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The Pennsylvania Supreme Court and Exclusionary Suburban Zoning: From Bilbar to Girsh - A Decade of Change

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COMMENTS

THE PENNSYLVANIA SUPREME COURT AND EXCLUSIONARY SUBURBAN ZONING:
FROM BILBAR TO GIRSH — A DECADE OF CHANGE

I. INTRODUCTION

Since 1926, when the United States Supreme Court, in the landmark decision of Village of Euclid v. Ambler Realty Co., upheld the constitutionality of municipal planning and land use regulations as valid exercises of the state police power; these activities have gained increasing acceptance by both communities and courts. Today the power to regulate land use through zoning and other regulatory schemes is virtually unquestioned. Traditionally, the courts in Pennsylvania have favored broad unfettered local government power to plan and regulate land use. But, in the most recent decade, the Pennsylvania Supreme Court has slowly altered its posture to the point that there now are strong indications that a deep seated philosophical change has taken place. The long accepted passive approach is being replaced by activism which allows the judiciary to play an increasingly major role in the evolution of land use planning.

The problems caused by the unparalleled population growth over the last decade in both the cities and its immediate environs have placed tremendous pressure upon the suburban fringe to absorb the crush of people migrating away from the inner cities. However, as the overcrowding and intolerable living conditions of the cities continue to fuel the suburban migration, migrating inner city residents have experienced a growing unconcealed suburban hostility. The settled suburbanites being well satisfied with their way of life and wishing to maintain the status quo, resent this threatening influx. They view the pressure of the expanding inner city.

2. The opponents of zoning had unsuccessfully argued that it was an unconstitutional taking of property violative of the 14th amendment of the United States Constitution, which provides in relevant part: “nor shall any State deprive any person of life, liberty, or property, without due process of law...” U.S. CONST. amend. XIV.

In Pennsylvania, the constitutional validity of zoning was settled in White's Appeal, 287 Pa. 259, 134 A. 409 (1926). However, the standard of constitutionality set forth in White's Appeal which states that a zoning law must be “clearly necessary to preserve the health, safety or morals of the people,” 287 Pa. at 265, has been modified by the Euclid standard.

3. For purposes of this Comment suburbia will be defined as those small municipalities surrounding the central city which are not yet fully developed nor so close to the city that they completely share its characteristics. Any more precise definition is, in this context, unnecessary.
4. The 1970 United States Census reveals that for the first time in the history of this country, more people are living in the suburbs than in cities. N.Y. Times, Sept. 6, 1970, § E, at 5, col. 4.
as a threat to the economic and racial character of their particular neighborhood as well as to the maintenance of the current population density. Moreover, they are further motivated to resist change by a desire to avoid the inconveniences and larger tax burdens which invariably follow rapid growth. The focus of the current land use dilemma centers upon the problems inherent in this basic conflict between suburban residents who are seeking continued stability in the form of assurances that any further development of their community will be a continuation of existing low density uses, primarily consisting of single family residences on large lots, and the non-residents, along with their representatives, the builders, who are seeking change in the form of suburban construction of commercial facilities, apartment houses and other high density, high profit, land uses.

Ideally, satisfactory resolution of this conflict should be achieved through effective use of the zoning power. The goals of each competing group should be considered with a view toward achieving solutions which will be acceptable to both. Regretably, however, this has not been the case. It is generally agreed that the failure of the zoning mechanism to respond satisfactorily to the demands of this challenge is in large part attributable to a structural deficiency found in the typical zoning scheme. Within such a scheme each separately organized governmental entity is permitted to zone its own land uses without even cursory consideration to other than local objectives. Because this arrangement places the zoning machinery in the hands of local interests, the typical zoning authority has, for the most part, been unresponsive to any pressures which might run counter to the desire of their narrow constituencies for stability. Given the proclivities of the local interests, it is easily seen why zoning, which was designed as an engine of change and development, has been transformed into an effective method of frustrating change.

5. Pressures for apartment development in suburban areas have aroused considerable opposition from suburban residents. The problem is discussed in Babcock & Bosselman, Suburban Zoning and the Apartment Boom, 111 U. Pa. L. Rev. 1040 (1963). The authors note both the shouted and the whispered reasons for opposing apartment development in the suburbs. They list as shouted reasons:

(1) Apartments will not pay their own way in taxes. This argument is usually directed to the effect on school taxes.

(2) Apartments reduce light and air.

(3) Today's apartments are tomorrow's slums.

(4) Apartments will reduce property values.

(5) Apartments will injure the character of the area.

As whispered reasons, the authors list:

(1) Lower class elements will be attracted by apartments.

(2) Multi-family housing will attract transients who have no interest in the community.

(3) And Negroes.

6. Id.

7. "Large" lot zoning is an extremely relative concept. See, id., at 1059-62; Note, Large Lot Zoning, 78 Yale L.J. 1418 (1969). But, as will be seen, the major litigation challenging large lot zoning in Pennsylvania has thus far been concerned with minimum building lot requirements of more than one acre.

8. See, e.g., AMERICAN SOCIETY OF PLANNING OFFICIALS, PROBLEMS OF ZONING AND LAND USE REGULATION (1968), one of a series of research reports prepared for the National Commission on Urban Problems.

9. Id. at 14.
The only effective counterweight to local zoning power which is available to community non-residents and land developers is the constitutional guarantee that all zoning regulations must "bear a substantial relationship to the health, safety, morals and general welfare of the community."10 Since this constitutional guarantee is the only restriction on the discretion of the local zoning authority, the strength of the outsider's position vis a vis the local interests is the direct function of the interpretation given to this limitation by the courts. Over the last decade, the Pennsylvania Supreme Court in a series of decisions has effected a thoroughgoing change in the judicial interpretation of the constitutionally permissible limits of zoning as an exercise of state police power. The result of this re-examination has been a shift in the traditional balance of power between the local interests and the developers. The focus of this Comment will be an examination of this emerging body of case law and an analysis of its impact on land use planning in Pennsylvania.

II. Background

The usual procedure employed for the implementation of zoning power has been through ordinances passed by municipal governments under the authorization of a state enabling act. Under the initial Pennsylvania enabling statute,11 which was modeled after the Standard State Enabling Act of the United States Department of Commerce,12 there was to be an administrator, often the building inspector, who was to supply the day to day application of the legislatively approved ordinance. The function of the administrator was to issue building permits in appropriate cases. In addition, there was provision for: (1) a planning commission whose function was to advise on the enactment and amendment of the original ordinance; and (2) the board of adjustment, also known as a board of zoning appeals, which was created to act as a safety valve for the zoning ordinance by providing administrative relief from its operation in proper circumstances.13 These groups were to work together as

11. Until recently the Pennsylvania enabling statutes were a hopeless morass of ad hoc solutions to pressing difficulties. The bulk of these statutes were recently replaced by the Municipalities Planning Act [hereinafter cited as M.P.A.], PA. STAT. tit. 53, §§ 10101-11202 (Supp. 1969), which encompasses Act of Assembly No. 247, approved July 31, 1968, effective January 1, 1969. For citation to the former enabling provisions of the Borough Code, First Class Township Code, Third Class City Code, Second Class Township Code, Second Class County Code and County Code, see repealer M.P.A. PA. STAT. tit. 53, § 11201 (Supp. 1969).
13. What was to be deemed "proper circumstances" was, within constitutional limits solely a matter of administrative discretion. For a commentary on the difficulties inherent in this entire structural arrangement, see Mandelker, Delegation of Power and Function in Zoning Administration, 1963 WASH. U.L.Q. 60, 61-65.
coordinated unit for the singular purpose of providing a workable plan of orderly land development.

Within this framework, litigation challenging a zoning decision could arise in several ways and take many forms. Historically, in Pennsylvania, zoning challenges can be categorized as follows: (1) applications for special exceptions; (2) requests for true variances; (3) constitutional challenge to a zoning ordinance because it results in an unfair taking as applied to a specific piece of property; and (4) a constitutional challenge to the zoning ordinance as applied to all the land within its scope.14

A special exception is generally defined as a use legislatively allowed by the ordinance subject only to specific approval by the board of adjustment.15 Typically, a use which is the subject of a special exception demands a large amount of land, may be public or semipublic in character and might often be noxious or offensive. However, not all of these characteristics need apply to every use. Hospitals or schools in residential districts are an example of a special exception. They may adversely affect a residential neighborhood because of the extensive area they occupy and the potential traffic problems and other difficulties they may create. A filling station in a light commercial district because of its potentially noxious effects is another example of this use.16 In cases involving a special exception, the burden of proof is upon the municipality to establish that the requested use will have an adverse effect on public health or safety.17

A variance is defined as an administratively authorized departure from the terms of a zoning ordinance granted in cases of unique and individual hardship in which a strict application of the terms of the ordinance would be unconstitutional.18 Approval of a request for a variance quite obviously results in a land use previously prohibited. The change, however, has been affected through use of the administrative machinery. This is in contrast to an amendment which is a zoning change secured through legislative action. In theory, the variance procedure is to be used for changes involving the use of single pieces of property whereas a zoning amendment is proper only in response to substantial changes in environmental conditions, or in other instances indicating a policy change.19 Use of amendments to accommodate limited changes in use, usually confined to one lot is a technique which is disapprovingly called spot zoning.20

15. Id. at 290; Mandelker, supra note 13, at 63.
19. deFuria, supra note 14, at 293; Mandelker, supra note 13, at 62-63.
20. See 1 Rathkopp, ZONING AND PLANNING 26-1 (3d ed. 1950), which defines spot zoning as:

[T]he practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district. It is
The third and fourth categories of litigation involve constitutional challenges of a zoning ordinance in its application to a specific piece of real estate or as it applies to all the land subject to its operation. These cases raise the question of the constitutionality of either the substantive provisions of a particular ordinance or the procedure employed in the enactment or amendment of the ordinance. The theory of the challenge is not that the ordinance or the procedure results in any undue hardship peculiar to a property, but rather that the zoning action results in a taking which bears no substantial relationship to the health, safety, morals and general welfare of the community, and is therefore ultra vires the statutory authority.

The cases have not always managed to distinguish clearly between a challenge to the administrative decision on a variance request and a true constitutional challenge. This confusion is in large measure due to the fact that a variance, although an administrative remedy, is in itself a form of constitutional challenge. The difference is that a variance request challenges the ordinance because, as applied to a specific piece of property, the ordinance operates to create an undue hardship which is peculiar to that property. By contrast, a true constitutional challenge is a challenge to the scope of the statutory authority regardless of the existence of a particular hardship, and may challenge the operation of the ordinance as applied to a specific piece of property as well as the application of the ordinance to all of the land within its purview.

also, but more rarely, used to describe the reverse proposition, that is, one in which a single lot has burdens imposed upon it which are more rigid than those imposed upon other properties within the same district.

21. deFuria, supra note 14; Mandelker, supra note 13.
22. This is, of course, the standard of constitutional due process announced in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). See note 1 supra.
23. Haar, supra note 18, at 1156.
24. deFuria, supra note 14, at 292.
25. An example may serve to illustrate the distinction. X was owner of a one acre tract on which he wished to construct a single-family residence. Under the terms of the local ordinance the minimum lot required for a single-family residence was one acre. There was also a requirement that any dwelling constructed on a one acre lot must be set back fifty feet from the property line on all sides. X’s property had a small stream running across it on one side which made it impossible to construct a residence on the land and still conform to the set back requirement. In this circumstance, X would apply to the zoning board of adjustment for relief from the set back requirement because that term of the ordinance operated to create a hardship unique and peculiar to his property. This would be a request for a variance.

Assume now that X’s one acre property was in no way differentiated from any other plot in the area. The local ordinance once again required a one acre minimum building lot and a fifty foot setback. This time X, a developer, wishes to utilize the land by constructing four single-family residences on quarter acre plots. In seeking to avoid the one acre minimum building lot requirement, X would challenge the validity of the ordinance as being beyond the constitutionally permissible limits of the zoning power. This would be a true constitutional challenge.

In National Land & Investment Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 505, 511-12, 215 A.2d 597, 602 (1965), the Pennsylvania Supreme Court at last made clear its position on this distinction. The court stated:

In essence, an application for a variance implies a challenge to the legality of the zoning ordinance as it applies to a specific piece of property. See Forest Hills Borough Appeal, 409 Pa. 392, 187 A.2d 166 (1963); Colligan Zoning Case, 401 Pa. 125, 162 A.2d 652 (1960); Baronoff v. Zoning Bd. of Adjustment, 385 Pa. 110, 122 A.2d 65 (1956); Garbev Zoning Case, 385 Pa. 328, 122 A.2d 682 (1956).
The thrust of this Comment is to examine the judicially established constitutional limits of local zoning power. Consequently, the cases discussed herein will treat challenges to the statutory authority — constitutional challenges — and challenges to the granting or denial of variances without differentiation. Within the context of this discussion, only the result — circumscription of the local legislative power — is of relevance.

III. THE EARLIER CASES

White's Appeal\(^{26}\) which was the first important Pennsylvania zoning case, held that the exercise of the police power under auspices of a zoning ordinance is valid only if the ordinance bears a substantial relationship to the public good within the proper spheres, \textit{i.e.}, the preservation of health, safety and general welfare, and that any invasion of constitutionally protected rights must be strictly construed. More recently in Lord Appeal\(^{27}\) and later in Medinger Appeal\(^{28}\) it was said that while zoning ordinances are valid and constitutional, in order to be enforceable in a particular case certain definite standards must be met. These cases held that a zoning ordinance must be: (1) necessary for reasons of public health, safety, morals or general welfare, \textit{i.e.}, the ordinance must be a proper exercise of the police power; (2) it must not be unjustly discriminatory, arbitrary or unreasonable; (3) it must not be confiscatory; and (4) it must operate uniformly within a zoning district.\(^{29}\)

Despite the restrictive tenor of this language it is fair to say that, in a practical sense at least, the decisions of the Pennsylvania Supreme Court until 1960 permitted unfettered exercise of broad local governmental

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\(^{26}\) 287 Pa. 259, 134 A. 409 (1926).
\(^{27}\) 368 Pa. 121, 81 A.2d 533 (1951).
\(^{29}\) deFuria, \textit{supra} note 14, at 287-89.
powers. The truly permissive attitude of the court was made explicit in 
Bilbar Construction Co. v. Easttown Township Board of Adjustment where the constitutionality of one acre minimum lot zoning was challenged. The Pennsylvania Supreme Court upheld both the zoning board of adjustment and the lower court stating that a zoning ordinance may be sustained solely on considerations of general welfare, even though the ordinance bears no reasonable relationship to the health, safety, or morals of the community. As Mr. Justice Bell pointed out in an extensive and vigorous dissent, the effect of this holding was to create a doctrine of unlimited police power.

The Bilbar decision followed the per curiam opinion in Swade v. Springfield Township, which was an appeal concerning the denial of an application for a variance to permit business use of a residential zone. The property owner offered evidence to show that the intended use of the property would have no adverse effect on public health or safety and that there was no relation between the regulation and lawful objects of the police power. The supreme court adopted the opinion of the lower court, rejecting this contention, stating that if appellant’s argument was adopted:

[B]usiness and industry could invade any zone just so long as it could be shown that the proposed use would not adversely affect to any reasonable extent the public health, safety or morals. The statutory law of zoning would be replaced by the law of nuisance.

Reading these cases together clearly indicates that at this time the posture of the court majority regarding zoning matters is best characterized as reluctant participation. The court seems to have taken the position that zoning ordinances were legislative enactments passed by duly elected representatives and that it should be wary of substituting its substantive judgment for that of the zoning authority. The result of this jurisprudential philosophy was that a zoning decision would be reversed by the court only when it involved a most flagrant abuse of discretion.

30. Id. at 286.
33. Id. at 78, 141 A.2d at 859.
35. Id. at 271, 140 A.2d at 598 (emphasis added).
37. See, e.g., Baronoff v. Zoning Bd. of Adjustment, 385 Pa. 110, 122 A.2d 65 (1956), wherein the Supreme Court reversed the board of adjustment’s refusal to grant a variance to permit a commercial use to the owner of a landlocked parcel abutting another township. With the variance the parcel could be used profitably in conjunction with the parcel in the next township for a drive-in movie theater. Without the variance it was useless.
The Bilbar and Swade cases are the high water mark of broad unfettered local zoning power. From this point in 1960 the Pennsylvania Supreme Court began an evolutionary process in which it moved away from its traditional posture with the purpose of developing meaningful limitations upon the exercise of local discretion.

IV. "IN ACCORDANCE WITH A COMPREHENSIVE PLAN" —  
A SEARCH FOR STANDARDS

The command that zoning enactments must be made "in accordance with a comprehensive plan" or words of similar import is contained in virtually all zoning enabling legislation. This limitation upon the exercise of statutory authority exists so that the legislation might pass constitutional standards — i.e., bear a reasonable relationship to the health, morals, safety or general welfare of the community. It is therefore not surprising that the initial attempts at meaningful proscription of discretionary power of the local zoning boards was approached through reference to this limitation. The following section is an examination of the results of these early cases.

A. The Rule of Eves

Although the language "in accordance with a comprehensive plan" is as old as zoning legislation itself, the first meaningful Pennsylvania Supreme Court treatment of the phrase came in the 1960 case of Eves v. Zoning Board of Adjustment. In 1958 the Board of Supervisors of Lower Gwynedd Township adopted Ordinance 28 which officially amended the general zoning ordinance of the township to provide for a new zoning district known as "F-1 Limited Industrial District." The industrial use sanctioned in this district was hedged with numerous terms and conditions. The novel provision of Ordinance 28, and the one which became the focus of litigation, was the failure of the ordinance to delineate the boundaries of those specific areas which were to be classified as "F-1" districts. Instead, the Ordinance outlined a procedure whereby anyone could submit to the board of adjustment an application, together with appropriate plans, requesting that his land be rezoned to "F-1." The Board, after proper  

38. See also Tidewater Oil Co. v. Poore, 395 Pa. 89, 149 A.2d 636 (1959); deFuria, supra note 14.
41. 401 Pa. 211, 164 A.2d 7 (1960).
42. Of every development, the plan required, inter alia, construction in accordance with an overall plan; integrated architecture; a minimum site of twenty-five acres, of which no more than ten per cent could be occupied with buildings; appropriate landscaping, as well as parking and ingress and egress facilities; and a buffer strip insulating the public streets. Id. at 212-14, 164 A.2d at 8-9.
consultation with the planning commission and public hearings, would then decide whether to grant or reject the requested change.\textsuperscript{43}

The question as presented to the supreme court was to determine if this zoning technique, aptly termed "flexible selective zoning," was within contemplation of the "comprehensive plan" language of the enabling act. The court held the Ordinance invalid and then commented:

Appellees vigorously contend that a comprehensive plan does exist for the Township of Lower Gwynedd and is set forth in the record. Essentially, appellees argue, the plan contemplates a "greenbelt" township predominantly residential in character with a certain amount of compatible non-residential occupancy consisting of shopping centers, research and engineering centers and limited industrial uses. It also contemplates that these non-residential uses shall be strictly controlled as to setback, building area, noise, smoke, sewage disposal, etc., and the means of such control shall be vested in the supervisors through strict ordinances of general application such as Ordinance 28, supra, setting up the requirements and limitations on limited industrial uses. In turn, these tools of control and minimum standards are to be the polestars (along with other factors, such as the proximity of through highways, availability of adequate streams for effluent disposal, etc.), in any further consideration to be given by the planning commission and the supervisors to applications for specific locations or areas. By adopting this approach, the appellees have confused comprehensive planning with a comprehensive plan. The foregoing are certainly the rudiments and fundamentals which enter into the promulgation of a planned zoning scheme for the township. They are, however, only the most preliminary and basic considerations from which the ultimate decision of selective land uses are to be made. Until such time, no final formulation exists which satisfies the "comprehensive plan" requirement within the meaning of the enabling legislation.\textsuperscript{44}

The ever present problem in zoning a community which contains undeveloped ground is anticipating the future needs of the populace. While this task is difficult, its corollary, the problem of predicting which owners of currently undeveloped land are going to be willing to sell their parcels so that an area zoned, for example, light industrial may develop as such, is virtually impossible. Ordinance 28 through its floating zone arrangement represented an imaginative attempt at resolution of this dilemma and the \textit{Eves} decision, because it invalidated this device, has been criticized as an inflexible approach to a very difficult problem.\textsuperscript{45} Nevertheless, one need not be too familiar with the zoning process to realize that the Lower Gwynedd scheme in operation, because of its unprecedented flexibility, represented a tremendous opportunity for local officials to permit or deny industrial zoning changes based on favoritism

\textsuperscript{43} Id.
\textsuperscript{44} Id. at 218–19, 164 A.2d at 11.
\textsuperscript{45} Haar & Hering, \textit{The Lower Gwynedd Township Case: Too Flexible Zoning Or An Inflexible Judiciary?}, 74 Harv. L. Rev. 1552 (1961).
or even worse, graft, without any fear of censure by the courts. Any decision that local zoning officials made could be easily justified under the nebulous criteria of the ordinance. It was this unfettered discretion which flexible selective zoning would allow the local board of adjustment, rather than any aversion to flexibility, that caused the court to declare this method of zoning invalid.

B. The Rule of Key Realty

The second major case attempting to define guidelines for legislative and administrative zoning action was *Appeal of Key Realty*. Under the facts of this case appellant, Key Realty, had purchased two lots in an area which permitted apartment uses. On one lot was a large single family residence which appellant converted into an apartment. The appellant made application for a permit to erect a second apartment on the other lot which was vacant. The application was denied and, while a second application was pending, the borough zoning ordinance was amended, upgrading the area to permit only single family detached dwellings. The appellant, on appeal to the Pennsylvania Supreme Court, challenged the validity of the amendatory ordinance in so far as the borough council did not adopt it "in accordance with a comprehensive plan" nor with "reasonable consideration . . . to the character of the district." 48

In an opinion by Justice Cohen, who had also written the majority opinion in *Eves*, the court upheld the validity of the amendment to the ordinance as a proper exercise of the local zoning board’s authority. The court distinguished the practice in *Key Realty* from the “flexible selecting zoning” of *Eves* stating that:

Selection of individual properties or groups of properties for rezoning, even if authorized by an ordinance, is not in compliance with the statutory mandate that zoning regulations must be “in accordance with a comprehensive plan.” To fulfill this requirement, zoning legislation must reflect and implement the totality of a municipality’s program of land utilization, considering both the land resources available and the needs and desires of the community. This does not contemplate a rigid “master-plan” which attempts to answer in minute detail every last question regarding land utilization; whether that plan be formulated by a planning commission or by the zoning ordinance itself. Nor, on the other hand, should it be, as in *Eves*, loose legislation permissive of ad hoc determinations of the land utilization of comparatively small sections of the community. 49

The proper degree of flexibility then is somewhere between the unbridled discretion of *Eves* and the rigidity of a fixed master plan. The court

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47. The first application for erection of an apartment structure was denied because the side yard requirements of the borough zoning ordinance would not be met by the proposed structure. *Id.* at 99, 182 A.2d at 188.
48. *Id.* at 100, 182 A.2d at 188.
49. *Id.* at 100-01, 182 A.2d at 189.
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posited that the amendatory scheme in *Key Realty* was within this spectrum, but failed to furnish any positive criteria to explain why.

**C. The Rule of Donahue**

Further confusion as to the true degree of permissible flexibility was supplied by the supreme court's decision in *Donahue v. Zoning Board of Adjustment*. In January 1962 the zoning ordinance of Whitemarsh Township was amended to authorize, for the first time, a residential "Apartment House District." Although the ordinance sufficiently described the new use, it did not designate a specific area which would be subject to the new classification. A group of neighboring land owners challenged the validity of this procedure grounding their argument on the authority of *Eves*. Two issues were presented for the court's determination: (1) was this a "floating zone" arrangement sufficiently analogous to the one condemned in *Eves* and therefore prohibited; and (2) was the change in zoning effected pursuant to the goals of a comprehensive plan. The court upheld the ordinance on the first count distinguishing the practice in the instant case from the prohibition of floating zones saying that "[i]t was the case by case review [in *Eves*] which demonstrated the absence of a comprehensive plan." The latter issue of the amendatory process conformity to the statutory and constitutional requirements of a comprehensive plan was answered simply by reference to the above quoted passage from the *Key Realty* holding.

While the court in *Donahue*, just as in *Key Realty*, attempted to distinguish the procedure in these cases from the forbidden floating zone of *Eves*, it is difficult to see how in actual operation they are in any manner different. The net effect sought to be achieved in each instance was broad legislative discretion for the local zoning board. In *Eves* the court condemned the scheme, whereas in *Donahue* and *Key Realty* the zoning changes were allowed to stand. The reasonable conclusion that seems to flow from this contradiction is that either *Eves* has been undermined almost out of existence or there is a ground for its distinction which the court has failed to make explicit.

**D. An Emerging Rationale**

In comparing the court's solutions to the zoning questions presented by the various cases and attempting to formulate some workable rationale from them, much insight can be gained from the observation of a single factual circumstance. If the proposed zoning change before the court involved an increase in the restrictions on use of the land in question, the decision of the zoning board would be given less scrutiny and be less likely

51. Id. at 334-35, 194 A.2d at 611.
52. Id.
53. Id. at 335, 194 A.2d at 612, quoted infra, p. 516.
to be overturned than if the zoning change operated to decrease the
restrictions on the property. The complaining parties in Eves were the
neighboring land owners. They considered themselves aggrieved because
the proposed zoning of the adjacent property from residential to limited
industrial was a decrease in restriction as to that piece of property. The
net result of the change was an increase in the value of the land zoned light
industrial and a decrease in the market value of the surrounding residential
properties. This type of zoning change in which there is a decrease in
restrictions is called a down zoning. Conversely, in Key Realty, the
zoning change was an increase in restriction from multi family residential
to single family residential. This change is termed an upgrading of land
use or up zoning. It usually results in a decrease in the sale value or
commercial utility of particular properties but, because it makes the com-

munity a more desirable place to live, works a benefit on the community
as a whole. Traditionally, the Pennsylvania Supreme Court, in reviewing
the validity of zoning decisions, has weighed the burden placed upon the
individual property owner against the benefit to the community interests
arising out of the zoning restriction. The decision of the local zoning
authority has always been given substantial weight in this balancing
process under the presumption that the local legislative or administrative
action was in itself best evidence of the community interest. However, a
planning decision, such as the down zoning in Eves, which works a benefit
to the land directly involved at the expense of neighboring property may
involve at least favoritism. A court in this situation can not presume that
the decision of the local authority is in the best interests of the community
without presuming away the very issue presented. Consequently, for
a court to exercise any sort of judicial review in the down zoning cir-
cumstance, it must be offered a realistic alternative to the blind presump-
tion that the action taken is in the best interests of the community. Cogni-
tion of this almost self evident fact was the first evidence of an increasingly
activist philosophy on the part of the court and it is the thread which recon-
ciles the seemingly incongruous results of Eves, Key Realty and Donahue.

In Eves there was a down zoning and the court in that circumstance
was given no ascertainable standard against which to measure the reason-
ableness of the change. Consequently the scheme was disallowed. The
apartment use requested in Donahue was, like Eves, a down zoning. It is
argued that the divergent result between these cases is not attributable
to any per se objection to a “floating zone,” but rather to any system of
flexible zoning which in operation would extend to the zoning authority
virtually unfettered discretion in reviewing requests and mapping future
development. The ordinance in Donahue, although nearly as flexible as the

54. See Urban Land Institute, Legal Aspects of Planned Unit Residential
56. Legal Aspects of Planned Unit Residential Development, supra note 54,
at 20-22.
57. Cf. id. at 17.
invalidated *Eves* ordinance, did at least provide, through a declaration of intent, a specific measurable criteria against which to judge the reasonableness of the zoning change. In *Eves* there was nothing comparable.

In seeking to define "comprehensive plan," the court is attempting to establish the parameters of a workable alternative to the presumption that local zoning authority action is in best interest of the community. Under this rationale it would be reasonable to conclude that when faced with review of a zoning decision, the Pennsylvania Supreme Court, in order to exercise meaningful review, would look to a "comprehensive plan" — an alternative to the blind presumption that the decision of the local zoning authority was in the best interests of the community — against which to measure the specific result obtained in any case. Because of the dangers of malfeasance implicit in a down zoning situation, the courts would seek a more definite objective standard than would be necessary if the rezoning was an increase in land restrictions.

In the converse situation, *i.e.*, an up zoning or increase in restriction, such as *Key Realty*, the court at this stage is less inclined to risk usurpation of legislative and administrative judgment. Deficiencies in planning can be bolstered by the presumption that the zoning authority is acting in the best interests of the community.

The court's decision since *Donahue* and *Key Realty* further substantiate this view. In *Furness v. Lower Merion Township*, decided one month after *Donahue*, a down zoning to apartment use was permitted because according to the court there existed a previously adopted comprehensive plan. Shortly afterward in *Cleaver v. Board of Adjustment* the supreme court similarly allowed a down zoning because of the existence of the sought after alternative — a previously adopted comprehensive plan for area development. Both of these decisions demonstrate that the court is willing to permit great flexibility so long as there exists a basis against which the reasonableness of any change may be measured. In both cases there existed a legally sufficient comprehensive plan and, similarly, the zoning adopted in both was a deviation from the comprehensive plan. But in each case there existed the possibility of measuring the "reasonableness" of the change and it was therefore permitted. Surely, it can not be said that


59. *Eves* is further distinguishable from *Donahue* on the grounds that *Eves* concerned a request for an industrial rezoning while *Donahue* involved a change from one residential use to another. Although this distinction is not believed paramount, one commentator has interpreted the concern with an "industrial" floating zone to be the distinguishing factor of *Eves*. See Johnston, *Developments in Land Use Control*, 43 Notre Dame Law. 399 (1970).


these permitted techniques are any less flexible than the "floating zone" of Eves. 63

The string of cases from 1960 to 1964 — Eves through Cleaver — firmly established the following propositions: (1) actions by a local zoning authority were valid only when there existed a "comprehensive plan" against which such actions could be judged for purposes of determining their reasonableness; and (2) the comprehensive plan may be a single written embodiment of planning goals or, in the absence of a document, the plan may be evidenced by the prior and current zoning enactments of the locale. 64 In addition, it was tentatively established that the court would be less likely to reverse the local authority when their decision was to up zone a property than when the decision was to down zone. As will be pointed out later, however, the presumption in favor of up zoning was an impermanent one. It was now evident that the court would no longer tolerate vague defenses couched in terms of general welfare and public good as a justification for zoning changes, or eschew a major role in determining their validity.

V. DEFINING THE OUTER LIMITS

After 1964 the focus of major zoning litigation shifted from the search for a workable definition of when a "comprehensive plan" exists to a case by case delineation of the constitutional limitations upon the substantive provisions of a plan.

The following review of these cases will serve to demonstrate the marked degree to which the court has involved itself into the substantive issues of zoning questions.

A. National Land and Investment Co. v. Easttown Township Board of Adjustment. 65

In 1965, the Pennsylvania Supreme Court again was presented with an opportunity to address itself to the problem of the permissible limits of minimum lot zoning. 66 Under the facts presented to the court, the titleholder of an eighty-five acre tract in Easttown Township known as "Sweetbriar" agreed in 1961 to sell the property to the National Land and Investment Co. At the time of the purchase agreement the zoning for "Sweetbriar", as well as the vast majority of the township, required a one acre minimum area for each building lot. However, in early 1962, shortly after the purchase by National an amendment to the zoning ordinance in-

63. As evidence that, in the absence of an alternative, the court will limit the scope of flexibility in a down zoning, see Salvetti v. Zoning Bd. of Adjustment, 429 Pa. 330, 240 A.2d 534 (1968); Mulac Appeal, 418 Pa. 207, 210 A.2d 275 (1965).
66. The Pennsylvania Supreme Court had previously upheld the constitutionality of the Easttown Township one acre minimum building lot requirement in Bilbar Constr. Co. v. Easttown Township Bd. of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958), discussed at p. 513 supra.
creased the minimum lot requirement from one acre to four acres. As a challenge to this amendment, National applied for a building permit to construct a single family dwelling upon one acre of the tract. After receipt of formal refusal from the zoning officer, National served notice that they would appeal to the zoning board of adjustment for, in their terms, “a variance from the terms of the ordinance.” Six months later, after no action had been taken by the zoning authorities, National requested a hearing on their appeal in support of which they filed a statement of appeal with the zoning board. In this statement of appeal National revised its theory of the case from a request for a variance to a direct challenge of the constitutionality of the four acre minimum lot requirement. In an opinion by Justice Roberts, the Pennsylvania Supreme Court, after disposing of the procedural issues presented, found that on the particular facts before the court the four acre minimum lot requirement of the Easttown Township zoning ordinance was not constitutional. The court explicitly refused, however, to find a four acre minimum residential lot requirement unconstitutional per se emphasizing instead the changeable nature of land utilities and the consequent variable nature of proper circumstances justifying subjugation to public control through use of the police power. The court specifically stated that:

At some point along the spectrum, however, the size of lots ceases to be a concern requiring public regulation and becomes simply a matter of private preference. The point at which legitimate public interest ceases is not a constant one, but one which varies with the land involved and the circumstances of each case.

The analysis employed in reaching the conclusions in National Land purports to be a demonstration that the arguments of the zoning authority provide no justification for their decision and, therefore, the zoning fails the constitutional test of reasonable relationship to the health, safety, morals and general welfare. But to glean meaningful precedent from National Land, an analytical inquiry must go beyond a mere recanting of the conjunctive criteria which were deemed sufficient by the court to constitute unlawful invasion of private rights. The key to the true decisional basis of National Land may be found through an examination of the fundamental balancing of interests approach employed by the court in reaching its result. Under this approach the court identifies the interests of the parties and then fashions the result by weighing one against the other. The interests implicitly identified by Justice Roberts are: (1) the pecuniary interest of the

67. At the time the National Land case went to the Pennsylvania Supreme Court there existed a substantial procedural question regarding the propriety of first filing a request for a variance and then prosecuting an appeal under the theory of a constitutional challenge. The court held the procedure valid and then used the opportunity to elaborate on the proper relationship between an application for a variance and a constitutional challenge. See note 25 supra.
69. Id. at 524, 215 A.2d at 608.
landowner-litigant,\textsuperscript{70} (2) the interest of the community in regulating its own affairs; and (3) the interest of community non-residents who are or will be affected by a zoning practice that has the effect of shifting a population burden from one community to another.\textsuperscript{71} As applied to the facts of National Land, the pecuniary loss assessable to the owner of "Sweetbriar" is used as a touchstone against which the arguments of the Township are placed singularly and cumulatively as counter balances. The third factor then added to the equation is the interest of community non-residents \textit{i.e.}, the outsiders seeking entrance. It is the presence of this third interest which colors the court's assessment of the proper weight to be given to the arguments of the other two interests.

Mindful of the influencing factor of the outsider interest, an examination of the Township's contentions made on behalf of the zoning restrictions and the treatment of these arguments by the court is illuminating. Initially the appellants (Township) argued that the added population occasioned by the new development will jeopardize the workability of the current system of sewerage disposal and consequently increase the danger of water pollution.\textsuperscript{72} Besides indicating that the Township did not meet its burden of proof on this point, the court affirmatively stated that the basis for rejecting this argument was its lack of relevance. The court stated:

We can not help but note also that the Second Class Township Code provides for establishing sanitary regulations which can be enforced by a "sanitary board" \textit{regardless of the zoning for the area}. The Code also provides for the installation and maintenance of sewer systems but the township has made no plan in this regard. In addition, under the township subdivision regulations, the zoning officer may require lots larger than the minimum permitted by the zoning ordinance if the result of percolation tests upon the land show that a larger land area is needed for proper drainage and disposal of sewage. These legislatively sanctioned methods for dealing with the sewage problem compel the conclusion that a four acre minimum is neither a necessary nor a reasonable method by which Easttown can protect itself from the menace of pollution.\textsuperscript{73}

\textsuperscript{70} Id. at 524, 215 A.2d at 608. The potential loss to the defendants because of the larger lot requirement was conservatively estimated at $85,000.00. In addition to reducing the number of available building lots, there was substantial proof that the marketability of the remaining lots was substantially impaired. It would seem that if a zoning ordinance had no relationship to the health, safety, morals and general welfare of a community then it would be unconstitutional without further inquiry. Nevertheless, courts seem to feel a need to have the pecuniary loss established, which lends insight into the true balancing nature of case law results.


\textsuperscript{72} 419 Pa. at 525, 215 A.2d at 608.

\textsuperscript{73} Id. at 526, 215 A.2d at 609 (emphasis added).
The Township also advanced two additional arguments that: (1) the zoning was necessary to avoid an overburdening of the local roads; and (2) aesthetic objectives justified the zoning decisions. Both of these arguments were rejected by the court as being unpersuasive. While the court pretended not to foreclose the possibility that the justifications advanced by the township when taken together might, under some circumstances, be sufficient, it is submitted that under circumstances where the purpose or effect of a zoning classification is to unreasonably exclude people and retard development these reasons will never be sufficient. In *National Land*, the truly persuasive interest was the court’s assessment of the certain deleterious impact of unbridled local discretion in making zoning determinations upon community non-residents. It is further submitted that judicial concern for this unrepresented yet substantial interest will prove to be virtually conclusive and that arguments marshalled on behalf of a decision adversely affecting this interest will in the future be required to significantly exceed the justifications advanced in *National*.

The assessment of the substantial weight given by the court to the unrepresented interest of the community non-resident finds support in the following statements of Justice Roberts:

> 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 can not 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.... 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.

A rationale under which non-residents have an interest in the zoning decisions of a community is by no means novel. But until recently the concept was only given scant consideration both in Pennsylvania and elsewhere. However, with courts and others becoming increasingly aware of the widespread social consequences of suburban zoning practices, it was hardly bold at the time to predict an increase in this approach. A comparison of the 1958 decision in *Bilbar v. Easttown Township* with *National Land* lends further credence to the conclusion that it was the

74. Id. at 528, 215 A.2d at 610.
75. Id. at 529, 215 A.2d at 610. For a full discussion of the controversy which formerly raged over the problem of zoning for aesthetics, see Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955).
78. See, e.g., *Report of the President's Advisory Commission on Civil Disorders* (1968). See also note 76 supra.
meaningful recognition of this third party interest which proved persuasive. This new found recognition coupled with the court's willingness to decide cases on their merits rather than abstaining through the use of antiquated and unrealistic presumptions will provide the framework for the courts further refinement of the limitations upon legislative and administrative discretion.

B. Concord Township Appeal

The next major development came in the case of Concord Township Appeal. It is a case of the same genre as National Land since it also deals with the successful challenge by a land developer of a large minimum building lot requirement. Concord Township is important for two reasons: (1) it is an indorsement of the rationale of National Land; and (2) it focused and made more explicit the approaches which were only implied in National Land.

Appellee Kit-Mar Builders Inc. was the buying party to an agreement to purchase 140 acres of undeveloped land in Concord Township, Delaware County. Included in the agreement was a contingency that made the transaction dependent upon a successful rezoning of the tract to permit the construction of single family residences on one acre plots. After attempts to secure the desired zoning change proved fruitless, Kit-Mar announced that it would not seek to prove the hardship necessary to secure a variance, but instead would directly attack the constitutionality of the zoning ordinance as it applied to the property in question. The Pennsylvania Supreme Court, in a four to three decision, adopted Kit-Mar's argument in finding the ordinance unconstitutional under the test set forth in National Land.

Concord Township is more than a reapplication of the rule of National Land. Justice Roberts was explicit in stating that a two or three acre minimum building lot requirement would, "absent some extraordinary justification," be unreasonable. Justice Pomeroy, in his dissenting opinion, indicated that the requirement of some "extraordinary justification" has the effect of shifting the burden of proof from those seeking to overturn the ordinance — who have always borne it — to the township which is seeking to sustain the ordinance. If this is so, then Concord Township is unquestionably a landmark holding. However, it is submitted that to read Concord Township this way would in all probability


81. At the time of the purchase agreement the tract was zoned to require lots of no less than two acres along the existing roads and no less than three acres in the interior. Id. at 469, 268 A.2d at 766.

82. Justice Jones filed a dissenting opinion joined in by Justice Cohen. Justice Pomeroy filed a second dissenting opinion joined in by Justice Jones.

83. 439 Pa. at 469, 268 A.2d at 766.

84. Id. at 471, 268 A.2d at 767.

85. Id. at 496, 268 A.2d at 779.
prove disastrous. A more accurate assessment of its effect would seem to be that once the challenger has alleged that: (1) the zoning ordinance as applied to his land is burdensome or that the ordinance is ultra vires the statutory authority; and (2) the purpose or foreseeable effect of the ordinance is to limit population growth, then the zoning authority will not be permitted to rest its case in whole or in part on the long accepted presumption that the legislative action was in the best interests of the community. Instead the zoning authority must now affirmatively demonstrate the justification, indeed the wisdom of their decision to limit population growth. It also seems clear that when, as in Concord Township, the court calls for "some extraordinary justification", it can be read to mean that as far as two and three acre minimum lot zoning is concerned, it will be difficult to conceive a justifying circumstance.

If, as postulated, the zoning authority is forced to defend on the merits any zoning decision the purpose or effect of which is to exclude population growth, then an interesting question arises. The question is at what point can the control of population density be reasonably related to the health, safety, morals and general welfare of the community. Phrased differently the question would be whether the zoning board can exclude any residential land use short of row homes or multi-family dwellings. While the precise answer to this question is at this point speculative, it would seem that the constitutionally permissible limit in the urban fringe is something less than one acre.

This Comment has advanced the proposition that the court's search for workable guidelines delineating the boundaries of the phrase "in accordance with a comprehensive plan" was in fact a quest for an objective criteria against which to gauge the actions of local governments and their administrative organs as an alternative to the presumption that the zoning authority was acting in the best interests of the community. It was pointed out that a reading of the cases disclosed a discernible propensity on the part of the judiciary to require less evidence of a comprehensive plan when the dispute involved an increase in land restriction — an up zoning — than was required when the change was a decrease in restriction — a down zoning. Furthermore, it was supposed that this was done on the premise that a down zoning of a particular property could involve favoritism or worse, whereas in an up zoning the action of the zoning authority was itself best evidence of the community’s interests. It is submitted that the rationale of National Land as extended and clarified by Concord Township, is an abrogation of this latter presumption and the next logical step toward a true adjudicative role in zoning disputes for Pennsylvania courts.

The reason behind the abrogation of the presumption as applied to up zoning is not the same as the down zoning argument. In the discussion of the rationale of National Land, it was suggested that the difference between

86. See supra at pp. 517-18 for discussion of the definitions which this Comment has assigned to the terms “up zoning” and “down zoning.”
that result and the 1958 Bilbar decision was attributable to the re-evaluation of the proper weight to be given to the third interest in the computation of the balancing equation. The importance of this third interest is even more apparent in Concord Township where the Court stated:

The implication of our decision in National Land is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area. If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community and the requirement that they do so is not a decision that Concord Township should alone be able to make.87

It is the recognition of this non-resident interest which now prompts the Court to say that a presumption in which a local government, unresponsive to the preferences of this third force, is held to be acting in the best interest of this group is no less than absurdity.

Several other aspects of the Concord Township opinion corroborate the view that its true decisional basis is an increasing judicial recognition of the impact of local zoning determinations on non-local residents. For example, the pecuniary interest of the land owner, Kit-Mar, is not even mentioned. While it is fair to assume that the builder could realize a greater profit at less risk through the sale of houses on one acre lots as opposed to houses on three or even two acre lots, it is not necessarily true that the potential profit realizable from the sale of fewer houses on larger lots or that the risk attending the sale of a more expensive unit is unreasonable or even considerable. In other words, the only pecuniary loss which could be proved by Kit-Mar would be a slight reduction in potential profit and even this reduced figure may have represented more than just a reasonable profit. Unlike National Land, where the proven pecuniary loss of the developer was used as a touchstone and was implicitly essential,88 the question is not even raised in Concord Township. More worthy of note is the court's treatment of the arguments raised by the township in defense of its zoning ordinance. The only objection given serious consideration was the question of sewerage difficulties caused by the increase in population density. This question was dismissed as irrelevant.89 The other justifications for the use of zoning to control population growth including the ownership of only one bus by the township, the rural character of the road network, and the desirability of preserving

89. 439 Pa. at 472, 268 A.2d at 767.
the rural and historical surroundings of the neighborhood were dismissed as merely "makeweight." 90

While the language of the court would seem to be dispositive of the relevance of these aforementioned criteria, the enactment of the Municipalities Planning Act of 1969,91 although inapplicable in the Concord Township controversy, raises many new questions which seem to negate its holding. These questions and the statute, which is a revision of the Pennsylvania zoning enabling laws, will be considered in Section VI of this comment.

C. Girsh Appeal92

In a case decided the same week as Kit Mar, the Pennsylvania Supreme Court was given the opportunity to develop the rationale of National Land in a new context. In July of 1964, Joseph Girsh, a land developer, agreed to purchase a 17½ acre tract of land in Nether Providence Township, Delaware County, Pennsylvania. At the time of purchase the tract was zoned "R-1 residential."93 Girsh's plan was to build on the land two, nine story, high rise apartment houses each containing 216 units. Toward this end, Girsh applied for a building permit which was denied because his development plan violated the zoning code. He then appealed to the zoning board of adjustment on the grounds that the ordinance was unconstitutional.94 The adverse decision of the board was upheld by the Delaware County Common Pleas Court. On appeal, the Pennsylvania Supreme Court held that the failure of the township's zoning scheme to provide for apartments was, in fact, unconstitutional and reversed the decree of the court below.

Before the supreme court, appellee-township focused their position on two issues. First, the zoning ordinance of the township did not exclude apartment uses because there existed procedures through which the landowner could, in special circumstances, alleviate an undue burden to himself.95 Secondly, assuming arguendo the total exclusionary effect of the Nether Providence zoning ordinance, this result was a proper exercise of the local planning function. The court, in remaining consistent with its established position on the proper function of the variance procedure96

90. Id. at 472 n.5, 268 A.2d at 767 n.5.
93. Id. at 239, 263 A.2d at 396. Under the terms of the Nether Providence Township Zoning Ordinance, R-1 residential permits the construction of single-family residences on lots of not less than 20,000 square feet.
94. Id. at 240-41, 263 A.2d at 396-97. In directly challenging the Nether Providence ordinance as being ultra vires the police power, Girsh relieved himself of the burden of proving an unnecessary hardship, unique and particular to his piece of property. He instead chose to prove the unreasonability of the ordinance as applied to all the land in the township. See discussion pp. 509-11 supra.
96. See discussion, note 25 supra.
dismissed the initial argument in cursory fashion and turned to deal more thoroughly with the legality of the total exclusion of apartments.

In ruling against the exclusion of apartments in this case the supreme court used as precedent a line of cases holding other forms of total exclusions to be illegitimate uses of the police power. These included: (1) an ordinance which prohibited quarrying anywhere in the township; (2) a total ban on flashing signs; and (3) a total prohibition on billboards. Just as these total prohibitions were declared invalid, the court found that appellee-township could not have a zoning scheme which made no reasonable provision for a legitimate land use such as apartment housing.

Reading the Girsh opinion in the perspective of other supreme court zoning pronouncements leads with certainty to a conclusion that the real decisional basis was not the compelling persuasiveness of analogs drawn from quarrying, billboard and flashing light rulings, but was the concern for the use of zoning as a device to deny future development. On this point the court stated:

In refusing to allow apartment development as part of its zoning scheme, appellee has in effect decided to zone out the people who would be able to live in the Township if apartments were available.

The danger of this zoning practice was again focused upon when Justice Roberts stated that:

Nether Providence Township may not permissibly choose only to take as many people as can live in single family housing, in effect freezing the population at near present levels. Obviously if every municipality took that view, population spread would be completely frustrated.

A close examination of the Girsh case serves to reinforce the conclusions drawn from the previous analysis of the Kit-Mar decision, i.e., that even in the case of restrictive zoning the courts will no longer be content with the zoning authority basing their case upon an unrealistic presumption of validity as justification for their determinations. If this assessment of the decision is correct, then many of the difficulties which spring to mind upon the first reading of the decision become groundless. For example, if Girsh is a per se ban on total exclusions of a legitimate use then despite Justice Roberts’ protestations to the contrary, one would be hard pressed under this rationale to deny a zoning change to a builder who sought to erect a gas station in a residential neighborhood which was located in a municipality that had zoned out gas stations as a permissible

101. Id. at 244, 263 A.2d at 398.
use. On the other hand, however, if the gas station request is considered under the frustration of population growth test, denial of the zoning change becomes more easily supported under the rationale that despite the fact that the total ban on gas stations would seem to run afoul of Girsh and supporting cases, if the purpose or effect of the use restriction was not to deny progress then the township would be allowed to advance the basis for their decision. If their justifications are sufficient and there exists a comprehensive plan of development which rationally excludes several uses, it seems reasonable to conclude that their arguments would be sufficiently persuasive to obtain the approval of the court. Moreover, if one reads the rule from Girsh to mean simply that a community can not exclude a legitimate residential use from its plan of development, there is little to prevent the zoning board from amending its ordinance to allow apartment uses in an area of the municipality already developed as commercial. Such an obvious perversion of judicial intent would be within the letter of the law under a per se rationale.

In addition, declining to interpret Girsh as per se prohibiting the total exclusion of legitimate uses avoids a possible conflict between Girsh and the traditional prohibition of spot zoning. To illustrate this conflict suppose X, owner of a two acre plot in a residential area, desires to erect a convalescent home on his property and that there were no such institutions in the community. Assume further that X’s application for a building permit was denied and that he has appealed, citing as support for his argument the rule from Girsh which states that local authority may not totally prohibit a legitimate use. In opposition to X, the government and the neighborhood landowners argue that to grant X’s request would necessitate a change in the zoning law for the benefit of a small piece of property since this change is in no way justified by any change in environment or circumstance such a change would clearly be spot zoning. This dilemma may be avoided, however, by reading Girsh only as prohibiting unreasonable population restrictions. Thus, if a municipality, in a similar situation, seeks to exclude a use such as a convalescent home from its plan of development, it is submitted that under the above reading of Girsh it may do so within the confines of reasonableness.

VI. POSITIVE ALTERNATIVES FOR THE FUTURE

Prior to the series of cases which has been the subject of this Comment, the posture of the typical zoning board was that of straightforward resistance to change. Under the restrictions developed by the Pennsylvania

102. The distinction between commercial and residential uses which Justice Roberts is careful to point out, (437 Pa. at 245, 263 A.2d at 399), falters when it is realized that the case law upon which the result is premised deals with the exclusion of commercial uses.
103. See note 20 supra.
104. Id.
Supreme Court this resistance, although far from impossible, will be measurably more difficult. The criticism could be raised that the effect of the large scale judicial intervention into land use planning has been to create a power vacuum. The local zoning authority has been effectively stripped of meaningful power, and in its place there has been left nothing. The suburban ring will now develop without plan or meaning which is the very evil that zoning was designed to avoid. While the criticism raises a specter magnified beyond its realistic limits — the zoning authority does indeed retain some substantial weapons for controlling development — the premise of the thought seems basically correct. The supreme court has significantly undermined the foundation of the local zoning board. In the face of this change, if a zoning authority continues to pursue its established policies through traditional means, it is going to become increasingly ineffectual.

By closing off the traditional avenues, the court has wrought change capable of creating deep seated disruptions in our institutional arrangements. However, the contribution of the court has not been entirely negative. In Cheney v. Village 2 at New Hope, Inc. the court recognized as constitutional the form of land use control known as planned unit development. In criticising the traditional zoning patterns the court said:

This [traditional] approach fares reasonably well so long as development takes place on a lot-by-lot basis, and so long as no one cares that the overall appearance of the municipality resembles the design achieved by using a cookie cutter on a sheet of dough. However, with the increasing popularity of large scale residential developments, particularly in suburban areas, it has become apparent to many local municipalities that land can be more efficiently used, and developments more aesthetically pleasing, if zoning regulations focus on density requirements rather than on specific rules for each individual lot. Under density zoning, the legislature determines what percentages of a particular district must be devoted to open space, for example, and what percentage used for dwelling units. The task of filling in the particular district with real houses and real open spaces than falls upon the planning commission usually working in conjunction with an individual large scale developer.

105. The zoning power is, of course, only slightly eroded. In addition, other regulatory weaponry is available to the governing body, e.g., building codes, road capacities and health regulations including sewerage requirements, (both storm sewer and waste sewer capacities are limited), and waste disposal facilities. These tools, although they can not permanently prevent expansion and growth, can effectively retard it.

106. Id.
108. See Zucker & Wolfe, Supreme Court Legalizes PUD: New Hope from New Hope, 2 LAND USE CONTROLS 32 (1968). The innovative feature of planned unit development (called alternatively planned residential unit development) is its rejection of the old pattern of single-family detached residences on uniform “cookie-cutter” lots in favor of cluster development, townhouses, and other techniques resulting in more closely spaced dwellings with provision for open space and recreational areas to be used by all residents jointly. See generally, Symposium, Planned Unit Development, 114 U. Pa. L. Rev. 1 (1965).
Beyond this the court in Concord Township Appeal made reference to the desirability of experimenting with the innovative and imaginative developmental schemes available for effective planning.¹¹¹

The true answer to the zoning dilemma lies in effective legislative action and not with the judiciary. The abuses which have grown up are far too extensive to lend themselves to judicial correction.¹¹² In Pennsylvania there has been a limited attempt at legislative reform. The Municipalities Planning Act of 1969¹¹³ represents an attempt to provide a more flexible framework for dealing with the increasing complexity of zoning schemes. Among other provisions the new act provides a specific framework for the implementation of a scheme of planned unit development,¹¹⁴ and a section expanding the permissable purposes for which a governing body may zone.¹¹⁵ Unfortunately, these limited reforms do not fit the malady. What is needed is an extensive restructuring, i.e., a regional approach, rather than alteration of the present form.

¹¹¹. Id. at 475, 268 A.2d at 769. Examples of devices designed to increase zoning flexibility include the conditional grant of special exceptions, variances, and rezoning amendments. See generally 1 R. Anderson, American Law of Zoning §§ 8.17-8.21 (1968).
¹¹². Concord Township Appeal, 439 Pa. 466, 241 A.2d 765 (1970). The court explicitly recognized this fact in saying:

We fully realize the overall solution to these problems lies with greater regional planning; but until the time comes that we have such a system we must confront the situation as it is. The power currently resides in the hands of each local governing unit, and we will not tolerate their abusing that power in attempting to zone out growth at the expense of neighboring communities.

Id. at 476, 241 A.2d 769.

¹¹³. It has been charged that:

1 (i) Excessive zoning restrictions and subdivision standards interfere with construction of low and moderate-cost housing.
2 (ii) Land-use regulations have failed to halt wasteful urban sprawl.
3 (iii) Zoning for large lots is used to prevent Negroes from living in the suburbs.
4 (iv) Zoning favors are for sale by public officials in many communities.
5 (v) Land-use regulations have become so complex that it cannot properly be administered by laymen — city councils, planning commissions, boards of zoning appeals.
6 (vi) Archaic and rigid zoning ordinances prevent the use of design innovations such as cluster subdivisions, which could provide higher standards of amenity and bring housing within the reach of families that cannot now afford it.
7 (vii) Zoning is not adequate to guide or regulate urban development.
8 (viii) Local government actions in land-use regulation are often against the public interests of the metropolitan region.
9 (ix) Zoning has never been able to carry out a comprehensive plan.
10 (x) Zoning and subdivision regulations are used primarily to correct the fiscal problems of local government and not to guide urban expansion in an efficient pattern. (This is called fiscal zoning.)

AMERICAN SOCIETY OF PLANNING OFFICIALS, PROBLEMS OF ZONING AND LAND-USE REGULATION (1968).

¹¹⁷. Id. at § 10604.
As an alternative to a regional approach, the needed restructuring could be implemented through a consolidation involving the reorganization of the 2600 local governmental units in the state of Pennsylvania.\textsuperscript{118} Should the impetus provided by the Court's active intervention into land use control prove insufficient to supply the needed legislative reform, other more drastic judicial approaches are available. It has been suggested that the current zoning patterns are invalid because, in operation, they have resulted in discrimination against the poor and racial minorities on a scale amounting to a violation of their constitutional right to equal protection under the law.\textsuperscript{119} Another commentator postulates that the operation of the zoning structure is an unconstitutional disenfranchisement of substantial segments of the populace.\textsuperscript{120}

The trend is clear, however, that suburban zoning, as conceived in the 1920's, is not capable of dealing with the expanding population and technological innovations of the present day. Its deleterious effects of: (1) oppression of huge blocs of the constituency; (2) ecological blight; and (3) needless waste of valuable land, have reached intolerable proportions. Change must come, and should the legislative and executive branches continue to be recalcitrant, the courts in Pennsylvania and elsewhere\textsuperscript{121} will be forced to further inject themselves into the major role of reform.

\textit{John W. Nilon Jr.}

\textsuperscript{118} Report of Governor's Commission for Modern State Government (1969). Among other reforms the Commission recommended consolidation of the 2600 local governmental units.


\textsuperscript{121} See Johnston, \textit{Developments in Land Use Control}, 45 Notre Dame Law. 399 (1970).