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Zoning - Constitutionality of Exclusionary Zoning Ordinance - Fair Share

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Recent Decisions

ZONING — CONSTITUTIONALITY OF EXCLUSIONARY ZONING ORDINANCE — FAIR SHARE — The Supreme Court of Pennsylvania has held that a suburban zoning ordinance which limited multi-family dwellings to a forty-three acre commercial district was unconstitutionally exclusionary, since it did not provide a fair share of the township's 3,800 acres for development of multi-family dwellings.

Surrick v. Zoning Hearing Board, 382 A.2d 105 (Pa. 1977).

In 1972, Robert B. Surrick was the equitable owner of a 12.25 acre tract of land and the legal owner of an adjacent ten acre tract in Upper Providence Township, a suburb of Philadelphia.[1] The property was located in an A-1 Residential zone in which only single family dwellings on one acre lots were permitted under the township zoning ordinance.[2] The zoning ordinance restricted multi-family dwellings or apartments to the forty-three acre B-Business district, an area that constituted 1.14% of the township's 3,800 acres.[3] This district was substantially developed, while one fourth of the total township acreage remained undeveloped.[4]

Desiring to build garden apartments on the 12.25 acre tract, Surrick applied unsuccessfully to the township Board of Supervisors to rezone the property to B-Business.[5] He then sought a building per-

1. Surrick acquired the 10 acre tract in 1968, and entered into an agreement to purchase the 12.25 acre tract immediately adjoining it in June of 1971. The agreement was contingent upon his ability to secure permission to build apartments on the property. Brief for Appellant at 3-4, Surrick v. Zoning Hearing Bd., 382 A.2d 105 (Pa. 1977) [hereinafter cited as Brief for Appellant].

2. Surrick v. Zoning Hearing Bd., 382 A.2d 105, 106 (Pa. 1977). The area immediately surrounding Surrick's property was utilized primarily for single family residences on lots of one or more acres, with the exception of a gas station one hundred feet to the south, a junior high school on a 30 acre tract to the north, a 95 acre park to the east, and several churches. Brief for Appellant, *supra* note 1, at 3.

3. 382 A.2d at 107. The northern boundary of the B-Business zone was the southern boundary of Surrick's tract. Most of the zone extended eight to ten blocks south from this point in a section 175 feet wide on either side of Providence Road, the eastern boundary of Surrick's tract. *Id.* The gas station south of Surrick's property was, however, the only business use north of the Media Bypass, a highway running parallel to and about five hundred feet to the south of Surrick's southern boundary. Surrick v. Zoning Hearing Bd., 11 Pa. Commw. Ct. 607, 610, 314 A.2d 565, 566-67 (1974), *rev'd,* 382 A.2d 105 (Pa. 1977).

In addition to multi-family dwellings, commercial uses were permitted in the B-Business zone. 382 A.2d at 107 & n.4.

4. *Id.* at 107.

5. Brief for Appellant, *supra* note 1, at 4.

mit to erect 187 apartment units, but the request was refused by the township Building Inspector.[6] Thereafter, Surrick appealed to the Zoning Hearing Board of Upper Providence Township,[7] which denied his request for a variance[8] and made findings of fact concerning the constitutionality of the ordinance.[9]

Surrick appealed the decision of the Board to the Court of Common Pleas of Delaware County,[10] which upheld the denial of the variance and concluded that the zoning ordinance was not unconstitutional.[11] In considering the constitutionality of the ordinance, the court emphasized that the division of the township into use districts[12] promoted the general welfare, since it contributed to orderly development of the community.[13] Based upon data pertaining to

6. Brief on Behalf of Intervenors Collectively Known as the Citizens on Zoning at 3, Surrick v. Zoning Hearing Bd., 382 A.2d 105 (Pa. 1977).

7. Brief for Appellant, *supra* note 1, at 5. Under the Pennsylvania Municipalities Planning Code, each municipality that enacts a zoning ordinance pursuant to the Act or prior enabling codes must have a zoning hearing board consisting of three residents of the municipality, appointed by the governing body. PA. STAT. ANN. tit. 53, §§ 10901, 10903 (Purdon 1972). The functions of the Board include hearing challenges to the validity of zoning ordinances and requests for variances. *Id.* §§ 10910, 10912.

8. A variance from the provisions of a zoning ordinance may be granted only if unique physical conditions peculiar to the property in question, and not caused by the individual applying for the variance, make it impossible to develop the property as zoned, and thus inflict an unnecessary hardship on the applicant. The variance must not alter the essential character of the neighborhood, and must be the minimum modification of the regulations necessary to give relief. PA. STAT. ANN. tit. 53, §§ 10912(1)-10912(5) (Purdon 1972).

9. 382 A.2d at 107. At the time of the hearing, the Board was not authorized to determine constitutional claims, but could only make findings of fact as to these claims. PA. STAT. ANN. tit. 53, § 10910 (Purdon 1968) (*amended* 1972). Since then, this section has been amended to provide that the Board "shall decide all contested questions," in addition to making findings of fact. PA. STAT. ANN. tit. 53, § 10910 (Purdon 1972).

10. The Code provides that appeals from decisions of the Zoning Hearing Board as to variance requests and constitutional challenges are to be taken to the court of common pleas of the county in which the land involved is located. PA. STAT. ANN. tit. 53, § 10102 (Purdon 1972).

11. Appeal of Surrick, 61 Del. Cty. 72 (1973), *aff'd*, 11 Pa. Commw. Ct. 607, 314 A.2d 565 (1974), *rev'd*, 382 A.2d 105 (Pa. 1977).

12. Use districts are legislative divisions of a community in which only certain designated uses of land, such as residential, industrial, and commercial uses, are permitted. *See* Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 110, 141 A.2d 606, 609 (1958). Such divisions are authorized by the Pennsylvania Municipalities Planning Code. Municipalities may enact zoning ordinances to accomplish any of the purposes of the Code, PA. STAT. ANN. tit. 53, § 10601 (Purdon 1972), which include guiding "uses of land and structures." *Id.* § 10105. The Code also provides that zoning ordinances may "permit, prohibit, regulate, restrict and determine . . . uses of land." *Id.* § 10603(1).

13. 61 Del. Cty. at 74. A zoning ordinance that restricts the use of property is an unconstitutional taking unless the restriction contributes to the public health, safety, morals or welfare, and is thus a legitimate exercise of the state's police power. Village of Euclid v.

apartment construction in the township, the court found that the ordinance had no de facto exclusionary impact.[14] The common pleas court believed that a variance should not be granted since the tract could be reasonably developed as currently zoned and the only resulting hardship to Surrick was essentially "self-inflicted."[15]

The Pennsylvania Commonwealth Court agreed not only with the lower court's conclusion that Surrick had failed to prove the hardship required to obtain a zoning variance,[16] but also agreed that the township's zoning pattern advanced the general welfare of the community.[17] Therefore the court found that the one-acre minimum lot size in the A-1 Residential district was not unconstitutionally exclusionary,[18] and additionally found that the intent of the requirement concerning the lot size was not to zone out new residents or to avoid

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Ambler Realty Co., 272 U.S. 365, 387 (1926). In *Euclid*, an ordinance dividing a municipality into use districts was held to be constitutional under this test as against a landowner's claim that designation of his land as residential was an unconstitutional taking since it deprived him of the additional value for which the land could be sold for industrial use. *Id.* at 384-85, 397.

See Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 141 A.2d 606 (1958) (zoning ordinance setting aside districts for single family residences held valid); Bilbar Construction Co. v. Easttown Township, 393 Pa. 62, 141 A.2d 851 (1958) (ordinance establishing one acre minimum lot size in certain areas found to promote general welfare). *See also* note 25 and accompanying text *infra*.

14. Since 1960, 385 apartment units and 697 single-family dwellings had been constructed in the township, a ratio of one apartment for every 1.5 single family homes. Of the 2,697 residential units in the township at the time of the trial, 565 were rental units. 61 Del. Cty. at 74-75.

An exclusionary zoning ordinance is one which "render[s] . . . housing costs so prohibitively high that low and moderate-income families cannot afford to buy." Township of Willistown v. Chesterdale Farms, Inc., 7 Pa. Commw. Ct. 453, 468, 300 A.2d 107, 115 (1973), *aff'd*, 462 Pa. 445, 341 A.2d 466 (1975). A zoning ordinance can also be exclusionary if it fails to provide for multi-family dwellings and thus excludes those who can only afford to rent. Appeal of Girsh, 437 Pa. 237, 242, 263 A.2d 395, 397 (1970). An exclusionary zoning ordinance is unconstitutional. *See* notes 26 & 27 and accompanying text *infra*.

15. 61 Del. Cty. at 77-78. Surrick argued that since the purchase price of the tract in the agreement of sale was $225,000, and the maximum price at which it would have been profitable to develop the land as zoned was $195,000, the single family residential zoning imposed a hardship on him. The court quoted Appeal of Gro, 440 Pa. 552, 269 A.2d 876 (1970), for the proposition that a buyer who agrees to a purchase price which renders it impossible to develop the land as zoned imposes the hardship upon himself. 61 Del. Cty. at 77-78. A variance may not be granted to alleviate a self-inflicted hardship. For an explanation of the criteria necessary for a variance grant, see note 8 *supra*.

16. 11 Pa. Commw. Ct. at 613-15, 314 A.2d at 568-69.

17. *Id.* at 616-17, 314 A.2d at 569-70.

18. *Id.* at 615-17, 314 A.2d at 569-70. The court found that the ordinance was not invalid on its face, since it did not totally fail to provide for apartments; it also found no de facto exclusionary impact. *Id.*

placing burdens on municipal services.[19]

The Pennsylvania Supreme Court reversed[20] the decision of the commonwealth court and ordered that a building permit be issued to Surrick and zoning approval granted for his land.[21] A majority of the court, speaking through Justice Nix, focused on the question of whether the Upper Providence Township zoning ordinance was unconstitutionally exclusionary.[22] The test used by the supreme court to determine whether a zoning ordinance offends the Constitutions of the United States[23] or Pennsylvania[24] was a substantive due process test: a zoning ordinance is constitutional only if it bears a substantial relationship to the health, safety, morals or general welfare of the community.[25] Relying upon prior Pennsylvania Supreme Court cases,[26] Justice Nix maintained that the court had in the past

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19. *Id.* at 617, 314 A.2d at 570. For the proposition that exclusionary intent is necessary for an ordinance to be invalid, the court cited Nat'l Land and Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965). *See* note 26 *infra*.

20. The case was heard before Chief Justice Jones, and Justices Eagen, O'Brien, Roberts, Nix and Manderino. 382 A.2d at 106. Chief Justice Jones did not participate in the decision, and Justice Pomeroy did not participate in the consideration or decision of the case. Justices Manderino and Roberts concurred in the result, and Justice Roberts filed a concurring opinion. *Id.* at 112, 114-15.

21. 382 A.2d at 112.

22. *Id.* at 106. Surrick also argued that the court of common pleas denied him due process when it accepted the findings of fact made by the Zoning Hearing Board concerning facts which were determinative of his constitutional rights, since the members of the Board, as residents of Upper Providence, were persons whose private interests were at stake. Brief for Appellant, *supra* note 1, at 23-33. This argument, rejected by the commonwealth court, 11 Pa. Commw. Ct. at 609-13, 314 A.2d at 567-68, was not considered in the supreme court opinion. The court also did not consider whether Surrick was entitled to a variance.

23. U.S. CONST. amend. V provides: "No person shall . . . be deprived of . . . property, without due process of law . . . ."

24. PA. CONST. art. I, § 1 provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of . . . acquiring, possessing and protecting property . . . ."

25. 382 A.2d at 108 (citing Nat'l Land and Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965)). *See* note 26 *infra*.

26. Justice Nix cited Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970), and Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970), as support for this implicit conclusion. 382 A.2d at 108. The majority in Kit-Mar found that the two and three acre minimum lot sizes in Concord Township's ordinance were not related to police power goals, 439 Pa. at 470-71 & 470 n.1, 268 A.2d at 766-67 & 766 n.1, and that these restrictions were invalid as exclusionary. *See id.* at 470-78, 268 A.2d at 766-70. The *Girsh* court held that an ordinance which made no provision for apartments was both unreasonable and exclusionary. 437 Pa. at 242-45, 263 A.2d at 397-99. Neither court explicitly stated that an exclusionary zoning ordinance cannot bear a substantial relationship to public health, safety, morals or general welfare.

Girsh and *Kit-Mar* each employed much of the reasoning used in Nat'l Land and Inv. Co.

implicitly concluded that a zoning ordinance which is exclusionary or unduly restrictive does not bear the requisite substantial relationship to these legitimate police power objectives.[27]

The majority also held that municipalities have an obligation to incorporate the fair share principle when enacting local zoning ordinances.[28] The fair share principle, adopted by a plurality of the court in *Township of Willistown v. Chesterdale Farms, Inc.*,[29] requires local political units designing land use regulations to plan and provide for the legitimate needs of all categories of people who may desire to live within the municipality.[30] In discussing the fair share principle, Justice Nix noted that it was adopted to implement concepts found in prior Pennsylvania cases. Among the concepts embraced by that principle are that a municipality, which is a logical place for population growth, cannot refuse to bear its rightful part of the burden of growth, and that a municipality must take regional housing needs into account in land use planning.[31] The court did not

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v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965). In *National Land*, the Pennsylvania Supreme Court invalidated a zoning ordinance that established a four acre minimum lot size in 30% of a suburban township's 8.2 square miles, refusing to accept the public health, safety, and general welfare arguments proffered by the township. *Id.* at 525-31, 215 A.2d at 608-12. *National Land* set forth explicitly the conclusion implicit in *Girsh* and *Kit-Mar* concerning the relationship between exclusionary zoning and the general welfare: "It is clear . . . that the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive and exclusionary." *Id.* at 533, 215 A.2d at 612.

27. 382 A.2d at 108.

28. *Id.*

29. 462 Pa. 445, 341 A.2d 466 (1975). In *Willistown*, the court invalidated a zoning ordinance amendment which set aside for apartments only 80 of the 11,589 acres in the township. The ordinance was found to be exclusionary because it did not provide a fair share of the township land for apartments. *Id.* at 449-50, 341 A.2d at 468.

30. 382 A.2d at 108. The fair share principle was first enunciated in S. Burlington Co. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), in which the court found a zoning ordinance of a suburb of Camden invalid. The New Jersey court expressed the issue in that case as whether a developing municipality could establish a system of land use regulation which makes it physically and economically impossible to provide low and moderate income housing within the municipality. *Id.* at 173, 336 A.2d at 724. The majority concluded "[t]hat 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 174, 336 A.2d at 724 (emphasis added).

31. 382 A.2d at 108 (citing Appeal of Girsh, 437 Pa. 237, 245, 263 A.2d 395, 399 (1970)). The court noted that its ruling in Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975), rested upon the premise established in *Girsh* that a municipality must bear its rightful part of the burden, and that this premise incorporated the broader principle that a municipality cannot plan in isolation.

perceive the fair share principle to be a new test of constitutionality in addition to the substantive due process test, but rather as another method of viewing an ordinance to ascertain whether its provisions bear a substantial relationship to the public health, safety, morals or general welfare.[32]

Justice Nix also recognized that critics of the fair share principle have expressed concern that its adoption would place courts in the position of super boards of adjustment, thereby usurping a function that is more properly legislative or administrative in nature. However, he explicitly denied any intent to involve the courts in such legislative or administrative functions. He perceived the role of the courts in fair share cases as being limited to a determination of whether the zoning ordinance adequately balances and weighs the factors involved in local and regional housing needs and development. Thus, the actual fashioning of zoning formulas is left to the zoning hearing boards and local governments.[33]

Justice Nix then outlined an analytical method for ascertaining whether a zoning ordinance is exclusionary. In prior Pennsylvania cases, the court had considered three factors in making this determination:[34] whether the community was a logical area for development and population growth, the amount of land available for develop-

32. The court stated: "The 'fair share' requirement, as we view it, is merely an analytical strand in the substantial relationship test already employed by this Court in reviewing zoning ordinances." 382 A.2d at 109 n.8.

33. *Id.* at 109-10.

34. *Id.* at 110. In support of the first factor, Justice Nix cited Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970), and Nat'l Land and Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965). *See* note 26 *supra*. He also relied upon Waynesborough Corp. v. Easttown Township Zoning Hearing Bd., 23 Pa. Commw. Ct. 137, 143, 350 A.2d 895, 898 (1976), to demonstrate that a community's proximity to a large metropolis and projected population growth has been considered relevant to the first factor. In *Waynesborough*, the court struck down a zoning ordinance that limited multi-family dwellings to 49 of the 5,250 acres in the township. *Id.* at 141, 350 A.2d at 897.

Nix also referred to several previous cases that had considered the community's present level of development, including *National Land*, *Waynesborough*, DeCaro v. Washington Township, 21 Pa. Commw. Ct. 252, 344 A.2d 725 (1975), and Township of Willistown v. Chesterdale Farms, Inc., 7 Pa. Commw. Ct. 453, 300 A.2d 107 (1973), *aff'd*, 462 Pa. 445, 341 A.2d 466 (1975). 382 A.2d at 110. *DeCaro* involved a three acre minimum lot size requirement in 50% of a rural township. The ordinance was upheld, the court concluding that no minimum lot size is unconstitutional *per se* so long as it has a reasonable relationship to the public health, safety or welfare, and has no exclusionary purpose or effect. 21 Pa. Commw. Ct. at 257-58, 344 A.2d at 728.

The third factor, Justice Nix stated, had previously been considered by Pennsylvania courts in Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970), *National Land*, and *Willistown*. 382 A.2d at 110.

ment in the community, and the exclusionary impact of the ordinance.[35] Justice Nix concluded that where the amount of land zoned for multi-family dwellings is small in proportion to the demand and room for potential development, the ordinance is unconstitutionally exclusionary.[36]

Applying this analytical method to *Surrick,* the court held that the zoning ordinance of Upper Providence Township was exclusionary. Because it was situated only twelve miles from Philadelphia and located on major traffic arteries, the township was a logical area for development and population growth. Moreover, the court noted that since 25% of the township's land was currently undeveloped, the present level of development did not preclude further development of multi-family dwellings. In light of these factors, the forty-three acres of township land which apartments had to share with business uses was disproportionately small.[37] The majority concluded, therefore, that the township had not provided a fair share of its land for multi-family dwellings, and consequently the township ordinance was declared unconstitutionally exclusionary.[38]

In his concurring opinion, Justice Roberts agreed with the result reached by the court,[39] but disagreed with the majority's use of the concept of fair share.[40] Justice Roberts maintained that a majority of the Pennsylvania Supreme Court had never adopted fair share,[41] and that strong reasons existed for a continued refusal to do so.[42] After examining the New Jersey decisions that have applied the concept of fair share,[43] Justice Roberts expressed concern that an

35. 382 A.2d at 110-11. In his discussion of the third factor, Justice Nix focused on exclusionary impact rather than exclusionary intent, noting that the latter is still considered if a denial of equal protection is claimed. *Id.* at 110 & n.10.

36. *Id.* at 111. While the analytical method was applied here to zoning for multi-family dwellings, the court relied on cases which dealt with large minimum lot sizes for the factors considered in the method. *See* note 34 *supra.*

The test for an exclusionary ordinance would invalidate not only an ordinance which totally fails to provide for a certain residential use, but also an ordinance which provides a disproportionately small amount of land for the use, if the other factors are present. *See* Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975) (court extended the prohibition against total exclusion to include such partial exclusion *See* note 29 *supra.*

37. 382 A.2d at 111-12.

38. *Id.* at 112.

39. *Id.* at 114 (Roberts, J., concurring).

40. *Id.*

41. *Id.*

42. *Id.*

43. Justice Roberts analyzed several cases, including Fobe Ass'n. v. Mayor of Demarest, 74 N.J. 519, 379 A.2d 31 (1977) (fair share did not require that any land be zoned for apart-

attempt to analyze decisions in these terms would transform Pennsylvania courts into super boards of adjustment, a legislative function for which the judiciary is ill-equipped.[44]

Surrick represents the first time that a majority of the Pennsylvania Supreme Court has adopted the concept of fair share and discussed the court's role in applying this principle.[45] At first glance, therefore, the standard articulated by the *Surrick* court appears to depart from the established Pennsylvania standards for reviewing the constitutionality of zoning ordinances. In adopting fair share, however, the court failed to define it in a manner that would impose upon municipalities any new obligation to fill regional housing needs. Consequently, *Surrick* is a mere reiteration of the standards enunciated in prior Pennsylvania cases, and thus does not alter Pennsylvania's approach regarding the constitutional analysis of zoning ordinances. This may be seen by considering the three tests used by the *Surrick* court to determine that the Upper Providence ordinance was unconstitutional.

First, the substantive due process test used in *Surrick*[46] has long been established in Pennsylvania as the test for evaluating the constitutionality of a zoning ordinance.[47] Second, since the Pennsylvania Supreme Court's 1965 decision in *National Land and Invest-*

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ments in developed municipality); Pascack Ass'n v. Mayor of Washington, Bergen County, 74 N.J. 470, 379 A.2d 6 (1977) (fair share standard held to apply to developing municipalities only); and Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977) (ordinance zoning 2.37% of a township's ten thousand acres for multi-family dwellings, and 2% for small lot single family housing, held invalid). Justice Roberts felt that the New Jersey court in *Oakwood* became involved in legislative functions and regional zoning. 382 A.2d at 114-15. *See* notes 73 & 74 and accompanying text *infra*. He cautioned the Pennsylvania court that New Jersey had limited the applicability of fair share in *Fobe* and *Pascack*. 382 A.2d at 115 & n.2.

44. 382 A.2d at 115.

45. A plurality of the court adopted the fair share principle in Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975). In *Willistown*, however, the court did not discuss fair share or the role of courts in fashioning relief under the principle. Instead, the court simply quoted the passage from S. Burlington Co. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), in which fair share was first employed, and applied the principle to the facts of the case without further elaboration. 462 Pa. at 449-50, 341 A.2d at 468. *See* notes 29 & 30 and accompanying text *supra*.

46. *See* notes 13 & 25 and accompanying text *supra*.

47. *See, e.g.*, Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 58, 228 A.2d 169, 178 (1967); Nat'l Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965); Norate Corp. v. Zoning Bd. of Adjustment, 417 Pa. 397, 405, 207 A.2d 890, 895 (1965); Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 111-12, 141 A.2d 606, 610 (1958); Bilbar Construction Co. v. Easttown Township, 393 Pa. 62, 72, 141 A.2d 851, 856 (1958).

ment Co. v. Easttown Township Board of Adjustment,[48] a determination that an ordinance is exclusionary is tantamount to a finding that it violates substantive due process.[49] Therefore, Justice Nix's analytical method for determining whether an ordinance is exclusionary likewise did not represent a new test, but rather represented a refinement of the traditional one.

Third, in considering the constitutionality of zoning ordinances, past Pennsylvania cases have required that municipalities plan with regional housing needs in mind. The majority in *National Land* was apprehensive of the consequences that would ensue if every municipality practiced exclusionary zoning, and each political unit considered only its own welfare.[50] Thereafter, in *Appeal of Girsh,*[51] the court spoke of the obligation of developing municipalities to assume part of the burden of providing municipal services,[52] and to not use exclusionary zoning to avoid this responsibility by unnaturally limiting population.[53] Moreover, in *Appeal of Kit-Mar Builders,*[54] the supreme court maintained that a municipality which practiced exclusionary zoning and failed to consider regional housing needs had determined wrongfully the fate of neighboring communities. Although these cases did not employ the term "fair share," they did express a commitment by the court to require local governments to look beyond their own borders in land-use planning.

In light of these earlier cases, an analysis of the fair share standard set forth in *Surrick* discloses that it adds nothing to the existing obligation of municipalities to provide for regional housing needs. Justice Nix viewed the fair share requirement as an "analytical strand" in the substantive due process test, rather than

48. 419 Pa. 504, 215 A.2d 597 (1965).

49. *See* note 26 *supra.*

50. The court in *National Land* observed: "It is not difficult to envision the tremendous hardship, as well as the chaotic conditions, which would result if all the townships in this area decided to deny to a growing population sites for residential development within the means of at least a significant segment of the people." 419 Pa. at 528, 215 A.2d at 610.

51. 437 Pa. 237, 263 A.2d 395 (1970).

52. "Municipal services must be provided *somewhere,* and 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." *Id.* at 244-45, 263 A.2d at 398-99.

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

54. 439 Pa. 466, 268 A.2d 765 (1970). The *Kit-Mar* court stated:

> If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make.

Id. at 474-75, 268 A.2d at 769.

as a new test of constitutionality.[55] Furthermore, the *Surrick* court essentially merged the test for determining compliance with the fair share standard with the test for determining whether an ordinance is unconstitutionally exclusionary. The factors which affect local and regional housing needs, factors that Justice Nix enunciated in his analytical method for determining whether an ordinance was exclusionary, were the same factors that he previously used in ascertaining whether a municipality had provided its fair share of housing.[56] Accordingly, after considering these factors and concluding that the Upper Providence ordinance was exclusionary, and without considering separately whether it violated the fair share standard, the court held that the township had not provided a fair share of its land for apartments.[57]

The *Surrick* court's approach to fair share is very different from that of New Jersey, the jurisdiction in which the principle was first enunciated.[58] An examination of several important New Jersey decisions in this area reveals that, unlike Pennsylvania, New Jersey views the fair share standard as an affirmative obligation, extending beyond the requirement that a zoning ordinance not be exclusionary. In *South Burlington Co. NAACP v. Township of Mount Laurel,*[59] the New Jersey decision first defining fair share, the term was used as a quantitative standard that delineated the extent to which municipalities must provide for local and regional housing needs.[60] The *Mount Laurel* court indicated that a figure represent-

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55. 382 A.2d at 109 n.8. *See* note 32 *supra.*

56. The court used nearly identical language in setting forth the fair share standard and in discussing the test for an exclusionary ordinance. The fair share principle was limited as follows:

> In establishing the "fair share" standard, this Court has merely stated the general precept which zoning hearing boards and governing bodies must satisfy by the full utilization of their respective administrative and legislative expertise. We intend our scope of review to be limited to determining whether the zoning formulas fashioned by these entities reflect a balanced and weighted consideration of the many factors which bear upon local and regional housing needs and development.

382 A.2d at 109-10. After setting forth the analytical method for determining whether a zoning ordinance is exclusionary, the court acknowledged that factors other than those listed could be considered, and stated: "We anticipate that zoning boards and governing bodies, in the exercise of their special expertise in zoning matters, will develop and consider any number of factors relevant to the need for and distribution of local and regional housing." *Id.* at 111 n.12.

57. *Id.* at 111-12.

58. *See* note 30 *supra.*

59. 67 N.J. 151, 336 A.2d 713 (1975).

60. *Id.* at 174, 336 A.2d at 724. *See* note 30 *supra.*

ing the township's fair share of low and moderate income housing could be determined by local and state planning agencies.[61] Although the New Jersey Supreme Court in *Oakwood at Madison, Inc. v. Township of Madison*[62] did not require the municipality to devise a formula representing its fair share in terms of housing units,[63] the majority in that case did perceive the fair share principle to be one requiring affirmative action of municipalities. Under the *Oakwood* rationale, zoning ordinances were to be designed to provide for a fair share of the lower income housing needs of the region.[64] To comply with the fair share standard articulated in these cases, municipalities must actively determine and plan for regional needs, and not merely passively refrain from engaging in exclusionary conduct.

The difference between the New Jersey and Pennsylvania definitions of fair share may be attributable to the fact that the issue arose in different factual settings in the two jurisdictions. In *Surrick,* the plaintiff was a landowner[65] who successfully claimed that the ordinance deprived him of his property without due process of law, since it restricted his use of the land for a reason not substantially related to a police power objective.[66] The court granted Surrick a building permit and zoning approval to permit apartments,[67] a remedy which provided for the desired use of his land. The court did not order any other change in the township's zoning scheme, nor did it claim that this decree would result in achievement of the desired fair share.[68]

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61. 67 N.J. at 190, 336 A.2d at 733.

62. 72 N.J. 481, 371 A.2d 1192 (1977). The zoning ordinance amendment invalidated in *Oakwood* zoned only 2.37% of the township's approximately ten thousand undeveloped acres for multi-family dwellings. Only 2% was zoned for single family homes on lots smaller than ten thousand square feet. The zoning ordinance also allowed apartments in planned unit development areas, and small lot single family or attached houses in cluster development areas. Other requirements for such developments, however, increased the cost to such an extent that it was not economically feasible to build for low income families. *Id.*

63. *Id.* at 498-99, 371 A.2d at 1200.

64. *Id.* at 525, 371 A.2d at 1213.

65. *See* note 1 and accompanying text *supra.*

66. Brief for Appellant, *supra* note 1, at 9-16. *See* notes 13 & 25 and accompanying text *supra.*

67. 382 A.2d at 112.

68. Under the Pennsylvania Municipalities Planning Code, this was the only remedy the court could provide in a challenge to a zoning ordinance. The Code provides that, in a zoning appeal, the court shall have the power to declare an ordinance invalid and to set aside or modify any action of a municipal governing body, agency, or officer brought on appeal. PA. STAT. ANN. tit. 53, § 11011 (Purdon 1972). The first section of the Appeals Article of the Code states that the proceedings set forth in the Article shall constitute the exclusive mode for securing review of a zoning ordinance. *Id.* § 11001.

Pennsylvania cases have also held that, where a statutory remedy is provided, it is exclu-

Thus, the relief granted in Surrick was no more extensive in scope than the relief afforded in prior cases to plaintiffs who had proved only that a zoning ordinance was exclusionary without relying upon a fair share argument.[69]

On the other hand, the plaintiffs in each of the New Jersey fair share decisions included poor persons excluded from a municipality because of its restrictive zoning patterns.[70] In each instance, the municipality had zoned in a fashion that deliberately maintained the cost of housing at a price that low and middle income persons

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sive, and a court cannot order another remedy. *See, e.g.*, Wilkinsburg-Penn Joint Water Authority v. Borough of Churchill, 417 Pa. 93, 207 A.2d 905 (1965); Gold v. Dep't of Public Instruction, Commonwealth of Pa. Pub. School Employees Retirement Bd., 16 Pa. Commw. Ct. 247, 328 A.2d 559 (1974). In Appeal of Olson, 19 Pa. Commw. Ct. 514, 338 A.2d 748 (1975), the court concluded that a court considering a challenge to a zoning ordinance under the Code could not order a municipality to amend the ordinance, since amendment is a purely legislative matter, exclusively within the control of the municipal governing body. *Id.* at 520-21, 338 A.2d at 751.

69. *See* Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 469, 478, 268 A.2d 765, 766, 770 (1970) (township ordered to rezone plaintiff's land to permit homes on one acre lots, and to grant building permit); Appeal of Girsh, 437 Pa. 237, 240, 263 A.2d 395, 396 (1970) (failure to provide for apartments held unconstitutional); Nat'l Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 510, 533, 215 A.2d 597, 601, 613 (1965) (ordinance declared unconstitutional, and lower court order remanding case to board of adjustment upheld).

In Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975), in which the court did utilize the fair share standard, it directed that zoning approval and a building permit be granted to the plaintiff. *Id.* at 450, 341 A.2d at 468.

See Rose, *Exclusionary Zoning and Managed Growth: Some Unresolved Issues*, 6 RUT.-CAM. L.J. 689 (1975) [hereinafter cited as Rose], in which the author compared *Kit-Mar, Girsh* and *National Land* with S. Burlington Co. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), and noted that although the Pennsylvania cases prohibit exclusionary zoning, they "support . . . only indirectly" the proposition of *Mount Laurel* that municipalities must provide for their fair share. Rose observed that these Pennsylvania cases "did not expressly state that the validity of the ordinances would depend upon whether they contained affirmative programs to meet regional housing needs." *Id.* at 702.

70. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 492, 371 A.2d 1192, 1196-97 (1977); S. Burlington Co. NAACP v. Township of Mount Laurel, 67 N.J. 151, 159 & n.3, 172-73, 336 A.2d 713, 717 & n.3, 724 (1975).

In Pennsylvania, such plaintiffs could not challenge the validity of a zoning ordinance. The Municipalities Planning Code limits the right to appeal to landowners wishing to challenge the validity of a zoning provision that prohibits or restricts the use or development of land in which they have an interest, or persons aggrieved by a use or development permitted on the land of another. PA. STAT. ANN. tit. 53, §§ 11004-11007 (Purdon 1972). The Code provisions constitute the exclusive mode for securing review of a zoning ordinance. *See* note 68 *supra*.

For a discussion of the advantages to and problems of using an equal protection approach, rather than a substantive due process approach in exclusionary zoning cases involving such plaintiffs, see Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

could not afford.[71] The remedies provided by the New Jersey court were designed to effectuate the ultimate goal of enabling such persons to live in the municipality. In *Mount Laurel,* the township was ordered to eliminate the deficiencies in its zoning ordinance.[72] The *Oakwood* court specified the minimum revisions to be made in the ordinance[73] to ensure that it would provide for a fair and reasonable share of the "least cost" housing needs of Madison's region.[74] The New Jersey court corrected the unconstitutional ordinances by mandating alterations of their contents; rather than merely permitting the plaintiff to use his land in a certain desired manner, the decisions sought to bring future zoning patterns of the municipalities into compliance with the fair share standard.[75]

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71. *See* note 14 *supra.*

72. The plaintiffs in *Mount Laurel* were permitted to attack any such revised ordinance by supplemental complaint. 67 N.J. at 191, 336 A.2d at 734.

73. The changes mandated by the court were as follows:

> The revision shall, as *minima:* (a) allocate substantial areas for single-family dwellings on very small lots; (b) substantially enlarge the areas for dwellings on moderate sized lots; (c) substantially enlarge the AF district [multi-family apartment zone] or create other enlarged multi-family zones; (d) reduce the RP [Recreational Preservation], R-80 [two acre minimum lot size] and R-40 [one acre minimum lot size] zones to the extent necessary to effect the foregoing . . .; (e) modify the restrictions in the AF zones and PUD [planned unit development] areas . . . which discourage the construction of apartments of more than two bedrooms; (f) modify the PUD regulations to eliminate . . . undue cost-generating requirements . . .; and (g) generally eliminate and reduce undue cost-generating restrictions in the zones allocated to the achievement of lower income housing in accordance with the principles of least cost zoning . . . .

72 N.J. at 553, 371 A.2d at 1228. The revised ordinance was to be submitted to the trial court for its approval. *Id.*

74. *Id.* "Least cost housing" was defined as housing constructed at the least cost consistent with reasonable standards of health, safety and welfare. *Id.* at 513 n.21, 371 A.2d at 1208 n.21. The court in *Oakwood* realized that it would not always be possible for a municipality to guarantee construction of low income housing, due to the reluctance of developer to build such housing without government subsidies or legislated incentives. In such instances, zoning for least cost housing was adopted as the goal. *Id.* at 510-12, 371 A.2d at 1206-07. The court felt that construction of least cost housing would increase the total housing supply and provide housing for low income families through a "filtering" process, as moderate income families would move into this housing, leaving their older, less expensive housing vacant for low income families. *Id.* at 513-14, 371 A.2d at 1207-08.

75. The majority in *Surrick* did state that the principle of fair share requires local political units to plan for the needs of all categories of people who may wish to live in them. *See* notes 28-30 and accompanying text *supra.* The remedy in *Surrick,* however, did not affect the municipality's zoning plan, except for the rezoning of the plaintiff's land. *See* notes 67 & 68 and accompanying text *supra.*

Translating such decrees into actual low and moderate income housing often engenders problems because of factors other than zoning which impede development of low and moderate income housing. For a discussion of the problems involved, see Mallach, *Do Lawsuits*

The New Jersey decisions also illustrate that the adoption of the fair share standard does not necessarily involve courts in fashioning zoning formulas, a function that is essentially legislative in nature.[76] The New Jersey courts did not set aside certain land areas within the municipality for low income housing, nor did they mandate a specific number of units of such housing.[77] Rather, they left these zoning functions to the local legislature, to be exercised within the limits of the judicial standard. The remedies in these cases are comparable to those in housing and school desegregation cases, in which the Supreme Court has ordered governmental units to submit plans of affirmative action to correct imbalances.[78]

In light of the fact that Pennsylvania does not require any such affirmative action on the part of municipalities to comply with fair share, it is difficult to perceive of any necessity for adopting the principle, at least in a factual situation similar to that presented in *Surrick*. The prior Pennsylvania test for compliance with due process — that an ordinance not be exclusionary in nature — resulted in the same minimal alleviation of the housing needs of low and moderate income persons as the *Surrick* fair share requirment.[79] The new standard, which is in effect a prohibition against exclusionary zoning, will most likely engender confusion, not only for municipal governments in fashioning zoning ordinances, but also for courts who must consider their validity.

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Build Housing?: The Implications of Exclusionary Zoning Litigation, 6 RUT.-CAM. L.J. 653 (1975). Mallach concludes that judicial remedies are nonetheless valuable, since they create "a climate for legislative land use reform." *Id.* at 686.

76. Critics of fair share have claimed that adoption of the standard has this effect. *See, e.g.*, 382 A.2d at 115 (Roberts, J., concurring).

77. *See* notes 72-74 and accompanying text *supra*.

78. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (if desegregation plan submitted by school district is unsatisfactory, court can formulate its own plan); Reynold, Judge v. Sims, 377 U.S. 533 (1964) (court may order state legislature to reapportion voting districts which violate equal protection clause, and may grant judicial relief if legislatures fail to obey order); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (defendant school boards ordered to devise plan to desegregate school systems under supervision of federal district court).

See also Rose, *supra* note 69, at 723-24, in which the author maintains that school desegregation cases, public housing dispersal cases, and the New Jersey exclusionary zoning cases afford ample precedent for deciding that an exclusionary ordinance is invalid and for providing a remedy which alters the circumstances upon which the determination of illegality is based.

79. *See* note 69 and accompanying text *supra*.