NORMAN WILLIAMS, EXCLUSIONARY ZONING, AND THE *MOUNT LAUREL* DOCTRINE: MAKING THE THEORY FIT THE FACTS

John M. Payne*

Many hands have touched the *Mount Laurel* doctrine[1] over the years, but it is safe to say that most of them would never have been called to the task had it not been for Professor Norman Williams. Norman's seminal 1955 article, *Planning Law and Democratic Living*,[2] supplied the theory which Justice Frederick Hall of the New Jersey Supreme Court brought to life in the celebrated *Vickers* dissent.[3] *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*,[4] his 1971 *Syracuse Law Review* article with Thomas Norman, demonstrating that half of one percent of the land in the four rapidly developing "outer ring" counties of northern New Jersey was zoned for multiple dwelling residences, supplied the crucial data that converted the Hall dissent into a unanimous condemnation of exclusionary zoning in *Mount Laurel I*. His thundering endorsement of the *Mount Laurel* doctrine in his treatise, the "bible" of American land use law,[5] helped keep the doctrine alive after Justice Hall passed from the scene and the New Jersey Court temporarily lost its way.[6]

---

* Professor of Law, Rutgers School of Law, S.I. Newhouse Center for Law and Justice. B.A., 1963, Yale University; J.D., 1970, Harvard Law School.

1. The two cases from which the Mount Laurel doctrine evolves are Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*], and Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*]. Hills Development Co. v. Township of Bernards, 510 A.2d 621 (N.J. 1986), which upheld the New Jersey Fair Housing Act, a legislative response to the *Mount Laurel* cases, is sometimes referred to informally as *Mount Laurel III*, although Mount Laurel Township was not a party to that litigation.

In *Mount Laurel II*, Chief Justice Wilentz recapitulated the *Mount Laurel* doctrine in these words: "[T]hose regulations that do not provide the requisite opportunity for a fair share of the region's need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection." *Mount Laurel II*, 456 A.2d at 415.

2. Norman Williams, Jr., *Planning Law and Democratic Living*, 20 L. & CONTEMP. PROBS. 317 (1955).

3. Vickers v. Gloucester Township, 181 A.2d 129 (N.J. 1962) (Hall, J., dissenting) (majority holding total exclusion of mobile homes from municipality pursuant to zoning ordinance was constitutional).

4. Norman Williams, Jr. & Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971).

5. NORMAN WILLIAMS, JR., AMERICAN LAND PLANNING LAW (1974 & Supp. 1988).

6. Developments between 1975 and 1983 are described in John M. Payne, *Housing Rights and Remedies: A "Legislative" History of Mount Laurel II*, 14 SETON HALL L. REV. 889 (1984).

Norman Williams *is* the *Mount Laurel* doctrine, and it is a great honor to be asked to speak and write on this subject for his *festschrift*. In keeping with the legal realist tradition that is the theme of the *festschrift* and the center of Norman's approach, I want to address what has actually been accomplished, and how the facts can guide us towards a reconceptualization of the *Mount Laurel* doctrine, which in its present form has strayed quite far from the rigorous tenets of common sense bestowed upon it by Norman and Fred Hall at its birth. I will get to the numbers in a bit, but first I need to set the scene.

IMPLEMENTING THE *MOUNT LAUREL* DOCTRINE

Nothing much happened on (or in) the ground by way of actually constructing low and moderate income housing in New Jersey until after the second *Mount Laurel* decision in 1983, and even then, it took the three specially assigned trial judges another year or so to develop and implement the formulaic fair share rules mandated by the court. It was my privilege to inherit one of the great, early *Mount Laurel* cases, *Urban League of Greater New Brunswick v. Borough of Carteret*,[7] and to participate before Judge Serpentelli in the development of the methodology and the settlements and orders that were worked out once "the numbers" were known.[8] I can attest from personal experience that towns took the process seriously only when it became clear to them that something was actually going to happen, that the *Mount Laurel* doctrine had actually arrived. That did not happen until 1984, and as soon as it did, the League of Municipalities rushed down to Trenton, reported to the Legislature that "home rule" was not all that it was cracked up to be, and virtually begged for a state law that would get the courts out of the land use business.

The Legislature readily complied, enacting the optimistically titled *Fair* Housing Act of 1985.[9] The Act, which created the Council On Affordable Housing (COAH) and mandated a whole new round of rule making, was found constitutional by the New Jersey Supreme Court in *Mount Laurel III*.[10] By the time COAH was up and running, with rules in place, another eighteen months had passed, and it was 1987 before the

---

7. Urban League v. Borough of Carteret, 359 A.2d 526 (N.J. Super. Ct. Ch. Div. 1976), *rev'd*, 406 A.2d 1322 (N.J. Super. Ct. App. Div. 1979), *rev'd and remanded sub nom.*, *Mount Laurel II*, 456 A.2d at 390.

8. *See generally* AMG Realty v. Warren Township, 504 A.2d 692 (N.J. Super. Ct. Law Div. 1984).

9. N.J. STAT. ANN. § 52:27D-301 (West 1986) (emphasis added).

10. Hills Dev. Co. V. Township of Bernards, 510 A.2d 621 (N.J. 1986).

compliance process started in earnest.[11] I note these dates out of frustration. In 1983, New Jersey was just emerging from the oil bust economy of the late 1970s, and the middle part of the 1980s saw the greatest burst in homebuilding that the state had seen since the post-war suburbanization days. Yet we in the housing community were not able to take advantage of the boom. As 1984 dragged into 1985 and then 1986, with court hearings and political machinations galore, huge swaths of central New Jersey (the very counties surveyed by Williams and Norman in 1971) began to be built over, before the *Mount Laurel* orders could be put in place. By 1988, where everything *was* in place, the boom was coming to an end, soon to be replaced by the slump of the late 1980s and early 1990s.[12]

MOUNT LAUREL STUDIES

I go through all of this because it underscores the difficulty of taking an adequate measure of what the *Mount Laurel* doctrine had actually accomplished. *Espousing* legal realism is not necessarily as easy as *doing* it. But let me piece together what I can. The most extensive study to date was published in the *Rutgers Law Review* in 1989 by Martha Lamar, Alan Mallach, and me.[13] The Alliance for Affordable Housing, a coalition of groups interested in preserving the *Mount Laurel* doctrine, sponsored the research, which was funded by local foundations. The study first identified the fifty-four communities that had significant affordable housing activity and obtained (by questionnaires and follow-up interviews) as

---

11. The present rules are found in N.J. ADMIN. CODE tit. 5, § 93 (1995). The constitutionality of the Fair Housing Act was never seriously in doubt; the court had repeatedly signalled that it would defer to any plausible legislative choice of remedial approach. What is generally overlooked in commentary on *Hills/Mount Laurel III* is that the court narrowed virtually to extinction a provision of the statute that would have permitted the courts to retain jurisdiction of pending *Mount Laurel* cases, rather than transferring them to COAH for completely new proceedings. *See* N.J. STAT. ANN. § 52:27D-316(a) (West 1986) (mandatory transfer except where "manifest injustice" would result). The court refused to find "manifest injustice" even where cases had been in litigation for years, defendant municipalities had unconscionably delayed the proceedings, and final disposition by the trial court was possible within a brief time. *See, e.g., Hills*, 510 A.2d at 658-59. The weakly-reasoned interpretation of the "manifest injustice" clause, is one of a series of brutally pragmatic decisions made by the court. *See also* cases cited *infra* notes 38 and 45 to minimize further controversy that threatened to undermine the legitimacy of the judiciary, but the resulting delay meant the loss of a great deal of lower income housing during the years when it could most easily have been produced in inclusionary developments.

12. *See* JAMES W. HUGHES, ONE-HALF CENTURY OF HOUSING PRODUCTION IN NEW JERSEY: 1940-1990, Rutgers Regional Rep. Issue Paper Number 1, Dec. 1990.

13. Martha Lamar et al., *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197 (1989) [hereinafter *Rutgers Study*].

precise a count as possible of the number of housing units produced or planned between 1983 and 1988. Second, it compiled a physical, financial and social profile of ten completed *Mount Laurel* developments.

Because of our general familiarity with *Mount Laurel* activity around the state, we could estimate that the total number of completed units in the fifty-four municipalities constituted about 93% of the statewide total of built and occupied units. We could not estimate the percentages for less visible types of activities (units in the planning stage, for instance) except to note that the fifty-four communities certainly represented less than 93% of the total. In this sense, our counts are very conservative and represent a minimum threshold of compliance.

Anticipating (correctly) that inclusionary developments with 20% set-asides would be the dominant form of compliance, we tabulated data for these units separately from all other compliance methods, such as publicly subsidized, 100% lower income projects. Within each category, we also were able to distinguish between completed and occupied units, units under construction, units with legally vested approvals that had not yet gone into the ground, units for which site-specific planning work had been done, and units which existed only as paper proposals in *Mount Laurel* compliance plans. Obviously, these categories arrange themselves in descending order of likelihood of actually being completed, and we wanted to avoid overstating whatever accomplishments could be claimed.

Our report nonetheless overstated the degree to which the units identified in our survey would actually be built. We thought that units that were through the planning process and had vested rights would actually get built, that site-specific units would probably be built on the theory of investment-backed expectations, and that only the "paper" units faced a more uncertain future. As it turned out, the housing economy began to fall apart as our article hit the streets and the decline continued through the early 1990s. Even vesting was not enough to sustain development interest and many projects simply stopped in their tracks if they were not already in the ground. (Some unfortunate enough to be in the ground ended up in the inventory of the savings and loan bailout, but that is another story.) Then, in one of the seemingly endless string of cruel twists of fate, COAH published revised fair share numbers in 1993 and mooted out some of the developments placed on hold during the down years.[14]

---

14. Under *Mount Laurel II*, a municipality has no obligation to zone for lower income housing once its fair share obligation has been satisfied. *Mount Laurel II*, 456 A.2d at 421. A municipality thus could downzone previously designated compliance sites if they were no longer needed to meet a lower fair share, so long as the developer had not acquired vested rights.

The second part of the *Rutgers Study* looked at ten completed developments. Physical characteristics of the housing units were available from simple observation, of course, and financial/administrative matters were fully documented in most cases. It was difficult, however, to obtain full data on the socio-economic characteristics of occupants, because there is no centralized reporting requirement and no protocol on what information should be kept. Most importantly, most developers failed to keep (or at least were unwilling to acknowledge that they kept) data on race and ethnicity, presumably because of Title VIII concerns.[15] Thus, our socio-economic profile of the occupants of the developments sampled was too small to draw statistically valid conclusions, but it did allow us to propose hypotheses which persons familiar with *Mount Laurel* developments in New Jersey have found to be intuitively correct.

The central conclusions of the *Rutgers Study* are:

1. Between 1983 and 1988, 5,087 low and moderate income units were built or under construction (2,830 completed, 2,257 under construction). An additional 8,876 units were approved or pending, and there were a further 8,740 units, whose status was more speculative, proposed in plans before COAH or the courts;[16]
2. Approximately 75% of the total number of units counted were in inclusionary developments, where a fixed percentage of the units (usually 20%) are sold or rented at controlled prices affordable to lower income households and the remainder are sold or rented at market prices. The remaining 25% of the units were in publicly-subsidized developments or were created by rehabilitation of existing structures;[17]
3. The *Mount Laurel* units in inclusionary (market-provided) developments were almost always offered for sale rather than rental, were usually available without age restrictions, and were skewed slightly in favor of being affordable to moderate-income rather than low-income unit households. By comparison, the non-market (publicly subsidized) units were more evenly balanced between rental and sale, between age restricted and non-age

---

15. *See* Title VIII, Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1982 and Supp. IV 1986), *as amended by* Act of Sept. 13, 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988). Section 3604 makes it illegal "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

16. *Rutgers Study*, *supra* note 13, at 1210.

17. *Id.*

restricted, and between low- and moderate-income units. This reflects the prevalence of federally subsidized senior citizen rental units in the non-market category;[18]

4. Based on the Lamar sample of ten completed inclusionary developments, the typical residents of a *Mount Laurel* development are:

   a. young married couples with one or more children, although there are also significant numbers of singles and single parents;

   b. drawn from households that formerly rented or doubled up with relatives in nearby communities, and;

   c. people who work nearby in blue collar, "pink collar," and low-level managerial or professional jobs which offer relatively small opportunities for advancement.[19]

5. Minorities are substantially underrepresented, especially African-Americans, although there is some reason to believe that larger numbers of minorities will be found in rental developments and in developments located closest to urban centers;[20]

6. The 11,700 *Mount Laurel* units completed or in the development process as of 1988 in inclusionary developments would also result in the creation of approximately 47,000 market rate units which, the study found, tend to be priced towards the low end of the housing market.[21] I will return to this point later.

One other, more recent study, *The Math of Mount Laurel*, prepared by Robert Fitzpatrick for the New Jersey Department of Community

---

18. *Id.* at 1212.

19. *Id.* at 1249-55.

20. *Id.* at 1256.

21. *Id.* at 1260. This assumes four market rate units for each *Mount Laurel* unit, the rule of thumb now embodied in N.J. ADMIN. CODE tit. 5, § 93-5.6(b)(1) (1995). The *Rutgers Study* slightly overstates this effect by leveraging the total number of *Mount Laurel* units in the development process, 14,000, rather than only the 11,700 in inclusionary developments. Publicly subsidized developments and rehabilitations are much less likely to spin off market rate units.

Affairs in 1992,[22] is in most respects consistent with the earlier data assembled for the *Rutgers Study*. Here are the high points of the Fitzpatrick data:

1. As of 1992, 13,592 dwelling units were built, rehabilitated or under construction.[23] This figure is in line with the 5,087 similarly defined units found in the *Rutgers Study*, if one extends the earlier line from 1988 to 1992 and takes account of the larger number of municipalities reporting affordable housing activity;
2. A questionnaire response rate of 350 out of 567 municipalities (compared to 54 useable responses out of 80 in the earlier study), yet all of the reported progress was found in only 125 of the 350 responding municipalities;[24]
3. Overall, there was an even split between sales and rental units, and slightly more low than moderate income units;[25]
4. New construction (inclusionary and otherwise) accounts for about 75% of the total housing production; 45% of the total (6,000 of 13,600) are inclusionary units, most of them produced without any other form of subsidy.[26] This is the most significant difference between Fitzpatrick's numbers and the *Rutgers Study*, which found 75% of the total production in inclusionary developments;
5. Fitzpatrick's study counts housing produced in towns whose compliance plans were approved by courts before the adoption of the Fair Housing Act, as well as a few towns that were successfully sued after failing to immunize themselves by participation in the voluntary COAH process. The 136 COAH-certified towns report 4,639 units; 75 court-supervised towns report 5,333 units, suggesting the relatively watered down compliance mechanisms permitted by the COAH rules.[27]

---

22. As an aside, when I requested a copy of this report from a friend at COAH, she sent it along with a cover letter informing me that her secretary, who had taken my request over the phone, left a message that I wanted a copy of "The Mess of Mount Laurel." So be it!

There also are several county or multi-county studies which I do not examine in detail, because they are more limited in scope.

23. ROBERT FITZPATRICK, THE MATH OF MT. LAUREL, N.J. DEPT. COMM. AFF., at 2 (Mar. 1993).

24. *Id.*

25. *Id.* at 3-4.

26. *Id.* at 4, 7.

27. *Id.* at 9-10.

Fitzpatrick's study does not report socio-economic status of the occupants of the surveyed units.

The *Rutgers Study* is now out of date. Even apart from that, it was a sample, albeit a large one, and it studied a five-year period during which the law and practice of *Mount Laurel* compliance was in considerable flux. The Fitzpatrick/DCA study, while useful, is incomplete. A follow-up study has been underway since 1993, under the auspices of the Center for Public Service at Seton Hall University, with financial support from the Ford Foundation and the Fund for New Jersey.[28] The Seton Hall study attempts comprehensiveness, but has thus far not resulted in publishable data, because of the difficulty of collecting and commensurating the sources of information. One useful aspect of this study, if it can be completed successfully, is that it will examine data on the characteristics of *applicants* for *Mount Laurel* housing, not simply those who have been successful in actually gaining a unit. This is important, because one way of evaluating the skewed racial profile noted by the *Rutgers Study* is to better understand how the applicant pool is constituted.

The Council on Affordable Housing also produces data, although nothing that could properly be called a "study." COAH has a tiny staff and a tiny budget. It is not equipped to monitor compliance and does not do so in any meaningful way. Moreover, COAH has the political need of any bureaucracy to demonstrate "success," creating an incentive for it to inflate the numbers as much as possible. COAH counts every unit included in a fair share plan, whether or not that unit has in fact been built and with only the bare legal presumption that the certification of the plan means that there is a "realistic opportunity" that it will be built. COAH's numbers are, in short, paper numbers only.[29]

COAH does report two sets of numbers that are useful and reliable. First, it accounts for Regional Contribution Agreements. Under these Agreements, "sending" municipalities, invariably in the suburbs, can contract with "receiving" municipalities, invariably poorer and more urbanized, for the former to fund up to half of its fair share obligation through construction or rehabilitation of housing in the latter. The most recent COAH summary shows a total of thirty-nine Regional Contribution Agreements, designed to produce 4,172 units of housing at a total subsidy cost of $80,982,795 (additional subsidies may have come from other sources) and an average subsidy of $19,411 per unit. Five municipalities accounted for 21 of the 39 contracts and 1,855 of the 4,172 housing units:

---

28. I am an advisor to that study, although not a principal investigator.

29. *See infra* text accompanying note 55 for an illustration.

Newark (6 contracts/732 units); Jersey City (5/194); New Brunswick (4/406); Phillipsburg (3/373); and, Perth Amboy (3/150).[30]

COAH also reports useful data on the number of municipalities actually participating in the COAH process, which is voluntary. I will return to these data below.

MOUNT LAUREL: SUCCESS OR FAILURE?

That is about all we know, remarkably little considering the amount of political, legal and scholarly commentary that the *Mount Laurel* doctrine has produced. Based on this skimpy evidence, what can we say about the "success" of the effort? "Success," like "affordable housing" is a relative term (affordable to whom?). The *Mount Laurel* process has not "solved" our problems of low and moderate income housing, and in that overarching sense it can not yet claim "success." This lack of ultimate success becomes particularly clear when I explain that the actual need for low and moderate income housing in New Jersey is not the 244,000 units estimated by Judge Serpentelli's *AMG* opinion,[31] nor the 145,000 units estimated by COAH in 1986,[32] and certainly not the ludicrously low 86,000 units estimated by COAH when its revised rules were published in 1993.[33]

All of these estimates are driven by a political need to keep the number manageable, so that the fair share allocations will not become even larger.[34] To this end, they are based on census counts of substandard housing, and ignore both the homeless (who do not have even a substandard unit to call home) and the large number of households that live in safe, decent housing but pay more than 30% of their income for that privilege. New Jersey's 1991 Comprehensive Affordable Housing

---

30. COAH, REGIONAL CONTRIBUTION AGREEMENTS (Feb. 15, 1995).

31. AMG Realty v. Warren Township, 504 A.2d 692, 734, 767 (N.J. Super. Ct. Law Div. 1984). Judge Serpentelli, an astute politician as well as a thoughtful judge, nowhere states this relatively large number (243,736) in his opinion, apparently to dampen any negative popular reaction. It is derivable from the tables at the cited pages.

32. *See* N.J. ADMIN. CODE, tit. 5, § 92-4.1 (1995) (145,707).

33. *Id.* § 93-App. A at 98. For a somewhat fuller account, see John M. Payne, *Rethinking Fair Share*, 16 REAL EST. L.J. 20, 26-27, 29-31 (1987).

34. Judge Serpentelli was quite explicit about this, pointing out that "[t]he inclusion of the financial need category would dramatically increase the present need." *AMG Realty*, 504 A.2d at 710. Judge Serpentelli also noted that the "sheer size" of the numbers might make the fair share "unattainable." *Id.*

Strategy (CAHS) placed the total number of households experiencing some kind of housing need at some 675,000.[35]

On the other hand, the construction or rehabilitation of as many as 13,000 units of housing affordable to low and moderate income households, units that for the most part would not have been built otherwise, cannot be ignored. A particularly revealing insight into this measure of success is noted by Fitzpatrick in the DCA study. Since the advent of the federal housing subsidy program in 1937, public sector funding has produced an average of 2,400 units per year, while *Mount Laurel* production ranges from 1,350 to 2,700 units per year, depending on whether one measures from *Mount Laurel II* in 1983 or from the first COAH decisions in 1987.[36] This type of comparison, I submit, is a more realistic frame within which to judge the *Mount Laurel* process, and in this sense I am not at all hesitant to proclaim *Mount Laurel* a "success."

BUILDING ON THE STUDIES

The studies, incomplete or out of date as they are, also permit some further generalizations, and it is to these that I now turn. There are two numbers that are particularly important, and a third number that explains, to a considerable extent, the other two.

First and foremost, it is important to highlight the dismal race and ethnicity data reported by the *Rutgers Study*. While the numbers do not have statistical validity, no one working in the field expects that the results will be dramatically different if and when a more comprehensive study is published. Second, it is important to highlight the dismal participation rate in the "voluntary" compliance processes of the Council on Affordable Housing. A final number, and one important to explaining the first two—the *Rutgers Study* found that 75% of the units in development between 1983 and 1988 were in market-driven "inclusionary" developments.

---

35. N.J. DEPT. OF COMM. AFFAIRS, COMPREHENSIVE AFFORDABLE HOUSING STRATEGY 55 (1991). The CAHS is a federally-required study that must be approved by the Department of Housing and Urban Development (HUD) prior to award of certain federal subsidies.

36. Fitzpatrick, *supra* note 23, at 13. Martha Lamar et al., Mount Laurel *at Work: Affordable Housing in New Jersey*, 1983-1988, 41 RUTGERS L. REV. 1197, 1209 (1989), points out that the public sector commitment declined precipitously during the 1980s. Between 1985 and 1988, 1700 units were created (567 per year) and in 1988 that number had dropped to 350 units. Thus, Fitzpatrick's estimate of 2400 public sector units per year is clearly generous if one concentrates on current policy, and measuring *Mount Laurel* production from 1983 clearly dilutes its accomplishments since there was a long start-up period after *Mount Laurel II*.

Let us consider race first. The data present a hard challenge to the underlying premise of the original *Mount Laurel* case, in which the New Jersey Supreme Court emphasized economic exclusion over racial exclusion. That made sense when federal equal protection doctrine was losing its steam, and the federal Title VIII[37] had not acquired the settled meaning that it has today. Moreover, as a string of Title VIII cases has demonstrated, most notably *Huntington*,[38] the broader theory of income-based housing rights can sweep the theory of race-based rights along with them.

But as the data remind us, there is a considerable gap between theory and practice. Despite good intentions (on the part, at least, of the public interest plaintiffs in *Mount Laurel* cases) racial equalization has not followed in the wake of economic equalization. And the COAH Regional Contribution Agreement (RCA) data remind us that all is not based on good intentions; no one with the slightest acquaintance with this process doubts that the RCAs help keep the suburbs white and the central cities otherwise.[39]

Even apart from the RCA problem, the data, thin as they are, also help to construct a plausible hypothesis for why racial integration has not followed in the wake of *Mount Laurel* housing. The *Rutgers Study* found larger numbers of minority households in two situations—where the development was located close to an urban center and where the development included rental units.[40] Since minority households have been "ghettoized" in center cities for generations now, it is understandable that many would prefer to move to a close-in suburb, rather than to leapfrog way out into the "sticks," far removed from the social networks that have sustaining force for them. Since minority households tend to be poorer than white households,[41] it is foreseeable that they would disproportionately have difficulty meeting the down payment and closing

---

37. Title VIII, Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1982 and Supp. IV 1986), *as amended by* Act of Sept. 13, 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

38. Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988).

39. This issue was raised and decided adversely to the Title VIII claimants in In re Petition for Substantive Certification Filed by the Township of Warren, 588 A.2d 1227 (N.J. Super. Ct. App. Div. 1991), *rev'd*, 622 A.2d 1257 (N.J. 1993). In a blatant (and doctrinally incoherent) bit of political maneuvering, the New Jersey Supreme Court denied review of the RCA issue, but granted certification on a parallel challenge (in the same litigation) to municipal residency preferences and held them invalid, technically on *Mount Laurel* grounds, but with strong dictum all but saying that they would also violate Title VIII. It requires no great leap of analysis to apply the *Warren* dictum to RCAs.

40. Lamar et al., *supra* note 36, at 1256.

41. *See Huntington*, 844 F.2d 926.

cost requirements for purchasing, as opposed to renting, a *Mount Laurel* unit, even if the subsequent carrying charges made that unit "affordable."

These phenomena need careful exploration in further studies, but I am morally certain that what I have said here will be substantiated eventually. This explains why inclusionary zoning (75% of the total units in the *Rutgers Study*) is the compliance technique of choice.[42] Inclusionary projects tend to offer their units for sale, rather than as rentals, because that is the marketing form preferred by private developers since the 1986 Tax Reform Act withdrew federal tax incentives for rental housing.[43] They also tend to be located further from the urban core, because inclusionary developments are easiest to produce on a large scale, using efficient design, construction and marketing techniques. Generally speaking, large developments require larger tracts of vacant, developable land than are available in most closer-in suburbs. Market-driven projects, even with internal subsidies, cannot reach the poorest of the poor, who require levels of subsidy overwhelming compensating benefits to the developer that result from density increases.[44] The ultimate correlation is not hard to fathom—encourage exurban, non-rental compliance with affordable housing requirements, and one will get lily-white communities.[45]

The same pattern repeats itself when we examine the COAH participation rate. COAH's final report for the first round of certifications (1986-1992)[46] identifies 158 certified municipalities. Of these 158, however, 40 municipalities (25% of the total participants) have a *zero* fair share. No wonder they participate! Another 46 municipalities (29% of

---

42. While Fitzpatrick drops this number to 45% (6,000 of 13,600), his data are somewhat questionable because the self-reporting method he used permitted municipalities to inflate their accomplishments by including units that would not qualify as part of a compliance plan had they been scrutinized fully by COAH or a court. Even if we take Fitzpatrick's numbers at face value, inclusionary zoning is still the largest single compliance method and the one, as I shall demonstrate later, that dominates the fair share methodology.

43. *See* Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 883 (1993).

44. *See Rutgers Study*, *supra* note 13, at 1261-62.

45. The correlation is not ironclad, of course, and the causes of racial segregation are more complex than the text has opportunity to explore. Residency preferences also contribute. *See In re Township of Warren*, 588 A.2d at 1227. Inadequate affirmative marketing, often left to developers who have little incentive to reach out to urban prospects given the large pool of poor suburban households is also a problem. *See Rutgers Study*, *supra* note 13, at 1273-75. But even if these types of problems were mitigated, the inexorable financial and geographical demography of race would remain.

46. N.J. COUNCIL ON AFFORDABLE HOUSING, STATUS OF MUNICIPALITIES (Nov. 1993) (unnumbered/unpaginated table, *COAH Substantive Certification*). The numbers will have changed little since the date of this report, because most certifying activity has been in abeyance while COAH adopted new substantive rules and fair share estimates in preparation for a new round of submissions currently underway.

the total participants) have a fair share between 1 and 50 units, and 19 (12% of the total participants) have a fair share between 51 and 99 units. Thus, COAH's nominal overall participation rate of 28% (158 of 567 municipalities), is readily shown to be much poorer than that. If we eliminate the 40 towns with zero fair shares, the overall participation rate becomes 21%. If we further eliminate the 46 towns with nominal fair shares (those below 50 units, many of which, as I will show later, are phantom units), the overall participation rate drops to 12.6%.

Again, a significant culprit in this dispiriting pattern is the dominance of inclusionary zoning. Spurred by the language of *Mount Laurel II*, both the courts and COAH have chosen a fair share methodology shaped around the implicit premise that inclusionary solutions are the only ones that work. Exploration of a series of missteps demonstrates how the overemphasis on inclusionary zoning works against the goal of 100% voluntary participation in the COAH process.

The New Jersey Supreme Court took the first misstep, linking inclusionary zoning to the "builder's remedy." That presumptive entitlement allows the winning plaintiff to build its project on its site, regardless of whatever other changes the municipality makes to bring its zoning into *Mount Laurel* compliance.[47] I have nothing against the builder's remedy as such, but the court failed to perceive that providing a powerful incentive for private market plaintiffs to sue, while offering virtually nothing to the public interest plaintiffs (the NAACPs, Urban Leagues, and Fair Housing councils) that earlier had dominated the litigation landscape, seriously skewed the system. We asked for a system of attorneys fees, modeled on the Federal Civil Rights Act.[48] Public interest litigants would plow these fee recoveries back into new litigation and monitoring of prior victories, freeing them from dependence on other sources of support. We were turned down cold.

Virtually all of the litigation brought after 1983 was brought by private plaintiffs seeking builders' remedies.[49] Sometimes the feeding frenzy approached an obscene level, as in rural Cranbury Township, where nine developers offered to build 2,444 units to meet a fair share of 816

47. *Mount Laurel II*, 456 A.2d at 452.

48. There is no reported decision. For a related decision denying attorneys fees under Title VIII, see Urban League v. Mayor and Council, 559 A.2d 1369 (N.J. 1989) (although holding that in principle a federal fee recovery was possible in a *Mount Laurel* case).

49. Between 1983 and 1986, more than 100 developer suits were filed against some 70 municipalities. *See* Alan Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the Berenson Decision*, 4 PACE ENVTL. L. REV. 37, 119 (1986).

units.[50] And not surprisingly, builder-litigants in search of profit sought to build where they could build most easily, in the rapidly developing suburban ring, rather than in the cities or the older suburbs.

The second misstep—or cynical political calculation—was the New Jersey Legislature's decision to make compliance with the COAH process voluntary. The only real incentive offered for participation is that certified municipalities enjoy a virtual statutory immunity from other *Mount Laurel* litigation.[51] In essence, the process runs on fear, the fear of being sued without the protection of COAH certification. The only real fear of being sued, however, arises in communities with large amounts of developable land.

When a developer does focus on an older, more developed suburb, or one of the gentrifying cities across the Hudson from the picturesque Manhattan skyline, such as Hoboken or Jersey City, it more often than not finds a warm welcome for its development proposal, without having to use the threat of *Mount Laurel* litigation to open the door. These places tend to welcome proposed reinvestment in high density, high profit projects. While gentrification displaces the poor, it also replaces dilapidated or functionally obsolete land uses contributing little to the tax base and blighting the community's self-image. The municipality has no fear of suit, and thus has no incentive to participate.

Public interest suits could alter this calculation by suing (or threatening suit) in precisely the places that profit-motivated plaintiffs will not touch. That is why the denial of attorneys fee recoveries was so short-sighted. Sponsoring foundations, once attracted by the novelty of the *Mount Laurel* theory, have become disillusioned by the controversy and the lack of dramatic progress, and have moved on to more fashionable causes. In this respect, unfortunately, legal realism bites the hand that feeds it. In 1992, the Legislature barred the New Jersey Department of the Public Advocate, the mainstay of public interest housing litigation in recent years, from challenging COAH-approved RCAs,[52] obviously in retaliation for the *Warren Township* litigation.[53] The Department was

---

50. This information is from the author's litigation files in the *Urban League* case. For a comparably egregious example (11 developers) and Judge Serpentelli's elaborate effort to set ground rules, see J.W. Field Co., Inc. v. Township of Franklin, 499 A.2d 251 (N.J. Super. Ct. Law Div. 1985).

51. *See* N.J. STAT. ANN. § 52:27D-317 (West 1986).

52. *See* N.J. STAT. ANN. § 52:27E-31 (West 1986) *repealed by* N.J. STAT. ANN. § 52:27E-51 (West 1995).

53. *In re* Petition for Substantive Certification Filed by the Township of Warren, 588 A.2d 1227 (N.J. Super. Ct. App. Div. 1991), *rev'd*, 622 A.2d 1257 (N.J. 1993).

abolished altogether in 1994.[54] Today, the only agency in New Jersey with the capacity to mount a serious *Mount Laurel* case is Legal Services of New Jersey, and it is overwhelmed by competing demands. Again, if there is no fear of suit, there is no incentive to participate.

COAH further reduced the incentive to use precious resources to sue in these older suburbs by excusing municipalities from meeting their fair share to the extent that they do not have vacant, developable land.[55] This approach assumes, without foundation, that a land-intensive solution, i.e., inclusionary zoning, is the only practicable solution. It is this adjustment that has brought so many communities' fair share obligation to zero, or near zero. Suing to achieve a minimum fair share is pointless.

One example drawn from my experience will illustrate the baneful effects of what I believe is an overemphasis on inclusionary zoning as a *Mount Laurel* compliance solution. This is a true story, and I will supply the name of the town to anyone who cares to ask, but for present purposes I prefer to call it Littleton. Affluent Littleton, population 8,000, was fully developed by 1935 and 85% of the town lies in a National Register Historic District. Littleton agreed to participate in the COAH process only after its planner advised the town that it would have no *Mount Laurel* obligation.

Littleton's initial fair share was 83 units, of which 22 were "indigenous need," to be met through rehabilitation using Community Development Block Grant (CDBG) money. A compliance plan had to be developed for the remaining 61 units. The town could accommodate 25 units on a fourteen acre site by rezoning the site at nine units per acre with a 20% set-aside. Since Littleton contained no other large vacant site, it was excused from further compliance and the fair share obligation was formally reduced by 36 units, to 47. By formally reducing the fair share, Littleton had no obligation to seek non-inclusionary solutions to its original fair share.

Now let us look at what really happened. The "vacant" fourteen acre site is the Littleton portion of a country club, which is prospering and has no intention of selling its golf course for residential development. The twenty-two units of indigenous need, calculated from census data on substandard housing, are actually illegal attic and carriage house apartments without complete facilities, rented primarily to college students from the area. An owner applying for the rehabilitation subsidies in effect

---

54. N.J. STAT. ANN. § 52:27E-51 (West 1995).

55. *See* N.J. ADMIN. CODE tit. 5, § 92-8.1 (West 1995) (governing much of the compliance measured in the studies noted above). A modified form of this regulation was adopted in the rules governing the 1993-99 compliance cycle. *See id*, § 93-4.2.

admits the violation of the zoning ordinance (the census data does not locate specific units). Needless to say, *none* of these rehabilitations have occurred. The only thing that has occurred is that a developer assembled a one acre site in the historic district by knocking down two dilapidated old houses, and Littleton approved redevelopment with eighteen town houses to be sold in the $300,000/unit range (without any inclusionary component). This will not jeopardize the COAH certification because the certified housing element does not require any actions except the rehabilitations and the golf course rezoning. Littleton, by the way, is an "inner ring" suburb, served by two railroads and numerous bus lines. It is ideally located for lower income workers who must depend on public transportation to reach jobs in the urban core.

Littleton's story, unfortunately, is not unique and it is symptomatic of what has gone wrong with the *Mount Laurel* doctrine. *Mount Laurel* has not lived up to its promise of racial as well as economic integration and, despite the *Mount Laurel II* court's insistence that all 567 New Jersey municipalities have the same constitutional obligation, actual compliance is better than in the days of *Mount Laurel I*'s "developing communities" standard[56] only because anything is better than zero. The *Mount Laurel* doctrine has become tangled in the abstractions of a politically weak bureaucracy (a point legal realists can readily comprehend) and has lost its way in the work of the real world.

BEYOND *MOUNT LAUREL II*

But all is not doom and gloom. This is a *festschrift*, a celebration of Norman Williams' dogged insistence on the positive uses of law in realistic ways for the good of the whole community. He is, I think, an optimist, and one has to be an optimist in this business, because the task is so daunting that the only other solution is to give up (the choice made by those numerous commentators who conclude, uncritically, that *Mount Laurel* has failed because it has not fully succeeded). With the irony that seems to dog this field, some of my own sense of optimism flows from the same source that I have been highlighting here as the problem—inclusionary zoning.

Inclusionary zoning is not all bad. First, let me reemphasize a positive aspect of the heavy reliance on inclusionary developments. The *Rutgers Study* found that, in addition to whatever number of lower income units are created, inclusionary developments open up conventional markets

56. *See Mount Laurel I*, 336 A.2d at 717, 724, 733. The developing community standard was abandoned in *Mount Laurel II*, 456 A.2d at 422-23.

for thousands of units of modestly priced middle class housing in communities whose restrictive zoning practices would otherwise have kept residential prices unaffordably high.[57] Thus, when considering the "success" of the *Mount Laurel* process, the emphasis on *inclusionary* zoning represents a much broader triumph over *exclusionary* zoning than the count of low- and moderate- income households alone implies.

This interplay between exclusionary and inclusionary zoning returns us to our theme of legal realism. For years, doomsday prophets such as Robert Ellickson have predicted that inclusionary zoning, operating like a tax, would shrink supply and cause a general rise in prices in any given housing market, offsetting for most poor people the benefit that a few would gain from the inclusionary units. This was, in Ellickson's widely noted phrase, the "irony" of inclusionary zoning.[58]

Ellickson bases his analysis on abstract economic modeling, the very antithesis of the legal realist's approach that we celebrate in Norman Williams' work. If the *Rutgers Study* data are correct, however, they suggest an explanation for why Ellickson is wrong. The data suggest a flood of modestly priced market rate units in *Mount Laurel* developments in communities that would otherwise have been able to restrict supply through their zoning controls. This may provide a supply-side increase sufficient in terms of garden variety microeconomic analysis to offset whatever upward pressure on prices the inclusionary "tax" would otherwise produce. (This suggestion is consistent with William Fischel's arguments,[59] except that he insists unrealistically that zoning controls generally should be relaxed.)

Data from the 1990 Census offer a tantalizing hint that this is what is actually happening. Between 1980 and 1990, median values of single family homes in every New Jersey county in the New York metropolitan region, where inclusionary zoning was actively practiced, actually rose more slowly than in any county in the New York and Connecticut parts of the region, where inclusionary zoning was virtually non-existent. The increase in the eleven county New Jersey segment was 179.5% (weighted by number of housing units in 1990). Depending on the combination of New York and Connecticut counties used, the increase there was between 234% and 239%.[60]

---

57. *See supra* note 21 and accompanying text.

58. *See* Robert C. Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167 (1981).

59. *See* WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAW: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS (1985).

60. U.S. BUREAU OF THE CENSUS, 1990 CPH-1-32, 1990 CENSUS OF POPULATION AND

Thus, when one takes a legal realist's view of the *potential* in inclusionary zoning, we can see the very considerable positives, and we must be careful not to discard the baby with the bath. And that leads to a broader point. The embrace of mandatory inclusionary zoning, after the very tepid remedial approach taken by the court in *Mount Laurel I* cases,[61] was a signal aspect of the second *Mount Laurel* opinion, because it was a realistic remedy that convinced municipalities that the constitutional mandate had to be obeyed. Mandatory inclusionary zoning was a quintessentially legal realist decision by the New Jersey Supreme Court. As late as 1975, at the time of *Mount Laurel I*, it was possible to think of the constitutional obligation in strictly passive terms—desist from the erection of land use barriers, stand out of the way, and other players will be able to successfully tackle the low income housing problem by integrating the suburbs. Hence, the *Mount Laurel I* court could confidently state that municipal subsidies were not constitutionally required.

Hindsight suggests that this was a bit naive. The commitment to public sector subsidies was weakening, even by 1975, and by 1983 it was unmistakably clear that requiring municipalities to do no more than simply "get out of the way" would achieve a hollow victory. The big federal programs were dead or dying, state resources were structurally limited by federalism, and the pent-up demand for middle-class housing was so large that homebuilders could ignore the less profitable low end market.

Driven by the analytic methods of a legal realist, the *Mount Laurel II* court asked what would work,[62] and came to the conclusion that in the absence of other techniques, inclusionary zoning must be employed where it could create a "realistic opportunity." This dramatic shift, from the passive remedies of *Mount Laurel I* to the active requirement of *Mount Laurel II* went essentially unexplained by the court.

An explanation is required. For governmental actors to have an affirmative constitutional obligation to do something, there must be a constitutional right driving that obligation. Chief Justice Wilentz asserts rather blandly in *Mount Laurel II* that the constitutional basis of that decision "remains the same" as that of *Mount Laurel I*,[63] but that simply

---

HOUSING, SUMMARY POPULATION AND HOUSING CHARACTERISTICS, NEW JERSEY; CPH-1-8 (Connecticut), CPH-1-34 (New York). (Data summaries and calculations available from the author.)

61. *See Mount Laurel I*, 456 A.2d at 734 ("Courts do not build housing nor do municipalities. That function is performed by private builders . . . .").

62. For a characterization of the Court's "legislative" approach when it heard oral argument in *Mount Laurel II*, see Payne, *supra* note 6, at 899-902.

63. *Mount Laurel II*, 456 A.2d at 415.

is not true.

I suggest that *Mount Laurel II* recognizes (creates, its critics would say) a constitutionally protected right of access to shelter, albeit a significantly qualified right. One cannot fairly read *Mount Laurel II* as requiring the government to be the provider of last resort for any citizen in need of shelter, but one can read the decision as requiring that governments (the state government as well as its constituent municipalities) do all that is within the ambit of their powers to ameliorate suffering. Inclusionary zoning is something that governments can do; experience demonstrates that it is possible to use land use controls to reserve a share of private economic activity for the benefit of the poor, and because it is possible, the "do all that you can do" principle requires that it in fact be done. From the "realistic opportunity" standard of *Mount Laurel I*, *Mount Laurel II* subtly shifts to a "realistic effort" standard.

We usually think of doctrine and rule being the province of the formal lawgivers, the courts and legislatures, with legal realists (and their deconstructionist cousins) following behind, saying that it is not so. The singular aspect of the second *Mount Laurel* opinion is the court's seizure of the realist initiative, reshaping doctrine to fit what works, and in the process, albeit *sotto voce*, fashioning what is in effect a new constitutional right.

This leads to the final irony in the string of ironies I have been noting in this commentary. The court's realist approach forged new constitutional doctrine, and out of that abstract doctrine comes the antidote to at least some of the problems that I have been sketching here from a legal realist's perspective. Properly understood, I suggest the correct "rule" of *Mount Laurel II* is not the rule of inclusionary zoning which leads to racial segregation and serious underachievement. Rather, inclusionary zoning is simply one aspect of the "do everything you can do" principle that is the true lesson of *Mount Laurel II*. COAH's rules should be revised accordingly.

First, there is an underlying question that must be confronted. Although I did not emphasize this point earlier, implicit in the criticism that the present fair share rules favor inclusionary zoning solutions (and excuse compliance where inclusionary zoning cannot or will not work) is the premise that "fair share" itself is part of the problem.

Consider the genesis of "fair share" for a moment. In Justice Hall's *Mount Laurel I* opinion, it is almost a throwaway line, a loose verbal formulation of the ethical principle that exclusionary municipalities abuse the public trust by not acting "fairly." Drawing on the unhappy lessons of noncompliance after *Mount Laurel I*, *Mount Laurel II* converted the fair share requirement into a *numerical* obligation, not so much, I think,

because it thought "fairness" could be quantified, but because it recognized that only a quantified obligation would destroy the incentive for avoidance and endless litigation of "soft" terms.

The court was clearly right about quantified obligations and they did work but, as I have traced above, we were all sidetracked by the inclusionary zoning approach. The trick is to hold to the principle of fair share, and of *quantified* fair share, without bogging down in overuse of inclusionary zoning.

The idea of "growth share" is one way to do that. It draws in part on one of Norman Williams' greatest insights, although he was then writing in a context very different from what I am talking about here, and I do not tax him with any commitment to the growth share idea itself. In *The Three Systems of Land Use Control*,[64] he observed that formal rules are at best a partial determinant of how land will actually be managed. Of at least equal importance, he argued, are the decisions about how land uses are taxed, and about how infrastructure is developed.

Extrapolating from this idea, I think it is also obvious that the process of land development is much too complex to be reduced to a formula. Yet that is what the inclusionary-based "fair share" formula does. We give each municipality a number, and then we press it to permit actual development (the "realistic opportunity") to achieve some or all of that number. No planner would approach growth planning this way but for the *Mount Laurel* mandate.

I suggest that land development policies should be separated from fair share housing policies. The former should be determined by whatever procedures the states choose: New Jersey's State Development and Redevelopment Plan,[65] Oregon's growth boundaries,[66] Vermont's Act 250,[67] or Norman Williams' "three systems."[68] If a community chooses to grow, so be it, but equally so if it chooses not to grow (it is the effect of the "three systems" that convinces me that not too many communities will be able to avoid growth completely, even if they espouse such a policy). Fair share housing policies would kick in only after the commitment to growth has been made. A share of that growth (hence, "growth share") would be earmarked for social housing goals.

---

64. Norman Williams, Jr., *The Three Systems of Land Use Control (Or, Exclusionary Zoning and Revision of the Enabling Legislation)*, 25 RUTGERS L. REV. 80 (1971).

65. N.J. STAT. ANN. § 52:18A-196 (West 1995).

66. OR. REV. STAT. § 197.225 (1991).

67. VT. STAT. ANN. tit. 10, § 6001 (1993).

68. *See generally* Williams, *supra* note 64.

This is not the place for a detailed exploration of the growth share approach, although this is an ongoing project of mine. Suffice it to say that *all* growth, residential and non-residential, would trigger a growth share obligation. No individual unit of growth (a two lot subdivision, for instance, or a five store strip mall, or the eighteen unit luxury development in Littleton) would necessarily have to set aside an inclusionary component or the cash equivalent. Instead, each increment of growth would trigger an accumulating *numerical* obligation to provide a proportionate amount of lower income housing. Periodically, the municipality would be required to account to COAH (or a court) as to what its plans are for meeting this obligation. In the absence of a plan no growth would be allowed. None of this turns on vacant, developable land, or the opportunity for inclusionary developments. If there is room for other forms of growth, then by definition there is room for *Mount Laurel* compliance, and the town would have to get creative to figure out solutions that are not land intensive.[69]

The growth share approach makes for better planning, because the numerical *Mount Laurel* obligation attaches *after* the planning decisions (sound ones, we would hope) have been made, rather than before. It is also politically astute, because it piggybacks the *Mount Laurel* requirement on decisions that the local citizenry has already made for itself. How can a town such as my hypothetical Littleton[70] defend its opposition to creating *Mount Laurel* housing when it has just finished approving other forms of growth, except on the immoral ground of disliking poor people? Because it could be enforced by giving objectors standing to halt development if the town does not have a growth share plan in place, it would create a new pool of potential plaintiffs and might lure public interest groups back into the fray because the cost/benefit ratio would be in their favor.

Yes, the "paper" numbers, the ones COAH loves so much, would not initially be as high as they are now. But, I predict, the actual results would be better. A state that in a good year issues 40,000 or 50,000 residential building permits and permits for 5000 or so non-residential developments worth about a billion and a half dollars,[71] ought to be able to achieve more than 2000 or 3000 *Mount Laurel* units a year. In the

---

69. One that was used successfully in the part of the *Urban League* litigation involving Plainsboro Township, which did not want to permit additional new construction (although it had plenty of room), was to use development fees on commercial development along a busy highway corridor to finance a housing trust fund that subsidizes the difference between market rents and *Mount Laurel* levels in rental apartments in the community.

70. *See supra* pp. 679-80.

71. NEW JERSEY DEPARTMENT OF LABOR, NEW JERSEY BUILDING PERMITS, SUMMARY 1991, Table 1 at 3 (residential) and Table 15 at 49 (non-residential).

heady stew of legal doctrine and legal realism that has characterized the *Mount Laurel* process these many years, growth share would achieve the ultimate merger of abstract constitutional theory with the *realpolitik* of land use controls whose understanding has been Norman Williams' life work.