

Middlesex + Mahwah Funding Proposal 6-20
(1983)

Proposal for emergency grant to support
development ~~for~~ implementation of hearing
remedy

16 pgs

MA 000002 D

**National Committee
Against Discrimination
in Housing** 1425 H Street, N.W., Washington, D.C. 20005 · (202) 783-8150

June 20, 1983

MEMORANDUM

To: Dick, Paul, Jeff, Ken & Alan
From: Bruce
Re: Middlesex and Mahwah Funding Proposal

Enclosed is a revised draft of the Middlesex/Mahwah funding proposal which incorporates suggestions made by Ken Meiser and Alan Mallach. Please let me know as soon as possible if you have any problems or suggestions regarding the draft. Also enclosed is a first draft of a letter prepared by Ken for Joe Rodriguez' signature.

I propose that we determine as quickly as possible who should write the cover letter to the two foundations. I will then run off two original copies of the proposal and mail them to the appropriate person for inclusion with the cover letter. In addition, if it is acceptable to the Public Advocate, we might also include Mr. Rodriguez' letter in our proposal package.

With regard to our cover letter, I suggest that it state that it is written on behalf of all three organizations; it contain some explanation for our delay in submitting the proposal; and it indicate that we are willing to meet with representatives of the foundation to discuss any questions they may have about the proposal.

PROPOSAL FOR EMERGENCY GRANT TO
SUPPORT DEVELOPMENT AND IMPLEMEN-
TATION OF A HOUSING REMEDY IN THE
MIDDLESEX COUNTY AND MAHWAH TOWN-
SHIP EXCLUSIONARY LAND USE CASES

Submitted by

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June _____, 1983

INTRODUCTION

The National Committee Against Discrimination in Housing, the Center for Metropolitan Action, and the American Civil Liberties Union of New Jersey submit this emergency request for grant assistance in the amount of \$65,000 to support efforts to secure the construction of low and moderate income housing through implementation of a housing remedy in two successful cases involved in the state-wide Mount Laurel II Litigation. These cases are Urban League of Greater New Brunswick, et. al. v. Mayor and Council of the Borough of Carteret, et. al. (the "Middlesex County case") and Urban League of Essex County, et. al. v. Township of Mahwah (the "Mahwah case"), which were brought to promote the development of affordable housing in Middlesex County, New Jersey and Mahwah Township, respectively. The grant request represents the minimum amount of financial assistance needed to enable the ~~non-profit sponsors~~^{applicants} and their attorneys to bring these cases to a successful conclusion through development of affirmative zoning^{and other} measures designed to promote the construction of lower income housing in these communities. These cases provide the first real opportunity to test fully the New Jersey Supreme Court's recent mandate that the Mount Laurel obligation is "to provide a realistic opportunity for housing, not litigation."

MOUNT LAUREL II DECISION

On January 20, 1983, the New Jersey Supreme Court issued what undoubtedly is one of the most important municipal land use decisions in history. In that decision, known as Mount Laurel II (19² N.J. 158), the Court unanimously reaffirmed the doctrine first announced in 1975 ~~decision~~ in Southern Burlington County NAACP v. Mount Laurel Township, 67 N.J. 151 (Mount Laurel I). That doctrine provides that each developing municipality in the State has an affirmative obligation to provide, through its land use regulations, a realistic opportunity for the construction of its fair share of the regional need for low and moderate income housing.

Declaring that it is "more firmly committed to the original Mount Laurel doctrine than ever," the Supreme Court stressed that this obligation derives, not from some theoretical analysis of the State Constitution, but from concepts of "fundamental fairness in the exercise of governmental power." The Court explained that the constitutional power to zone must be exercised for the "general welfare" and that "when the exercise of that power affects something as fundamental as housing," the general welfare encompasses the welfare of "those residing outside of the municipality" as well as those living within its boundaries. Thus, in exercising their power to zone, municipalities may not arbitrarily exclude the poor, many of whom are black or Hispanic, from attractive suburban areas and thereby consign them to living in urban slums. This, the Court noted, is a

"vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency." The Court

~~Added:~~

The basis for the constitutional obligation is simple: the State controls the use of land, all of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and direct housing elsewhere for everyone else.

Despite its ringing reaffirmation of the Mount Laurel doctrine, the Court recognized that Mount Laurel I has not resulted in housing, but rather has led to more litigation and the waste of judicial resources. The Court criticized what it perceived as "widespread non-compliance with the constitutional mandate of our original opinion." Declaring that this must not continue, the Court vowed to "put some steel" into the Mount Laurel doctrine and "make it work" by strengthening, it clarifying it, and making it easier to apply.

Accordingly, in Mount Laurel II, the Court reexamined the doctrine and resolved the principal legal issues which have plagued its effective application. Specifically, the Court ruled that:

- o Every municipality, at a minimum, must provide a realistic opportunity for the development of housing to meet the needs of its indigenous poor, except where they represent a disproportionately large segment of the ~~City's~~ population.
- o The existence of a municipal obligation to provide for a fair share of the regional housing need no longer will be

determined by whether or not a town is "developing," but will extend to every municipality which is designated by the New Jersey State Development Guide Plan (SDGP) as having a "growth area"; because the SDGP sets forth the State's judgment as to where growth should and should not occur, it is an appropriate vehicle for identifying which municipalities are subject to Mount Laurel's fair share obligation.

- o To satisfy its Mount Laurel obligation, a municipality must provide a realistic opportunity for development of both low and moderate income housing: "Since there are two fairly distinct lower income housing needs, an effort must be made to meet both."
- o The municipal obligation to provide a realistic opportunity for development of low and moderate income housing no longer will be satisfied by proof that the municipality made a "good faith" attempt to provide the opportunity, but rather will be determined *based on* ~~on the basis of~~ whether it in fact has provided this opportunity.
- o In all Mount Laurel cases, trial courts will be required to make a precise determination of region, regional need and the specific number of units needed to meet the municipality's fair share; "numberless" resolution of these issues no longer will be sufficient.
- o Upon finding that a municipality's ordinance fails to satisfy its Mount Laurel obligation, the municipality will be required, "at the very least, [to] remove all municipally-created barriers to the construction of their fair share of lower housing," including the removal of all zoning and subdivision restrictions and exactions that are not necessary to protect health and safety."
- o Upon finding that a municipality has violated Mount Laurel, courts ordinarily will award a "builder's remedy" (i.e., a variance or other approval of a proposed project), so long as the developer has acted in good faith and the project includes an appropriate amount of lower income housing and is consistent with sound planning considerations.

Notwithstanding the importance of these rulings, the heart of the Court's decision really lies in its holding that, where the removal of cost-producing barriers are inadequate to assure construction of a municipality's fair share of low and moderate income housing, the municipality will be required to undertake affirmative measures to make the opportunity for construction of its fair share truly "realistic." In a significant advance over prior law, the Court explained:

It was never intended by Mount Laurel I that this awesome constitutional obligation, designed to give the poor a fair chance for housing, be satisfied by meaningless amendments to zoning or other ordinances. "Affirmative," in the Mount Laurel rule, suggests that the municipality is going to do something, and "realistic opportunity" suggests that what it is going to do will make it realistically possible for lower income housing to be built.

The Court recognized that satisfaction of the Mount Laurel doctrine "cannot depend on the inclination of developers to help the poor." Merely affording developers an "opportunity" to build lower income housing will not result in the development of such housing if alternative uses of the property will yield a higher profit. Thus, the Court noted that "affirmative inducements" ordinarily will be necessary to ensure that the opportunity is taken: "For an opportunity to be "realistic" it must be one that is at least sensible for someone to use." The Court concluded that

unless removal of restrictive barriers will, without more, afford a realistic

opportunity for the construction of a municipality's fair share of the region's lower income need, affirmative measures will be required.

Principal among these "affirmative measures" are inclusionary zoning devices such as "mandatory set-asides," which require developers to include a minimum amount of low and moderate income housing in each residential development. They also include "density bonuses" and other forms of incentive zoning. These provisions offer economic incentives to developers by relaxing various restrictions in exchange for the construction of a specified amount of lower income housing. Other affirmative measures include zoning for mobile home developments, overzoning for low-cost residential uses, taking all actions necessary to secure state and federal housing subsidies and grant assistance, waiving development fees, providing tax abatements, and expanding municipal services or infrastructure^{USE}, such as water, sewer, and street improvements, ~~for~~^{to} provide an additional incentive to the development of lower-cost housing. In discussing these affirmative measures, the Court made clear that construction of "least-cost" housing (i.e., the least expensive housing that can be built after removal of all excessive restrictions) will satisfy a municipality's Mount Laurel obligation only if all alternatives have been explored and all affirmative devices

have been considered.*

In its January 20th decision, the Supreme Court noted that Mount Laurel I already had held that municipalities must do more than simply refrain from precluding ~~the~~ construction of low and moderate income housing; they must also affirmatively provide a realistic opportunity for the development of such housing. Nevertheless, until Mount Laurel II, it was never clear precisely what would be required of municipalities. As a result, few communities acted voluntarily and affirmatively to meet their Mount Laurel obligation and few courts required them to do so. The Supreme Court's decision in Mount Laurel II serves to clarify the municipal obligation and creates the procedures for enforcing it. It therefore, for the first time, provides the means for translating our legal victories into the construction of housing for low and moderate income people. An immediate opportunity to apply the principles of Mount Laurel II exists in the cases remanded for development of a housing remedy in connection with that decision.

* To ensure greater compliance and increase the effectiveness of the judicial remedy, the Court also adopted simpler, more efficient procedures for handling Mount Laurel litigation. These included: providing for the liberal use of experts to assist the court in resolving questions relating to region, regional need and fair share; providing for closer judicial supervision and for the appointment of a master to assist in formulating and implementing a proper remedy; limiting the number of appeals; and assigning all future Mount Laurel cases to one of three judges specially appointed to handle all such cases within one of three regions in the State.

MIDDLESEX COUNTY AND MAHWAH CASES

The Court's Mount Laurel II decision resolved six cases that had been consolidated for consideration by the Court. Three of these cases -- Middlesex County, Mahwah, and the original Mount Laurel case -- were initiated by non-profit civil rights organizations and several individuals on behalf of a class of low and moderate income households seeking to reside in these communities. In all three cases, the Court ruled in favor of plaintiffs and remanded for determination of the municipality's fair share and ~~for~~ adoption of a revised ordinance and affirmative zoning measures. The other three cases were brought by for-profit housing developers who sought local approvals for the development of specific tracts.

In the Mahwah case, plaintiffs Urban League of Essex County, the North Jersey Community Union, and three individuals, who were seeking housing in Mahwah, brought suit in 1972 against the northern Bergen County municipalities of Mahwah, Ramsey, Saddle River, and Upper Saddle River alleging that these municipalities had failed to provide their fair share of low and moderate income housing as required by Mount Laurel. The trial court dismissed the action on grounds that the plaintiffs did not have standing to sue. In 1977, the Appellate Division ~~reversed~~ reversed and remanded the matter for a plenary hearing.

In December, 1977, the lower court ordered a severance of the defendant municipalities. Plaintiffs decided to

proceed initially against Mahwah and a trial was held in January and February, 1979. In March 1979, the trial court again ruled in favor of defendants on the grounds that the township's Mount Laurel obligation had been met by the township's "bona fide" efforts to provide "least-cost" housing through its new multi-family and mobile home zones, although housing in these zones was priced at \$70,000 and above.

The Supreme Court ~~reversed~~^{er}, ~~rejecting~~^{er} the trial judge's conclusion -- which was based on his ^{own} personal knowledge -- that low or moderate income housing could not be built in Mahwah, the Court remanded for a determination of Mahwah's fair share and the appointment of an expert to assist the court in the fair share hearing. The Court added that, assuming Mahwah's ordinance is found not to comply with Mount Laurel (which the Court indicated "seems certain from the record before us"), the trial court must enter judgment for the plaintiffs, order Mahwah to revise its ordinance, and appoint a master to aid in formulating and implementing affirmative zoning measures and other remedial actions designed to promote the construction of the township's fair share of affordable housing.

With respect to the Middlesex County case, the Supreme Court in Mount Laurel II stated: "The impact of the holding and spirit of ... Mount Laurel is nowhere better illustrated than in this case." In that case, the Urban League of Greater New Brunswick and seven individuals challenged the

zoning ordinances of 23 of the 25 municipalities in Middlesex County. The trial court dismissed one town outright and dismissed 11 other substantially developed communities condition^{ed} on the revision of their zoning ordinances to remove all exclusionary provisions. As to the remaining 11 municipalities - those with large amounts of vacant, developable land - the court held that their zoning ordinances were unconstitutional under Mount Laurel. After determining the lower income housing need for the region and correcting for imbalances between the towns, the court distributed this need evenly among the 11 defendants on grounds that each had ample vacant land to accommodate their fair share of the total number of units. The court then required the towns, not only to reverse their ordinances, but also to take affirmative steps such as mandatory set asides, density incentives and mobile home development, to facilitate construction of their fair share of the lower income housing need.

Seven municipalities appealed. The Appellate Division reversed and dismissed the case on ~~the~~ grounds that the trial court's definition of region was too narrow to support the finding of a violation. The appeals court also objected to the trial court's allocation of the region's unmet housing needs among the defendants, stressing that the municipalities should first have full opportunity to act without judicial supervision.

The Supreme Court reversed. The Court approved both

the trial court's holding that the challenged zoning laws were unconstitutionally exclusionary and its order that municipalities take affirmative measures, in addition to revising their zoning laws, "to afford the realistic opportunity for lower income housing." The Court also approved of the lower court's definition of Middlesex County as the appropriate region for purposes of determining a fair share remedy. ⁽⁹⁾ The Court noted, however, ~~that~~ the trial judge had not defined the larger region from which the low and moderate income housing need would be generated. The Supreme Court also questioned the advisability of allocating that need equally among the defendant municipalities without considering other factors relating to their suitability to meet that need. Accordingly, the Supreme Court remanded the case for a determination of the appropriate region, regional need, and fair share allocation for each of the defendant municipalities, and for revision of the ordinances and adoption of appropriate affirmative measures. The Court added that on remand there would be no need for a new trial concerning the municipalities' non-compliance with Mount Laurel, unless a municipality's ordinance has been substantially amended. Because several of the defendants' land use ordinances have been amended, plaintiffs expect that, subsequent to the fair share hearing but prior to appointment of a master, ~~there~~ will be compliance hearings with respect to at least some of the defendants.

IMPORTANCE OF THE MIDDLESEX COUNTY AND MAYHAWK CASES
For several reasons, these two cases, along with the

Mount Laurel case, are of critical importance to the future application of exclusionary land use principles in New Jersey, as well as nationwide. First, as part of the Mount Laurel II sextent, these cases have been remanded with specific instructions from the Supreme Court to implement an appropriate remedy. *(test and apply the holdings of that decision. ~~and~~ Their succe.* Each will be required to implementing the Court's mandate will have a direct bearing on the future success of all Mount Laurel litigation in secur^{ing} the construction of lower income housing. Second, each of these cases is relatively old -- having been filed in 1970, 1972 and 1974, respectively. Accordingly, each can expect to receive expedited consideration on remand. As a result, these cases will be among the first to apply the principals laid down in Mount Laurel II. Indeed, in two of the cases -- Mount Laurel and Mahwah -- experts have already been appointed and fair share hearings have been scheduled for early fall. Finally, being among the first cases to follow Mount Laurel II, each will have enormous precedential impact on other cases in their region: Mount Laurel in South Jersey, Middlesex in Central Jersey, and Mahwah in North Jersey. This is especially true of the Middlesex County case which involves more than one jurisdiction and ~~which~~ has been assigned to one of the three judges recently appointed by the Supreme Court to handle all future Mount Laurel litigation.

Because these three cases were brought by public interest organizations on behalf of a class of poor people,

rather than by for-profit developers, they have always had to rely on outside support to fund their costs. The plaintiffs in these cases cannot shoulder the financial burden of this litigation. In this regard, The New Jersey Department of the Public Advocate has committed itself to support the entire cost of the remand proceedings in the Mount Laurel case.

The non-profit sponsors and plaintiffs in the Middlesex County and Mahwah cases, however, need your financial support in order to complete the remedial stage of this litigation. Both the National Committee Against Discrimination in Housing (NCDH) and the American Civil Liberties Union of New Jersey (ACLU) are able and willing to make a substantial commitment to the Middlesex County case in terms of attorney time. As indicated in the budget, attached hereto as Appendix A, they require an additional \$32,000 in order to pay for costs and secure the services of those experts needed to help develop and implement an effective remedy in ^{that} ~~their~~ case. Neither organization has the funds available for this purpose. In addition, while the Center for Metropolitan Action (formerly Suburban Action Institute) is willing and able to contribute \$2,500 toward costs in the Mahwah case, it needs an additional \$33,000 as indicated in Appendix A, in order to continue with ^{the} ~~the~~ case.

Each of the non-profit sponsors has been intimately involved in the creation and evolution of the Mount Laurel doctrine. Both the Center for Metropolitan Action and NCDH

have been advocating the theory of fair share allocation of housing need since the 1960's. Moreover, all three organizations have been a primary moving force behind exclusionary land use litigation in New Jersey since the early 1970's.

The remand proceedings in the Middlesex County and Mahwah cases present the first opportunity to test the strength and practical feasibility of the Supreme Court's rulings in Mount Laurel II. This final round of hearings will help to determine the ultimate impact of the Mount Laurel doctrine on New Jersey's suburbs and inner cities. The plaintiffs, represented by the applicants herein, need your financial aid in order to ensure that these proceedings result in the actual construction of badly needed housing. After twelve years of successful litigation, this effort must not be abandoned for lack of funds, especially at the very time that realization of housing for the poor is within our grasp. We ask your assistance to enable these cases to be continued in order to make suburban housing for the poor a reality.

APPENDIX A

LITIGATION COSTS FOR REMAND
 PROCEEDINGS IN MIDDLESEX
COUNTY AND MAHWAH CASES

<u>Task</u>	<u>Cost</u>	
	<u>MIDDLESEX COUNTY</u>	<u>MAHWAH</u>
1. Attorney(s)	--	\$20,000
2. Planning Expert on Definition of Region, Determination of Regional Need, Impact of State Development Guide Plan, and Determination of Fair Share	\$ 3,600	2,500
3. Planning Expert on Compliance with <u>Mount Laurel</u> Obligation, Including Review of Revised Zoning Ordinances and On-Site Evaluation of Present and Potential Land Uses	12,000	--
4. Planning Expert on Inclusionary Land Use Regulations, Municipal Infrastructive, and Proposed Housing Developments	10,000	7,500
5. Housing Expert on Federal and State Housing and Community Development Programs and Housing Development Remedies	2,200	2,000
6. Administrative Costs, Including Travel, Lodging, Meals, Transcripts, Exhibits, Aerial Maps, etc.	4,200	1,000
	Subtotal	\$33,000
	Total	\$65,000