

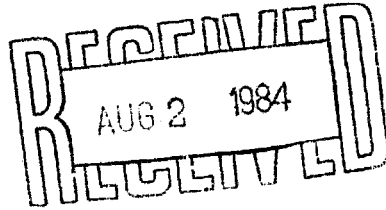
Mount Laurel ~~MD~~

8/15 (1984)

- growth area as a factor in determination
of local fair share of regional housing needs

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Memorandum

August 15, 1984

TO: Philip Caton, Richard Coppola, Carla Lerman, Alan Mallach, Jay Lynch

FROM: George Raymond

SUBJECT: Agenda for August 7th Meeting

In addition to anything any one of you may wish to have discussed I would like to put the following somewhere near the top of our agenda:

1. Use of Growth Area factor in determination rather than implementation of fair share. (See my paper on the subject--attached.)
2. The Rutgers method of determining present need (see Skillman decision in Ringwood case).
3. Overzoning--over what? Theoretical fair share or forecast market demand?
4. Is the 20% surcharge part of the fair share or allocated in addition to the fair share? .
5. Staging of development opportunities.

I look forward to our meeting. See you in Carla's office at 10 AM on the 7th.

The Growth Area as a Factor in the Determination of the Local
Fair Share of Regional Housing Needs¹

George M. Raymond, P.P.

¹This memorandum is written in opposition to the use of the growth area factor in the calculation of fair share. It is important to note at the outset that use of the growth area concept for determining only the locus where a municipality's Mount Laurel obligation should be satisfied rather than its magnitude, as recommended herein, would not cause any diminution in the amount of affordable housing that would have to be provided in the region. Its effect would be limited to changing its distribution among municipalities. The total regional housing need is derived from household growth projections formulated independently of any of the factors used in the calculation of municipal fair shares. As a result, if elimination of the growth area factor from the fair share allocation formula will increase the obligation of some communities, that of other communities will be decreased by the same amount.

Despite lack of proof that the elimination of the growth area factor will increase the obligation of communities that are less able to accommodate it because of a shortage of suitable vacant developable land, it is also important to note that the "consensus formula" accepts as a given that any portion of the fair share of any municipality which cannot be satisfied because of insufficiency of vacant land must be reallocated to other municipalities in the region. This the "consensus formula" seeks to accomplish by adding a 20 percent surcharge to the fair share of all municipalities in the region to make up for those instances in which particular municipalities will prove unable to accommodate their fair share.

The State Development Guide Plan: Application of the Growth Area Concept

"Growth Area" is a concept introduced by the New Jersey State Development Guide Plan (SDGP) prepared by the N.J. Department of Community Affairs with the help of a federal grant starting in 1975 and culminating with the loose "adoption" of the somewhat sketchy resulting document in May 1980.

The Supreme Court in Mount Laurel II took cognizance of the SDGP in the following context:

The existence of a municipal obligation to provide a realistic opportunity for a fair share of the region's present and prospective low and moderate income housing need will no longer be determined by whether or not a municipality is "developing." The obligation extends, instead, to every municipality, any portion of which is designated by the State, through the SDGP as a "growth area." This obligation, imposed as a remedial measure, does not extend to those areas where the SDGP discourages growth--namely, open spaces, rural areas, prime farmland, conservation areas, limited growth areas, parts of the Pinelands and certain Coastal Zone areas. The SDGP represents the conscious determination of the State, through the executive and legislative branches, on how best to plan its future. It appropriately serves as a judicial remedial tool. The obligation to encourage lower income housing, therefore, will hereafter depend on rational long-range land use planning (incorporated into the SDGP)...(92 N.J. 215--emphasis supplied).

In the above-cited paragraph, the Court discusses the existence of "the obligation." It clearly spells out the fact that an obligation will attach to all communities that contain any land mapped in the growth area on the SDGP map. The statement that areas intended to be preserved as "open spaces, rural areas,

prime farmland, conservation areas, limited growth areas..." are to be free of the imposition of remedial measures can only be interpreted to mean that the locus of the obligation, once determined to exist, must be sought on lands mapped in growth areas.² This had to be made clear since, in a municipality only a part of which consists of growth area lands, all other lands are mapped in one of the exempt classifications and thus must be protected against development. The preservation of such areas is not assured by merely mandating that the obligation be satisfied only by municipalities that contain some growth areas.

The Court has indicated its belief that, if the SDGP is used as

the primary standard to determine the locus of the Mount Laurel obligation and consequently to determine where development (in this case housing) should be encouraged... (and) to assure that the Mount Laurel doctrine does not encourage development in conflict (emphasis in original) with the State's comprehensive plan...

its remedial use would conform with legislative intent and with that of the Plan itself (92 N.J. 233). As stated above, the allocation of a larger fair share to a municipality with substantial amounts of land in growth areas does not guarantee that the locus of that obligation within the municipality will conform with the SDGP. The State's comprehensive planning objectives can

² Subject to certain exceptions set forth on pp. 240-243 which are discussed on page ____, below.

only be implemented if whatever obligation may be allocated to a given municipality will be located in growth areas.

This theme is a constantly recurring one. Thus, recognizing that the SDGP "provides a statewide blueprint for future development," the Court expressed its satisfaction that the existence of this document will furnish the needed

guarantee that if lower income housing resulted, it would be built where it should be built, i.e. where a comprehensive plan for the State of New Jersey might indicate such development was desirable. (92 N.J. 225--emphasis supplied)

By thus reiterating that the housing should be built in growth areas, and not in areas designated in the SDGP as limited or non-growth areas, the Court again deals with the locus of the housing, rather than with the amount required to fulfill the local obligation:

"The Mount Laurel obligation should, as a matter of sound judicial discretion reflecting public policy, be consistent with the state's plan for its future development. Consequently, the obligation should apply in these "growth " areas, and only in these areas...Channeling the development impetus of the Mount Laurel doctrine into "growth areas" is precisely the kind of use of the plan that was intended by those who prepared it. (92 N.J. 226-227)."

* * *

Should "Growth Area" be Used in Determining the Magnitude of the Mount Laurel Obligation?

In three places, the Court relates the magnitude of the fair share, or the obligation, to the presence of growth area land in the municipality. These are set forth and commented on below.

The first such statement is as follows:

The remedial obligation of municipalities that consist of both "growth areas" and other areas may be reduced, based on many factors, as compared to a municipality completely within a "growth area." 92 N.J. 215 (emphasis supplied).

Unlike its position regarding the existence of the obligation, which is mandated, as discussed above, the Court does not mandate that the size of the obligation be modulated on the basis of the extent of a municipality's growth area. All that can be inferred from the above-cited language is that if the inherent logic of using the growth area factor--as proposed in the "consensus methodology," for instance--were to be established, Mount Laurel II would not preclude its use. The discretionary use of the growth area factor seems to be confirmed by its conspicuous absence from the factors which the Court said it would favor in the fashioning of a formula for determining a municipality's fair share--which include only "employment opportunities in the municipality, especially new employment accompanied by substantial ratables" (92 N.J. 256)--despite the fact that the Court's discussion of the growth area concept and its meaning covers 25

pages of the total of 35 in which it discusses the Mount Laurel obligation and the calculation of fair shares³.

This interpretation of the Court's intent finds additional support in its statement that

By virtue of our opinion today, the State Development Guide Plan's delineation of growth areas will in most cases determine the existence and location for the imposition of the Mount Laurel obligation (92 N.J. 247)

which again omits mention of the magnitude of the obligation.

After discussing the difficulty of determining a given municipality's region and regional need, the Court expressed its hope that

within several years the fair share question will be confined to the allocation issue. Our use of the SDGP should end practically all disputes over the existence of the Mount Laurel obligation..." (92 N.J. 255--emphasis supplied).

The existence of the obligation results from the presence of any growth area in the municipality. Had the Court intended to use the extent of the growth area as a factor, clearly this would have been the appropriate place to state that use of the SDGP

³What the Court failed to say is as significant as what it did say (Orgo Farms & Greenhouses, Inc. v. Township of Colts Neck, p.8 of pre-publication version).

should help resolve disputes regarding calculation of fair shares as well.

The statement that "the remedial obligation of municipalities that consist of both 'growth areas' and other areas may be reduced, based on many factors, as compared to a municipality within a 'growth area'" cannot be taken literally since the extent of the growth area in a municipality which also contains some non-growth areas may be greater than the entire area of a municipality located entirely in the growth area.

To repeat, therefore, if use of the growth area factor is not mandated, whether it is used or not should depend on its inherent logic. Set forth below are some of the reasons why I believe it to fail that test:

1. In and of itself, the amount of growth area mapped in one municipality as against another is not meaningful to a determination of the appropriate sequence of development. Adjacent to dynamically developing areas, the phasing in of housing development sooner rather than later places such housing within relatively easy reach of employment opportunities and within reach of existing infrastructure. By including all growth area land throughout the region as a factor in the distribution of housing, the fair share of a rapidly

developing municipality may be reduced by reason of the presence of large amounts of growth area land on the periphery of the 45-minute or more commutershed region, much of which conceivably should not be encouraged to develop for decades.

The SDGP is quoted in the opinion as recommending the targeting of public investments for new growth-inducing facilities to growth areas and the encouragement of housing development in proximity to jobs, commercial areas, and public transportation (92 N.J. 231). This type of correlation can exist in municipalities with a well-developed job base much more readily than in municipalities whose principal characteristic is that they contain a great deal of land in their growth areas, particularly so if that land is largely vacant.

2. The presence of a large amount of growth area land in a municipality lacking ratables should not be used to increase its fair share especially if, regardless of the size of its growth area relative to that of other municipalities in the region, some of these other municipalities are the main sources of housing needs (by reason of new growth) and contain vacant developable land in an amount sufficient to enable them to satisfy their logically derived fair shares.

3. If, in one municipality which has a larger than proportionate share of growth area land, such land is substantially developed, whereas in another, with a smaller amount of growth area land, such land is mostly vacant, the use of the growth area factor cannot be said to express the relative ability of the two municipalities to absorb new development. To illustrate the distorting effect of the use of the growth area factor, I will hypothesize two communities that are equal in all respects except that in one, only 10 percent of the growth area is still undeveloped while in the other, with only one half as much growth area, 90 percent is totally vacant. The formula will allocate a considerably larger share to the municipality which will have the greater difficulty accommodating it.

For the three reasons stated above, use of the amount of growth area in one municipality as a percentage of the total throughout the region for the calibration of a municipality's fair share of the regional housing need would be arbitrary and illogical. In many instances it would distort the result in ways that would be both counterproductive in terms of sound planning and unfair to some municipalities.

The second statement relating the magnitude of the obligation to the growth area concept appears in the Court's discussion of the

three exceptions to acceptance of the SDGP determinations of the existence and location of the Mount Laurel obligation. The Court suggested that a municipality which lies entirely within a non-growth area but where proof is offered to the effect that that characterization is no longer appropriate should have an obligation imposed upon it; that in a municipality whose growth area was insufficient to accommodate its fair share but where proof is offered to the effect that the municipality has encouraged growth outside that area, any developable land thus properly reclassifiable as growth area should be considered as available for the purpose of satisfying the obligation or for use in a builder's remedy; and, conversely, that the full obligation should not be imposed upon proof that the SDGP's delineation of growth areas includes lands that should properly be designated as agricultural or limited growth.

In discussing the effect of the exceptions, the Court stated that they:

will allow a party to have the court impose a Mount Laurel obligation on a municipality that has no growth area as shown on the concept map, or to impose a greater Mount Laurel obligation by, in effect, proving that the growth area should be enlarged, or, conversely, to relieve a municipality from any Mount Laurel obligation even though the concept map shows it as including a "growth area," or to diminish the obligation by proving that the "growth area" shown on the concept map should be cut down (92 N.J. 241).

The above statement is intended to prevent a rigid interpretation of the lines on the SDGP by a municipality for the purpose of avoiding whatever obligation may have been allocated to it on the basis of any appropriate factors. In fact, since the Court's entire discussion of the three exceptions occurs in the context of an application for "a ruling that varies the locus of the Mount Laurel obligation"... (92 N.J. 240--emphasis supplied), this language seems to equate "the obligation" with the actual housing developments which it will cause to be built. The Court makes clear elsewhere that the choice of a locus for a builder's remedy should be constrained by "the clear obligation to preserve open space and prime agricultural land (92 N.J. 211)" designated on the SDGP. The Court itself provides the key to its thinking where, after stating that:

"determination of fair share must take into consideration, where it is a fact, the inclusion within particular municipalities of non-growth areas where, according to the plan, growth is to be 'discouraged'... (92 N.J. 351)"

it refers the reader for an explanation of the meaning of this statement to its discussion (on p. 331) of the appropriateness or lack thereof of a specific tract for a builder's remedy given contested claims of its environmental sensitivity.⁴

⁴The Court also refers the reader to page 212 where it points out that determining where development is or is not appropriate is a legislative responsibility and that the SDGP constitutes "some legislative initiative in this field."

Further support for this interpretation is furnished in the Court's discussion of the Clinton case. After indicating that "the fair share (should) be accommodated completely in the growth area consistent with sensible planning," the Court states

If it can, then the fair share determination below shall stand; if not, it shall be revised appropriately.

This instruction to the trial court on remand to examine Clinton Township's ability to accommodate its full fair share in its growth area (92 N.J. 329) could be interpreted to be applicable only where a fair share had already been determined without regard to the impact of the SDGP on the feasibility of its being satisfied. While this is unquestionably the context of that portion of the decision, there is no reason why the same technique of first, determining a fair share on a basis that does not include the growth area factor, and second, of determining the ability of the municipality to accommodate it, is not appropriate in all cases. Use of the growth area factor will not relieve the trial courts of the need to consider each municipality's ability to accommodate its fair share within the SDGP guidelines (viz. the clear inability of South Plainfield and Piscataway Townships to provide their full fair share through new construction despite the derivation of that obligation using the "consensus methodology"). What is at issue, therefore, is not whether such a procedure is only appropriate on remand but whether the growth area factor expresses municipal characteristics that should

relieve some municipalities of any portion of such fair share obligation as may result from the use of factors that are clearly relevant to that determination.

Use of the Growth Area Factor is Contrary to the Spirit of Mount Laurel II

The Court notes that, while the legislature

did not mandate conformance of the municipal master plan or the development of the municipality to the SDGP, the legislative intent was clear: municipalities were encouraged to guide their development in conformance with the state plan to make it more likely that through voluntary municipal action, the future development of the entire state would be in accordance with comprehensive sound planning...[T]he municipal master plan...which must relate to the SDGP, is to guide the use of lands within the municipality" (92 N.J. 228-229).

The intent of reflecting growth areas in a municipal plan is thus to encourage their development. This means that, sooner or later, the growth areas in the municipality will be expected to develop. In a municipality subject to development pressures available growth area land can be expected to be used up at a rate roughly reflecting its previous rate of growth. If a municipality's Mount Laurel obligation, computed on the basis of employment growth, is large but the amount of land in the growth area within its borders is relatively small, any deflection of its obligation onto others by reason of the use of the growth area factor in computing its fair share risks the total depletion

of the still available growth area lands for purposes other than the satisfaction of its obligation.

To illustrate this point I will hypothesize a municipality with high job growth--and, therefore, a high fair share obligation--but with a relatively low amount of growth area land. I will assume that, using the growth area factor, the local fair share would amount to 2,000, but that excluding that factor would increase it to 2,400 units. Of its 5,000 acres of growth area land, most of which are devoted to offices, manufacturing plants and shopping centers, 1,200 are still vacant and suitable for housing development at 10 dwellings per acre. The total capacity of this land is 12,000 units, which, with a 20 percent set aside, would produce 2,400 Mount Laurel units. The reduced fair share of 2,000 units could be accommodated on 1,000 acres, leaving 200 acres free for the development of more offices, manufacturing plants and shopping centers! At the same time, the unsatisfied obligation amounting to 400 units may be allocated to a municipality which, while it may contain a larger proportion of the region's growth area, may also have no infrastructure, little employment and ratables, and no transportation. To put it another way, a community with a high employment base (read ratables) and substantial recent job growth (read housing need) will be able to use some of its developable land for still more employment growth and ratables while satisfying less than its

fair share of housing needs determined on the basis of those factors that are specifically "favored" by the Court.

It is difficult to conceive that such a result is consonant with the philosophy which permeates Mount Laurel II. In articulating its commitment to sound planning, the Court clearly did not intend to relieve municipalities subject to the obligation from having to use any portion of their growth area for the purpose. The only thing that comes through clearly from the decision is that, if a municipality contains a growth area, such obligation as it may be allocated using a logical formula should be satisfied within its boundaries on lands mapped in the growth area, or on lands adjacent thereto which the particular situation may suggest could be used for that purpose without doing violence to the SDGP.

Use of Growth Area as a Surrogate for Vacant Developable Land

The last argument in favor of use of the growth area factor that needs to be considered is its use as a surrogate for vacant developable land. It was pointed out above that "growth area" is not synonymous with vacant land. But even if it were, there is no need to guess the Court's intent in this regard, given the following statement in Mount Laurel II:

...there (is no) justification for allocating a particular regional need equally among municipalities simply because they have enough land to accommodate such equal division. There may be factors that render such a determination

defensible, but they would have to be strong factors, and certainly not the simple fact that there is enough land there. (92 N.J. 350)

Conclusion

The conclusion is inescapable: Mount Laurel II seeks to determine the local obligation on the basis of factors that express housing needs and employment opportunities and expects all localities to satisfy their obligation to the full extent of this ability. Reducing such obligation is only justifiable upon conclusive proof that the municipality is unable to satisfy its full fair share. The fact that some township that is located 40 miles away happens to contain more growth area land as a percentage of the total in the region definitely does not constitute such proof.

June 1, 1984