THE "FAIR" HOUSING ACT?

*by Senator Wynona M. Lipman**

In *Hills Development Co. v. Township of Bernards*,[1] the New Jersey Supreme Court sounded a judicious retreat from the field of the low income housing controversy. This was, perhaps, to be expected. The court had stated clearly and repeatedly its preference for legislative over judicial action in this area. What was somewhat unexpected was the court's readiness to defer so completely, if temporarily, to the executive and legislative approach to the issue.

Nevertheless, in upholding the Fair Housing Act,[2] at this time *in toto*, and transferring all pending litigation to the Council on Affordable Housing ("Council"), the court has announced that the immediate burden of implementing the constitutional obligation has shifted to the Council. The court, indeed, views the Act as a historic and hopeful development, which may produce results far better than the judicial remedies exercised under *Mt. Laurel II*, both in terms of housing construction and social consensus. It remains to be seen whether or not the Act and the Council are sufficient to sustain that hope.

I was the original sponsor of Senate Bill 2046, the measure which ultimately became the Fair Housing Act. In devising the bill, I worked with a broad-based committee that included planners, attorneys, builders, the League of Municipalities, the Public Advocate and the Governor's Office. We had such great hopes for this bill. We believed it provided a straightforward planning mechanism which municipalities could use as an alternative to judicial determinations of housing obligations. It was designed to receive deference from the courts as a legislative determination in the Legislature's field of jurisdiction, and to provide clear di-

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[1] The Hills Development Co. v. Township of Bernards, No. A-122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, slip op. (Feb. 20, 1986).

[2] 1985 N.J. Sess. Law Serv. 222 (West) N.J. STAT. ANN. §§ 52:27D-301 to -334 (West Supp. 1986).

rection to municipalities for complying with their constitutional obligation.

Following its introduction, the bill underwent intensive negotiations and multiple amendments. When the Governor returned it to the Senate with his conditional veto[3] and suggested amendments, I could no longer support the bill.

The reasons for my withdrawal of support, a gesture which, given the political pressures on the Legislature to "do something about *Mount Laurel*," was more symbolic than persuasive, relate to the multitude of vague concepts and criteria inserted by the Governor's amendments. The insertions bore little relationship to the basic legislative scheme of the bill. There were two principal aspects of the conditional veto to which I objected.

First, the Governor's amendments sought a confrontation with the court in its field of jurisdiction, and deflected the thrust of the legislation away from the constitutional issues involved in the *Mount Laurel* litigation. The conditional veto introduced procedural complications to the resolution of legal issues and greater confusion in the definition of key legal terms. I feared that the law, in confusing, complicating and delaying the resolution of fair share questions, would assure a continuing series of court challenges and decisions as interested parties attempted to fathom the true meaning of the legislation. The court has skillfully sidestepped this first contention in an exercise of comity for the actions of the other two branches of government, and in a reservation of judgment respecting the good faith efforts of the Council on Affordable Housing to exercise its powers to establish procedures and definitions capable of meeting the constitutional obligation.

My second objection to the conditional veto was that it confused not only legal questions involved in determining housing obligations, but the planning and zoning process as well. A great concern of municipal officials and the courts, throughout the *Mount Laurel* controversy, was the need for a rational planning mechanism under which municipalities might meet their housing obligations in accordance with sound land use policies. My original bill attempted to do this by providing for a planning process

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[3] *See* 1985 N.J. Sess. Law Serv. 222 at p. 89 (West) (Governor's Reconsideration and Recommendation Statement, Senate Nos. 2046 and 2334, P.L.1985, c.222).

which was comprehensive, but locally initiated. It was characterized by some planners as basically a "growth control bill."

The conditional veto inserted elements which invited both bad planning and bad faith planning. For example, even after a municipality's fair share of the regional housing need is determined, the municipality can make adjustments of its fair share based upon historic preservation, environmental, agriculture and open space, recreational, infrastructure and other factors.[4] The criteria for invoking these are so vague as to be completely open-ended. One provision permits a downward adjustment if a municipality lacks adequate public facilities and it would be prohibitively expensive to provide them. This cuts across the grain of legal precedents that the existence or non-existence of schools and other facilities cannot be used to deny a local development application. It invites the Council to enter into the complexities of local property tax assessment, local expenditure limitations, and other matters where it has little expertise. Far more questionable is the adjustment permitted if the "established pattern of development in a community would be drastically altered."[5] With no criteria to guide the Council in this most subjective judgment, the granting of any such adjustment will contribute to the perpetuation of exclusionary zoning, wherever the "established pattern of development" of a municipality is based on exclusionary practices.

Furthermore, the law permits the Council to reduce or limit a municipality's fair share, even beyond the various downward adjustments, on the basis of any other criteria the Council develops. The law does not require that the criteria be general in application or be known to all. Any Council action in this regard is certain to be challenged in court. Whatever may have been the Governor's intent in inserting these provisions, the effect is to place municipalities in the contradictary and untenable position of using a purported fair share compliance mechanism to thwart the constitution.

The court in upholding the Fair Housing Act rejected the assumption that the legislation and the Council have a mission, nowhere expressed in the Act, of sabotaging the *Mount Laurel*

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[4] N.J. STAT. ANN. § 52:27D-307(c) (West Supp. 1986).

[5] N.J. STAT. ANN. § 52:27D-307(c)(2)(b) (West Supp. 1986).

doctrine. The court assumed, on the contrary, that the Council will pursue the vindication of the *Mount Laurel* obligation with determination and skill. In deferring to the planning elements of the Act, the court relied strongly on the legislative intent for a sound, comprehensive statewide planning strategy as evidenced by the integration of the Fair Housing Act with the efforts of the State Planning Commission.[6]

Where do I stand with respect to my objections to the Fair Housing Act, as enacted, in light of the court's ruling? As a member of the Legislature, I am always ready to welcome a demonstration of comity by the judicial branch of government with legislative enactments. As a person seriously concerned with the plight of low income households in this State, I am more circumspect. I believe that the court was able to exercise comity only because enough of the basic structure of my original bill was still intact to permit the presumption of good faith which the court extended.

My greatest fear, which may well have been shared by the court, is that the future of the *Mount Laurel* doctrine in this state will be played out not in an atmosphere of political rest and good faith planning, but in an atmosphere of paranoia, confrontation and demagoguery—the dominating elements in the air during the Act's enactment process. Whether or not this continues to be the case depends heavily upon the Council on Affordable Housing. The Council confronts, as the court states, "a monumental social task," amidst a constitutional and political minefield. The court is willing to restrain itself in ruling on the constitutional issues, but a superficial approach by the Council, achieving nothing but delay, will invite court intervention.

As with any public entity charged with a comprehensive planning responsibility, the Council will experience great pressures from elected officials whenever its decisions adversely affect the parochial interests of local constituencies. There may be attempts to change the legislation to reverse or modify Council decisions. If the court must reintervene, there will be heightened pressure for a constitutional amendment. These pressures will lead to greater social division and political strife in the state.

The Council must find a way to navigate within the precari-

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[6] 1985 N.J. Sess. Law Serv. 398 (West).

ous waters in which it finds itself. It must endeavor to withstand attempts to circumvent the spirit of the *Mount Laurel* doctrine, and must refrain from exercising its powers in a manner which would violate the constitution. The Council must do all of this with wisdom, in spite of an almost open invitation in portions of the Act to do otherwise. This is indeed a monumental task.