

# 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<sup>1</sup> housing in suburban areas and to legal challenges<sup>2</sup> to exclusionary zoning schemes.<sup>3</sup> Several state courts have

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1. The definition of "low and moderate income" is usually conditioned upon various social and economic factors. The United States Supreme Court recently grappled with the phrase in *Warth v. Seldin*, 422 U.S. 490, 494 n.5 (1975). See also *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 158 n.2, 336 A.2d 713, 716 n.2, cert. denied, 423 U.S. 808 (1975), citing *Oakwood at Madison, Inc. v. Township of Madison*, 128 N.J. Super. 438, 445, 320 A.2d 223, 227 (L. Div. 1974), modified and aff'd, — N.J. —, — A.2d — (1977) (No. A-80/81, Jan. 26, 1977); *Urban League v. Mayor & Council (Carteret)*, 142 N.J. Super. 11, —, 359 A.2d 526, 542 (Ch. 1976).

2. Land use regulations which adversely affect the poor have been challenged under the Warren Court's "new equal protection." See, e.g., Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment, The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7 (1969); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 769 (1969); Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970). These challenges have argued that the effect of exclusionary zoning practices has been to confine the poor to the inner city, denying them equal housing and employment opportunities through racial and economic discrimination in violation of the equal protection clause of the fourteenth amendment. E.g., *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir. 1974), rev'd, 97 S. Ct. 555 (1977); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970). Cf. *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir.), cert. denied, 422 U.S. 1042 (1975) (Title VIII, federal fair housing laws); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975) (state constitutional grounds).

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).

3. Exclusionary zoning regulations operate to maintain or increase housing costs at a level which is prohibitive to persons with low or moderate income. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 159, 336 A.2d 713, 717, cert. denied, 423 U.S. 808 (1975). See generally R. BABCOCK & F. BOSSELMAN, *EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970's* at 3 (1973). Exclusionary zoning commonly occurs in suburban municipalities which surround urban core cities. See NATIONAL COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 1, 40-53, 211-18 (1968); REPORT OF THE PRESIDENT'S COMM'N ON URBAN HOUSING, *A DECENT HOME* 139-40 (1969).

responded to these challenges by reprimanding municipalities and recommending broad criteria for communities to consider when revising their zoning ordinances.<sup>4</sup> In *Township of Willistown v. Chesterdale Farms, Inc.*,<sup>5</sup> the Pennsylvania Supreme Court held a township zoning ordinance invalid as exclusionary.<sup>6</sup> 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.<sup>7</sup> The township zoning ordinance had been amended in accordance with the landmark Pennsylvania case *Appeal of Girsh*<sup>8</sup> to permit apartments in an eighty acre area. This area did not, however, include plaintiff-developer's land.<sup>9</sup> After his request for a building permit was denied by the local zoning

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Exclusionary land use controls include large lot zoning (e.g., *Steel Hill Dev., Inc. v. Town of Sanbornton*, 338 F. Supp. 301 (D.N.H. 1972)), prohibition of mobile homes (e.g., *Matthews v. Fayette County*, 233 Ga. 220, 210 S.E.2d 758 (1974)), bedroom limitations (e.g., *Molino v. Mayor & Council*, 116 N.J. Super. 195, 281 A.2d 401 (L. Div. 1971)), minimum floor space requirements (e.g., *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953)), prohibition of apartments (e.g., *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970)), and minimum lot size requirements (e.g., *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965)). Other exclusionary techniques include maximum height regulations, minimum setback requirements, architectural controls, spot zoning, and the use of special exceptions and variances. See generally Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANN. 9; Carter, Bert & Nobert, *Local Government Techniques for Managing Growth*, II MANAGEMENT & CONTROL OF GROWTH 330 (R. Scott ed. 1975); Freilich, *Development Timing, Moratoria and Controlling Growth: Preliminary Report*, II MANAGEMENT & CONTROL OF GROWTH 361 (R. Scott ed. 1975); Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Scott, *Exclusion and Land Use: A Comment and Research Bibliography*, I MANAGEMENT & CONTROL OF GROWTH 445 (R. Scott ed. 1975); Comment, *A Survey of the Judicial Responses to Exclusionary Zoning*, 22 SYRACUSE L. REV. 537, 538-62 (1971).

4. E.g., *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); *Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd.*, 23 Pa. Commw. Ct. 137, 350 A.2d 895 (1976).

5. — Pa. —, 341 A.2d 466 (1975).

6. *Id.* at —, 341 A.2d at 467.

7. *Id.* at —, 341 A.2d at 467.

8. 437 Pa. 237, 263 A.2d 395 (1970) (zoning ordinance which totally excluded apartments held unconstitutional). Before *Girsch* no zoning district in the township of Willistown permitted apartment uses. See notes 26 & 27 and accompanying text *infra*.

9. — Pa. at —, 341 A.2d at 467. For a discussion of the problems associated with developers' claims for site-specific relief in exclusionary zoning cases see Hyson, *The Problem of Relief in Developer-Initiated Exclusionary Zoning Litigation*, 12 URBAN L. ANN. 21, 27-30 (1976).

hearing board,<sup>10</sup> the developer appealed to the court of common pleas which upheld the hearing board decision but declared the amended zoning ordinance unconstitutional.<sup>11</sup> The commonwealth court affirmed.<sup>12</sup> 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 *Girsh*<sup>13</sup> and "'exclusionary' in that it does not provide for a fair share of the township acreage for apartment construction."<sup>14</sup> The court directed that zoning approval be granted and that a building permit be issued to plaintiff-developer.<sup>15</sup>

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10. — Pa. at —, 341 A.2d at 467. The developer's first application for a building permit was rejected under the township's pre-*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), *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.

11. *Appeal of Chesterdale Farms, Inc.*, 19 Ches. Co. Rep. 271, 273-74 (C.P. 1971), *aff'd by an equally divided court*, 7 Pa. Commw. Ct. 453, 300 A.2d 107 (1973), *aff'd*, — Pa. —, 341 A.2d 466 (1975).

12. *Willistown Twp. v. Chesterdale Farms, Inc.*, 7 Pa. Commw. Ct. 453, 300 A.2d 107 (1973), *aff'd*, — Pa. —, 341 A.2d 466 (1975).

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 *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.

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 *infra*. Cf. *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); *but cf.* *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 *Girsh*); *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).

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 *Hyson*, *supra* note 9, at 43 & nn.87-88. Compare *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 191, 336 A.2d 713, 734, *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), *with id.* at 735-36 (Pashman, J., concurring) (Justice Pashman would have the court go further in actual implementation of the principles of *Mount Laurel* and establish broad guidelines for judicial review of municipal zoning decisions which implicate exclusionary zoning abuses). See *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 *Mount Laurel*).

Zoning in the United States was not legally recognized until 1926 in *Village of Euclid v. Ambler Realty Co.*<sup>16</sup> in which the United States Supreme Court upheld the authority of a municipality to regulate land use as a valid exercise of police power.<sup>17</sup> The principles of *Euclid*, which accord zoning ordinances a presumption of validity<sup>18</sup> and apply the traditional police power test for validity,<sup>19</sup> have shaped zoning litigation for decades. Almost all zoning classifications have been upheld by courts<sup>20</sup> which have viewed "general welfare" in a geographically narrow, local context.<sup>21</sup> In 1965, however, the Pennsylvania Supreme Court in *National Land and Investment Co. v. East-*

16. 272 U.S. 365 (1926).

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.

20. Before 1965, Pennsylvania courts routinely deferred to local zoning legislation and decisions. *E.g.*, *Appeal of Key Realty Co.*, 408 Pa. 98, 182 A.2d 187 (1962); *Swade v. Springfield Twp. Zoning Bd. of Adjustment*, 392 Pa. 269, 140 A.2d 597 (1958); *cf.* *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965) (court applied the presumption of validity test but found that challenger had met its burden of proof). *See also* Washburn, *Apartments in the Suburbs: In re Appeal of Joseph Girsh*, 74 DICK. L. REV. 634 (1970); Comment, *The Pennsylvania Supreme Court and Exclusionary Suburban Zoning: From Bilbar to Girsh—A Decade of Change*, 16 VILL. L. REV. 507 (1971).

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.

*Euclid* established a reasonableness standard for constitutional attacks on zoning ordinances. Until recently, however, standing to challenge these ordinances was granted only to those persons who had suffered an injury, i.e. the adversely affected landowner. Nonresident standing to challenge exclusionary zoning in federal court was sharply restricted by *Warth v. Seldin*, 422 U.S. 490 (1975). *See* *Commonwealth v. County of Bucks*, 8 Pa. Commw. Ct. 295, 302 A.2d 897 (1973), *cert. denied*, 414 U.S. 1130 (1974) (state court denial of standing to nonresident challengers). *See generally* BABCOCK & BOSSELMAN, *supra* note 3, ch. 2; Hyson, *supra* note 9, at 22-23; Note, *Alternatives to Warth v. Seldin: The Potential Resident Challenger of an Exclusionary Zoning Scheme*, 11 URBAN L. ANN. 223 (1976).

Occasionally a judge or commentator has recognized that zoning ordinances may have an effect on persons other than local landowners. *E.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926); *Vickers v. Township Comm.*, 37 N.J. 232, 252, 181 A.2d 129, 140 (1962), *cert. denied*, 371 U.S. 233 (1963) (Hall, J., dissenting); *Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 139 A.2d 749 (1958); *Bilbar Constr. Co. v. Easttown Twp. Bd. of Adjustment*, 393 Pa. 62, 77, 141 A.2d 851, 859 (1958) (Bell, J., dissenting). *See also* Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317 (1955).

*town Township Board of Adjustment*<sup>22</sup> held a township zoning ordinance unconstitutional because of its restrictive effect on population growth,<sup>23</sup> stating that "the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive or exclusionary."<sup>24</sup> *Appeal of Girsh*<sup>25</sup> relied upon *National Land* and held a zoning ordinance that totally excluded apartment use unconstitutional.<sup>26</sup> The court found apartments to be a legitimate land use which must reasonably be provided for in the township zoning scheme.<sup>27</sup>

The more recent exclusionary zoning cases have examined the effects of zoning ordinances from a regional perspective.<sup>28</sup> 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.<sup>29</sup> New Jersey has been at the center of exclusionary zoning litigation.<sup>30</sup> In *Southern Burlington*

22. 419 Pa. 504, 215 A.2d 597 (1971).

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.

25. 437 Pa. 237, 263 A.2d 395 (1970).

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.

[P]erhaps in an ideal world, planning and zoning would be done on a *regional* basis, so that a given community would have apartments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding municipalities and the central city.

*Id.* at 245 n.4, 263 A.2d at 399 n.4 (emphasis in original).

28. *Oakwood at Madison, Inc. v. Township of Madison*, — N.J. —, —, — A.2d —, — (1977) (No. A-80/81, Jan. 26, 1977) (slip op. at 36); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 174-81, 336 A.2d 713, 725-28, *cert. denied*, 423 U.S. 808 (1975); *Urban League v. Mayor & Council (Carteret)*, 142 N.J. Super. 11, 359 A.2d 526 (Ch. 1976); *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *Appeal of Girsch*, 437 Pa. 237, 263 A.2d 395 (1970); *Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd.*, 23 Pa. Commw. Ct. 137, 350 A.2d 895 (1976). See generally Moskowitz, *Regional Housing Allocation Plans: A Case History of the Delaware Valley Regional Plan*, 7 URB. LAW. 292 (1975); Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy*, 6 U. MICH. J.L. REF. 625 (1973).

29. See generally BABCOCK & BOSSELMAN, *supra* note 3, ch.2.

30. *E.g.*, *Oakwood at Madison, Inc. v. Township of Madison*, — N.J. —, —, — A.2d — (1977) (No. A-80/81, Jan. 26, 1977); *Southern Burlington County NAACP v. Township of*

*County NAACP v. Township of Mount Laurel*,<sup>31</sup> 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."<sup>32</sup> The court refused to allow the municipality to "build a wall around itself"<sup>33</sup> through its land use regulations and imposed an affirmative obligation<sup>34</sup> upon every "developing municipality"<sup>35</sup> to afford decent and adequate

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Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); Rutgers Univ. v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972); Kunzler v. Hoffman, 48 N.J. 277, 225 A.2d 321 (1966); Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963); Duffcon Concrete Prod., Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949).

31. 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

32. *Id.* at 187, 336 A.2d at 731-32. The court in *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." *Id.* at 179, 336 A.2d at 727-28 (emphasis added). *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. *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. *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. *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. *Id.* at 181, 336 A.2d at 728. *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." *Id.* *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

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

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

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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).

37. The New Jersey and Pennsylvania courts seem to have taken different approaches in their analysis of region and fair share. Justice Hall in *Mount Laurel* noted that the composition of the applicable "region" would vary from case to case. 67 N.J. at 189, 336 A.2d at 733. Compare *Oakwood at Madison, Inc. v. Township of Madison*, — N.J. —, — A.2d —, — (1977) (No. A-80/81, Jan. 26, 1977) (slip op. at 36) (concept of region as housing market); *Urban League v. Mayor & Council (Carteret)*, 142 N.J. Super. 11, 19-23, 359 A.2d 526, 531-32 (Ch. 1976) (Middlesex County designated as the region for the purpose of the litigation), *with Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd.*, 23 Pa. Commw. Ct. 137, 350 A.2d 895 (1976) (township); *Kaiserman v. Springfield Twp.*, 22 Pa. Commw. Ct. 287, 348 A.2d 467 (1975) (township); *Sullivan v. Board of Supervisors*, 22 Pa. Commw. Ct. 318, 348 A.2d 464 (1975) (township). *Cf. Commonwealth v. County of Bucks*, 9 Pa. Commw. Ct. 295, 302 A.2d 897 (1973), *cert. denied*, 414 U.S. 1130 (1974) (dismissal of nonresident attack on validity of zoning ordinances of all 54 townships in Bucks County; court noted that plaintiffs demanded "ongoing and continuing" relief).

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.<sup>38</sup> These issues were raised but not confronted in *Willistown*,<sup>39</sup> which was based almost entirely on *Girsh* and *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 *Girsh* standard."<sup>40</sup> The court then relied on *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."<sup>41</sup>

The court's characterization of the township's rezoning as an unacceptable token response to *Girsh* is questionable.<sup>42</sup> *Girsh* simply

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countywide low and moderate income housing need projected to 1985 with deductions for rehabilitated and projected housing to be built under revised zoning ordinances. 142 N.J. Super. at 35-38, 359 A.2d at 541. Then an initial fair share allocation was made to bring each defendant municipality (only 11 of the 23 municipalities in Middlesex County were found to have adequate vacant land suitable for housing development) up to the county proportion of 15% low and 19% moderate income population. *Id.* The balance of the county projected housing need of 14,667 units was then apportioned equally among the 11 defendant municipalities, approximately 1333 per municipality. *Id.* The court did not feel that any special factors (availability of land suitable for residential development, environmental considerations, relative access to employment) justified a deviation from this allocation. *Id.* at 37-39, 359 A.2d at 542; cf. *Oakwood at Madison, Inc. v. Township of Madison*, — N.J. —, — A.2d — (1977) (No. A-80/81, Jan. 26, 1977 (slip op. at 70-71) (setting gross regional goals but declining to fix a fair share quota for each township).

The criteria which have been frequently discussed by commentators to allocate a municipality's fair share include housing responsibility based on need, the achievement of racial and economic integration, the premise that an equal share is fair share, population proportions, proportion of existing jobs, proportion of future jobs, suitability of the particular municipality for low and moderate income housing, and the obligation that every municipality take care of the housing needs of its own constituents. See *Share Allocation Plans: Which Formula Will Pacify the Contentious Suburbs?*, 12 URBAN L. ANN. 3 (1976). See also L. RUBINOWITZ, *LOW-INCOME HOUSING: SUBURBAN STRATEGIES* 267-85 (1974); Brooks, *Lower-Income Housing: The Planner's Response*, ASPO REP. NO. 282 (July-Aug. 1972); Listokin, *Fair Share Housing Distribution: An Idea Whose Time Has Come?*, in INSTITUTE FOR ENVIRONMENTAL STUDIES, NEW JERSEY TRENDS 353 (1974); Listokin, *Fair-Share Housing Distribution: Will It Open the Suburbs to Apartment Development?*, 2 REAL ESTATE L.J. 739 (1974); Lustig & Pack, *A Standard for Residential Zoning Based on the Location of Jobs*, 40 J. AM. INST. PLANNERS 333 (1974); Moskowitz, *supra* note 28; Rose, *The Mount Laurel Decision: Is It Based on Wishful Thinking?*, 4 REAL ESTATE L.J. 61 (1975).

38. See note 15 *supra*. See Hyson, *supra* note 9; Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976); notes 58 & 64 *infra*.

39. — Pa. at —, 341 A.2d at 468.

40. *Id.* at —, 341 A.2d at 467.

41. *Id.* at —, 341 A.2d at 468.

42. *Id.* at —, 341 A.2d at 467. The exact holding in *Girsh* was that a township "cannot have a zoning scheme that makes no reasonable provision for apartment uses." 437 Pa. at 243, 263 A.2d at 398 (emphasis added). See note 37 *supra*. Arguably the



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.<sup>43</sup> 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*.<sup>44</sup> 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.<sup>45</sup> The 3120-person figure represented a potential increase of over one third the township population at the time of rezoning,<sup>46</sup> which is arguably neither a token increase nor a de facto exclusion.

The courts have attempted to substantively define regional need and fair share.<sup>47</sup> *Mount Laurel* and several recent Pennsylvania cases

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

46. *Id.* at —, 341 A.2d at 469. The township defended its amended zoning ordinance as an attempt to control its growth. Brief for Appellant at 9-14, *Township of Willistown v. Chesterdale Farms, Inc.*, — Pa. —, 341 A.2d 465 (1975). *Mount Laurel* did not present the question of the validity of growth control in a developing municipality but indicated that growth control might be permissible if not utilized as an exclusionary device. 67 N.J. at 188 n.20, 336 A.2d at 732 n.20. Growth control techniques have withstood several recent challenges. *See, e.g.*, *Construction Ind. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, — Cal. 3d —, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); *Golden v. City of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972); *cf. Sullivan v. Board of Supervisors*, 22 Pa. Commw. Ct. 318, 348 A.2d 464 (1975) (regulation of commercial rather than residential growth). *See generally* Carter, Bert & Nobert, *supra* note 3; Freilich, *supra* note 3; Note, *A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development*, 47 N.Y.U.L. REV. 723 (1972); Note, *Phased Zoning: Regulation of the Tempo & Sequence of Land Development*, 26 STAN. L. REV. 585 (1974).

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<sup>48</sup> to determine a municipality's fair share of low and moderate income housing. *Mount Laurel*, however, considered "fair share" in the context of "regional need."<sup>49</sup> The *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.<sup>50</sup> While the use of this criterion to determine fair share may be consistent with the *Girsh* opinion,<sup>51</sup> such a determination which is based solely on the percentage of township acreage is arguably inconsistent with the principles of *Mount Laurel*.<sup>52</sup>

48. See note 37 *supra*.

49. 67 N.J. at 173-74, 190, 336 A.2d at 724, 733 (suggesting a flexible fair share approach which did not contemplate equal allocation among the municipalities within a given region); cf. *Oakwood at Madison, Inc. v. Township of Madison*, — N.J. —, — A.2d — (1977) (No. A-80/81, Jan. 26, 1977) (flexible approach); *Urban League v. Mayor & Council (Carteret)*, 142 N.J. Super. 11, 359 A.2d 526 (Ch. 1976) (formula approach). See also Hanson, *Growth Control: The Role of Regionism*, III MANAGEMENT & CONTROL OF GROWTH 293 (R. Scott ed. 1975); Rose, *The Mount Laurel Decision: Is It Based on Wishful Thinking?*, *supra* note 37; Rose, *Exclusionary Zoning and Managed Growth: Unresolved Issues*, 6 RUT.-CAM. L.J. 689, 717-20 (1975).

50. — Pa. at —, 341 A.2d at 468.

51. See notes 37 & 42 *supra*.

52. *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, *cert. denied*, 423 U.S. 808 (1975). The *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 *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. See Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 922-41 (1976); note 46 *supra*. The Pennsylvania courts are beginning to take a more sophisticated approach. *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 *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,<sup>53</sup> which would also reduce the participation of the judiciary as a "super-planning agency" in the planning process.<sup>54</sup> 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.<sup>55</sup>

The transformation of a courtroom victory into actual housing has

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142-44, 350 A.2d at 898. *Sullivan* has distinguished commercial from residential exclusionary zoning—explicitly limiting the reasonable provision mandate of *Girsh* to residential uses. 22 Pa. Commw. Ct. at 323-24, 348 A.2d at 467. These recent cases indicate a moderation of the *Willistown* "percentage" interpretation of *Girsh*. *But see* Hyson, *supra* note 9, at 34-35 & n.60; Williams, Doughty & Potter, *Exclusionary Zoning Strategies: Effective Lawsuit Goals and Criteria*, I MANAGEMENT & CONTROL OF GROWTH 477, 485-87 (R. Scott ed. 1975) (contrasting the "Pennsylvania rationale" with the "sensible rationale" of the New Jersey courts).

53. *See* Listokin, *Fair-Share Housing Distribution: Will It Open the Suburbs to Apartment Development?*, *supra* note 37, at 740-41 (governmental and institutional bodies that have developed fair share plans). *But see* *Oakwood at Madison, Inc. v. Township of Madison*, — N.J. —, — n.43, — A.2d —, — n.43 (1977) (No. A-80/81, Jan. 26, 1977) (slip op. at 73 n.43) (critical evaluation of use of planning studies); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 170-71, 336 A.2d 713, 723, *cert. denied*, 423 U.S. 808 (1975) (court noted lack of effective inter-municipal or area planning or land use regulation). Massachusetts has enacted an "anti-snob zoning" law under which local land use controls can be overridden on appeal and thereby force a local community to assume its fair share of low and moderate income housing. MASS. ANN. LAWS, ch. 408, §§ 20-23 (Michie/Law. Co-op Supp. 1974). The Delaware Valley Regional Planning Commission (Philadelphia metropolitan area) can withhold A-95 approval and prevent distribution of state funds if a county has not made provisions for its fair share allocation. *Upper St. Clair Twp. v. Commonwealth*, 13 Pa. Commw. Ct. 71, 317 A.2d 906 (1974); *see* *Brussat, A-95 Review System: Can Be an Asset*, III MANAGEMENT & CONTROL OF GROWTH 298 (R. Scott ed. 1975); Moskowitz, *supra* note 28.

Many commentators have advocated regional planning. *See, e.g.*, Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976); Marcus, *Exclusionary Zoning: The Need for a Regional Planning Context*, 16 N.Y.L.F. 731 (1970); Rose, *From the Legislatures: State Government Role in Land Use Planning & Control is Growing*, 2 REAL ESTATE L.J. 809 (1974). Some commentators have suggested that a regional planning approach may actually operate to reinforce the status quo. *See, e.g.*, Burchell, Listokin & James, *Exclusionary Zoning: Pitfalls of the Regional Remedy*, 7 URB. LAW. 262 (1975); Parker, *Regional Imperatives & Managed Growth*, III MANAGEMENT & CONTROL OF GROWTH 284, 285 (R. Scott ed. 1975) (must reconcile regional problems with jurisdictional solutions).

54. The federal courts are reluctant to become super-planning agencies. *See, e.g.*, *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 97 S. Ct. 555 (1977); *Warth v. Seldin*, 422 U.S. 490 (1975); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Evans v. Hills*, 537 F.2d 589 (2d Cir. 1976) (en banc); *Construction Ind. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). State courts have not been so reticent. *See* note 37 *supra*.

55. — Pa. at —, 341 A.2d at 468.

been rare.<sup>56</sup> 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.<sup>57</sup> The courts have acknowledged this practical limitation on the granting of effective relief in exclusionary zoning cases.<sup>58</sup> Controversy has developed over the extent to which courts should order affirmative relief.<sup>59</sup> The court in *Willistown* granted zoning approval to plaintiff-developer<sup>60</sup> and directed that a building permit be issued, contingent upon developer "compliance with the administrative requirements of the zoning ordinance and other reasonable controls."<sup>61</sup> This affirmative order is particularly effective relief<sup>62</sup> and favorable to the developer.<sup>63</sup>

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*.

58. See generally Hyson, *supra* note 9; Mallach, *Do Lawsuits Build Housing? The Implications of Exclusionary Zoning Litigation*, 6 RUT.-CAM. L.J. 653 (1975); Mytelka & Mytelka, *Exclusionary Zoning: A Consideration of Remedies*, 7 SETON HALL L. REV. 1 (1975); Rose, *The Mount Laurel Decision: Is It Based on Wishful Thinking?*, *supra* note 37; Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy*, 6 MICH. J.L. REF. 625 (1973); Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, *supra* note 38; Note, *A Wrong Without a Remedy: Judicial Approaches to Exclusionary Zoning*, 6 RUT.-CAM. L.J. 727 (1975); Note, *Beyond Invalidation: The Judicial Power to Zone*, 9 URBAN L. ANN. 159 (1975).

The New Jersey Supreme Court finally became impatient with the progress of the *Oakwood at Madison* litigation and doubtful about adequate developer relief under the *Mount Laurel* type remedy. The court was therefore more forceful in its remedial order in *Oakwood at Madison*. Compare *Oakwood at Madison, Inc. v. Township of Madison*, — N.J. —, —, — A.2d —, — (1977) (No. A-80/81, Jan. 26, 1977) (slip op. at 94-97), with *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 191-92, 336 A.2d 713, 734, *cert. denied*, 423 U.S. 808 (1975).

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.

62. Pennsylvania courts do have the power to authorize this type of specific relief. *Municipalities Planning Code* § 1011, PA. STAT. ANN. tit. 53, § 11011 (Purdon 1972).

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). *National Land, Kit-Mar Builders and Girsh* clearly referred to the exclusion of low and

*Willistown* may represent an overreaction of the Pennsylvania Supreme Court to the frustration of its decision in *Girsh*<sup>64</sup> 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*.<sup>65</sup> However, the validity of a finding of exclusionary purpose and effect based solely on the acreage allotted for apartment use is questionable.<sup>66</sup> Consideration of percentage of township land alone is an inadequate basis from which to determine fair share or regional need.<sup>67</sup>

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moderate income housing in speaking of the "reluctance of rural communities to absorb their fair share of the load." Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 475, 268 A.2d 765, 769 (1970).

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.

Babcock, *On the Choice of Forum*, 27 LAND USE L. & ZONING DIG. 7, 7-8 (No. 6, 1975).

67. Subsequent Pennsylvania cases seem to have recognized this. In *Benham v. Board of Supervisors*, 22 Pa. Commw. Ct. 245, 349 A.2d 484 (1975), plaintiff filed for a curative amendment, challenging the township zoning ordinance because it prohibited townhouse development. The court upheld the ordinance, noting that the township had provided for its fair share of regional housing needs as projected for 1990 by the Delaware County Planning Commission. *Id.* at 253, 349 A.2d at 489. *Accord*, Application of Maida Blouch, — Pa. Commw. Ct. —, 362 A.2d 1139 (1976). *But see* *Camp Hill Dev. Co. v. Zoning Bd. of Adjustment*, 13 Pa. Commw. Ct. 519, 319 A.2d 197 (1974) (zoning ordinance which made no provision for townhouse use was invalid). In *DeCaro v. Washington Twp.*, 21 Pa. Commw. Ct. 252, 344 A.2d 725 (1975), plaintiffs argued that an exclusionary zoning scheme was invalid, citing *Willistown*. The court held that plaintiffs had not met the burden of proof, stating that there was "no evidence to support an argument that there is an anticipated population growth beyond that which can be accommodated under the present zoning." *Id.* at —, 341 A.2d at 728-29. See *Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd.*, 23 Pa. Commw. Ct. 137, 350 A.2d 895 (1976) (discussed in note 37 *supra*).

