

Hoboken 1985

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"Sketch of Mt. Laurel Argument for Hoboken"

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Alan: This is a rough sketch of a Mount Laurel argument for Hoboken. It obviously needs work (and citations) but I'd like your thoughts on whether the ideas are appropriate. Are the numbers and proofs as I confidently assert them to be? I will be away until next Wednesday but will call Thursday morning to find out what our meeting schedule is.

JMP

QUESTION: Is the City of Hoboken subject to a Mount Laurel II obligation?

ANSWER: Unquestionably, yes.

Mount Laurel II recognizes two distinct components of housing need that have constitutional dimensions. One is present need, which is concerned with the actual existing need of any given municipality and of other municipalities in the housing region; the other is prospective need, which is anticipated growth in lower income housing need due to population growth in that region.

Every municipality in the State of New Jersey has an obligation to meet at least a fair share of its own indigenous present housing need. In most suburban communities, because of prior development without significant concentrations of poor people, the present indigenous need is small, and such communities are required to meet this entire need within their own boundaries. In the special case of the central cities, however, the Court recognized that the existing overburden of poverty, itself a function of past exclusionary practices elsewhere, was such that it would be inappropriate to require these municipalities to meet their entire present indigenous need. A major thrust of the fair share methodology resulting from Mount Laurel II, therefore, has been to define a percentage rule of thumb as a ceiling on the urban fair share obligation. The excess is then reallocated to surrounding

suburban areas where available land, housing construction, and new jobs all permit accomodation of this "excess need." The fair share methodology approved by the two Mount Laurel trial judges who have ruled on the issue (including Judge Skillman, who would hear any Hoboken litigation), have implemented these principles.

It is important to recognize, however, that this judicial concern for the poverty overburden of the central cities does not relieve these cities of their constitutional obligation, but merely subjects it to special analysis.

As noted before, all municipalities' land use regulations will be required to provide a realistic opportunity for the construction of their fair share of the region's present lower income housing need generated by present dilapidated or overcrowded lower income units, including their own. . . . [T]here may be some municipalities, however, in growth areas where the portion of the region's present need generated by that municipality far exceeds the municipality's fair share. 456 A.2d at 433 [emphasis by the Court].

In a subsequent footnote dealing with a slightly different aspect of the problem, the Court gave a further indication of its view that the center cities retained a significant Mount Laurel obligation:

[D]eveloped municipalities shall be subject to the Mount Laurel obligation -- that includes the central cities and the built-up suburbs. The most significant question in such cases will ordinarily be whether there is any land available for development,

and, if not, what kind of remedy is appropriate to assure that as land becomes available, a realistic opportunity exists for the construction of lower income housing, assuming it is otherwise suitable for that purpose. 456 A.2d at 435-36 n.21.]

It is not sufficient then, that Hoboken has a significant population of lower income families. To the extent that these families are presently in need of safe and affordable housing, Hoboken, no less than any other municipality in the state, has a constitutional obligation to afford a realistic opportunity of meeting that need, to the extent that its governmental powers permit it to do so.

Using the slightly differing formulas developed by Judges Skillman and Serpentelli, the two Mount Laurel judges who have considered the issue, Hoboken's present, indigenous need is approximately *** housing units, or **% of the total number of housing units in the city. In the housing region of which

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Lawyer's footnote: The Court was addressing the possibility that the legislature might revoke the State Development Guide Plan, thereby undercutting the Court's mechanism for channeling the Mount Laurel obligation to SDGP "growth area" municipalities. In this event, the Court held, the old Mount Laurel I standard of "developing municipalities" would be used, but revised to include both center cities and fully-developed suburbs. Since all of these areas are classified as "growth areas" by the SDGP, it is clear that the Court's language about whether there is land available is intended to cover the existing rules under the SDGP as well as the hypothetical possibility of reversion to the "developing municipalities" standard.

Hoboken is a part, the average percentage of housing need is **%, and if Hoboken's fair share were held to be no more than the average need of the region, it would be obligated to provide for *** new or rehabilitated units. Because of the similarities between the approaches that the two Mount Laurel judges have taken, it is highly likely that the Supreme Court will approve some version of this methodology when the issue is presented to it on appeal, and *** therefore represents a realistic minimum estimate of Hoboken's present need fair share obligation.

It might well be, however, that Hoboken's obligation could be increased significantly beyond this figure. In Mount Laurel II, the Supreme Court was understandably concerned primarily with the stark dichotomy between central cities and affluent suburbs, and much of the Court's language was addressed to shifting burdens from the former to the latter. Gentrification, however, places Hoboken in a unique category (along with Jersey City and a few other communities) that could easily permit the Court to create new and different rules.

Gentrifying communities are unique because they present both the poverty overburden of the typical center city (such as Newark) with a dynamic housing market that produces a real capacity for the private market to meet lower income housing

needs, something that is virtually impossible in cities like Newark. Because of this dynamic growth (both in housing and in jobs, as measured by projects presently being considered), the Court might well be convinced to hold that Hoboken has an obligation to provide for more than a portion of its indigenous present need. Its proportion could be increased, for instance, or it could be made responsible for some prospective need as well as present need.

In addition to the powerful argument of economic capacity, it would be a simple matter to produce expert testimony demonstrating both the economic and social advantages to lower income families of remaining close to the transportation, services, and support mechanisms that cities can most efficiently provide, so long as decent housing and jobs are available. Similarly, housing experts could readily testify that the gentrification dynamic is so powerful that additional provision for lower income housing would not conflict with the judicially-recognized importance of encouraging the return of new businesses and higher income families to the cities. It cannot be seriously contended that the luxury housing and new office buildings proposed for the Hoboken waterfront would evaporate in the face of a decent proportion of housing for poor people. Such, at any rate, has not been the reaction of experienced developers in such fabled growth areas as Bedminster and Princeton.

The Supreme Court in Mount Laurel II repeatedly emphasizes the practicality and flexibility of its holdings. At one point, for instance, it explicitly invited litigation seeking to revise or refine its rules for use of the State Development Guide Plan "if events indicate" the need to do so. "[T]his area . . . is much too complex to be dogmatic about almost anything. Flexibility is needed here, for our work is partially legislative in character." 456 A.2d at 433. In light of the Court's humane concern that everything possible be done to house all of the state's population fairly, it is inconceivable that the Court would read Mount Laurel II so narrowly that it could not be adapted to the special problems of gentrifying cities. The first part of the opinion, in fact, is a lengthy critique of how the earlier Mount Laurel I decision had been sabotaged by ineffective, unrealistic interpretation, an experience that the court was determined not to repeat.

Moreover, gentrification presents issues not formally before the Court in Mount Laurel II, so that addressing them would not even amount to reconsideration of anything said there. For instance, gentrification frequently forces out lower income families whose present housing is (or was) both standard and affordable, while the serious region-wide shortage of such housing virtually guarantees that they will

not be able to find adequate replacement. Quite apart from the Mount Laurel II obligation of all municipalities to remedy existing needs, the inevitability of this process would explain why gentrifying urban communities should have a further obligation to anticipate prospective need (that need created by gentrification) and provide for it now. Put more simply, it is completely consistent with Mount Laurel II that a municipality not be permitted to exacerbate the present housing crisis by ignoring replacement obligations as decent units are lost from the market.

In sum, Mount Laurel II places a clear obligation on center cities, including Hoboken, to deal with their own existing poor. This obligation can be reduced to a specific number using the methodologies now approved by the courts. In addition, there is an excellent argument to be made that gentrifying communities such as Hoboken have additional responsibilities as well, driven in part by the practical ability that their economic success produces and in part by the need to make up the housing loss that their gentrification policies create. This obligation cannot be reduced to as certain a number as the present need obligation until further study is done. If the City proves receptive to these arguments, however, it would be desirable to work out a number by mutual consent rather than move to the cumbersome proofs of a full-scale trial. Such proofs, if necessary, however, can eventually be provided.