

## Judges as Agents of Social Change: Can the Courts Break the Affordable Housing Deadlock in Metropolitan Areas?

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### *Abstract*

Nowhere is the chasm between the races more apparent than in the physical division of metropolitan areas between inner-city poverty and suburban affluence. Thus far, public policy efforts to introduce metropolitan perspectives into local land use regulations have been unsuccessful. The series of New Jersey *Mount Laurel* decisions lays out a possible path for introducing comprehensive regional planning by deploying the constitutional power of state courts. Relying on the allied professions of economics and city planning, the New Jersey Supreme Court eliminated the legal barriers to affordable housing in the suburbs.

Questions have been raised over courts' ability to reform local government powers, but many traditional objections to the effectiveness of judicial reform seem to have been overcome in the New Jersey litigations and legislations. State courts can play an indispensable role in solving regional land use problems if they secure the support of community leadership groups.

**Keywords:** Land use/zoning; Low-income housing; Minorities

### **Introduction**

The major domestic issue facing the United States today is the chasm that separates the races. Nowhere is separation more glaring than in the physical division of metropolitan areas between inner-city poverty and suburban affluence. New patterns of land settlement concentrate poverty in the central city, with the result that the local government with the greatest welfare needs is left with the fewest resources to cope with them (Kain 1992; Massey and Denton 1993; Wilson 1996).

The dominant American vision of low-density sprawl has also resulted in growth management problems of a regional nature that cross over local boundaries. Examples include air pollution and loss of open space (Cisneros 1995). For decades, policy makers have sought the best way to dispel the dreaded dispersion

and stratification of populations in metropolitan areas (Downs 1994). Pointing to threats to economic productivity and political unity, policy makers call for some sort of revision of local government power (Advisory Commission on Regulatory Barriers to Affordable Housing 1991; Rusk 1993), for the dominant force in planning, zoning, and subdivision control in this country that has brought about metropolitan fragmentation is centered in local legislatures.

One possible avenue to reform parochialism in land use regulations is through the local governments themselves. But this road seems a dead end. Local councils represent local constituencies and populations, which are the base of their power, and it requires no rereading of James Madison's *Federalist No. 10* to recognize how impossible the system makes it for minorities to have a voice in determining local growth policies (Guinier 1991). The majority has its way in erecting barriers based on income and race to restrict entry into the municipality.

Nor can relief be sought from the executive branches of government—the mayor and the members of the planning commission. They share the beliefs and the desires of their electorate, whether those beliefs are phrased in terms of local community values or a small-town atmosphere, or whether they are directed by a discriminatory motive. At any rate, action to address a welfare outside the local boundaries is seen, realistically, as political suicide.

Another possible source of leadership for creating a metropolitan structure, the state legislature, carries attitudes toward land use similar to those of the localities. The chances that the so frequently enunciated reform will come about through the creation of metropolitan agencies seem nonexistent. Who is going to bell the cat?

An answer, temporary and transient as it may be, is one not often cited in the literature. Help may be coming from the third branch of government, the state courts. Recognizing the interdependence of localities in land use decisions, and the fact that current practices of suburbs are at odds with state and national interests (most sharply in the exclusion of the poor and minorities), courts have gradually moved to reform the institutional arrangements. Following the deepest beliefs of Americans as embodied in the Constitution—those of equal opportunity and of procedural due process and fairness—the courts are probing, albeit slowly and cautiously, into local land use controls to ascertain how they fit into broader societal goals. The tradition of

totally delegating state power over land development to local units of government is being reexamined and, ever more frequently, challenged (*Surrick v. Zoning Hearing Board of Upper Providence Township* [1977], 476 Pa. 182, 382 A.2d 105).

Of all the varied judicial actions taken thus far, that of the New Jersey Supreme Court in the *Mount Laurel* cases is the most noteworthy (*Southern Burlington County NAACP v. Township of Mount Laurel* [1975], 67 N.J. 151, 172, 336 A.2d 713, 724, cert. denied [1975], 423 U.S. 808, 96 S.Ct. 18 [*Mount Laurel I*]; *Southern Burlington County NAACP v. Township of Mount Laurel* [1983], 92 N.J. 158, 302, 456 A.2d 390, 464 [*Mount Laurel II*]). The cases enunciate a revolutionary doctrine in the world of land use planning: Local zoning ordinances must provide a realistic opportunity for the building of low- and moderate-income housing. By finding and enunciating a constitutional right to live in the suburbs for all people—rich or poor, black or white—the New Jersey Supreme Court undertook the boldest and most innovative judicial intervention ever to countermand exclusionary zoning. Through its forceful action, centered on regional planning and coordination, the court went to extraordinary lengths to change the physical and legal landscapes of the United States. But how successfully?

After the 25-year experience of judicial struggle with localities and the state legislature, it is important to distill the experiences of that fascinating point-counterpoint history. What are the implications for other legislatures and courts in how they may structure programs for affordable housing in the suburbs? What lessons from the New Jersey history can be applied in dealing with metropolitan fragmentation as awareness grows that local autonomy leads to a system of land use controls that excludes inner-city residents from access to suburban land and housing? Above all, what lessons can the supreme courts of other states draw from the New Jersey experience? What are the socially useful lessons for the future from decisions that turned into a laboratory experiment in judicial power to move local institutions?

## **Effectiveness of the judiciary**

### *Competency of the courts*

One reason for judicial isolation put forth by many political scientists and by students of the judicial process is that complicated social problems, such as governance of metropolitan areas,

are beyond the competency of the courts (Glazer 1978; Horowitz 1977). Boiled down, the argument is that lawyers, even bedecked in the robes of the judiciary, are simply not competent to deal with the complicated and divisive issues that are so plaguing the social consciousness. The *Mount Laurel* experience, however, rebuts this argument; once involved, the New Jersey courts were able to handle complexity fairly well.

*Specialized judges.* Of course, new judicial machinery has to be installed for the new judicial role. A major contribution of *Mount Laurel* is the recognition that expertise derives from experience. Instead of land use cases being assigned in haphazard fashion to various and sundry trial judges, three judges were chosen to be the specialists in these cases (over and above their usual assignments). New Jersey was divided into three regions, and one judge was designated the specialist in each. By dint of practice, concentrating on claims of exclusionary intent or practices, the judges developed expertise, as well as consistency and continuity in the decisions.

*Use of experts.* Extensive use of special masters is a major innovation of the *Mount Laurel II* opinion of Chief Justice Wilentz. One of the novel powers that the New Jersey Supreme Court conferred on the three trial judges, with the goal of animating case management, was broad discretion in the appointment of experts. By and large, where the issue is to save the judge's time or place a protective shield between the judge and the audience, the master appointed is usually a generalist lawyer—or a “clone” of the judge, as it were. In *Mount Laurel*, however, the trial judges used the expertise of professional planners in designating the master for an exclusionary zoning case. This move enabled them to tap the expertise of city planning professionals as well as put the stamp of legitimacy on their work.

This seemingly innocuous step nevertheless runs counter to judicial tradition. Indeed, Rule 53 of the Federal Rules (and its equivalents in state rules) requires that masters be appointed sparingly, only in unique and rare cases (New Jersey Civil Practice Rule 4:41-1). The *Mount Laurel* experience suggests the contrary: that in complex institutional litigation, a court should not proceed except with the help of professional experts. In *Mount Laurel* the special masters assisted in identifying a municipality's fair-share obligation, in determining the adequacy of revised local ordinances to provide a fair share of affordable housing within local borders, in supervising implementation, and in general wherever the trial judge thought they would be useful. Designed as a procedural technique to speed matters along, the

use of special masters significantly affected substantive outcomes, as they altered the nature of judicial proceedings and, as they pioneered and explored, lent the weight of professional expertise and legitimation to legal decisions.

Especially were the masters indispensable in answering the crucial question of whether the special remedy for builders should issue at all. Professional astuteness went into determining whether the developer's site was suitable from the planning and environmental perspectives. Undoubtedly, the masters' technical knowledge enabled the courts to discharge other continuing functions, such as supervising and monitoring the remedy over time.

*Reliance on other branches of government.* The *Mount Laurel* courts brought into their decisions the expertise of the state planning agencies. As a sequel to the various nods in earlier New Jersey cases to the comprehensive planning wisdom of the other branches of government, *Mount Laurel II* incorporated New Jersey's State Development Guide, prepared by the State Department of Community Affairs, into its calculations (*AMG Realty Co. v. Township of Warren* [1984], 207 N.J. Super. 888, 504 A.2d 692). So the burden of refining the economic projections and the low-income housing needs fell on the executive branch. Furthermore, its judgment was also a rod the court could lean on.

*New administrative machinery.* Moving into this new world of judicial action to ensure a metropolitan perspective requires an overhaul of traditional judicial mechanisms. Once the court intervenes—as it has no choice but to do under our constitutional system when its jurisdiction is invoked by complaining citizens—it has to be prepared for effective action.

If the intervention is to prove successful, the need is to reorder the ordinary court proceedings. The traditional delays of judicial process—the inordinate time spent on motions, the lobbying of discoveries, and the posing of interrogatories—need to be compressed. Delays by interim appeals should be limited. This reordering was the great contribution of *Mount Laurel II*. Chief Justice Wilentz outlined changes in the judicial internal proceedings to make the actions of the courts in debates about metropolitanism speedy and effective. Without these changes, the complexity of institutional litigation would provide a field day for ingenious lawyers to poke and find holes. “One trial and one appeal” may be a motto well worth repeating.

### *The learning process*

Overall, given the extraordinary sensitivity of the issue, the danger was that the *Mount Laurel II* conclusions would prove too complex to become the final word in land use reform. Apart from the intricacies of definitions, the uncertainties of projections of population and industry, and the difficulties of setting the scope of remedies, intervention confronted trial courts with perilous involvement in sensitive local decision making. For it is in the context of individual cases and particular controversies that the general principles of the *Mount Laurel* doctrine come to life. And here, I believe, the conclusion must be that the judges discharged their responsibilities responsibly and effectively.

Permutations of exclusionary devices were ascertained and the range of effective compliance mechanisms explored. The agreements hammered out in *AMG* by Judge Serpentelli over the methods for determining the regional fair share show the ability of trial proceedings to grasp intricacies and subtleties. In turn, definitions of region, of present and future housing need, and of regional fair share are contributions to understanding the metropolitan area. The case-by-case definition and redefinition of what constitutes a “realistic opportunity” for low-cost housing are illuminating. Indeed, several of the judicial opinions are models of balancing environmental needs against economic development that can be used by other state legislatures and courts.

Judges and special masters learned to work together and to tap and coordinate the expertise that different professions bring to a problem. Lawyers also participated in the learning process. Courts are adept at learning from more esoteric disciplines and incorporating the insights of other professions and experts into their judgments. So as the judges presided over the cases brought before them, read the masters’ reports, and listened to examinations and cross-examinations, they became adept at understanding and appraising city planning principles, the coordination requirements of regionalism, the demands of real estate marketing, and the objectives of comprehensive land use planning.

### *The question of patience*

Judges are busy men and women who cannot take on one case and give it a disproportionate share of time, as the extensive institutional litigation requires. Hence, many observers argue against judicial intervention on this ground (Rosenberg 1991).

Land use decisions are among the most time-consuming of all classes of controversy. Yet interpretation of the *Mount Laurel* doctrine, as it proceeded over the decades—especially for the three years when the trial judges were carrying out the mandate of the supreme court—showed a great deal of perseverance, along with a willingness to listen to all sides in the litigation, to understand ruffled feelings, and to institute acceptable remedies for constitutional wrongs. Through the three supreme court decisions, and subsequently in reviewing actions of the Council on Affordable Housing, the judges continued elaborating the constitutional doctrines, despite attacks by municipal and state political leaders. This tenacity should not be surprising; after all, the ability to withstand temporary majority pressures is why courts are given life tenure. The courts stayed the course, even when a *Mount Laurel* litigation continued for more than a decade.

### *Decisiveness*

Can the judges act decisively enough (Diver 1979; Rose 1988)? The courts, having reached their conclusion regarding an institutional breakdown, must present a public face of determination. This approach becomes necessary for achieving the decision's goals, even though it runs counter to what an influential group of academics have declared about reform. The Dahl-Lindblom hypothesis, for example, claims that change is best brought about by incremental means rather than by sudden, revolutionary shifts (Dahl 1957). This view has much to commend it. Interestingly, this cautious approach is also the hallmark of courts of equity. "Slicing the salami," taking slow steps, going forward only when compelled by recalcitrance, the theory states, gives an unpopular judgment a greater chance of gaining acceptance. Certainly, this approach helps avoid sharp criticism. However, often in social upheaval cases—such as those posed by the regulatory barriers raised by suburbia—decisive, quick action and visible determination to go ahead become indispensable predicates for successful judicial actions (Little 1984).

This, it seems to me, is one of the major lessons of *Mount Laurel*. Judge Pashman, in the first *Mount Laurel* case, urged his colleagues to proceed to immediate remedy. However, Judge Hall chose not to follow too vigorous an approach, presumably thinking it desirable to leave it to the locality to work its way pure, inch by inch, rather than placing a finished demand on it at the outset. The result was that for six years nothing much happened in the way of affordable housing in the suburbs. New Jersey

municipalities refused to act, shuffled their feet, lost papers, and found environmental problems in applications.

The New Jersey Supreme Court itself seemed uncertain over the wisdom of its initial determination. *Madison Township*, decided by the court in 1980, came between the *Mount Laurel I* and *Mount Laurel II* decisions and watered down the requirements for low-income housing laid down in the first *Mount Laurel* opinion (*Oakwood at Madison, Inc. v. Township of Madison* [1977], 72 N.J. 481, 371 A.2d 1192). Seven years of patient waiting were taken by the localities as a sign that the court did not really mean business (Resnik 1982). Gentleness encouraged recalcitrance and opposition. By maintaining the traditional path, especially the three-year delay in hearing and deciding the six consolidated cases preceding *Mount Laurel II*, the supreme court conveyed an impression of a court uncertain of itself. The lack of active supervision meant noncompliance with the court's housing vision. Once the court finds itself involved in a sticky situation—unpleasant as it is—the court has to display belief in its own conclusions. It must demonstrate a willingness to act quickly and decisively so that the program it enunciates will have a chance of breathing.

### **Leading the metropolitan charge**

#### *Between the Scylla of the law and the Charybdis of municipal acceptance*

In requiring a metropolitan perspective, the court has to determine how to coexist with unhappy majorities. Ultimately, continuous public opinion will determine the success of the judicial intervention in a democracy (Schill 1992). And so part of *Mount Laurel's* ambitious agenda—wrapped up though it was in legal terminology—was to change attitudes and to generate social learning.

While this agenda was accomplished to some extent by the New Jersey Supreme Court and by the special masters, this idea of changing attitudes is a supremely difficult area for leadership—one that we need far more experience to deal with properly (Bobbitt 1989). Especially important is learning how to muster the local bar, local community leaders, educators, top businesspersons, and the media. They can help explain the court's position as a defender of constitutional rights and a bastion for the kind of society that America must evolve to peacefully. In complex institutional breakdown cases, judges have to recognize that

they are cast as moral persuaders and must take their position to the people to convince them of the rightness of the approach.

The role of the media cannot be overstated if the initial step at metropolitan restructuring is to go further. The success of any judicial action to force localities to discharge their constitutional obligation to provide access to land for affordable housing depends ultimately on public understanding of that responsibility. Mass communication, admittedly, is alien to the common law concept of the individual judge, aloof from participation, waiting for the parties and their lawyers to present their arguments. But once the courts' authority is invoked for redressing a constitutional wrong and a systemic breaking of legal norms, the courts have to realize they are plunged into the midst of an intensive, often unpleasant, struggle. It behooves the judges and masters to clarify their positions to the public.

The New Jersey Supreme Court missed its opportunity to emphasize the ways its remedies were not intrusions of public power into spheres of private decision making, but steps to correct abuses of local regulatory power—in effect preventing the privatization by suburbs of the public engine of land use controls. The limited, temporary nature of the intervention should have been stressed. In addition, judges should have educated the public about the right of municipalities to retain reasonable land use restrictions and protection from would-be speculators.

Yet courts find it hard to “sell” their product. Tradition has left the judicial opinion as the sole articulation and explanation of the judges' reasoning. However, in the bitter controversies and arguments that ensue when the court enunciates a principle that runs counter to the majority's deeply felt values, it behooves the court to explain itself.

Such an approach may strike some as extreme. Holding discussions with reporters or sitting down with editorial boards of newspapers and television stations may seem out of character with the accepted judicial role. Yet this type of public education will be increasingly necessary if the courts are to make clear to society at large what is at stake when they take an unpopular stance. Learning how to present the court's interpretation of events to journalists and opinion molders is an important *Mount Laurel* lesson, as is the need to act as a catalyst for other public interest groups to join in the difficult process of institutional change (Haar 1996).

*Political sensitivity.* In a way, the judge must be a finely tuned political animal when dealing with sensitive metropolitan issues. Dangers abound when pushing through an agenda—such as affordable housing in suburban portions of a metropolitan area—that is too far ahead of public opinion. In many instances, conflicts between New Jersey municipalities and developers have continued after a purportedly final decision, in the form of bickering, denunciation, posturing and maneuvering, and amendments and new combinations. Therefore, gaining the support of the body politic in acknowledging and implementing the doctrine enunciated by the court is indispensable. Political savvy, or in the more formal description of the United States Supreme Court, “a practical flexibility in shaping its remedies and ... a facility for adjusting and reconciling public and private needs” (*Brown v. Board of Education* [1954], 349 U.S. 294, 300), is required to manage the various interests that make up a community and to ensure that each group is heard, involved, and to some degree pacified. On this front, the *Mount Laurel* courts were only partially successful.

*The call of the bugler: Finding and retaining ultimate goals.* In the struggle of day-to-day activities, it is essential for a court in complex institutional litigations to keep the ultimate goal constantly in mind. In the *Mount Laurel* situation, at least two practical ends can be identified.

One is on-the-ground building of affordable housing in the suburbs. The quantifiable results of the *Mount Laurel* litigations are considerable and have been evaluated in studies published by the Fannie Mae Foundation (Calavita, Grimes, and Mallach 1997). Just a brief overview shows that in the six years from 1987 to 1993, the courts oversaw affordable housing at a rate of 11,000 land parcels a year, and New Jersey municipalities zoned, rehabilitated, or built 54,000 dwelling units (Burchell, Listokin, and Pashman 1994; Wish and Eisdorfer 1996). While the research results are not all in, it is safe to conclude that the *Mount Laurel* decisions have enabled thousands of people in New Jersey to live in affordable housing units in attractive suburban communities that otherwise would have shut them out.

The other noteworthy achievement is to induce the legislature to move, discharge its mandate, and relieve the court of the heavy task. In *Mount Laurel III*, Chief Justice Wilentz indicated that this was the purpose all along (*Hills Development Co. v. Township of Bernards* [1986], 103 N.J. 1, 510 A.2d 621). If his opinion is to be taken at face value, the New Jersey Supreme Court was acting simply because of the vacuum in political power. The

argument can be advanced that Wilentz was depicting accurately the thought processes of the court. Beginning in 1975 and reinforcing its message in 1983, the New Jersey Supreme Court had been pointing out the intense public need for low-income housing in the suburbs and for the integration of communities—and the peculiar sensitivity of the problem to legislative action.

### *The need for legislative action*

And throughout the course of opinions, another theme, subtler than the discrimination argument yet asserted almost as continuously, was the supreme court's recognition that solutions would be more effective if enacted by the legislature and the executive branch. "Legislative action was the relief we asked for," the court announced in *Mount Laurel III*, "and today we have it." Now at last, after 13 years, after exclusionary zoning had come to public attention in an inescapable form through the remedies imposed in the three trial courts, and constitutional obligations could be avoided no longer, the legislature did step in. Together the governor and legislature passed the Fair Housing Act (*New Jersey Statutes Annotated* [1985], 52:27D-302(a)). The resultant exercise of powers continued the process of social change while modifying its pace in order to reflect public opinion. And so, having performed the job of bugler, the court could step back and maintain that the act was precisely the result it had always sought.

Nevertheless, a strong case can be made that the New Jersey Supreme Court stopped too soon, hemmed in by the Fair Housing Act and weary of the constant struggle. The judicial presence, it could be argued, should have persisted to institutionalize the reform of exclusionary zoning and get the localities to accept, however grudgingly, their obligation to be members of a metropolitan community.

Which is the correct interpretation of *Mount Laurel III*—a retreat or declaration of victory—will long be debated. At a minimum, then, *Mount Laurel* discharged its function as a catalyst for legislative action. It finally moved the New Jersey legislature to take the lead in repressing the suburban abuse of land regulatory powers that fragment metropolitan areas. Had there been more visible support from public interest groups, the New Jersey Supreme Court might have stayed longer to concretize the actions of the three trial judges. But a weary court chose, at least temporarily, to postpone a more determined stand, relying on the other branches of government to discharge their metropolitan-

area obligations as redefined by the court to meet changing circumstances.

## Lessons for judicial conduct

### *Soliciting initiatives from the locality affected by the decree*

Part of the success of the *Mount Laurel* decisions in revising ordinances and making sites available for low- and moderate-income housing in the suburbs came from the court's acknowledging the limits on its own powers.

The judges were highly sensitive to local concerns. How could they avoid that sensitivity in light of the continuous volley of criticisms aimed at them from local newspapers and politicians? Therefore, they concentrated on soliciting initiatives from the locality. How a local government would choose to remedy the formal flaw of an exclusionary ordinance was left to it to decide for itself within the broad mandates laid down by the supreme court opinion. The special masters were careful to let the remedies for exclusion be those selected by the local government. Although they retained a veto, the special masters acted almost like staff to the mayor and council in proposing alternatives. This solicitude provided the disgruntled with an ear and an outlet for concerns—especially with so intensely emotional an issue as land use regulation—and lowered resentment of the judicial system.

*How detailed a decree?* Once a court's jurisdiction is invoked and it takes charge of the proceedings, generalities cannot suffice. Declarations of constitutional law and arguments for the need for affordable housing and fair sharing of the burdens among different municipalities are, of course, first steps. But first principles smack too much of a hortatory sermon. The details take over. The remedy, not the liability, calls for the most concentrated attention.

Consequently, the judges in *Mount Laurel* took the time to work out detailed and extensive programs for correcting exclusionary zoning provisions. The more generalized requirements of *Madison Township* had to be recast, as its "good faith" reliance on localities failed where feelings ran so strong. Numbers of housing units and phased timing were made integral parts of the decree. While specific numbers are open to debate at the edges, they prove essential because a definitely formulated standard is more likely to achieve goals. Timing of steps needs to be set out

clearly. Mileposts should be established. A flowchart of the remedy is crucial.

*Affirmative remedies.* Traditionally, courts have been leery of remedies mandating affirmative actions. The *Mount Laurel* experience is to the contrary: To achieve results, it is necessary to seek actions of an affirmative nature by localities, such as setting up housing authorities, actively seeking federal subsidies, or providing inclusionary zoning provisions in the local ordinance at the outset. Novel methods of financing and of combining public and private energies may be ideas forthcoming from judges in order to ease political crises. Mere elimination of negative restraints—such as a minimum lot size or a prohibition on apartments—did not suffice to meet the constitutional requirement of breaking down barriers to low-income families seeking shelter in the suburbs. The court invented a new coalition between private developers, who can afford litigation expense, and public interest groups. Harnessing the energies of the private sector, through the Builder's Remedy (making sure that the builder who won an exclusionary zoning case would be the one to receive permission to develop), was an inspired choice. The invention of the Builder's Remedy, which marries the private profit motive to the public interest, is a technique worthy of replication. However, serious study is required of situations where it is too blunt an instrument and where it may have been overplayed.

*Negotiating and settling disputes.* Moreover, as the *Mount Laurel* doctrine evolved, *Mount Laurel* cases increasingly called for alternative dispute resolution rather than direct confrontation and traditional trial adjudication. As a result, the trial courts assigned to special masters the task of orchestrating settlement efforts, providing a forum before which the parties could argue informally, negotiate without committing themselves, and ultimately reach a compromise. Throughout the proceedings, the judges' representatives worked closely with local legislative bodies, planning boards, and the plaintiff to help shape and administer an equitable decree. Informality and postmodern negotiation practices—posturing and claiming in public, haggling and horse trading in private—led to settlements.

### *Courts as keepers of the Constitution*

One of the lessons from the *Mount Laurel* situation is that when a court intervenes with an unpopular decision in matters important to the majority of the citizens, it is more effective to rely on

constitutional rather than statutory grounds. Judicial invalidation of restrictive regulation is an accepted—even conventional—role for the courts as the final interpreters of the Constitution. In addition, wrapping the legal conclusion in a constitutional mantle avoids the immediate, sharp reaction of legislative overruling of a decision. Thus, Judge Hall in the first *Mount Laurel* case was more prescient than a concurring judge who would have invalidated the exclusionary zoning on the grounds that it was outside the scope of the enabling act for zoning. A constitutional basis normally fits the moral beliefs of lawyers, expressing the higher aspirations of this society. With a constitutional shield, judges, in order to promote the goals of a democratic society, are freer to carry out the function of defending principle against the wishes of a majority.

### **Transferable lessons of *Mount Laurel***

The major lesson of *Mount Laurel* is that judicial action is necessary when the political process becomes so frozen that no other remedy is forthcoming to deal with a systemic and continuing abuse. No other government unit was able or willing to curb local exclusionary zoning ordinances. While courts are regarded as a last resort for articulating public policy, persistent and continuous lawbreaking by the other branches of government necessitates action by the courts in a constitutional, democratic state.

That the conflict between the suburbs and the central city is such an explosive and politically sensitive matter means that the ordinary channels of change are blocked. Judicial action is therefore warranted in order to redress the imbalance. That there has been a long-standing disregard of a societal norm, especially one expressed in the Constitution, means also that the court intervention will be complex, difficult, and long term. Judicial intervention also bears the consequence that the final outcome may be action by a legislature compelled at last to act. This action may be the ironic conclusion of the judicial struggle, but, otherwise, legislative movement would not arise from its own initiative.

Having entered the fray, the court must recognize that it is in for a long siege. There is intense heat in that kitchen. Access to suburban land cuts into the nerve endings of society. And care must be the watchword as the court enters the minefield. Although judicial intervention is necessitated, there must be continuous respect for local government and its elected and

appointed officials. A strategy of leaving wide room for initiatives by the localities should be followed.

The emphasis on comprehensive regional planning has far-reaching consequences. As presently constituted, no public body represents the interests of metropolitan areas as a whole in implementing regional housing opportunity. In outlawing exclusionary zoning, the New Jersey Supreme Court ruled that local land use control is not the exclusive province of local government, going so far as to declare that the general welfare that justifies regulation without compensation is over and beyond the locality's own boundaries. A locality may not use zoning powers (a delegated police power of the state) to maintain itself as an enclave of affluence or social homogeneity. The housing needs of those far outside its borders, the judges added, must be taken into account by the enacting municipality. Thus, the court was the one state agency that laid down ground rules for dealing with the stratified hierarchy of place and that expanded consideration by local legislatures beyond local, parochial concerns to regional and state interests. The region becomes, in effect, a recognized legal grouping in New Jersey.

Nor is the significance of the decisions confined to residential exclusion. The *Mount Laurel* opinions foreshadow a willingness to modify the desultory "minimum rational basis" analysis, under which an ordinance is upheld if it bears any reasonable relation to the ends of health, safety, or welfare. There is no reason the regional logic of the *Mount Laurel* doctrine could not extend to other issues affecting an entire metropolitan area, such as water pollution, the location of waste treatment plants, or the building of hospitals, sewer systems, or other major facilities. Taking their cue from the courts, public interest groups and developers may now react less deferentially to the historically presumptive authority of localities to formulate policies with an eye only to local welfare. Strictly insular regulation could become a relic of the past (Haar and Fessler 1986).

The *Mount Laurel* cases also offer a fresh baseline for evaluating other municipal actions that bear extralocal implications. If carried to their logical conclusion, these cases transform the nature of judicial review of local enactments. Legal rules that exclude groups from the prime necessities of life—affordable housing is but one example—should not be accorded the time-honored presumption of legislative validity. In addressing the issue of discrimination, the court made it clear that the critical point of concentrated judicial attention was effect rather than motive and intent. The almost impossible burden of proving a

desire to exclude gives way to ascertaining the impacts of a challenged regulation.

As a corollary to its formulation of a constitutional right of access to moderate- and low-income housing, the New Jersey Supreme Court broadened the equal protection clause of the state's constitution to encompass discrimination based on wealth. Suspect classification, in New Jersey at least, now goes beyond race to include poverty in a broad sense.

By striking out on a jurisprudential road far afield from federal interpretations and by introducing economic disparities as suspect classifications (with an unstated underlying theme that, for purposes of judicial review, the urban poor are of special significance among the class of persons disadvantaged by discriminatory practices), the New Jersey Supreme Court created a new avenue to constitutional protection in areas one can as yet only dimly discern.

Also, by calling into play the state development plan, the court gave legal teeth to the state environmental and land use plans. Even against claims of exclusionary practices, no permits would issue in areas deemed environmentally sensitive. Areas of natural beauty or environmental quality would be preserved as open space. Most significantly, state comprehensive plans for the future use of land would no longer be treated as idle professional exercises. The New Jersey Supreme Court, acting as a virtual metropolitan agency, linked judicial obligation to provide a fair share of affordable housing to sound comprehensive planning undertaken by the executive branch. The decisions breathed life into the theoretical concepts of regionalism and state comprehensive planning.

Together, the *Mount Laurel* decisions represent a concerted effort by judges to bring rational regional planning to troubled metropolitan areas—with a program to balance the competing land uses of suburban sprawl and open space, of housing density and natural resource enhancement. The decisions elevate regional planning to a new status in the future administration of metropolitan areas in New Jersey. In moving toward increased interrelation of the inner city and the suburbs by linking affordable housing to population growth, jobs, and transportation requirements, the need (and potential) for a coordinated metropolitan urban approach emerges.

Over and above the new mechanisms and details of the remedies, the strength of the New Jersey Supreme Court's intervention

hinges on the soaring goals it can enunciate. “Underlying concepts of fundamental fairness,” rather than technical legalisms, must underlie the exercise of government power. By calling society back to its lofty objectives of community—and, in the *Mount Laurel* situation, dealing with the rights of minorities to access to the American dream of a suburban home—the court restores the goal of equality to the center of the American political drama. By emphasizing metropolitan comprehensive planning, the New Jersey Supreme Court underlines the collective responsibility for eradicating exclusionary zoning.

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