

## Exclusionary Zoning and the Fair Share Doctrine

A zoning ordinance may be exclusionary in its effect either because it excludes a use from a municipality or makes only a token allocation of land available for the use. The “fair share” doctrine is an aspect of the more general rule applied in Pennsylvania, which states that a zoning ordinance may be held invalid if it is exclusionary in its effect.

With regard to exclusionary zoning generally, Robert S. Ryan in his seminal work, *Pennsylvania Zoning Law and Practice*, states that the development of definitive principles concerning this area of the law has been difficult; nevertheless, Mr. Ryan suggests that the following analytical rules apply:

- (1) A municipality must make provision not only for “basic forms” of housing, but also for business and institutional uses that are not inherently objectionable.<sup>1</sup>
- (2) If a municipality excludes an industrial, commercial, or institutional use that is not inherently objectionable, it must justify the exclusion. A total exclusion of a basic form of housing cannot be justified.<sup>2</sup>
- (3) Where the exclusion is not total, a challenger may still be able to prove that the municipality has not made adequate provision for the use. In cases involving “basic forms” of residential uses, the analysis will follow the *Surrick*<sup>3</sup> “fair share” analysis. The cases do not give any precise formulation of the standard to be applied to claims involving “partial exclusion” of industrial, commercial or institutional uses. However, it seems unlikely that the courts will invalidate an ordinance that makes provision for such uses unless that provision is clearly inadequate in light of demonstrable current demand.<sup>4</sup>

The *Surrick* “fair share” analysis referred to above is essentially this:

- A review is made to determine if the community is a logical area for development and population growth, including a consideration of the community’s proximity to a large urban area and the region’s population growth.
- After establishing that the community is in the path of growth, the present level of development within the community is examined.
- In deciding whether a community has met its “fair share” obligations, the court is to review a number of factors, including:
  - current population growth and pressures within the community and region;

<sup>1</sup> See Robert S. Ryan, *Pennsylvania Zoning Law and Practice*, Section 3.5.2., George T. Bisel Company, Inc., Philadelphia, Pa., 2001, Supp. 2020.

<sup>2</sup> *Id.*

<sup>3</sup> *Surrick v. Zoning Hearing Board of Upper Providence Township*, 476 Pa. 182 (1977).

<sup>4</sup> *Ryan*, *supra* note 1.

- the percentage of land available under the zoning ordinance for the use in question;
- the amount and percentage of undeveloped land in the particular community; and
- the extent of the use that can be accommodated under the existing zoning ordinance.<sup>5</sup>

*Application:* If, for example, the amount of land zoned as being available for a particular use, such as multifamily dwellings, is disproportionately small in relation to these factors, the ordinance will be held exclusionary.

The “fair share” analysis is inapplicable where the challenged zoning ordinance totally excludes the use in question;<sup>6</sup> it was designed to apply only in cases where it is alleged that the amount of land zoned as being available for a particular use is disproportionately small. Also, mere conclusions are insufficient to establish that a municipality has failed to provide its “fair share” of a particular use; data supporting such a conclusion must be provided. Nevertheless, while a landowner challenging a zoning ordinance on a “fair share” theory should provide evidence regarding the percentage of undeveloped land in the municipality or risk a determination that it has failed to meet its burden of proving the ordinance invalid, there is no hard-and-fast rule that a municipality’s “fair share” of a particular use is to be based solely upon some set percentage of land being available for the use. In some circumstances, a very small allocation of land may meet the “fair share” requirement, particularly if there is no demonstration of a greater need.

In addition, Act 67 of 2000 amended the Pennsylvania Municipalities Planning Code (MPC) to allow a broadened geographic area for “fair share” where multi-municipal planning and generally consistent zoning occurs. More specifically, if a party challenges the validity of a zoning ordinance, where municipalities have adopted a multi-municipal comprehensive plan and are administering zoning ordinances generally consistent with the plan, the governing body, zoning hearing board or court on appeal shall proceed as follows: To determine whether a particular use is available within a reasonable geographic area, the administrative bodies or court shall consider the provision made for this use within the entire area covered by the zoning ordinances of the participating municipalities, not merely the municipality where the proposed use is located.<sup>7</sup>

<sup>5</sup> Ryan, *supra* note 1, at § 3.5.2, *citing* 476 Pa. at 191-194.

<sup>6</sup> Rather, a zoning ordinance that provides for the total prohibition of legitimate businesses from an entire community is likely unconstitutional. *See, e.g., Girsh Appeal*, 537 Pa. 237 (1970); *Exton Quarries, Inc. v. Zoning Hearing Bd. of Adjustment*, 425 Pa. 43, 59 (1967).

<sup>7</sup> *See* Pennsylvania Municipalities Planning Code, Act 247 of 1968, §§ 916.1(h), 1006-A(b.1) (53 P.S. §§ 10916.1(h), 11006-A(b.1)). The Pennsylvania Supreme Court has suggested that these sections were intended to alter the rule exemplified in prior case law that required municipalities to provide for every lawful use in their individual zoning ordinances, even if they were party to multi-municipal planning. *See In re Petition of Dolinger Land Group*, 576 Pa. 519 (2003), *citing Nicholas, Heim and Kissinger v. Harris Township*, 375 A.2d 1383 (Pa. Cmwlth. 1977) (holding that a joint comprehensive plan may not be used to justify exclusion of a legitimate use because comprehensive plans are “recommendatory” rather than regulatory). While the aforementioned sections may have broadened the geographic area considered in an exclusionary analysis, there is nothing to suggest that the underlying constitutional principles applied by the courts have been altered by amendments to the MPC.