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# *OAKWOOD AT MADISON*: A TACTICAL RETREAT TO PRESERVE THE *MOUNT LAUREL* PRINCIPLE†

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*In volume 12 of the Urban Law Annual Professor Rose described various fair share allocation plans that a court could use in implementing the principles of the* Mount Laurel *decision. In* Oakwood at Madison, Inc. v. Township of Madison, *the New Jersey Supreme Court considered various fair share allocation plans but did not adopt any particular model. In this Article Professor Rose analyzes the strengths and weaknesses of the* Oakwood at Madison *decision.*

After over six years of litigation, the New Jersey Supreme Court finally rendered its decision in *Oakwood at Madison v. Township of Madison*.[1] In a four to three decision, written by Justice Conford and with separate opinions written by Justices Clifford, Mountain, Pashman and Schreiber, the court made a tactical decision to withdraw its troops (i.e. the trial courts) from the losing battle of "statistical warfare" involved in the legislative-administrative process of defining "region" and allocating a "fair share" of regional housing needs to municipalities which appeared to be required by *Southern Burlington County NAACP v. Township of Mount Laurel*.[2]

† Copyright © 1977 by Jerome G. Rose. This article will be part of a larger work on the subject to be published by Rutgers University Center for Urban Policy Research entitled AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING.

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1. — N.J. —, — A.2d — (1977) (No. A-80/81, Jan. 26, 1977).

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



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*Oakwood at Madison* is the New Jersey Supreme Court's latest word in the litigation that gave rise to the concept of a municipal obligation to provide for a fair share of regional housing needs adopted by the court in *Mount Laurel*. The litigation started in September 1970 when the developer-plaintiff brought an action challenging the validity of the Madison Township zoning ordinance.[3]

The trial court held the zoning ordinance invalid on the grounds that "it fail[ed] to promote reasonably a balanced community in accordance with the general welfare."[4] The decision also said that in defining a "balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region."[5] This decision was appealed to the New Jersey Supreme Court[6] and was scheduled for argument in March, 1973 and again in January, 1974, together with oral argument in the *Mount Laurel* case. However, because Madison Township had adopted a major amendment to the zoning ordinance the New Jersey Supreme Court remanded the *Oakwood at Madison* case to the trial court for a ruling upon the effect of the amended ordinance. The supreme court then rendered a decision in the *Mount Laurel* case.

After a hearing on remand, the trial court held that the township's obligation to provide its fair share of the housing needs of its region is not met unless its zoning ordinance approximates in additional housing unit capacity the same proportion of low income housing as its present low income and moderate income population.[7] The trial court found that the amended ordinance did not meet this test and the entire ordinance was therefore invalid.[8] In defining "region," the housing needs of which must be met by the township, the trial court said that the region is not coextensive with the county, "rather it is the area from which in view of available employment and transportation the population of the township would be drawn absent invalidly exclusionary zoning."[9]

Upon return of the appeal to the supreme court, oral argument was

3. Oakwood at Madison, Inc., v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971), *modified and aff'd*, — N.J. —, — A.2d — (1977) (No. A-80/81, Jan. 26, 1977).

4. *Id.* at 21, 283 A.2d at 358.

5. *Id.* at 20, 283 A.2d at 358.

6. *Certification granted*, 62 N.J. 185, 299 A.2d 720 (1972).

7. 128 N.J. Super. 438, 447, 320 A.2d 223, 227 (L. Div. 1974).

8. *Id.*

9. *Id.* at 441, 320 A.2d at 224.

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presented twice with emphasis placed upon the effect of the *Mount Laurel* decision that had been rendered in the intervening period. The New Jersey Supreme Court affirmed the judgment with modifications.[10] In the majority opinion, written by Justice Conford, the legal issues of the case were broken down into three questions: (1) Is the zoning ordinance exclusionary? (2) Should the trial court demarcate the "region" and determine the "fair share" of regional need? and (3) What is the proper judicial remedy?[11]

In answering the first question, whether the zoning ordinance is exclusionary, the court made it clear that a zoning ordinance is "exclusionary" if it "operates in fact to preclude the opportunity to supply any substantial amounts of new housing for low and moderate income households now and prospectively needed in the municipality and in the appropriate region" whether or not such effect was intended.[12] Thus the New Jersey Supreme Court has taken a position that squarely contravenes the position taken by the United States Supreme Court a few weeks earlier in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[13] In *Arlington Heights* the United States Supreme Court upheld the refusal of a municipality to zone to permit subsidized multifamily housing because there was insufficient evidence to show a racially discriminatory *intent* even though such a refusal had a racially discriminatory *effect*. In *Oakwood at Madison*, the New Jersey Supreme Court held that a zoning ordinance may be "exclusionary" without a showing of exclusionary *intent*.

The test established by the New Jersey Supreme Court is whether the zoning ordinance operates *in fact* to preclude the opportunity for the requisite share of low and moderate income housing to be built.[14] Under this new test it is not necessary for the municipality "to devise specific formulae for estimating [a] precise fair share of the lower income housing needs of a specifically demarcated region."[15] Nor is it necessary for a trial court to make such findings.[16] What is necessary under the *Oakwood at Madison* test is a "bona fide" effort by the municipality toward the elimination or minimization of undue cost-

10. — N.J. —, — A.2d — (1977) (No. A-80/81, Jan. 26, 1977).
11. *Id.* at —, — A.2d at —. (slip op. at 12).
12. *Id.*
13. 97 S. Ct. 555 (1977).
14. — N.J. at —, — A.2d at —. (slip op. at 12).
15. *Id.* at —, — A.2d at —. (slip op. at 14-15).
16. *Id.*

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generating requirements in the zoning ordinance.[17] In the language of the court:

> To the extent that the builders of housing in a developing municipality like Madison cannot through publicly assisted means or appropriately legislated incentives . . . provide the municipality's fair share of the regional need for lower income housing, it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the "least cost" housing, consistent with minimum standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share.[18]

Under this standard for evaluating the exclusionary effect of a zoning ordinance the court held the Madison ordinance invalid because (1) it designated insufficient areas for very small lots and multi-family housing;[19] (2) it contained undue cost generating features such as requirements for roads and utilities;[20] (3) it failed to provide for *prospective* regional need for lower cost housing beyond 1975.[21]

The primary contribution of the *Oakwood at Madison* decision may be its admonition to the trial courts to withdraw from the process of "demarcating the region" and determining the "fair share" of the municipality.[22] The court observed that this process "involves highly controversial economic, sociological and policy questions of innate difficulty and complexity. Where predictive responses are called for they are apt to be speculative or conjectural."[23] In a statement that may have only limited significance, the court articulated the constitutional truism that this process "is much more appropriately a legislative function rather than a judicial function to be exercized in the disposition of isolated cases."[24] Nevertheless, after indicating its awareness of the existence and importance of the fundamental principle of separation of powers in our legal system, the court stated:

> But unless and until other appropriate governmental machinery is effectively brought to bear the courts have no choice, when an ordinance is challenged on *Mount Laurel* grounds, but to deal with

17. *Id.* (slip op. at 15).

18. *Id.* at —, — A.2d at —. (slip op. at 36). In footnote 21, — N.J. at —, — A.2d. at —, the court explains that "least cost" housing is housing which can be built at the least cost and still meet health and safety requirements.

19. *Id.* at —, — A.2d at —. (slip op. at 53).

20. *Id.* at —, — A.2d at —. (slip op. at 53-54).

21. *Id.* at —, — A.2d at —. (slip op. at 80).

22. *Id.* at —, —, — A.2d at —, —. (slip op. at 14, 54).

23. *Id.* at —, — A.2d at — (footnote omitted). (slip op. at 66).

24. *Id.* at —, — A.2d at — (footnotes omitted). (slip op. at 67).

this vital public welfare matter as effectively as is consistent with the limitations of the judicial process.[25]

These preliminary statements alone would have left unanswered the question of how the trial courts will deal with the concepts of "region" and "fair share" when the validity of a municipal zoning ordinance is challenged in an action before them. The opinion, however, continues and provides some guidelines. Generally, the court concluded that "there is no specific geographical area which is necessarily the authoritative region as to any single municipality in litigation."[26] The objective of the trial courts is to determine whether the zoning ordinance "realistically permits the opportunity to provide a fair and reasonable share of the region's need for housing for the lower income population."[27] The technical details of the basis for fair share allocations of regional goals among municipalities are not as important "as the consideration that the gross regional goal shared by the constituent municipalities be large enough fairly to reflect the full needs of the housing market of which the subject municipality forms a part."[28] The court then indicated its approval of the trial court's definition of "region" as "the area from which, in view of available employment and transportation, the population of the township would be drawn absent exclusionary zoning."[29] The court also reaffirmed the statement by Justice Hall in *Mount Laurel* that "confinement to or within a certain county appears not to be realistic, but restriction within the boundaries of the state seems practical and advisable."[30] The opinion predicted that an official fair share housing study of a group of counties or municipalities conducted under the auspices of a regional agency pursuant to the Governor's Executive Order No. 35 would be entitled to prima facie judicial acceptance.[31]

On the question of the computation of the "fair share" allocation for the defendant municipality, the court was equally circumspect. The court noted that "because of the conjectural nature of such calculations, utilization of the court as the forum for determining a municipality's fair share may result in 'statistical warfare' between the liti-

25. *Id.* at —, — A.2d at —. (slip op. at 69-70).
26. *Id.* at —, — A.2d at —. (slip op. at 75).
27. *Id.* at —, — A.2d at —. (slip op. at 81).
28. *Id.* at —, — A.2d at —. (slip op. at 70-71).
29. *Id.* at —, — A.2d at —. (slip op. at 71).
30. *Id.*
31. *Id.* at —, — A.2d at —. (slip op. at 72-73).

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gant's."[32] Nevertheless, the court acknowledged that "fair share studies by expert witnesses may be of substantial evidential value to a trial court."[33] The opinion then summarized the court's conclusion on this issue.

> Fair share allocation studies submitted in evidence may be given such weight as they appear to merit in the light of [our above conclusions]. But the court is not required, in the determination of the matter, itself to adopt fair share housing quotas for the municipality in question or to make findings in reference thereto.[34]

After setting forth these general principles relating to the fair share allocation to municipalities, the court directed its attention to the specific issue of the relevance of ecological and environmental considerations in this process.[35] Evidence had been offered at the trial relating to the adverse environmental impact of the proposed development upon the surrounding area. The trial court had declined to consider this evidence because there was a substantial amount of other land free from such environmental impact available in the municipality with which the fair share of its regional housing needs could be met.[36] The supreme court ruled that the trial court had erred in not receiving in evidence and considering these environmental factors.[37] The court said:

> It is not an answer to say there is ample other land capable of being deployed for lower income housing. The municipality has the option of zoning areas for such housing anywhere within its borders consistent with all relevant considerations as to suitability . . . .[38]

To prevent future litigants from generalizing too broadly from this statement, the court repeated its statement in the *Mount Laurel* decision that although ecological and environmental factors may be considered in zoning "the danger and impact must be substantial and very real (the construction of every building or the improvement of every plat has some environmental impact)—not simply a makeweight to support exclusionary housing measures or preclude growth."[39]

32. *Id.* at — n.39, — A.2d at — n.39. (slip op. at 66).

33. *Id.* at — n.5, — A.2d at — n.5. (slip op. at 16).

34. *Id.* at —, — A.2d at —. (slip op. at 81).

35. *Id.*

36. *Id.* at —, — A.2d at —. (slip op. at 82).

37. *Id.* at —, — A.2d at —. (slip op. at 83).

38. *Id.*

39. *Id.*, *citing* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 187, 336 A.2d 713, 731, *cert. denied*, 423 U.S. 808 (1975).

To prospective developers of higher density housing in suburban communities the most significant part of the *Oakwood at Madison* decision may be the order of the court directing the issuance of a permit for the development of the housing project proposed by the developer-plaintiff.[40] The order, however, was made subject to the condition that the developer comply with its representation that it will guarantee the allocation of at least twenty percent of the units to low or moderate income families.[41] However, the court did subject the enforcement of the order to the supervision of the trial court to assure compliance with local regulations and to determine whether the developer's land is environmentally suited to the degree and density and type of development proposed.[42]

In addition, the court ordered the municipality to submit to the trial court for its approval a revised zoning ordinance that would, among other things, allocate more land for single family houses on small lots, allocate more land for multi-family units, eliminate provisions resulting in bedroom restrictions and eliminate undue cost-generating requirements.[43] The trial court is specifically authorized, in its discretion, to appoint an impartial zoning and planning expert or experts, to assist in the process.[44]

The full significance of an important judicial decision is seldom immediately discernible. It is often necessary for some time to elapse before the many complex ideas can be ascertained and interrelated with each other and with the realities of the world in which they will be applied. Some first impressions may be of interest.

The *Oakwood at Madison* decision reaffirms the *Mount Laurel* principle that the zoning ordinance of every developing municipality

40. *Id.* at —, — A.2d at —. (slip op. at 93).

41. *Id.* This type of developer relief, requiring the construction of a mandatory percentage of moderately priced dwellings, can also be part of a municipal zoning scheme, known as an MPMPD ordinance. *See generally* Rose, *The Mandatory Percentage of Moderately Priced Dwelling Ordinance (MPMPD) Is the Latest Technique of Inclusionary Zoning*, 3 REAL EST. L.J. 176 (1974). For a further discussion of developer relief, *see* Hyson, *The Problem of Relief in Developer-Initiated Exclusionary Zoning Litigation*, 12 URBAN L. ANN. 21 (1976). Note that the court did not engage in "judicial rezoning" in formulating the relief to be granted; i.e., it did not map out specific districts to accommodate low and moderate income housing. *See* Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760, 768-79 (1976).

42. — N.J. at —, —A.2d at —. (slip op. at 93).

43. *Id.* at —-—; — A.2d at —-—. (slip op. at 94-97).

44. *Id.* at —, — A.2d at —. (slip op. at 97).

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must afford the opportunity for the municipality's "fair share" of the present and prospective regional need for low and moderate income housing.[45] Although the role of the trial courts is to be more constrained, the test of validity of a municipal zoning ordinance will continue to be based upon the answers to such questions as (1) What is the "region?" (2) What is "fair share?" (3) What is the present housing need?" (4) What is the prospective housing need?"

In *Oakwood at Madison* the New Jersey Supreme Court has paid homage to the constitutional principle of separation of powers and to the concept of judicial restraint. The court has recognized the impropriety of judges engaging in the legislative and administrative processes necessary to define "region" and calculate "fair share."[46] The court has at the same time, however, made it clear that it intends to retain such judicial power as is necessary to protect and preserve the integrity of the judicial process. Having found in *Mount Laurel* that exclusionary zoning violates the state constitution, the court does not intend to abandon the judicial power to enforce its ruling. The *Oakwood at Madison* decision should not be interpreted as a weakening of the court's resolve to outlaw exclusionary zoning. The decision is based instead upon a tactic designed to consolidate the judicial forces into a position which will be less vulnerable to direct attack.

It is also interesting to note that most of the admonition relating to the court's participation in the process of demarcating the region and computing "fair share" is more applicable to Judge Furman's decision in *Urban League v. Mayor & Council (Carteret)*[47] than Judge Furman's decision in *Oakwood at Madison*. Although the *Urban League* case was not before the court there is little doubt that the court knew of its existence and the extent to which a trial judge can become enmeshed in the intricacies of the planning process.

45. *Id.* at —, — n.33, — A.2d at —, — n.33. (slip op. at 54, 55-56).

46. *Id.* at ——-, — A.2d at —-—. (slip op. at 67-69).

47. 142 N.J. Super. 11, 359 A.2d 526 (Ch. 1976). The trial court accepted the demarcation of Middlesex County as the "region." This decision was based upon several factors: the county constitutes a Standard Metropolitan Statistical Area (SMSA), 20 of the 25 municipalities joined in a community block grant application as an "urban county," and the existence of a county master plan and available statistics. The trial court prescribed a three-step process for the calculation of each municipality's "fair share" allocation of regional housing needs. The court first determined the amount of low and moderate income housing needed in the county for the next ten years (18,697 units). The court made an initial allocation (total of 4,030 units) to each municipality to bring each up to the county proportion of 15% low and 19% moderate income housing. The court then allocated the remaining 14,667 units equally among the defendant municipalities.

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*Oakwood at Madison* fails to provide an unambiguous standard for municipal officials to determine, with some assurance, whether their zoning ordinances will be upheld, short of completely abandoning all programs of rational and comprehensive community planning. On one hand the decision states that it is not necessary for a municipality whose zoning ordinance is challenged to devise specific formulae for estimating its precise share of the housing needs of the region.[48] Rather, the municipalities and the courts should look to the *bona fide* efforts toward the elimination or minimization of undue cost generating requirements.[49] On the other hand when a zoning ordinance is challenged, the court will evaluate "fair share" allocation studies submitted in evidence (although the court will not adopt a "fair share" housing quota for the municipality).[50] Thus, it would appear that a municipality could make a bona fide effort toward the elimination of undue cost-generating requirements in the zoning ordinance but still be vulnerable to attack on the grounds that it has not fulfilled its "fair share" housing quota. Consequently each municipality and each developer-challenger of the zoning validity will have to prepare its own study to support its position and the statistical warfare will continue to be fought in the courtrooms. The only difference after *Oakwood at Madison* is that the trial court will remain aloof from the proceedings and only evaluate the alternative methodologies but will not prescribe one for the municipality.

When the court ordered the issuance of a building permit to the developer-plaintiff subject to the condition that the developer guarantee the allocation of at least twenty percent of the units to low or moderate income families,[51] it did not deal with the complex problem of administering the procedure by which the benefits of low and moderate income housing units would be preserved over a period of time for succeeding generations of occupants. This issue creates a difficult dilemma. If no attention is given to the implementation of the mandatory percentage of moderately priced dwellings (MPMPD) requirement, the first occupant of each of the twenty percent of the units will benefit from the court-ordered allocation imposed on the developer. As costs rise and property values increase, however, subsequent occupants will have to pay the increased nonsubsidized costs of

48. — N.J. at —, — A.2d at — (slip op. at 14-15). *See* note 16 *supra*.

49. *Id.* (emphasis in original). (slip op. at 15). *See* note 17 *supra*.

50. *Id.* at —, — A.2d at —. (slip op. at 81). *See* note 34 *supra*.

51. *Id.* at —, — A.2d at —. (slip op. at 93). *See* note 41 *supra*.

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occupancy. On the other hand, to avoid the short-lived benefits to only the first occupant, a system of administration would have to be established that would control the rents of apartments or control the selling prices of sales units. Either mechanism would subject the developer to a form of regulation that would constitute a significant disincentive to development.

The *Oakwood at Madison* decision recapitulated the misconception of *Mount Laurel* that the state of the art of the planning profession has been developed to the point where a competent, honest, and objective professional planner can, with or without the aid of electronic data processing devices, calculate objectively and accurately the numbers on which "fair share" allocations can be made. There is an assumption in both *Oakwood at Madison* and *Mount Laurel* that the disparity in testimony from competing expert planning witnesses is the result of the advocacy procedure and that planning truth can be found by the simple device of turning to an objective source of information and advice. This would appear to be the basis on which the court suggests that fair share housing allocations made by regional planning agencies (such as the Delaware Regional Planning Commission) would merit prima facie judicial acceptance.[52] This assumption also appeared to be the basis for the authorization to the trial court to appoint an impartial zoning and planning expert or experts.[53]

The difficulty with this assumption is that honesty, integrity, competence, and objectivity alone are insufficient to extrapolate, project, and predict the events upon which the future development of a region will depend. The planning process is designed to formulate plans and programs to achieve goals and objectives of the community it seeks to serve. Professional planners do not make basic policy decisions, such as whether the community seeks rapid growth, moderate growth, or slow growth. An "objective" planner would base his projections and calculations upon policy judgments of the appropriate community officials. For example, *predictions* of future housing need will depend upon policy decisions relating to desired rate of growth. *Actual* housing needs, in most regions, will depend upon the extent to which employment opportunities are generated *in fact* in the region. The science, methodology, and art of predicting the number of future jobs (i.e., industrial and commercial growth) in any given region have not yet been developed to the point where an impartial regional planning

52. *Id.* at —, — A.2d at —. (slip op. at 72-73).

53. *Id.* at —, — A.2d at —. (slip op. at 97).

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agency or an impartial court-appointed planner can provide calculations of sufficient reliability to determine the validity of a municipal zoning ordinance.

At some point in every comprehensive discussion of exclusionary zoning it becomes necessary to remind all participants that there are two separate and distinct questions that must be resolved if low and moderate income families are to have an opportunity to live in suburban communities. The first question is: Is land available in the community that can be used for "least cost" housing?[54] The second question is: Are subsidies available to close the gap between the cost of housing construction and the amount that low and moderate income families can afford to pay? The *Oakwood at Madison* decision focused attention upon the duality of these issues and reaffirmed the principle that the state constitution requires each developing municipality to make land available for "least cost" housing. In response to the second question, however, the court was unwilling to impose an affirmative obligation on developing municipalities to help to subsidize construction costs. Although an amicus brief had suggested various forms of affirmative municipal action to help subsidize these costs,[55] the New Jersey Supreme Court deferred this issue to another day.

The New Jersey Supreme Court is continuing its leadership in the exclusionary zoning field. *Oakwood at Madison* reaffirms the principles of the landmark *Mount Laurel* decision and goes so far as to grant specific relief to the plaintiff-developer. But municipal officials who had hoped that *Oakwood at Madison* would provide an unambiguous standard to determine the validity of their zoning ordinances may find this latest decision unsatisfactory.

54. *See* note 18 *supra*.

55. Brief for the Public Advocate as Amicus Curiae, Oakwood at Madison, Inc. v. Township of Madison, — N.J. —, —A.2d — (1977) (No. A-80/81, Jan. 26, 1977).

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