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FAIR SHARE HOUSING ALLOCATION PLANS:  
WHICH FORMULA WILL PACIFY THE  
CONTENTIOUS SUBURBS?†

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The decision of the Supreme Court of New Jersey in *Southern Burlington County NAACP v. Township of Mount Laurel*<sup>1</sup> has focused the attention of planners and land use lawyers throughout the country on the complex problem of devising a plan by which the housing needs of a region may be allocated to municipalities within that region. This problem is acute in New Jersey where the *Mount Laurel* decision held invalid a municipal zoning ordinance because it failed to provide for the fair share of the housing needs of the region of which the municipality was a part.<sup>2</sup> The problem also exists in many other parts of the country where legislative and administrative bodies have attempted to allocate to suburban communities a fair share of the housing needs of a metropolitan area.<sup>3</sup>

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1. 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

2. *Id.* at 174, 336 A.2d at 724-25.

3. The following governmental and institutional bodies have either implemented or

Some municipalities have responded with their own constructive programs to provide for their fair share of regional housing needs.<sup>4</sup> Other communities have resisted the effort of extra-municipal agencies to intervene in what is perceived to be a local affair of local government. To some municipalities, the imposition of a fair share allocation plan by an outside agency threatens the character, the identity and the integrity of the community.<sup>5</sup>

It is very likely that much of the opposition to fair share allocation plans is caused by the ambiguity and uncertain consequences of applying the formulae that have been devised for the computation of fair share allocations.<sup>6</sup> During the past few years many fair share allocation plans have been formulated.<sup>7</sup> Each is designed to achieve a particular objective and each bases the allocation plan on a different set of standards.<sup>8</sup> The misapplication of an allocation plan to a purpose for which it was not intended can produce results that are not consistent with sound planning principles. In the selection or formulation of a housing allocation plan it is essential to consider the *purpose* for which the plan is intended and the *nature of the governmental process* by which it is to be implemented. In addition, the *criteria* on which the allocation is based

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proposed fair-share plans: Dade County Metropolitan Planning Board; Delaware River Valley Regional Planning Commission; Fairfax County, Va.; The Greater Hartford Process, Inc.; the State of Massachusetts; Metropolitan Washington Council of Governments; Metropolitan Dade County Planning Department; Metropolitan Council of the Twin Cities Area; Miami Valley Regional Planning Commission; Middlesex County (N.J.) Planning Board; the State of New Jersey; New York State Urban Development Corporation; Sacramento Regional Area Planning Commission; and the San Bernardino County Planning Department. Others developing fair-share mechanisms have included the University of Pennsylvania's Fels Center of Government and the St. Louis Metropolitan Section of the American Institute of Planners. Listokin, *Fair-Share Housing Distribution: Will It Open the Suburbs to Apartment Development?*, 2 REAL ESTATE L.J. 739, 740-41 (1974) (footnotes omitted) [hereinafter cited as Listokin].

4. *Id.*

5. The "controlled growth" position may merely be a convenient justification by suburban communities for retaining their exclusive nature. The popularity of such a position poses a direct threat to fair share programs. See Finkler, *Non-growth as a Planning Alternative*, ASPO REP. NO. 283 (Sept., 1972).

6. For a review of the first year of post-*Mount Laurel* litigation see Rose, *The Trickle Before the Deluge from Mount Laurel*, 5 REAL ESTATE L.J. 69 (1976).

7. For an excellent overview of the existing and implemented fair share plans see Brooks, *Lower-Income Housing: The Planner's Response*, ASPO REP. NO. 282 (July-Aug., 1972) [hereinafter cited as Brooks]. See also Listokin, *supra* note 3, at 743 (analyzes the variations in the types of housing to be allocated).

8. Perhaps the most frequently mentioned standards used in determining fair share housing allocations are grounded upon considerations of equality, need, distribution, suitability, and the availability of jobs. See Brooks, *supra* note 7, at 20; Listokin, *supra* note 3, at 743.

should be selected to be consistent with the plan's purpose and administrative process.

### I. THE PURPOSE OF THE FAIR SHARE ALLOCATION PLAN

The usual purpose of a fair share housing allocation plan is to promote a greater choice of housing opportunities and to avoid undue concentration of low and moderate income persons in central cities or older built-up suburbs.<sup>9</sup> Congress has described this objective as one of the express purposes of the housing assistance plan requirement of the Housing and Community Development Act of 1974.<sup>10</sup> The 1974 Act also describes the following as one of the objectives of that legislation:

the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income. . . .<sup>11</sup>

The housing allocation plans created in response to the *Mount Laurel* decision should be designed to achieve the same purpose.<sup>12</sup> The New Jersey supreme court made that purpose clear when it stated that every developing municipality "must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively, it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor."<sup>13</sup> Thus it should be clear that the purpose of a fair share housing allocation plan is to provide an opportunity for low and moderate income families to escape from the older central cities to the newer developing suburbs.<sup>14</sup> An allocation plan that fails to achieve this objective or, even worse, serves to increase the

9. See Brooks, *supra* note 7; Listokin, *supra* note 3.

10. 42 U.S.C. § 5304(a)(4) (1970).

11. *Id.* § 5301(c)(6).

12. See note 2 and accompanying text *supra*. The New Jersey supreme court cited approvingly Listokin, *Fair Share Housing Distribution: An Idea Whose Time Has Come?*, in INSTITUTE FOR ENVIRONMENTAL STUDIES, NEW JERSEY TRENDS 353 (1974). 67 N.J. at 190-91, 336 A.2d at 733-34.

13. 67 N.J. at 174, 336 A.2d at 724.

14. This may necessarily be predicated on the availability of land appropriate for residential development. For an investigation of the characterization of a municipality as a "developing municipality" see Rose & Levin, *What is a 'Developing Municipality' within the Meaning of the Mount Laurel Decision*, 4 REAL ESTATE L.J. 359 (1976) [hereinafter cited as Rose & Levin].

concentration of low and moderate income families in central cities or older built-up suburbs, would be inconsistent with the objectives of both the 1974 Act and the *Mount Laurel* decision.

## II. THE NATURE OF THE GOVERNMENTAL PROCESS RESPONSIBLE FOR IMPLEMENTING THE FAIR SHARE ALLOCATION PLAN

The allocation plans created for the implementation of the Housing Assistance Plans of the 1974 Act as well as allocation plans designed for implementation by an administrative agency can provide for a wide range of opportunities for administrative discretion in their application. Such plans are designed to determine the eligibility of government applicants for federal funding or other benefits and anticipate the opportunity for negotiation and compromise in an on-going administrative process. Housing plans for such a governmental process can be effective even though they are intricate, complex and even ambiguous.

A fair share housing allocation plan designed in response to the *Mount Laurel* decision, to be implemented by a court, must be evaluated by different criteria.<sup>15</sup> Such a plan should be created to help the court determine whether the land use regulations adopted by the duly elected legislative body of a municipality have so clearly denied an appropriate variety and choice of housing that they violate the "general welfare" principles of the state constitution.<sup>16</sup> A fair share housing allocation plan designed for the judicial process cannot assume an on-going administra-

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15. In considering the remedies available in *Mount Laurel*, the court noted:

We are not at all sure what the trial judge had in mind as ultimate action with reference to the approval of a plan for affirmative public action concerning the satisfaction of indicated housing needs and the entry of a final order requiring implementation thereof. Courts do not build housing nor do municipalities. That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government. The municipal function is initially to provide the opportunity through appropriate land use regulations and we have spelled out what *Mount Laurel* must do in that regard. It is not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any such power.

67 N.J. at 192, 336 A.2d at 734.

16. The court based its decision on "the basic state constitutional requirements of substantive due process and equal protection of the laws," *id.* at 174, 336 A.2d at 725, rather than the express statutory requirement that zoning regulations promote the general welfare. N.J. STAT. ANN. § 40:55-32 (1967). See note 43 *infra*. For an examination and discussion of why the protections afforded by the state constitution were invoked as the basis for the decision in the *Mount Laurel* case see Rose, *The Mount Laurel Decision: Is It Based on Wishful Thinking?*, 4 REAL ESTATE L.J. 61 (1975) [hereinafter cited as Rose]. See also *Urban League v. Mayor & Council of Borough of Carteret*, 142 N.J. Super. 11, 359 A.2d 526 (Ch. 1976) (indicating that if a zoning ordinance is in derogation of the general welfare encompassing housing needs, it will be struck down as unconstitutional).

tive process of negotiation, compromise and adjustment between the courts and the municipal governing bodies. The test of the utility of a judicially implemented allocation plan is not whether it can achieve an optimum condition of integration by a continuing and persistent administrative process, but rather whether it provides a range of possibilities of housing choice that can be evaluated by a standard of reasonableness. The state of the art of the planning profession is such that a precise and exact formulation of the optimum range of housing variety in a given community cannot be provided. A court should not be misled by the purported exactitude of the print-outs of computer-programmed housing allocation models.

### III. ASSORTED CRITERIA FOR HOUSING ALLOCATION

A plan for the allocation of a "fair share" of low and moderate income housing units to municipalities will adopt one or more criteria on the basis of which the allocation will be made. There is no principle of planning, logic or morality that makes any one criterion more correct than any of the others. Each has its advantages, disadvantages and professional proponents. The selection of one standard, rather than another, can result in a very substantial difference in the number of units to be "assigned" to a municipality and upon which the validity of its zoning ordinance will depend.<sup>17</sup>

For the purpose of illustrating the application of each of the following criteria of fair share allocation, let us assume that the "region" has been delineated and that the regional need for housing units for low and moderate income persons has been postulated for a period of time.

#### A. Allocation Based Upon Need

This principle is designed to allocate housing units for low and moderate income families to those municipalities having the greatest need for such housing. This need may be measured by such factors as vacancy rate, deterioration, overcrowding, and percentage of families paying over 25% of their income for shelter. The difficulty with this criteria is

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17. If a court determines that a particular municipality has not, in fact, met its fair share, then under the *Mount Laurel* holding, the zoning ordinance will be considered as "presumptively contrary to the general welfare and outside the intended scope of the zoning power." 67 N.J. at 185, 336 A.2d at 730.

In *Urban League v. Mayor & Council of Borough of Carteret*, the court responded to the argument that a municipality might be exempted from *Mount Laurel* criteria if there existed only minimal vacant acreage: "but a municipality is not exempt from the constitutional standards of reasonableness in its zoning ordinance because it is not 'developing' within *Mt. Laurel*." 142 N.J. Super. at \_\_\_, 359 A.2d at 533.

that it would allocate the greatest obligation for housing to urban areas where there is the greatest overcrowding and deterioration. Thus, an exclusionary suburban municipality within the region would have a small allocation of housing units while a municipality more like a central city or older built-up suburb would be assigned a larger share. Such an allocation would not achieve the objectives of the *Mount Laurel* decision.

To overcome this objection it would be necessary to base the allocation on future rather than existing housing need, on the assumption that most future growth and housing need will be in the suburbs. To accomplish this, it is necessary to predict the housing need of the future for each of the municipalities within the region. There are two commonly accepted techniques for making this prediction: extrapolation and prediction of future employment opportunities. The extrapolation technique is based upon the assumption that the trends indicated by census and similar data will continue in the same direction and rate as previous years. Thus if one of the municipalities had a population increase of 200 persons per year for the past five years it would be predicted that this rate of increase will persist for the next five or ten years and a projection of future population would be made on that assumption.

The next step in this process would be to ignore the same census data relating to the socio-economic composition of the population by income levels and assign a proportionate share of the regional need for housing for low and moderate income families to that municipality. Thus even though an exclusionary suburban community had been increasing in population by 200 persons of upper income per year, the projection of future population would assume a continuation of the same rate of increase but would reject an assumption of the same socio-economic composition. Population prediction by extrapolation is subject to criticism for this reason and because it assumes a continuation of existing population trends. This assumption has not been supported by the facts of the past few years during which the rate of suburban growth in the middle-Atlantic states has declined significantly.<sup>18</sup> It is presently unclear whether the growth rate of suburban communities in the middle-Atlantic states will resume. If such growth does resume, it is uncertain what the rate of that growth will be.

Because of the inherent weakness of the extrapolation technique of population prediction, some housing allocation formulas have adopted

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18. See U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATIONS 32-5, 34-5, 40-5 (1970).

the "prediction of future employment opportunities" method of predicting the size and composition of future suburban populations.<sup>19</sup> This method seeks to forecast future population characteristics based upon a prediction of family income that may be derived from anticipated changes in employment opportunities in the region. The future employment opportunities in turn are predicted on the basis of interviews and surveys of representatives of industries that might reasonably be expected to consider the region for future growth and expansion.

Thus it should be apparent that there are serious methodological weaknesses in the techniques for predicting the size and composition of future population. Consequently the computation of future housing need based upon those predictions is similarly suspect.

### B. Allocation Based Upon Economic and Racial Integration

This criterion is designed to allocate housing units for low and moderate income families to those areas having the fewest low income and racial minority families within their communities. If this standard is to be used, it is important to direction attention to the similarities and differences between economic integration and racial integration. There is no question but that the denial of an opportunity for housing to any person by a municipality on the grounds of race would violate our federal Constitution<sup>20</sup> and federal<sup>21</sup> and state<sup>22</sup> laws. However, the dis-

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19. In *Mount Laurel* the court considered future employment opportunities to be an important factor in terms of housing need. "Certainly, when a municipality zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses." 67 N.J. at 187, 336 A.2d at 732. Moreover, in discussing the determination of fair-share, and the factors involved therein, the court indicated that "in arriving at such a determination the type of information and estimates . . . concerning the housing needs of persons of low and moderate income now or formerly residing in the township in substandard dwellings and those presently employed or reasonably expected to be employed therein, will be pertinent." *Id.* at 190, 336 A.2d at 733. See also *Urban League v. Mayor & Council of Borough of Carteret*, 142 N.J. Super. 11, 359 A.2d 526 (Ch. 1976).

By the year 2000, the deficiencies in low and moderate income housing for industrial employees within each municipality would be of disastrous proportions under present zoning. . . . It is pertinent to note that at the present an estimated 75,000 residents of the county are employed outside the county, as compared to an estimated 55,000 residents elsewhere who are employed within the county.  
*Id.* at —, 359 A.2d at 535.

20. U.S. CONST. amend. V, XIV.

21. See, e.g., 42 U.S.C. §§ 3601-05 (1970); cf. *id.* §§ 1981, 1983. Note particularly *id.* § 3604 which provides in pertinent part that "It shall be unlawful . . . (2) to refuse to sell or rent . . . 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 . . .," and *id.* § 3605, entitled "Discrimination in the Financing of Housing," which makes it unlawful to deny a loan or other financial assistance to a person for the purpose of purchasing, constructing, repairing or

parity in housing facilities<sup>23</sup> and other material advantages based upon differences in wealth<sup>24</sup> has not usually been held to violate the law. The *Mount Laurel* decision has been the most dramatic recent departure from this otherwise well established principle of constitutional law.<sup>25</sup> The *Mount Laurel* decision does not, however, purport to address the issue of racial discrimination directly.<sup>26</sup> The court made this distinction clear at the beginning of the opinion:

We will, therefore, consider the case from the wider viewpoint that the effect of Mount Laurel's land use regulation has been to prevent various categories of persons from living in the township because of the limited extent of their income and resources. In this connection, we accept the representation of the municipality's

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maintaining a dwelling. *See generally* United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826 (1973); Sanborn v. Wagner, 354 F. Supp. 291 (D. Md. 1973); United States v. Real Estate Dev. Corp., 347 F. Supp. 776 (N.D. Miss. 1972); Williamson v. Hampton Management Co., 339 F. Supp. 1146 (N.D. Ill. 1972); United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969).

22. *See* N.J. STAT. ANN. § 10:5-12g-i (Supp. 1976) which proscribes discriminatory practices in the sale or rental of dwellings. The statute is patterned after the federal Fair Housing Act, and uses substantially the same language. *See* note 21 *supra*.

23. *See, e.g.,* James v. Valtierra, 402 U.S. 137 (1971), where California's referendum approval requirement of low-rent public housing projects was held constitutionally sound, implying that the right to adequate shelter (where the shelter can be denied by a vote of the people of the state) is not a fundamental right. *See also* Lindsey v. Normet, 405 U.S. 56 (1972).

The Court in *Lindsey* considered a constitutional challenge by tenants of the Oregon forcible entry and detainer statute, which provided summary eviction procedures upon nonpayment of rent and did not allow a defense of uninhabitability. In rejecting plaintiff's equal protection argument, the Court said:

We do not denigrate the importance of decent, safe, sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality. . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.

*Id.* at 74.

24. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth held not to be a suspect classification in the area of school funding). In *Rodriguez*, the Court explained its conclusion as follows:

We perceive no justification for such a severe denigration of legal property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this court to nullify statewide measures for financing public services *merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.*

*Id.* at 54 (emphasis added). *But see* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). *See also* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

25. It should be noted, however, that the *Mount Laurel* court expressly disavowed any reliance on federal constitutional principles. 67 N.J. at 174, 336 A.2d at 725. *See also* note 16 and accompanying text *supra*.

26. 67 N.J. at 159, 336 A.2d at 717.



counsel at oral argument that the regulatory scheme was not adopted with any *desire or intent* to exclude prospective residents on the obviously illegal basis of race, origin or believed social incompatibility.<sup>27</sup>

There is little question, however, that the court was well aware of the fact that discrimination against the poor usually falls most heavily upon racial and ethnic minorities.<sup>28</sup> Nevertheless, the *Mount Laurel* decision does not purport to provide a remedy for racial discrimination directly.<sup>29</sup> The decision prescribes a remedy directed specifically to the problem of economic discrimination in the suburbs. A fair share housing allocation plan adopted to comply with the *Mount Laurel* principles should similarly be directed specifically to the problem of economic discrimination in the suburbs.<sup>30</sup>

27. *Id.* (emphasis added). See also *Urban League v. Mayor & Council of Borough of Carteret*, 142 N.J. Super. 11, —, 359 A.2d 526, 530 (Ch. 1976) where the court similarly dismissed claims of wilful racial discrimination and proceeded to address the exclusionary aspects of the defendants' zoning ordinances.

28. 67 N.J. at 159, 336 A.2d at 717. See also *Urban League v. Mayor & Council of Borough of Carteret*, 142 N.J. Super. 11, —, 359 A.2d 526, 530 (Ch. 1976) ("the impact of low density zoning is most adverse to blacks and Hispanics, who are disproportionately of low and moderate income").

29. 67 N.J. at 159, 336 A.2d at 717. As an appropriate remedy, the court suggested: "We have in mind that there is at least a moral obligation in a municipality to establish a local housing agency pursuant to state law to provide housing for its resident poor now living in dilapidated, unhealthy quarters." *Id.* at 192, 336 A.2d at 734.

In concurrence Justice Pashman forcefully stated:

The problems we begin to face today are of awesome magnitude and importance, both for New Jersey and for the nation as a whole. It will not do to approach them gingerly; they call out for forceful and decisive judicial action.

. . . The question is whether the suburbs will act to accommodate this growth in an orderly way or will simply and blindly resist.

. . . The shape of the possible disaster can now be foreseen. The inevitable alternative to assumption by suburban communities of an obligation to provide for their fair share of regional housing needs is an increase in the size of slums with all their attendant miseries. The consequences of such economic, social, and racial segregation are too familiar to need recital here. . . . Justice must be blind to both race and income.

. . . Like animal species that overspecialize and breed out diversity and so perish in the course of evolution, communities, too, need racial, cultural, social and economic diversity to cope with our rapidly changing times.

*Id.* at 220-21, 336 A.2d at 749-50 (Pashman, J., concurring). See also *Urban League v. Mayor & Council of Borough of Carteret*, 142 N.J. Super. 11, —, 359 A.2d 526, 530 (Ch. 1976) ("[N]o credible evidence of deliberate or systematic exclusion of minorities was before the court").

30. 67 N.J. at 159, 336 A.2d at 717. See *Urban League v. Mayor & Council of Borough of Carteret*, 142 N.J. Super. 11, —, 359 A.2d 526, 541 (Ch. 1976), where the court determined that the first fair share allocation would be to "correct the present imbalance, that is to bring each defendant municipality up to the county proportion of 15% low and 19% moderate income population."

The use of this standard to formulate a fair share housing allocation plan is comparatively easy. Census data will disclose the income of the residents of each of the municipalities within the designated region. The proportion of low and moderate income residents in each municipality can be calculated and an allocation of low and moderate income housing would be made in inverse proportion to existing proportions. Thus, a municipality that has very few low and moderate income residents would have a large share of low and moderate income housing units assigned to it while another municipality that already has a very large proportion of low and moderate income residents would receive a small allocation. Such an allocation system would achieve directly the *Mount Laurel* objective of economic integration in the suburbs<sup>31</sup> and would foster indirectly the additional benefit of racial integration. On the other hand, the allocation of any significant number of low and moderate income housing units to central cities, older built-up suburbs or to municipalities with existing large amounts of low and moderate income housing would subvert the purpose of the *Mount Laurel* decision.<sup>32</sup>

### C. Allocation Based On the Premise That an Equal Share is a Fair Share

Under the equal share formula each municipality would receive an allocation of an equal share of the regional housing need, regardless of size, population or other significant characteristics. This principle of allocation is based upon the misconceived premise that "equality" can be equated with "fairness." From the perspective of a planner, this principle makes little sense because the planning process should be designed to formulate rational plans and programs that are custom-made to meet the specific needs of and to utilize the available resources of a particular community. An allocation system that ignores real and substantial differences among municipalities must be characterized as "arbitrary and irrational" rather than "fair."<sup>33</sup> In addition, such a

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31. 67 N.J. at 159, 336 A.2d at 717.

32. *Id.* at 160, 336 A.2d at 717. For a discussion of how the *Mount Laurel* principles are applicable to a municipality which is located outside the central cities and older built-up suburbs see Rose & Levin, *supra* note 14, at 370-71.

33. The court in *Mount Laurel* apparently recognized the need to direct a certain amount of attention to the differences between municipalities, as evidenced by its limitation of the *Mount Laurel* mandate to those municipalities which can appropriately be characterized as "developing." Justice Hall used the phrases "developing municipality like Mount Laurel," "such municipalities," and the like, a total of fifteen times. See 67 N.J. at 160, 173, 174, 179, 180, 185, 186, 187, 188, 190, 191, 336 A.2d at 717, 724, 727, 728, 731, 732, 733. *But see id.* at 194, 336 A.2d at 735 (Pashman, J., concurring). Justice Pashman voiced dissatisfaction with the restrictive approach taken by the majority:

system would be oblivious to the underlying purpose of the *Mount Laurel* decision, to avoid undue concentrations of low and moderate income persons in central cities and older built-up suburbs.<sup>34</sup>

#### D. Allocation Based on Population Proportions

The use of this criterion would allocate a share of the regional need for low and moderate income housing units to each of the municipalities within the region based upon the proportion of population of each municipality to the total population of the region. This technique is only one step removed from the oversimplistic principle of "equal share." The population proportion technique is an improvement over the equal share technique because it begins to recognize that there are differences among municipalities within a region and that those differences are relevant in a rational system of allocation of low and moderate income housing units.<sup>35</sup> The improvement is insufficient, however, because only one of the many relevant factors that differentiate municipalities is

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The majority has chosen not to . . . consider the degree to which the principles applicable to developing municipalities are also applicable to rural ones and to largely developed ones . . . [E]xclusionary zoning is a problem of such magnitude and depth as to require that the Court extend these principles to all municipalities in the State

*Id.* at 208, 336 A.2d at 743. See also *Urban League v. Mayor & Council of Borough of Carteret*, 142 N.J. Super. 11, —, 359 A.2d 526, 537-41 (Ch. 1976) (the court painstakingly described the existent condition as to each defendant municipality); *Rose & Levin, supra* note 14, at 369-81.

The *Mount Laurel* court was also aware of possible environmental and ecological problems which might be relevant:

The present environmental situation in the area is . . . no sufficient excuse in itself for limiting housing therein to single-family dwellings on large lots. . . . This is not to say that land use regulations should not take due account of ecological or environmental factors or problems. Quite the contrary. Their importance, at last being recognized, should always be considered.

67 N.J. at 186, 336 A.2d at 731.

34. 67 N.J. at 159, 336 A.2d at 717. *But see* *Urban League v. Mayor & Council of Borough of Carteret*, 142 N.J. 11, —, 359 A.2d 526, 541-42 (Ch. 1976) where the projected need of housing was allocated to each of the defendant municipalities equally. In support of this determination, the court stated:

Subtracting 4,030 from the 18,697 low and moderate income housing units needed in the county to 1985, the balance is 14,667 or approximately 1,333 per municipality. There is no basis not to apportion these units equally. Each municipality has vacant suitable land far in excess of its fair share requirement without impairing the established residential character of neighborhoods. Land to be protected for environmental considerations has been subtracted from vacant acreage totals. No special factors, such as relative access to employment, justifies [sic] a deviation from an allocation of 1,333 low and moderate housing units, plus the allocation to correct the imbalance, to each of the 11 municipalities.

*Id.*

35. See note 34 *supra*.

considered.<sup>36</sup> The allocation of low and moderate income housing would be based exclusively upon the total population. This standard is a gross measure of the difference among municipalities when the objective is to avoid undue concentration of low and moderate income persons in central cities or older built-up suburbs. The use of this standard would contravene the purpose of the *Mount Laurel* decision because it would allocate the greatest share to the most populous central cities and would allocate the smallest share to the most exclusionary suburbs.

#### E. *Allocation Based Upon Proportion of Existing Jobs*

The use of this criterion would allocate a share of the regional need for low and moderate income housing to each municipality within the region based upon the relationship of the number of jobs within each municipality to the total number of jobs within the region. This technique is appealing because it begins to address the issue of the suitability of the municipality to accommodate the low and moderate income families for whom the housing is allocated. In addition, the information upon which the allocation is made is readily available and is not based upon indefinite or conjectural assumptions. This allocation technique also responds well to a test of fairness because it would impose the greatest obligation on those municipalities that reap the advantage of tax revenues from the industrial enterprises that now provide the jobs and that would provide suburban jobs to city residents.<sup>37</sup> This standard is appealing to planners who seek to conserve human and natural resources by reducing the amount of time and energy required for the daily trip from residence to place of employment and to the judiciary seeking to implement the *Mount Laurel* decision with a comparatively simple and easily administered principle.

The primary disadvantage of this criterion is that its application would result in the allocation of few low and moderate housing units to the most exclusionary residential suburbs with few jobs and would frequently impose the greatest obligation upon those communities that have already assumed the greatest share of such housing. In addition the adoption of this system of allocation would permit "exclusionary-minded" municipalities to avoid further allocations of low and moderate

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36. For an example of other factors that distinguish municipalities from each other see Rose & Levin, *supra* note 14, at 369-81.

37. This technique is also consistent with *Mount Laurel* principles. 67 N.J. at 187, 336 A.2d at 732: "Certainly when a municipality zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses."

cost housing by discouraging industrial and commercial development.<sup>38</sup>

#### F. Allocation Based Upon Proportion of Future Jobs

This technique was designed to retain the advantages of the existing-jobs allocation formula and eliminate its disadvantages. It would achieve neither purpose. By allocating a share of the regional need for low and moderate income housing to each municipality based upon the proportion of future rather than existing jobs, the allocation becomes dependent upon indefinite and conjectural assumptions; obligations are imposed without regard to the actual municipal revenue; and there is no assurance that the jobs will ever materialize in fact.<sup>39</sup> The supposed advantage of this technique is that it would permit the allocation of a share of housing to "exclusionary" suburbs that offer only expensive housing and no job opportunities. It would also permit allocation of housing to other suburbs that discourage residential development by zoning large tracts of land for industrial use even though the likelihood of any such industrial use in the foreseeable future is slight.

The weakness of this technique derives from the need to predict the

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38. Such a policy might not be in the best fiscal interests of the particular municipality. The existing policy of land use regulation for a fiscal end derives from New Jersey's tax structure. What occurs in a typical municipality is that:

Sizeable industrial and commercial rates are eagerly sought and homes and the lots on which they are situated are required to be large enough, through minimum lot sizes and minimum floor areas, to have substantial value in order to produce greater tax revenues to meet school costs. Large families who cannot afford to buy large houses and must live in cheaper rental accommodations are definitely not wanted, so we find drastic bedroom restrictions for, or complete prohibition of, multi-family or other feasible housing for those of lesser income.

67 N.J. at 171, 336 A.2d at 723. The court also pointed out the inadequacies of such a practice:

One incongruous result is the picture of developing municipalities rendering it impossible for lower paid employees of industries they have eagerly sought and welcomed with open arms (and, in *Mount Laurel's* case, even some of its own lower paid municipal employees) to live in the community where they work.

*Id.* at 172, 336 A.2d at 723.

39. If no jobs do in fact materialize, the lower income or unskilled employee may not be able to find work at all. The court in *Mount Laurel* was astutely aware of the potential problems in such a situation:

In a society which came to depend more and more on expensive individual motor vehicle transportation for all purposes, low income employees very frequently could not afford to reach outlying places of suitable employment and they certainly could not afford the permissible housing near such locations. These people have great difficulty in obtaining work and have been forced to remain in housing which is overcrowded, and has become more and more substandard and less and less tax productive. There has been a consequent critical erosion of the city tax base and inability to provide the amount and quality of those governmental services—education, health, police, fire, housing and the like—so necessary to the very existence of safe and decent city life.

*Id.* at 172-73, 336 A.2d at 724.

future or to rely upon the prediction made by each municipality contained in the allocation of land zoned for industrial use. Since the allocation of housing would be based upon the relationship between the number of acres of land in each municipality zoned for industrial and/or commercial use and the total number of acres zoned for such use in the designated region, a municipality that has no industry or commerce to provide jobs for low and moderate income persons and has no revenue to support the costs associated with such housing would nevertheless receive a substantial housing allocation if the zoning ordinance of the municipality contains a substantial amount of vacant land zoned for industrial and/or commercial use. The difficulty with this technique is that the obligations of a municipality can easily be avoided by reducing or eliminating the amount of land zoned for industrial and/or commerce use.<sup>40</sup>

#### G. *Allocation Based Upon Suitability of the Municipality For Low and Moderate Income Housing*

If a fair-share housing allocation plan must comply with principles of rational and comprehensive planning then the suitability of the municipality for low and moderate income housing should be the criterion upon which that allocation plan is based.<sup>41</sup> In fact, it would require a judgment bordering upon professional irresponsibility to propose that housing for low and moderate income families should be allocated to an area where there are few jobs, no public transportation, insufficient educational, medical and social services, inadequate water and sewer facilities and inordinate ecological risks. These and other factors, including the fiscal capacity of the municipality to provide the requisite services and the allocation of land within the jurisdiction, are among the many factors considered and evaluated in the planning process.<sup>42</sup>

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40. It should be noted, however, that the court in *Mount Laurel* may have had precisely this result in mind—*i.e.*, breaking up the usual municipal practice of zoning an excess amount of vacant land for industrial and commercial uses. *See id.* at 163, 336 A.2d at 718. *See also* note 39 *supra*.

41. *See* Listokin, *supra* note 3, at 746, 754-55 (Massachusetts fair share plan guided by suitability considerations).

42. The fiscal capacity of a municipality is an appropriate factor to be considered in determining whether that municipality is a suitable place for housing, except when fiscal factors are considered for the purpose of excluding certain categories of housing. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 185-86, 336 A.2d 713, 731, *cert. denied*, 423 U.S. 808 (1975):

We have previously held that a developing municipality may property zone for and seek industrial ratables to create a better balance for the community vis-a-vis educational and governmental costs engendered by residential development, provided that such was “. . . done reasonably as part of and in furtherance of a legitimate

The critical issue that must be comprehended by the judiciary and other intervenors in the planning process is that there is no objective method of weighing each of the many factors of "suitability." It is precisely for this reason that, after the planning studies are made and professional opinions are offered, the planning process must be continued in a forum comprised of elected representatives with a democratic and constitutional mandate to make policy decisions.<sup>43</sup> This creates a difficult dilemma for a court seeking to implement the *Mount Laurel* decision by a judicial determination of the "fair share" obligation of a municipality. If an easy-to-apply allocation formula (such as number of jobs) is adopted, the allocation will be made without regard to the many other critical principles and practices of the planning process. Such an allocation would be vulnerable to attack as an arrogant disregard of the integrity and purpose of the planning process.<sup>44</sup> On the other hand, if the allocation formula considers the many factors involved in

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comprehensive plan for the zoning of the entire municipality." *Gruber v. Mayor & Township Comm. of Raritan Township*, 39 N.J. 1, 9-11 (1962). We adhere to that view today. But we were not there concerned with, and did not pass upon, the validity of municipal exclusion by zoning of types of housing and kinds of people for the same local financial end. We have no hesitancy in now saying, and do so emphatically, that, considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for that reason or purpose. While we fully recognize the increasingly heavy burden of local taxes for municipal governmental and school costs on homeowners, relief from the consequences of this tax system will have to be furnished by other branches of government. It cannot legitimately be accomplished by restricting types of housing through the zoning process in developing municipalities.

43. *Compare* 67 N.J. at 194, 336 A.2d at 735 (Mountain, J., concurring) (agreeing with the majority, but basing his conclusion on his interpretation of the term "general welfare" as it appears in N.J. STAT. ANN. § 40:55-32 (1967): "[zoning] regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to . . . promote . . . the general welfare . . ."), *with id.* at 151, 336 A.2d 713 (Hall, J., majority opinion). One significant difference between the two opinions rests on the availability of legislative review. Justice Mountain would have permitted the state legislature, as opposed to the judiciary, to effectively change the interpretation of "general welfare" through the legislative process. Justice Hall, on the other hand, would find this result nearly impossible in that the conclusions are grounded on inherent due process and equal protection clauses of the state constitution. *See Rose, supra* note 16.

44. The then-effective New Jersey municipal zoning enabling legislation provided:

Such regulation shall be in accordance with a comprehensive plan and designed for one or more of the following purposes:

Such regulation shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.

N.J. STAT. ANN. § 40:55-32 (1967) (repealed effective Aug. 1, 1976). *See Rockhill v. Chesterfield Twp.*, 23 N.J. 117, 128 A.2d 473 (1957) (where the court held that zoning regulations had to be in accordance with a comprehensive plan and designed to serve the public welfare); *see also Udell v. Haas*, 21 N.Y.2d 43, 288 N.Y.S.2d 888, 235 N.E.2d 897 (1968).

the "suitability" of each municipality, then the judgment of the court on these issues would be vulnerable to attack as an unwarranted intrusion into the legislative process.<sup>45</sup> It is questionable whether a court can avoid this dilemma by appointing a professional planner to formulate the housing allocation plan. Such an appointed expert could bring to the process nothing more than professional competence and seasoned judgment. The professional planner would have no special ability or mandate to make the policy decisions upon which any allocation plan must eventually rest. This observation may disclose the weakest assumption upon which fair share allocation plans and the *Mount Laurel* principle are based.

#### H. *Allocation Based Upon the Obligation of Every Municipality To Take Care of the Housing Needs of Its Own Constituents*

This method of allocation is designed to meet local municipal housing needs rather than regional housing needs. Consequently it does not purport to comply with the theory of the *Mount Laurel* decision. Its primary advantage, however, is that it may be capable of achieving the objectives of the *Mount Laurel* decision more readily than allocation formulas designed to achieve more idealistic but politically assailable regional housing needs. The objective of the *Mount Laurel* decision can be achieved only if a variety and choice of housing is made available in most, if not all, of the municipalities within the state.<sup>46</sup> As a practical matter, this means that apartments, townhouses and aggregated, higher-density dwelling unit construction must be permitted under municipal law.<sup>47</sup> If all municipal governing bodies *willingly* permit a limited amount of such construction, there is reason to predict that more housing will be built in this voluntary way than will ever be built as a result of a judicially

45. See N.J. CONST. art. 3, par. 1. See also *Maule v. Conduit & Foundation Corp.*, 124 N.J. Super. 488, 307 A.2d 651 (L. Div. 1973); *West Morris Regional Bd. of Educ. v. Sills*, 110 N.J. Super. 234, 265 A.2d 162 (Ch. 1970); cf. *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973), *appeal dismissed*, 414 U.S. 1106 (1973).

46. See 67 N.J. at 187, 336 A.2d at 731-32:

As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income.

47. As to this practical effect, the court in *Mount Laurel* noted that a developing municipality like Mount Laurel

. . . must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply of these needs.

*Id.* at 187, 336 A.2d at 732.



mandated and politically resisted fair share housing allocation plan.

The purpose of a "take-care-of-our-own" allocation plan is to propose a formula that is more acceptable politically to the constituents of municipalities to whom the state constitution has granted the power of home rule.<sup>48</sup> This plan rests upon the assumption that most fair-minded people recognize a need to provide housing for themselves, when they become elderly, for their children, for the policeman, fireman, teachers and other municipal employees who provide essential government services, and even to those who work within the community or who have recently left because of an inability to find satisfactory housing within their means. All judicially proclaimed ideals to the contrary notwithstanding, local opposition to apartments and less expensive housing becomes manifest only when it is possible for local residents to conjure up the threat of invasion of hordes of outsiders whose numbers and presence may threaten the safety, security and amenities of the community they seek to preserve. There is no need to call forth such images to correct the inequities of restrictive zoning ordinances. There is no need to arouse the fears or to deny the legitimate concerns of suburban residents.<sup>49</sup> There is no need to pit the powers of the courts against the prerogatives of the legislature.

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48. See N.J. CONST. art. 4, § 6, par. 2:

2. The Legislature may enact general laws under which municipalities . . . may adopt zoning ordinances limiting and restricting . . . buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed within the police power. . . .

Pursuant to this constitutional provision, there is a strong presumption in favor of validity of a zoning ordinance. See, e.g., *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); *Harvard Enterprises, Inc. v. Board of Adjustment*, 56 N.J. 362, 266 A.2d 588 (1970); *Bogart v. Washington Twp.*, 25 N.J. 57, 135 A.2d 1 (1957); *Molino v. Mayor & Council of Glassboro*, 116 N.J. Super. 195, 281 A.2d 401 (L. Div. 1971).

49. In addressing these fears and images the *Mount Laurel* court stated:

There is no reason why developing municipalities like Mount Laurel, required by this opinion to afford the opportunity for all types of housing to meet the needs of various categories of people, may not become and remain attractive, viable communities providing good living and adequate services for all their residents in the kind of atmosphere which a democracy and free institutions demand. They can have industrial sections, commercial sections and sections for every kind of housing from low cost and multi-family to lots of more than an acre with very expensive homes. Proper planning and governmental cooperation can prevent over-intensive and too sudden development, insure against future suburban sprawl and slums and assure the preservation of open space and local beauty. We do not intend that developing municipalities shall be overwhelmed by voracious land speculators and developers if they use the powers which they have intelligently and in the broad public interest. Under our holdings today, they can be better communities for all than they previously have been.

67 N.J. at 190-91, 336 A.2d at 733-34.

### CONCLUSION

The *Mount Laurel* decision opened a new era in exclusionary zoning litigation by mandating that each developing municipality must provide for its fair share of the regional housing needs. The court did not, however, specify the criteria by which each municipality's fair share is to be determined.

This Article has considered eight possible criteria for determining the fair share allocation of every developing municipality. If exclusionary zoning laws constitute the evil sought to be removed by the *Mount Laurel* decision (rather than the national system of distribution of resources that causes great disparities in ability to afford housing) then the appropriate principle to be adopted by the courts would be the one that declares invalid, as unreasonable, any zoning ordinance that fails to reasonably provide for the housing needs of its own constituents. Such a standard would be consistent with the principles of sound planning, the limits of judicial power and the fundamental principle of democracy that the power to make decisions of public policy must rest ultimately upon the consent of those whose lives will be governed thereby.