Land Use—Do Girsh and Mt. Laurel Compel the Zoning of a Fair Share of Acreage for Apartment Use? Pennsylvania Says Yes

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DO GIRSH AND MT. LAUREL COMPEL THE ZONING OF A FAIR SHARE OF ACREAGE FOR APARTMENT USE? PENNSYLVANIA SAYS YES

The 1970's have witnessed a sudden but not unexpected increase in the judicial shaping of land use policies. This development can be attributed chiefly to an increased awareness of the acute shortage of low and moderate income housing in suburban areas and to legal challenges to exclusionary zoning schemes. Several state courts have


Two recent Supreme Court decisions have seriously undermined the federal equal protection attack. See Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 97 S. Ct. 555 (1977); Washington v. Davis, 426 U.S. 229 (1976).

responded to these challenges by reprimanding municipalities and recommending broad criteria for communities to consider when revising their zoning ordinances. In *Township of Willistown v. Chesterdale Farms, Inc.*, the Pennsylvania Supreme Court held a township zoning ordinance invalid as exclusionary. In allowing this characterization to determine the result without analyzing the criteria which it used to reach its conclusion, the court may have invalidated a zoning ordinance which was not in fact exclusionary.

In *Willistown* plaintiff-developer proposed to build apartments on a parcel of land located in the township. The township zoning ordinance had been amended in accordance with the landmark Pennsylvania case *Appeal of Girsh* to permit apartments in an eighty acre area. This area did not, however, include plaintiff-developer's land. After his request for a building permit was denied by the local zoning


6. *Id. at —, 341 A.2d at 467.*

7. *Id. at —, 341 A.2d at 467.*


hearing board,\textsuperscript{10} the developer appealed to the court of common pleas which upheld the hearing board decision but declared the amended zoning ordinance unconstitutional.\textsuperscript{11} The commonwealth court affirmed.\textsuperscript{12} On allocatur, the Pennsylvania Supreme Court held the rezoning to be "mere tokenism" in violation of the restrictions on exclusionary land use regulations set forth in \textit{Girsh}\textsuperscript{13} and "‘exclusionary’ in that it does not provide for a fair share of the township acreage for apartment construction."\textsuperscript{14} The court directed that zoning approval be granted and that a building permit be issued to plaintiff-developer.\textsuperscript{15}

\textsuperscript{10} Pa. at -, 341 A.2d at 467. The developer’s first application for a building permit was rejected under the township’s pre-\textit{Girsh} zoning ordinance which did not permit apartments. The second application was refused because the new zoning ordinance was pending. For a discussion of the "pending ordinance" doctrine, see Boron Oil Co. v. Kimple, 1 Pa. Commw. Ct. 55, 275 A.2d 406 (1970), \textit{aff’d}, 445 Pa. 327, 284 A.2d 744 (1971). After the new zoning ordinance was passed, the zoning board denied the developer a variance.


\textsuperscript{13} Pa. at -, 341 A.2d at 467. The commonwealth court stated "we are brought face to face with the most compelling problem posed by the \textit{Girsh} case: If total prohibition of apartments within a municipality is not to be countenanced, at what point short of total prohibition will a township be found to have met its responsibility to the community at large . . . ." 7 Pa. Commw. Ct. at 468, 300 A.2d at 115.

\textsuperscript{14} Pa. at -, 341 A.2d at 467. The court noted that less than one percent of the township’s total acreage was zoned to permit apartments. See notes 40 & 41 and accompanying text \textit{infra}. Cf. \textit{Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd.}, 23 Pa. Commw. Ct. 137, 350 A.2d 895 (1976) (less than one percent of township land was not reasonable provision for apartment use); \textit{but cf.} \textit{Kaiserman v. Springfield Twp.}, 22 Pa. Commw. Ct. 287, 348 A.2d 467 (1975) (10.4% of township land was zoned to permit apartments but less than 1% was actually available for development; ordinance did not represent "token" compliance with \textit{Girsh}); \textit{Sullivan v. Board of Supervisors}, 22 Pa. Commw. Ct. 318, 348 A.2d 464 (1975) (one percent of township land zoned for commercial development was not invalid as "token" amount of land for such permissible use; no impermissible exclusionary effect).

\textsuperscript{15} Pa. at —, 341 A.2d at 468-69. Whether this kind of relief is within the power of the court and an appropriate remedy is very controversial. See \textit{Hysom, supra note 9}, at 43 & nn.87-88. \textit{Compare} Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 191, 336 A.2d 713, 734, \textit{cert. denied}, 423 U.S. 808 (1975) (Chief Justice Hall, writing for the majority, invalidated only that part of the township ordinance found to be exclusionary and permitted the township to amend its ordinance in light of the opinion), \textit{with id.} at 735-36 (Pashman, J., concurring) (Justice Pashman would have the court go further in actual implementation of the principles of \textit{Mount Laurel} and establish broad guidelines for judicial review of municipal zoning decisions which implicate exclusionary zoning abuses). \textit{See} \textit{Oakwood at Madison, Inc. v. Township of Madison}, — N.J. —, —, — A.2d —, — (1977) (No. A-80/81, Jan. 26, 1977) (the court noted that more effective relief would be necessary to ensure developer permission to build and compared the case with \textit{Mount Laurel}).
Zoning in the United States was not legally recognized until 1926 in *Village of Euclid v. Ambler Realty Co.* in which the United States Supreme Court upheld the authority of a municipality to regulate land use as a valid exercise of police power. The principles of *Euclid*, which accord zoning ordinances a presumption of validity and apply the traditional police power test for validity, have shaped zoning litigation for decades. Almost all zoning classifications have been upheld by courts which have viewed "general welfare" in a geographically narrow, local context. In 1965, however, the Pennsylvania Supreme Court in *National Land and Investment Co. v. East-__

17. Id. at 397.
18. Id. at 388.
19. Id. at 387, 395. Under the police power test the zoning ordinance must promote the public health, safety or general welfare; if it does not, it is invalid.
21. 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 nonresidents. The restricted concept of the general welfare plus the presumption of validity made successful challenge of exclusionary zoning in the courts nearly impossible.


town Township Board of Adjustment held a township zoning ordinance unconstitutional because of its restrictive effect on population growth, stating that "the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive or exclusionary." Appeal of Girsh relied upon National Land and held a zoning ordinance that totally excluded apartment use unconstitutional. The court found apartments to be a legitimate land use which must reasonably be provided for in the township zoning scheme.

The more recent exclusionary zoning cases have examined the effects of zoning ordinances from a regional perspective. The courts consider a wider range of interests, including those of neighboring communities and potential residents, to be within the general welfare when reviewing challenged zoning ordinances. New Jersey has been at the center of exclusionary zoning litigation. In Southern Burlington

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23. The suburban township was directly in the path of population expansion from Philadelphia and had enacted a four-acre minimum lot size provision. Id. at 528, 215 A.2d at 610. Accord, Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (two and three acre minimum lot size ordinance held invalid).
24. 419 Pa. at 533, 215 A.2d at 612.
26. Id. at 245, 263 A.2d at 398-99. In Girsh the developer proposed to build apartment buildings but the township zoning ordinance did not permit apartment uses anywhere in the township. The township refused to rezone developer's land. The court declared the total exclusion (the court did not consider the theoretical availability of a variance to be curative) of apartments to be unconstitutional.
27. Id. at 244-45, 263 A.2d at 398-99. The court based its decision in part on the lack of regional consideration in zoning and planning.
29. See generally BABCOCK & BOSSELMAN, supra note 3, ch.2.
County NAACP v. Township of Mount Laurel,\textsuperscript{31} the New Jersey Supreme Court declared a municipal zoning ordinance invalid because the ordinance denied "the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income."\textsuperscript{32} The court refused to allow the municipality to "build a wall around itself"\textsuperscript{33} through its land use regulations and imposed an affirmative obligation\textsuperscript{34} upon every "developing municipality"\textsuperscript{35} to afford decent and adequate


32. \textit{Id.} at 187, 336 A.2d at 731-32. The court in \textit{Mount Laurel} noted that "proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulations," 67 N.J. at 179, 336 A.2d at 727, and that the need for housing is so "important and of such broad public interest that the general welfare which developing municipalities . . . must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality." \textit{Id.} at 179, 336 A.2d at 727-28 (emphasis added). \textit{Cf.} Kunzler v. Hoffman, 48 N.J. 277, 288, 225 A.2d 321, 327 (1966) (local zoning authorities are not limited to a consideration of only those benefits to the general welfare which would be received by residents of municipality in granting use variance to private hospital for emotionally disturbed); Roman Catholic Diocese v. Ho-Ho-Kus Borough, 47 N.J. 211, 218, 220 A.2d 97, 101 (1966) (local action with respect to private educational projects largely benefiting those residing outside the borough must be exercised with due concern for values which transcend municipal lines).

33. 67 N.J. at 171, 336 A.2d at 723.

34. \textit{Id.} at 179, 336 A.2d at 728. This affirmative obligation requires the municipality to provide, by its land use regulations, a reasonable opportunity for varied types of housing for persons at all levels of income. \textit{Id.} This affirmative obligation has two aspects—procedural and substantive. Procedurally, a showing that a "developing municipality in its land use regulations has not made realistically possible a variety and choice of housing" which includes low and moderate income housing will shift the burden of proof to the municipality to justify its regulations. \textit{Id.} at 180-81, 336 A.2d at 728. Particular land use regulations and the facts and circumstances that will sustain the municipality's burden of proof are the substantive aspect and will vary from case to case. \textit{Id.} at 181, 336 A.2d at 728. \textit{Cf.} Township of Willistown v. Chesterdale Farms, Inc., — Pa. —, 341 A.2d 465, 470 (1975) (Pomeroy, J., dissenting) (presumption of validity attaches to a zoning ordinance and burden of proof is upon party challenging the ordinance).

35. 67 N.J. at 160, 336 A.2d at 717. Those municipalities which contain undeveloped land and are in the path of future residential, commercial and industrial growth may be characterized as "developing." The court specifically excluded central cities, older built-up suburbs and areas likely to remain rural from the concept of "developing municipality." \textit{Id.} \textit{Cf.} Urban League v. Mayor & Council (Carteret), 142 N.J. Super. 11, 27, 359 A.2d 526, 536 (Ch. 1976) (the court used a comparative statistic of "gross vacant acreage suitable for housing" that excluded environmentally critical land, land reasonably zoned for industrial and commercial uses and all farmland in present use to

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low and moderate income housing at least to the extent of the "municipality's fair share of the present and prospective regional need therefor." 36

Mount Laurel left several questions unanswered: how to actually determine "regional need" and "fair share" 37 and the extent to which

determine which municipalities in the county fit within the developing municipality status). See Rose & Levin, What is a 'Developing Municipality' within the Meaning of the Mount Laurel Decision?, 4 REAL ESTATE L.J. 359 (1976).

36. 67 N.J. at 174, 336 A.2d at 724. This qualification of the municipality's affirmative obligation is critical. The extent of the obligation to provide low and moderate income housing will depend upon the definition of region, determination of regional need and calculation of each municipality's fair share. See generally Ackerman, The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform, 1976 U. ILL. L.F. 1; Degraff, Exclusionary Zoning: The View from Mount Laurel, 40 ALB. L. REV. 646 (1976); 27 LAND USE L. & ZONING DIG., no. 6 (1975); note 38 infra. It is important to note that Mount Laurel represented a significant step to housing and zoning reform advocates because the judiciary was compelled to intervene in the public interest in exclusionary zoning as it had done in other controversial social areas. E.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (desegregation in public education). But see Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 97 S. Ct. 555 (1977); Warth v. Seldin, 422 U.S. 490 (1975); Evans v. Hills, 537 F.2d 589 (2d Cir. 1976) (en banc), rev'g Evans v. Lynn, 537 F.2d 571 (2d Cir. 1975).


Although the fair share language of the Mount Laurel opinion was extensively cited, the Willistown court apparently considered only the percentage of township acreage zoned to permit apartment use to support its finding of exclusionary zoning. — Pa. at —, 341 A.2d at 468. The Pennsylvania commonwealth court, however, in Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd., 23 Pa. Commw. Ct. 137, 350 A.2d 895 (1976), set forth several additional factors to consider—the nature of the land made available, the prior history of zoning within the township (whether the ordinance represents a reasonable effort at compliance), and whether the township is a "logical place for development to take place." Id. at 142-43, 350 A.2d at 898, citing Appeal of Girsh, 437 Pa. 237, 245, 263 A.2d 395, 398 (1970).

In Mount Laurel the court stated that the housing needs of low and moderate income persons residing within the township and such persons presently employed or reasonable expected to be employed would be relevant in any determination of a municipality's fair share. 67 N.J. at 189-90, 336 A.2d at 733. Subsequent cases and commentators have tried to actually determine fair share. In Carteret the court made a factual finding as to the
courts should grant affirmative relief in exclusionary zoning cases.\textsuperscript{38} These issues were raised but not confronted in \textit{Willistown},\textsuperscript{39} which was based almost entirely on \textit{Girsh} and \textit{Mount Laurel}. The court found that "the rezoning of only eighty acres out of 11,589 acres in the township constitute[d] 'tokenism,' and [was] an exclusionary land use restriction not meeting the \textit{Girsh} standard."\textsuperscript{40} The court then relied on \textit{Mount Laurel} to hold that the township zoning ordinance continued to be exclusionary because "it did not provide for a fair share of the township acreage for apartment construction."\textsuperscript{41}

The court's characterization of the township's rezoning as an unacceptable token response to \textit{Girsh} is questionable.\textsuperscript{42} \textit{Girsh} simply...
held a total exclusion of apartment use to be an impermissible restraint on population growth, and required zoning schemes to make "reasonable provision" for such uses. The *Willistown* court apparently considered an eighty acre rezoning (less than one percent of the total township acreage) to be unreasonable and tantamount to a total exclusion under *Girsh*. The dissent, however, noted that the rezoning for apartment use in the predominantly rural township would have provided for the construction of 800 to 1040 apartment units which could have housed 1600 to 3120 persons. The 3120-person figure represented a potential increase of over one third the township population at the time of rezoning, which is arguably neither a token increase nor a de facto exclusion.

The courts have attempted to substantively define regional need and fair share. *Mount Laurel* and several recent Pennsylvania cases

Pennsylvania Supreme Court should have examined the actual circumstances in Willistown more fully and determined whether in fact the district was a reasonable provision for apartment uses. The opinion of the commonwealth court is more instructive. It noted that there was a regional housing shortage (the region was Chester County) and stated that such a small apartment use district was merely a token response to *Girsh*. 7 Pa. Commw. Ct. 453, 469-73, 300 A.2d 107, 115-17 (1973), aff'd, — Pa. —, 341 A.2d 465 (1975).

43. 437 Pa. at 243, 263 A.2d at 398. See notes 37 & 42 supra.

44. — Pa. at —, 341 A.2d at 467-68.

45. *Id.* at —, 341 A.2d at 469 n.3 (Pomeroy, J., dissenting).


47. 67 N.J. at 190, 336 A.2d at 733; *see note 37 supra. But see Oakwood at Madison, Inc. v. Township of Madison, — N.J. —, —, — A.2d —, — (1977) (No. A-80/81, Jan. 26, 1977) (slip op. at 14-16) (court does not mandate formula approach to fair share allocation but instead defers to administrative agencies in regulation of housing distribution); Urban League v. Mayor & Council (Carteret), 142 N.J. Super. 11, 35-39, 359 A.2d 526, 541-42 (Ch. 1976) (use of numerical housing need figures and formula approach to allocate fair share).
have applied socioeconomic criteria\textsuperscript{48} to determine a municipality's fair share of low and moderate income housing. \textit{Mount Laurel}, however, considered "fair share" in the context of "regional need."\textsuperscript{49} The \textit{Willistown} court did not consider regional housing needs but instead looked only to the fact that less than one percent of the township acreage was zoned to permit apartments.\textsuperscript{50} While the use of this criterion to determine fair share may be consistent with the \textit{Girsh} opinion,\textsuperscript{51} such a determination which is based solely on the percentage of township acreage is arguably inconsistent with the principles of \textit{Mount Laurel}.\textsuperscript{52}

\textsuperscript{48} See note 37 supra.


\textsuperscript{50} — Pa. at —, 341 A.2d at 468.

\textsuperscript{51} See notes 37 & 42 supra.

\textsuperscript{52} \textit{Mount Laurel} stated "[i]n arriving at such a fair share determination . . . the housing needs of persons of low and moderate income now or formerly residing in the township in substandard dwellings and those presently employed . . . will be pertinent." Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 189-90, 336 A.2d 713, 733, \textit{cert. denied}, 423 U.S. 808 (1975). The \textit{Willistown} court did not consider these factors in its determination of "fair share." The New Jersey cases have used a more complex approach in the analysis of exclusionary zoning than the Pennsylvania cases. In a \textit{Mount Laurel}-type analysis the court must make several threshold determinations involving rather sophisticated planning and zoning considerations—definition of region, regional housing need, characteristics of the land under consideration, comprehensive review of the entire zoning ordinance, regional patterns of development and growth. In contrast the approach of the Pennsylvania courts has been more simplistic. For example, until recently the Pennsylvania cases examined the zoning ordinances of the defending township without detailed consideration of the status of the municipality (whether developing, fully developed or rural) or the relationship between the township and neighboring municipalities in terms of suitability to accommodate population expansion. By not considering the special characteristics of the particular township, the Pennsylvania approach has not been restricted to developing municipalities only and should therefore be more effective in forcing revision of exclusionary land regulations. Such an approach is, however, somewhat difficult to reconcile with rational planning and zoning and growth control strategies. \textit{See} Mandelker, \textit{The Role of the Local Comprehensive Plan in Land Use Regulation}, 74 \textit{Mich. L. Rev.} 889, 922-41 (1976); note 46 supra. The Pennsylvania courts are beginning to take a more sophisticated approach. \textit{Waynesborough} has elaborated on certain relevant considerations for review of allegedly exclusionary zoning ordinances and in the process has qualified the absolute "percentage" approach of \textit{Willistown}. 23 Pa. Commw. Ct. at
The courts have also promoted the rational estimation of regional need and fair share by regional and state planning commissions, which would also reduce the participation of the judiciary as a "super-planning agency" in the planning process. The Willistown court, however, neither recognized nor examined a regional housing plan or a pending county housing plan in its evaluation of the amended zoning ordinance.

The transformation of a courtroom victory into actual housing has
been rare. Since municipal legislation is necessarily local in scope, it has been difficult to persuade local planning and zoning officials to consider the needs of "outsiders" or nonresidents. The courts have acknowledged this practical limitation on the granting of effective relief in exclusionary zoning cases. Controversy has developed over the extent to which courts should order affirmative relief. The court in Willistown granted zoning approval to plaintiff-developer and directed that a building permit be issued, contingent upon developer "compliance with the administrative requirements of the zoning ordinance and other reasonable controls." This affirmative order is particularly effective relief and favorable to the developer.

56. None of the developers in National Land, Kit-Mar Builders, or Girsh were able to proceed with the proposed development.

57. See note 37 supra.


59. See Hyson, supra note 9; Note, The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning, supra note 38. Compare Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975) (Hall, J., writing for the majority), with id. at 208-09, 336 A.2d at 743 (Pashman, J., concurring); Urban League v. Mayor & Council (Carteret), 142 N.J. Super. 11, 359 A.2d 526 (Ch. 1976). The court in Oakwood at Madison followed the remedial posture of the majority in Mount Laurel but directed that the developer be granted development permission in this particular case. — N.J. at —, — A.2d at — (slip op. at 90-97).

60. — Pa. at —, 341 A.2d at 468.

61. Id. at —, 341 A.2d at 469.


63. It is unlikely that the proposed development will in fact provide low and moderate income housing. Chesterdale's own architect has described the proposed apartment complex as a "middle to high income" development. Chesterdale Farms, Inc. v. Willistown Twp., 7 Pa. Commw. Ct. 453, 486, 300 A.2d 107, 124 (1973), (Wilkinson, J., in support of affirming in part and reversing in part), aff'd. — Pa. —, 341 A.2d 466 (1975).
EXCLUSIONARY ZONING

Willistown may represent an overreaction of the Pennsylvania Supreme Court to the frustration of its decision in Girsh and to the attention given to Mount Laurel. While a charge of "tokenism" is undoubtedly valid in some circumstances, it is possible that the court has misapplied this characterization in Willistown. Willistown Township may have in fact complied with the mandate of Girsh. However, the validity of a finding of exclusionary purpose and effect based solely on the acreage allotted for apartment use is questionable. Consideration of percentage of township land alone is an inadequate basis from which to determine fair share or regional need.

Marc Chalfen


64. The court declared the ordinance invalid but did not retain jurisdiction. The township amended the ordinance to zone a quarry for apartment use, complying with the court's mandate while preserving the exclusionary effect. The developer then petitioned the court for further relief; the court granted the petition. Order No. MP-12, 271 (Aug. 29, 1972) (unpublished). See Casey v. Zoning Hearing Bd., 459 Pa. 219, 328 A.2d 464, 468 (1974).

65. See notes 42-46 and accompanying text supra.

66. See notes 42, 49 & 55 supra. One commentator has stated:
The Mount Laurel case does contain one somber note of caution to those who might contemplate similar cases in other state jurisdictions. One cannot read that opinion without an awareness of the care with which the plaintiffs did their homework. The court has at hand a comprehensive brief on what was happening to housing patterns and job locations in New Jersey. The same quality of data gathering and analysis is an essential predicate to a similar result in any other state.

