

RULS-AD-1980-210

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Amended Questions (By Supreme Court?)

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100 W. Street
AMENDED QUESTIONS¹ By Supplement

May 19, 1980

(1) Discuss the application of the duty not to exclude, as first announced in Mt. Laurel, to all types of housing (i.e., regardless of income level).

(2) Discuss the appropriate procedural posture for the joinder of necessary/desirable parties in an exclusionary zoning suit (for example, neighboring municipalities in a particular county or region).

(3) Discuss the relevance of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1, et seq. (in particular, the general welfare requirement in N.J.S.A. 40:55D-2(a)) in exclusionary zoning cases.

--Does the MLUL adopt the dictates of Mt. Laurel and require compliance by all municipalities?

--If the MLUL "general welfare" duty is interpreted so that the regional need requirements of Mt. Laurel are limited to developing municipalities, is delegation of the zoning power to other municipalities without a concomitant regional perspective requirement unconstitutional? See Payne, 29 Rutgers L. Rev. 80 (summer 1976).

--If the MLUL represents a complete adoption of Mt. Laurel principles, should the Court adjust its focus in these cases so as to concentrate on violations of the statute?

* -- Discuss the significance of the reexamination (40:55D-89) and variance (40:55D-70) provisions of the law in developing guidelines for exclusionary zoning litigation.

-- Discuss those legislative enactments listed in the amicus curiae brief of legislators accepted by Court on April 16, 1980 that are responsive to the exclusionary zoning problem.

¹ Questions added are marked *

-- Discuss those legislative enactments listed in the amicus curiae brief of legislators accepted by Court on April 16, 1980 that are responsive to the exclusionary zoning problem.

(4) Discuss the significance of Executive Order 35. Discuss any other similar initiatives relating to the problems of exclusionary zoning that you may be aware of.

(5) What practical effects have the decisions in Southern Burlington County NAACP v. Mt. Laurel, Oakwood at Madison v. Madison, Pascack v. Mayor and Council of Township of Washington and Fobe v. Demarest had on either zoning or housing in New Jersey?

(6) Is the underlying goal of Mt. Laurel -- providing housing opportunities outside urban areas for low and moderate income New Jersey citizens -- economically feasible? Will attainment of the goal affect another important goal of this state - to rehabilitate its cities?

(7) Discuss the wisdom of limiting the reach of Mt. Laurel to developing municipalities.

--What rationale exists to support such distinction?

--Would the distinction reward those municipalities who have used exclusionary zoning most successfully, either in remaining rural, or becoming developed without providing a variety of types of housing opportunities?

--What impact would the distinction have on the Executive's apparent priority to help rebuild urban areas? (See 1980 State of the State message.) Would it add to or subtract from an effort to concentrate on urban problems?

--Discuss the function of the six Mt. Laurel criteria relating to the "developing" status of a municipality.

--Are the criteria (a) conjunctive?
(b) merely illustrative?

--Can a municipality fit into more than one Mt. Laurel category (undeveloped, developing, developed) simultaneously? For example, what is the "duty" of an 80% developed municipality under Mt. Laurel?

(8) Discuss the relevance of "fiscal zoning" to Mt. Laurel cases. Should the Mt. Laurel doctrine be dependent on a showing of fiscally exclusionary motive or purpose or is the effect of exclusion the only factor to be considered in exclusionary zoning litigation?

* (9) Discuss the wisdom of a per se rule against large lot (e.g. 5 acre) zoning.

* (10) Discuss the validity of a per se exclusion of mobile housing (see Vickers v. Gloucester Township, 37 N.J. 232 (1962)).

(10) When, under Mt. Laurel, does the presumption of invalidity of an ordinance (based on particular exclusionary characteristics) attach and to what extent? What evidence will rebut such presumption?

* -- What is the effect of such rebuttal (i.e., does the burden shift back to plaintiffs)?

* -- Where plaintiffs seek a builder's remedy, how should the burden of proof be allocated as to that remedy?

(11) Discuss the proper function of the Housing Allocation Plan of the New Jersey Department of Community Affairs Division of State and Regional Planning (Division on Planning) in exclusionary zoning litigation.

--Should a demonstration of satisfaction of a particular Division on Planning allocation constitute prima facie evidence of compliance with Mt. Laurel?

--Should fair share orders imposed on non-complying municipalities adopt the Division on Planning's allocation unless the municipality demonstrates that such allocation is inappropriate.

--What effect should changed allocation have on a finding of previous compliance?

(12) Discuss the proper function of the State Development Guide Plan in such litigation.

(a)

* (13) What is the function and relative importance of defining the appropriate region in a court's determination and disposition of cases challenging municipal land use regulations as unconstitutionally exclusionary?

* (h) Discuss the wisdom of a formulaic analysis for determining fair share/regional need. What alternatives exist to such numerical review?

(j) Can and should a fair share/regional need allocation be used to:

- meet today's housing needs throughout the State;
- remedy prior exclusions by particular municipalities;
- meet future demands for housing in New Jersey:

- (a) from within the State
- (b) throughout the Northeast Corridor?

(14) Discuss the relevance of an existing county-wide percentage of low and moderate income housing in an analysis of a particular municipality's compliance or non-compliance with Mt. Laurel.

--Is the concept of "tipping" relevant in this area?

(15) Discuss the fair share formula introduced in Mt. Laurel at 67 N.J. 190, and cited by Justice Pashman in Pascack at 74 N.J. 511.

--Should municipalities have an absolute duty to provide an opportunity for housing for all present and potential employees in the region?

h --Should a change in employment figures affect such litigation?

* -- Should municipalities have a duty to house for their resident poor?

* -- Should these duties be incumbent upon all municipalities regardless of the developing status?

(16) Discuss the function of the "time of decision" rule (which, when applicable, requires judicial review of a law or ordinance to focus on the version of the law in effect at the time the judicial decision is made).

--Is the rule applicable?

--If so, should a time limitation on the right to submit amendments to a zoning ordinance be placed on defendant municipalities to avoid dilatory action?

--How can time-consuming remands triggered by submission of amended ordinances be avoided?

--How can the problems stemming from outdated statistics be avoided?

--How does the rule affect the shifting burden of proof in exclusionary zoning cases once a prima facie showing of exclusion is made -- does submission of an amended ordinance during trial return the burden of proving invalidity to plaintiffs? on appeal? after final appellate review when compliance with a final judgment is questioned?

--When, if ever, should a trial court ignore amendments submitted during litigation and look only at the original ordinance?

(17) Should a trial court retain jurisdiction to rule on orders of compliance after the main case has been appealed?

(18) What function should a showing of good faith or bona fide efforts at compliance with existing principles of law play in these cases?

(19) Discuss the validity of a "trickling down" theory in the current housing market.

(20) Discuss the function of "phasing" in a fair share plan.

(21) Discuss the legal and practical implications of the following remedial devices a court might employ in exclusionary zoning cases.

--Total invalidation of an ordinance, accompanied by an order to draft a new ordinance within a certain time period (i.e., 90 days) or be unzoned, see Orgo Farms.

--Presumptive variances as suggested by Justice Pashman in Pascack and Fobe.

--An order for specific rezoning of plaintiffs' land for multi-family development (Builder's remedy).

--Orders to seek subsidies, provide density bonuses, institute rent-skewing.

-- Specific rezoning for high-density development accompanied by automatic reverter if the development planned is not for low and moderate income units.

(22) Should all remedies developed in these cases be tracked to the level of need in the region and/or municipality, or does Oakwood suggest the possibility of "numberless" (as opposed to fair share/regional need) remedies?

(23) Discuss the function of expert planners in exclusionary zoning litigation:

--At what stage of such litigation should expert planners be utilized?

--Should a trial judge delegate rezoning authority to such expert, and embody the product of such rezoning in the trial court judgment?

--How should such expert be selected and paid?

(24) Should the trial judge assume a supervisory role over the implementation of his order? If so, how long should such role continue?