. Ill. 1969)); *accord*, Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969). *See also* Otey v. Common Council of City of Milwaukee, 281 F. Supp. 264 (E.D. Wis. 1968).

in the former the court required that three units be built in the latter. In addition, the court specified regulations on building size, height, location, and number of occupants. The decision required the housing authority to use its best efforts to increase the supply of public housing units. Recent commentary on the *Gautreaux* case labelled the decree "overly ambitious" and an "excessively large step in the judicial administration of public housing programs."[74] Not only did the decree require affirmative action, but it specified what action the housing authority had to take.

The remedies in both *Girsh* and *Gautreaux* were justified by their fact situations. *Girsh* involved a public provision infringing on a private property right. Invalidation of the provision restored the proper balance without a further judicial inroad into local discretion. In *Gautreaux*, public action had denied equal protection in a sensitive area of racial confrontation. To right the balance required more than mere invalidation of the practice; the court had to reverse the trend by ordering discrimination in favor of blacks.[75] It is arguable that *Girsh* involved a question of racial discrimination of no less magnitude than that in *Gautreaux*, requiring, perhaps, as pervasive a remedy.[76] On the *Girsh* fact situation, however, the Pennsylvania Supreme Court would not have been justified in making a broader decree.

The form of remedy utilized in *Girsh* has a serious defect: it sends the matter back to the local government for resolution. In the process of remedying the constitutional flaw, the local decision-making machinery will again respond to the political pressures which caused the original ordinance to exclude apartments. This in fact was the aftermath of *Girsh*. Shortly after the decision Nether Providence began consideration of an amendment to the zoning code which permitted apartment development on four tracts in the Township, but left the Duer Tract zoned R-1 Residential.[77]

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74. Note, *Gautreaux v. Public Housing Authority: Equal Protection and Public Housing*, 118 U. PA. L. REV. 437, 439, 447 (1970).

75. This concept was popularized in P. FREUND, ON LAW AND JUSTICE 33-34 (1968).

Not every allegation of racial discrimination will result in active judicial intervention. *See* Southern Alameda Spanish Speaking Organization v. Union City, F.2d , (9th Cir. 1970) (injunction denied because it would "not serve to freeze the status quo but would require that affirmative steps now be taken in the direction of the ultimate remedy sought by appellants"); Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *rev'g* 293 F. Supp. 301 (W.D. Mich. 1969).

76. This contention is more fully explored in the conclusion. See notes 91-105 and accompanying text *infra*.

77. This attempt to impede apartment development on the Duer Tract

Alternatively, a township could so restrict an apartment zone as to make apartment development infeasible.

On the other hand, the developer can attempt to foreclose these exclusionary results. Since the decision of the building inspector refusing permits for apartments on the Duer Tract was reversed, the requested permits should be forthcoming. If Girsh filed an application for building permits, the inspector could be legally compelled to issue them if the application met building code standards, since no zoning approval is necessary. However, the mere application for a permit conveys no vested rights; it can be refused as long as permits have not been issued and detrimentally relied upon in good faith.[78] Several cases in Pennsylvania have held that permits need not be issued if the applicant applied when an amendatory ordinance rezoning the tract was pending before the municipal legislative body.[79] When an ordinance can be considered "pending" is a difficult question. The Pennsylvania Supreme Court has held the amendment to be pending after two readings by council,[80] when the public hearing has been scheduled but not held,[81] or even on the day it was introduced into council.[82] In another case, however, an amendment was held not pending after it was referred by council to the planning commission, approved by that body and sent back to council, because no public hearings had been held and the municipality had never publically announced its intent to rezone.[83] In addition, if the permits are not sought in good faith but as an attempt to circumvent an expected change, they can be denied.[84] Therefore, if Nether Providence Township Commission began consideration of a new zoning code before an application for building permits were

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will probably fail. The Pennsylvania Supreme Court's reversal of the court of common pleas has the effect of reversing the decisions of the Nether Providence Zoning Board and the building inspector refusing to grant permits to construct apartment buildings. The new developer (Girsh's transferee) should, therefore, be entitled to the requested permits.

78. Beverly Building Corp. v. Board of Adj. of Lower Merion Twp., 409 Pa. 417, 187 A.2d 567 (1963); Shender v. Zoning Bd. of Adj., 388 Pa. 265, 131 A.2d 90 (1957); A. J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954); Dunlap Appeal, 370 Pa. 31, 87 A.2d 299 (1952); Mutual Supply Co. Appeal, 366 Pa. 424, 77 A.2d 612 (1951); Appeal of A. N. "Ab" Young Co., 360 Pa. 429, 61 A.2d 839 (1948).

79. Colligan Zoning Case, 401 Pa. 125, 162 A.2d 652 (1960); Shender v. Zoning Bd. of Adj., 388 Pa. 265, 131 A.2d 90 (1957); Mutual Supply Co. Appeal, 366 Pa. 424, 77 A.2d 612 (1951); Appeal of A. N. "Ab" Young Co., 360 Pa. 429, 61 A.2d 839 (1948); and cases cited in notes 80-83 *infra*.

80. Gold v. Building Comm. of Warren Borough, 334 Pa. 10, 5 A.2d 367 (1939).

81. Beverly Building Corp. v. Board of Adj. of Lower Merion Twp., 409 Pa. 417, 187 A.2d 567 (1963).

82. A.J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954).

83. Lhormer v. Bowen, 410 Pa. 508, 188 A.2d 747 (1963).

84. *Id.*

submitted, or if permits were sought with an improper intent, the building inspector would be justified in refusing to issue them. By quickly commencing consideration of a zoning amendment, a township may foreclose action by the developer.

The difficult question of remedies and the necessity for additional litigation which is caused thereby is well illustrated in the series of cases involving minimum lot sizes for singe-family dwellings. In 1956, *In re Volpe's Appeal*[85] held valid a 20,000 square foot minimum with no indication what larger lot sizes would also be reasonable. *Bilbar Construction Co. v. Easttown Township Board of Adjustment*[86] in 1958 held valid a one acre minimum. Seven years later, in *National Land & Investment Co. v. Easttown Township Board of Adjustment*,[87] four acre minimum lots were held excessive; again the court did not specify the limits of reasonable regulation. Finally, *In re Appeal of Kit-Mar Builders*[88] held two and three acre lots excessive in 1970. The parameters of reasonable lot sizes have been slowly emerging in an ad hoc, case by case method. A proper view of judicial restraint dictates this approach, except, perhaps, when a case such as *Gautreaux v. Chicago Housing Authority*[89] requires greater judicial intervention. The piecemeal approach is, however, costly and wasteful and renders the law uncertain. For instance, without further litigation it may be impossible to predict what limitations municipalities can constitutionally impose on apartment developments.

III. Conclusion: The Future of Suburban Housing

It is a simple matter to state what results will *not* flow from the *Girsh* decision. The *Girsh* decision will not result in large numbers of suburban high-rise apartment buildings in Pennsylvania; it will not result in suburban housing opportunities for low-income families; it may not, in fact, result in apartments being built in Nether Providence.[90] *Girsh* will not produce a revolution because many suburbs contain sufficient existing apartments to satisfy their duty, and others have zoning codes which permit

85. 384 Pa. 374, 121 A.2d 97 (1956).
86. 393 Pa. 62, 141 A.2d 851 (1958).
87. 419 Pa. 504, 215 A.2d 597 (1965) (discussed at text accompanying notes 44-45 *supra*).
88. Pa. , A.2d (1970) (discussed at text accompanying notes 47-49 *supra*).
89. 296 F. Supp. 907 (N.D. Ill. 1969) (Judgment Order entered at 304 F. Supp. 736 (N.D. Ill. 1969)) (discussed at notes 73-74 and accompanying text *supra*).
90. See note 77 and accompanying text *supra*.

apartments. Suburbs desiring to remain without apartments will employ other methods to obstruct developers. *Girsh* is at best an "all deliberate speed" integration of apartments into the suburbs.

A. *Equal Protection and Low-Income Suburban Housing*

The apartment-suburb conflict in *Girsh* is related to the issues of equal protection and constitutional rights in the field of low-income housing. An ever-growing polarization exists between the affluent, white suburbanite and the low-income inner-city resident of both races. Many ghetto dwellers feel trapped by their environment and seek leisure life, open space, superior schools, and other suburban advantages. Many suburbanites feel threatened by this desire and erect legal and economic barriers to in-migration. These barriers greatly restrict the housing opportunities of inner-city residents[91] and increase the polarization between the suburbanite and the city dweller. The Kerner Commission, for example, found that elimination of such barriers is essential to reverse the dangerous consequences of racial and residential separation.[92]

The urban-suburban conflict is exemplified by the apartment dispute. Low-income urbanites have no realistic hope of purchasing a single-family home in the suburbs. Rising land, construction, and financing costs have forced prices up to the extent that the median price for a conventionally built home is now $27,000.[93] Without a more extensive federal subsidy, which at present is not politically feasible, this market is beyond the reach of low-income purchasers. With apartments, however, it would be possible for the developer to achieve economies that would lower rentals to within the means of some inner-city residents.[94] The suburban self-protective barriers, therefore, frequently appear in the form of zoning restrictions on apartment and other multi-family developments. Recognizing this, the President's Committee on Urban Housing recommended that housing authorities be authorized to supersede local zoning codes in constructing low-income hous-

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91. Note, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 HARV. J. LEGIS. 246, 248-52 (1970).

92. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 480-82 (1968).

93. PRESIDENT'S SECOND ANNUAL REPORT TO CONGRESS ON NATIONAL HOUSING GOALS 1 (April 1, 1970).

94. NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 215 (1968).

Although economies can be achieved in apartment construction, the differential between the construction cost per unit of single-family housing and the cost per unit of multi-family housing is not great enough to produce a substantial difference in the monthly cost to the consumer of the two types of housing. Since apartment rentals are somewhat lower, they can serve lower income groups than single-family homes, although without federal subsidy the market will not open to those most in need of better housing and a new environment.

ing.[95] Massachusetts was one of the first states to respond by adopting a statute permitting developers of low-income housing to appeal to a state Housing Appeals Committee which has the power to reverse local zoning decisions.[96]

On the issue of opening the suburbs to inner-city residents, the *Girsh* case makes only modest impact. The suit was prosecuted by a commercial developer wishing to make the most economic use of his property, rather than by inner-city residents seeking escape to the suburbs. The proposal was not for low-income housing, but for a luxury high-rise. The optimistic point is that, although the holding was not based on equal protection grounds, it was based on human rights and not on property rights alone. The rationale that suburbs cannot exclude those seeking a comfortable place to live should prove a helpful precedent to those organizations[97] which are litigating the constitutionality of suburban restrictive zoning.[98] Professor Paul Davidoff, head of the Suburban Action Institute, believes that the *Girsh* doctrine will prove helpful because it refutes several justifications and techniques which the suburbs have traditionally employed in defense of exclusionary zoning.[99]

That the population exclusion rationale will prove helpful is shown by the appearance of an analogous argument as dicta in a recent federal appeals court decision.[100] The municipality had rezoned a tract to permit low-income housing, only to have the ordinance almost immediately nullified by a referendum. The

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95. PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME 143-44 (1968); *see* Renshaw v. Coldwater Housing Comm'n, 381 Mich. 590, 165 N.W.2d 5 (1969).

96. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (Supp. 1970). The New Jersey legislature began consideration of a similar provision on May 12, 1969 (Bill S. 803, New Jersey Land Use Planning and Development Law). These statutes are extensively discussed in Note, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 HARV. J. LEGIS. 246 (1970).

97. Notably the National Association for the Advancement of Colored People and the Suburban Action Institute of White Plains, New York.

98. N.Y. Times, March 22, 1970, § A, at 51, col. 1. *See also* Philadelphia Evening Bulletin, March 24, 1970, at 18, col. 4; *id.*, April 3, 1970, at 52, col. 3.

The National Commission on Urban Problems recommended that the Justice Department research the constitutionality of exclusionary zoning and participate as *amicus curiae* in cases challenging such zoning. NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 243-44 (1968).

99. N.Y. Times, March 22, 1970, § A, at 51, col. 1.

100. Southern Alameda Spanish Speaking Organization v. Union City, F.2d (9th Cir. 1970).

sponsor of the proposed housing project sued the city, requesting an injunction requiring the city to effectuate the zoning changes. The federal district court denied a three-judge panel and a preliminary injunction. Although the ninth circuit affirmed, it recognized that "since 1962, suburban pressures have created an increasing need for multi-family housing in Union City"[101] and said:

> Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups. It may be, as matter of fact, that Union City's plan, as it has emerged from the referendum, fails in this respect. These issues remain to be resolved.[102]

Besides the population exclusion rationale, *Girsh* contributes a new standard of judicial inquiry. No longer are local planning and land use decisions sacrosanct except in case of gross impropriety. The courts are exhibiting a growing awareness of urban-suburban tension and a new willingness to examine municipal planning policies. As Professor George Lefcoe[103] predicts, municipalities are "not going to be allowed just to let the shape of development take a form, then codify it."[104] Justice Roberts' emphasis that the case requires the township to "provide for apartment living as part of its *plan* of development"[105] supports this prediction.

B. *Regional Zoning and the Municipalities Planning Code*

In both *Girsh* and *In re Appeal of Kit-Mar Builders*,[106] Justice Roberts suggested that the adoption of regional planning and zoning would allow municipalities to allocate unwanted land uses on a rational basis.[107] The Pennsylvania Supreme Court has dealt

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101. *Id.* at .
102. *Id.* at .
103. Of the University of Southern California Law School.
104. N.Y. Times, March 22, 1970, § A, at 51, col. 1.
105. *In re* Appeal of Joseph Girsh, 437 Pa. 237, 242, 263 A.2d 395, 397 (1970) (emphasis in original).
106. Pa. , A.2d (1970).
107. *See generally* NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 222-24 (1968); Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, 1966 WASH. U.L.Q. 1; Haar, *Regionalism and Realism in Land Use Planning*, 105 U. PA. L. REV. 515 (1957); Note, *Regional Impact of Zoning: A Suggested Approach*, 114 U. PA. L. REV. 1251 (1966); Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107.

It is probable that decisions under Massachusetts' new Snob Zoning Law will be based on low-income housing needs on a regional basis. Note, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 HARV.

with inter-municipal zoning in the past. In *National Land & Investment Co. v. Easttown Township Board of Adjustment,*[108] Justice Roberts pointed out that while zoning in surrounding townships is frequently a relevant consideration, it is not controlling in deciding zoning cases.[109] Presumably, if regional zoning existed and allocated all apartments to Township *A* and none to Township *B*, Justice Roberts would hold the scheme to be controlling in passing on the validity of the exclusion in Township *B*. Such exclusionary zoning, when an element of a regional scheme, should be held valid despite Justice Roberts' statement in *Exton Quarries, Inc. v. Zoning Board of Adjustment*[110] that zoning prohibitions are suspect "despite the possible existence outside the municipality of sites on which the prohibited activity may be conducted."[111]

Justice Roberts is, of course, aware that the Pennsylvania legislature has sought to move municipalities in the direction of regional zoning, and perhaps he hopes to quicken the pace along the road. The Municipalities Planning Code,[112] adopted in 1968, is designed to "accomplish a coordinated development of municipalities"[113] and authorizes joint municipal planning commissions to further that end.[114] The goal of joint planning is not municipal general welfare, but the "health, safety, morals and the general welfare of the various areas in the Commonwealth."[115] The general welfare promoted by the Act is not the parochial interests of individual municipalities, but rather the betterment of entire regions. Inter-municipal cooperation of the type urged by Justice Roberts is thus a feature of state law. The *Girsh* case may be intended to indirectly advance such cooperation. If each municipality is forced to accept unwanted uses, they may decide to plan and zone jointly under the Planning Code. Thereby, municipalities will be able to allocate the burdens rather than each accepting all of them.

J. LEGIS. 246, 260-61, 269 (1970); see note 96 and accompanying text *supra*.

In *Kit-Mar*, Justice Roberts also suggested that municipalities can solve their land use allocation problems by authorizing planned unit developments and other innovative subdivision and land use techniques. *See generally* Village 2 at New Hope, Inc. Appeals, 429 Pa. 626, 241 A.2d 81 (1968).

108. 419 Pa. 504, 215 A.2d 597 (1965).

109. *Id.* at 531, 215 A.2d at 612; *accord*, Bilbar Const. Co. v. Board of Adj., 393 Pa. 62, 141 A.2d 851 (1958).

110. 425 Pa. 43, 228 A.2d 169 (1967).

111. *Id.* at 59, 228 A.2d at 179.

112. PA. STAT. ANN. tit. 53, §§ 10101-11202 (Supp. 1970).

113. *Id.* § 10105.

114. *Id.* § 11102.

115. *Id.* § 11101.

Whether or not municipalities make use of the Planning Code, Justice Roberts has served notice that "as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city."[116]

C. *The Bounds of Permissible Exclusionary Zoning*

Justice Roberts indicates that since *Girsh* involves the right of people to live on land, it does not stand for the proposition that all municipalities must provide for all types of land uses.[117] When *Girsh* and *Exton* are read together, however, it is arguable that a municipality may not exclude what the court considers to be a "reasonable" use. The *Girsh* court concluded that while a suburban township may be justified in excluding "certain industrial uses," such an exclusion would be suspect under *Exton*.[118]

When the cases are combined, failure to provide for a use is unconstitutional when (1) the exclusion is adopted for an unconstitutional purpose, or (2) the use is a reasonable one. As discussed earlier,[119] the first of these criteria involves the court in difficult questions of collective motive and intent. To fulfill the second criteria, the court must determine what constitutes a reasonable use. In *Exton* the majority assumed that quarrying was a "legitimate business." In *Girsh* the dissent found that appartments were not a reasonable use. The record in *Girsh* contained much conflicting evidence, especially expert testimony and official planning reports, as to whether apartments were a reasonable use in Nether Providence. While the majority was willing to ignore this evidence when the case involved the right to live on land, it is clear under the *Exton* decision that the rationale of the reasonableness of the use will be applied in cases of non-residential uses.[120]

The synthesis does not allow much leeway to local governments. Residential uses cannot be restricted if the intent or result is to impede population growth. If such an impedimentary intent is not present, residential uses are still presumably not prohibitable because they are a reasonable and legitimate use in the suburbs. A real problem is presented, as predicted by the appellee's brief:

> There is no way to hold that a municipality must allow high-rise apartments somewhere in order to have a valid zoning ordinance without at the same time establishing a precedent that each municipality must also pro-

116. *In re* Appeal of Joseph Girsh, 437 Pa. 237, 245, 263 A.2d 395, 399 (1970).
117. *Id.*
118. *Id.* at 246 & n.6, 263 A.2d at 399 & n.6.
119. Page 650 *supra.*
120. Exton Quarries, Inc. v. Zoning Bd. of Adj., 425 Pa. 43, 59, 228 A.2d 169, 179 (1967).

> vide somewhere for mid-rise apartments, garden-type apartments, row homes, town houses, twin houses, duplexes, single homes on uniform lots and single homes in cluster development.[121]

Residential uses can of course be regulated on health, safety, morals and general welfare grounds, but present case law does not explore the parameters of reasonable regulation. For non-residential uses, the *Exton* doctrine continues to apply. While a community need not accept all uses, it has thus become extremely difficult to justify the exclusion of any particular use, especially if it is residential.

D. *The Bounds of Reasonable Regulation*

The *Girsh* case preserves in suburban municipalities the necessary right to reasonably regulate apartment development. The decision explicitly allows municipalities to protect their attractive character by reasonable use of location, set-back, open space, height, and other light and air regulations.[122]

While there can be no argument with the validity of this aspect of the decision, in it lies the most fruitful area for future difficulty. The expected reaction of suburban communities is for them to walk the tightrope of reasonable regulation, that is, to pass zoning and other land use restrictions which make it extremely unattractive to construct apartments, but which are still within constitutional limits. For instance, the "most common treatment of multiple family housing is to provide apartment zones in areas which are not considered desirable for single-family residences,"[123] such as zones adjacent to commercial or industrial uses. Decisions in other jurisdictions have held such regulation to be reasonable.[124] Not only is there nothing in *Girsh* to prevent this response, but the decision specifically allows it:

> . . . [A]ppellee could show that apartments are not appropriate on the site where appellant wishes to build, but that question is not before us as long as the zoning ordinance in question is fatally defective on its face. Appellee could properly decide that apartments are more appropriate in one part of the Township than in another, but it

121. Brief for Appellees at 21, *In re* Appeal of Joseph Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

122. *In re* Appeal of Joseph Girsh, 437 Pa. 237, 245, 263 A.2d 395, 397 (1970).

123. Babcock & Bosselman, *supra* note 16, at 1060-61. *See also* RAYMOND & MAY ASSOC., *supra* note 16, at 27-29.

124. Babcock & Bosselman, *supra* note 16, at 1060-61 & nn.147-49, 152-53.

> cannot decide that apartments can fit in *no* part of the Township.[125]

Nether Providence is, in fact, considering a zoning amendment which establishes four apartment zones, but leaves the Duer Tract zoned R-1 Residential.[126]

Is restriction of apartment zones to areas considered undesirable for single-family housing reasonable? If a township contains apartments as an existing use, can a litigant claim that it does not have enough apartments? The answers are unclear. If a suburban code contains an apartment zone, the fact that no apartments exist in the township may not bring the *Girsh* doctrine into play. Lack of apartments may indicate lack of interest on the part of developers, or it may indicate unreasonable regulation or discriminatory administration of the code. Does *Girsh* reach the latter situation? The answer, again, is uncertain. The one thing that is certain is that Pennsylvania's history of repeated litigation over minimum lot sizes will be duplicated in the apartment context; further litigation is required to test suburban regulation and administration of the now-required apartment zones.

125. *In re* Appeal of Joseph Girsh, 437 Pa. 237, 246 n.6, 263 A.2d 395, 399 n.6 (1970) (emphasis in original).

126. *But see* note 77 *supra*.

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