

THE ART OF THE POSSIBLE

by Senator Gerald R. Stockman*

On July 2, 1985, Governor Kean signed into law the "Fair Housing Act."¹ The statute incorporates the *Mt. Laurel II* mandate that "every municipality in a growth area has a constitutional obligation to provide through its land use regulations, a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families."² The Act is an attempt to remove the courts from local zoning disputes by establishing an administrative framework for determining the extent of a municipality's *Mount Laurel* obligation, and the manner in which it will be satisfied. Responsibility for administration of the statute is conferred upon a newly established state administrative agency called, "The Council on Affordable Housing."³

Legislative activity in the area of land use and planning, as well as with the specific question of affordable housing greatly increased in early 1983. Within days of the *Mt. Laurel II* decision, the administration had dismantled the Division of State and Regional Planning in the Department of Community Affairs. That agency had produced the State Development Guide Plan utilized by the court in fashioning its *Mt. Laurel II* decision. In the decision, the court urged that the Guide Plan be updated and revised. In May, 1983, the Senate Legislative Oversight Committee began hearings to inquire into "the continued suitability of the State Development Guide Plan, or any aspect thereof, in light of current and foreseeable state and local planning needs and other

* Senator Stockman (D-Mercer) is one of the co-sponsors of the Fair Housing Act. He graduated from Holy Cross College (1956), and received his law degree from Villanova Law School (1959). Senator Stockman was elected to the Assembly in a special election in 1978 and was re-elected in 1979. He was elected to his first Senate term in 1981, and was re-elected in 1983.

¹ 1985 N.J. Sess. Law Serv. 222 (West) (to be codified at N.J. STAT. ANN. §§ 52:27D-310 to -334).

² *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 179 (1975); *Southern Burlington County NAACP v. Mount Laurel Township*, 92 N.J. 158, 199 (1983).

³ N.J. STAT. ANN. 52:27D-305 (West Supp. 1986).

relevant considerations, including the constitutional obligations defined by the supreme court in its recent decision in [*Mt. Laurel II*]."⁴

The committee hearings increased pressure on the administration to respond to both the *Mt. Laurel II* mandate and to the broader need for some state level planning mechanism to deal with land use and development in our state. The administration's response to the former was quite hostile; to the latter more sympathetic. Working with committee staff as well as an *ad hoc* group of persons representing a diverse cross-section of interests, including planners, environmentalists, representatives of the League of Municipalities, the Regional Planning Association, the League of Women Voters and an "unofficial" representative of the administration, on March 1, 1984, I introduced Senate Bill 1464, the State Planning Act.⁵ The State Planning Act (specifically referred to in the Fair Housing Act)⁶ will create a State Planning Commission as well as an Office of State Planning.⁷ The Act's goals are to prepare and adopt a statewide development and redevelopment plan; to prepare and adopt a long-term local and regional infrastructure needs assessment; to coordinate state and local inter-government planning; to provide technical assistance and to identify investment strategies for urban development and redevelopment; and to coordinate with other planning entities.

By linking the *Mt. Laurel II* housing doctrine to the State Development Guide Plan, the court forcefully brought to the public attention the absolute need for an ongoing coherent, deliberative and unified planning process within the state of New Jersey. Indeed, state and regional planning can no longer be ignored.

Efforts to fashion litigation in the area of affordable housing as called for in the *Mt. Laurel II* holding proved much more difficult, however. As indicated above, the administration showed extreme hostility to the *Mt. Laurel* decision. In addition, some legislators attempted to totally politicize this landmark civil rights

⁴ See New Jersey Senate Resolution, April 19, 1983.

⁵ P.L. 1986, c. 398 (1986).

⁶ N.J. STAT. ANN. 52:27D-304(j) (West Supp. 1986); N.J. STAT. ANN. 52:27D-307 (West Supp. 1986).

⁷ P.L. 1986, c. 398 (1986).

decision. In that atmosphere, compromise and a well-balanced bill became extremely difficult to achieve.

The original bill S-2046, sponsored by Senator Lipman and co-sponsored by Senator Lynch and myself, was the product of compromise. After further legislative compromise, a committee substitute for S-2046 and Senator Lynch's separate proposal (S-2334) passed both houses. This bill was conditionally vetoed by the Governor on April 22, 1985.

The ten-page conditional veto message severely threatened the integrity of the legislation. Both Senator Lipman and I felt compelled to attempt to defeat the final version of the bill in the Senate. We met with no success. We argued that the Governor's proposal, among other things, threatened to deprive persons who need housing from representation on the board; established fair share housing criteria that easily could be used to reward those affluent municipalities that have been most blatantly exclusionary; reduced the commitment of resources so that the proposed financial program after the first year was largely illusory and introduced provisions into the act which clearly raised serious constitutional questions.

Politics is the art of the possible and legislation is no less. The Legislature and the Governor have spoken. For that reason, the Act and the new Council itself must be supported. The courts have already shown some willingness to attempt to work with the legislation. Judge Skillman has ruled that on its face, the Act is constitutional.⁸ He endorsed the concept of regionalization and transfer development rights. He did observe that "the council will find itself walking through a constitutional mine field when it undertakes in conformity with the Act, to establish housing regions to determine regional needs for low income housing; to adopt 'criteria and guidelines' for determining municipal fair share allocations; and to review municipal petitions for substantive certification of housing elements."⁹ Nevertheless, the initial indications are that the Council and its chairmen are sincere and intent on doing the job. Whether they succeed in large measure depends on the support and cooperation of the Governor, the

⁸ *Morris County Fair Housing Council v. Boonton*, No. L-6001-78 P.W., L-42898-84 P.W., L-55343-85 P.W., L-29176-84 P.W., L-38694-84 P.W., L-86053-84 P.W., slip op. (Law Div. 1985).

⁹ *Id.* at 41.

administration and the Legislature.¹⁰

For me, *Mt. Laurel II* represents a landmark civil rights decision. It offers some small hope for breaking the obvious cycle of continuing the concentration of our poor, our weak, our minorities in older underdeveloping cities, of ending a long and dangerous trend in New Jersey toward two societies, separate but unequal. It is critical that the Act and the Council be given an opportunity to do their job. Meanwhile, the State Planning Commission can begin to deal with broader issues of land use and development including conservation, air and water quality, farm preservation, historic preservation and other major issues facing the state as it enters a new century.

Governor Kean must resist the extremists who may attempt to continue hostile actions against *Mt. Laurel II*. To tamper with our Constitution and restrict the courts in their exercise of responsibility to protect the poor and the weak in our society would be a serious mistake. If this were to happen (and perhaps only the Governor can avoid it), it would be a blemish on Thomas Kean's public record. A serious question would arise concerning his image as a moderate republican with an ability to attract many of those people who are most in need of low and moderate income housing. Obviously, this issue is a test for the leadership in the Legislature. It is especially a test for the democratic leadership in the Senate. To the extent that they waiver or compromise on this issue of a constitutional amendment, I believe they will further undermine the unity and integrity of the democratic party in this state.

¹⁰ Since writing this article the Supreme Court of New Jersey did in fact uphold the Act as constitutional and (under obvious political pressure) defer to the Fair Housing Council in litigation pending before the court.