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Note

THE PENNSYLVANIA SUPREME COURT AND THE EXCLUSIONARY ZONING DILEMMA

I. INTRODUCTION

Since the concept of zoning as a form of land use regulation first received judicial approval in 1926, suburban communities have utilized zoning ordinances to prevent unwanted development. Typically, the goal of precluding development may be achieved by means of zoning ordinances that effectually exclude outsiders along economic lines, thereby preserving the suburban character of the community.

For more than a decade, the Pennsylvania Supreme Court attempted to


The Supreme Court’s Euclid decision set forth the proposition that zoning is constitutional when enacted for the health, safety, or general welfare of the community. 272 U.S. at 391. This proposition has been similarly embraced by Pennsylvania case law. See Cleaver v. Board of Adjustment, 414 Pa. 367, 374, 200 A.2d 408, 413 (1964) (the right to use property is subject to the police power of the state to regulate an owner’s use of property, provided that the regulation is reasonably necessary to protect the health, safety, welfare, or general morals of the people); Appeal of Glorioso, 413 Pa. 194, 196 A.2d 668 (1964) (zoning ordinances must bear reasonable relationship to police power purposes); Eller v. Board of Adjustment, 414 Pa. 1, 198 A.2d 863 (1964) (regulation adopted pursuant to police power must not be unreasonable, arbitrary, or confiscatory).


Generally, the authority to zone is granted to local municipalities pursuant to an express delegation by a state of its police power. Developments in the Law—Zoning, 91 HARV. L. REV. 1427, 1429 (1978).

In Pennsylvania, the exclusionary zoning dilemma is exacerbated by the legislative limitation that nonresidents of a community do not have standing to challenge that community’s zoning ordinance as exclusionary. See 53 PA. STAT. ANN. tit. 53, § 11004(1) (Purdon 1972). Although this note does not endeavor to analyze this major impediment to achieving balanced housing communities, see note 27 for a brief additional discussion of the standing issue.

3. See Hyson, supra note 2, at 324. For purposes of this note, exclusionary zoning means land-use controls which tend to exclude persons of low or moderate incomes from the zoning municipality. See R. ANDERSON, LAW OF ZONING IN PENNSYLVANIA 146 (1982). On account of the economic orientation of suburban zoning ordinances, one commentator appropriately referred to such zoning practices as “snob zoning.” See generally, Note, Snob Zoning—A Look at the Economic and Social Impact of Low Intensity Zoning, 15 SYRACUSE L. REV. 507 (1964). Because zoning schemes are promulgated and enacted by local legislative and administrative bodies, it is not surprising that zoning, which was designed as a method of development, has been transformed into an effective method for frustrating growth. See Comment, The Pennsylvania Supreme
eradicate the exclusionary effect of such ordinances by attacking the specific zoning techniques utilized by suburban communities, and by fashioning remedies which responded only to the specific mischief alleged. These narrowly fashioned remedies, created on a case-by-case basis, represented a piecemeal approach to the exclusionary zoning dilemma. When zoning municipalities discovered a means to circumvent the zoning obligations developed under the piecemeal approach, the Pennsylvania Supreme Court purported to adopt a more wide-sweeping, fair share approach. However, this approach has also proven to be inadequate, as recent decisions purporting to apply a fair share analysis have permitted municipalities to continue to deny housing opportunities to our expanding society. This application of

Court and Exclusionary Suburban Zoning: From Bilbar to Girsh—A Decade of Change, 16 Vill. L. Rev. 507, 508 (1971).

Several commentators have attempted to analyze the suburban mentality behind exclusionary zoning restrictions. See, e.g., Note, Apartments in the Suburbs, In re Appeal of Girsh, 74 Dick. L. Rev. 634, 640-41 (1969-70). The author of the note suggests that suburbanites, feeling that they have struggled to escape from the city and obtain the advantages of suburban life, wish to preserve their lifestyle against urban encroachment. Id. at 640. This desire for preservation may be reflected by restrictions against multi-family and small single-lot zoning. Id. Thus, the suburbanites' ideological basis for such restrictions may be to protect themselves from the ills which prompted them to leave the city in the first place. See Babcock & Bosselman, Suburban Zoning and the Apartment Boom, 111 U. Pa. L. Rev. 1040 (1963). These authors list both "shouted" and "whispered" reasons for the opposition to apartment development in suburban municipalities. Id. at 1062-71. They list the following as "shouted" reasons:

1. 'Apartments don't pay their own way! If we allow apartments to come in, our taxes will go up!
2. Apartments reduce light and air.
3. '[T]he builders of suburban apartments are constructing tomorrow's slums.'
4. 'Apartments will reduce property value.'
5. Apartments will injure the character of the neighborhood.

Id. at 1062-67. As "whispered" reasons, the authors list the following:

1. 'Apartments will attract persons of the lower classes.'
2. 'Multiple-family housing will bring in a lot of transients who have no interest in the neighborhood.'
3. 'If we let them build apartments they'll be renting to Negroes . . .'

Id. at 1067-71.


5. See Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975). In the Willistown decision, a plurality of the Pennsylvania Supreme Court applied a fair share approach to strike down the zoning community's attempt to circumvent the judicial mandate that municipalities can not totally exclude apartment development by setting aside only a token amount of acreage for multi-family uses. Id. Two years later, the court gave majority approval to the fair share approach. See Surrick v. Zoning Hearing Bd., 476 Pa. 182, 382 A.2d 105 (1977). For a further discussion of the Willistown and Surrick decisions, see notes 68-87 and accompanying text, infra.

the fair share analysis, as well as the court's earlier piecemeal approach, reflects a position of judicial reluctance to address squarely the problems created by exclusionary zoning. In response, this note will point out the need for the Pennsylvania Supreme Court to take a more active role in this arena and a more effective and holistic approach to enforcing the duty of municipality zoning ordinance which did not provide for a fair share of multi-family housing was not unconstitutionally exclusionary where the municipality was not a logical place for future development); Appeal of Elochin, 501 Pa. 348, 461 A.2d 771 (1983) (a zoning ordinance which did not provide for a fair share of multi-family housing was not unconstitutionally exclusionary where the zoning community was already substantially developed). For a further discussion of the Krawitz and Elochin decisions, see notes 88-111 and accompanying text infra.

7. Cf. Southern Burlington County NAACP v. Mount Laurel County, 92 N.J. 159, 456 A.2d 390 (1983) (hereinafter cited as Mt. Laurel I). The Mt. Laurel II decision is a commendable attempt to face, head on, the exclusionary zoning dilemma. This decision not only rebukes suburban municipalities for utilizing exclusionary zoning schemes, but also attempts to provide a means for producing increased low and moderate income housing throughout the state of New Jersey. For an excellent discussion of the Mt. Laurel II decision, see Rose, The Mt. Laurel II Decision: Is It Based on Wishful Thinking?, 12 Real Est. L.J. 115 (1983); 112 N.J.L.J. 1 (1983).

The New Jersey Supreme Court first demonstrated its willingness to take an active role in the exclusionary zoning arena in 1975. See Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (hereinafter cited as Mt. Laurel I). In Mt. Laurel I, the New Jersey Supreme Court placed upon developing municipalities an affirmative obligation to zone for their fair share of the regional housing needs for low and moderate income housing. Id. This approach, therefore, differed from the approach previously employed by the Pennsylvania Supreme Court in that it attempted to eradicate exclusionary zoning by creating a system which was to provide for balanced housing, rather than by creating a system of favored and disfavored uses. For further discussion of the differences between the Pennsylvania and New Jersey approaches, see note 86 infra.

The Mt. Laurel II decision was written to effectively implement the goals set forth in Mt. Laurel I. Rose, supra, at 115. In summary, Mt. Laurel II directs all communities designated as containing growth areas pursuant to the State Development Guide Plan, to provide housing for their own indigenous poor and for a fair share of the region's low and moderate income families. See, 112 N.J.L.J. 21 (1983).

The provision of such housing is to be accomplished through both the removal of existing exclusionary schemes and the imposition of affirmative zoning techniques, such as mandatory set asides, density bonuses, and cooperation with developers' efforts to obtain subsidies. Id. Moreover, all future zoning litigation is to be handled by three judges appointed by the chief justice. Id.

The New Jersey Supreme Court deserves much credit for its willingness to become an active participant in the land-use arena, and for its creativity in fashioning a system to preclude further exclusionary zoning. However, despite the noble goals of Mt. Laurel II, commentators have recognized that weaknesses in that decision exist. See generally, Rose, supra. Specifically, Professor Rose has questioned whether the policy goals of Mt. Laurel II can actually be achieved in light of current economic realities. Id. at 137. Another commentator has questioned the fairness of placing the responsibility for subsidizing low-income housing on builders and purchasers of new homes. Bernstein, Why Mount Laurel Won't Work, 112 N.J.L.J. 21 (1983). Moreover, it is submitted that the delegation of all future exclusionary zoning cases to three judicially-selected judges may come under constitutional attack. For these reasons, it is suggested that the Pennsylvania Supreme Court should emulate the active position adopted by the New Jersey bench, though not necessarily by adopting the approach itself.
palities to zone for the regional community.\textsuperscript{8}

Generally, the Pennsylvania Supreme Court decisions on the exclusionary zoning issue can be characterized under three modes of analysis: the large lot analysis,\textsuperscript{9} the total exclusion of use analysis,\textsuperscript{10} and the fair-share obligation analysis.\textsuperscript{11}

The first two modes of analysis originally appeared to be distinct, and were applied in direct response to the type of mischief embodied in the challenged zoning ordinance. It is these decisions, promulgated under the large-lot analysis and the total exclusion of use analysis, that are submitted to represent a “piecemeal” approach to exclusionary zoning.\textsuperscript{12} Specifically, the Pennsylvania Supreme Court applied a substantive due process approach where it determined that the ordinance was exclusionary due to large minimum lot requirements.\textsuperscript{13} Alternatively, the court appeared to apply a \textit{per se} analysis where the zoning ordinance effected a total prohibition of multi-family uses.\textsuperscript{14}

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\textsuperscript{8} See Developments in the Law—Zoning, supra note 2, at 1639. Commentators have observed that Pennsylvania has analyzed the exclusionary zoning issue by establishing a list of favored uses. \textit{Id}. This practice should be compared with that of New Jersey, which is not concerned with the protection of particular uses, but rather, with providing for “balanced communities.” \textit{Id}. For a further discussion of the difference between the New Jersey and Pennsylvania theories of exclusionary zoning, see note 86 infra. For a brief discussion of New Jersey’s most recent articulation on the exclusionary zoning issue, see note 7 supra.

\textsuperscript{9} For a discussion of the large-lot analysis, see notes 17-37 and accompanying text infra. This analysis emerged in response to zoning schemes which sought to preserve the suburban, low-density character of communities by requiring large minimum lots. \textit{See}, e.g., National Land and Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965) (zoning scheme requiring minimum of four acres per lot held unconstitutional); Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970) (two and three-acre minimum lot restrictions declared unconstitutional because of the effect of freezing population density at near-present levels). In addition to preserving population density, large minimum-lot sizes also ensure that potential residents will be relatively affluent because large-lot zoning raises the price of residential access, thereby denying that access to members of low income groups. \textit{See} Sager, \textit{Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent}, 21 \textit{Stan. L. Rev.} 767, 767 (1969).

\textsuperscript{10} See, e.g., Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (failure of zoning scheme to provide for apartment development rendered ordinance unconstitutionally exclusionary). For a discussion of \textit{Girsh}, see notes 38-61 and accompanying text infra. It has been noted that the total exclusion of multiple dwellings was left unchallenged in most jurisdictions until 1970. \textit{See} R. Anderson, supra note 3, at 256 (1982).

\textsuperscript{11} For a discussion of the fair share obligation as adopted by the Pennsylvania Supreme Court, see notes 62-87 and accompanying text infra.

\textsuperscript{12} See text at notes 4 & 5 supra. It is submitted that this approach is piecemeal because it seeks to remedy the situation by addressing only the specific issue presented by the case, rather than by taking a more holistic approach to the exclusionary zoning dilemma.


Unlike these first two modes of analysis, the application of the fair share analysis is not dependent upon the type of mischief alleged. Rather, recent decisions by the Pennsylvania Supreme Court indicate that these earlier modes of analyzing zoning ordinances have been abandoned, and in their stead, a fair share analysis has been adopted as the appropriate bench mark for testing the validity of zoning ordinances which are challenged as exclusionary.

II. MODES OF ANALYSIS

A. The Large Lot Analysis

The first important Pennsylvania Supreme Court case to address directly the validity of large-lot zoning was National Land Investment Co. v. Easttown Township Board of Adjustment. In National Land, the Pennsylvania Supreme Court held that a four-acre minimum lot requirement was unconstitutional as applied to residential districts in Easttown Township.

15. For a discussion of Pennsylvania Supreme Court cases that utilize the fair share approach in analyzing exclusionary zoning, see notes 62-111 and accompanying text infra. The fair share approach has been employed where the challenged mischief is both tokenism and total exclusion of a particular use. See, e.g., Appeal of M. A. Kravitz Co., Inc., 501 Pa. 200, 460 A.2d 1075 (1983) (fair share test employed where zoning community failed to provide for townhouse development); Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975) (fair share approach employed where zoning community set aside only a token amount of acreage for multi-family uses). Although the Pennsylvania Supreme Court has not had the opportunity to decide a large-lot case since its acceptance of the fair share approach, it is submitted that this approach would be utilized in such a case because both modes of analysis are essentially substantive due process approaches. See Note, Zoning—Constitutionality of Exclusionary Zoning Ordinance—Fair Share, 17 Duq. L. Rev. 507, 510 (1978-79) (the Pennsylvania fair share test is essentially a substantive due process test). For a discussion of the Pennsylvania large-lot zoning decisions see notes 17-37 and accompanying text infra.

16. See, e.g., Appeal of M. A. Kravitz Co., Inc., 501 Pa. 200, 460 A.2d 1075 (1983) (in situation where developer challenged zoning ordinance as creating a total exclusion of use, supreme court applied three factors of Surrick fair share test to determine whether a township provided a fair share of acreage for multi-family development); Appeal of Elocin, Inc., 501 Pa. 348, 461 A.2d 771 (1983) (in a challenge to zoning ordinance on grounds that the ordinance totally excluded townhouses and mid- or high-rise apartments, court upheld ordinance through utilization of fair share analysis). For a discussion of the Kravitz and Elocin decisions, see notes 88-111 and accompanying text infra. For a discussion of the Surrick fair share test, see notes 76-87 and accompanying text infra.

17. 419 Pa. 504, 215 A.2d 597 (1965). One commentator observed that until the 1960’s, the Pennsylvania Supreme Court “permitted unfettered exercise of broad local governmental control” over municipal zoning. Comment, supra note 3, at 512-13. For an example of this deference to local governing bodies, see Bilbar Constr. Co. v. Easttown Township Bd. of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958) (validity of large-lot ordinance upheld on general welfare considerations, despite the fact that the ordinance bore no reasonable relationship to the health, safety, or morals of the community). Thus, the National Land case may be viewed as a turning point for the Pennsylvania Supreme Court in refusing to defer to the local zoning municipality.

18. 419 Pa. 504, 215 A.2d 597 (1965). In National Land, the title holder of an 85-acre tract, “Sweetbriar,” agreed to sell the property to National Land and Invest-
disposing of the procedural issues presented, Justice Roberts set out the legal parameters for exclusionary zoning: the constitutional guarantee of the right to use property and the judicial mandate that zoning ordinances are valid when enacted pursuant to the state's police power for promotion of the health, safety, and general welfare of the community. Weighing the interests of the parties in order to determine whether the four-acre minimum lot restriction bore a substantial relationship to the general welfare of the community, the court took into account the interests of the developer, the municipality, and those persons desiring to settle within the community.

The Pennsylvania Supreme Court utilized National Land as an opportunity to elaborate on the proper relationship between an application for a variance and a constitutional challenge. 419 Pa. at 511, 215 A.2d at 601-02. The court stated that a party petitioning for a variance is permitted to challenge the constitutionality of an ordinance either in front of the local zoning board, or if unsuccessful, on appeal to the court of common pleas. Id. Relying on this interpretation, the court ruled that the National Land and Investment Company could properly shift its emphasis from a variance to a constitutional challenge prior to the hearing before the board of adjustment. Id. at 511, 215 A.2d at 601-02.

The court noted that a landowner’s right to use property is guaranteed by both the United States and Pennsylvania Constitutions. Id. at n.20. See U.S. CONST. amd. V, XIV; Pa. CONST. art. I, §§ 1, 10. See also note 1 supra. Writing for the court, Justice Roberts stated that while recognizing the presumption of validity of zoning ordinances, “we must also appreciate the fact that zoning involves governmental restrictions upon a landowner’s constitutionally guaranteed right to use his property, a right which is unfettered except in very specific instances.” 419 Pa. at 522, 215 A.2d at 607 (footnotes omitted). According to Justice Roberts, these specific instances include the following: 1) if the landowner violates the state or federal constitution; 2) if the landowner creates a nuisance; 3) if the landowner violates any covenant, restriction, or easement; and 4) if the landowner violates any valid zoning laws, including zoning regulations. Id. at n.21.

Justice Roberts first identified the interest of the landowner-developer; that is, the
Justice Roberts' initial emphasis on the developers' loss of profits resulting from four-acre lot restrictions\(^\text{23}\) indicated that in large-lot zoning cases, the Pennsylvania Supreme Court would rely on a traditional zoning analysis of whether the large-lot requirement had imposed an unreasonable restriction on the right of a landowner to use his property.\(^\text{24}\) After rejecting the township's justification for requiring large, minimum lot restrictions,\(^\text{25}\) the court concluded that the restriction was invalid.\(^\text{26}\) Although this fact is significant, the *National Land* decision is pivotal because the Pennsylvania Supreme Court joined with the traditional analysis a new approach. This newly-created inquiry focused upon the responsibility of the municipality to

diminution in value of the property if limited to four-acre lots. Id. at 523-24, 215 A.2d at 608. Justice Roberts then expressed that the interest of the landowner-developer must be weighed against the interest of the municipality. Id. at 525, 215 A.2d at 608. In addition to the interests of the parties to the action, the *National Land* court further considered the regional interest in population expansion. Id. at 523-27, 215 A.2d at 609. One commentator has suggested that it is the presence of this third, regional interest "which colors the court's assessment of the proper weight to be given to the arguments of the other two interests." See Comment, supra note 3, at 622. For a discussion of the interests asserted by the municipality in *National Land*, see note 25 infra.

23. 419 Pa. at 524, 215 A.2d at 608. Justice Roberts noted that the four-acre lot restrictions would obviously diminish the value of the developer's property and greatly restrict the marketability of the tract. Id. Justice Roberts noted that when divided into one acre lots as originally planned, the value of "Sweetbriar" for residential building was approximately $260,000. Id. When the four-acre restriction was imposed, the number of available building sites was reduced by 75% and the value of the land, under even the most optimistic appraisal, fell to $175,000. Id.

24. Id. at 522-25, 215 A.2d at 607-08. The *National Land* court began its discussion by stating the general proposition that zoning presents a governmental restriction upon a landowner's guaranteed right to use his property. Id. at 522, 215 A.2d at 607. Against this general proposition, the court then considered the extent to which the restriction deprived the landowner of his property's value. Id. at 523-25, 215 A.2d at 608.

25. Id. at 531, 215 A.2d at 611. The appellee township cited four public purposes as justifications for the large minimum-lot requirement. Id. at 525-31, 215 A.2d at 608-11. Specifically, the township alleged that the four-acre minimum lot requirement was necessary because 1) it ensured proper sewage disposal and protection from water pollution, 2) the township roads were inadequate and one-acre zoning would impose upon the road system, 3) the large-lot restriction served to preserve the character of the area in regard to open spaces, and 4) the restriction was necessary to present the historic sites in the township in the proper setting. Id. The court rejected the first two arguments alleged by the township, reasoning that zoning may not be used to avoid the increased responsibilities brought by natural growth. Id. at 527-28, 215 A.2d at 610. The court stated as follows:

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 cannot be used as a means to deny the future.

Id. In response to the last two proffered justifications, the court emphasized that they did not reflect the public welfare, and were based purely on private interests, which zoning regulations may not be employed to effectuate. Id. at 531, 215 A.2d at 611.

26. Id. at 533, 215 A.2d at 613.
accommodate its share of the developmental needs of an expanding society by considering the interest of persons desiring to live within the municipality.27 It is the acknowledgment of this regional interest which subsequently formed the basis for imposing a fair share obligation upon zoning municipalities.28

In National Land, the Pennsylvania Supreme Court explicitly stated that large, minimum lot requirements were not unconstitutional *per se*,29 and that "[e]very zoning case involves a different set of facts and circumstances in light of which the constitutionality of a zoning ordinance must be tested."30 As this proposition left unclear the future of large, minimum lot zoning restrictions, it is not surprising that, five years later, the Pennsylvania Supreme Court was again presented with this issue in Concord Township Appeal.31 In Concord Township, a plurality of the supreme court reaffirmed its earlier reasoning in National Land by stating that a two or three-acre minimum lot requirement would be unreasonable "absent some extraordinary justification."32 Although Justice Roberts’ opinion in Concord Township did not re-

27. Id. at 532, 215 A.2d at 612. In response to the township’s justifications for requiring large, minimum-lot restrictions, the National Land court stated as follows: Four acre zoning represents Easttown’s position that it does not desire to accommodate those who are pressing for admittance to the township. . . . The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens . . . can not be held valid.

Id.

Although the National Land court recognized this interest of third persons outside the zoning community, Pennsylvania law still does not permit such third persons to challenge a zoning ordinance as exclusionary. See Hyson, supra note 2, at 324, 325 n.7. Only landowners, or persons who have an interest in property located in the zoning community, may challenge zoning legislation as exclusionary. Id. This limitation that non-residents may not bring such a challenge is mandated by statute. See 53 PA. STAT. ANN. tit. 53, § 11004(1) (Purdon 1972). Thus, the only means by which housing for this regional interest could ever be provided in Pennsylvania is through a landowner-developer. Cf. Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 159 n.3, 336 A.2d 713, 717 n.3 (1975) (in New Jersey, non-resident individuals have standing to challenge zoning ordinance).

28. For a discussion of the development of the fair share obligation as applied by the Pennsylvania Supreme Court, see notes 62-87 and accompanying text infra.

Commentators have suggested that while the National Land opinion is of great importance to Pennsylvania’s development of exclusionary zoning principles, the large-lot zoning restriction in National Land could have been invalidated solely upon a more traditional due process analysis; that is, by focusing on the reasonableness of the restriction in terms of the rights of the landowner. See Ryan, Pennsylvania Zoning Law and Practice, 1 Law Practice Forms § 3.5.7, at 100 (1981).

29. 419 Pa. at 523, 215 A.2d at 608.
30. Id. at 523, 215 A.2d at 607-08.
31. 439 Pa. 466, 268 A.2d 765 (1970). In Concord Township Appeal, the township board of adjustment denied the developer’s request for a rezoning and upheld two and three-acre minimum lot requirements. Id. at 469, 268 A.2d at 766. The developers filed a petition for appeal which was granted by the supreme court.
32. Id. at 471, 268 A.2d at 767. Justice Roberts reiterated and expounded upon
ceive the support of a majority of the court, the decision is nevertheless significant because it demonstrated that zoning ordinances which serve to maintain population density by imposing large, minimum-lot restrictions would be upheld only where there are extraordinarily strong justifications. Specifically, these justifications must be strong enough to outweigh both the developers' right to use property and the state's interest in accommodating population growth.

the National Land principle that minimum lot sizes are not inherently unreasonable. Id. at 470-71, 268 A.2d at 766-67. In analyzing the constitutionality of the requirements in question, Justice Roberts indicated that such a requirement would be reasonable only when "necessary," and not merely when "desirable." Id. Before even addressing the issue of regional needs, he wrote,

The two and three acre minimums imposed in this case are no more reasonable than the four acre requirements struck down in National Land. As we pointed out in National Land, there are obvious advantages to the residents of the community in having houses build on four- or three-acre lots. However, minimum lot sizes of the magnitude required by this ordinance are a great deal larger than what should be considered as a necessary size for the building of a house, and are therefore not the proper subjects of public regulation. . . . Absent some extraordinary justification, a zoning ordinance with minimum lot sizes such as those in this case is completely unreasonable.

Id. (emphasis supplied) (footnote omitted).

33. Only Justices Eagen and O'Brien joined in Justice Roberts' opinion stating that large-lot zoning is invalid in a suburban context absent extraordinary justification. Id. at 468, 768 A.2d at 765. Chief Justice Bell filed an opinion concurring in the conclusion that the large-lot limitations were unreasonably restrictive. Id. at 478-81, 268 A.2d at 771-72 (Bell, C.J., concurring). Thus, the plurality opinion reflected the more traditional approach to large-lot zoning which permeated the National Land majority opinion. For a discussion of the National Land opinion, see notes 17-28 and accompanying text supra. The three dissenting justices accepted the proposition that large-lot zoning should not be utilized as a means to divert growth, yet concluded that the evidence concerning the potential sewage problem was sufficient to sustain the validity of the large-lot requirement. 439 Pa. at 481-98, 268 A.2d at 772-80 (Cohen, Jones, and Pomeroy, J.J., dissenting).

34. See Ryan, supra note 28, at 99.

It is submitted that the National Land and Concord Township cases illustrate the two-tiered substantive due process approach that the Pennsylvania Supreme Court utilized when confronted with a zoning ordinance alleged to be exclusionary. See Surrick v. Zoning Hearing Bd., 476 Pa. 182, 188, 382 A.2d 105, 108 (1977) (noting that the approach used in these earlier cases was essentially a substantive due process analysis).

35. 439 Pa. at 474-75, 268 A.2d at 768-69. This regional interest, recognized by a majority of the court in National Land, was a major factor in the Concord Township Appeal decision. Id. For a discussion of the interest of third persons as recognized by the National Land majority, see notes 27 & 28 and accompanying text supra. In his Concord Township opinion, Justice Roberts re-emphasized the exclusionary effect that large, minimum-lot requirements had on the broader regional community. 439 Pa. at 474-75, 268 A.2d at 768-69. Justice Roberts stated,

The implication of 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 at 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
Although both *National Land* and *Concord Appeal* recognized a regional interest of persons living outside the boundaries of the zoning municipality, these decisions may be characterized as passive because they did not fashion a remedy that responded to this acknowledged regional interest. Specifically, these decisions merely discourage municipalities from zoning large-lot tracts, rather than imposing an affirmative obligation to provide for increased housing opportunities.

B. **Total Exclusion of Use**

A separate mode by which a township can maintain its suburban character of low-density residential housing is to totally exclude particular uses, such as apartment or townhouse development. In *Appeal of Girsh*, the Pennsylvania Supreme Court set forth the approach to be used by a court when faced with an ordinance alleged to be exclusionary on the grounds that it effectively prohibited apartment development throughout the municipality. In *Girsh*, the court applied exclusionary zoning principles and held

> growth through the use of exclusionary 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.


37. It is submitted that these decisions reflect a judicial characterization of large minimum lot requirements as disfavored uses, as compared with zoning ordinances which contain a high proportion of small-lot zoning districts. This creation of a system of favored uses has been criticized as a less-than-optimal approach. *See generally Developments in the Law—Zoning, supra* note 2, at 1639-40.

38. *See generally, R. Anderson, supra* note 2, at 258-63. Exclusion of apartments and townhouses can be effected by zoning ordinance in one of two ways: 1) by expressly prohibiting multi-family development, or 2) by failing to provide for apartment or townhouse development. *Id.* For example, in one case, the appellee township argued that the zoning ordinance should not be deemed unconstitutional because the ordinance merely failed to provide for apartments, as opposed to expressly excluding apartment development. Appeal of Girsh, 437 Pa. 237, 240, 263 A.2d 395, 396 (1970). Thus, the township argued that its ordinance was distinguishable from ordinances that amounted to total exclusions because, under its ordinance, apartment use by variance was available. *Id.* The court rejected this distinction stating that "the failure to provide for apartments anywhere within the Township must be viewed as the legal equivalent of an explicit prohibition of apartment houses in the zoning ordinance." *Id.* at 241, 263 A.2d at 397.

39. 437 Pa. 237, 363 A.2d 395 (1970). In *Girsh*, developers sought to build high-rise, luxury apartments. *Id.* at 239, 363 A.2d at 396. Because the applicable zoning ordinance did not provide for multi-unit apartment buildings, the developers requested that the tract by rezoned. *Id.* This request was denied by the township board of commissioners. *Id.* The zoning board of adjustment similarly sustained the ordinance over the developers' constitutional challenge that the ordinance was exclusionary; this rule was affirmed by the Court of Common Pleas for Delaware County. *Id.* On appeal, the Pennsylvania Supreme Court held that the failure of the appellee-township's zoning scheme to provide for apartments was unconstitutional and reversed the court below. 437 Pa. at 244, 263 A.2d at 398.

40. *Id.* at 240, 263 A.2d at 396. The zoning ordinance provided for single-family residential uses only and therefore, it did not explicitly prohibit multi-unit apartment dwellings. *Id.* The *Girsh* court determined that this amounted to a total
that a municipal zoning ordinance which failed to provide for apartments was unconstitutional.41

This first application of exclusionary zoning principles to a total exclusion of a form of residential use was facilitated by a precedent line of cases in the commercial zoning area which held that other forms of total exclusion constituted an illegitimate exercise of the police power. Specifically, the Girsh court relied on cases declaring invalid zoning ordinances which prohibited quarrying in a township,42 enacted a total ban on flashing signs,43 exclusion of use. For a further discussion of the rationale of the Girsh decision, see note 41 infra.

For an in-depth analysis of the Girsh decision, see Note, Apartments in the Suburbs: In re Appeal of Girsh, 74 Dick. L. Rev. 634 (1970). The position taken by this commentator is that "[t]he Girsh court . . . 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." Id. at 649. It is submitted that although this may have been underlying the Girsh opinion, recent Pennsylvania applications of Girsh indicate that this interpretation of Girsh is no longer viable. Specifically, zoning ordinances which preclude reasonable multifamily development in areas where developable land exists, have been found unconstitutional if the effect of the ordinance is to prohibit multi-family housing, regardless of intent. See, e.g., Camp Hill Dev. Co. v. Zoning Bd. of Adjustment, 13 Pa. Commw. 519, 319 A.2d 197 (1974) (commonwealth court interpreted Girsh to mean that an ordinance which fails to provide for a legitimate and needed residential use is unconstitutional), disapproved in, Appeal of M. A. Kravitz Co., 501 Pa. 200, 246 A.2d 107 (1983). Moreover, the Pennsylvania Supreme Court has recently articulated a three-prong test to determine whether an allegedly exclusionary ordinance is unconstitutional. See Surrick v. Zoning Hearing Bd. of Adjustment, 476 Pa. 182, 382 A.2d 105 (1978) (in order to determine whether a zoning ordinance is unconstitutional, a court must look at the following factors: 1) whether the community is a logical place for development; 2) the present level of development; and 3) whether the challenged zoning scheme effected an exclusionary result, or alternatively, whether there was an exclusionary intent to zone out population growth) (emphasis added). The last prong of the Surrick test illustrates that a zoning ordinance may be declared unconstitutional even in the absence of exclusionary intent, where the ordinance results in an exclusionary effect. For a full discussion of Surrick, see notes 76-87 and accompanying text infra.

41. 437 Pa. at 240, 263 A.2d at 396. Justice Roberts, writing for the majority, stated that the issue before the court was "whether appellee [township] must provide for apartment living as part of its plan of development." Id. at 242, 263 A.2d at 397 (emphasis added). In answering this question, Justice Roberts drew from his opinion in National Land the basic concept that a township cannot use zoning as a tool to prevent the entrance of newcomers. Id. at 244, 263 A.2d at 398. For a discussion of the exclusionary zoning principles as set forth in National Land, see notes 17-28 infra. Specifically, Justice Roberts 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." 437 Pa. at 242, 263 A.2d at 397 (emphasis added).

It is noted that Justice Roberts made use of the word "apartments" as opposed to "multi-family" units. For a discussion of the implications created by limiting the holding of Girsh to apartments, see notes 57-61 and accompanying text infra.

42. See Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967) (complete prohibition of quarrying in township in question was not justified by potential problems, must be viewed with particularly circumspection, and was an unconstitutional use of police power).
and created a total prohibition on billboards. Drawing from these total exclusion of commercial use cases, the Girsch court emphasized that not only must a land-use restriction be reasonable in order to be constitutionally sustained, but also “[t]he constitutionality of zoning ordinances which totally prohibit legitimate businesses . . . from an entire community must be regarded with particular circumspection. . . .” Based on this standard, the Girsch court was able to apply the exclusionary zoning principles developed in National Land to a distinct factual allegation. The court was also able to set new standards which would form the basis for future exclusionary zoning challenges.

In Girsch, as in National Land, Justice Roberts emphasized the exclusionary character of the ordinance by rejecting the township’s justifications for upholding the ordinance, while recognizing the interests of persons desir-

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43. In re Appeal of Ammon R. Smith Auto Co., 423 Pa. 493, 223 A.2d 683 (1966) (zoning ordinance which prohibited flashing and intermittent lights on all signs throughout the township was too general, too broad and unreasonable, and was invalid as an improper exercise of the township’s police power).

44. Norate Corp. v. Zoning Bd. of Adjustment, 417 Pa. 397, 207 A.2d 890 (1965) (ordinance purporting to ban all “off-site” billboards throughout the entire township was patently unreasonable and invalid).

45. 437 Pa. at 241, 263 A.2d at 397.

46. Id. at 242, 263 A.2d at 397 (quoting Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 59, 228 A.2d 169, 179 (1967)). The Girsch majority emphasized this analogy by stating, “Just as we held in Exton Quarries, Ammon R. Smith and Norate that the governing bodies must make some provision for the use in question, we today follow those cases and hold that appellee cannot have a zoning scheme that makes no reasonable provision for apartment uses.” Id. at 243, 263 A.2d at 398.

47. Id. at 240, 263 A.2d at 396. In Girsch, the zoning ordinance in question was alleged to be exclusionary because it did not provide for apartment development. Id. In National Land, the ordinance was alleged to be exclusionary because it required large minimum lots in approximately 80% of the municipality. 419 Pa. at 508-09, 215 A.2d at 600. For a discussion of the facts in National Land, see notes 18-28 and accompanying text supra. It is submitted that although large-lot zoning and prohibition of apartments are distinct means by which an exclusionary zoning ordinance may operate, both of these means effect the same basic result of maintaining the low density nature of the community.

48. 437 Pa. at 243-46, 263 A.2d at 398-99. In concluding, Justice Roberts indicated that an important factor in deciding whether the exclusion was unconstitutional was whether the township itself was a “logical place for development to take place.” Id. at 245, 263 A.2d at 398.

The inquiry into whether the municipality is a “logical place for development” has been subsequently regarded as the basic premise of the Girsch decision. See Surrick v. Zoning Bd. of Adjustment, 476 Pa. 182, 189, 382 A.2d 105, 108 (1977) (the Girsch “premise” requires that where a municipal subdivision “is a logical place for development, it should not be heard to say that it will not bear its rightful part of the burden”). Moreover, this inquiry was adopted as the first prong of the three-part test set out in Surrick. For a discussion of the Surrick test, see notes 76-87 and accompanying text, infra.

49. 437 Pa. at 240, 263 A.2d at 396. The township’s primary contention was that apartment development was not expressly prohibited; rather, it was permitted by means of obtaining a variance. Id. The majority rejected this contention upon determining that the failure to provide for apartments was a legal equivalent to an express prohibition. Id. at 241, 263 A.2d at 397. The township then contended that
ing to move into the municipality.\textsuperscript{50} The \textit{Girsh} court found that the prohibition of apartments resulted in a frustration of natural population growth into the municipality,\textsuperscript{51} and held that the municipality "cannot have a zoning scheme that makes no reasonable provision for apartment uses."\textsuperscript{52} In this manner, the Pennsylvania Supreme Court recognized the obvious exclusionary effect of freezing population density that is created by a zoning ordinance that prevents apartment development.\textsuperscript{53}

The \textit{Girsh} holding appeared to embody a blanket presumption of unconstitutionality which would thereafter be applied to zoning ordinances which prevented apartment development. However, before concluding his opinion, Justice Roberts added that "if Nether Providence is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden."\textsuperscript{54} Although stated in dictum, this con-

\begin{itemize}
\item apartment use, causing a significant increase in the population of the municipality, would result in a strain upon municipal services and "would clash with the existing residential neighborhood." \textit{Id.} at 243, 253 A.2d at 398. Quoting from \textit{National Land}, Justice Roberts stated that zoning may not be used to avoid expansion of municipal facilities. \textit{Id.} In respect to the latter contention, the court reaffirmed its holding in \textit{National Land} that the protection of the aesthetic nature of the community was an insufficient justification for the exclusionary zoning technique. \textit{Id.}
\item \textit{Id.} at 242, 263 A.2d at 397 ("appellee has in effect decided to zone out the people who would be able to live in the Township if apartments were available") (emphasis in original).
\item \textit{Id.} at 246, 263 A.2d at 399. The \textit{Girsh} court stated, Apartment living is a fact of life that communities like Nether Providence must learn to accept. If Nether Providence is located so that it is a place where apartment living is in demand, it must provide for apartments in its plan for future growth; it cannot close its doors to others seeking a 'reasonable place to live.'
\item \textit{Id.}
\end{itemize}

It is interesting to note that the apartment development in question in the \textit{Girsh} decision was not of the type that would provide housing for low or middle-income families. \textit{Id.} at 240, 263 A.2d at 396. One commentator has optimistically expressed that the \textit{Girsh} doctrine would prove to be a helpful precedent to those seeking to provide suburban apartment housing to persons of moderate income. Comment, supra note 40, at 657. Although it is agreed that \textit{Girsh} is helpful, it is suggested that its impact has been modest: the \textit{Girsh} decision does not require zoning municipalities to provide for low and middle-income housing, nor do later decisions by the Pennsylvania Supreme Court require zoning ordinances to provide for such housing. For a discussion of later Pennsylvania Supreme Court decisions which similarly omit the proposition that municipalities provide for balanced communities, see notes 68-111 and accompanying text infra. For a discussion of the Pennsylvania approach to fair share, which is based on land available for apartment development, see notes 68-87 and accompanying text infra.

\begin{itemize}
\item 437 Pa. at 243, 263 A.2d at 398.
\item \textit{Id.} at 244, 263 A.2d at 398. Justice Roberts stated that "Nether Providence may not permissibly choose to only take as many people as can live in single-family housing, in effect freezing the population at near present levels." \textit{Id.}
\item \textit{Id.} at 245, 263 A.2d at 398-99. Justice Roberts added a footnote to support this proposition:
Perhaps in an ideal world, planning and zoning would be done on a \textit{regional} basis, so that a given community would have apartments while an adjoining community would not. But as long as we allow zoning to be done
cept of a "logical place for development" later served to create a safe harbor for municipalities that would otherwise fall prey to the *Girsh* mandate that zoning ordinances provide for apartment growth.\(^{55}\) Regardless of this qualification, just as *National Land* and *Concord Township* illustrate the Pennsylvania court's strong preference toward small minimum-lot restrictions, the *Girsh* case characterizes that court's view of apartment development as a favored use.\(^{56}\)

This protection afforded to apartment development has been subjected to much interpretation by the Pennsylvania Commonwealth Court.\(^{57}\) Although the narrow holding of *Girsh* imposed upon municipalities the sole 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.

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\(^{55}\) *Girsh v. Board of Supervisors*, 501 Pa. 438, 461 A.2d 771 (1983) (zoning ordinance failing to provide for mid-rise and high-rise apartments was not invalid where the court determined that the zoning municipality was already substantially developed and hence not a logical place for future growth and development). For a discussion of *Elocin*, see notes 105-11 and accompanying text infra. Without relying on the *Elocin* case as precedent, the Pennsylvania Commonwealth Court has similarly recently held that a zoning municipality which is not a logical place for development is not required to zone for apartment construction. *See* Fernley v. Board of Supervisors, 76 Pa. Commw. 409, 464 A.2d 587 (1983).

\(^{56}\) *See Developments in the Law—Zoning*, supra note 2, at 1639-40. The *Girsh* opinion placed apartments onto a list of favored uses, thereby joining small-lot zoning. *Id.* The Pennsylvania creation of a system of favored uses has been criticized, specifically when compared with New Jersey's judicial mandate that a township provide a fair share of housing for low and moderate income groups. *See id.* In response to the *Girsh* opinion, it has been suggested that

[limiting the court's focus to protecting specific uses may not solve underlying aspects of exclusionary practices. . . . Moreover, given the impossibility of directly matching particular uses with specific income groups, a mixture of uses creating an environment of suburban heterogeneity seems best suited to achieving open communities.]

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\(^{57}\) *Girsh v. Board of Supervisors*, 501 Pa. 438, 461 A.2d 771 (1983) (zoning ordinance failing to provide for mid-rise and high-rise apartments was not invalid where the court determined that the zoning municipality was already substantially developed and hence not a logical place for future growth and development).
requirement that they zone for apartments, numerous Pennsylvania lower courts have utilized the Girsh decision to require that municipalities provide for different types of reasonable multi-family residential uses. The commonwealth court generally has held that a Pennsylvania zoning ordinance which excludes townhouse development is invalid. The usefulness of the total exclusion line of cases has been substantially curtailed by recent decisions of the Pennsylvania Supreme Court, in which the court resolved that a failure to provide for a particular use did not give rise to a constitutional violation where the zoning municipality was not a logical place for growth and development.

C. Regionalism: Imposing a Fair Share Obligation

Although the Pennsylvania Supreme Court had previously announced


The commonwealth court has most recently held that a zoning ordinance which effectively excludes all multi-family development is not subject to the mandate of Girsh where the municipality is not a logical place for development. See Fernley v. Board of Supervisors, 76 Pa. Commw. 409, 464 A.2d 587 (1983). Hence, it is submitted that although the commonwealth court had in the past appeared to be less deferential to zoning communities wishing to avoid population expansion, the Fernley case indicates that the lower courts may not be willing to allow a developer to construct apartments in established suburbs.

58. Girsh, 437 Pa. at 240, 263 A.2d at 396. For a discussion of the Girsh mandate that zoning municipalities provide for apartment development, see notes 41 & 51-53 and accompanying text supra.

59. See note 57 supra.


61. See Appeal of M. A. Kravitz Co., Inc., 501 Pa. 200, 460 A.2d 1075 (1983) (failure of zoning ordinance to affirmatively provide for townhouse development did not render ordinance unconstitutional where the municipality was not a logical place for growth and development); Appeal of Elocin, Inc., 501 Pa. 347, 461 A.2d 773 (1983) (failure to provide for particular multi-family uses did not render ordinance unconstitutional where the municipality was not already substantially developed). For a discussion of Kravitz and Elocin, see notes 89-111 and accompanying text infra. The reasoning in Kravitz and Elocin, that community which is not a logical place for development need not provide for a particular use, has been utilized by the commonwealth court to allow such communities to expressly exclude particular uses. See Fernley v. Board of Supervisors, 76 Pa. Commw. 409, 464 A.2d 587 (1983).
principles that were specifically tailored to mitigate against the exclusionary effects of either large-lot zoning or total exclusion of use zoning,62 recent decisions indicate that these earlier modes of analysis have been abandoned and a more unified doctrine has emerged.63 The key to this unified doctrine is regionalism.64 This new mode of judicial analysis recognizes the broad extra-territorial impact of a zoning ordinance and generally requires that a zoning municipality provide housing for a fair share of development and population expansion.65 Where prior cases utilized the concept of regionalism as but one facet of their analysis,66 the current Pennsylvania decisions illustrate that “regionalism” has itself developed into an analytical device to determine whether an ordinance is exclusionary and therefore unconstitutional.67

62. See notes 9-13 and accompanying text supra.

63. See, e.g., Fernley v. Board of Supervisors, 76 Pa. Commw. 409, 464 A.2d 587, 589 (1983). Judge Craig, writing for the Fernley court, observed that “the fair share analysis most certainly embraces total exclusion and is not to be used apart from total exclusion cases, that is, only in partial exclusion cases.” Id. For an illustration of the distinction between total and partial exclusion, also known as “tokenism,” compare discussion of Girsh at notes 38-53 and accompanying text supra, with the discussion of Township of Willistown v. Chesterdale Farms at notes 68-75 and accompanying text infra.

64. See Developments in the Law—Zoning, supra note 2, at 1636. The judicial principle of regionalism provides that a “locality is liable if it fails to provide for its fair share of the regional housing need.” Id. at 1640. The Pennsylvania and New Jersey courts are not in concert in their application of the concept of regionalism. For a discussion of the Pennsylvania courts’ application of regionalism as compared with the application of regionalism by the New Jersey courts, see note 86 infra.

65. The “fair share” principle was first enunciated in Mount Laurel I, 67 N.J. 151, 336 A.2d 713 (1975). In finding a suburban zoning ordinance invalid, the New Jersey Supreme Court was faced with the issue of whether a developing municipality could establish a system of land-use regulation which made it physically and economically impossible to provide low and moderate income housing within the municipality. Id. at 173, 336 A.2d at 724. The Mt. Laurel I majority concluded that “every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity . . . at least to the extent of the municipality’s fair share of the present and prospective regional need therefor.” Id. at 184, 336 A.2d at 724 (emphasis added). For a comparison of the New Jersey fair share approach with the Pennsylvania fair share approach, see note 86 infra.

66. See National Land, 419 Pa. at 532, 215 A.2d at 612 (“zoning ordinance whose primary purpose is to prevent the entrance of newcomers . . . cannot be held valid”). See also Concord Township, 439 Pa. at 474, 268 A.2d at 768-69 (“[i]t 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”); Girsh, 438 Pa. at 242, 253 A.2d at 397 (“[t]he question posed is whether the township can stand in the way of natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live”).

Township of Willistown v. Chesterdale Farms, Inc. was the first Pennsylvania Supreme Court case that attempted to invoke regionalism as an operative standard for determining whether an ordinance was exclusionary. In *Willistown*, a plurality of the court was faced with the issue of whether a zoning ordinance that provided less than one percent of its total acreage for apartment-type dwellings was exclusionary. The court cited to both *Appeal of Girsh* and *National Land*, and reasoned that because a zoning ordinance must be reasonable and its primary purpose must not be to prevent the entrance of newcomers into the municipality, the ordinance in question was "'exclusionary' in that it [did] not provide for a fair share of the township acreage for apartment construction." Thus, *Willistown* illus-

68. 462 Pa. 445, 341 A.2d 466 (1975). In *Willistown*, the developer desired to construct apartments on a tract of land that was zoned for single-family residential use. *Id.* at 447, 341 A.2d at 467. The developers' proposal was rejected by the township. *Id.* Shortly after the *Girsh* decision, the developers again applied for a building permit and additionally filed an action in mandamus alleging that in light of *Girsh*, the ordinance was unconstitutional. *Id.* While the township subsequently rezoned 80 acres to allow apartments to be built, the tract owned by the developers was not within the rezoned area. *Id.* Consequently, the developers request for a building permit was denied by the zoning hearing board. *Id.* The developers appealed to the Court of Common Pleas for Chester County, which upheld the zoning board's decision but declared the new ordinance unconstitutional. *Id.* Both parties sought allocatur, which was granted by the Pennsylvania Supreme Court. *Id.* at 447-48, 341 A.2d at 467.

69. *Id.* at 447-50, 341 A.2d at 467-69. Justice O'Brien, writing for the court, was joined by Justice Eagen and Justice Nix. *See id.* The plurality found that the zoning ordinance in question was exclusionary because it did not provide for a fair share of apartment construction. *Id.* at 449-50, 341 A.2d at 468. Justice Manderino concurred in the result. *Id.* at 451, 341 A.2d 469 (Manderino, J., concurring). Justice Roberts also concurred, filing a separate opinion. *Id.* at 454, 341 A.2d at 471 (Roberts, J., concurring). The sole dissenting opinion was filed by Justice Pomeroy. *Id.* at 451, 341 A.2d at 469 (Pomeroy, J., dissenting). Chief Justice Jones did not participate in the consideration of the decision. *Id.* at 450, 341 A.2d at 469.

70. *Id.* at 448, 341 A.2d at 467. At the time the suit was instituted, only 80 of 11,589 acres in the township were available for apartment development. *Id.*

71. *Id.* Both the developer and the township based their arguments on the *Girsh* decision, which had held that a zoning ordinance that did not provide for apartment development anywhere within the zoning municipality was exclusionary. For a discussion of *Girsh*, see notes 38-56 and accompanying text supra. In *Willistown*, the township argued that because the ordinance provided for an 80-acre site upon which apartments could be built, the ordinance met the *Girsh* mandate. 462 Pa. at 448, 341 A.2d at 467. In contrast, the developer contended that the rezoning of only 80 acres out of 11,589 acres in the township constituted "tokenism" and was an exclusionary land-use restriction within the reasoning of *Girsh*. *Id.*

72. *See Girsh*, 437 Pa. at 241, 263 A.2d at 397 ("[t]o be constitutionally sustained, the appellee's land-use restriction must be reasonable"); *National Land*, 419 Pa. at 532, 215 A.2d at 612 ("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").

73. 462 Pa. at 450, 341 A.2d at 468. The *Willistown* plurality quoted the following language from *Concord Township*:

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
trates that, even where there is not a total exclusion of apartment development, a zoning ordinance may nonetheless be deemed exclusionary if the zoning provision sets an amount of acreage for apartment development which does not constitute a fair share of the regional demand.

Two years later, in *Surrick v. Zoning Hearing Board of Upper Providence Township*, the Pennsylvania Supreme Court gave majority approval to the fair share approach articulated by the Willistown plurality. Although Justice Nix, writing for the *Surrick* majority, purported to establish a new three-prong “analytical matrix,” this approach did not effect a significant departure from prior jurisprudence.

Id. at 449, 341 A.2d at 468 (quoting *Concord Township Appeal*, 349 Pa. at 474, 268 A.2d at 768-69 (footnotes and citations omitted)).

Because the township had rezoned 80 acres for apartment development, the ordinance no longer amounted to a total exclusion. *Id.* However, the Willistown plurality concluded that “the prevention of 'newcomers' is not limited to total exclusion, but also selective admission.” *Id.* at 449, 341 A.2d at 468 (emphasis added).

Our review of the record convinces us that the township zoning ordinance which provides for apartment construction in only 80 out of a total 11,589 acres in the township continues to be 'exclusionary' in that it does not provide for a fair share of the township acreage for apartment construction.

It is noted that the only affirmative obligation placed upon the zoning municipality was to set aside a fair share of township acreage for apartment development. *See id.* Cf. *Mt. Laurel I*, 67 N.J. 151, 336 A.2d 713 (1975) (zoning municipality under obligation to provide an opportunity for low and moderate income housing).

In *Surrick*, a landowner sought to build both apartments and townhouses on a tract located in an area which was zoned to permit only single-family dwellings on one-acre lots. *Id.* at 186, 382 A.2d at 106. After his request for rezoning of the tract was denied, the landowner appealed to the board of adjustment requesting a variance and challenging the constitutionality of the ordinance. *Id.* at 186, 382 A.2d at 107. The zoning ordinance in question designated only 1.14% of total township acreage for apartment development. *Id.* at 187, 382 A.2d at 107. The area designated for apartment development also permitted commercial uses and was found to be already substantially developed. *Id.* The board denied the landowner's request, and the landowner subsequently appealed to the Supreme Court of Pennsylvania. *Id.* at 186, 382 A.2d at 107. For an in-depth discussion of *Surrick*, see Note, *Zoning—Constitutionality of Exclusionary Zoning Ordinance—Fair Shares* 17 Duq. L. Rev. 507 (1979).

Justice Nix wrote the majority opinion in which Justices Eagen and O'Brien joined. *Id.* at 185, 382 A.2d at 106. Justice Roberts filed a concurring opinion. *Id.* at 198, 382 A.2d at 114 (Roberts, J., concurring). Justice Mandel concurred in the result. *Id.* at 196, 382 A.2d at 112 (Mandel, J., concurring). Justice Nix, writing for the *Surrick* majority, concluded by stating that the court's analysis led inescapably to the conclusion that the facts of the instant case are legally indistinguishable from those in *Willistown*. Thus we hold that Upper Providence Township has not provided a 'fair share' of its land for development of multi-family dwellings.

*Id.* at 195-96, 382 A.2d at 112 (footnote omitted).
ture from prior Pennsylvania zoning law.\textsuperscript{78}

In \textit{Surrick}, the Pennsylvania Supreme Court was again faced with the issue of whether a zoning ordinance which effected a partial exclusion of apartments was invalid.\textsuperscript{79} In finding that the zoning ordinance was exclusionary, the court implemented a fair share analysis\textsuperscript{80} which required a cumulative determination of three separate issues: 1) whether the community is in the path of urban-suburban growth;\textsuperscript{81} 2) whether the particular community is already highly developed;\textsuperscript{82} and 3) whether the challenged zoning scheme causes an exclusionary result.\textsuperscript{83} This mode of analysis, although

\textsuperscript{78} See Note, supra note 77, at 514 (commenting that \textit{Surrick} is a mere reiteration of the standards set forth in prior Pennsylvania cases, and thus does not alter Pennsylvania's constitutional analysis of zoning ordinances). It has been suggested that each of the three prongs of the \textit{Surrick} test can be traced to language of earlier Pennsylvania decisions. See \textit{id}. For example, the first prong of the \textit{Surrick} test requires consideration of whether the community is in the path of urban-suburban growth. 476 Pa. at 192, 382 A.2d at 110. This inquiry contemplates the same issue raised by Justice Roberts in \textit{Girsh} when he stated that if the township in \textit{Girsh} was a "logical place for development," then it could not assert that it should not bear its rightful part of the regional burden. See \textit{Girsh}, 437 Pa. at 245, 263 A.2d at 390-99.

\textsuperscript{79} 476 Pa. at 187, 382 A.2d at 111. The zoning ordinance for Upper Providence Township provided 1.14% of the township land for multi-family development. \textit{id}. This issue was therefore similar to the issue decided in \textit{Willistown}, where 80 acres of 11,586 total township acres permitted development of multi-family dwellings. For a discussion of \textit{Willistown}, see notes 68-75 and accompanying text supra.

\textsuperscript{80} 476 Pa. at 189, 382 A.2d at 108. Justice Nix defined "fair share" as a principle which "requires local political units to plan for and provide land-use regulations which meet the legitimate needs of all categories of people who may desire to live within its boundaries." \textit{id}. (emphasis added). This definition is particularly interesting in light of the fact that the Pennsylvania Supreme Court has never required that a zoning ordinance provide for low and middle income housing. See \textit{Surrick}, 476 Pa. 182, 382 A.2d 105 (zoning ordinance which did not provide a fair share of land for development of multi-family dwellings was unconstitutionally exclusionary); \textit{Girsh}, 438 Pa. 237, 263 A.2d 395 (1970) (zoning ordinance must provide for apartment development somewhere within the municipality); \textit{Willistown}, 462 Pa. 445, 341 A.2d 466 (1975) (plurality opinion) (zoning ordinance must provide for a fair share of apartment development). \textit{Cf. Mt. Laurel I}, 67 N.J. 151, 336 A.2d 713 (1975) (zoning ordinance must provide a fair share of moderate and low income housing).

\textsuperscript{81} 476 Pa. at 192, 382 A.2d at 110. Specifically, the court stated, "The initial inquiry must focus upon whether the community in question is a logical area for development and population growth." \textit{id}.

\textsuperscript{82} \textit{id}. Justice Nix set forth the second prong of his analytical matrix to be the "present level of development within the particular community," and listed three factors which he perceived to be "highly relevant" to that determination: 1) the population density rate; 2) the percentage of total undeveloped land; and 3) the percentage available for the development of multi-family dwellings. \textit{id}.

It is submitted that the identification of the last of the three factors sheds uncertainty upon the \textit{Surrick} holding. It is questioned whether the 1.14% of land was not sufficient to constitute a fair share, or alternatively, whether the 1.14% was not a satisfactory allocation because the land was already highly developed.

\textsuperscript{83} \textit{id}. at 192-93, 382 A.2d at 110-11. The \textit{Surrick} court noted that although prior cases had focused on whether there was an exclusionary intent, it was their opinion that in light of \textit{Willistown}, evidence of exclusionary motive was not of critical importance. \textit{id}. at 193, 382 A.2d at 110. Rather, the \textit{Surrick} court stated, "\textit{Willistown} marked an implicit departure away from judicial inquiry into the motives underlying
a particular zoning ordinance. Our primary concern now is centered upon an ordinance's exclusionary impact.\(^{84}\) Id. at 193, 382 A.2d at 110-11 (footnotes omitted). In considering the effect of an alleged exclusion, Justice Nix stated that the extent of the exclusion must be considered. \(^{85}\) Id. at 194, 382 A.2d at 111. Specifically, this inquiry becomes a determination of whether there is a total exclusion of multi-family dwellings—which the Pennsylvania Supreme Court disapproved in Girsch Appeal—or, alternatively, whether the exclusion is partial. \(^{86}\) Id. In response, Justice Nix stated that where the amount of land zoned for multi-family dwellings is disproportionately small in relation to population growth pressure, the current level of population, and the amount of undeveloped land in the community, then the ordinance will be held to be exclusionary. \(^{87}\) Id.

84. \(^{84}\) Id. at 188-89, 382 A.2d at 108. \(^{85}\) See also Note, supra note 77, at 510 ("test used by the supreme court [in Surrick] to determine whether a zoning ordinance offends the Constitution of the United States or Pennsylvania was a substantive due process test").

85. 476 Pa. at 192, 382 A.2d at 110 ("[f]rom this body of law a useful analytical matrix can be synthesized to aid our review").

86. Two years prior to the Willistown case, the New Jersey Supreme Court coined the phrase "fair share." \(^{86}\) See Mt. Laurel I, 67 N.J. 151, 337 A.2d 713 (1975). The Willistown plurality chose to utilize this term in its analysis. \(^{87}\) See notes 74-75 and accompanying text supra. The Pennsylvania court gave majority approval to the term "fair share" in Surrick. \(^{88}\) See notes 76 & 77 and accompanying text supra.

The term "fair share" has enjoyed considerable popularity, and although it connotes the concepts of regionalism in both Pennsylvania and New Jersey, the affirmative duty placed on zoning municipalities is notably different in the two states. \(^{88}\) See notes 7, 8 & 75 supra. Specifically, the New Jersey "fair share" obligation mandates that a zoning ordinance provide a fair share of low and middle-income housing, whereas the Pennsylvania "fair share" obligation merely requires that the township provide a fair share of acreage for apartment development. \(^{89}\) See note 75 supra. It is submitted, therefore, that a Pennsylvania township could meet its fair share obligation if it provided for a reasonable number of luxury apartments, even if those apartments were well outside the financial means of low and middle income persons. Thus, the Pennsylvania courts have in effect applied the New Jersey principle of "fair share" in name, but not in spirit. For a discussion of the New Jersey fair-share standard, see note 2 supra.

This conceptual difference is also reflected in terms of standing: unlike New Jersey, Pennsylvania law does not permit non-residents to challenge zoning provisions. \(^{90}\) See note 27 supra. Although the Pennsylvania court has not acted on this distinction to require municipalities to zone for all economic classes, there are indications that the Pennsylvania court is aware of this distinction. \(^{91}\) See Surrick, 476 Pa. at 193, n.10, 382 A.2d at 110, n.10 ("it should be noted that the decisions of this court which have struck down zoning schemes have focused the analysis upon the restriction on or exclusion of uses, not on the exclusion of certain classes of people") (emphasis added).

87. \(^{88}\) See Note, supra note 77, at 515 (the Surrick analytical method does not represent a new test, but rather a refinement of the traditional substantive due process test).
III. THE RECENT DECISIONS: IMPLEMENTATION OF SERRUCK, AND DOES GIRSH SURVIVE?

After a six-year hiatus in the resolution of exclusionary zoning issues, the Supreme Court of Pennsylvania was recently confronted with a new aspect of exclusionary zoning: whether a township that does not stand in the path of development, or, alternatively, is already substantially developed, may validly preclude the development of multi-family dwellings where the township does not contain a fair share of acreage for multi-family housing.88

In Appeal of M. A. Kravitz, Inc., 89 the Pennsylvania Supreme Court was faced with the specific issue of whether the Wrightstown Township zoning ordinance, which failed to provide for townhouse development, could nonetheless be constitutional.90 In considering this issue, the court was faced with a township which had zoned only .6% of the total acreage for multi-family housing.91 In reversing the lower court’s invalidation of the ordinance,92 Justice Zappala, writing for the plurality of the court, concluded that


89. 501 Pa. 200, 460 A.2d 1075 (1983). On May 7, 1976, the M. A. Kravitz Co. petitioned the zoning board for Wrightstown Township for a curative amendment to the zoning ordinance and approval of a proposed townhouse development on a 96-acre tract of land. Id. at 503, 460 A.2d at 1077. The tract owned by the developer was zoned to permit only single-family residences. Id. The developer argued to the board that the ordinance was unconstitutional because it totally excluded townhouses, and, alternatively, that even if the ordinance did not totally exclude townhouse development, it resulted in a de facto exclusion because it made only token provision for such development. Id. Upon its finding that the ordinance permitted multi-family dwellings and that the township provided a “fair share” of population growth, the Board of Supervisors of Wrightstown Township denied the amendment. Id. The court of common pleas, without taking additional evidence, affirmed the board’s decision. Id. On appeal, the commonwealth court reversed and directed that the proposed development be given approval. M. A. Kravitz Co., Inc. Appeal, 53 Pa. Commonw. 622, 419 A.2d 227 (1980), rev’d, Appeal of M. A. Kravitz Co., 501 Pa. 200, 460 A.2d 1075 (1983). In support of its ruling, the commonwealth court cited a line of its own decisions which had held that an ordinance which prohibits or reasonably fails to provide for townhouses was unconstitutional. Id. For a discussion of commonwealth court decisions requiring a zoning municipality to provide the same protection to townhouses as it must for apartment development, see notes 57-61 and accompanying text supra.

90. 501 Pa. at 211, 460 A.2d at 1081 (“[t]he question which this case presents is whether a community must affirmatively provide for a particular architectural design in its plan for development”). The Kravitz court, in its analysis, drew a distinction between a prohibition of uses and failure to provide for uses. Id. In its discussion of this distinction, the court concluded that although a township may not totally prohibit certain uses, an ordinance will not be found unreasonable solely because it failed to provide for a particular use. Id. The Wrightstown ordinance did not expressly prohibit townhouses and defined this use in its definitional section. Id. at 703, n.1, 460 A.2d at 1077, n.1. Thus, even though the board had conceded that no separate townhouse district was established by the zoning ordinance, this failure to provide did not render the ordinance exclusionary. Id. at 211, 460 A.2d at 1081.

91. Id. at 214, 460 A.2d at 1083. Out of a total township area of 6,491 acres, only 40 acres were zoned for multi-family housing. Id. The appellant argued that
the failure to provide for townhouses nor the notably small percentage of acreage zoned for multi-family development rendered the ordinance unconstitutionally exclusionary.93

The Kravitz court first addressed the zoning ordinance's failure to provide for townhouses.94 Despite the commonwealth court's repeated utilization of the Girsh decision in order to require townhouse development,95 the Pennsylvania Supreme Court firmly concluded that the Girsh mandate was "explicitly limited to the facts peculiar to that case."96 Justice Zappala reasoned that because the township in Girsh had failed to provide for any type of multi-family housing, this failure "operated to exclude population growth, an impermissible result under the National Land rationale."97 While the commonwealth court had construed Girsh to mandate that ordinances which failed to provide for legitimate multi-family uses were per se unconstitutional,98 Justice Zappala interpreted Girsh to state that municipalities may

this amounted to "tokenism," similar to that found by the court in Willistown. Id. For a discussion of Willistown, see notes 68-75 and accompanying text, supra. 92. See M. A. Kravitz, Inc. Appeal, 53 Pa. Commw. 622, 419 A.2d 227 (1980). The commonwealth court concluded that the township ordinance failed to provide for townhouse development. Id. at 627, 419 A.2d at 230. The court reasoned that although the ordinance specifically provided for "Single-Family Attached Dwellings (Townhouses)," the multi-family district did not contemplate such development. Id. President Judge Crumlish granted relief for the developer by relying on prior commonwealth court decisions which had held that ordinances which prohibit townhouses throughout the entire municipality were unconstitutional. Id. at 625-28, 419 A.2d at 229-30. See, e.g., Appeal of Olson, 19 Pa. Commw. 514, 338 A.2d 748 (1975); Ellick v. Board of Supervisors, 17 Pa. Commw. 404, 333 A.2d 239 (1975); Camp Hill Dev. Co. v. Zoning Bd. of Adjustment, 13 Pa. Commw. 519, 319 A.2d 197 (1974). For a discussion of the commonwealth court's treatment of townhouses, see note 60 and accompanying text supra. 93. 501 Pa. at 216, 460 A.2d at 1082-83. Justice Flaherty concurred in the result reached by the plurality. Id., 460 A.2d at 1083 (Flaherty, J., concurring). Justice Nix filed a dissenting opinion in which Justice Larsen joined. Id., 460 A.2d at 1084 (Nix, J., dissenting). Justice Hutchinson filed a dissenting opinion. Id. (Hutchinson, J., dissenting). 94. 501 Pa. at 205, 460 A.2d at 1078-80. For a discussion of the distinction between a failure to provide for certain use, and a total prohibition of uses, see note 90 supra. 95. For a discussion of the application of the Girsh decision to townhouse development, see note 60 and accompanying text supra. 96. 501 Pa. at 206, 460 A.2d at 1079. Justice Zappala arrived at this limitation to the applicability of Girsh by citing to, and emphasizing, specific language in the Girsh decision. Id. Justice Zappala, in reviewing Justice Roberts' opinion in Girsh, wrote, [Justice Roberts] then observed that at least for purposes of this case, the failure to provide for apartments anywhere within the Township must be viewed as the legal equivalent of an explicit prohibition of apartment houses in the zoning ordinance. Id. (emphasis supplied by Justice Zappala). For a further discussion of Girsh, see notes 38-56 and accompanying text supra. 97. Id. at 208, 461 A.2d at 1079. 98. For a discussion of the commonwealth court's interpretation of Girsh at the time Kravitz was resolved by the supreme court, see notes 57-61 and accompanying
not frustrate population expansion by means of their zoning ordinances.99 Hence, under Justice Zappala's reading of Girsch, the Wrightstown zoning ordinance in Kravitz was not deemed exclusionary because it failed to specifically provide for townhouse development, since it did not have the effect of frustrating development.100

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99. 501 Pa. at 211, 460 A.2d at 1079-80. It is submitted that Justice Zappala's reading of Girsch is not fully consistent with the Girsch decision itself, nor with exclusionary zoning principles set forth in supreme court precedent. For example, in concluding his analysis in Girsch, Justice Zappala stated that the Pennsylvania Supreme Court has "implicitly acknowledged the primary position which the population issue occupies, subordinating the question of particular uses." Id. at 209, 460 A.2d at 1080. It is submitted that this proposition is untenable since Pennsylvania zoning law is premised upon "use" exclusion, rather than "class" exclusion. See Surrick, 476 Pa. at 193 n.10, 382 A.2d at 110, n.10. Justice Nix, writing for the Surrick court, added that "the decisions of this Court which have struck down zoning schemes have focused the analysis upon the restriction on or exclusion of certain uses, not on the exclusion of certain classes of people." Id. For example, the only relief ever granted by a Pennsylvania court in an exclusionary zoning challenge has been site-specific relief, that is permitting the landowner/developer to construct the previously prohibited use. Hyson, supra note 2, at 332-34. See, e.g., Surrick, 476 Pa. at 196, 382 A.2d at 12 (in finding that the township had not provided a fair share of its land for multi-family dwellings, the court directed that "zoning approval for appellant's land be granted and that a zoning permit be issued\). It is submitted that the notion of site-specific relief reflects the Pennsylvania Supreme Court's preference toward resolving exclusionary zoning problems on a "use" basis, rather than outwardly confronting the population expansion problem, as suggested by Justice Zappala.

Moreover, specific language in Girsch indicates that the Girsch court intended its holding to afford protection to apartments as a legitimate type of land use: "Apartment living is a fact of life that communities like Nether Providence must learn to accept. If Nether Providence is located so that it is a place where apartment living is in demand, it must provide for apartments in its plan for future growth..." 263 Pa. at 246, 263 A.2d at 399.

100. 501 Pa. at 208-11, 460 A.2d at 1080-83. The Kravitz plurality drew a distinction between ordinances that fail to provide for a specific use and ordinances that prohibit a specific use. Id. at 210-11, 460 A.2d at 1081. For an additional discussion of this distinction, see note 90 supra. This distinction is surprising in light of language in the Girsch opinion stating that a failure to provide is, in effect, a total prohibition. See Girsch, 437 Pa. at 241, 263 A.2d at 397 ("[a]t least for purposes of this case, the failure to provide for apartments anywhere within the area must be viewed as the legal equivalent of an explicit prohibition of apartment houses in the zoning ordinance").

Recently, the commonwealth court incorrectly applied this prohibition/failure-to-provide distinction in this area. See Fernley v. Board of Supervisors, 76 Pa. Commw. 409, 464 A.2d 587 (1983). In Fernley, the commonwealth court found that the Schuylkill Township zoning ordinance flatly prohibited multiple dwellings. Id. at 411, 464 A.2d at 588. The Kravitz decision suggested that in the case of a total prohibition, the Exton Quarries rationale would be applicable. Kravitz, 501 Pa. at 210-11, 460 A.2d at 1075 ("Whether a community could permissibly prohibit a given use... is a question which is not presented in this case. We suspect that the Exton Quarries rationale standing alone might control that question") (emphasis supplied). However, Justice Craig, writing for the commonwealth court in Fernley, nevertheless
The *Kravitz* court then turned to the issue of whether the Wrightstown ordinance was rendered exclusionary because it provided for less than one percent of the township's acreage for multi-family development. To resolve this issue, the *Kravitz* plurality applied the fair share test as articulated in *Surrick*. The plurality summarily dismissed the contention that the township did not provide a fair share of multi-family dwellings under the first inquiry of the *Surrick* test. Specifically, the *Kravitz* court found that the township was "not a logical place for rapid growth and development." Accordingly, the Pennsylvania Supreme Court concluded that the zoning ordinance was valid.

In addition to providing a safe-harbor for communities that do not lie in the path of future development, the Pennsylvania Supreme Court in *Appeal of Elocin, Inc.* similarly utilized the *Surrick* analysis to absolve substantial ambiguity in the first prong of the *Surrick* test and found that the area was not a logical place for development. 76 Pa. Commw. at 414, 464 A.2d at 590.


102. *Id.* For a discussion of the *Surrick* fair share test, see notes 81-83 and accompanying text supra.

103. 501 Pa. at 214-15, 460 A.2d at 1082-83. The initial factor in the *Surrick* analysis considers whether the community in question is in the path of urban-suburban growth. *Id.*

104. *Id.* The *Kravitz* court concluded that the local board had properly determined that the township was not a logical area for future development after it scrutinized the following factors: the distance between Wrightstown Township and major metropolitan areas, the lack of highway linkages and mass transportation, and the projected population growth. *Id.*

105. 501 Pa. 348, 461 A.2d 771 (1983). In *Elocin*, the developer proposed to construct both townhouses and mid- or high-rise apartments on a tract of land which was zoned to permit only single-family detached residences. *Id.* at 350, 461 A.2d at 772. The Board of Commissioners of Springfield Township denied the developer's curative amendments. *Id.* This decision was upheld by the Court of Common Pleas of Delaware County. *Id.* The commonwealth court reversed, holding that the zoning ordinance was invalid and remanded the case for reconsideration of Elocin's development proposal. 66 Pa. Commw. 28, 443 A.2d 1333, rev'd, Appeal of Elocin, Inc., 501 Pa. 348, 461 A.2d 771 (1983). On appeal to the Pennsylvania Supreme Court, the township sought reinstatement of the order of the court of common pleas, and the developer sought definitive relief without the necessity of a remand. 501 Pa. at 350, 461 A.2d at 772. At the time suit was instituted in the supreme court, the Springfield zoning ordinance made no provision for townhouses or mid- or high-rise apartments, although other types of multi-family uses were permitted in districts other than that in which the Elocin tract was located. *Id.* The commonwealth court had noted that a great number of these multi-family uses were twin-houses, which existed only as non-conforming uses. However, this fact escaped the notice of the plurality of the Pennsylvania Supreme Court. See 66 Pa. Commw. at 36-37, 443 A.2d at 1338. The Pennsylvania Supreme Court nonetheless acknowledged that 12% of the housing units were multi-family dwellings and that 4% of the total township acreage remained undeveloped. 501 Pa. at 331, 461 A.2d at 772.

Moreover, it is submitted that the *Elocin* decision should be considered only for the supreme court's determination that a substantially-developed community is relieved from providing additional multi-family housing, and not for its analysis of what constitutes a fair share. *Elocin* breaks with traditional Pennsylvania analysis of what "share" is allocated to a particular use by looking not at the ratio of acres zoned for a particular use to the total number of acres, but rather at the ratio of housing units.
tially-developed communities from a duty to provide additional multi-
family housing.\textsuperscript{106} Decided contemporaneously with \textit{Kravitz}, \textit{Elocin}
presented the supreme court with the issue of whether a community that is
already substantially developed may validly preclude the construction of
apartment buildings and townhouses.\textsuperscript{107} Relying on its decision in \textit{Kravitz},
the court found that the failure to provide for the specific use of townhouses
and mid-rise apartments did not render the zoning ordinance \textit{per se} invalid.\textsuperscript{108} Moreover, in a straightforward utilization of the \textit{Surrick} analytical
matrix,\textsuperscript{109} the \textit{Elocin} plurality upheld the constitutionality of the zoning or-
dinance, finding that "the refusal to allow the proposed development [was]
of a particular type to the total number of housing units. See 501 Pa. at 356, 461
A.2d at 771. The Pennsylvania Supreme Court has repeatedly defined the fair share
obligation to require that municipalities provide a fair share of total township acre-
age for multi-family development. \textit{Surrick}, 476 Pa. at 196, 382 A.2d at 112; \textit{Willis-
town}, 462 Pa. at 450, 341 A.2d at 468. However, it is observed that unlike prior
exclusionary zoning decisions decided on fair share grounds, the \textit{Elocin} court did not
provide information concerning the total township acreage which permitted multi-
family development. \textit{Id.} at 351-53, 461 A.2d at 772-74. Cf. \textit{Kravitz}, 501 Pa. at 200,
460 A.2d at 1075 (40 acres out of a total township area of 6,491 acres permitting
multi-family development); \textit{Surrick}, 476 Pa. at 187, 382 A.2d at 107 (1.14% of total
township acreage was designated as permitting apartment use); \textit{Willistown}, 462 Pa. at
448, 341 A.2d at 467 (80 acres out of total 11,589 acres—or less than one percent—
was rezoned to permit apartment development).

\textsuperscript{106} 501 Pa. at 353, 461 A.2d at 773. Such an extension of the first prong of the
\textit{Surrick} test was predictable in light of Justice Nix's \textit{Surrick} footnote which elaborated
on his discussion of whether a community is in the path of urban-suburban growth:
Analytically, the present level of community development could be in-
cluded under the initial inquiry as to whether a community was a logical
area for population growth and development. Commentators have noted,
and probably correctly so, that a particular community might lie along a
corridor of population expansion but already be so highly developed that it
cannot properly be called a "developing" community.

476 Pa. at 192 n.9, 382 A.2d at 110 n.9.

\textsuperscript{107} 501 Pa. at 352, 461 A.2d at 772. \textit{But see} Appeal of Silver, 35 Pa. Commw.
569, 387 A.2d 169 (1978). Five years prior to the supreme court's \textit{Elocin} opinion, the
commonwealth court was confronted with the question of whether a developed com-
community could deny a curative amendment to permit the construction of multi-family
residences. \textit{Id.} at 570-71, 387 A.2d at 170. The commonwealth court applied \textit{Surrick}
and first inquired whether the community was a logical area for development. \textit{Id.} at
572, 387 A.2d at 171. At the time the suit was instituted, the portion of land upon
which multi-family units could be developed constituted only 3.5% of the total acre-
age. \textit{Id.} Although the ordinance was found non-exclusionary on other grounds, the
\textit{Silver} opinion is noteworthy because the Court premised its holding on 100% de-
velopment capacity, thereby indicating in its opinion that unless a community is 100%
developed, it is not "fully" developed. \textit{Id.} at 574, 387 A.2d at 172.

\textsuperscript{108} \textit{Id.} at 353, 481 A.2d at 773. The \textit{Elocin} court, through Justice Zappala,
stated, "We find the analysis of \textit{Kravitz} to be controlling and incorporate it here." \textit{Id.}

\textsuperscript{109} \textit{Id.} Justice Zappala reiterated the three prong test of the \textit{Surrick} "analytical
matrix" and stated,

\textit{Applying the test of \textit{Surrick}} . . . we consider whether the area is logical for
development and growth, the degree to which it is developed, and whether
the exclusion is partial or total. Springfield Township is not a logical area
for development and growth.

\textit{Id.}
reasonably related to the public health, safety and welfare” of the community.\footnote{110} 
\textit{Elocin} is an important addition to Pennsylvania zoning law because it establishes that a substantially, though not fully,\footnote{111} developed community will be relieved from the obligation of further accommodating the housing needs of an expanding society.

IV. Analysis

Since \textit{National Land}, which was decided in 1965, the Pennsylvania Supreme Court has recognized that zoning may not be used to frustrate the satisfaction of regional housing needs.\footnote{112} However, rather than assume responsibility for imposing an affirmative duty upon municipalities to zone for those persons in the region who need housing, the court has been reluctant to take an active role in the exclusionary zoning arena.

This reluctance to impose an affirmative duty upon suburban communities to accommodate regional housing needs is first illustrated by the early cases of \textit{National Land}, \textit{Concord Township}, and \textit{Girsh}, wherein the justices attempted to eradicate the exclusionary effect of freezing population density levels by employing a piecemeal approach.\footnote{113} Specifically, the justices required municipalities to rezone tract size where the challenged mischief was large-lot zoning, and required local zoning boards to grant approval for apartment development where the exclusionary result was due to a total exclusion of multi-family housing.\footnote{114}

The insufficiency of these analyses soon became evident as townships discovered “tokenism.” By allocating only a token amount of acreage for apartment development, suburban communities could effectively preserve their low-density character without falling prey to the mandate that municipalities may not frustrate population growth by totally excluding apartments.\footnote{115}

\footnote{110}{\textit{Id.}}
\footnote{111}{\textit{Id.} at 351, 461 A.2d at 772. Springfield Township contains approximately 160 acres of undeveloped land.}
\footnote{112}{\textit{See National Land}, 419 Pa. 504, 532, 215 A.2d 497, 612 (“[a] zoning ordinance whose primary purpose is to prevent the entrance of newcomers . . . can not be held valid”).}
\footnote{113}{For a discussion of the \textit{National Land} and \textit{Concord Township} decisions, see notes 17-37 and accompanying text \textit{supra}. For a discussion of \textit{Girsh}, see notes 38-61 and accompanying text \textit{supra}.}
\footnote{114}{\textit{See, e.g., Girsh}, 437 Pa. 237, 263 A.2d 365 (1970) (reversing order of the Court of Common Pleas of Delaware County upholding zoning scheme which did not provide for apartments); \textit{National Land}, 419 Pa. at 504, 215 A.2d at 597 (affirming order of Court of Common Pleas of Chester County that zoning ordinance providing for four-acre minimum lot requirements was unconstitutional).}
\footnote{115}{\textit{See, e.g., Willistown}, 462 Pa. 445, 341 A.2d 466 (1975). In its earlier \textit{Girsh} decision, the Pennsylvania Supreme Court stated that the zoning municipality in that case, which did not provide for multi-family development, “must provide for apartments in its plan for future growth.” \textit{Girsh}, 438 Pa. at 246, 273 A.2d at 339. Hence, by allocating only a token amount of acreage for multi-family development, the township of Willistown attempted to maintain its suburban nature without fall-}
In a seemingly proper response, a plurality of the Supreme Court of Pennsylvania adopted a fair share approach.\textsuperscript{116} However, this approach, as applied by the Pennsylvania Supreme Court, does not serve to provide adequately for population growth. For example, the Pennsylvania fair-share obligation requires only that municipalities provide a fair share of total township acreage for apartment development.\textsuperscript{117} This requirement does not necessarily benefit moderate income families since a municipality’s zoning board could grant approval only for luxury apartments, beyond the financial means of such families.\textsuperscript{118} In this manner, a suburban community could preserve its exclusive nature by selectively admitting affluent persons and by neglecting to provide housing for various categories of persons in need of housing. It is suggested that even though the fair-share approach is more jurisprudentially satisfying than a piecemeal approach to exclusionary zoning, the adoption of a fair-share standard by the Pennsylvania Supreme Court cannot be considered an activist position since it does not require municipalities to provide for an economically-balanced fair share of development.

Regardless of this weakness, the Pennsylvania Supreme Court has developed the fair-share approach into a complex “analytical matrix.”\textsuperscript{119} Although this analytical matrix was utilized initially in Surrick to invalidate a zoning ordinance found to be exclusionary, recent decisions demonstrate that the Surrick analysis can be used as a shield against development. In the Kravitz and Elocin decisions, the Pennsylvania Supreme Court applied the Surrick test and enabled zoning municipalities to absolve themselves from the obligation to provide housing by establishing that the community is either not in the path of future development or is already substantially devel-

\textsuperscript{116} Willisown, 462 Pa. 445, 449-50, 341 A.2d 466, 468 (1975) (“[o]ur review of this record convinces us that the zoning ordinance which provides for apartment construction in only 80 acres out of a total of 11,589 acres in the township continues to be ‘exclusionary’ in that it does not provide for a ‘fair share’ of the township acreage for apartment construction”) (emphasis added).

\textsuperscript{117} See Surrick, 476 Pa. at 195-96, 382 A.2d at 112 (township “has not provided a ‘fair share’ of the township acreage for apartment construction”).

\textsuperscript{118} See note 86 supra. In Pennsylvania, the only relief granted pursuant to an exclusionary zoning challenge is site-specific relief. See Hyson, supra note 2, at 332-34. Hence a developer could successfully challenge a zoning scheme on the ground that the scheme is exclusionary and then proceed to develop only luxury apartments. See, e.g., Girsch, 438 Pa. at 238, 263 A.2d 396 (1970) (“appellant sought a building permit to construct two nine-story luxury apartments”). Moreover, the probability of this occurrence is increased by the fact that only landowners have standing to challenge the zoning scheme. For a discussion on the statutory limits to standing in Pennsylvania, see note 27 supra.

\textsuperscript{119} Surrick, 476 Pa. at 183, 382 A.2d at 105. For a discussion of the Surrick analytical matrix, see notes 76-87 and accompanying text supra.
These decisions may be viewed as further evidence of the Pennsylvania Supreme Court’s reluctance to take a position which would fulfill its stated desire to accommodate regional housing needs. In light of these judicial developments, it is submitted that if Pennsylvania is truly committed to providing housing for her citizens, she must take one step backwards, before she may proceed forward in resolving the exclusionary zoning dilemma.121

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120. For a discussion of the Kravitz and Elocin decisions, see notes 88-111 and accompanying text supra.

121. See Developments in the Law—Zoning, supra note 2, at 1639-40. Pennsylvania has implemented its judicial attacks by designating favored uses. Id. This implementation should be compared with that of New Jersey and New York, which require that communities provide for an “appropriate variety and choice of housing.” Id. The Harvard commentators suggest this difference in theory is more than merely semantic. Id. at 1640. The commentators have submitted the following:

Concern for balanced housing [such as in New Jersey] would seem to lead to broader judicial activism in reshaping offending plans, since creating a balanced community necessarily involves review of the entire ordinance. Limiting the court’s focus to protecting specific uses may not solve the underlying aspect of exclusionary practices; providing an area for apartments while maintaining large-lot zoning for single family homes everywhere else may serve to ensure contained exclusion. Thus the more informed view would seem to favor the broader vision of assuring an adequate overall mix of residential uses.

Id.

It is therefore suggested that in light of this difference in approach between the Pennsylvania and New Jersey supreme courts, even the Elocin and Kravitz decisions represent a step backwards for the Pennsylvania court in two respects: first, despite the utilization of the Surrick “fair share” test, the cases represent a return to principles of favored uses; second, by disregarding any protection that townhouses may have previously enjoyed under the Commonwealth’s interpretation of Girsh, the Pennsylvania court has further impaired the possibility that municipalities would provide an overall mixture of residential uses.