IN RE: Application of EMBREEVILLE REDEVELOPMENT LP	**Before the ZONING HEARING BOARD OF WEST BRADFORD TOWNSHIP** **Validity Challenge to Constitutionality of Zoning Ordinance** **No. 395**

DECISION

PROCEDURAL BACKGROUND

On March 13, 2014, Embreeville Redevelopment LP ("**Applicant**") submitted an application ("**Application**") to the Zoning Hearing Board ("**Board**") of West Bradford Township ("**Township**") pursuant to Sections 609.1 and 916.1(1) of the Municipalities Planning Code ("**MPC**"), 53 P.S. §10101 *et seq.*, challenging the substantive validity of the Township's Zoning Ordinance ("**Ordinance**"). The Application alleges that the Ordinance failed to provide for the Township's "fair share" of various types of multi-family and single-family attached housing units[1] as required under applicable Pennsylvania Law and requests site-specific relief in order to permit the use of the Applicant's property located between West Strasburg Road to the North and Telegraph/Embreeville Road to the South, (the "**Property**") in order to meet the alleged deficiency in the Township's allocation of land available for such residential housing units. Pursuant to Section 909.1(a)(1) of the MPC, and Section 450-82 of the Ordinance, the Board convened a public hearing on August 6, 2014 to consider the Application.

[1] Collectively, Multi-Family Residential and Single-Family Attached uses are referred to herein as "**MF/SFA**." Both such dwelling types contain three (3) or more dwelling units and are variations of the "multifamily" dwelling type to be accommodated by municipal zoning ordinances under Section 604(4) of the MPC. The use of the word "multifamily" in this decision includes both the Ordinance's multifamily dwelling and single-family attached dwelling unit types.

On December 10, 2013, prior to the Applicant filing the Application, the Township's Board of Supervisors voted to enact their own curative amendment pursuant to Section 609.2 of the MPC by enacting Ordinance 13-06. The Applicant filed a timely challenge to the procedural validity of Ordinance 13-06 in the Court of Common Pleas of Chester County. On June 30, 2015, the Court of Common Pleas of Chester County, at Number 2014-00183, ruled in favor of the Township in the Applicant's procedural validity challenge to Ordinance 13-06; finding that Ordinance 13-06 was procedurally valid. The Applicant appealed that ruling to the Commonwealth Court. On March 2, 2016, the Commonwealth Court, ruled in favor of the Applicant and held that Ordinance 13-06 was void *ab initio* because Ordinance 13-06 was not enacted in accordance with the enhanced notice and advertising procedures applicable to the enactment of a "zoning map change" amendment to a zoning ordinance. See Embreeville Redevelopment, L.P. v. Bd. of Sup'rs of W. Bradford Twp., 134 A.3d 1122 (Pa. Cmwlth. 2016), appeal denied sub nom. Embreeville Redevelopment, L.P. v. Bd. of Supervisors of W. Bradford Twp., 145 A.3d 728 (Pa. 2016).[2]

The hearing proceedings before the Board overlapped the Applicant's separate procedural validity challenge. The Board hearings took place over the course of eighteen (18) meetings of the Board over a period of time spanning more than forty (40) months. Subsequent to the initial hearing on August 6, 2014, the proceedings were continued to the dates of October 1, 2014 and November 6, 2014. By the mutual agreement of the Applicant and Township, the hearing was temporarily suspended after the hearing on November 6, 2014 and subsequently resumed, again by the mutual agreement of the Applicant and Township, on October 7, 2015 and subsequently continued on the record to the dates of December 2, 2015, January 6, 2016, March 2, 2016, April 6, 2016, May 4, 2016, June 1, 2016, October 5, 2016, November 2, 2016, and December 7, 2016.

[2] A copy of the Commonwealth Court Decision was entered in the Record, for reference, as Exhibit A-72.

By the mutual agreement of the Applicant and Township the hearing was again temporarily suspended after the hearing on December 7, 2016 and subsequently resumed on September 6, 2017 and continued to October 18, 2017, and December 6, 2017.

The Applicant rested its case-in-chief at the September 7, 2016 hearing. The Township rested its case-in-chief after the September 6, 2017 hearing. After several rebuttal witnesses, both the Applicant and Township rested their cases at the December 6, 2017 hearing and the record was closed. The foregoing proceedings were transcribed. The Applicant and Township, by agreement, submitted proposed findings of fact and conclusions of law to the Board on or before January 22, 2018. A public meeting to take argument was held on February 7, 2018. The Parties submitted rebuttal briefs on March 14, 2018. The Board rendered this decision at their regularly scheduled public hearing on April 4, 2018.

In addition to the Applicant and the Township, the following parties requested, and were granted party status during the course of the hearing proceedings:

Party Name(s)	**Property Address**
Phyllis Allen	934 Stargazer Road
Earle Bare	1210 Telegraph Road
Bradley Bernosky	708 Shagbark Drive
Michael Billings	600 Jolene Drive
Joe Breslin	721 Shagbark Drive
Jeffrey Callahan	623 Broad Run Road. #1
Everett and Carol Chapman	690 Spruce Drive, #4
Roberta Ekdahl	1751 West Strasburg Road
Mary Ewing	481 Brandywine Drive
Maryanne E. Gallucci	1830 West Strasburg Road
Ryan Gregan	611 Foothill Drive
Barbara Howard	998 Broad Run Road

Jeffrey Moore	609 Foothill Drive
Natural Lands Trust, Inc.	650 Brandywine Drive
Len Ostanek	612 Foothill Drive
Kate Roby	899 Stargazer Road
Lenore Southam and Elaine Hammel	1819 West Strasburg Road
John Stillman	726 Shagbark Drive
Alexander and Paula Squitiere	1834 West Strasburg Road
Catharine and David Vrencur	680 Spruce Drive
Ed Weisbrod and Betsy DeMarino	261 Brandywine Drive
Erica Young	649 Sugars Bridge Road

The Board denied the requests of party status, made by Erica Young, putatively on behalf of the Marshallton Conservation Trust, because Ms. Young presented no formal evidence of her authority to act on behalf of the Marshallton Conservation Trust. Ms. Young was nonetheless personally granted party status.

During the hearing proceedings, the following exhibits were admitted into evidence:

a. Board Exhibits

Number	Exhibit
B-1	Proof of Publication of Notice in the Daily Local News on July 21 and 28, 2014.
B-2	Proof of Posting of Notice on July 21, 2014
B-3	Emails of January 26, 27, and 30, 2017 regarding continuance of proceedings.
B-4	Correspondence of July 27, 2017 regarding resumption of proceedings.
B-5	Township Zoning Ordinance (by reference)

b. Applicant Exhibits

Number	Exhibit
A-1	ZHB Application of Embreeville Redevelopment L.P.
A-2	Dennis Glackin C.V.

A-3	Existing Conditions Plan
A-4	Fall 2012 WBT Embreeville Article
A-5	Consultation Management Agreement
A-6	Township Fact Sheet
A-7	Emails of June 17 and 18, 2013
A-8	P. 95, 2009 West Bradford Township Comprehensive Plan
A-9	Township Board of Supervisors Resolution 13-12
A-10	Curative Zoning Amendment Presentation from Brandywine Conservancy
A-11	Glackin Review Memorandum Dated November 5, 2013, and marked E-1 with BLN letter during ordinance adoption hearing
A-13	West Brandywine Township Ordinance 13-06
A-14	Brandywine Conservancy Report
A-15	Letter dated July 20, 2010 from EDiS to Jack Hines RE: Environmental Remediation
A-16	Future Land Use Map 8-1 adopted as part of Ordinance 13-06
A-17	Emails of October 4, 2013
A-18	Industrial Zoning Planning Area Map Exhibit 10 from Glackin Report
A-19	Industrial Zoning Planning Map 11 A & 11 B part of Exhibit 11 to Glackin Report
A-19A	Industrial Zoning Planning Map 11 A & 11 B Revised part of Exhibit 11 to Glackin Report
A-20	Industrial Zoning Area Parcel Details
A-21	Industrial Parcels Chart, P.13 from Glackin Report
A-21A	Industrial Parcels Chart – Revised November 5, 2014
A-22	Emails of November 12, 2013
A-23	Emails of September 5, 2013

A-24	P.123, 2009 West Bradford Township Comprehensive Plan
A-25	West Bradford Township Board of Supervisors Minutes dated August 13, 2013
A-26	Emails of August 28, 2013
A-27	Emails of August 19 and 20, 2013
A-28	Emails of September 9 and 10, 2013
A-29	Brandywine Conservancy - West Bradford Curative Amendment Status Report of September 10, 2013
A-30	Emails of October 17 and 21, 2013
A-31	P.88, 2009 West Bradford Township Comprehensive Plan
A-34	Chester County Planning Commission Recommendation dated November 19, 2013
A-35	Glackin Report
A-36	Greg Newell C.V.
A-37	Stantec Survey
A-38	Aqua Letter dated October 22, 2014
A-39	Matt Hammond C.V.
A-40	Land Use Assumption Report
A-41	Roadway Sufficiency Analysis
A-42	Transportation Report
A-46	West Bradford Twp. 2011 Act 537 Plan
A-47	35 P.S. 750.1
A-48	Ch. 71 Sewage Facilities
A-49	Chapter 94 Report
A-50	PUC Petition of UIP
A-51	PUC Comments of Consumer Advocate

A-52	Utilities Inc. letter dated March 3, 2015
A-53	Petition to Withdraw Joint Petition
A-54	PUC Order
A-55	DEP Letter of August 26, 2013
A-56	Appendix B & C
A-57	StanAb Agreement for Sewer Utility Service
A-60	Steven Cawley C.V.
A-61	Aerial of Plant
A-62	Matt Brown C.V.
A-63	Matt Brown Photographs
A-64	David Babbitt C.V.
A-65	Housing types by Township
A-66	Brandywine Conservancy Fair Share Analysis, 2013
A-67	David Babbitt Fair Share Analysis, 2016
A-68	Right to Know Request Form
A-69	Stantec Sketch 1 4 Units per Acre (partial)
A-70	Stantec Sketch 2 7 Units per Acre (partial)
A-71	Stantec Sketch 3 10 Units per Acre (partial)
A-72	Commonwealth Court Decision in Embreeville Redevelopment, L.P. v. Bd. of Sup'rs of W. Bradford Twp., 134 A.3d 1122 (Pa. Cmwlth. 2016)
A-73	David Babbitt Expert Report
A-75 (a - ee)	David Babbitt photos of Embreeville site
A-76	U.S. Census Bureau - size of housing units
A-77	Resume of Lisa Thomas

A-78 (A & B)	Glackin Thomas Concept Plan A
A-79 (A & B)	Glackin Thomas Concept Plan B
A-80 (A & B)	Glackin Thomas Concept Plan C
A-81 (a - n)	Photos of Embreeville Complex from November 29, 2017 Site Visit

c. Township Exhibits

Number	Township Exhibit
T-2	Correspondence dated August 10, 2012 from Kenneth C. Hellings to Tommy Ryan
T-3	Excerpts from West Bradford Township Comprehensive Plan of 2009 (pages 91-92, 95, 122-123, 125, Map 8-1)
T-4	Exceprts from East Marlborough Township 2014 Adopted Zoning Amendments
T-5	Recorded Land Development Plan for United Sports Training Center
T-7	August 30, 2010 Transcript
T-8	Thomas J. Comitta C.V.
T-9	Expert Witness Report of Thomas J. Comitta dated October 15, 2016
T-9a	Expert Witness Report of Thomas J. Comitta revised November 2, 2016
T-10	John E. Theilacker, AICP C.V.
T-11	Existing Zoning and Industrial Build-out of West Bradford Township prepared by Brandywine Conservancy dated March 6, 2009
T-12	Spreadsheet of proposed residential buildout of existing properties in Industrial District
T-13	Aerial map of West Bradford Township printed by Brandywine Conservancy dated September 6, 2017
T-14	Proposed Land Use Plan of Embreeville Center prepared by Brandywine Conservancy dated September 6, 2017

T-15	Aerial map of Braod Run Watershed prepared by Brandywine Conservancy created March 21, 2017
T-16	Township Comprehensive Plan (by reference)

d. Other Party Exhibits

None.

FINDINGS OF FACT

1. The foregoing Procedural Background is incorporated here as if set forth at length.

2. During or before June of 2013, the Township identified the possibility that the Ordinance may not provide for an adequate number of MF/SFA Units for the Township in order to meet the Township's fair share of such housing types regionally. See Exhibit A-7, Emails between John Theilacker (of Brandywine Conservancy) and Tommy Ryan (the then-Township Manager).

3. In June of 2013, the Township commissioned a study performed by the Brandywine Conservancy, Inc. ("**Conservancy**"). See Exhibit A-7.

4. The Conservancy issued its report on August 8, 2013 (revised October 23, 2013, the "**Conservancy Report**") finding that the Ordinance "*vulnerable to legal attack*" because the Conservancy's analysis suggested that the Township would not be able to provide sufficient MF/SFA units to accommodate a regional statistical mean of unit mix.[3] See Exhibit A-14, Conservancy Report, at p. 14.

5. On August 13, 2013, by motion, the Township Supervisors invoked Section 609.2 of the MPC by declaring that the Ordinance was substantively invalid and directed the Township Manager and staff to undertake the preparation of a curative amendment. See Exhibit A-9, at p. 1.

6. The August 13, 2013 Motion was subsequently ratified by the Township Supervisors in Resolution 13-12, wherein the Township Supervisors subtly altered their original declaration in the August 2013 Motion that the Ordinance was invalid, in favor of a position that the Ordinance "*may be substantially invalid...*" [emphasis added] for failing to provide for an adequate number of multifamily units. See Exhibit A-9, at No. 2.

7. In Resolution 13-12, the Township Supervisors also resolved to "... *prepare a curative amendment to overcome any invalidity as may be determined...*" Id.

8. On December 10, 2013, the Township Supervisors voted to enact Ordinance 13-06 which, *inter alia*, amended the Ordinance to permit multifamily units within the Township's I – Industrial Zoning District. See Exhibit A-13.

[3] The Brandywine Conservancy also identified a potential deficiency in the Township's provision of Mobile Homes, which was not related to the Applicant's challenge.

9. As described above, Ordinance 13-06 was subsequently deemed void *ab initio* by the Commonwealth Court and the Township's *Petition for Certiorari* was denied by the Pennsylvania Supreme Court. See Exhibit A-72.

THE EMBREEVILLE PARCEL

10. The property which is the subject of the Application, Parcel No. 50-8-9 (the "**Embreeville Parcel**" or "**Property**"), consists of 206.14 acres, located entirely within the Township is the site of the former Embreeville State Mental Hospital. Exhibit A-1.

11. The Property is located in the Township's IM – Institutional / Mixed Use zoning district (the "**IM District**"). Exhibit A-1.

12. Multifamily residential dwellings and single-family attached dwellings are not permitted in the IM District. See Ordinance §450-58 B.

13. Historically, the Embreeville Parcel has been used as a medical hospital, as a mental hospital operated by the Commonwealth of Pennsylvania, and for other institutional uses. The state-run mental hospital on the Embreeville Parcel closed in the 1990's, after which several smaller sections used for other institutional uses which have all since ceased. See Exhibit A-35, pg. 2.

14. The Embreeville Parcel still bears the extensive remnants of its former, historical, use as a mental institution, including an internal road network, paved parking areas, sixteen buildings, several of which are multi-story buildings, and the parcel's own decommissioned water treatment plant. Id.

15. Since the disuse of the Embreeville Parcel, many of the aforesaid improvements on the Embreeville Parcel have become derelict and fallen into disrepair. See Exhibit A-75 (a) through Exhibit A-75 (ee).

16. The Applicant is the lawful owner of the Embreeville Parcel pursuant to that certain instrument dated May 1, 2013 and recorded on May 7, 2013 in Chester County in Book 8711 at page 1841. Exhibit A-1, at p. 7.

17. On that same date of May 7, 2013, and by that same instrument, Applicant also acquired parcel No. 49-2-54 (the "**Newlin Township Parcel**"), consisting of 12.67 acres, is located to the south of, and immediately adjacent to, the Embreeville Parcel in Newlin Township.[4]

[4] The boundary line between the Embreeville Parcel and the Newlin Township Parcel forms part of the municipal boundary between West Bradford Township and Newlin Township. The contents of this decision are rendered only with respect to the Embreeville Parcel and the SPCA Parcel, being located within the jurisdiction of the West Bradford Township Zoning Hearing Board.

18. The Applicant is also the equitable owner of parcel No. 50-8-9.4 (the "**SPCA Parcel**"), consisting of approximately 20 acres, located in the northeast corner of (and adjacent to) the Embreeville Parcel.[5] See Exhibit A-1, at p. 5.

THE TOWNSHIP AND ITS ZONING ORDINANCE

19. The Township is within the path of logical growth along the Route 30 and Amtrak/SEPTA corridor located along the northern boundary of the Township. N.T. 10/5/2016 at 34:10.

20. The Township is not already highly developed. See Exhibit A-14.

21. The Ordinance permits multifamily and single-family attached uses (in varying configurations) within five of the ten residential zoning districts in the Township (to wit: the R-1, R-4, R-5, TND-1, and TND-2 zoning districts), under and subject to various conditions and limitations. See Ordinance §§ 450-11.B.(3)(d); 450-17.B.(1)(c); 450-36 A.(1); 450-28.A.(1)(d); 450-28.A.(1)(e); §450-46 A.(1).

22. The area of land within the Township zoned for MF/SFA uses, exclusive of the R-1 Residential District, 4.1% of the total area within the Township, or approximately 487.9 acres. N.T. 11/2/2016 at 9:10; see also Ordinance Zoning Map dated July 30, 2008 as incorporated at Ordinance § 450-9.

23. Within the R-1 Residential District, an undetermined number of historic structures are also entitled to MF/SFA uses. Ordinance §450-11 B.(3)(d).

24. The precise amount of the total portion of the Township's land zoned for MF/SFA uses is not determinable from the record (since the acreage of qualifying R-1 parcels is not calculable from the record); however, such total is not less than 4.1%.

25. Applicant did not show, or claim, that the regulations and conditions imposed by the Ordinance upon the development of MF/SFA uses in the various zoning districts where MF/SFA uses are permitted (for example only, the requirements for public water and sewerage) unreasonably impede the development of MF/SFA units within those five districts.

26. Based on Township-specific data derived from the U.S. Census and Chester County Planning Commission, the population projected for West Bradford Township by the year 2040 is 16,155 persons. Exhibit T-9a; Comitta Report, Table A-1; N.T. 10/5/2016, at 38; Exhibit A-14, Conservancy Report, at p.6,

27. Based on Township-specific data derived from the U.S. Census and Chester County Planning Commission, the number of persons per household is 2.96. Exhibit T-9a, Comitta Report, Table A-1; N.T. 10/5/2016 at p. 44-47.

[5] The term "**Property**" as used herein shall refer exclusively to the Embreeville Parcel and the SPCA Parcel except where otherwise indicated.

28. The capacity of additional housing units of all types developable under the Township's zoning ordinance (1,807) exceeds the number of additional housing units of all types (1,240 additional) that will be needed to accommodate the projected Township population by the year 2040. Exhibit T-9a, Comitta Report, Tables A-3 and A-4; N.T 10/5/2016, at p. 48-62.

29. The total number of housing units (of all types) needed to accommodate The Township's 2040 projected population is between 5,400 and 5,457. Exhibit A-14, Conservancy Report, at p. 8; Exhibit T-9a, Comitta Report, at p. 2-3; N.T. 10/5/2016 at 47.

30. Based upon a parcel by parcel analysis of the lands zoned for MF/SFA use within the Township (exclusive of historic structures in the R-1 District), and factoring out all lands constrained by steep slopes and flood plain: of the Township's 2040 projected total inventory of dwelling units needed to accommodate the Township's population growth, 559 units[6], or more than 10.24% of such inventory, are existing, approved and/or developable for MF/SFA use under the Ordinance.

31. The Township's share of then-existing multifamily housing type by percentage of dwelling units was only 3.26% at the time of the last census in 2010. However, its multifamily share of all potential new housing units in the Township is as much as 20.5%. Exhibit A-14, Conservancy Report, at pp. 5 and 9.

[6] As of November 2, 2016, there were 201 existing or substantially-complete MF/SFA units within the Township. Exhibit T-9a, Comitta Report, at p. 2-3, fn. 1 and fn. 2. As of that same date, there were an additional 112 single-family attached units planned. Id. at p. 2-3, fn. 3. A further 230 MF/SFA units are buildable throughout the remaining parcels of the Township. Id. at p. 2-4. Thus, the total, future number of MF/SFA units within the Township is 559 units.

DISCUSSION

A. The Validity of the Ordinance

Because Ordinance 13-06 has been conclusively deemed a legal nullity *ab initio* by the Applicant's separate procedural validity challenge, the Board's review is limited to the Township's Ordinance as it existed prior to the enactment of Ordinance 13-06.[7]

The question of whether an ordinance is exclusionary is a question of law. Cracas v. Board of Supervisors of West Pikeland Twp., 492 A.2d 798, 800 (Pa Cmwlth. Ct. 1985). So, while the Township's statements regarding the constitutional validity of their own zoning ordinance are probative, only the Township's Zoning Hearing Board, or a reviewing court, is empowered under Pennsylvania law to conclusively determine the constitutionality of the Township's zoning ordinance. Appeal of Marple Gardens, 514 A.2d 216, 221 (Pa. Cmwlth. Ct. 1986) ("[a] Township's resolution declaring its ordinance to be invalid would not... establish invalidity as a matter of law."), This is especially so in the case where a Township's invocation of MPC Section 609.2, as in the present case, merely stated that its zoning ordinance "may be" invalid. C&M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd., 820 A.2d 143, fn. 28 (Pa. 2002). Thus, the Township's statements regarding the Ordinance are not dispositive and the Board must conduct its own analysis of whether the Ordinance is constitutionally valid or unconstitutionally exclusionary as alleged by the Applicant.[8] However, In conducting its analysis, the Board has given due

[7] As used herein, the term **"Ordinance"** refers to the Township's Zoning Ordinance as it existed prior to the enactment of Ordinance 13-06.

[8] The Applicant argued in the Board proceedings that the Township is estopped from asserting that the Ordinance is substantively valid because of the pronouncement to the contrary in Ordinance 13-06 and the Township's defense of Ordinance 13-06 in the procedural validity challenge. However, a municipality's invocation of the statutory municipal cure provision of MPC Section 609.2 does not constitute an admission of the ordinance's invalidity. In Re Petition of Dolington Land Group, 839 A.2d 1023, fn. 7, (Pa 2003). Furthermore, "absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,' and thus poses little threat to judicial integrity." New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001) (Internal Citations

consideration to Township's declaration and to the record of its adoption, including, in particular, the Conservancy Report, on which the Township's declaration was based.

"If an ordinance totally excludes a particular use, such as mobile homes or billboards, then the ordinance is *de jure* exclusionary; if an ordinance provides for a particular use but applies additional restrictions on the use that have the effect of excluding or making provision of the use illusory, then the ordinance is *de facto* exclusionary." KS Dev. Co., L.P. v. Lower Nazareth Twp., 149 A.3d 105, 113 (Pa.Cmwlth. 2016), appeal denied, 169 A.3d 533 (Pa. 2017); See Also Twp. of Exeter v. ZHB of Exeter Twp., 962 A.2d 653, 659 (Pa. 2009); Atiyeh v. Bd. of Commissioners of Twp. of Bethlehem, 41 A.3d 232, 236–237 (Pa. Cmwlth. 2012); Stahl v. Upper Southampton Twp. ZHB, 606 A.2d 960 (Pa. Cmwlth. 1992).

Section 604 (4) of the MPC requires that any zoning ordinance:

> "*provide for the use of land within a municipality for residential housing of various dwelling types encompassing all basic forms of housing including single-family and two-family dwellings, and a reasonable range of multifamily dwellings in various arrangements,[...] provided, however, that no zoning ordinance shall be deemed invalid for the failure to provide for any other specific dwelling type.*"[9]

Multi-family and single-family attached dwellings are permitted in the Township's R-1 Residential District (the "**R-1 District**") by conditional use within historic structures. See

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Omitted). For judicial estoppel to apply, the party sought to be estopped must have successfully maintained its position in the prior proceeding. Morris v. South Coventry Township Bd of Supervisors, 898 A.2d 1213 (Pa Cmwlth. 2006). The Township did not prevail in the procedural validity challenge, thus, the doctrine of judicial estoppel does not apply.

[9] The Board finds that the delineation of three categories of dwellings (to wit: "single-family", "two-family", and "multifamily") suggests that the dwelling type described herein as "single-family attached" (i.e. townhouses) is merely one arrangement of multifamily housing as described in Section 604 (4) of the MPC, but nevertheless one of the "various arrangements" of multifamily housing that must be provided by the Ordinance.

Ordinance §450-11.B.(3)(d).[10] Single-family attached uses and "Garden Apartments" (a species of multifamily dwellings by the terms of the Ordinance)[11] are permitted by right in the Township's R-4 Residential District (the "**R-4 District**") where public sewerage and public water systems are provided. See Ordinance §450-17.B.(1)(c). Single-family attached dwellings (in the form of triplexes) are permitted, by right, in the Township's R-5 Residential District (the "**R-5 District**") where public sewerage and public water systems are provided. See Ordinance §450-36 A.(1). Single-family attached dwellings are also permitted by right in the Township's Traditional Neighborhood Development-1 / Village Overlay District (the "**TND-1 District**"). See §450-28.A.(1)(d). "Apartment (multifamily)" dwellings are also permitted by right in the TND-1 district where "located on the second or third floor over a shop or office within the village center." See §450-28.A.(1)(e). Both the single-family attached dwelling use and the "Apartment (multifamily)" use are also permitted in the Township's Traditional Neighborhood Development-2 District (the "**TND-2 District**"). See §450-46 A.(1). As described in more detail below, the total area of these various districts permitting MF/SFA uses is at least 4.1% of the Township's

[10] Ordinance Section 450-11 A.(3)(d) describes conditional uses in the R-1 District and includes the following text: "*Single-family semi-detached; single-family attached; two-family attached; and multifamily detached dwellings, only when built in existing historic structure(s) in accordance with § 450-62 O.*" There may be a reasonable interpretation of the foregoing language (based upon the use of serial semicolons) which suggests that the restriction of use to historic structures applies only to multifamily uses; and that single-family attached uses are excluded from such limitation. It is not clear to the Board whether this reading was the intent of the language as enacted by the Board of Supervisors. The use of the word "dwelling" to apply across all of the serial list items suggests that the limitation to historical structures applies to each of the types of "dwellings" listed. Where any doubt exists, the Board has a duty imparted by Section 603.1 of the MPC to interpret the language of the Ordinance against any implied extension of such restriction. Moreover, the Board has a duty to interpret the Ordinance in order to achieve a reading which is non-exclusionary. See Robinson Twp. v. Com., 83 A.2d 901 (Pa. 2013); Stilp v. Com., 905 A.2d 918, 939 (Pa. 2006). Because of the great quantity of identified historic resources within the Township, and because the Applicant failed to prove that development of multifamily dwellings within those historic resources was practically constrained such that the Ordinance is exclusionary, the Board finds that it does not need to expansively interpret this provision insofar as there has been no suggestion that use of historic structures for multifamily dwellings is infeasible or illusory. However, if read expansively, the provision would permit the Single-Family Attached dwelling use throughout the entire R-1 District, which contains 8,738.56 acres, or approximately 73.43% of the total Township land area. See Ordinance Zoning Map dated July 30, 2008 as incorporated at Ordinance § 450-9.

[11] See Ordinance §450-8 (definition of "Dwelling Types"): *"GARDEN APARTMENT – A **multifamily dwelling** up to three stories in height designed for rental or condominium ownership of the housekeeping unit."* [Emphasis added]

lands. N.T. 10/5/2016 at 71:23. Thus, the Ordinance is not *de jure* exclusionary because the Ordinance does not completely exclude MF/SFA uses.

Pennsylvania's "Fair Share Doctrine" in the context of exclusionary zoning (i.e. municipalities which provide for some – but perhaps not enough – land zoned for a given use) arises from the case of Surrick v. Zoning Hearing Board of Upper Providence Twp., 382 A.2d 105 (Pa. 1976). In that case, the Upper Providence zoning scheme was found to be exclusionary where multifamily housing was allowed only on 1.14% of the Township's total land area (upon which over a dozen other uses were allowed).

The test promulgated in Surrick consists of three phases which the Commonwealth Court has described as follows:

> *"First, the inquiry must focus on whether the community in question is a logical area for population growth and development. Next, if the community is in the path of growth, the present level of development must be examined. Lastly, if the community which is located in the path of growth is not already highly developed, then the reviewing body must determine if the zoning ordinance has the practical effect of unlawfully excluding the legitimate use in question. Exclusionary impact can invalidate an ordinance; exclusionary intent is not necessary."*

Overstreet v. Zoning Hearing Board of Schuylkill Twp., 618 A.2d 1108, 1113 (Pa. Cmwlth. 1992).

Under the caselaw as it has evolved over the four decades since Surrick, A *de facto* challenge to an ordinance regulating a residential use may be based either on (1) the amount of land made available for a class of residential uses; or (2) the inability to develop the residential use on land provided in a sufficient amount for that class of use because of unduly restrictive conditions on development; or (3) on both bases. KS Dev. Co. L.P. 149 A.3d at 115; Twp. of Exeter, 962 A.2d at 659 & n.5.

Importantly, the Township's Ordinance enjoys a presumption that is constitutionally valid. See Miller & Son Paving, Inc. v. Wrightstown Twp., 451 A.2d 1002 (Pa. 1982); Robinson Twp.

v. Com., 83 A.2d 901,943 (Pa. 2013). The Surrick test does not replace this presumption, but instead works in conjunction with the presumption to determine whether the zoning ordinance is constitutional and imposes a heavy burden of substantial evidence upon the party who seeks to challenge its validity. 382 A.2d at 112 n. 13. The burden of proof and persuasion are upon the challenger to such validity. Id.

Here, the Applicant alleges that the Township's Ordinance is *de facto,* partially exclusionary because the Township's allocation of land for such MF/SFA is inadequate to accommodate the Township's fair share of multifamily housing to accommodate projected future population growth under Pennsylvania Law. However, the Applicant did not rebut (or even address) the sufficiency of the amount of land zoned for MF/SFA uses under the Ordinance.

The Parties stipulated during the hearing, and the Board concurs, that portions of West Bradford Township are in the path of growth.[12] There is also little question that the Township is not already highly developed. Exhibit A-14, p. 5. Thus, the primary question for the Board arising out of the Surrick analysis is whether the amount of land allocated for the MF/SFA use is so disproportionately small that such land will not accommodate a fair share of multifamily housing in light of the Township's regional setting and its projected growth in population.

The Township's expert, Mr. Comitta set out to directly address the amount of land zoned for multifamily housing and calculated that the amount of land zoned for MF/SFA uses in the

[12] The Board took creditable testimony and evidence that the path of growth did not necessarily extend over the entire Township. The northern portion of the Township, closer to the Route 30 and Amtrak/SEPTA rail lines, is more developed and offers a more compelling location for growth than the southern portions of the Township which are more rural (and where the Applicant's Property is located). See N.T. 10/5/2016 at pp. 32-37. However, the question posed by Surrick is not whether the Applicant's Property is within the likely path of growth, but rather whether the Township – or any portion of the Township – is within the path of growth. If so, it is the duty of the Township's governing body to accommodate the Township's fair share of land within the Township for the class of housing under consideration by designating locations in the Zoning Ordinance to accommodate such housing type within the Township.

Township's R-4, R-5, TND-1, and TND-2 districts totaled 4.1% of the Township's land. N.T. 10/5/2016 at 71:23. This calculation understates the amount of land available for such uses because it does not include the area within the R-1 District which could be used for MF/SFA uses by conditional use.[13] Thus, while the precise extent of land available for multifamily use within the R-1 District is unclear, the Board can reasonably find that the available land is certainly no less than the 4.1% of township lands in the districts other than the R-1 district, and perhaps considerably more.

Pennsylvania does not have a bright-line rule with respect to the minimum amount of land necessary to assure that a municipality's ordinance is not *de facto* exclusionary. However, the Township's minimum allocation of 4.1% is significantly greater than in the several other Pennsylvania cases where the use allocation was found to be constitutional. See e.g. Cambridge Land Co. v. Twp. of Marshall, 560 A.2d 253 (Pa. Cmwlth. 1989) (2.75% multifamily held to be valid); Warwick Land Development Corp. v. Bd. of Supervisors of Warwick Twp., 376 A.2d 679 (Pa. Cmwlth. 1977) (2.95% multifamily held to be valid); Hostetter v. Township of North Londonderry, 437 A. 2d 806 (Pa. Cmwlth. 1981) (2.6% multifamily held to be valid); Boss v. ZHB of the Borough of Bethel Park, 517 A.2d 1371 (Pa. Cmwlth. 1985) (3.2% multifamily held to be valid); Appeal of Silver, 387 A.2d 169 (Pa. Cmwlth. 1978) (3.5% multifamily held to be valid)[14].

[13] There are at least 180 separate historic resources identified within the Township. See Exhibit T-16, West Bradford Township Comprehensive Plan, Historic Resources Map 1-1. It is not clear to what extent each of these historic resources is a "historic structure" or to what extent each might be developable for multifamily residential use. However, despite the burden to do so, the Applicant provided no evidence of any provision of the Zoning Ordinance or practical limitation which would render such potential use illusory.

[14] By contrast: 1.14% was insufficient in Surrick (where a dozen other uses were allowed in the subject land), 1.16% was insufficient in Appeal of Abcon, 387 A. 2d 1303 (where none of the zoned land was available for development), but even .6% was sufficient where the land allotted would accommodate anticipated population growth for the next decade. Appeal of M.A. Kravitz Co., 460 A.2d 1080 (Pa. 1983).

"Where a zoning provision's validity is debatable, the legislature's judgment must control." Boundary Drive Associates v. Shrewsbury Twp. Bd. of Sup'rs., 491 A.2d 86, 90 (Pa. 1985). Thus, given the absence of direct evidence on the record as to the precise percentage of land zoned for MF/SFA uses (for which the Applicant bore the burden of proof), and coupled with the several cases cited above where lesser allocations of land were found to be valid, the Board finds that the Township's allocation of at least 4.1% of its land for uses that include the MF/SFA uses, is not mere tokenism and remains facially constitutionally valid.

Notwithstanding the facially constitutional allocation of land by the Township, the Applicant was entitled to prove that some other regulatory factor unduly restricted development of MF/SFA uses such that they remained unconstitutionally excluded. Here, however, the Applicant again failed to meet its burden. The Applicant's own expert, Mr. Babbitt, largely builds upon and incorporates a derivative of the methodology originally used by the Brandywine Conservancy's report to the Township which focuses heavily on the number and mix of MF/SFA uses relative to other uses within the Township and within a wider region. However, the methodology in the Conservancy Report, and thus the analysis conducted by Mr. Babbitt and patterned on the Conservancy methodology, as well, were not Surrick analyses.

While it is true that Surrick and its progeny are "results-based" (in the sense that they give lesser regard to the intent of an ordinance than to evaluation of ordinance's effect), the Applicant has misapprehended the burden imposed by Surrick on the Township insofar as it relates to exclusionary zoning. Surrick merely requires the adequate allocation of land for all required types of housing – not a permanent and continuing obligation on the part of the Township to assure that sufficient land remains available for such use. If the land zoned for a given use (among all permitted uses) is later used for another purpose, the Ordinance cannot be found exclusionary on

that basis. Montgomery Crossing Associates v. Twp. of Lower Gwynedd, 758 A.2d 285, 290-291 (Pa. Cmwlth. 2000), appeal denied, 771 A.2d 1291 (2001) ("[...] if a district containing available land has been zoned to permit a particular use, one may not later base a claim that the use is excluded on the fact that the land has been used for another purpose instead."); See also Overstreet v. Zoning Board of Schuylkill Twp., 618 A.2d 1108, 1115 (Pa. Cmwlth. 1992); Appeal of Groff, 274 A.2d 574, 575 (Pa. Cmwlth. 1971); KS Dev. Co., L.P. v. Lower Nazareth Twp., 149 A.3d 105, 116 (Pa.Cmwlth. 2016), appeal denied, 169 A.3d 533 (Pa. 2017).

The Conservancy Report's analytical framework used readily-available data published by the American Community Survey ("**ACS**") in order to arrive at the proportion of MF/SFA uses (relative to other uses) within relatively nearby municipalities. The panel of which nearby municipalities should be selected (to describe the various "regions") was a matter of considerable discussion during the proceedings before the Board.[15] However, the arithmetic used to evaluate each region in the Conservancy Report was identical: (1) using the ACS data archive, identify the statistical mean of the percentage of MF/SFA uses, relative to other uses, within the selected region (the "**Present Regional Allocation**"); (2) multiply the projected, future number of housing units

[15] The Board does not find the "Rural Central Chester County" region proposed by the Brandywine Conservancy to be a reasonable basis for analysis because the region would not adequately include the more developed areas adjacent to the Township. In selecting adjacent municipalities to the south and west of the Township, which are expressly included because of their rural character, the region isolates the Township from a duty to compare itself to more densely, yet no less-contiguous, municipalities to the north and east of the Township. Even the Brandywine Conservancy noted, in its own report, that the Rural Central Chester County region was suspect. Exhibit A-14, Conservancy Report, at p. 14. However, both of the other regions offered in the Conservancy Report, which the Applicant's experts also touted, are similarly flawed – if perhaps in a less-apparent way than the Rural Central Chester County region. The Downingtown Area School District region also fails to include municipalities which are immediately adjacent to the Township, which was an essential flaw in the Rural Central Chester County Region. The Adjacent Municipalities region fails to account for municipalities which are similarly-situated to the Township to the north of the Route 30 and Amtrak/SEPTA corridors, and therefore no-less in the same path of growth as the Township. Moreover, both regions – perplexingly – include the Township itself. Thus, the Townships' own existing deficit allocation (if any) or existing surplus allocation (if any) improperly affect the statistical outcome in each of the proposed regions. These deficiencies reinforce the notion that the Conservancy Report was not intended to provide a conclusive determination as to the Ordinance's constitutionality as a matter of law.

within of the Township by the Present Regional Allocation to arrive at the minimum future number of MF/SFA units within the Township ("**Future Township Allocation**"); (3) compare that Future Township Allocation number to the Township's existing, approved, or developable stock of MF/SFA units ("**Township's MF/SFA Stock**"). The extent to which the Future Township Allocation exceeded the Township's MF/SFA Stock was termed a "deficit" in the Conservancy Report. If the Township's MF/SFA Stock exceeded the Future Allocation, that excess would be termed a "surplus."[16] In other words, the Conservancy Report compared the Township's projected future mix of MF/SFA uses against the present (or, depending on the age of the demographic data used, historical), statistical mean of unit mix within a given region.

The Conservancy Report Methodology has two obvious practical benefits to those who, like the Brandywine Conservancy, are in the business of advising municipalities whether the municipality's zoning ordinance is, or might be, exclusionary. First, it can be rapidly calculated from data which is already in the public domain. The ACS data is readily available via the Census Department's website and, while the data has a modest margin of error,[17] it offers some objective basis for an expert to form an opinion about vulnerability without conducting a resource-intensive, in-depth analysis or survey of both the subject municipality and the surrounding region. Second, and perhaps more importantly, where the Conservancy Report Methodology yields a surplus (using an appropriate region), the expert can credibly opine that the subject municipality's zoning ordinance is *not* exclusionary. The municipality can then rest assured that its ordinance is valid because the best available demographic data at that time indicates that the municipality has not only allocated sufficient land for the uses, but even that the municipality has sufficient

[16] This methodology and framework for evaluation is referred to herein as the "Conservancy Report Methodology."

[17] See Exhibit A-14, Conservancy Report, at p. 13.

undeveloped and properly-zoned land remaining to accommodate no less than the statistical mean of unit mix currently accommodated by surrounding municipalities. So, the Conservancy Report Methodology offered a quick means of evaluating the Township's Ordinance and, had it found a surplus of MF/SFA units, would have been reliable evidence – verging on certitude – that the Township's ordinance was constitutionally valid.

There are, however, several flaws with the Conservancy Report Methodology that undermine its credibility as conclusive, substantial evidence that the Ordinance is exclusionary as a matter of law. First, the Conservancy Report Methodology improperly fails to consider the total amount of land already allocated under the ordinance for the MF/SFA use. If land was allocated for the MF/SFA use along with other permitted uses at the time the Ordinance was enacted, but some portion of that allocated land has since been put to some other permitted use, the Conservancy Report methodology would fail to account for that land put to another permitted use. Moreover, if sufficient land was allocated and that same land was developed for MF/SFA use at a density less than the maximum MF/SFA use permitted by the Ordinance, the Conservancy Report would fail to account for the potential underdevelopment of that land.

In addition to these practical flaws, or perhaps because of them, the Conservancy Report Methodology suffers from a one legal flaw as well: it is not fundamentally the sort of analysis required by Surrick and the subsequent cases relating to the evaluation of whether an ordinance is exclusionary. Surrick and its progeny deal in *land* allocation, not the number of dwellings of one type relative to other types of dwellings – that is, acreage, not percentages of units. Applying the Conservancy Report Methodology improperly shifts the argument from a discussion of the appropriate land allocation (as required by Surrick) to a discussion of the appropriate mix of MF/SFA units relative to other uses within the Township.

The Conservancy Report used a regional statistical mean to arrive at a 30% to 33.4% MF/SFA unit allocation (relative to other uses), depending on the region selected. Exhibit A-14, Conservancy Report, at p. 14. Mr. Babbitt simply incorporated the Conservancy Report's 33.4% MF/SFA unit allocation with certain questionable augmentations discussed below. Exhibit A-73, Babbitt Report, at p. 6. Yet neither of these opinions, regardless of their foundation, are conclusive evidence of whether the Ordinance is exclusionary under Pennsylvania law because they each describe the proportion of the number of units of the MF/SFA use relative to the number of units put to other uses in the future within the Township. This is a decidedly different matter from the amount of land area currently zoned for the MF/SFA use in the Township and whether that amount of land is disproportionately small.

Finally, and most importantly, the Conservancy Report Methodology is flawed as conclusive and substantial evidence of an exclusionary effect because the Board was unable to find, and the Applicant has not offered, any authority arising under Surrick or the subsequent Pennsylvania fair share jurisprudence which would require that the Township zone sufficient land to match or exceed, in the future, some historical or current, regional statistical mean of unit mix. A municipality may choose legislatively to meet this standard to avoid the risk, cost, or protracted distraction of a potential legal challenge, but the Board concludes that there is no legal justification for a finding that a municipality's zoning ordinance is unconstitutionally exclusionary if the municipality chooses not to do so or even if the municipality fails in attempting to do so.

In essence the Conservancy's approach assumes that if a municipality's ratio of multifamily homes to total homes projects to be "below average" regionally, then the municipality allocation of land zoned for multifamily housing under the he municipal zoning must be to that extent, unconstitutional. Under none of Surrick's progeny brought to the attention of the Board,

has such a burden been placed on a Township to defend its zoning by meeting or exceeding a statistical average.[18]

These flaws in the Conservancy Report Methodology would be meaningless if the analysis yields a surplus of units. This is because such an outcome necessitates that sufficient land has been allocated and that no excessive regulations have been imposed such that it constitutes a *de facto* exclusion. In other words, if a municipality's zoning scheme yields a percentage of multifamily housing that is "above average" in the region, the municipality could comfortably conclude that its ordinance could not be subject to a claim that it is exclusionary. However, the converse is not also true: if the Conservancy Report Methodology yields a deficit, that finding is not substantial and conclusive evidence that the ordinance is exclusionary as to allocation of land area to multifamily usage – it simply means that the expert cannot reliably opine, on that basis alone, that the Ordinance is certainly valid. It is important to note that the Conservancy Report itself acknowledged this limitation and a need for a "more in-depth analysis" and merely stated that the Ordinance might be "vulnerable to legal attack." Exhibit A-14, p. 13. A township's land allotment for multifamily housing stock may represent a fair share of all housing types, even though it yields something less than the "average" percentage of multi-family housing mix in a broader geographic region.

Over time, and applied broadly over several municipalities as a conclusive test of constitutionality, the Conservancy Report Methodology would tend to irrationally homogenize all

[18] In those cases which have examined potential multifamily housing percentage of overall housing, as *one factor* in testing out the adequacy of the land area zoned for such, lower and/or equivalent percentages to those supported by the Township's zoning here have been cited as supportive of the validity of those township's zoning schemes. For example, where 3.5 % of a township's land zoned for multifamily housing yielded an 11% multifamily percentage of housing in Appeal of Silver, 387 A.2d 169 (1978) and where 2.75% yielded a 9% to 10% multifamily percentage of housing in Cambridge v. Marshall, 560 A.2d 253 (1989), those zoning ordinances were deemed non-exclusionary.

of the municipalities within any given region without respect to the factors of population growth, the availability of undeveloped land, proximity to metropolitan centers, and the other factors that Surrick suggests are relevant to the evaluation of whether an ordinance is exclusionary, but which will vary from one municipality to another. See 382 A.2d at 110-111.[19] Moreover, if accepted as conclusive proof of unconstitutional exclusion, the Conservancy Report Methodology would require each municipality to reactively, constantly, and irrationally chase a moving, regional statistical mean of actual unit mix as land is developed.

For example, let us imagine a hypothetical, large (several-hundred-acre) parcel within the R-1 Residential District which is currently used for one, single-family dwelling. Now, let us imagine that same parcel is to be subdivided into several hundred parcels for single-family dwellings. The subdivision would have no effect on the amount of land zoned for any use, but it would increase the number of single family units within the Township (and correspondingly reduce the percentage of MF/SFA uses relative to all uses). The Conservancy Report Methodology (if substituted for the sort of analysis required by Surrick) would require the Township to either zone additional land for MF/SFA uses, or prohibit other uses in districts where MF/SFA uses were already permitted, in order to achieve or maintain an average unit mix within the region. This is not the sort of burden imposed by Pennsylvania law.

Instead, Surrick and its progeny require the Board to evaluate the amount of land where MF/SFA uses are permitted, and do so in light of the particular circumstances of the Township, because the amount of land zoned for MF/SFA uses is the only metric which the Township can control and which remains unchanged in the absence of action by the Township. Thus, the

[19] As noted by Mr. Comitta, it would be inappropriate to overlook each municipality's individual characteristics in conducting a Surrick analysis and, so, he concluded he would expect proper planning to yield a higher percentage of multifamily units than the Township's in a more urbanized area like Downingtown Borough and a lower percentage in the more uniformly rural areas such as Southwest Chester County. N.T. 11/02/16 at 33.

Conservancy Report Methodology is substantially different from the test described in Surrick and the cases that have followed it.

To be clear, the Conservancy Report's Methodology is not a completely useless diagnostic test. It can be used to rapidly and conclusively determine that a municipality's ordinance is not exclusionary. Where, as here, it identifies a deficit, that preliminary finding can indicate that further analysis is required. However, the Conservancy Report Methodology cannot be used to conclusively determine that a municipality's ordinance is exclusionary under Pennsylvania Law. By analogy, it is like a medical test that, if passed, can grant the patient peace of mind that he is healthy, but, if failed, cannot prove that he is certainly sick.

Therefore, where the Conservancy Report's methodology cannot rule out that an ordinance is exclusionary, the municipality's governing body may be justified in availing itself of the legislative curative amendment procedures described in Section 609.2 of the MPC to amend its ordinance to allocate sufficient additional lands as the Township seemingly attempted to do in this case. Having prevailed in its separate procedural validity challenge to that amendment by the Township's supervisors, it was the obligation of the Applicant to conduct that in-depth analysis and to prove out, as a matter of law, that the Ordinance is exclusionary. The Applicant has failed to do so.

During the pendency of its procedural validity challenge, the Applicant presented to the Board considerable testimony and evidence relating to the intent and effect of Ordinance 13-06. In fact, the Applicant's analysis of the effect of Ordinance 13-06, and especially the testimony of Mr. Newell with respect to the practical effect of Ordinance 13-06 within the I - Industrial zoning district, seemed to suggest that the Applicant understood the correct approach to a proper Surrick analysis. See N.T. 10/7/2015, Testimony of Gregory C. Newell. However, while the depth of the

Record is considerable with respect to the effect of the subsequently-voided Ordinance 13-06, the totality of the Applicant's proof that the Ordinance is exclusionary, in the absence of Ordinance 13-06, rests upon the Conservancy Report as augmented by the testimony and report of the Applicant's expert, Mr. Babbitt.

For reasons explained above, the Conservancy Report's Methodology renders it inconclusive in proving that the Ordinance is exclusionary as a matter of law. In addition to incorporating that flawed methodology, Mr. Babbitt incorporated much of the Conservancy Report's underlying data regarding population projections to which Mr. Babbitt added other certain augmentations.

Except for the analysis of existing, approved and future build-out potential for MF/SFA uses, which was incorporated from the Conservancy report, Mr. Babbitt did not conduct any sort of analysis as to the land area allocated for MF/SFA uses. Among the augmentations he applied to the Conservancy Report, Mr. Babbitt suggested that the actual number of total units in the Township needed in the future (by 2040) would be 5,940. Exhibit A-73, Babbitt Report, at p. 4. This projection of the number of total residential units was greater than the number projected in the Conservancy Report (5,400)[20] and Mr. Comitta (5,457),[21] in part, because Mr. Babbitt assumed a lower number of persons-per-household. Id. at p. 3. He did so by borrowing data from a Montgomery County planning study that analyzed person per household as a composite of various housing types. This differed from the Brandywine Conservancy and Thomas Comitta's use of U.S. census and county planning data which were specific to the Township. In other words, all three expert reports and opinions agreed on the future population of the Township, but Mr. Babbitt

[20] See Exhibit A-14, Conservancy Report.

[21] See Exhibit T-9a, Comitta Report.

estimated that same population would live in more housing units. The Board finds no substantive error with Mr. Babbitt's opinion or credibility on this matter, however, the Board finds the Conservancy Report and Mr. Comitta to be likewise creditable on this topic and, upon the weight of the evidence, the Board finds the total number of housing units in 2040 needed to accommodate population projections to be not less than 5,400 and not more than 5,457.

As another factor contributing to Mr. Babbitt's larger housing unit number, he seems to have separately invented the notion of a "vacancy rate" with the effect of such factor being to increase the deficit of MF/SFA units required under his analysis. The Applicant was not able to offer any example of another fair share analysis where such a vacancy rate was a component of the analysis and Mr. Comitta credibly testified that, despite his considerable experience, he had never heard of such a component being used. Moreover, the inclusion of a vacancy rate seems to run at a cross-purpose to the goal of any analysis under Surrick and the cases that follow it; namely: to assure that there exists adequate allocation of land for housing of all types in each municipality, not an additional surplus sufficient to accommodate empty homes. That is, the existence of a meaningful rate of vacancy for a given use would tend to suggest that the municipality is already meeting its fair share of land allocation for that use. Thus, the Board finds that the application of a vacancy rate component to determine future housing needs is inappropriate when evaluating whether the Ordinance is unconstitutionally exclusionary.

The Township argues that, based upon the novelty of Mr. Babbitt's "vacancy rate" component, the Board should disregard the entirety of Mr. Babbitt's analysis. We decline to do so. Instead, the Board finds that both the Conservancy Report and Mr. Babbitt's derivative analysis are simply not conclusive, substantial evidence that the Ordinance is unconstitutionally exclusionary. Because the Ordinance enjoys a presumption of constitutionality, and because the

Applicant has failed to provide substantial, conclusive evidence sufficient to overcome that presumption, the Board finds that the Ordinance remains constitutionally valid.

Unlike the Conservancy (and Mr. Babbitt), Mr. Comitta's analysis first, and appropriately (under Surrick), measured the relative amount of the total Township land zoned for multifamily housing and, then, concluded that 4.1% of such lands was adequate (based on percentages judicially examined and validated in other Pennsylvania municipalities)[22]. See generally Exhibit T-9a. In order to be certain that the Township's zoning scheme sufficiently accommodated the population growth predicted for the next two decades, Mr. Comitta then calculated an overall housing unit yield (of all types) by the year 2040 and satisfied himself that the number of additional homes needed to accommodate the projected Township population by that year could be met and exceeded under existing zoning (1,807 additional units developable versus 1,240 units needed). Having satisfied himself as to both the adequacy of the percentage of Township lands zoned for multifamily dwelling use and of the carrying capacity of total housing units under existing zoning to serve population demands, Mr. Comitta then tested his initial conclusion as to the adequacy of land area zoned for multifamily usage, by methodology similar to the Conservancy's. He projected the number of existing, approved and buildable multifamily housing units that could be yielded under existing zoning by the year 2040.[23] Corroborating his conclusion as to the sufficiency of the amount of lands zoned for multifamily usage, Mr. Comitta's report credibly

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[22] As noted by Mr. Comitta, neither the Conservancy Report nor Mr. Babbitt's testimony or report speak at all to the sufficiency of the amount or share of the Township's *land* area zoned for multi-family uses. N.T. 11/02/16 at 32, 60. This would appear, under the Surrick line of cases, to be a fundamental omission.

[23] While the methodology employed by The Conservancy and adopted by Mr. Babbitt, is similar to that used by Mr. Comitta (in this last phase of Mr. Comitta's analysis), the manner by which Mr. Comitta calculated potential build-out of units was notably more detailed. While the Conservancy Report's build-out prediction was a computer generated analysis of vacant and underdeveloped lands by total acres and zoning districts, Mr. Comitta's build-out analysis approach consisted of his parcel by parcel examination of vacant lots, lots capable of further subdivision, lots with pending approvals and lots under construction. See and compare Exhibit A-14, Conservancy Report, Table 1 vs Exhibit A-9, Comitta Report, Tables A-3 and A-4, and Maps B-4, B-5 and B-6.

demonstrates that more than 10% of all housing needed in the Township by that year could be multifamily homes yielded by that multifamily use land allocation. Whether or not less than equal to a regional average, that percentage of multifamily unit mix is neither insubstantial nor illusory, as a results-based measure of the adequacy of land zoned for that dwelling type.

Giving due consideration to all of the evidence, the Board is unable to find that the amount of Township land zoned for multifamily use in West Bradford is so small as to be unconstitutionally exclusionary under existing law, merely because it may fall short of equaling a given region's statistical average of such housing percentage.

B. The Intent of the Township

The Applicant has argued to and before the Board that the Ordinance may be deemed exclusionary based not only on its effect but, alternatively, based upon a "primary purpose" or exclusionary intent to zone out the natural growth of population, citing Kelley v. Zoning Hearing Board of Upper Moreland Township, 487 A.2d 1042, 1045 (Pa. Cmwlth. 1985). Pennsylvania Courts have moved away from an intent-based analysis in fair share cases to a primary concern centered on an ordinance's actual effect on the availability of multi-family dwellings. Appeal of M.A. Kravitz Co., 460 A.2d 1080 (Pa. 1983). However, Applicant asserts that an alternative showing of a primary purpose to zone out population growth remains probative of a zoning ordinance's invalidity, citing to E. Marlborough Township v. Jenson, 590 A.2d 1321, 1323 (Pa. Cmwlth. 1991).

In its effort to show an exclusionary motive behind the Ordinance, Applicant asserted that the evidence shows the Township desired, in adopting Ordinance 13-06, to avoid the IM Institutional Mixed Use zoning district (where the Property is sited) as a site for additional

multifamily housing development, by placing such opportunities, instead, in the I - Industrial zoning district. However, the Board finds no logic in this position.

Firstly, the legislative choice of one location over another for multifamily housing shows that the Township was engaged in planning for additional multifamily housing opportunities rather than showing that they were planning to limit such additional opportunities. Secondly, and even more fundamentally, from the time that Ordinance 13-06 was determined to be procedurally void, it has not existed and its validity has no longer been the subject of these proceedings before the Board. It is not conceivable, therefore, how the legislative intent underlying that legislation, which was void from its beginning, is probative of, or relevant to, a determination of the intent behind the enactment, by a prior governing body, of the Ordinance as it stood at a prior time.

CONCLUSIONS OF LAW

1. The Board has jurisdiction to decide this matter.
2. The hearings and other proceedings in this matter were duly advertised, convened, and conducted in accordance with applicable law.
3. The Applicant has standing to bring this matter and the other Parties have standing to participate in the matter.
4. The Township's Ordinance 13-06 has been deemed void *ab initio* as a matter of law.
5. The Applicant's challenge is limited to the Township's zoning ordinance as it existed prior to Ordinance 13-06.
6. The Township's Board of Supervisors was empowered to legislatively invoke a municipal cure procedure by a declaration of invalidity, but was not empowered to judicially decide that the Township's zoning ordinance is constitutionally invalid as a matter of law.
7. The Zoning Hearing Board is empowered to find that the Township's zoning ordinance is constitutionally invalid as a matter of law.
8. The Township's invocation of the curative amendment process of Section 609.2 of the MPC, although given evidentiary consideration by the Board, was neither an admission of, nor determinative of, the substantive invalidity of the Ordinance.

9. The Township's Ordinance enjoys a presumption of constitutionality which may only be rebutted via substantial evidence to the contrary.

10. The Applicant bore the burden of proof and persuasion in providing substantial evidence that the Township's zoning ordinance was *de facto* exclusionary for failing to provide for the Township's fair share of Multifamily Dwelling uses, Single-Family Attached Dwelling uses, or both.

11. The Applicant failed to establish the precise amount of land available for Multifamily uses within the Township.

12. The Applicant failed to establish the precise amount of land available for Single-Family Attached uses within the Township.

13. The minimum amount of land, discernable from the Record, wherein multifamily uses are permitted within the Township under the Ordinance is not merely a token allocation and is facially constitutional in the absence of substantial proof that some regulation unduly restricts the actual development of such uses.

14. The Applicant failed to prove by substantial evidence that the amount of land allocated for multifamily uses within the Township is disproportionately small to represent a deficiency in the Township's fair share of such housing type.

15. The Applicant failed to prove by substantial evidence that the Township's allocation of lands for multifamily dwelling uses is of lands that are unduly constrained or is rendered illusory by other provisions of the Township's Ordinance.

16. The failure of the Township's zoning scheme to yield a percentage of multifamily housing that is equal to an arithmetical average mix of multifamily housing throughout a chosen region does not, of itself, render the zoning unconstitutionally exclusionary.

17. The inclusion of multifamily housing opportunities in five (of ten) residential zoning districts, on lands exceeding 4.1% of the Township's total acreage, and capable of yielding a multifamily housing percentage of over 10 percent of the townships' projected housing needs over more than the next two decades of population growth, does not reflect a *de facto* and unconstitutional exclusion of multifamily housing opportunities in West Bradford Township.

18. Applicant has not demonstrated that there existed a primary purpose or exclusionary intent on the part of the Township to zone out the natural population growth, underlying the Township's Ordinance.

19. The Township's Ordinance is not unconstitutionally exclusionary.

ORDER

NOW THEREFORE, this 4th day of April, 2018, upon consideration of the evidence and argument by the Parties, the Application of Embreeville Redevelopment L.P. is hereby DENIED.

BY THE ZONING HEARING BOARD OF
WEST BRADFORD TOWNSHIP

Edwin R. Hill, Chairman

Douglas R. Gindin, Vice Chairman

John T. Prader, Secretary