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A New Deference Towards Exclusionary Zoning in Pennsylvania: Appeal of M. A. Kravitz Co. {460 A.2d 1075 (Pa.)}

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A NEW DEFERENCE TOWARDS EXCLUSIONARY ZONING IN PENNSYLVANIA: *APPEAL OF M.A. KRAVITZ CO.*

Suburban communities often enact exclusionary land use controls[1] to prevent the increased residential development associated with urban sprawl.[2] Development of these exclusionary techniques is largely in response to the fear that the migrating urban poor will overburden municipal services without providing an increase in local revenue.[3] Local land use controls traditionally have withstood constitutional challenge,[4] as courts analyzed whether an ordinance promoted the "general welfare" solely in terms of the individual municipality's interests.[5]

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1. Exclusionary zoning encompasses "the complex of zoning practices which results in closing suburban housing and land markets to low- and moderate-income families." Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509, 519 (1971).

2. Exclusionary zoning takes many forms. Common techniques include lack of provision for or prohibition of multifamily dwellings, restrictions on the setback and height of structures, and density controls such as minimum lot and floor area requirements. These provisions have the effect of making new housing prohibitively expensive or nonexistent. Therefore, outlying municipalities may maintain their status quo by preventing migratory lower-income groups from establishing residences in the community. *See* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970'S 3-11 (1973); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

3. *See* R. BABCOCK & F. BOSSELMAN, *supra* note 2, at 3-11.

4. *See, e.g.*, Appeal of Key Realty Co., 408 Pa. 98, 182 A.2d 187 (1962); Swade v. Springfield Township Zoning Bd. of Adjustment, 392 Pa. 269, 140 A.2d 597 (1958). *See also* R. ANDERSON, AMERICAN LAW OF ZONING § 8.12 (1976).

5. *See, e.g.*, Appeal of Key Realty Co., 408 Pa. 98, 182 A.2d 187 (1962); Swade v. Springfield Township Zoning Bd. of Adjustment, 392 Pa. 269, 140 A.2d 597 (1958). *See also* Comment, *Do* Girsh *and* Mt. Laurel *Compel the Zoning of a Fair Share of Acreage for Apartment Use? Pennsylvania Says Yes*, 13 URBAN L. ANN. 277, 280 (1977). The author stated:

> Because zoning was to serve local needs, "general welfare" was interpreted to refer to the welfare of the enacting municipality, not the welfare of neighboring areas or non-residents. The restricted concept of the general welfare plus the presumption of validity made successful challenge of exclusionary zoning in the courts nearly impossible.

Id. at 280 n.21.

During the last several decades, however, several state courts began to consider regional housing needs in determining the constitutionality of a challenged ordinance.[6] Pennsylvania incorporated the regional concept into the general welfare test by means of a per se rule that invalidated regulations having an exclusionary purpose or impact.[7] In 1977, the Pennsylvania Supreme Court rejected the per se rule in favor of a test that sought to balance the needs of the region against the interests of the individual municipality.[8] In *Appeal of M.A. Kravitz Co.*,[9] the Pennsylvania Supreme Court applied the new balancing test and upheld the constitutionality of a partially exclusionary zoning ordinance on the ground that the local governing body had given appropriate consideration to regional, as well as local, factors.[10]

M.A. Kravitz Co. proposed a townhouse development for a ninety-six acre tract of land in Wrightstown Township, a community on the outskirts of Philadelphia.[11] The municipality's zoning ordinance designated a forty acre site in another part of the township for multifamily dwellings.[12] Kravitz challenged the constitutionality of the ordinance, claiming that the township, by allowing multifamily development in only forty of its 6,491 acres, had created a de facto partial exclusion of multifamily units.[13] The township's board of supervisors rejected the

6. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

7. *See* Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965). *See infra* notes 25-43 and accompanying text.

8. *See* Surrick v. Zoning Hearing Bd. of Adjustment, 476 Pa. 182, 382 A.2d 105 (1977). *See infra* notes 49-62 and accompanying text.

9. 501 Pa. 200, 460 A.2d 1075 (1983).

10. *Id.* at 216, 460 A.2d at 1083.

11. *Id.* at 203, 460 A.2d at 1077.

12. *Id.* at 214, 460 A.2d at 1083. Kravitz' property was located in a R-2 Residential Area that permitted only single-family detached dwellings, defined by the ordinance as "a building designed for and occupied exclusively as a residence for only one family and having no party wall in common with an adjacent building." WRIGHTSTOWN TOWNSHIP, PA., ORDINANCE art. 100, § 102.3 (1971), *quoted in* 501 Pa. at 204 n.1, 460 A.2d at 1077 n.1. The 40-acre R-4 zone, on the other hand, allowed "multifamily dwelling[s] constituting a single operating . . . unit." WRIGHTSTOWN TOWNSHIP, PA., ORDINANCE art. 200, § 204.1(A), *quoted in* 501 Pa. at 204 n.1, 460 A.2d at 1077 n.1.

13. 501 Pa. at 214, 460 A.2d at 1083. Kravitz argued that the provision for multifamily dwellings, which represented only 0.6% of the township's acreage, was wholly inadequate to meet the municipality's responsibility to provide housing for the region's

developer's claim and upheld the ordinance.[14] The court of common pleas affirmed the board's action.[15] The commonwealth court reversed and directed approval of the proposed development.[16] On appeal, the Pennsylvania Supreme Court concluded that the zoning board properly had determined that the township was not a logical area for rapid population expansion and reinstated the original decision upholding the ordinance's validity.[17]

The power of a municipality to control land use within its borders is a function of the state police power.[18] Zoning regulations, therefore,

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growing population. *Id.* Kravitz's claim was similar to that accepted by the court in Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975). *See infra* notes 37-43 and accompanying text. The developer supported his argument with expert testimony that the area likely would undergo significant population increases in the near future if relaxation of the zoning restriction occurred. 501 Pa. at 215-16, 460 A.2d at 1083.

Kravitz argued alternatively that the ordinance totally excluded townhouses and therefore was unconstitutional. *Id.* at 203, 460 A.2d at 1077. Kravitz alleged that townhouses are a distinct use, quite apart from other multifamily structures. According to Kravitz, because the ordinance itself defined "townhouses" and "multifamily dwellings" separately, the R-4 multidwelling zone did not include townhouses. *Id.* Kravitz asserted that the rule announced in Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970), barred this total exclusion of townhouses. *See infra* notes 32-36 and accompanying text.

14. 501 Pa. at 203, 460 A.2d at 1077. The board of supervisors first dismissed Kravitz's total exclusion argument after it concluded that the drafters of the ordinance had in fact contemplated the inclusion of townhouses in the multifamily zone. *Id.* at 212, 460 A.2d at 1081-82.

The board employed the test developed in Surrick v. Zoning Hearing Bd. of Adjustment, 476 Pa. 182, 382 A.2d 105 (1977), *see infra* notes 49-62 and accompanying text, to determine whether an impermissible partial exclusion existed. 501 Pa. at 203-04, 460 A.2d at 1077. The board examined a number of criteria: the township's distance from the major employment centers of Philadelphia and Trenton, the lack of major employers in the township itself, the absence of major highways and mass transit connecting the locality with the rest of the region and the limited projected population growth for the entire metropolitan area. Examination of these factors led the board to conclude that the township was not a logical area for development. *Id.* at 214-15, 460 A.2d at 1082-83. Therefore, the township's 40-acre provision for multifamily housing was adequate to meet the limited local and regional housing demand. *Id.* at 204, 460 A.2d at 1077.

15. M.A. Kravitz, Inc. v. Wrightstown Township Bd. of Supervisors, 32 Bucks Co. L. Rep. 143, 146 (1978), *rev'd*, 53 Pa. Commw. 622, 419 A.2d 227 (1980), *rev'd*, 501 Pa. 200, 460 A.2d 1075 (1983).

16. M.A. Kravitz Co. Appeal, 53 Pa. Commw. 622, 419 A.2d 277 (1980), *rev'd*, 501 Pa. 200, 460 A.2d 1075 (1983). The commonwealth court agreed with Kravitz's total exclusion argument and held that the exclusion was per se unconstitutional. 53 Pa. Commw. at 628, 419 A.2d at 229-31.

17. Appeal of M.A. Kravitz Co., 501 Pa. 200, 460 A.2d 1075 (1983).

18. R. ANDERSON, *supra* note 4, § 3.10.

must promote the public health, safety, morals, or general welfare to fit within constitutional guidelines.[19] The United States Supreme Court approved zoning regulations as an exercise of the police power in *Village of Euclid v. Ambler Realty Co.*[20] The Supreme Court viewed municipal regulation of land as an essential ingredient to the orderly and safe development of the nation's urban areas.[21] To ensure effective regulation, the Court warned against excessive judicial interference and instructed courts to defer to the local legislative judgment in cases in which the wisdom of a particular classification is debatable.[22] Implicit in this instruction is the notion that local officials can best resolve the complex factual issues surrounding a particular zoning decision because of their greater familiarity with the locality.

Judicial deference to local land use classifications continues unabated in a majority of states.[23] One of the notable exceptions to this general rule is Pennsylvania, where the exclusionary zoning issue has produced a more interventionist judiciary.[24] This trend began in 1965 with *National Land and Investment Co. v. Kohn*.[25] The ordinance challenged in *National Land* required a minimum lot size of four acres for single-family residential development.[26] The locality attempted to justify the restriction with evidence that local considerations and char-

19. *Id.* § 7.03. Modern courts continue to determine the validity of zoning plans, like other police power measures, under the substantive due process test, whereby a plan is invalid only if it is arbitrary, capricious, or lacking any reasonable relation to the public safety, health, morals, or general welfare. *See, e.g.*, Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, 410 A.2d 1138 (1980); Ginsberg v. Yeshiva of Far Rockaway, 45 A.D.2d 334, 358 N.Y.S.2d 477 (1974), *aff'd*, 36 N.Y.2d 706, 325 N.E.2d 876, 366 N.Y.S.2d 418 (1975); Campbell v. Zoning Hearing Bd., 10 Pa. Commw. 251, 310 A.2d 444 (1973).

20. 272 U.S. 365 (1926).

21. *Id.* at 386-87. According to the Court, the increasing complexity of urban life in the first quarter of this century was likely to continue and necessitated some restrictions on the use of private land. *Id.*

22. *Id.* at 388.

23. *See* D. MANDELKER, LAND USE LAW §§ 1.13-.16 (1982).

24. *See* Comment, *The Pennsylvania Supreme Court and Exclusionary Suburban Zoning: From* Bilbar *to* Girsh*—A Decade of Change*, 16 VILL. L. REV. 507, 512-13 (1971); Comment, *supra* note 5, at 280-81. In addition to Pennsylvania, New Jersey and New York have taken interventionist stances with respect to exclusionary zoning. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

25. 419 Pa. 504, 215 A.2d 597 (1965).

26. *Id.* at 508, 215 A.2d at 600.

acteristics precluded development at higher densities.[27] The Pennsylvania Supreme Court rejected the township's evidence[28] and found instead that the primary purpose behind the four acre minimum lot size was to bar the entrance of newcomers to avoid further burdens upon the administration of public services and facilities.[29] The court declared this exclusionary purpose per se improper[30] and invalidated the minimum acreage requirement as it applied to the plaintiff developer's land.[31]

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27. *Id.* at 525-32, 215 A.2d at 608-12. The township offered four primary justifications for the low density restriction: 1) higher density would burden the present sewage disposal system; 2) any increase in population would bring increases in traffic—congesting and damaging local roads and bridges; 3) further development would detract from the area's historical significance; and 4) growth would preclude the township from maintaining its rural character. *Id.*

28. *Id.* at 525-26, 215 A.2d at 609. The court first found the evidence regarding potential sewage problems inconclusive, and found further that other legislatively sanctioned methods, such as sanitary regulations administered by a sanitary board, were better equipped than minimum lot zoning to deal with the problem. *Id.* As to future burdens on traffic arteries, the court relied on expert testimony to conclude that the township roads could accommodate the additional traffic accompanying significant population increases until 1972 or beyond. Thus, the court perceived the township's action as an attempt to "deny the future," whereas zoning is designed to "plan for the future." *Id.* at 526-28, 215 A.2d at 609-10. While recognizing the legitimacy of the desire to preserve "historical aura" and open spaces, the court held that minimum lot zoning was an impermissible means of achieving that end. The court stated that the township had effectuated purely private aesthetic desires through public regulations. *Id.* at 528-31, 215 A.2d at 610-11. Finally, the court stated that development on four acre lots would not preserve the township's rural character any more than smaller lots. Lower density would simply mean "larger homes on larger lots." *Id.* at 531, 215 A.2d at 612.

29. *Id.* at 532, 215 A.2d at 612.

30. *Id.* The basis of the court's holding was that exclusionary motives were inconsistent with the constitutional mandate that zoning promote the general welfare. *Id.*

Although the court rested its decision on constitutional grounds, it made no reference to a specific federal or state constitutional provision. *See* D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 187-88 (1977). *Cf.* South Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (the New Jersey Supreme Court expressly stated that substantive due process and equal protection under the state constitution formed the basis for invalidation of an exclusionary ordinance; specifically, the court stated that it was offering constitutional protection to the interests of nonresidents that desired to move into the locality), *cert. denied*, 423 U.S. 808 (1975).

31. 419 Pa. at 533, 215 A.2d at 613. *But cf.* Robert E. Kurzius, Inc. v. Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (five acre minimum lot size requirement not an unreasonable exercise of police power), *cert. denied*, 450 U.S. 1042 (1980); DeCaro v. Washington Township, 21 Pa. Commw. 252, 344 A.2d 725 (1975) (five acre lot density restriction not per se unconstitutional under Pennsylvania law; challenger failed to meet heavy burden that provision was unreasonable).

Pennsylvania offers site specific relief, as opposed to total invalidation of the ordi-

Five years later, the Pennsylvania Supreme Court reiterated the *National Land* rationale and concluded that an ordinance that made no provision for apartment development was unconstitutional.[32] In *Appeal of Girsh*,[33] the court stated that the ordinance's silence with regard to apartments was equivalent to an express, total prohibition[34] and, therefore, represented a conscious decision to exclude outsiders.[35] The court feared that judicial approval of this action would establish a dangerous precedent whereby communities could legally foreclose all housing opportunities in the suburbs.[36]

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nance, upon a finding of an impermissible exclusion. For a discussion of the effectiveness of this relief, particularly as compared to that afforded by the New Jersey courts, see D. MOSKOWITZ, *supra* note 30, at 275-88. *See also* Hyson, *The Problem of Relief in Developer-Initiated Exclusionary Zoning Litigation*, 12 URBAN L. ANN. 21, 27-30 (1976).

32. Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970). The court recognized the important and distinct function apartments serve in the housing market, providing shelter for those of relatively limited means. In addition, the court took notice of the fact that lower-income groups had begun to move away from the urban core. Proceeding on this assumption, the court held that the township was attempting to stand in the way of the growing population. *Id.* at 244-45, 263 A.2d at 398-99. The court refused to allow the township to accomplish this result through its zoning ordinance. *Id.*

Apparently because of *Girsh's* discussion regarding the validity of apartments as a specific residential use, some commentators interpret its holding as one of per se unconstitutionality for exclusions of distinct multifamily uses. *See Pennsylvania Supreme Court Modifies Exclusionary Zoning Rules*, 7 AM. PLAN. ASS'N, PLAN. & L. DIV. NEWSLETTER No. 4, at 3 (1983) [hereinafter cited as NEWSLETTER]; Comment, *supra* note 5, at 281. *But see* Appeal of M.A. Kravitz Co., 501 Pa. 200, 205-08, 460 A.2d 1075, 1079-81 (1983) (*Girsh* stands for the proposition that a locality cannot frustrate population growth, not that it must provide an area for each architectural design); Comment, *supra* note 24, at 528-29 (construing *Girsh* as a per se rule disregards the court's intent).

33. 437 Pa. 237, 263 A.2d 395 (1970).

34. *Id.* at 241, 263 A.2d at 397.

35. *Id.* at 245-46, 263 A.2d at 399.

36. *Id.* The court concluded that the area surrounding the township was experiencing increases in population attributable to migration away from the large metropolitan areas. *Id.* at 244, 263 A.2d at 398. The court then generalized this data, inferring that the phenomenon was not confined to this particular case, and recognized the danger in permitting one locality to decide that it did not want to bear any part of the growth burden. *Id.* The court declared that the municipality could not make a zoning decision that totally restricts population growth. *Id.*

In Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970), decided the same year as *Girsh*, the court again demonstrated its increasing scrutiny of exclusionary controls. In *Kit-Mar*, the Pennsylvania court invalidated the township's two- and three-acre minimum lot size requirements. *Id.* The township's arguments in favor of the ordinance were nearly identical to those advanced in *National Land*. *See supra* note 27. In *Kit-Mar*, however, the court went further than it previously had gone to dispose of

The focus of judicial scrutiny under the per se doctrine shifted when, in *Township of Willistown v. Chesterdale Farms, Inc.*,[37] the Pennsylvania Supreme Court abandoned the intent test employed in *National Land* and *Girsh*. As the court explained in a subsequent case, proof of exclusionary impact would thereafter suffice to invalidate a challenged ordinance.[38] The ordinance at issue in *Willistown*, like that in *Girsh*, made no provision for apartments.[39] Following the decision in *Girsh*, however, the zoning board amended the ordinance to allow apartments on eighty of the township's 11,589 acres.[40] The court characterized the amendment as a weak attempt to comply with *Girsh* after finding the provision for apartments wholly inadequate to meet the demand for multifamily dwellings.[41] The court held that the municipality had failed to provide for its "fair share" of the regional housing

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the alleged justifications. For example, in response to the township's contention that local roads were inadequate to handle additional traffic, the court said that this did not excuse the township from providing space for incoming residents, even if doing so required the construction of new roads. 439 Pa. at 472 n.5, 268 A.2d at 767 n.5. *See also* Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975) (court placed an affirmative duty on communities facing population growth to increase municipal services to meet the needs of the incoming residents; locality could not disregard its duty by enacting exclusionary devices).

The *Kit-Mar* court realized that its decision placed limitations on the zoning process and its flexibility. Nevertheless, the court emphasized that until an effective system of regional planning was in place, the judicial branch must deal with the problem. 439 Pa. at 476, 268 A.2d at 769.

In *Kit-Mar*, the court clarified its interpretation of general welfare in the substantive due process test to include regional interests. *See supra* notes 6-7 and accompanying text. While recognizing that its earlier decisions dealt with the interests of the individual property owner or developer prohibited from putting his land to a particular use, the *Kit-Mar* court expressed its additional concern for and protection of the constitutional interests of those "in search of a comfortable place to live." 439 Pa. at 474 n.6, 268 A.2d at 768 n.6. *See* D. MOSKOWITZ, *supra* note 30, at 222-24, for a discussion of the problems created by the Pennsylvania court's earlier failure to articulate precisely "whose rights are at stake" and the constitutional source of those rights.

37. 462 Pa. 445, 341 A.2d 466 (1975).

38. *See* Surrick v. Zoning Hearing Bd. of Adjustment, 476 Pa. 182, 192-93, 382 A.2d 105, 110-11 (1977).

39. 462 Pa. at 447, 341 A.2d at 467.

40. *Id.*

41. *Id.* at 448-50, 341 A.2d at 468. The court agreed with the developer that the amendment represented "tokenism," designed only to give the appearance of adherence to *Girsh*, and not actually to provide adequate acreage for the necessary multifamily housing. *Id.* at 448, 341 A.2d at 467. The court apparently felt that a partial exclusion, whereby a municipality reserves a very small portion of its land for multifamily dwellings, should come under judicial scrutiny in much the same way as a total exclusion because of its ability similarly to restrict housing choices.

burden.[42] Thus, *Willistown* extended *Girsh's* prohibition of total exclusion of apartments to partial exclusions.[43]

Willistown prompted a vigorous dissent.[44] The dissenting justice felt that the local officials justifiably had concluded that the eighty acre provision was a reasonable beginning designed eventually to meet the region's housing needs.[45] The dissent also argued against second guessing local authorities.[46] In addition, the dissent attacked the plurality for failing to explain adequately the impact standard or "fair share" formula used to invalidate the ordinance.[47] This ambiguity, according to the dissenter, left the courts and communities of Pennsylvania without adequate guidance as to the exact nature of the constitutional obligation to provide space for housing to accommodate regional demand.[48]

In *Surrick v. Zoning Hearing Board of Adjustment*,[49] the Pennsylvania Supreme Court attempted to answer the criticism expressed

42. *Id.* at 449-50, 341 A.2d at 468. The Pennsylvania court borrowed the term "fair share" from the New Jersey Supreme Court's landmark opinion in South Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975). In *Mount Laurel*, the New Jersey court held that municipalities must provide a "reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within [the municipality's] boundaries." 67 N.J. at 179, 336 A.2d at 728. According to the New Jersey court, an ordinance that did not provide for a community's "fair share" of the regional housing need would not promote the general welfare as constitutionally required. *Id.*

In *Willistown*, the Pennsylvania Supreme Court did not articulate whether the "fair share" principle announced therein followed the New Jersey model. Explanation of the doctrine as established by the Pennsylvania court did not occur until *Surrick*. *See infra* notes 49-62 and accompanying text.

43. 462 Pa. at 449, 341 A.2d at 468.

44. 462 Pa. at 451, 341 A.2d at 469 (Pomeroy, J., dissenting).

45. *Id.* at 452-54, 341 A.2d at 470 (Pomeroy, J., dissenting). The dissent pointed out that the board of supervisors studied the data and recommendations of regional planning bodies prior to amending the township's ordinance. *Id.* at 453, 341 A.2d at 470. The dissenting justice concluded that the board diligently considered the regional problem and developed a reasonable solution. *Id.* The dissent then criticized the plurality for substituting its judgment for that of the local governing body. *Id.* at 453-54, 341 A.2d at 470. Moreover, the plurality improperly looked solely to the percentage of land provided and invalidated the ordinance because the percentage appeared miniscule to the court. *Id.* For a criticism of *Willistown*, see Comment, *supra* note 5, at 285, 289.

46. 462 Pa. at 452-54, 341 A.2d at 470 (Pomeroy, J., dissenting).

47. *Id.* at 451-52, 341 A.2d at 469 (Pomeroy, J., dissenting).

48. *Id.* (Pomeroy, J., dissenting).

49. 476 Pa. 182, 382 A.2d 105 (1977).

by the *Willistown* dissent.[50] The court explained that the fair share principle adopted in *Willistown* was merely a part of the requirement that an ordinance bear a substantial relationship to the general welfare.[51] As a means of implementing the fair share standard, *Surrick* developed an "analytical matrix" to test the constitutionality of allegedly exclusionary zoning restrictions.[52] The three-part test required balancing the severity of the exclusion against the likelihood and feasibility of further population growth and multifamily development in the municipality.[53]

The first part of the test involved an analysis into whether the particular municipality was a "logical area for development."[54] If this initial inquiry revealed a likelihood of expansion, then the reviewing court was required to consider the existing state of development to determine whether additional growth could occur.[55] The final step required an examination of the extent of the exclusion created by the challenged restriction.[56] The court held that an ordinance is excessively exclusion-

50. *See supra* notes 44-48 and accompanying text.

51. 476 Pa. at 191 n.8, 382 A.2d at 109 n.8. The court labelled the fair share obligation an "analytical strand" in the substantive due process test used to determine the constitutionality of all zoning ordinances. *Id.*

The court stated that the substantial relationship-substantive due process test, of which the fair share requirement was now a component, formed the basis for its decisions in *National Land* and *Girsh*. *Id.* at 188, 382 A.2d at 108. While the court conceded that its application of the test in the two cases was unclear, the court stated that it had "concluded implicitly that exclusionary or unduly restrictive zoning techniques do not have the requisite substantial relationship to the public welfare." *Id.*

52. *Id.* at 194, 382 A.2d at 111.

53. *See infra* notes 54-57 and accompanying text. Earlier commentators noted that the active intervention of the Pennsylvania courts in the exclusionary zoning cases severely restricted the discretion of local political units. *See* Comment, *supra* note 24, at 529-30. For the view that the *Surrick* balancing test, as compared to the earlier Pennsylvania cases, gives localities more freedom in the zoning process, see NEWSLETTER, *supra* note 32, at 5. The article expresses the view that *Surrick's* more flexible approach reduced the importance of *Girsh* as a rule of per se unconstitutionality. *Id.* at 3-5.

54. 476 Pa. at 192, 382 A.2d at 110. The court suggested that the locality's proximity to major metropolitan areas and the region's projected population were relevant to this initial inquiry. The court noted, however, that it did not intend these suggestions to comprise an exhaustive list. *Id.* at 194 n.12, 382 A.2d at 111 n.12. Instead, communities were free to examine any number of factors they considered important. *Id.*

55. *Id.* at 192, 382 A.2d at 110. This second step required an examination into the township's present population density and the amount of undeveloped land. *Id.*

56. *Id.* at 194, 382 A.2d at 111. The court conceded that the determination of validity was more complex in the case of a partial exclusion. While a total exclusion carried a strong presumption of unreasonableness, a partial exclusion required a more thorough examination into the intricacies of the community's particular situation. *Id.*

ary if, on balance, the provision for multifamily dwellings appeared "disproportionately small" in relation to regional growth pressures and local conditions.[57]

Applying the balancing test to the facts in *Surrick*, the court first found that the township's proximity to Philadelphia placed it in the "path of urban-suburban growth."[58] Second, the court noted that approximately one-quarter of the community consisted of undeveloped land and that the existing development was not of a high density.[59] Finally, the court analyzed the ordinance's provision for multifamily units and concluded that a partial exclusion would result.[60] The court found the exclusion unreasonable considering the township's high potential for growth.[61] The court, therefore, held that the township had evaded its fair share responsibilities.[62]

In *Appeal of M.A. Kravitz Co.*,[63] the Pennsylvania Supreme Court began its opinion with a brief review of its prior exclusionary zoning cases.[64] The supreme court criticized the lower courts for interpreting those cases, particularly *Girsh*, to require a municipality to provide zoning for each type of residential use.[65] According to the supreme court, this misinterpretation created the assumption, held by the commonwealth court, that all exclusions were per se unreasonable.[66] The

57. *Id.*

58. *Id.* The township was 12 miles from Philadelphia and direct traffic routes linked the two cities. *Id.*

59. *Id.* at 195, 382 A.2d at 111.

60. *Id.* The multifamily development provision in the ordinance was of 1.14% of the township's area. *Id.* The court also noted that the ordinance permitted more than a dozen other uses in the multifamily zone. *Id.*

61. *Id.* at 195, 382 A.2d at 111-12. The facts in *Surrick*, according to the court, presented a situation that was "legally indistinguishable" from that found in *Willistown*. *Id.* at 195, 382 A.2d at 112.

62. *Id.* at 195-96, 382 A.2d at 112.

63. 501 Pa. 200, 460 A.2d 1075 (1983).

64. *Id.* at 205-11, 460 A.2d at 1078-81.

65. *Id.* The court stated that the Pennsylvania Commonwealth Court, in a number of decisions, improperly relied on *Girsh* as requiring provision for each multifamily design. *Id.* at 205, 208, 460 A.2d at 1078, 1079-80. The supreme court interpreted *Girsh* to hold that the exclusion of population growth, rather than the township's failure to provide for apartments as a separate use, made the ordinance unreasonable. *Id.* at 208-09, 460 A.2d at 1079-80. The court attempted to reduce the applicability of *Girsh* to future cases by stating that its reasoning was limited expressly to its facts. *Id.* at 206, 460 A.2d at 1078.

66. *Id.* at 208, 460 A.2d at 1080.

supreme court added that the lower court improperly ignored the newly developed *Surrick* model and, therefore, disregarded the decisive issue of whether the ordinance's provision for multifamily dwellings had a restrictive effect on population growth.[67]

The court then proceeded to analyze Kravitz' claim under the *Surrick* balancing test.[68] First, the court relied heavily on the findings of the zoning board which had concluded that the Philadelphia area, and in particular Wrightstown Township, was not likely to experience rapid growth pressure.[69] Second, the court noted that the township's current stage of development had not reached a point that precluded further growth.[70] Finally, the court stated that the ordinance's provision of less than one percent of township land for multifamily use could have an exclusionary impact.[71] The court warned, however, that the percentage of land available for multifamily housing was not the only relevant factor; instead, the court stressed the importance of balancing all factors, including local considerations.[72]

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67. *Id.* at 209-10, 460 A.2d at 1080.

68. *See supra* notes 52-57 and accompanying text.

69. 501 Pa. at 213-14, 460 A.2d at 1081-82. The evidence, as presented to the zoning board, focused on the township's physical location and characteristics. *See supra* note 14. In addition, the board relied on a market study, prepared by a professor of finance at the Wharton School of the University of Pennsylvania, that analyzed projected housing needs for the Philadelphia area and Wrightstown Township. 501 Pa. at 214, 460 A.2d at 1082. The board accepted the conclusions reached in the study, namely, that the major metropolitan areas of the northeast, including Philadelphia, were not likely to experience net population growth because of population shifts towards the nation's "sun belt," and that Wrightstown Township, as a result of this trend and based on its prior history, likely would grow at a relatively slow rate. *Id.* The *Kravitz* court stated that "[b]ased on this and other evidence, the Board properly determined that the Township is not a logical place for rapid growth and development, although some population expansion may be anticipated." *Id.*

The court's acceptance of the board's conclusion in this respect was crucial to the resolution of the case under the *Surrick* model. The absence of significant growth pressures, as found by the board, allowed the court to relax its scrutiny of the exclusionary effects of the ordinance. If the court had disagreed with the board and instead had accepted the developer's evidence, *Kravitz* would have presented a situation identical to that found in *Surrick*. To maintain *Surrick's* vitality, the court would have been forced to conclude that Wrightstown Township's provision of less than 1% of its acreage for multifamily housing was unconstitutionally exclusionary. *See supra* notes 58-62 and accompanying text.

70. 501 Pa. at 214, 460 A.2d at 1083.

71. *Id.*

72. *Id.* After stating that a court should not view the percentage of land for multifamily housing in isolation, the court referred to *Surrick's* discussion of the relevant

The township's zoning board, according to the court, gave balanced consideration to these numerous and complex factors.[73] On that basis, the court upheld the board's determination that the ordinance, although partially exclusionary, nevertheless was reasonable in light of the township's limited potential for growth.[74] The court was unwilling to overturn the board's judgment on the basis of the developer's contrary evidence that the township would undergo significant population increases if the ordinance offered more acreage for multifamily development.[75]

"fair share" factors, which included local considerations regarding growth pressures. *Id.* *See supra* note 54 and accompanying text.

Analyzing the local considerations present in *Kravitz*, the court referred to the zoning board's findings concerning the inadequacy of the township's roads and the absence of a system of mass transportation. 501 Pa. at 214-15, 460 A.2d at 1083. The court cited *National Land* and *Girsh* for the proposition that a municipality could not justify an exclusion with evidence of inadequate public services. *Id.* at 215, 460 A.2d at 1083. The court in *Kravitz* recognized, however, "that not all such services are entirely within the township's ability to provide." *Id.* The court cited highways and mass transit as two examples of non-municipal, yet necessary, services. *Id.* The court's discussion differed substantially from its earlier statements in *Kit-Mar* and *Willistown* that a municipality had an affirmative duty to increase public services in proportion to the growing population. *See supra* notes 28 & 36.

73. 501 Pa. at 216, 460 A.2d at 1083.

74. *Id.* at 214-16, 460 A.2d at 1082-83.

75. *Id.* at 215-16, 460 A.2d at 1083. The Pennsylvania Supreme Court decided Appeal of Elocin, Inc., 501 Pa. 348, 461 A.2d 771 (1983), contemporaneously with *Kravitz*. The court once again employed the *Surrick* test and held that the municipality had met its fair share obligation. *Id.* at 353, 461 A.2d at 773. The court's holding was based on the fact that the township previously had undergone significant population expansion. *Id.* at 352, 461 A.2d at 773. Thus, additional development and growth was virtually impossible. In addition, although the court stressed that it was not looking solely to percentages, 12% of the municipality's existing housing stock consisted of multifamily development in the form of duplexes and low-rise apartments. *Id.*

In *Elocin*, the developer alleged that the ordinance's failure to provide for townhouses and mid- and high-rise apartments rendered the ordinance unconstitutionally exclusionary. *Id.* at 353, 461 A.2d at 773. In response, the court stated that the city in *Elocin*, like Wrightstown Township in *Kravitz*, was not a logical area for development. *Id.* Therefore, as in *Kravitz*, the partial exclusion resulting from the zoning restriction was permissible. *Id.*

Justice Hutchinson, in a separate opinion, agreed with the majority that the ordinance's failure to provide for higher density apartment buildings was not unconstitutional. Appeal of Elocin, Inc., 501 Pa. 348, 355, 461 A.2d 771, 774 (1983) (Hutchinson, J., concurring and dissenting). The justice, however, disagreed with the majority's opinion as it related to the city's failure to zone for townhouses. *Id.* at 355, 461 A.2d at 774 (Hutchinson, J., dissenting). Justice Hutchinson applied the reasoning that he had employed in his dissent in *Kravitz* and reiterated his belief that an ordinance may not totally exclude townhouses. *Id.* *See infra* notes 78-81 and accompanying text. The

Of the seven member court, three justices dissented.[76] Justice Nix's brief dissent, joined by Justice Larsen, warned that the plurality's relaxed scrutiny, in the form of increased deference to the biased zoning board, effectively sanctioned suburban exclusionary zoning.[77]

Justice Hutchinson offered a separate dissenting opinion,[78] premised on his belief that the ordinance prohibited townhouses in the multifamily zone.[79] After he outlined the unique functions served by townhouses in the residential housing market,[80] Justice Hutchinson relied on *Girsh* to find an unconstitutional total prohibition of a valid residential use.[81] Justice Hutchinson then criticized the plurality's reliance on the *Surrick* test and the fair share standard on two grounds. First, the dissent argued that the complex determinations necessary to resolve cases under *Surrick* were proper subjects for land use planners and the legislature, not the courts.[82] Second, Justice Hutchinson stated that the plurality erroneously implied that an exclusion is proper, despite the absence of a relationship to a proper zoning purpose, when a community is not in the path of expansion.[83]

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justice stated that the *Surrick* fair share test's distinction "between 'developing' and 'developed' communities" should not apply to a situation, as in *Elocin* and in *Kravitz*, "where a municipality fails to provide in its zoning ordinance for a distinct and legitimate use." *Id.* at 355, 461 A.2d at 774-75.

76. 501 Pa. at 216, 460 A.2d at 1084 (1983) (Nix, J., dissenting); 501 Pa. at 216, 460 A.2d at 1084 (1983) (Hutchinson, J., dissenting).

77. 501 Pa. at 216, 460 A.2d at 1084 (Nix, J., dissenting).

78. 501 Pa. at 216, 460 A.2d at 1084 (Hutchinson, J., dissenting).

79. *Id.* at 216-18, 460 A.2d at 1084-85 (Hutchinson, J., dissenting). Justice Hutchinson agreed with the commonwealth court's assessment that the "plain meaning" of the ordinance, in its mutually exclusive definitions of "townhouses" and "multifamily dwellings," precluded incorporation of townhouses into the R-4 multifamily zone. *Id.* *See supra* notes 13 & 16.

80. 501 Pa. at 219-20, 460 A.2d at 1085-86 (Hutchinson, J., dissenting). Justice Hutchinson asserted that townhouses, in contrast with single-family and apartment uses, "provide families of moderate means with the opportunity to own or rent economical dwellings which preserve some of the benefits of privacy, ease of access and open space normally associated with single-family dwellings." *Id.* at 220, 460 A.2d at 1085.

81. *Id.* at 220-22, 460 A.2d at 1086-87 (Hutchinson, J., dissenting). The dissent disagreed with the plurality with respect to the proper reading of *Girsh*. Justice Hutchinson interpreted *Girsh* as creating a presumption that all exclusions fail to promote the general welfare. *Id.* at 220-21, 460 A.2d at 1086. An exclusion is constitutional only when substantially related to the general welfare as demonstrated by the ordinance's proponents. *Id.* at 220, 460 A.2d at 1086.

82 *Id.* at 221-22, 460 A.2d at 1086-87 (Hutchinson, J., dissenting).

83. *Id.* at 222, 460 A.2d at 1087 (Hutchinson, J., dissenting). The determination that Wrightstown Township was not a "developing" municipality under *Surrick*, ac-

The vitality of Pennsylvania's constitutional limits on exclusionary zoning is certainly in doubt after *Kravitz*.[84] In the trilogy of cases forming these limits—*National Land*, *Girsh*, and *Willistown*—the Pennsylvania Supreme Court placed an affirmative duty upon localities to provide housing to meet the needs of lower-income groups escaping the central cities.[85] *Kravitz*, however, implies that the fair share obligation disappears when a municipality is unlikely to grow rapidly. In this respect, *Kravitz* ignores the rationale that initially led to judicial intervention in the exclusionary zoning cases[86] because the court failed to

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cording to Justice Hutchinson, did not justify the exclusion of townhouses. *Id.* at 221-22, 460 A.2d at 1087. The dissenting justice argued that substantive due process retained its vitality as a restraint on a locality's ability to exclude—a restraint the court could not eliminate. *Id.* at 222, 460 A.2d at 1087.

84. *See* NEWSLETTER, *supra* note 32, at 3-5. Fernley v. Board of Supervisors of Schuykill Township, 76 Pa. Commw. 409, 464 A.2d 587 (1983), a case decided by the Pennsylvania Commonwealth Court subsequent to *Kravitz*, appears to diminish the importance of the earlier cases, particularly *Girsh*, even further. The zoning ordinance at issue in *Fernley* expressly prohibited all multifamily development. *Id.* at 411, 464 A.2d at 587-88. A preliminary issue facing the court was whether the *Surrick* fair share test should apply because the case involved a total, as opposed to a partial, exclusion. *Id.* at 410-11, 464 A.2d at 587. The court held that the supreme court intended the use of *Surrick* for both types of exclusion. *Id.* at 415, 464 A.2d at 589. The court then considered the evidence developed by the board of supervisors at the initial hearing and found that no reason existed for disturbing the board's findings that the township was not a "logical area for development and population growth." *Id.* at 412, 464 A.2d at 588. The court held that under *Surrick*, the total exclusion of multifamily dwellings was permissible because of the township's classification as a little or no growth area. *Id.* at 416, 464 A.2d at 590. The commonwealth court stated that "the *Surrick* opinion leaves no doubt that an affirmative answer to the initial inquiry [as to the likelihood of population expansion] is a prerequisite to a conclusion that the zoning is exclusionary." *Id.* at 414, 464 A.2d at 589.

Despite the fact that *Kravitz* and *Fernley* involve different types of exclusions, these cases rest on the same rationale. Nevertheless, the commonwealth court in *Fernley* expressly declined to rely on *Kravitz* because the court felt that there never had been a "clear finding" that Wrightstown Township was not a developing municipality. *Id.* at 415-16, 464 A.2d at 589-90. The *Fernley* court viewed *Kravitz* as explainable on the basis of the justices' differing opinions as to whether a total exclusion of townhouses existed and whether the exclusion was proper. *Id.*

85. *See supra* notes 25-43 and accompanying text.

86. *See supra* note 36 and accompanying text. In *Kit-Mar*, the Pennsylvania court explained the underlying rationale of its exclusionary decisions:

> 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.

439 Pa. at 474-75, 268 A.2d at 769.

recognize that the absence of growth pressure may have resulted from the zoning restriction itself.[87]

Kravitz represents a philosophical transition by the Pennsylvania Supreme Court from its activism of the past several decades to a more deferential stance. The court's willingness to accept the findings and conclusions of the local board increases the discretion and flexibility afforded to local political units in the zoning process.[88] *Kravitz*, therefore, signals a return to a more traditional, "Euclidean" theory on the judicial role in zoning litigation.[89] While this retreat is an improvement from the court's extreme intervention in *Willistown*[90]—labelled by some as "judicial zoning"[91]—the court's new approach may have gone too far. Relaxed scrutiny, together with the inherent bias of local officials to maintain the status quo,[92] may result in the erection of new exclusionary walls around the suburbs.[93] *Kravitz* represents an attempt to shift the business of zoning back to the individual municipality. In so doing, the Pennsylvania Supreme Court may have removed the only effective remedy to the exclusionary zoning problem.

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87. The *Kravitz* court's refusal to inquire into the relationship between the restriction and the expected lack of population growth is a clear departure from the court's attitude in *Girsh*, wherein the court stated that "[t]he simple fact that someone is anxious to build apartments is strong indication that the location of this township is such that people are desirous of moving in." 437 Pa. at 245, 263 A.2d at 399.

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

89. *See supra* notes 20-22 and accompanying text.

90. *See supra* notes 37-43 and accompanying text.

91. Justice Pomeroy's dissenting opinion in *Willistown*, discussed *supra* at notes 44-48, criticized the plurality for interfering without adequate justification in the municipality's planning process. 462 Pa. at 452-53, 341 A.2d at 470 (Pomeroy, J., dissenting). The dissenting justice felt that the court, despite its own prior warnings, had become a "super board of adjustment." *Id.* at 452, 341 A.2d at 470.

One commentator concluded that the Pennsylvania court's heightened scrutiny had eliminated most, if not all, of the discretion necessary to exercise effectively the zoning power. *See* Comment, *supra* note 24, at 529-30. The result, according to the author, would be haphazard development in the suburbs. *Id.*

92. *See supra* notes 2-3 and accompanying text. *See also* Comment, *supra* note 24, at 529.

93. Two dissenting judges took this position in *Kravitz*. *See supra* note 77 and accompanying text.