ON THE PUBLIC ADVOCATE'S INVOLVEMENT IN *MOUNT LAUREL*

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Near the end of his excellent book on the subject of exclusionary zoning, Professor Michael Danielson poses the question of whether the fight to open the suburbs is worth the trouble.[1] In raising this question, Danielson cites widespread opposition to those engaged in this fight, a lack of support from those who have been excluded from the suburbs, and the meager results of past efforts to open them. Others have reasoned that the minority poor, concentrated in the urban centers, can better be served by focusing resources on the cities—rehabilitating older neighborhoods, attracting jobs, maximizing the political power which results from concentration—rather than through futile efforts to expand housing opportunities in the suburbs. As the person responsible for committing the resources, prestige, and political capital of the Department of the Public Advocate to the effort to strike down exclusionary zoning,[2] the author has long been troubled by the question asked above, and welcomes this opportunity to ruminate in public on an issue which has caused so much private reflection. The resounding reaffirmation by the New Jersey Supreme Court of its open housing position in *Mount Laurel II* gives much comfort, but is not entirely dispositive of the issue.[3] Has the game been worth the candle? The answer to that question turns on a mix of legal, political, and social considerations.

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[1] M. DANIELSON, THE POLITICS OF EXCLUSION 327 (1976).

[2] The discretion to involve the Department was exercised by the Commissioner. N.J. STAT. ANN. § 52:27E-31 (West Cum. Supp. 1983-1984); *see* Van Ness v. Borough of Deal, 139 N.J. Super. 83, 352 A.2d 599 (Ch. Div. 1975) (upholding constitutionality of statute's delegation of power), *rev'd on other grounds*, 145 N.J. Super. 368, 387 A.2d 571 (1978); Township of Mount Laurel v. Department of Public Advocate, 83 N.J. 522, 416 A.2d 886 (1980) and Borough of Morris Plains v. Department of Public Advocate, 169 N.J. Super. 403, 404 A.2d 1244 (App. Div. 1979) where the courts found that the exercise of discretion in specific cases dealing with the issue of exclusionary zoning was not violative of the statute or the constitution; *see also* Delaney v. Penza, 151 N.J. Super. 455, 376 A.2d 1334 (App. Div. 1977).

The discretion was the Commissioner's. The inspiration and perspiration were provided by others, most notably Carl Bisgaier and Kenneth Meiser. Both were associated with the original *Mount Laurel* litigation before they came to the Department of the Public Advocate.

[3] Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

I. THE LEGAL SETTING

With its two *Mount Laurel* decisions, the New Jersey Supreme Court has clearly established this state as the most forward-looking jurisdiction in the nation in recognizing the rights of persons to seek decent housing, unimpeded by exclusionary zoning practices. This has not always been so.

After the adoption of the 1947 constitution, the New Jersey courts abandoned decades of hostility toward zoning.[4] Propelled by that document's mandate that legislation be construed liberally in favor of the municipalities,[5] the supreme court handed down a series of decisions making the exercise of the zoning power virtually immune from attack. Thus, the court upheld municipal zoning ordinances which established minimum interior floorspace requirements;[6] permitted minimum lot sizes of five acres;[7] prevented the construction of multi-family units;[8] and prohibited trailer parks.[9] The exclusionary impact of those decisions did not escape the attention of all jurists[10] and legal commentators.[11] In fact, it was the classic dissent of Justice Hall in *Vickers v. Gloucester Township*[12] which nurtured the progressive principles of zoning reform which the Justice was later able to put in place with the support of the entire court in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* (*Mount Laurel I*).[13]

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[4] *See generally* E. BASSETT, ZONING (1940).

[5] N.J. CONST. art. IV, § 7, para. 11.

[6] Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).

[7] Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952).

[8] Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958).

[9] Vickers v. Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962), *appeal dismissed*, 371 U.S. 233 (1963).

[10] The dissenting opinion of Justice Oliphant in Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953), stated:

> Zoning has its purposes, but as I conceive the effect of the majority opinion it precludes individuals in those income brackets who could not pay between $8,500 and $12,000 . . . from ever establishing a residence in this community. . . . A zoning provision that can produce this effect certainly runs afoul of the fundamental principles of our form of government.

Id. at 181, 89 A.2d at 701 (Oliphant, J., dissenting).

[11] *See* Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Note, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720 (1962).

[12] 37 N.J. 232, 252, 181 A.2d 129, 140 (1962) (Hall, J., dissenting).

[13] 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter cited as *Mt. Laurel I*].

In fairness to the court which decided *Lionshead Lake, Inc. v. Township of Wayne*,[14] *Fischer v. Township of Bedminster*,[15] and the others,[16] it should be noted that the New Jersey Supreme Court was not unmindful that a time might come when its laissez-faire attitude toward the exercise of municipal zoning authority might have to change. The court warned in *Pierro v. Baxendale*:[17]

> We are aware of the extensive academic discussion following the decisions in the *Lionshead* and *Bedminster* cases and the suggestion that the very broad principles which they embody may intensify dangers of economic segregation. . . . In the light of existing population and land conditions within our State these powers may fairly be exercised without in anywise endangering the needs or reasonable expectations of any segments of our people. If and when conditions change, alterations in zoning restrictions and pertinent legislative and judicial attitudes need not be long delayed.[18]

It took nearly twenty years for judicial attitudes to change, and for the court to hand down its decision in *Mount Laurel I*[19] (the Legislature's attitude still has not changed).[20] Stated succinctly, the holding in *Mount Laurel I* was that every developing municipality must afford a reasonable opportunity for location within its borders of its fair share of the regional need for low and moderate income housing, and that it must not only eliminate exclusionary practices, but must also act affirmatively to provide that opportunity.

Justice Hall based his decision on article I, paragraph 1 of the New Jersey Constitution, and thereby insulated it from federal constitutional or legislative review. He found within article I, paragraph 1, the equivalent of federal substantive due process and equal protection guarantees against police power enactments which do not promote the general welfare. The general welfare, in the Justice's opinion, is the welfare of all the people, not just those who are present residents of a particular municipality.[21]

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[14] 10 N.J. 165, 89 A.2d 693 (1952).

[15] 11 N.J. 194, 93 A.2d 378 (1952).

[16] *See supra* notes 8 & 9.

[17] 20 N.J. 16, 118 A.2d 401 (1955).

[18] *Id.* at 29, 118 A.2d at 407-08 (citation omitted).

[19] 67 N.J. at 151, 336 A.2d at 713.

[20] Senator Gerald Stockman (D-Mercer) recently introduced legislation to create a State Planning Commission. One of the announced purposes of the bill is to establish a mechanism for the updating of the State Development Guide Plan, *see infra* note 66 and accompanying text, so as to meet the supreme court mandate. This effort, which some suspect has the tacit approval of the Governor, would represent the first positive legislative reaction to the entire *Mount Laurel* controversy. *See* S. 1464, 201st N.J. Leg., 1st Sess. (1984).

[21] *Mt. Laurel I*, 67 N.J. at 177, 336 A.2d at 726.

The landmark dimensions of *Mount Laurel I* are not diminished by the fact that the opinion raised and left unanswered some important questions, nor are they minimized by the court's toothless approach to the issue of remedy. It might remain for other courts, or the same court at a later date, to wrestle with the concepts of "developing municipality," "fair share" and "region." The absence of clearly enunciated remedies might, as Justice Pashman feared,[22] encourage municipalities to evade their responsibilities, obfuscate their purposes, and generally frustrate the court's decisional goals for many years. It might be years, if ever, before the residents of exclusionarily zoned municipalities would be shocked with the knowledge that low and moderate income persons had moved in. But when poor black and Hispanic plaintiffs prevailed over the Township of Mount Laurel, it became evident that the zoning laws of this state, and perhaps of the nation,[23] would never be the same again. Once *Mount Laurel I* had been decided, the peace and serenity once thought to go hand in hand with exclusivity was forever gone. Now there were lawsuits and rumors of more lawsuits. Now it became necessary to hire lawyers and land-use experts to turn back the lawyers and land-use experts who were attempting to breach the walls.

Still, during the years following the decision, open housing advocates had little to celebrate. The supreme court seemed to retreat in *Oakwood at Madison, Inc. v. Township of Madison*[24] when it concluded that a municipality could meet its *Mount Laurel I* obligation by permitting "least cost" housing even though such housing was more expensive than that which low and moderate income families could afford. Further, the court in *Madison Township* refused to require a technical definition of "housing region" or "fair share," opting instead for a "numberless approach" and accepting as sufficient the "bona fide" efforts of municipalities toward the elimination or minimization of undue cost-generating requirements.[25]

Next, the court ruled that *Mount Laurel I* did not apply to built-up suburbs, either in regard to general zoning ordinances, in *Pascack Association, Ltd. v. Mayor of Township of Washington*,[26] or where variances were being sought, in *Fobe Associates v. Mayor of De-*

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[22] *Id.* at 207, 336 A.2d at 742.

[23] CENTER FOR URBAN POLICY RESEARCH, *MOUNT LAUREL II:* CHALLENGE DELIVERY OF LOW-COST HOUSING 4 (Rutgers University 1983).

[24] 72 N.J. 481, 371 A.2d 1192 (1977).

[25] *Id.* at 498-99, 371 A.2d at 1200.

[26] 74 N.J. 470, 379 A.2d 6 (1977). In *Pascack*, the court paid deference to a local zoning policy in a way strangely reminiscent of *Lionshead Lake*.

marest.[27] Apparently sensing some softening of the supreme court's *Mount Laurel I* commitment, lower courts began limiting the holding. It was not to be applied to rural communities which were "non-developing";[28] least cost housing in excess of $70,000 satisfied *Mount Laurel I*;[29] there was to be no generally recognized builder's remedy;[30] and, in the case of the Township of Mount Laurel itself, an ordinance which permitted the development of low income housing on but twenty of the nearly 15,000 acres in the municipality was held to meet its fair share obligation.[31] Significantly, none of the twenty acres was suitable for development.

In October, 1978, the Department of the Public Advocate brought suit against twenty-seven municipalities in Morris County to force compliance with *Mount Laurel I*. That action, which touched off wildfire controversy, was later stayed by the supreme court while the court considered the cases consolidated in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* (*Mount Laurel II*).[32]

II. The Political Setting

Insofar as New Jersey is concerned, those who thought the principle of "one man—one vote" would enhance the political power of city dwellers were mistaken. From a rurally dominated legislature, where the senator from bucolic Hunterdon County exercised the same voting power as the senator from populous Essex County, the state "progressed" to a point where suburban legislators, who so overwhelmingly outnumber their colleagues from urban areas, virtually controlled the legislative process. Small wonder, then, that legislation dealing with the problem of exclusionary zoning, which trespasses (as it must) on the doctrine of "home rule," was never enacted, despite

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[27] 74 N.J. 519, 377 A.2d 31 (1977).

[28] Glenview Dev. Co. v. Franklin Township, 164 N.J. Super. 563, 397 A.2d 384 (Law Div. 1978), *aff'd in part, rev'd in part sub nom.* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

[29] Urban League v. Township of Mahwah, 147 N.J. Super. 28, 370 A.2d 521 (App. Div.), *certif. denied*, 74 N.J. 278, 377 A.2d 682 (1977).

[30] Caputo v. Township of Chester, Docket No. L-42857-74 (Law Div. Oct. 4, 1978) (unreported), *aff'd in part, rev'd in part sub nom.* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

[31] Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 161 N.J. Super. 317, 391 A.2d 935 (Law Div. 1978), *aff'd in part, rev'd in part*, 92 N.J. 158, 456 A.2d 390 (1983).

[32] 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter cited as *Mt. Laurel II*].

the prodding of both Governors Cahill and Byrne[33] and entreaties from the supreme court.[34]

State Senator Martin Greenberg[35] came as close as anyone to success in this area when his bill, S. 505,[36] was passed by the Senate. The bill, which started as an effort to establish mandatory housing quotas under the State Department of Community Affairs, evolved into a "voluntary" quota system to be developed by a commission of state, county, and municipal officials, without any effective enforcement mechanism. Ironically, the bill was so watered-down at the time of passage that it had the support of the League of Municipalities, and failed even to interest most open housing advocates. Senate Bill 505 never moved out of committee in the House of Assembly, largely because Assemblyman W. Carey Edwards[37] proposed a bill, A. 3162,[38] which was even more "voluntary"; in fact, Assemblyman Edwards' bill lacked even the hint of compulsion. In light of A. 3162, the League of Municipalities withdrew its support from S. 505.[39]

Aside from the bills noted above (A. 3162 was reintroduced several times), and the annual introduction of concurrent resolutions to amend the New Jersey Constitution so as to negate *Mount Laurel I*,[40] the legislative response to *Mount Laurel I* was one of studied inaction. That is not to suggest that there were no attempts to punish the Department of the Public Advocate for bringing the Morris County suit. The annual meeting of the Joint Appropriations Committee was the forum for a confrontation which, fortunately, never

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[33] Governor Cahill twice went before the New Jersey Legislature to present special messages on the housing crisis in New Jersey. In both instances he urged action to eliminate exclusionary zoning practices. *See A Blueprint for Housing in New Jersey*, A Special Message by Governor William T. Cahill (Dec. 7, 1970) [hereinafter cited as *Blueprint*]; *New Horizons in Housing*, A Special Message by Governor William T. Cahill (Mar. 27, 1972) [hereinafter cited as *New Horizons*]. In addition, several of the Governor's annual messages repeated the exhortation. Governor Byrne struck a similar note of urgency in his early annual messages. *See, e.g.*, First Annual Message of Governor Brendan T. Byrne (Jan. 14, 1975), at 11 [hereinafter cited as First Annual Message].

[34] The court called for legislative action from the moment of decision in *Mount Laurel I*. *See Mt. Laurel I*, 67 N.J. at 189, 336 A.2d at 732-33; see also *Madison Township*, 72 N.J. at 629, 731 A.2d at 1266, where the court stated: "How much better were the Legislature to take steps that would obviate this problem altogether!" *Id.* Even now, with the decision in *Mt. Laurel II*, the court is seeking legislative consideration. *Mt. Laurel II*, 92 N.J. at 212, 456 A.2d at 41.

[35] Senator Martin Greenberg (D-Essex).

[36] S. 505, 198th N.J. Leg., 1st Sess. (1978).

[37] W. Carey Edwards (R-Bergen and presently Counsel to Governor Kean).

[38] A. 3162, 198th N.J. Leg., 2d Sess. (1979).

[39] Newark Star Ledger, Feb. 27, 1983, § 1, at 21, col. 1.

[40] *See, e.g.*, S.C.R. 30, 198th N.J. Leg., 1st Sess. (1978), by Hagedorn, Dorsey, and Foran, which would have legitimized economic segregation.

resulted in action being taken against the Department.[41] Forty members of the Legislature did file an *amicus curiae* brief in *Mount Laurel II*, the substance of which asserted that zoning was a legislative matter which the court should leave to duly elected officials. The court's rejoinder is well worth noting:

> [A] brief reminder of the judicial role in this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is better left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them. We recognize the social and economic controversy (and its political consequences) that has resulted in relatively little legislative action in this field. We understand the enormous difficulty of achieving a political consensus that might lead to significant legislation enforcing the constitutional mandate better than we can, legislation that might completely remove this Court from those controversies. But enforcement of constitutional rights cannot await a supporting political consensus. So while we have always preferred legislative to judicial action in this field, we shall continue—until the Legislature acts—to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine. That is our duty. We may not build houses, but we do enforce the Constitution.[42]

As previously noted, both Governor Cahill and Governor Byrne sought a legislative solution to the problems caused by exclusionary zoning. In his customary forthright fashion, Governor Cahill told the Legislature:

> Many municipalities did accept the zoning powers and acted in a resolute and responsible manner. Regrettably, many more accepted the responsibility, but in a purely parochial way.
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> Particularly in the last decade we have seen many of our suburbs expand with little or no regard for the needs or financial capacities of our citizens nor for the policies of neighboring municipalities. Other suburbs and some rural areas have inhibited expansion through the zoning and planning tools of large lot requirements and high minimum floor area standards. Whatever the device, the effect has been a systematic exclusion of many people, including a large segment of our middle income sector. Of equal

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[41] Senator Foran was quoted after a meeting of the Joint Appropriation Committee on the Public Advocate's budget as saying: "I'd like to cripple that outfit." Newark Star Ledger, Apr. 3, 1980, at 21, col. 1.

[42] *Mt. Laurel II*, 92 N.J. at 212, 456 A.2d at 417.

> seriousness is the devastating effect these policies have had upon our cities.[43]

The call for reform was repeated in a second special message[44] and in several of the Governor's annual messages. Not only did the Governor's exhortations fail to stir any legislative activity; it is thought by some that his strong support for reform cost him the gubernatorial primary, which he lost to Representative Charles Sandman.

Governor Byrne went on record in support of the *Mount Laurel* principle early in his administration. His first annual message contained the following passage:

> Abuses of local zoning cannot be ignored by this Legislature. Restrictive zoning involves consequences felt throughout the State: it contributes to the depressed building industry and the soaring unemployment among tradesmen; the low density development of such zoning causes more public funds to be expended to serve sprawling suburbs. As a result of zoning patterns, workers cannot find housing near available jobs. The cost of housing is increased; and families with modest incomes, including young couples and retired citizens, are caught in the squeeze. Finally, and most troubling, misuse of local zoning brings judicial solutions which burden the process of local government.[45]

He was to find, however, that the Legislature had no trouble ignoring "abuses of local zoning." He then turned to the device of the executive order.

Executive Order No. 35[46] ordered the Director of the Division of State and Regional Planning to prepare a housing needs study which would take into account the existence of substandard and overcrowded housing, and the number of households paying a disproportionate share of income for housing. The Director was to formulate a state housing goal which was to be allocated first among the counties, and eventually, to each municipality. The initial task of housing goal allocation was to be carried out as expeditiously as possible, with a deadline of ten months from the date of the Order. Thereafter, reallocation was required within two years of each decennial census. State officials were admonished to consider the extent to which a municipality was meeting its fair share housing responsibility in administering state and federal programs which provided grants to localities for

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[43] *Blueprint*, *supra* note 33, at 11.

[44] *New Horizons*, *supra* note 33, at 5.

[45] First Annual Message, *supra* note 33, at 11.

[46] Exec. Order No. 35, 1976 N.J. Laws 665.

open space preservation, sewerage improvements, community development, road and bridge repair, street lighting, and public transportation.

The housing allocation was completed in December, 1976 but the Governor then issued Executive Order No. 46,[47] ordering the Director to "review and if necessary modify . . . the preliminary housing allocation goals" in order to take into account current urban revitalization programs. The final allocation goals were to be reached not later than December 1977. In the interim, the gubernatorial primary and general election occurred.

Executive Order No. 46 was the last official word from Governor Byrne on the subject of exclusionary zoning. Thereafter, his emphasis was on rehabilitating and revitalizing the cities. He did, however, continue to support the Department of the Public Advocate which, by reason of the Morris County litigation, had become the object of outrage for those who opposed *Mount Laurel I*.

All but one of the candidates in the 1981 Republican gubernatorial primary expressed opposition to the open housing activities of the Department of the Public Advocate.[48] Criticism ranged from calls for the ouster of the author, then incumbent, to total abolition of the Department. Thomas Kean, who was to win the primary and, by a narrow margin, the general election, favored retention of the Department but with new leadership, which he provided with the appointment of Joseph Rodriguez in February, 1982. Rodriguez, however, has continued the Morris County suit, although scaled down as required by *Mount Laurel II*. Moreover, he has called the *Mount Laurel II* decision "one of the strongest constitutional court decisions since the desegregation decision of the U.S. Supreme Court."[49]

On the other hand, Thomas Kean's election marked the first time in more than ten years that the Governor could not be counted on the side of those who favored reform of local zoning policies. One of his first official acts was to rescind Executive Orders 35 and 46, which had been promulgated by his predecessor.[50] His response to the supreme court's call for an updated State Development Guide Plan by

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[47] Exec. Order No. 46, 1976 N.J. Laws 685.

[48] Mayor Patrick Kramer of Paterson took no public position on the Morris County litigation. Perhaps, as the mayor of an urban municipality, he knew too well the problems caused by isolating the poor.

[49] Asbury Park Press, Mar. 18, 1984, at C1, col. 6.

[50] By Executive Order dated May 4, 1982, Executive Orders 35 and 46 were rescinded. The stated reason for rescission was that they "have proven inadequate and ineffective in meeting their stated goal." Exec. Order No. 6, slip form (May 4, 1982).

1985 was to defund the agency charged with the responsibility of preparing the plan. Most recently, the Governor was quoted as saying that the implementation of *Mount Laurel II* was "a 'Communist' concept."[51] It remains to be seen whether the Governor will provide leadership in this area.

III. Social Setting

Ironically, the litigation culminating in the *Mount Laurel I* and *II* decisions was not started by persons trying to move into an exclusive suburb. In fact, Mary Robinson and her daughter, Ethel Lawrence, two of the original and most persistent plaintiffs, could trace their ties to Mount Laurel to before the Civil War, when their ancestors had settled there. Their presence there predated that of the vast majority of persons who were then responsible for the municipality's exclusionary practices. Their sole interest was in finding decent housing in which to live so that they could remain in the town. The scope of the action soon broadened, however, and it became a vehicle for challenging the barriers which kept people out.

The Report of the National Advisory Commission on Civil Disorders cites exclusionary zoning as one of the major reasons why this country is divided into "two societies, one black, one white—separate and unequal."[52] Closer to home, the Governor's Select Commission on Civil Disorder, following the Newark Riots of 1967, found: "Suburban residents must understand that the future of their communities is inextricably linked to the fate of the city, instead of harboring the illusion that they can maintain invisible walls or continue to run away."[53] And further:

> This Commission believes that the policy of integrated schools must be pursued and carried out as rapidly and imaginatively as possible; for the ills of the ghetto will not be permanently cured until the people of the ghetto have the same opportunity as other citizens to choose where they want to live, and the economic means to exercise this option.[54]

The moral imperatives sounded by these Commissions and others have faded as the incidence of mass urban disorders has diminished. Yet the conditions which they describe are even more acute today

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[51] N.Y. Times, Feb. 29, 1984, at A1, col. 1.

[52] Report of The National Advisory Commission on Civil Disorders 1 (1968).

[53] Governor's Select Commission on Civil Disorder, State of New Jersey Report for Action xi (1968).

[54] *Id.* at 75.

than they were nearly twenty years ago. Consider just the issue of school integration. In *Brown v. Board of Education*,[55] we were told that the "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal . . . , deprive[s] the children of the minority group of equal educational opportunities,"[56] and the "[s]eparate educational facilities are inherently unequal."[57]

The extent to which existing housing patterns have contributed to the separation of the races in New Jersey's public schools can be seen through a few comparisons. For instance, in 1983, the public schools in East Orange had the following racial breakdown: White .2%; Black 98.1%; Hispanic 1.5%. In Parsippany-Troy Hills, not more than ten miles away, the corresponding numbers were: White 89.2%; Black 1.6%; Hispanic 1.7%. The nonwhite population of the Camden schools is 93.4%. In Cherry Hill, an adjoining suburb, the number is 4.4%. Caldwell, in Essex County, has a school population which is 95.9% White, .5% Black, and .7% Hispanic. Yet if one simply travels down Bloomfield Avenue to Newark, the composition of the student population becomes: White 8.8%; Black 68.2%; Hispanic 22.7%.[58] The housing patterns within the older cities create further racial separation. For instance, more than one half of the White students in the Newark high school system attend a single school. Similarly, only 238 out of 10,448 black students attend a high school which is not at least 95% nonwhite.[59] Judge Irving Kaufman, in the famous New Rochelle case of *Taylor v. Board of Education*,[60] assessed the effect of racial imbalance in schools and held:

> [T]he fact that the Lincoln School contains approximately 6% whites, surely cannot divest Lincoln of its segregated character. In a community such as New Rochelle, the presence of some 29 white children certainly does not afford the 454 Negro children in the school the educational and social contacts and interaction envisioned by Brown.[61]

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[55] 347 U.S. 483 (1954).

[56] *Id.* at 493.

[57] *Id.* at 495.

[58] NEW JERSEY STATE DEPARTMENT OF EDUCATION, NEW JERSEY PUBLIC SCHOOL RACIAL/ETHNIC DATA 1982-83 (1983).

[59] 1983-1984 New Jersey Department of Education Statistics (unpublished).

[60] 191 F. Supp. 181 (S.D.N.Y.) (footnote omitted), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961).

[61] *Id.* at 193.

It would appear that the spirit of *Brown* is regularly and persistently ignored in New Jersey as well, and that exclusionary housing practices are one of the principal reasons why that is so. Unequal educational opportunity, however, is not the only result of existing housing separation. The deleterious effects of such separation are as broad as they are widely felt, both in the cities and in suburbia. As the court noted in *Mount Laurel II:*

> Cities, while most directly affected, are not the sole victims of exclusionary zoning. The damage done by urban blight and decay is in no way confined to those who must remain in our cities. It affects all of us. Violent crime and drug abuse spawned in urban slums do not remain within city limits, they spread out to the suburbs and infect those living there. Efforts to combat these diseases require expenditures of public dollars that drain all taxpayers, urban and suburban alike. The continuing disintegration of our cities encourages business and industry to leave New Jersey altogether, resulting in a drain of jobs and dollars from our economy. In sum, the decline of our cities and the increasing economic segregation of our population are not just isolated problems for those left behind in the cities, but a disease threatening us all. Zoning ordinances that either encourage this process or ratify its results are not promoting our general welfare, they are destroying it.[62]

IV. MOUNT LAUREL II

The decisions in *Madison*, *Pascack*, and *Fobe* may have led some to believe that the court rued its action in *Mount Laurel I*. As previously noted, a number of lower court opinions unrepentantly whittled away at the holding, in the apparent belief that *Mount Laurel I* was to be narrowly construed. After reviewing these decisions, some observers noted that it appeared that the only municipality in the state with the *Mount Laurel I* obligation was Mount Laurel itself.[63] But any thought or hope that the court was equivocating was forever dashed by the opening lines of *Mount Laurel II:*

> This is the return, eight years later, of *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I)*. We set forth in that case, for the first time, the doctrine requiring that municipalities' land use regulations provide a realistic opportunity for low and moderate income housing. The doctrine has become famous. The *Mount Laurel* case itself threatens to

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[62] *Mt. Laurel II*, 92 N.J. at 211 n.5, 456 A.2d at 416 n.5.

[63] *See* Payne, *From the Courts*, 12 REAL EST. L.J. 85, 86 (1983).

> become infamous. After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case.[64]

The court went on to reemphasize, in no-nonsense terms, its requirement that the zoning power be exercised in pursuit of the general welfare as mandated by concepts of fundamental fairness. It stated:

> The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted. It is a vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.[65]

A municipality's obligations under *Mount Laurel II* are now defined. No longer are "bona fide" efforts to construct the requisite number of low and moderate income units sufficient. Rather, municipalities will be held to an objective standard: Has the municipality provided, in fact, for a realistic opportunity for the building of the units necessary to meet its fair share? The municipality is now required to encourage the construction of housing through affirmative conduct such as set asides, density bonuses, zoning for mobile homes, tax incentives, and such other action as will render the zoning scheme inclusive.

In an effort to simplify the question as to which of New Jersey's 567 municipalities have a regional fair share obligation, the court shelved the "developing municipality" concept, at least temporarily, and embraced the State Development Guide Plan.[66] The Guide Plan,

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[64] *Mt. Laurel II*, 92 N.J. at 198-99, 456 A.2d at 409-10 (citation omitted).

[65] *Id.* at 209-10, 456 A.2d at 415 (footnote omitted).

[66] *Id.* at 225, 456 A.2d at 423-24. The State Development Guide Plan was promulgated pursuant to N.J. STAT. ANN. § 13:1B-15.52 (West 1979). The Legislature mandated the use of

adopted in 1980, divides the state into growth, limited growth, agricultural conservation, pinelands, and coastal zones. The supreme court's opinion channels the prospective low and moderate income housing into the "growth areas." While all municipalities must make provision for the housing needs of their resident poor (unless, as in the cities, there exists a disproportionate need), only those municipalities undergoing "growth" must become "inclusionary." Regrettably, places like Harding Township and Mendham Township are relieved from responsibility under this approach. But should growth occur in the future, as measured by some updated guide plan, the *Mount Laurel II* obligations will attach. In all probability, however, where a municipality is prepared and able to forego any kind of substantial development, it will forever remain a bastion of privilege.

Future *Mount Laurel II* litigation will be handled by one of three judges, who shall have been selected by the Chief Justice to hear all of the cases arising in a particular sector of the state.[67] It is apparent that these judges will soon have a handle on all of the cases arising in their area. Determinations of "region" and "fair share" will be consistent and presumptively binding on nonparty municipalities.[68] Clearly, the court has provided a streamlined method for disposing of these cases which will make it more inviting for interested developers to pursue challenges to exclusionary ordinances, particularly where the court recognizes the propriety, under most circumstances, of a builder's remedy.[69]

V. WILL *Mount Laurel II* RESULT IN AFFORDABLE HOUSING?

After the *Mount Laurel I* decision, critics were quick to point out that little affordable housing was built. It is fair to observe that, had many of the critics expended as much energy to meet their constitutional obligations as they did to avoid them, the outcome might have been much different. Nevertheless, it is true that little actual housing

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the Guide Plan in enacting the Municipal Land Use Law, N.J. STAT. ANN. §§ 40:55D-1 to -92 (West Cum. Supp. 1983-1984); *see id.* at § 40:55D-28d calling for the use of a plan promulgated pursuant to N.J. STAT. ANN. § 13:1B-15.52 (West 1979). The Municipal Land Use Act had among its purposes the following: "To encourage municipal action to guide the appropriate use or development of all lands in this State. . . ." *Id.* at § 40:55D-2a (West Cum. Supp. 1983-1984). It is doubtful, though, that this legislative action was a response to *Mount Laurel I*.

[67] Presently, Judges Stephen Skillman, Eugene D. Serpentelli, and Anthony L. Gibson are assigned to all *Mount Laurel* litigation initiated subsequent to January 20, 1982. 111 N.J.L.J. 637, 638 (June 16, 1983).

[68] *Mt. Laurel II*, 92 N.J. at 254, 456 A.2d at 439.

[69] *Id.* at 279, 456 A.2d at 452.

was constructed during the eight years following *Mount Laurel I*, although this was due largely to the depressed state of the housing industry. In any event, the relevant inquiry may be stated simply: Will the reaffirmation of *Mount Laurel I* principles and the attendant procedural steps adopted by the *Mount Laurel II* court produce the needed housing?

First, it must be noted that the court rejects the argument that the efficiency of its decision is to be measured by the number of homes which are built. As the opinion stated:

> The provision of decent housing for the poor is not a function of this Court. Our only role is to see to it that zoning does not prevent it, but rather provides a realistic opportunity for its construction as required by New Jersey's Constitution. The actual construction of that housing will continue to depend, in a much larger degree, on the economy, on private enterprise, and on the actions of the other branches of government at the national, state and local level. We intend here only to make sure that if the poor remain locked into urban slums, it will not be because we failed to enforce the Constitution.[70]

The tone of the opinion, however, strongly suggests that the court is also deeply concerned about the pragmatic effect of its decision, and will not brook half-hearted recognition of its constitutional mandates.

In assessing whether the Public Advocate's decision to take the lead in the assault on exclusionary zoning was wise, practical consequences must be evaluated. True, the enforcement of the constitutional rights of the citizens of the state is a clearly recognized objective of the statute which created the Department.[71] It is possible to say that pursuit of that objective was sufficient justification for the action taken. The decision to intervene, however, made the Department the center of partisan political controversy in a way none of its other actions ever had, thereby jeopardizing its effectiveness, and, perhaps, its continued existence. The gubernatorial election of 1982 may have been decided in Governor Kean's favor as a result of the heavy outpouring of Republican voters in Morris County who were stimulated, at least in part, by the Morris 27 litigation.[72] Under the circumstances,

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[70] *Id.* at 352, 456 A.2d at 490.

[71] *See* N.J. STAT. ANN. § 52:27E-30 (West Cum. Supp. 1983-1984).

[72] On November 3, 1977, Thomas Kean defeated James Florio by 1,797 votes in the closest gubernatorial election in the State's history. MANUAL OF THE LEGISLATURE OF NEW JERSEY 845 (1982). Morris County gave Kean his largest plurality, 45,572 votes. *Id.* at 886. In 1973, Brendan Byrne defeated his Republican opponent, Charles Sandman by 721,378 votes, with a Morris County plurality of 32,015 votes. MANUAL OF THE LEGISLATURE OF NEW JERSEY 821 (1974). In 1977, Brendan Byrne was reelected, but his opponent, Raymond Bateman, prevailed in Morris County by 11,255 votes. MANUAL OF THE NEW JERSEY LEGISLATURE 422 (1978).

one might insist upon a showing of some tangible positive effects flowing from the *Mount Laurel I* involvements before concluding that the Department's choice was a wise one.

It is not entirely true that *Mount Laurel I* failed to produce any response toward the development of needed housing. Several municipalities did modify their zoning ordinances to eliminate cost generating measures and to encourage low and moderate housing construction.[73] The Pinelands Commission and the Department of Environmental Protection, in the exercise of its coastal areas facility review authority, did incorporate *Mount Laurel I* requirements into their regulations.[74] *Mount Laurel II*, however, promises more—a substantial and immediate breakthrough.[75]

The decision to undertake the *Mount Laurel* cases was predicated, in large measure, on the belief that success would serve to reduce the racial separation which the Advisory Committee found so destructive of the American promise. The construction of housing which does not serve to foster racial/economic integration would hardly foster the stated goal. If new housing is not available for nonwhites, or if nonwhites refuse to take advantage of housing opportunities which become available, because of fear of the kind of reception they will receive or because they believe their political strength will be dissipated through dispersal, the probability that the action was taken in error is increased.

Noting that there are more low and moderate income white families than black living in urban areas in New Jersey, a commentator recently suggested that "it is highly conceivable that the *Mount Laurel II* doctrine could enjoy significant success without directly affecting a single black family."[76] It is difficult to quarrel with the observation that there will be greater suburban resistance to housing developments which provide opportunity for poor black families instead of poor white families or senior citizens. One would have to

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[73] NEW JERSEY STATE DEPARTMENT OF COMMUNITY AFFAIRS, HOUSING HANDBOOK 12-16 (1976) (listing and describing inclusionary zoning ordinances which have been adopted by New Jersey municipalities).

[74] *See* NEW JERSEY PINELANDS COMPREHENSIVE MANAGEMENT PLAN 96-1202, at 428 (1980); N.J. ADMIN. CODE tit. 7, §§ 7E-1.1 to -8.26 (1982); *see also In re* Egg Harbor Assocs. (Bayshore Centre), 94 N.J. 358, 464 A.2d 1115 (1983).

[75] Signs that the breakthrough is occurring are already evident in the action taken by municipal officials in Branchburg, Bedminster, and other suburban municipalities.

[76] Holmes, Mount Laurel II: *A Black Lawyer's Perspective*, in BLACKS IN NEW JERSEY—1983: PERSPECTIVES ON *MOUNT LAUREL II*, FOURTH ANNUAL REPORT OF THE NEW JERSEY PUBLIC POLICY RESEARCH INSTITUTE 20, 23 (1983).

ignore two hundred years of this nation's history to conclude otherwise. But as much as a municipality might wish to include whites and exclude minorities, it is hard to see how it can succeed if fair housing and civil rights organizations carefully monitor the process, and pursue existing legal remedies as needed. Their willingness to do so will depend, of course, on the degree of interest in moving into suburbia exhibited by minorities.

Past surveys have indicated a marked reluctance on the part of blacks to move into white neighborhoods.[77] One might have hoped the passage of time would alter this view, but clearly it has not, at least as far as poor blacks are concerned. Thus, questions arise as to whether minorities will view *Mount Laurel II* as a significant legal development. Only time will tell. But perhaps it is possible to engage in some speculation which is more than wishful thinking. The NAACP is still the leading civil rights organization in the country, and its positions are still accorded substantial weight in the black community. The New Jersey State President of that organization has described *Mount Laurel II* as "just as important as, and more far reaching than anything since *Brown*."[78] In fact, the NAACP jointed both the Mount Laurel and the Morris County litigation as plaintiff. To the extent that the long standing commitment of the NAACP to the concept of integration remains unchanged, and to the extent that that commitment is accepted, one can expect that there will be steady, if not great, pressure from blacks seeking desperately needed housing in previously exclusive areas.

On the issue of the impact of dispersal on black political power, Dr. Bruce Ransom offered a comprehensive and insightful opinion. Dr. Ransom examined the present distribution of blacks throughout the state and concluded: "At first glance, the dispersal of blacks suggests an erosion of the black political base in central cities. On the contrary, a close examination of black settlement patterns and the distribution of blacks within counties throughout the state indicate an expanding black political base."[79]

Further dispersal in response to *Mount Laurel II* principles is not seen as causing a diminution of the black political base. Rather, it is

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[77] *See generally* Foley, *Institutional and Contextual Factors Affecting the Housing Choices of Minority Residents*, in SEGREGATION IN RESIDENTIAL AREAS 85 (1973).

[78] Telephone interview with Irene Smith, State President of NAACP (Apr. 24, 1984).

[79] Ransom, *Black Population Trends and Their Political Significance*, in BLACKS IN NEW JERSEY—1983: PERSPECTIVES ON *MOUNT LAUREL II*, FOURTH ANNUAL REPORT OF THE NEW JERSEY PUBLIC POLICY RESEARCH INSTITUTE 30 (1983).

thought that "[i]ncreased black participation in an expanding number of localities, particularly under conditions of black population growth across New Jersey, establishes the territorial base for maximum black influence in local and state politics."[80]

VI. Was the Game Worth the Candle?

It might be argued, and indeed it was, at least within the Department of the Public Advocate, that it was foolhardy to plunge this new and vulnerable agency into the political thicket associated with the issues of exclusionary zoning and home rule. Some felt that gains which had been won, as well as gains which might in the future be won—on behalf of the mentally ill and developmentally disabled; for consumers in utility and insurance rate matters; to reform health delivery systems; to end sex and race discrimination in employment; to keep government responsive to the needs of the people, and in numerous other worthwhile areas which the Public Advocate could pursue—were jeopardized by the Department's involvement in *Mount Laurel I*.

As noted previously, the action, which was taken in a climate of intense local hostility, did arouse a storm of controversy. The Republican minority in the Legislature was infuriated, and the Democratic majority merely indifferent. The Department's actions may well have affected the outcome of a gubernatorial election. All in all, there are substantial reasons supporting the view that the development of the *Mount Laurel I* principles and the enforcement of those principles should have been left to others.

On the other hand, there are substantial and, on reflection, overriding reasons why an agency created to represent the public interest—"an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens"[81]—had to become involved. At the time that the Morris County litigation was commenced, the court seemed to be vacillating in its commitment to the *Mount Laurel I* doctrine. Meanwhile, the need for affordable housing was clear. The disastrous effects of exclusionary zoning were manifest. It was precisely because no other entity could or would act that it became incumbent upon the Public Advo-

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[80] *Id.* at 43.

[81] N.J. Stat. Ann. § 52:27E-30 (West Cum. Supp. 1983-1984).

cate to act. The subsequent decision of the New Jersey Supreme Court in *Mount Laurel II*, and the strong belief that the decision will result in affordable housing in the suburbs, which in turn may result in the reduction of racial and economic segregation in this state, satisfies the author that the job was worth doing.