INCLUSIONARY ZONING: THE EVOLUTION OF PRESENT-DAY MOUNT LAUREL

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Inclusionary Zoning: The Evolution of Present-Day *Mount Laurel*

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I. Abstract

This essay analyzes the present-day effect of the prominent New Jersey Supreme Court Mount Laurel I and II cases on inclusionary zoning. The Mount Laurel decisions, which initiated the provision of affordable housing to low-income New Jersey residents, remain influential in current local legislation. Today, the Mount Laurel Doctrine continues to encourage the development of affordable housing through legislative initiatives designed to satisfy both the constitutional rights of developers as well as the needs of local, low-income families.

II. Introduction: Inclusionary Zoning

The attempt to solve the affordable housing crisis across the nation is not a new challenge. No single solution has prevailed as significantly more successful than another, despite a broad range of ideas and efforts. City planners and local government officials have begun to recognize that a paucity of housing affordable to low- and moderate-income families affects more than those families, but the entire community through increased traffic congestion, crime in dilapidated neighborhoods and even racial segregation. Admittedly, regional differences in population size, market conditions, local and state economics, as well as topical geography create distinct community needs for affordable housing. Developers are less likely to build budgetary units affordable to low-income families when upper-class housing and commercial real estate properties garner abundant profits. Consequently, local governments have attempted to enact mandatory statutes, regulations and local provisions for the purpose
of ensuring an adequate supply of affordable housing in neighborhoods otherwise unavailable to low- and moderate-income families.

One trend which has emerged as a potential success is the application of municipal and county ordinances which mandate that new development projects include a certain percentage of residential units available to moderate and low-income households, known as inclusionary zoning.\(^1\) Inclusionary zoning generally mandates or encourages developers of housing projects, generally of a certain minimal size, to either allocate a certain percentage of their units to low- and moderate-income families, or make payments to government housing authorities to cover the construction costs of affordable housing units.\(^2\) The provisions enacted by local governments are designed to encourage the development of housing units affordable to low-income families through incentives such as “tax abatements, waivers of fees, expedited permitting or subsidies, or waivers of zoning requirements.”\(^3\) Most regulations also establish a maximum value for rental prices and re-sale values as to protect the purpose of the original inclusionary zoning provisions on re-sale.\(^4\)

Specific community needs influence the various elements of inclusionary zoning ordinances dedicated to providing housing affordable to low- and moderate-income families. Components of inclusionary zoning provisions vary greatly among local governments. Municipalities determine the specific components based on the needs of


\(^{3}\) *Id.*

\(^{4}\) *Id.* at 302.
the jurisdiction and the ability of the municipality to implement the provisions. Such considerations include what income levels are considered affordable, how long the units must be “affordable,” what size developments qualify under the ordinance, and whether the developers are in compliance with the ordinance by building actual units off site or by paying a fee, among others.\(^5\)

Inclusionary zoning provisions considering such details have become increasingly popular across the country. Nationwide, over 100,000 low-income housing units are attributed to local inclusionary zoning provisions.\(^6\) California, for example, maintains some of the strongest efforts towards inclusionary zoning provisions. By March 2003, approximately 107 cities and counties in California maintained inclusionary zoning provisions in their local land use policies.\(^7\) Only six percent of these localities report voluntary housing development programs, which have proven less successful at encouraging developers to build affordable units.\(^8\) The state of California requires that localities to adopt a “General Plan” which includes a housing element section that is certified by the Department of Housing and Community Development.\(^9\) Within the General Plan for each locality, each jurisdiction must include a housing element that demonstrates an appropriate amount of land zoned for the projected housing need of all income levels.\(^10\) In 2003, California established the Housing

\(^5\) Michael Floryan, *supra* note 1 at 1052.
\(^6\) *Id.*
\(^8\) *Id.* at 13.
\(^9\) *Id.* at 4.
\(^10\) *Id.* at 17.
Element Working Group to reform California’s housing laws to provide for greater locality incentives, beyond state funding and shelter from potential litigation.\(^\text{11}\)

At the forefront of inclusionary zoning provision is the state of New Jersey. As of 2005, New Jersey maintained up to 20,000 low-income housing units,\(^\text{12}\) 18,500 of which were built within the first 10 years of the creation of the Council on Affordable Housing (COAH).\(^\text{13}\) Currently over 300 municipalities in New Jersey participate in the COAH (low-income housing improvement) process.\(^\text{14}\) Through this process, approximately $120mm has been injected into urban areas of New Jersey, a vast majority of which funded market-rate units in suburban areas.\(^\text{15}\)

Although the purpose of inclusionary zoning plans greatly benefit low- to moderate-income households, a debate exists as to whether such provisions are unfair or even unconstitutional to the developers. Developer advocates maintain that inclusionary zoning provisions, especially those enacted within the Fair Housing Act of 1985\(^\text{16}\) infringe on their Constitutional Due Process rights, as well as their Equal Protection rights. Developers have attempted to establish that the re-zoning of their development property to include affordable housing units was “arbitrary, unreasonable and capricious,” and consequently, in violation of their rights.\(^\text{17}\) Developers have also claimed that a municipality’s favoring of a development bid offer which includes an

\(^{11}\) *Id.* at 1.


\(^{13}\) For a description of the enactment and purpose of the COAH, see 15, *infra*.

\(^{14}\) State of New Jersey Council on Affordable Housing, available http://www.state.nj.us/dca/affiliates/coah/reports/


\(^{16}\) For more on the New Jersey Fair Housing Act of 1985, see 15, *infra*.

affordable housing stipulation may violate the developer’s rights to equal protection of the laws. To combat this argument, the legislation has mitigated the potential for builders to use the remedy as a threat. Should a developer abuse the builder’s remedy process against municipalities to receive higher-density or other beneficial permits, without the intent to build affordable housing, the developer will be defeated in any subsequent Mount Laurel litigation.\textsuperscript{18}

In addition to developers, inclusionary zoning provisions face substantial skepticism and outright hostility from value-conscious property owners affected by the nearby development of low-income housing projects. Both citizens and city planners have asserted complaints against excessive density and congestion, the de-construction of a small-town atmosphere, as well as the spoiling of the suburban character of their neighborhoods. While courts have stated that compliance with inclusionary zoning provisions should not drastically alter the landscape of a community or “radically transform the municipality overnight,”\textsuperscript{19} finding equilibrium between the need for affordable housing and the desire to maintain the integrity of a neighborhood remains a struggle facing local governments and the COAH. The Council has attempted solving the conundrum by capping the number of overall affordable housing units required by a municipality, however courts in New Jersey have overturned the cap, citing that the cap was “arbitrary and unreasonable.”\textsuperscript{20}

\textsuperscript{19} \textit{Southern Burlington County NCAPP v. Mount Laurel Tp.}, 456 A.2d 390, 420 (N.J., 1983) (\textit{Mount Laurel II}).
Courts have reached various opinions on the validity and construction of inclusionary zoning provisions. Overall, courts have generally supported the efforts of municipalities to persuade the development of affordable housing projects. In New Jersey, the Supreme Court has attempted to remain consistent regarding its high standard towards supporting compelling inclusionary zoning provisions, after the groundbreaking, although controversial, *Mount Laurel I* and *II* decisions.

**III. History of Mount Laurel**

New Jersey is a state at the forefront of successfully utilizing inclusionary zoning provisions to increase affordable housing statewide. The Mount Laurel Doctrine emanates from the New Jersey Supreme Court *Mount Laurel I* (1975) and *II* (1983) decisions, which mark the first judicial opinions that successfully established the validity of, and obligation towards, inclusionary zoning provisions to increase affordable housing statewide. The *Mount Laurel I* and *II* cases represent two historical decisions made by an activist court dedicated to the notion of the court’s essential role in enacting social change. New Jersey’s judicial system, through a strenuous crusade, addressed a state-wide crisis regarding affordable housing, eventually solidifying a stringent process using methods “conventionally understood as legislative and executive functions,”21 which drastically increased the production of affordable housing units.

*Mount Laurel I* began with the initiation of a class-action lawsuit brought by the NAACP against the town of Mount Laurel when it refused to change its minimum half-acre zoning ordinance, effectively eliminating the proposed development of low-income

housing. The plaintiffs claimed that the township of Mount Laurel was abusing the state’s delegation of zoning power given to the municipality by not zoning the land to benefit all Mount Laurel constitutes equally. The Mount Laurel decisions began with the invalidation of a zoning ordinance by a New Jersey District Court on the grounds of economic discrimination that was appealed directly to the New Jersey Supreme Court.

In the case of Mount Laurel I, in a unanimous decision, the New Jersey Supreme Court ruled that zoning ordinances which make it physically and economically impossible for low- and moderate-income families to afford housing are unconstitutional. Justice Frederick Hall relied on a constitutional argument which asserted that a local government’s police power is the power of the state to protect the general welfare of its inhabitants. A land use ordinance that aids one group of inhabitants while harming the general population is unconstitutional under the state’s obligation to equally protect all its citizens. Justice Hall effectuated this responsibility of the municipalities of New Jersey:

“It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.”

\[22\] Charles M. Harr *supra* note 18 at 16.
\[25\] *Mount Laurel I* at 179.
Although the opinion’s language appears to aggressively push local jurisdictions towards adopting comprehensive plans to address the shortage of affordable housing, the decision did not supply strict guidelines required of local governments. Consequently, the court relied on the initiative of municipalities to develop their own plans to overcome the local affordable housing crisis, which eventually proved to be a shortcoming of the court in the accomplishment of its overall ambition.

After the decision in Mount Laurel I, the reliance on local municipalities to develop their own policies to construct affordable housing plans led generally to local governments asserting passive measures, such as declaring exclusionary zoning ordinances unconstitutional. 26 Local legislatures attempted to comply with the Mount Laurel I decision by invalidating exclusionary zoning ordinances such as large-lot only residences or single-family only residences.

Prior to the decision of Mount Laurel II, two Supreme Court cases tested the strength of the court’s ruling in Mount Laurel I. The case Oakwood at Madison v. Township of Madison held that zoning ordinances must permit the building of a fair number of residential units at the lowest feasible cost. 27 This was a retreat from its holding in Mount Laurel I that loosened a township’s Mount Laurel obligations to “any approach that could be said to prove rough for an appropriate physical area to accommodate extralocal needs.” 28 Oakwood shifted the requirement originally established by Mount Laurel I from a mandate to build low-cost housing, to a mandate

26 John Payne, supra note 24 at 559.
28 Charles M. Harr, supra note 18 at 34.
to provide land for the lowest-possible cost housing, which no longer assured that low-income housing would truly be built.\textsuperscript{29}

In the case of \textit{Pascack Association Ltd. V. Mayor of Washington}, the Supreme Court further limited the holding of \textit{Mount Laurel I} by asserting that the obligations to comply with the affordable housing requirements of \textit{Mount Laurel I} applied only to “developing communities.”\textsuperscript{30} The court deferred to the legislature to determine the “requirements of the general welfare,” stating that the role of the court was limited only to examining whether the ordinance is arbitrary or unreasonable.\textsuperscript{31} Both \textit{Oakwood} and \textit{Pascack} demonstrated the court’s lack of confidence in the validity of inclusionary zoning ordinances at the time of the decision by refusing to solidify explicit measures required of municipalities.

Neither \textit{Oakwood} nor \textit{Pascack Association Ltd.} gave hope to the proponents of mandatory inclusionary zoning ordinances who believed that municipalities should compel developers to allocate a certain percentage of units available to low- and moderate-income buyers and renters. Instead, the court relied “upon the good faith of the defendant municipalities” to uphold the measures of \textit{Mount Laurel I}.\textsuperscript{32} Local jurisdictions claimed their compliance with \textit{Mount Laurel I} simply by enacting less restrictive ordinances which allowed, but did not mandate, the development of less expensive housing.\textsuperscript{33} As a result, the lower courts deferred the determination of the need for affordable housing to local legislatures, which effectuated an unsubstantial

\textsuperscript{29} \textit{Id.}
\textsuperscript{31} \textit{Id.} at 13.
\textsuperscript{32} Kenneth Meiser, \textit{supra} note 15 at 9.
\textsuperscript{33} John Payne, \textit{supra} note 24 at 559.
change resulting in the development of hardly any affordable housing.\textsuperscript{34} Until the historic decision of \textit{Mount Laurel II}, the New Jersey Supreme Court incorrectly anticipated that local jurisdictions would enact such provisions as part of their duty to serve the general welfare.

In its second decision eight years later, a series of six major lawsuits challenging local zoning ordinances as prejudiced towards low-income buyers were combined to create \textit{Mount Laurel II}. The New Jersey Supreme Court clarified the obligation of all developing municipalities to provide an opportunity for low-income families to afford housing through inclusionary zoning provisions.\textsuperscript{35} The Supreme Court justified its opinion on a moral foundation, claiming that the obligations of the government rest on the concept of “fundamental fairness in the exercise of governmental power.”\textsuperscript{36} The court determined that because the state controls the use of its land, it couldn’t favor the use of the land towards those of a greater economic status.\textsuperscript{37} The court held that the rich and the poor must benefit from stringent governmental land use planning and consequently, low-income families are entitled to the same benefits.\textsuperscript{38}

The Mount Laurel Doctrine requires that all municipalities in New Jersey address the regional need for low- and moderate-income housing by providing a realistic plan for the construction of affordable residential units.\textsuperscript{39} The court placed the impetus on state planners within the executive department to develop a comprehensive

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\textsuperscript{34} Charles M. Harr, \textit{supra} note 18 at 32.
\textsuperscript{35} Mount Laurel II at 442.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Kenneth Meiser, \textit{supra} note 15 at 10.
\textsuperscript{39} Kenneth Meiser \textit{supra} note 15 at 9.
\end{flushleft}
plan to provide a fair share of affordable housing. This decision was not based on a theoretical analysis of the constitutional obligation of a government to provide housing for all its constituents; rather, it was based on the underlying fairness owed to low-income families in need of housing.\footnote{Charles M. Harr, \textit{supra} note 18 at 37.} Justice Hall based his opinion on the notion that “society could no longer isolate itself from the evils of concentrating poverty in the urban ghettos of the metropolitan area, and could no longer shirk responsibility for the future of the nation’s cities, suburbs, and countryside.”\footnote{\textit{Id.} at 52.} Consequently, the decision in \textit{Mount Laurel II} was controversial for its ambitious judicial ruling, which proactively established the duty of municipalities to create affirmative measures designed to battle the scarcity of affordable housing.

This justification paved the way for the court to establish an aggressive set of remedies to battle the lack of sufficient affordable housing. The decision examined the affordable housing needs of each municipality, and provided a formula to remedy the deficit based on the examination.\footnote{\textit{Mount Laurel II} at 401.} The decision of \textit{Oakwood} was essentially suspended, as the court no longer could rely on the good faith efforts of a jurisdiction to provide low- or moderate-income housing. A municipality was in compliance with \textit{Mount Laurel II} if it provided “a realistic opportunity for the construction of its fair share of lower income housing,” which could not be satisfied by meaningless amendments or paper compliance.\footnote{Kenneth Meiser, \textit{supra} note 15 at 10.}

“Mandatory set-asides can be rendered ineffective if a developer builds all its conventional units first and then reneges on the obligation to

\begin{footnotesize}
\begin{enumerate}
\item Charles M. Harr, \textit{supra} note 18 at 37.
\item \textit{Id.} at 52.
\item \textit{Mount Laurel II} at 401.
\item Kenneth Meiser, \textit{supra} note 15 at 10.
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build the lower income units. To avoid this problem, municipalities and courts should require that a developer phase-in the lower income units as the development progresses. That is, if a developer is required to set aside 20 percent of a development for lower income units, 20 percent of each stage of the development should be lower income, to the extent this is practical.  

The court validated the use of inclusionary zoning provisions through its language that a municipality must maintain affirmative inducements to initiate the building of affordable housing units. Through a demand that municipalities take affirmative steps towards the genuine development of affordable residential housing units, the court urged both local governments as well as the State Legislature to take assertive action.

Government officials and land use planners immediately felt and reacted to the impact of Mount Laurel II. Land use planners in local municipalities begin to alter their plans to accommodate the demands of Mount Laurel II, providing for multiple changes in zoning to include mandatory affordable housing units. Over 125 lawsuits were filed within two years of the decision. The lawsuits in such cases were generally brought by developers seeking remedies as payment for their compliance with the specific affordable housing allocation, despite the fact that the court in Mount Laurel I instructed builders such remedies would rarely be granted. Immediately following

44 Mount Laurel II at 447.
45 Id.
47 Kenneth Meiser, supra note 15 at 10.
48 Id.
the decision of *Mount Laurel II*, builders attempted to take advantage of the system by applying for remedies for the sole purpose of gaining higher density permits.\(^{49}\)

As part of the opinion in *Mount Laurel II*, the builder’s remedy authorized builders to build additional market-priced units over the maximum allowed by the zoning ordinance if they promised to build low-income units.\(^{50}\) The establishment of the builder’s remedy, a powerful tool to encourage private builders to develop low-income properties, incentivised builders to include affordable housing units in their bid offers.\(^{51}\) “The ‘builder’s remedy’ is a device that rewards a plaintiff seeking to construct lower income housing for success in bringing about ordinance compliance through litigation,”\(^{52}\) such as increased density permits. Designed to provide an equitable remedy for builders affected by the township’s Mount Laurel obligations, builder’s remedies have helped settle claims by a builder against a municipality.\(^{53}\) Although builder’s remedies have been a useful tool to mitigate the negative affect felt by the developers facing the Mount Laurel obligation established by their municipality, courts have determined that not all developers are automatically entitled to a builder’s remedy.\(^{54}\) A developer is required first to demonstrate that a municipality’s land-use regulation is, in fact, exclusionary, and then must contract to build substantial low-income units before the builder’s remedy will be granted.

\(^{49}\) Charles M. Harr, *supra* note 18 at 39.
\(^{50}\) *Mount Laurel II* at 452.
\(^{51}\) Charles M. Harr, *supra* note 18 at 45.
\(^{52}\) *Mount Olive Complex* at 712.
\(^{54}\) Charles M. Harr, *supra* note 18 at 112.
The New Jersey Supreme Court foresaw abuse of the system and implemented safeguards to mitigate the potential for developers to abuse the builder’s remedy. First, a builder would be defeated by any Mount Laurel litigation if an attempt was made to use the remedy as a negotiation tactic with municipalities.55 Second, an economic analysis of the builder’s remedy outcome details that while developers overall may benefit from the builder’s remedy allowing more dense zoning, in high-density zones, the government bears the cost of infrastructure services which in turn is passed along to the unit owners.56 Consequently, few low-income housing builders are truly willing to develop affordable housing in such areas. Third, luxury unit developers disfavor competition that will result in denser, less valuable properties.57 Finally, through the FHA, municipalities that fall short of their fair-share obligations may create Regional Contribution Agreements (RCAs) which allow a town to pay a neighboring municipality to assume their shortage.58 This voluntary agreement plan has transferred millions of dollars from wealthy suburbs to poor communities in need of affordable housing, as well as permitted the COAH to enact rigorous affordable housing standards.59

In reaction to the extensive litigious claims resulting from Mount Laurel II, the New Jersey State Legislature reacted swiftly to the decision of the Supreme Court,

55 Id. at 45.
57 Id.
59 Id. at 28.
enacting the New Jersey Fair Housing Act of 1985.\textsuperscript{60} In its enactment, the legislators attempted to replace the close supervision of the courts over local zoning with its own administrative agency, the Council on Affordable Housing (COAH), which would focus more heavily on specific, jurisdictional needs regarding fair-share housing. The Act codified the intent of the \textit{Mount Laurel} decisions by explicitly stating that each jurisdiction had an obligation to provide realistic opportunity for housing for low- and moderate-income families.\textsuperscript{61} Each municipality would maintain a housing element as part of their fair share housing plan “designed to achieve the goal of access to affordable housing to meet present and prospective housing needs, with particular attention to low- and moderate-income housing.”\textsuperscript{62}

The Fair Housing Act established the Council on Affordable Housing, which is responsible for administering a system of voluntary compliance with \textit{Mount Laurel II} for municipalities certifying their plans with the COAH.\textsuperscript{63} Once a plan is approved by the COAH, a municipality is relieved of the possibility of litigation in the Superior Court.\textsuperscript{64} The COAH maintains effectively the same court-developed tests to determine the number of affordable housing units needed by each region, and whether the municipality’s plan is in accordance with its obligations.\textsuperscript{65} All pending cases after the \textit{Mount Laurel II} decision that dealt with a municipality’s inclusionary zoning provisions, or lack thereof, which wouldn’t be manifestly unjustified by the transfer,

\textsuperscript{63} John M. Payne, \textit{supra} note 46 at 367.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
were referred to the COAH.\textsuperscript{66} The court gave extreme discretion to the Council, which continues to provide administrative guidance, approve plans in accordance with \textit{Mount Laurel}, and promote effective processes for the building of affordable housing units today.\textsuperscript{67}

Immediately following the enactment of the Fair Housing Act, the New Jersey Supreme Court faced the question of the Act’s constitutionality. In the case of \textit{Hills Development Co. v. Township of Bernards}, the court upheld the Act as an appropriate legislative reaction to the Mount Laurel Decisions, affirming the COAH’s unilateral power to determine each jurisdiction’s compliance with its Mount Laurel obligations:

“The basic power of the Council is to grant or withhold substantive certification; the Council also has the further power to impose conditions on its grant and the implied power to accelerate its denial. We believe that the Council may use its power to grant or deny substantive certification in a multitude of ways in order to accomplish its mission of bringing about statewide compliance with the Mount Laurel obligation. That power is considerable, since denial of substantive certification may result in Mount Laurel litigation brought by a builder, a consequence that the Act was designed to avoid and that most municipalities want to avoid.”\textsuperscript{68}

Critics have identified some negative aspects of the COAH. One criticism asserts that the COAH does not have the ability to force municipalities to submit a fair-share housing plan. The Fair Housing Act does not compel municipalities to expend funds towards providing affordable housing units; they are only obligated to establish realistic provisions for fair-share low- and moderate-income housing units.\textsuperscript{69} The

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  \item \textsuperscript{66} Kenneth Meiser, \textit{supra} note 15 at 10.
  \item \textsuperscript{67} \textit{Id}.
  \item \textsuperscript{68} \textit{Hills Development Co. v. Township of Bernards}, 510 A.2d 621, 650 (N.J. 1986).
  \item \textsuperscript{69} State of New Jersey Council on Affordable Housing, available \texttt{http://www.state.nj.us/dca/affiliates/coah/about/}
\end{itemize}
COAH relies on the municipalities to submit their plans voluntarily, which originally the legislature believed would suffice, assuming municipalities would be fearful of builders’ remedy suits.\(^{70}\)

To counter this criticism, the COAH publicizes the fact that as of the end of 2010, over 300 New Jersey municipalities participate in the COAH inclusionary zoning provisions process.\(^{71}\) Local jurisdictions that do not submit their inclusionary zoning plans for the purpose of accommodating the development of low- and moderate-income units subject themselves to lawsuits from both local constituents who believe the municipality has not complied with the Mount Laurel Doctrine, and developers who contend that the inclusionary zoning provisions established by the municipality violate their equal protection rights. In 2002, the New Jersey Supreme Court affirmed this requirement upon the municipalities, stating “thus, what appears at first to be simply an option available to municipalities is more realistically a procedure that practically all municipalities with a significant Mount Laurel obligation will follow, both to determine and to satisfy their Mount Laurel obligation.”\(^{72}\)

**IV. Application of Mount Laurel**

Private developers and buyers have contested the inclusionary zoning provisions enacted by local New Jersey jurisdictions, disputing their constitutional authority.\(^{73}\) Developers use facial attacks on inclusionary zoning ordinances, arguing that the

\(^{70}\) Kenneth Meiser, *supra* note 15 at 11.

\(^{71}\) State of New Jersey Council on Affordable Housing, available [http://www.state.nj.us/dca/affiliates/coah/about/](http://www.state.nj.us/dca/affiliates/coah/about/)


mandate to allocate part of their development project to low- and moderate-income housing violates their constitutional right to equal protection of the laws.⁷⁴ However, *Mount Laurel* established a strong presumption in favor of zoning ordinances that encourages or even mandates the inclusion of affordable housing. Since the *Mount Laurel* decisions, courts in New Jersey have generally upheld inclusionary zoning ordinances through the police power of local governments. Municipalities rely on this Constitutional police power to enact and enforce ordinances that support the community’s public health, safety, and welfare.⁷⁵

Local zoning ordinances that are protected by the government’s interest in community welfare will generally be upheld.⁷⁶ *Mount Laurel II* established that inclusionary zoning is a use of the government’s police power that regulates land use for the benefit of the entire community by giving all members of the community the opportunity to afford housing.⁷⁷ Inclusionary zoning provisions enacted to benefit the community as a whole by allowing all members of the community the opportunity to afford housing “enjoy a strong presumption of constitutionality.”⁷⁸ A heavy burden of proof rests upon a developer attacking an inclusionary zoning ordinance.⁷⁹ After the enactment of the Fair Housing Act of New Jersey, the New Jersey Supreme Court held in *Brown v. City of Newark* that if a rational relationship between an inclusionary zoning ordinance and a legitimate governmental interest exists, despite hardship placed

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⁷⁷ Id.
⁷⁹ Id.
on a developer or buyer, the ordinance is not in violation of the equal protection clause.\textsuperscript{80}

The presumption favoring zoning ordinances is challenging to overcome. A developer’s chances of winning an attack increase when the developer demonstrates that the effect of the ordinance excludes a legitimate alternate use.\textsuperscript{81} There is a presumption in favor of a zoning ordinance’s validity, unless the petitioner demonstrates that the zoning ordinance has no “rational, reasonable, or conceivable basis related to the public interest.”\textsuperscript{82} A claimant asserting a facial challenge against a zoning ordinance must demonstrate that those administering the ordinance have applied the ordinance unconstitutionally, a difficult challenge to overcome.\textsuperscript{83} Consequently, the developer maintains the burden of proof to demonstrate that the zoning ordinance not only precludes the developer from a legitimate use of the land, but bears no rational relationship to serve the public.\textsuperscript{84}

Municipalities that impose a range of provisions designed to increase the capability of low- to moderate-income families to afford housing don’t violate the equal protection of land developers, so long as they are rationally related to legitimate governmental interests.\textsuperscript{85} In a case immediately following the decision of \textit{Mount Laurel II}, the New Jersey Supreme Court was faced with the issue of whether the township of Bedminster properly utilized its police power abilities by adopting inclusionary zoning

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\bibitem{80} Brown v. City of Newark, 552 A.2d 125, 130 (N.J. 1989).
\bibitem{81} Id.
\bibitem{82} Jerold S. Kayden, Land Use Regulations, Rationality and Judicial Review: The RSVP in the Nollan Invitation (Part I), 23 URBLAW 301, 308. (Summer 1991).
\bibitem{83} Home Builders Ass’n. of Northern California v. City of Napa, 90 Cal. App. 4\textsuperscript{th} 188, 194 (1\textsuperscript{st}. Dist. 2001).
\bibitem{84} Id.
\end{thebibliography}
ordinances to develop affordable housing units that radically altered development projects in the township in *Allan-Deane Corp. v. Bedminster Tp.*\(^6\) The court held that such police power ordinances may include the “consideration of such matters as subsidies, inclusionary zoning devices, incentive zoning, mandatory set-asides, and resale controls” as realistic measures for the construction of low- to moderate-income housing.\(^7\) Applying *Mount Laurel II* to its decision, the Court held that in determining whether a township has complied with its fair share obligation, a court may evaluate “site suitability, use of affirmative measures to encourage lower cost housing, alternative compliance mechanisms, project feasibility, and any intangible factors which may have real influence upon development of lower income housing.”\(^8\)

Townships facing a radical transformation as result of the fulfillment of the obligation towards the development of affordable residential units may implement the phasing in of the units over a reasonable period of time.\(^9\) The court in *Allan-Deane Corp* took on the role of determining the capacity of the township to absorb the radical change necessary to fulfill the development of affordable-housing units required by *Mount Laurel*.\(^10\) A court may consider the existing growth rate of a municipality and the projected growth rate as result of the builder’s remedies to comply with the obligation, in order to determine whether phasing in of the low-income housing units is

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\(^7\) *Id.* at 63.
\(^8\) *Id.* at 62.
\(^9\) *Id.*
\(^10\) *Id.* at 61.
appropriate. However, the concept of phasing-in should be used sparingly, so as to not avoid altogether a municipality’s Mount Laurel obligations.

After two almost decades, the New Jersey Supreme Court again stayed true to its decision in Mount Laurel II, reaffirming the duty of each municipality to actively engage in realistic planning for the development of affordable housing. In the case of Toll Brothers, Inc. v. Township of West Windsor, the court declared that the municipality’s plan to almost exclusively use multi-family housing to fulfill their Mount Laurel obligation was invalid. The court clarified what measures taken by a township constituted a “realistic opportunity” for low-income properties to be built. The court found that if a town issues zoning ordinances that allow a type of housing only available to a fraction of the town’s population, the town has failed to satisfy its affordable housing requirement. Similarly, a municipality may not assign the development of low-income housing units to sites that are not economically or physically viable for such development due to the extreme costs of infrastructure development. While permitting flexibility in the municipality inclusionary zoning plans by conceding that market forces play an integral role in their development, the court solidified the concept that regardless of such extenuating circumstances, each municipality is obligated to effectuate real, not illusory, development plans.

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91 Id.
92 Id. at 60.
93 Toll Brothers Inc. at 81.
94 Mount Laurel II at 442.
95 Id. at 85.
96 Id. at 87.
97 Id. at 85.
The New Jersey Supreme Court has also upheld the use of fees charged to developers in lieu of, or used concurrently with, inclusionary zoning provisions. In *Holmdel Builders Ass’n v. Township of Holmdel*, the court upheld local ordinances that mandate fees on developers who design commercial and non-inclusionary residential property, used by the government towards affordable housing projects.98 This fee establishes a reasonable incentive to the real estate developers, even if the development plan is not facially exclusionary, to include affordable housing in their development project.99 The court limited its holding by noting that the imposition of such fees required approval by the COAH, which would also effectuate the authority of the municipality to promulgate rules defining the appropriate standards and guidelines for the imposition of the fees.100 The municipality applies the fees to the development of local low-income housing units. Consequently, the fees were not arbitrary and bore a true, rational relationship to the development of low-income housing.101

After the *Mount Laurel II* decision in New Jersey, other courts around the nation faced the affordable housing crisis through litigation regarding their own municipal zoning issues. No states had adopted legislation establishing affirmative duties on municipalities to address the lack of affordable housing; however, courts began declaring exclusionary zoning ordinances enacted with discriminatory purposes invalid under the equal protection clause.102 The Southern District of New York held that a municipality that established a discriminatory zoning ordinance based on economic or

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99 *Id.* at 289.
100 *Id.* at 290.
101 *Id.* at 286.
New York courts will invalidate ordinances that do not consider the regional affordable housing needs of a community or that simply qualify multi-family dwellings as affordable housing. A zoning ordinance bears the burden of giving adequate regard to local and regional housing needs.

Following New Jersey’s lead in reaction to numerous litigious claims regarding inclusionary zoning and municipal affordable housing provisions, some state courts relied exclusively on the decisions of Mount Laurel in their opinions. In New Hampshire, the court again relied on the general welfare provision within its state constitution, claiming that a government must protect the general welfare of all its citizens, regardless of their economic status. Although the court stopped short of extending its decision to that of Mount Laurel I, the court made a sedulous reference to the decision, squarely declaring the town’s exclusionary zoning ordinances, which provided for no affordable housing units, created a minimum acreage level per residential unit and allowed only a small number of multi-family developments within the area, constitutionally invalid.

California has initiated similar inclusionary zoning ordinance plans. In the case of Home Builders Ass’n of Northern California v. City of Napa, the Court of Appeal, First District in California upheld a zoning ordinance which required that ten percent of all new residential housing developments be ‘affordable.’ The court reasoned that

104 Id.
105 Id. at 92.
107 Id.
108 Home Builders Ass’n. of Northern California at 188.
the inclusionary zoning requirement met its burden of fulfilling a legitimate state interest in creating housing for low and moderate-income families. The requirement of developers to include affordable housing in ten percent of all newly constructed units did substantially advance the legitimate state interests, the standard established by Nollan v. California Costal Comm’n in determining whether a zoning ordinance constituted a governmental “taking” of property:

“Second, it is beyond question that City's inclusionary zoning ordinance will “substantially advance” the important governmental interest of providing affordable housing for low and moderate-income families. By requiring developers in City to create a modest amount of affordable housing (or to comply with one of the alternatives) the ordinance will necessarily increase the supply of affordable housing. We conclude City's ordinance ‘substantially advances legitimate state interests.’”

The ordinance was upheld as actively advancing a legitimate governmental interest in providing housing for all municipal inhabitants.

In the case of Commercial Builders of Northern California v. City of Sacramento, the Ninth Circuit upheld a fee placed on all commercial developers used to address the affordable housing crisis of Sacramento. The ordinance was upheld on the finding that an essential nexus existed between the need for affordable housing and the non-residential development. Because the fee was derived from paying the social cost of non-residential development, the fee was not unconstitutional. The court concluded that a nexus existed between the development of commercial property and the cost of the influx of low-income workers to the building grounds, who could not

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109 Id. at 195.
110 Id. at 195-6.
112 Id. at 874.
113 Id.
afford to live nearby. Consequently, a fee owed by the developers of the commercial property used towards the development of affordable housing in the municipality was appropriate and constitutional.\textsuperscript{114}

The New York courts established the Mount Laurel Doctrine as precedence, poignantly applying the New Jersey opinion to the facts of its own case.\textsuperscript{115} The court in \textit{Asian Americans for Equality} wholly accepted the Mount Laurel Doctrine, and even promoted stronger enforcement measures, actively asserting the government’s obligations towards the creation of affordable housing:

“In terms of zoning for low-income housing…the evidence thus suggests that New York's attempts to serve its peoples' general welfare, particularly the needs for adequate housing by persons of low-and-middle-income, by focusing on whether there exists a properly balanced and well ordered plan for the community, has been unsuccessful in promoting these peoples' interests…It is my opinion that it is now appropriate to adopt the Mount Laurel Doctrine as the law of New York.”\textsuperscript{116}

Relying on the Mount Laurel Doctrine, the plaintiffs attempted to emphasize that a zoning ordinance for expensive, high-rise condominium buildings in a dilapidated area of Manhattan unconstitutionally precluded moderate and low-income families from living in their own neighborhood, in direct contrast to the purpose of the Mount Laurel Doctrine.\textsuperscript{117} The plaintiffs did not prevail in their attack on the validity of the permit issued to the condominium buildings. The court determined that the zoning ordinance was constitutional as it was part of a larger plan of the entire city which was responsible for the general welfare of all constituents, not only those of the

\textsuperscript{114} Id. at 875.
\textsuperscript{115} See \textit{Asian Americans for Equality v. Koch}; 72 N.Y.2d 121 (N.Y. 1988).
\textsuperscript{117} \textit{Asian Americans for Equality} at 135.
Chinatown neighborhood.\textsuperscript{118} However, although the local residents were unsuccessful, the opinion initiated the incorporation of the Mount Laurel Doctrine into states beyond New Jersey.

Despite the effort of the court in \textit{Asian Americans for Equality}, the question remains in states such as New York, and even some municipalities of New Jersey, whether the municipal administrative responsibilities established by the proactive court in \textit{Mount Laurel} will actually encourage the use of inclusionary zoning. New York remains a state that does not mandate that municipalities utilize inclusionary zoning provisions to address affordable housing issues. However, New York has given builders a density bonus, allowing the builder to develop a greater number of residential units in exchange for the provision of low-income housing, although critics maintain that this provision has stolen the municipality’s opportunity to enact more stringent, inclusionary zoning provisions.\textsuperscript{119} Similarly, in New Jersey, a court upheld a stringent thirty-percent affordable-housing set aside provision established by the Township of Warren, stating that the set-aside and the unit-density level was reasonable to satisfy the mandatory inclusionary zoning requirements.\textsuperscript{120}

\section*{IV. Growth Share Plans}

One relatively recent development in the concept of inclusionary zoning is the introduction of Growth Share plans. Growth Share is defined as “a conceptual

\begin{flushleft}
\textsuperscript{118} \textit{Id.}
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framework for affordable housing construction which requires that for any future market rate development within a municipality, a certain number of affordable units must be constructed.” Growth share plans time the implementation of inclusionary zoning ordinances with market-rate development. The purpose of growth share plans is to create a simpler mechanism for municipalities to determine their need for affordable housing units, basing the measure of necessity on the development of private, non-affordable units.

The Council on Affordable Housing of New Jersey initially attempted to implement the Growth Share guidelines in 2004 as the “Third Round Rules,” which govern affordable housing obligations. The obligation was calculated by combining rehabilitation share (the measure of a municipality's old or run-down housing occupied by low- and mid-income residents), unsatisfied prior round obligation, and Growth Share.” However, the plan was not received well by the proponents of inclusionary zoning measures, nor by urban developers. Critics felt that the Growth Share plan was insufficient to support the inclusionary zoning requirements established by Mount Laurel, while private developers argued that the growth share plan adopted by the COAH was confusing.

121 Jason McCann, supra note 119 at 206.
122 Id.
125 Id.
127 Jason McCann, supra note 119 at 208.
The Coalition for Affordable Housing and Environment (CAHE) filed suit against the COAH, demanding a higher ratio of affordable housing units for every non-affordable housing unit built.\textsuperscript{128} Petitioners argued that permitting municipalities to develop their own growth share projections would allow municipalities to underestimate their need for affordable housing development, thus constitutionally in violation of Mount Laurel.\textsuperscript{129} Ultimately, the Appellate division of the superior Court determined that the ability of a municipality to calculate its own growth would cause a municipality to adopt small fair-share housing plans which would provide insufficient low-income housing, noncompliant with their Mount Laurel obligations.\textsuperscript{130} The New Jersey Appellate Division additionally declared that the growth share plans would be considered unconstitutional if they did not actively address the affordable housing need. Municipalities which implement growth share plans but slow the rate of development of non-affordable housing purposely to halt the obligation to build affordable units have not properly fulfilled their obligation.\textsuperscript{131}

Finding a constitutional balance between the implementation of growth share plans, and the benefits to developers affected by the growth share, may be the best method for the COAH to implement constitutional inclusionary zoning regulations. In order to achieve constitutionality of the growth share plans, municipalities will need more stringent requirements in calculating their projected residential growth. In the COAH’s original growth share plan, municipalities maintained the responsibility to

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\item[\textsuperscript{128}] {\textit{Id.}}
\item[\textsuperscript{129}] {\textit{Id.}} at 209.
\item[\textsuperscript{130}] {\textit{In re Adoption of N.J.A.C. 5:94 and 5:95 By New Jersey Council on Affordable Housing, 914 A.2d 348 (N.J. Super. A.D. 2007).}}
\item[\textsuperscript{131}] {\textit{Id.}} at 381.
\end{itemize}
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calculate their own growth projections and consequently predetermined their own need for affordable housing development. Municipalities could factor into the calculation an estimated number of housing units which would become “affordable” based on the overproduction of non-affordable housing units, a process referred to as “filtering down.” The Appellate court found that this technique left too much discretion to the local municipalities, leaving room for manipulation to avoid further development. COAH would need to demand a greater specificity from each municipality in calculating their projected growth to be in compliance with their Mount Laurel obligations.

The COAH responded to the court’s decision by revising its growth share regulations. The COAH provided each municipality with its own projected affordable housing need calculations for the entire state, thereby nullifying the potential for municipal manipulation in order to avoid the development of affordable housing units. Still, critics note that although the COAH now is in control of the growth share calculation for each municipality in New Jersey, the calculation relies upon on the concept of continual housing growth, a shaky premise on which to rely. Critics also note that a housing scarcity may in fact increase the property demand for exclusive, wealthy housing, eradicating the market for affordable housing units. Additionally,

132 Jason McCann, supra note 119 at 211.
133 Daniel Meyler, supra note 124 at 238.
134 In re Adoption of N.J.A.C. 5:94 and 5:95 By New Jersey Council on Affordable Housing at 375.
135 Daniel Meyler, supra note 124 at 239.
136 Id. at 240.
the premise of growth share relies on an adequate amount of physical space that must also support the requisite amount of infrastructure.\textsuperscript{137}

Proponents of growth share plans have developed various financing methods to push the plans towards success. Advocates have considered requiring municipalities to subsidize the private development of affordable housing.\textsuperscript{138} A municipality may benefit greatly from its investment in the private development of affordable housing units. Growth share plans may also achieve their purpose by not permitting development fees in lieu of on-site affordable housing units to initiate the development of affordable housing units immediately. Such fees may be below the cost of additional affordable units, and at best, only support the potential for the development of affordable housing units, not the initiation of actual construction.\textsuperscript{139}

Proponents of growth share have developed the idea of ‘pure’ growth share. Pure growth share centers upon real-time data to determine yearly a municipality’s obligation to build.\textsuperscript{140} The data would be based on the number of permits issued the previous year. While this method would provide a more precise development determination for each municipality, the development numbers would not be predictable, inevitably creating difficulty in planning.\textsuperscript{141} However, with continued growth in a state of small physical space, accuracy in projections regarding the need for low- and moderate-income housing may prove promising to address the affordable housing crisis.

\textsuperscript{137} Id. at 242.
\textsuperscript{138} Jason McCann, supra note 119 at 206.
\textsuperscript{139} Id. at 216.
\textsuperscript{140} Daniel Meyler, supra note 124 at 249.
\textsuperscript{141} Id.
V. Conclusion

With affordable housing needs increasing nation-wide, innovative ideas promoting inclusionary zoning provisions will continue to flourish and with expert guidance, succeed past litigious claims. The *Mount Laurel* Decisions established a high standard to achieve affordable housing developments, and have paved the way for other states to follow. New Jersey remains at the forefront of inclusionary zoning innovation, consistently remaining true to the proactive decision by Justice Hall in 1983. Although almost three decades have passed since the initial *Mount Laurel II*, the vigor and applicability of its holding remains true today. The Council for Affordable Housing continues to grow and guide the development of an unprecedented number of low-income affordable housing units. The spirit of the Mount Laurel Doctrine will continue to inspire new and innovative ideas to solve the nation’s affordable housing crisis.