Mt Laurel II 1975

- Review of the Mt Laurel Decision

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# A Review of the Mount Laurel Decision

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# A Review of the Mount Laurel Decision

Any discussion in New Jersey in late 1975 of current perspectives on land use zoning, which is the topic of this portion of your program, cannot help but be concerned with the Mount Laurel case, decided by the Supreme Court last March 24th. Those in charge have asked me, as the author of the opinion for a unanimous court, to review it from the point of view of attempting to assist you municipal officials and your attorneys in understanding its implications and in applying it as called for in your various municipalities. Although the request is unusual, I have agreed to do so for the reason stated, within certain limitations.

What I have to say has, of course, not been submitted to or approved by the court. As most of you know, I am no longer a member of it, having retired some months ago. The thoughts to be expressed do represent, however, the plain meaning and implications of the decision as I believe every member of the court understood them at the time the opinion was filed. I have no reason to believe that they are not still held just as firmly. Of course, I do not mean to predict the views of the court on questions which may arise beyond the context just mentioned and any such views I may express must

be considered personal. Further, in view of the peculiar position I occupy, I feel that all that I can appropriately say is contained in this paper and that I should not enlarge upon it by entertaining questions.

Before dealing with the specific holdings and implications of Mount Laurel, mention should be made, particularly for the benefit of the lay members of the audience, of the scope and purpose of an opinion of an appellate court. Its purpose is to express in writing the decision of the court in the particular case before it and the reasons for it, in the light of the proofs, other facts of which the court may properly take note, and applicable law. The point to be emphasized is that the court is deciding a specific case grounded in certain facts, and is not attempting to solve all the possible cases that could arise in the field involved. Legislation can provide in advance, and frequently does, for all aspects and details of a field; judicial opinions cannot. But they can by their approach and language indicate the general spirit in which the court views the issue and the overall problem and may well set forth some guidelines to aid future action in related aspects of the subject. This is especially true when the case is an important public one, such as Mount Laurel, and the opinion followed that general line.

A few words about the background of the decision, a good part of which was placed in evidence or referred to by counsel and is to be found in the factual portion of the opinion. One element is the well known fact that New Jersey, with its two very densely populated metropolitan areas has even in times of prosperity, long had a serious housing shortage, especially affecting the less affluent members of our society. The legislature has so declared time and again, governors' messages have reiterated it and called for action in the strongest terms and state agency studies have consistently established and publicized it. But little positive correction has taken place. Large segments of our population are compelled to live in substandard and dilapidated housing by reason of their economic condition. This situation is not confined to our central cities nor to the so-called minority members of the population. It exists in all types of municipalities and with respect, for example, to young couples, elderly people and families with numbers of children who just cannot afford, or are not accommodated by the only kinds of better housing which most outlying municipalities permit to be built.

The second important element in the background of the decision is the explosive population, commercial and industrial growth in the last 25 years outside the central cities and the

built-up suburbs and the course of municipal land use regulation which accompanied it. The details are familiar and need not be repeated in full. The consequence has been phenomenal expansion of the so-called outer-ring municipalities at the expense of crumbling cities and older suburbs, but with residential growth limited, by zoning ordinances in practically every such municipality, to large houses on large lots, and in some cases, apartments so confined in size that they cannot be occupied by families with school children. Indeed, high municipal walls have been erected and defended in the name of the local property tax rate. Despite clear warnings from governors and others of this parochial perversion of land use regulation and strong indication by the court in earlier cases that municipalities cannot hide behind boundary walls without regard for the world outside and that provision for decent housing for those of low and moderate income cannot be disregarded, the pattern has continued. While the first case directly raising these basic questions involved Mount Laurel, dozens of other municipalities had acted in the same way, and are affected by the decision.

So I come to the principal holdings and implications of the decision. The basic principles are elementary and the spirit of the opinion is plain. Land use regulations, to meet

the state constitutional requirements of substantive due process and equal protection of the laws, must promote, and not be contrary to, the general welfare. What does or does not promote the general welfare, and so whether particular legislation, be it municipal or state, is constitutional, is a question for the judicial branch of government to decide. The matter of whose general welfare is to be served and not violated by the inclusion or omission of zoning ordinance provisions depends upon the general importance of the subject matter and whether regulation has a substantial impact beyond the borders of the particular municipality. If so, the welfare of the state's citizens beyond those borders cannot be disregarded and must be recognized and served.

In the matter of housing, we are concerned with one of the most basic human needs and proper provision for adequate housing of all categories of people is an absolute essential in promotion of the general welfare, required in all local land use regulation, absent zoning on a regional basis, of which more later. So the court held that the presumptive obligation arises for each developing municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including low and moderate income housing by

way of multi-family dwellings, townhouses, mobile homes, small houses on small lots and the like, to meet the needs, desires and resources of all classes of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity. When a municipality has not so acted, the heavy burden shifts to it to establish a valid basis for its action or non-action. To phrase the holding in another way, the court was saying that the exclusion of people wishing to live in the community because they could not afford the only housing permitted by the zoning ordinance was just as wrong as excluding them from residence because of their race, religion or national origin. Such fundamentals clearly must override any so-called "home rule" or local fiscal considerations.

This zoning for the living welfare of people is the essential spirit of the opinion and it must be in the light of that spirit that its implications and its application to other situations are to be derived and tested. I fear that already there has been too much narrow nitpicking and card matching by municipal officials, attorneys, planners and even some lower court judges, seeking to distinguish the case or its application, when regard for this essential spirit might have dictated a different answer to the particular question.

For example, we spoke of the holding applying to "developing municipalities", large, sprawling and with much vacant land remaining, because that was the case of Mount Laurel before us. But we did not say that the same principle would not apply to smaller or other types of municipalities with available land, nor to parts of now rural townships as growth and demand reach them, nor to generally built-up suburbs and central cities, although different circumstances as to them might involve different considerations and different remedies.

The opinion went on to specifically strike down certain types of regulations utilized to carry out the policy of excluding all but expensive housing. It held improper requirements throughout a developing municipality of only single family dwellings on large lots, artificial and unjustifiable minimum house size, arbitrary bedroom restrictions as to multi-family dwellings where allowed, and unreasonable removal of land from residential use by excessive allocation for industrial and commercial purposes. It also spoke of the necessity of inclusion of low and moderate income housing in planned unit developments unless opportunity therefor has already been realistically provided for elsewhere in the municipality. And it very pointedly said that when a municipality zones land for industry and commerce, which are, of course, primarily designed for local tax benefit purposes, it must

also zone to permit adequate housing within the means of the employees of such uses. This includes porters as well as presidents and stenographers as well as scientists.

One of the significant holdings of the decision is that the zoning power may not be used to exclude the less expensive forms of housing - those more likely to increase municipal government and school costs - for the sake of the local property tax rate. This may well call for some change in the tax structure to something more equitable than the present uneven system, a change which can only come from another branch of government having that policy responsibility. The implications of this whole problem are thoroughly explored in Chapter 9 of a report of the state Economic Policy Council very recently released, which I commend to your attention. Municipalities immediately affected by Mount Laurel may well find it most advisable to take the lead in urging changes in this area.

Also pointed out in the opinion is the fact that true ecological and environmental factors may lessen the extent of a given municipality's obligation under the decision or dictate the location of certain types of housing in one location rather than another or call for clustering or some comparable technique to preserve important ecological considerations.

There would appear to be no reason why courts, in this connection, should not consider county or regional plans, provided they are proved to be sound and reasonable and not simply devices to avoid all growth, and direct where and to what degree the more dense residential uses are to go. Caution ought to be exercised in enacting so-called environmental impact ordinances, of which there has been a recent flurry. Some seem to me to be so all encompassing, so devoid of standards and so harassing to land-owners as to amount to transparent methods to preclude growth entirely.

This leads to mention of an argument made by some against the Mount Laurel rationale which should not pass unnoticed. I refer to the contention that a municipality should be able to decide its own physical and population make-up and ought to be let alone when it does so. This view necessarily means that a majority of its citizens should be able to dictate to those within as well as all those without what kind of people can live in the municipality and in what kind of dwellings. The answer, of course, is that such a thesis has no place when we are dealing with a matter of constitutional dimensions - decent housing within the financial reach of those who wish to live in the community. Any so-called majority - I have a great deal of trouble concerning when and by whom the gate

in the wall can be slammed shut - cannot override the fundamental rights of others. It has been the function of courts for centuries to protect against just that sort of thing. All interests can be accommodated with some sensible planning and a good will approach.

In conclusion, allow me to mention the matter of the remedy directed by the Mount Laurel opinion. The suit was not brought by a landowner or developer who sought to have his particular property zoned for low and moderate income housing - a result the decision does not compel. The location of such zones or the handling of their location by the special exception procedure is for the municipality to decide, assuming its choice is realistic and reasonable. Rather this was a suit by poor people who wanted to live in the township and the result was a declaration of invalidity of the zoning ordinance to the extent of the failure to provide the municipality's regional fair share of low and moderate income housing, which deficiency it was properly given the first opportunity to correct. The concepts of the "region" and "fair share" have been much bandied about since. They present no real problem in Mount Laurel and are the main subjects involved in the Madison case pending before the court, so I should not comment other than to say I doubt they are as difficult to translate into reasonable application

in a particular case as has been made out in some quarters. A little common sense, hard thinking and good faith ought to produce a result a court would accept.

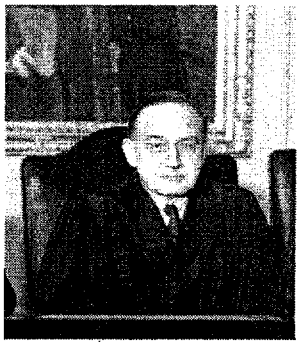
But I do wish to comment on another aspect of the remedy. The imposition of the obligation on each municipality to afford the opportunity for its fair share of the demand in its region for low and moderate income housing rests on the basis that as yet there is no general way to bring about appropriate zoning for every municipality in a region, although many uses may belong more properly in one municipality than in another. The opinion suggested that regional zoning authority was a logical and desirable legislative step, regional planning now being permissible and in some cases compulsory. It would seem that such a step would also require inter-municipal tax sharing if the property tax structure remains as at present. Such a device is in use in other states and in fact is no stranger to New Jersey. The special Hackensack Meadowlands district has, by legislation, both regional zoning and inter-municipal tax sharing, which have been upheld by the Supreme Court.

The decision in Mount Laurel is not, as some have suggested, mere "wishful thinking" by the court. The court does not live in a vacuum and it was fully realized that the decision would not

immediately and in itself produce low and moderate income housing in outlying municipalities but was only a first step. It was apparent nothing along this line would be accomplished until the court established the legal nature and extent of the municipal obligation to provide this opportunity through appropriate land use regulations. The court has fully appreciated that the bulk of lower income housing will still remain in the cities and other suburbs, which cannot be abandoned, but must be rehabilitated and revitalized, with all of their inhabitants having the chance for suitable employment and to become imbued with an active spirit of civic and personal responsibility. The task is a huge and vital one and cannot be accomplished by a court alone. The municipalities affected by Mount Laurel and its implications owe the duty to act in the spirit of the opinion, by making appropriate provision in their ordinances and by fully cooperating with subsequent housing efforts. I sense that the court will not tolerate evasion or avoidance and will move forward to direct further steps in the process as found necessary.

Although the court has a rather full arsenal of weapons to combat recalcitrance, I earnestly trust they will not have to be used. I close by quoting a paragraph from the opinion:

Justice Hall



Frederick W. Hall

**Justice Fred Hall**

Frederick W. Hall was born on February 22, 1908 in Pittsburgh, Pennsylvania. He matri Rutgers College from which he graduated Phi Beta Kappa. He moved on to Harvard La graduating *cum laude* in 1931. Coincidentally, his classmates at Harvard included Dona eventually Senior Partner at Pitney, Hardin and Kipp, and my own personal mentor duri an associate and partner with that firm, and Justice William J. Brennan, Jr., also a partn before embarking on his unparalleled career as a state and federal Supreme Court Just other colleagues on the Weintraub Court, Justice Hall served on the Superior Court of N his case from 1953 to 1959, when Governor Meyner appointed him to the New Jersey S on which he served until 1975. Justice Hall died on July 7, 1984 at the age of 76.

Justice Hall was one of three members of the Court whose chambers were not located i Benefit Building on Broad Street in Newark. His were in Somerville, and those of his col Justices Haneman and Proctor were in Atlantic City and Asbury Park, respectively. The of the Court had varying views on the significance of having four Justices with adjacent a shared library in Newark, while their three colleagues were in scattered locations else State. It is clear, however, that no factionalism, based on geography or anything else, e Weintraub Court.

One of Justice Hall's former clerks writes: "Justice Hall's particular interest, perhaps der background as a 'small town lawyer' (Somerville) and member of the School Board in B was municipal law generally and land use law in particular. He was rather protective of t prerogatives of local officials, but at the same time wary of the misuse of local zoning pc especially in the form of so-called snob zoning. That wariness culminated in his authors Mount Laurel I decision."(10)

Richard H. Herold, Esq., offers the following expanded biographical sketch of Justice Hi his Supreme Court memorial:

"From the outset it's clear that his academic record was an accurate reflection of the qu Fred Hall began school in Neshanic, New Jersey at the age of five and that sounds ordi but he began in the third grade and that was not so ordinary. Keeping up that pace, he grammar school in 1918 at the age of ten and he went on to a successful high school ai career. He graduated from Rutgers College second in his class of 160 and was elected Kappa in his junior year. In 1928 the Justice entered Harvard Law School from which he graduated *cum laude* in 1931.

"With his fine education and record it was no surprise that the new law graduate was ac law clerk in the office of Arthur T. Vanderbilt. He honed his trial law skills in the future Cl office and also began there to accumulate his deep knowledge of municipal law."(11)

* * *

"During the years of his general practice the Justice also demonstrated his sense of res the larger community in which he resided. He served as a member of the Bound Brook for fifteen years, a member of the Board of Managers of what was later known as the N Neuro-Psychiatric Institute, a trustee of the Bound Brook Presbyterian Church and Pres Somerset County YMCA. However, it is not easy to describe Frederick Hall anecdotally person of high and steady purpose, dignified but not pompous, serious but not falsely s studious, lacking in artifice and seemingly free of those tendencies to self-aggrandizem the rest of us. Thus his integrity and consistent commitment to his fellow man are evide more by the calm examples he gave them than by any colorful affectations or self-asse fame." (12)

His colleague and long-time friend Justice Mountain added these observations about Fr judicial contributions: "Justice Frederick W. Hall sat as a member of the Supreme Court from 1959 until 1975. Before his elevation to the Supreme Court he had served as a tri Superior Court for about six years. In those days the volume of litigation was not what it one time Fred Hall held the position of Assignment Judge simultaneously in five differer extending from Sussex County in the north to Ocean County in the south. Today that w be impossible and even then it was difficult.

"A word should be said about his ability as an opinion writer. In the statement of analysi the defining and delineation of issues he was truly outstanding. This was due, I believe, the clarity of his thinking and the meticulous and lucid manner in which he habitually ex himself. As a trial judge he already manifested the great interest in and wide knowledge planning law that later, as a Supreme Court Justice, brought him national fame. Also, h extensively in this field and enjoyed discussing problems that land use law presented. I in conversations with him in those days that clearly portended what he later articulated comprehensively in his brilliant opinion in Mount Laurel. Because I believe it to be so ap repeat what I once before said about Justice Hall.

"Several hundred years ago Sir Edward Coke described the law as a jealous mistress. I Justice Holmes assured us that the law is a great calling when greatly pursued. Justice of that tradition. He gave his life to the law. During the sixteen years that Justice Hall sa Supreme Court of New Jersey it was considered one of the finest Courts in the land, as today. His contributions to the law during that period were many. His great reputation in use law has tended to deflect attention from his important writings in other fields. He wa home in the entirely intricate field of municipal law; he wrote important opinions in the a criminal law, constitutional law and many other subjects. Few judges possessed his ext knowledge of procedure and the rules of court.

"Those of us who knew Fred well will always remember him as a scholar of high attainn of the law and a loyal and kind friend and colleague." (13)