THE FIGHT TO PROVIDE AFFORDABLE HOUSING FOR THE POOR
THE NEW JERSEY MOUNT LAUREL DECISIONS

The First Fifteen Years (1970–1985)
Mount Laurel I and Mount Laurel II

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PREFACE

> In the annals of land use, the annals of poor people's justice too, the trilogy of "*Mount Laurel*" cases is renowned. Because these were state-court rulings, they never unleashed the national passions of cases like "*Brown v. Board of Education*", which outlawed racial segregation, "*Roe v. Wade*", which made abortion a constitutional right. Yet, these are the most critical decisions on zoning in the country since the U.S. Supreme Court first announced, nearly three-quarters of a century ago, that municipalities could tell landowners how their land could, and could not, be used.[1]

Fifty years ago, on behalf of lower-income persons of color and their representatives, I filed a complaint against the Township of Mount Laurel, New Jersey, in the State Superior Court, Law Division, Burlington County. The complaint alleged a pattern and practice of pervasive municipal discrimination against the poor. The means to that end were: (1) not providing any opportunity for the construction of affordable housing; and (2) failing to utilize a code enforcement program to upgrade dilapidated and dilapidating housing currently occupied by its resident poor; essentially, forcing them ultimately to move out of the Township.

At that time, I was in my second year as a practicing attorney. I had little experience with litigation, and, particularly, I had no way of judging how long a case like this might take. As was true of young people then, most of my understanding of

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[1] DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995).

how litigation worked was from watching a television series like *Perry Mason*. Mr. Mason's cases usually took about an hour from start to finish. As things turned out, the *Mount Laurel* case lasted a bit longer than that. In fact, now, half a century later, related litigation is pending and more is anticipated. Municipalities are still being sued, trial court decisions rendered, and, often, settlements reached. On July 1, 2025, a new "round 4" of municipal "fair share" housing obligations are likely to be determined and released.[2] Municipalities will be required to implement them and that, inevitably, will engender additional litigation.

This article is a personal accounting of the first fifteen years of the original litigation, from 1970 to 1985. As the events occurred many years ago, I have endeavored to be as accurate as possible and have shared drafts with others who were involved, received, reviewed and incorporated their comments. I apologize if there are any inaccuracies. I have tried to eliminate them or, at worst, minimize them.

This period covers the time from when the *Mount Laurel* case was conceived in 1970 until its final settlement in 1985. Even then, it would take another twelve years, not until 1997, before an affordable housing project would be approved by the Mount Laurel Township Planning Board and then another three years before construction would commence. The result, however, was and is extraordinary. That would be the acclaimed "Ethel R. Lawrence Homes." [3] This development honors, in name, the lead, non-institutional, plaintiff in the *Mount Laurel* case; its heart and soul. After the 60-acre site was acquired, Mrs. Lawrence did come for a visit and reviewed the concept plan for the development. Although she lived to see the ultimate settlement of the litigation, she died of cancer in 1994 and did not see the construction of the affordable housing that her

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[2] N.J. DEPT. OF CMTY. AFFS., AFFORDABLE HOUSING OBLIGATIONS FOR 2025-2035 (FOURTH ROUND) METHODOLOGY AND BACKGROUND (2024).

[3] *Ethel R. Lawrence Homes & Robinson Estates*, FAIR SHARE HOUSING DEVELOPMENT, https://fairsharedevelopment.org/housing/development/ethel-lawrence (last visited Dec. 13, 2024).

efforts had enabled. Had she been allowed that privilege, and had she walked among the buildings and shared time with the resident families and children, she would have been justifiably thrilled. But that was not to be.

When the development application was finally approved by the Township Planning Board, the process of review and decision was deemed sufficiently noteworthy to be reported in the New York Times on three different occasions.[4] Some news "fit to print."

A. Spoiler Alert

Ultimately, the plaintiffs won this case. The litigation, at least as it applied to Mount Laurel Township, did finally end, and they achieved a spectacular victory. It is often assumed, suggested or intimated that the experience must have been thrilling for me and the other attorneys who represented them and undertook the litigation on their behalf. Speaking for myself, it assuredly was not the least bit thrilling. For the better part of those fifteen years, I experienced defeat and certainly felt defeated, literally and repeatedly. Despite all of that, Mrs. Lawrence, was undaunted, and never seemed to waiver in her resolve. She was a very religious person and saw our effort in spiritual terms. To her, we were on a mission, one to be pursued for however long it would take. She was an inspiration, a rock. I could not comprehend how she managed it, but she never bent in her resolve – and, so, neither did we.

Personally, as the seemingly endless time went on in its "petty pace from day to everlasting day,"[5] I endured by adhering to an agenda that morphed from wanting to win to wanting, at least, to make life as miserable as possible for the defendants and their supporters and to make it impossible for the courts to

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[4] *See* Ronald Smothers, *Decades Later, Town Considers Housing Plan For the Poor*, N.Y. TIMES, Mar. 3, 1997 at B14. Ronald Smothers, *Ending Battle, Suburb Allows Homes for Poor*, N.Y. TIMES, Apr. 12 1997 at 21; Jill P. Capuzzo, *The Affordable Housing Complex That Works*, N.Y. TIMES, Nov. 25, 2001 at NJ14;

[5] WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5, l. 20

duck the rendering of a decisive opinion. We had to make it clear that we were not going to abandon the effort until the final decision was issued. As my knowledge, frustration and anger grew over the years, I got to the point of seeing everyone "on the other side;" including, all of the opposing lawyers, planners, government officials, judges and court "masters," as adversaries – some as obstacles, others, literally, as the enemy. Everyone who stood between us and victory had to be played, manipulated and, if I was able to do it, turned around or, if necessary, taken down.

When, after I retired, I related this to one of the court's masters, Betsy McKenzie, she was truly surprised and, I think upset. Given how we obviously felt about each other, Betsy could not believe that I thought of her that way and treated her as someone to be manipulated. She and I, on a personal and professional level, were truly deep mutual admirers. I could not think more highly of any one who was involved in this work than Betsy. Look, there were many that filled shoes like that besides her: David Kinsey, Phil Caton, Alan Mallach, the three trial judges who ultimately heard all of the cases and others. But, they all, including Betsy, had to be worked and played, as best I could, to get them to enable my clients to "win." Sorry, but that's the unvarnished truth. "Worked" and "played," whatever it took. For me it was a kind of theater – acting a part to get a result. Acting pretty much all the time.

Basically, what Ethel Lawrence experienced as a religious mission, I experienced as something akin to a holy war. The goal was to win, to take them down, and I tried my best to do just that. The issues presented in the case were not matters that I thought would yield to a "let's agree to disagree" or a "it's just a difference of opinion" handshake. I saw the issues, appropriately, in black and white: a stark difference between right and wrong, good and bad, righteousness and evil. There was really nothing to discuss about the constitutionality, legality and morality of what the government was doing. All of the "fair share" numbers that were paraded before the courts represented real, oppressed and suffering people. They deserved to be seen, to be heard and to obtain a definitive

judgement by the New Jersey Supreme Court. Under our law, these mean-spirited government officials were fiduciaries. They were sworn to help all of our people. Yet, to the contrary, they were using their power to persecute the poor – our own citizens, the ones who were least able to defend themselves. It was disgusting and it was unrelenting.

Despite the losses, the empty victories and the endless delays along the way, I developed a deep resolve to see the matter to its conclusion. I was committed to doing whatever I could to force the New Jersey Supreme Court to reveal publicly, in a written opinion, a clear and unambiguous ruling on what I and my colleagues perceived to be a patent government policy of racial and economic discrimination. Incredibly, the discrimination was open and notorious. Those devising it and implementing it, totally unapologetic. They, intentionally, were using the powers of government to foster the segregation of African-American and Hispanic citizens and the poor in urban ghettos and rural pockets of poverty. If the Supreme Court was going to sanction such discrimination by pubic officials, then it would have to say so openly. It would have to validate this outrage. The Justices would have to live with that, one way or the other. At least it wouldn't be swept under some tattered rug as if it were not a discernable reality.

B. The Game Plan

Strategically, the game plan was simple enough. I didn't have to make it up. It was outlined for me in a 1968 monumental report that set forth the findings of a Presidential Commission, the National Advisory Commission on Civil Disorders; known as the "Kerner Commission" after its chairperson, Illinois Governor, Otto Kerner.[6] This prestigious, bi-partisan body had been created by President Lyndon Johnson in 1967 by an

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[6] *See* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1967) [hereinafter KERNER REPORT], https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-advisory-commission-civil-disorders-report.

Executive Order.[7] It was tasked with the obligation to investigate, analyze, make findings and recommendations to address the intense urban civil war that recently had erupted in virtually every American city.[8] I believed that we could prove, in a legal proceeding, the factual existence in New Jersey of the injustices that the Commission had outlined and condemned. Further, I believed that we could prove these injustices were not circumstantial, and that, in fact, they were occurring, as the Commission had found, as an inevitable result of an intentional public policy of racism and economic discrimination. I reasoned that, if I could do that, we should have a shot at success. Although I had the support of an incredible group of plaintiffs and of other committed lawyers and planners, for me, personally, it was an extraordinarily difficult road to go down. You can't keep losing when you are litigating issues that are so fundamentally important to your clients and to so many disenfranchised people, and for such an incredibly long time, without it taking an enormous emotional toll. At least, I could not.

The defeats were hard to bear. The timing was worse. We started working on the case in 1970. The complaint was filed in 1971. In 1972 the initial trial court decision, while giving us a surprising partial victory, ruled against us on our most important legal theory – that suburban municipalities must respond to regional housing needs.[9] We then waited *three* years until an apparent Supreme Court victory in 1975.[10] However, as groundbreaking as it was, and as thrilled as we were to read it, the decision proved to do almost nothing to change the racist, segregationist, exclusionary landscape. The problem was that it had no teeth, nothing to stop the discrimination from happening and continuing. It also was inscrutable, as the Court left to

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[7] Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (Aug. 1, 1967).
[8] President Lyndon B. Johnson, Remarks Upon Signing Order Establishing the National Advisory Commission on Civil Disorders (July 29, 1967).
[9] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972).
[10] S. Burlington Cnty. NAACP v. Mount Laurel Twp. (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975).

others the task of defining basic relevant concepts and articulating what compliance would actually look like. An almost fatal blow occurred *three* years later, in 1978, as a second trial court decision ruled in favor of Mount Laurel Township.[11] The trial court validated an incredibly brazen "non-compliance" plan, clearly designed to thwart the Supreme Court decision.

After that debacle, we had to wait *eight* more years for the second Supreme Court decision.[12] Then, and not until then, did our clients and the poor achieve a conclusive and emphatic vindication of their constitutional rights. The Court gave them a complete victory, with remedial measures that went far beyond what we had sought, better than we had hoped. The Justices, unanimously, created the framework for the implementation of a *judicial* program that would result in the actual construction of affordable housing, and as a result, literally tens of thousands of low and moderate income households in New Jersey now reside in safe, decent, sanitary and affordable housing.

C. Beginnings

When the litigation was commenced, I was a staff attorney employed by Camden Regional Legal Services (CRLS). CRLS was a federally-funded poverty law program that delivered free legal services to indigent residents in a five-county region in South Jersey, located across the Delaware River from Philadelphia. I worked in the Law Reform Unit, headed by an extraordinary lawyer and tireless advocate for the poor, Peter O'Connor. It was staffed by Peter, me, Tom Oravetz, also a recent law school graduate, Ken Meiser, absent from his third-year at Harvard Law School, and a young planner, Carolyn Griesmann. We collectively had about six years of legal experience, none of which included much actual litigation and certainly nothing akin to "major" litigation. We had very little

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[11] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 391 A.2d 935 (N.J. Super. Ct. Law Div. 1978).

[12] S. Burlington Cnty. NAACP v. Mount Laurel Twp. (*Mount Laurel II*), 456 A.2d 390 (N.J. 1983)

experience preparing witnesses, hiring and presenting expert witnesses, doing much "discovery," preparing or undertaking cross-examination, taking appeals, preparing trial and appellate briefs, arguing before appellate panels. Substantively, we had little or no understanding of real estate development, affordable housing programs, land use, zoning or the like – except as we might have learned in law school. It would be appropriate to describe the lot of us as totally unprepared for what we were about to undertake – a fact that we openly shared with our clients.

I certainly did not imagine or anticipate that the case would occupy me for the remainder of my legal career and become, historically, one of the most seminal land use and civil rights matters ever decided. Ultimately, it fostered several New Jersey Supreme Court and a myriad of lower court decisions. The *Mount Laurel* Doctrine resulted in the development of affordable units throughout the State and continues to generate more. Noteworthy is the fact that many of these lower income units have been constructed in suburban municipalities that had blocked any such development - places where mostly White, middle- and upper-income people resided.

The Plaintiffs were nine individuals and three non-profit entities. The Defendants were the Township of Mount Laurel, its Governing Body and several builders who were developing properties in the Township. The litigation was tried twice in the State Superior Court, Law Division and heard twice on appeal by the New Jersey Supreme Court. Both Supreme Court decisions were fundamental land use law game changers - the first in 1975 and then, with a lot more conviction, the second in 1983. They exhibit what the judiciary can do, if it really desires to do so, in the face of economic and racial injustice and in the face of a lack of help or caring by the Legislative and Executive branches of government. It would be wrong to lose sight of the fact that it was the Judicial branch of our New Jersey government, not its Executive or Legislative branches, that acted to protect the rights of African-Americans and Hispanics and the poor. It did so by providing and assuring the implementation of a clear and decisive mandate through a court-created program that

guaranteed the actual construction of affordable housing. Housing which, ultimately, was built, with more still being built.

Much has been written about the role of the courts in this case and in other such matters. In the context of the *Mount Laurel* decisions, this concern has been openly discussed by members of the Supreme Court, itself. See, for example, the concurring opinion of the late Justice Robert C. Clifford, in *Oakwood-at-Madison, Inc. v. Township of Madison*,[13] ("*Madison Township*") which opens with this not-so-subtle reflection: "Sometimes judges decide cases with their fingers crossed."[14]

Academics, talking heads and spin merchants love to express their intellectual acumen by debating topics such as "the proper role of the courts". Over the years, I have tried to avoid getting caught up in that dialogue. Frankly, I have found it incredibly annoying and pondered upon by primarily White male academics who seem to have no understanding of what it is like to be disenfranchised and poor in America. There is nothing to learn from this debate for an advocate representing poverty-stricken clients. We represented people who had nowhere else to go to vindicate their Constitutional rights. Their plight was actually created and supported by our Legislative and Executive Branches of State Government and by a myriad of local officials. Our clients and we, their lawyers, did not "decide" to litigate. We and they had no choice. Further, the New Jersey courts were given little choice in the matter as well. They either were going to deliver justice or join the Executive and Legislative branches of our State Government in sanctioning its denial. Fortunately, for the poor, the courts determined to act.

The case was captioned, *Southern Burlington County NAACP v. the Township of Mount Laurel*. The first appeal led the New Jersey Supreme Court, in 1975, to articulate the "*Mount Laurel* doctrine". The basic principle, and I am paraphrasing, is that every municipality in the State has an *affirmative* obligation to address the housing needs of its indigenous poor, and all "developing" municipalities have an *affirmative* obligation to

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[13] 371 A.2d 1192 (N.J. 1977)
[14] *Id.* at 631.

address the housing needs of its regional, indigent, present and projected population. Municipalities were to provide measures to assess the need and to create realistic housing opportunities for their "fair share" of their regional need.[15]

Unfortunately, as previously stated, the Court, in *Mount Laurel I*, while articulating an extraordinary doctrine, failed to provide the clarity necessary for its implementation. Worse, the decision did not set forth any remedy for municipal intransigence. The Supreme Court did what courts usually do. Having set forth a mandate, it simply noted that it expected that municipalities would comply in "good faith". The following years proved, what both sides knew and believed from the start, that the Court's expectation was a naive fantasy. As time went by, municipal intransigence was the rule and little or nothing positive occurred. Even Mount Laurel Township, which remained, on remand, under judicial supervision, approved a contemptuous response, which, incredibly, was upheld by a horrifically misguided and unsympathetic trial court judge three years later in 1978.[16]

New Jersey municipal officials and their attorneys quickly learned that they could manipulate *Mount Laurel I* into a totally ineffective doctrine. The impact on us as advocates was devastating. We went from a sense of victory to pervasive professional depression. It was difficult to imagine how to go on with this. Yet there were those who seemed totally undaunted, like Mrs. Lawrence and Paul Davidoff, an academic and affordable housing advocate. Mr. Davidoff went to far as to convene annual meetings of housing advocates, some at the Mohonk Mountain House in New Paltz, New York. He and Mrs. Lawrence had experienced what it means to seek social change and that you just had to keep going, keep pushing and maybe you might achieve something positive. "You can't always get what you want, but if you try sometimes, you get what you need".[17] For me, personally, the emotions were all over the

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[15] *Mount Laurel I*, 336 A.2d at 734.
[16] *Mount Laurel II*, 391 A.2d 935.
[17] THE ROLLING STONES, YOU CAN'T ALWAYS GET WHAT YOU WANT (UMG 1969)

place – the anger was intense, the frustration palpable and the sense of hopelessness penetrating.

Ironically, there was an upside to what the municipalities were doing. As it turned out, the abject failure of *Mount Laurel I* was so blatant and luminous that no reasonable observer could deny it. And, as it ultimately turned out, there were seven personally affected reasonable observers out there taking it all in – the seven Justices of the New Jersey Supreme Court.

Municipal officials would pay a price for their arrogance and for so openly flaunting a Supreme Court ruling. As the landscape of non-compliance revealed itself and in light of the chaos created by a crush of pending cases, the Court became determined to avoid further embarrassment and to regain some semblance of credibility. In a way, the Justices had little choice – either back down or devise a truly positive outcome. After all was said and done, when I look back on what must have happened in 1983 and tried to envision what was going on as the Justices secretly deliberated on a ruling in the second *Mount Laurel* appeal, I was reminded of how American cinema immortalized what may well have been an apocryphal observation by the Japanese Admiral responsible for the "successful" attack on Pearl Harbor as he contemplated the inevitable American counterattack. While his cohorts were rejoicing in the "victory", he was portrayed musing: "I fear all we have done is to awaken a sleeping giant and fill him with a terrible resolve." [18] Well, in this context, it was our seven Supreme Court Justices who were awakened, and it was the Court that counterattacked with a terrible resolve. The result was its momentous decision, *Southern Burlington NAACP v. Township of Mount Laurel* (*Mount Laurel II*).

It can reasonably, if injudiciously, be said that the Court responded with a vengeance. Whatever was left to the imagination in *Mount Laurel I,* was detailed with unquestionable clarity in *Mount Laurel II*. The Court gave the most explicit and specific direction and expressed a total intolerance for further

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[18] TORA! TORA! TORA! (20th Century Fox 1970)

delay.[19] In a clear message, it provided a remedy that placed a high price and penalty on any municipality that had failed to fulfill the obligations as set forth in its *first* decision (as if it were clear and obvious what form compliance should have taken).[20] Nothing more could have underscored the Court's intolerance for the past years of municipal contempt than its refusal to give municipalities a grace period to comply before being vulnerable to a court challenge under the new and specific mandate set forth in *Mount Laurel II*. The municipalities simply could not protect themselves from the onslaught of litigation that the Court intentionally had unleashed, expressly anticipated and which soon cascaded down in a seemingly endless avalanche of litigation.

Shortly after *Mount Laurel II* was released, my late friend, colleague and notable New Jersey land use lawyer, Henry Hill, was asked by the press to assess how vulnerable New Jersey municipalities actually were. Henry was not one to pull any punches - in or out of a courtroom. In an infamous response, he likened their vulnerability to that of baby seals on the frozen Alaskan tundra helplessly awaiting being clobbered on their heads by a slew of salivating hunters – with no rock to hide under. Now, if true, that would be very "vulnerable", and it was, quite definitely, true.

I. CHAPTER 1: ORIGINS

A. Personal

There were both personal and professional origins for me setting a stage for my work in the Legal Services program and with a specialty in affordable housing that predated the filing of the *Mount Laurel* litigation. My father, Murray M. Bisgaier, was the son of immigrants, raised in a Manhattan tenement. He was friends with Meyer Lansky and his family. He was a LaGuardia Democrat who maintained strong ties to

[19] *Id.* at 307.
[20] *Id.* at 330.

Tammany Hall. As fate would have it, he became one of New Jersey's first municipal planners. He was a workaholic. Trained as a lawyer, he left his fledgling family in Brooklyn and went to Washington to work for the Federal Government during World War II. When the politicians realized that there would be a huge demand for housing generated by millions of young returning veterans, administrators were tasked with coming up with programs to address that need. Having no clear source of people with any expertise, they turned to their lawyers to do that job. So, my father became a housing and planning expert overnight. He and his colleagues created the massive housing programs that funded hundreds of thousands of new units throughout the United States. Part of the Federal program was the provision of federal grant-funding to help finance local municipal planning. New Jersey matched that federal program with one of its own.

When my father left his work in Washington, he created one of the first municipal planning firms in New Jersey, Community Housing and Planning Associates. He approached local officials offering to prepare "Master Plans". These plans would have several "elements" which, taken together, would provide a present-day snapshot of the municipality, an assessment of future needs (retail, residential, educational, recreational, public works, road construction and improvements, etc.) and a blueprint for how to address those needs. The attraction was that the towns needed the planning, and he could get it done for them "free of charge" by obtaining State and Federal grants. He was very successful, and at one point or another represented a host of New Jersey municipalities throughout the State – literally from the City of Cape May to the City of Patterson; including, Atlantic City and Hoboken and many other urban and suburban municipalities. When New Jersey began licensing planners, he and a few others, like the renowned planner, Harvey Moskowitz, were "grandfathered", being given the first planning licenses without having to take any examinations or showing any educational credentials, none of which they had.

My initiation into the world of planning and housing occurred while in high school and college, during the summers,

when I worked in his office in New York. I gathered data and even prepared some of the elements of Master Plans. In Hoboken, as part of the approval of an Urban Renewal Area, I did on-site resident relocation and building condition studies. I would go door to door, showing my credentials, interviewing and getting relocation data from the soon-to-be displaced residents. They turned out to be mostly single-parent women, transient, itinerant seamen and young prostitutes. They were oddly accommodating to me, apparently not looking for trouble from any public authority, even one who was all of 19. They dutifully answered my questions about their relocation needs – household size, children, income. I became an accepted oddball in the neighborhood as we all joined in on what was, effectively, a silly, but necessary charade.

I also had a checklist of housing conditions, which I had to assess for every building. This included an inspection of rooftops. My first visit to the top of one of these shoreline buildings blew me away, almost literally. I turned and actually fell back as there suddenly came into view the entire expanse of the New York City skyline across the Hudson River. My father and Hoboken had the accurate vision that this location and the existence of the Hudson Tubes that connected Hoboken to Manhattan by rail would transform it into an upscale city.

The most memorable part of that work came when I attended random hearings with my father on applications for housing developments. I was most deeply affected by the public meetings at which he would be tarred and feathered trying to get certain municipalities to accept affordable housing developments. While it was relatively easy when the housing was in urban areas and was dedicated to senior citizens, applications for family housing was another thing. The emergence of the NIMBYS ("not in my backyard") made it virtually impossible to achieve such developments anywhere except in some willing urban municipalities where the poor already were disproportionately located.

One of my memories of that time was of a map, pinned on a wall in my father's conference room, that depicted the actual right-of-way of the proposed Atlantic City Expressway,

connecting Philadelphia and points west with the New Jersey shore. Above the map was a drape ready to be pulled down as a cover if any visitor came in. I admit to having the thought that we could so easily have taken economic advantage of knowing the proposed right-of-way and where all the intersections would be, but I can't imagine that thought ever crossed my father's mind. He later became somewhat infamous for his opposition to gambling in Atlantic City which led him to get fired as that City's long-term municipal planner.

After he died, he was memorialized by the Catholic Diocese of Patterson for his work with their housing non-profits, the Riese Corporations. I then approached Bishop Frank Rodimer about naming a common room in the Patterson development after him. He declined. Instead, he offered to name the high-rise residential building, then the tallest in the city, after him and to display his portrait in the entrance hall. On the occasion of my parents' 50th Wedding Anniversary, the Diocese obtained a colorful plaque from the Vatican with a formal Papal Blessing for them; which, given their religious affiliation, was kind of a remarkable honor to have received and to hang in their home.

B. Professional

I never entertained a thought about working as a planner with my father. I graduated from college in 1965. Like many other college students at the time, I had been "radicalized" by the riots of the 1960s and the assassination of President Kennedy in 1963. Then, you could throw into the mix the Civil Rights Movement, the Anti-Vietnam War Movement and the televised depictions of protestors being attacked by sheriffs and the police. I was inspired by the work that Attorney General Robert Kennedy and other lawyers were doing to enforce the rights of the poor, largely African-American citizens, and the positive role the courts seemed to be playing in that effort. So, "lawyering" looked like a great portal to act out my own issues with the government institutions and the people who perpetuated this oppression.

The work of the US Attorneys personally protecting African-American students integrating public schools, colleges and universities, was not hidden from view. I was just 16 when I saw television videos of a little African-American girl being escorted by Federal Marshals into a public school in New Orleans, traversing a sea of horrific-looking, spitting and screaming White adults. I could not imagine how they could be doing that to a child or how she could have the courage to walk that gauntlet into grade school.

These events were all conveyed on an expanded media that brought them, sometimes live and in real time, into our homes and college dorms: that would be television. It was a new, more intimate and demanding form of television. We saw the daily reporting on the Vietnam War, literally from the battlefields, the Cuban Missile Crisis, Lee Harvey Oswald murdered on live TV, an elderly, unarmed African-American female protestor writhing in agony on the street after a sheriff planted a cattle prod on her chest and set off the electric charge.

I came to think of the law as a vehicle for social change and had that vision for my career. I went to the University of Pennsylvania Law School because of its "liberal" reputation. Penn had a policy of getting practitioners to teach and to encourage academics to actually practice law. It was one of the two law schools that were administering the Reginald Heber Smith Fellowship Program, a federally funded grant program to incentivize law school graduates to forego Wall Street and to work in a local Legal Services Program funded by the federal Office of Economic Opportunity ("OEO").

Having been awarded a "Reggie" Fellowship upon being graduated from Penn, I could have gone almost anywhere to work, as the Fellowship would pay for my salary and benefits for two years. However, my mentor at Penn, Howard Lesnick, suggested, kind of insisted, that I cross the Delaware River to Camden and meet with "this O'Connor guy", who he heard had a reputation for tilting at windmills and who might need some help. So, my friend and fellow "Reggie", Tom Oravetz and I did just that. We met with Peter. Peter was a "snake charmer" and he pulled us in like fish on a reel. He salivated at the opportunity

to get "free" staff attorneys from Penn, and set out a plan to do "law reform" in a separate unit of the program. Tom and I were sold by the prospect of having a great opportunity to do aggressive lawyering in Camden and told Howard we wanted him to assign us there – which I think he already had done.

It was 1969 when I started work as a staff attorney at CRLS. I became its Executive Director in 1972. In 1974, I left to join the newly formed State Department of the Public Advocate ("DPA") as Deputy Director, and later as Director of the Division of Public Interest Advocacy. The CRLS Law Reform Division transformed CRLS into one of the most notorious legal services programs in the country, maybe sharing that honor with Cal Rural.

In 1972, upon being reelected, President Nixon is said to have expressed his fury over the fact that the Federal Government was financing the Legal Services Program and being used to sue federal, state and local governments.[21] Looking for a poster child of what he deemed symbolized that abuse, his administration targeted our program, CRLS, citing our litigation against the City of Camden and Mount Laurel Township. Vice President Spiro Agnew was unleashed to openly attack us as representing everything he deemed wrong with the National Legal Services Program. We recall him saying that we were, essentially a left-wing "Fifth Column", supporting a rogue, OEO-funded, African-American and Hispanic "shadow government." We were, he charged, operating without oversight control or discipline, working outside of the elected government, challenging and undermining programs initiated by elected officials. In truth, he was absolutely right. Sometime after he resigned in disgrace, efforts like ours and charges like his, ultimately led to regulatory and statutory changes prohibiting the legal services programs from doing "law reform", class actions, and litigating on certain specified issues;

[21] Oval Office 498–5, May 13, 1971, White House Tapes, Richard Nixon Presidential Library and Museum (RNPL)

such as, abortion, redistricting, welfare.[22] But by then, our "damage" in South Jersey had already been done.

II. CHAPTER 2: URBAN RENEWAL — NEGRO REMOVAL

In the '60s and early '70s, Camden and other New Jersey cities, and cities across the country, were the venues of civil rights protests and many destructive riots.[23] My first day at work in September, 1969 actually was spent in the Camden Municipal Jail interviewing African-American prisoners who had been arrested during the prior night's rioting. CRLS was a civil, not a criminal, law program. Our focus was limited to what could be done through civil, not criminal, litigation to address the needs of our African-American, Hispanic and poverty-stricken clients. That first day was devoted to interviewing prisoners who had witnessed the police destroy an African-American owned and operated dashiki business. The officers of the law had, literally, gone around the sewing room floor of the building using their billy-clubs to smash the pins of all the sewing machines. That ended the dashiki business.

My "Bible" then was the Kerner Commission Report. The document was mesmerizing to me as a young attorney. The allegations and conclusions were incredible enough, but the fact that they were set forth in an official report published by a *Presidential* Commission was astonishing.

Our Country, it said, was "moving toward two societies, one Black, one White – separate and unequal." The blame was placed squarely on White America: "What White Americans have never fully understood — but what the Negro can never forget — is that White society is deeply implicated in the ghetto.

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[22] H.R.3610 - Omnibus Consolidated Appropriations Act, 1997

[23] *See* Nicholas Iaroslavtsev, *Camden, New Jersey Riots (1969 and 1971)*, BLACKPAST (July 1, 2018), https://www.blackpast.org/african-american-history/camden-new-jersey-riots-1969-and-1971/; *see also* Weekend Edition Saturday, *40 Years On, Newark Re-Examines Painful Riot Past*, NPR (July 14, 2007), https://www.npr.org/2007/07/14/11966375/40-years-on-newark-re-examines-painful-riot-past.

White institutions created it, White institutions maintain it, and White society condones it."[24]

The focus for us in Camden was a particular federal program that had been specifically targeted by the Kerner Commission: Urban Renewal. Urban Renewal can result in the demolition of whole neighborhoods and the required relocation of residents. The program mandates the completion of a several stage process regulated by both the Federal and State governments. It leads to the redevelopment of a designated "Urban Renewal Area". The designation of the targeted land area is preceded by studies demonstrating that the area is blighted or otherwise in need of redevelopment. Studies are done of the existing structures and the existing residents. All residents are interviewed and a determination is made of their needs if they were to be relocated. This results in a written "Relocation Plan". The overall Urban Renewal Plan would then be prepared, and all of this would have to be subject to approval by the local Governing Body after it conducted public hearings. The power is enormous, and the relevant law and how it was implemented by our courts is very deferential to the decisions made by the local government.

Once the planning was completed, the Governing Body would go through the next phase: choosing a Redeveloper. The work of a Redeveloper could be profitable enough to attract competitive applications. However, the choice of the Redeveloper was strictly in the discretion of the local Governing Body.

Urban Renewal was something that I had personal experience with when working with my father. I was shaken by the allegations in the report that branded Urban Renewal as simply a veiled program of "Negro Removal." I called and asked my father about that. He said it clearly was possible, if not probable, and was certainly happening; particularly, if a legitimate Relocation Plan was not implemented and affordable housing was not part of the Redevelopment Plan. The areas targeted by local politicians for "renewal" would be those

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[24] KERNER REPORT, *supra* note 6, at 1.

occupied by the poor since it was most likely those areas that would be the location of structures and neighborhoods that were "blighted". He said that municipalities strategically might allow these areas to deteriorate without making any remediation efforts so that residents would leave "voluntarily". Thus, they avoided the need for government financed relocation. Ultimately, the goal would be to relocate the remaining population, tear down the existing structures and create vacant land which could be redeveloped by a chosen private developer consistent with an approved Urban Renewal Plan. Since lower income areas would be targeted and since they would most likely be populated by African-Americans and Hispanics, that would be tantamount to "Negro (and Hispanic) Removal" – whether intentional or not.

III. CHAPTER 3: LITIGATING AN URBAN STRATEGY (1969)

Camden then was blessed with several very strong and vocal African-American and Hispanic organizations. They had been awarded grants from the OEO. This community leadership had created a local Camden County OEO Corporation which received federal grants and then funneled money and support to the local community – both African-American and Hispanic. The money and the funneling gave the CCOEO a huge power base in Camden, countervailing the elected government which had no say in who would get the money or how the money would be spent.

Camden was engaged in massive urban renewal projects. I believe there were five. They were designed to dislocate whole African-American and Hispanic neighborhoods and a daunting number of individuals and families. Also, the alignment of a proposed Interstate highway, I-676, connecting the Ben Franklin Bridge and the Walt Whitman Bridge, was designed to cut through community neighborhoods, effectively destroying them and causing massive residential dislocation.

The local government had a grand plan.[25] Camden is located on the Delaware River directly across from Philadelphia. It is the home of Rutgers University – Camden. It then was the location of the RCA Corporation ("Camden Records", "His Master's Voice") and the Campbell Soup Corporation which processed its tomato soup at a plant along the river. It is directly connected to Philadelphia by two bridges and a modern rail transit system to Center City. With that base, there was hope of a strategic Camden renewal that would bring new construction, upgraded residential developments and a higher income population. Not surprisingly, Urban Renewal was to be a major player.

The local OEO, controlled by African-Americans and Hispanics, wanted this to stop or, at least, wanted input into the planning process to protect their people. So, with little encouragement from us, they authorized us to sue. And we did. A massive lawsuit was filed challenging the planning of the projects.[26] Other action was taken challenging the proposed right-of-way of the Interstate Highway and many lesser suits attacked other actions by the City Government.

The "Camden Coalition" litigation brought everything to a halt. Ultimately, it would be settled by the intervention of the City's political boss and Director of its Department of Public Works, Angelo ("Eric") Errichetti. He later would become the City's Mayor and a State Senator. Peter would actually join his Senate staff. Unfortunately, Eric, who was a genuinely good and, I totally believe, honest person, would gain national notoriety as a victim of the Abscam scandal.[27] He would be manipulated by federal agents and taken down with a U.S. Senator, a Congressman or two and other politicians and serve time in a Federal Penitentiary. He never recovered. In 2013 he would be

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[25] Donald Janson, *Camden Mayor Strives for Rebirth of Blighted City*, N.Y. TIMES, Nov. 6, 1975, at 88.

[26] *About Peter J. O'Connor*, FAIR SHARE HOUSING DEVELOPMENT, https://fairsharedevelopment.org/about/staff/peter/ (last visited Dec. 13, 2024).

[27] FBI, *ABSCAM*, FBI: HISTORY, https://www.fbi.gov/history/famous-cases/abscam (last visited Dec. 13, 2024).

fictionalized as "Carmine Polito", and the scandal would be immortalized in a "major motion picture" - "American Hustle".[28]

IV. CHAPTER 4: THE SUBURBS — WAKE UP AND SMELL THE LATTE

A. Haddonfield Calling

All that being said, this isn't about our CRLS "Urban Strategy". It is actually about the flip side. A side that we had completely ignored until I got one of those random phone calls that triggered a lot of our work. It turned out that just as urban municipal governments were doing their best to divest themselves of blight, poverty and their indigent populations, suburban governments were doing their best to undermine that effort and maintain the status quo. They were committed to keeping "those people" out of their towns and making sure that the urban ghettos remained as their perpetual homes. The path to the success of that goal was obvious: preclude the construction of affordable housing.

I probably never would have focused on what these towns were doing had I not gotten a totally unexpected phone call from a minister who served his flock in a nearby suburb, Haddonfield, New Jersey. I do not remember, for sure, which of these two prominent church leaders called, but it would have been either Reverend Dr. Charles A. Sayre of the United Methodist Church or Reverend Dr. Thomas P. Lindsay of the First Presbyterian Church. I'm thinking it was Dr. Lindsay, but it doesn't really matter. Both were major figures in Haddonfield and their churches were renowned institutions in the region with a large flock composed of some of the more prominent regional dignitaries. I recall that, innocently, both ministers and some other good local souls were engaged in a failing mission to aid what was left of Haddonfield's poor, African-American community.

Until then, the truth is that Peter, Tom, Ken, Carolyn and I were not looking East at all. We didn't care much about what

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[28] AMERICAN HUSTLE (Columbia Pictures 2013).

was going on in the suburbs. Our only suburban connection was with a do-gooder, White organization, the "Friends of the Black Peoples Unity Movement", which supported the economic efforts of the Camden African-American community. Our clients were urban and had local organizational support. No one ever asked us anything about the suburbs, and we never gave a thought to what they were doing or how that might be impacting our Camden clients. We were focused solely on urban poverty. It is embarrassing to acknowledge that I had ignored, essentially, half of the findings in the Kerner Commission Report.

Haddonfield was and still is the crown jewel of South Jersey suburbia. It has a thriving main street - "Kings Highway", literally dating back to a 60-foot wide "King's" right-of-way granted in something like 1680.[29] The "highway" and immediate vicinity are lined with many buildings that also predate the Revolutionary War. It has a history of being settled and developed in the 1600s and celebrates its history of Colonial, British and Hessian troop movements and the like. The main retail area is surrounded by intact and massive neighborhoods of mostly very large Victorian homes. This is all perpetuated by the Borough's adoption of one of the first Historic Preservation District ordinances in New Jersey.[30] If you want to do anything to a structure located in that District, you need approval from the local Historic Preservation Commission – like even the color of the paint you might want to use.

Haddonfield is serviced by a station on a High-Speed (commuter) Line traversed by modern, air-conditioned trains. They run just about every quarter hour during peak times and

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[29] U.S. Dep't of Interior, Nat'l Register of Historic Places, King's Highway Historic District, (2000) https://npgallery.nps.gov/NRHP/ (Reference Number 00001493).

[30] Adam L Cataldo & S. Joseph Hagenmayer, *A Leader for Preservation in Haddonfield Dies at 82 Now Described as a Visionary, Joan L. Aiken Organized a Pioneering Effort to Save the Borough's Historic Architecture*, PHILA. INQUIRER (July 11, 2000), https://archive.ph/20130615231413/http://articles.philly.com/2000-07-11/news/25608998_1_historic-district-historic-buildings-preservation-council.

provide service to Philadelphia in about twelve minutes. Haddonfield accepted the commuter rail, but conditionally. It is the only suburban town where the otherwise elevated train stations and tracks were, the story goes, required to be set far below street level. The Borough is a stone's throw from access to Interstate 295 which connects it to the rest of the world. As you might imagine, Haddonfield has one of the wealthiest populations south of Princeton,[31] New Jersey and one of the best public-school systems in the State, if not in the country.[32] It is so small geographically, that its kids all walk to school – bussing is not provided except for developmentally or physically impaired students. I know this as a long-term resident who raised my own children there – as do a lot of our local professional athletes.

Now, doesn't that sound like a great place to locate some affordable housing? Not according to Haddonfield. At the time, it had virtually no housing affordable to lower income households. But it still had some. It turned out that the remnants of a poor, African-American community actually still existed in Haddonfield. It was located at the intersection of Ellis Street and Lincoln Avenue. Incredibly, two Churches that serve mostly African-American congregations were and *still are* located there, in this incredibly wealthy, predominantly White haven: the Mt. Olivet Baptist Church (circa 1890) and the Greater Mt. Pisgah Church (circa 1860). These, originally, provided spiritual relief to the African-American servants of Haddonfield's wealthy, White community. While the two churches are still active, the former neighboring African-American residents and their residences are not.

The minister who called me that day was the leader of a prominent, mostly White, church. He and another minister of a different prominent, mostly White, church were supporting a

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[31] *List of New Jersey Locations by Per Capita Income*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_New_Jersey_locations_by_per_capita_income (last visited Dec. 15, 2024) (citing census data, Haddonfield is ranked 52nd out of 559 total municipalities).

[32] *Best New Jersey High Schools*, U.S. NEWS, https://www.usnews.com/education/best-high-schools/new-jersey/rankings (last visited Dec. 15, 2024).

coalition of local good guys who had joined together to develop some vacant land at that intersection and to redevelop some rundown multifamily structures along Ellis Street - all for lower income households. They had obtained an option on the land and were working with the State to achieve the necessary funding. The problem was that any project like that would require significant municipal cooperation through rezoning and support for a grant application. Apparently, Haddonfield was not cooperating.

The minister's call came at a time when their option on the land was expiring or had expired. He asked if I could come out and discuss what they could do, how I might help them. So, with my limited knowledge of this area of the law, the law of land use regulations, I agreed. We met that night at one of the African-American churches. They detailed their tale of woe. Apparently, the land owner, a local attorney, was not inclined to extend their option. They said that he now would achieve something of a windfall by selling the land to a developer for the construction of relatively (by Haddonfield standards) small-lot single-family homes. Not surprisingly, according to them, Haddonfield, which normally would have opposed such a development, intended to cooperate and support it. If you saw it today, you might contemplate this oddity in a town of larger homes on larger lots. You would need to know the history to understand how a small lot development of modest-sized homes ever got there.

My feedback was relatively simple. First, the landowner is a non-governmental person who can be sued only for breach of contract, which isn't applicable here. Absent a contractual commitment to the contrary, he can choose whether to extend an option on his land. If the land is not under contract, he can choose to sell it to the new buyer, a regional developer. Second, the only leverage that they could have over the municipality, landowner and developer would be to sue the Borough for discrimination against the poor and/or challenge any rezoning that would benefit the builder as part of a municipal conspiracy to undermine a legitimate housing opportunity for the poor.

This meeting was held before my own conceptualization of the *Mount Laurel* litigation and the legal theories I and my colleagues developed for that case. So, in a way, Haddonfield lucked out. If this had happened in a few more months, given the opportunity to enhance my own land use education and an emerging understanding of the effects of "exclusionary zoning", the *Mount Laurel* Doctrine might well have been the *Haddonfield* Doctrine. However, in retrospect, even armed with that greater knowledge, I do not believe that I ever could convince these ministers to support any legal action against their own town. I mean, it probably wouldn't have gone down all that well in their church pews on Sunday.

B. We Build What They Want

I learned five things from this encounter. First, it is very hard to get local residents and professionals, like the two ministers involved here, to sue their own town. That idea was flat out rejected - which meant that their project was dead and that the Borough had successfully thwarted their effort to provide affordable housing in the town. Second, the law is all on the municipal side. The courts pay enormous deference to local decisions on local zoning matters, and it would be difficult to go up against the presumption of rationality and validity that insulates government decision making. Third, time is on the municipal side. Legal actions take a lot of time, and if the municipality intends to fight any action for as long as it can, landowners, option holders and developers would be looking at years before they could get any result. Fourth, even if they prevailed, the remedy the courts would provide would be to order the municipality to rezone. However, there would be no requirement that the municipality grant any preference or benefit to the litigating plaintiff or to provide the zoning that they needed to build what they wanted.

The fifth and, perhaps, my greatest lesson occurred when I was schooled by the Haddonfield developer who took over the do-gooders option and by other developers in the region. After walking away from my meeting in Haddonfield and feeling

pretty ineffective, I decided to see if the current developer would be willing to chat about what had happened. I called him, and he said we could talk but only at a meeting of the regional professional group of developers, the South Jersey Builders Association ("SJBA"). That was fine with me, and he agreed to set up the meeting.

When I attended a meeting of the SJBA, I had really just one question to ask: since there are abundant federal and state funds available to finance the construction of affordable housing, making the construction virtually risk free (an incredible incentive to builders), and since there would be a virtually unlimited class of prospective tenants whose rents would be underwritten by the Federal Government, *why don't you do it*? Why don't you approach the municipalities and seek approval for an affordable housing project. Sounded good to me, but I actually, unintentionally, provoked laughter. They said that I was completely out of touch with the reality of the development business. Actually, the truth was that I knew absolutely nothing about it at all.

Apparently, for similar reasons as set forth above, the idea of suing a municipality to get an approval was beyond ridiculous. First, it might take years. Second, even if you won, you would not get what they called a "builder's remedy", a remedy for the prevailing plaintiff to get what they had proposed. Third, it is virtually impossible, financially, to work in a town where you are seen as an "enemy". Why? They gave me a simple example: before they can pour concrete, a local official might have to come out to verify that the psi (pounds per square inch) of the concrete is acceptable. If the guy doesn't show up, you could lose a lot of concrete and time. The fact was that almost every aspect of the actual path to and through the construction of a development was fraught with approvals, permits and inspections. If the local code enforcement official was looking to kill your project, he or she easily could.

They were very convincing. In any event, they clearly were not going to be any help absent a dramatic change in the law. Their final words, left ringing in my ears, were: "We build

what they want and where they want it, and we are doing just fine. The last thing we need is to get on their shit list."

C. The Two Americas

When I returned to the office, I picked up the Kerner Commission Report again and reread the language on the "two Americas" – one urban and predominantly Black, the other suburban and predominantly White. The Report, in fact, said that this was a function of local governmental power, design and intent. This assessment made me reflect on our work - were we at CRLS innocently fostering this segregation by focusing all of our efforts on urban development? Shouldn't we also, at least in tandem, be seeking to open up the suburbs to the poor, African-American and Hispanic populations? The fact that I was even asking the question was kind of pathetic. Had I been a more careful reader of the Kerner Commission Report, I would have gotten the answer some time ago.

> Unless there are sharp changes in the factors influencing Negro settlement patterns within metropolitan areas, there is little doubt that the trend toward Negro majorities will continue."[33]
> "Providing employment for the swelling Negro ghetto population will require ... opening suburban residential areas to Negroes and encouraging them to move closer to industrial centers . . ."[34]
> "[C]ities will have Negro majorities by 1985, and the suburbs ringing them will remain largely all white unless there are major changes in Negro fertility rates, in migration

[33] KERNER REPORT, *supra* note 6, at 216.
[34] *Id.* at 217.

> settlement patterns or public policy."[35]

According to the Report, something called “zoning” was being used by municipalities to orchestrate and control suburban development to assure that only middle- and upper-income housing could be constructed. I had never heard of zoning. Maybe I did when I was working for my father, but I had no memory of it. I did a little research and learned enough to truly open my eyes as to how effectively and completely municipalities could use this power to control development. This incredible intrusion of government power into private sector decision-making (ironically with the full support of conservative politicians and voters) was first approved by the U.S. Supreme Court in 1926, ostensibly to provide municipalities with a tool to avoid massive conflicts in land use; such as, the location of a cement factory or gravel excavation pit next to an existing or planned residential development.

Initially, zoning seemed like a relatively harmless device to provide legally separate areas so as to keep apart and buffer incompatible residential, commercial and industrial developments. It was upheld as constitutional in a case captioned, *The Village of Euclid v. The Ambler Realty Company*,[36] This aspect of land use control is often referred to as “Euclidian Zoning”. The Court was very deferential to the municipality and, basically, ruled that every exercise of the zoning power would be upheld if it had *any relationship to public health, safety, morals or, something called, “the general welfare”*.[37] To be successful, a challenger would have the burden of demonstrating that the particular ordinance was arbitrary, capricious or unreasonable in the face of a *presumption of validity* granted to the public entity. Lots of luck with that.

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[35] *Id.* at 216.
[36] 272 U.S. 365 (1926).
[37] *Id.* at 395.

D. It's So Easy

The thing of it was that, while reading the cases was enlightening, I was at sea as to how the zoning power could promote such effective exclusion and discrimination. So, I turned to our resident planner, Carolyn. Her immediate reaction was: "It's so easy. They can pretend that all that they are doing is establishing standards to promote tax ratables with upscale, attractive residential development, but by indirection or intent, they are undermining the possibility of providing housing for a substantial percentage of our population. Further, they have no scientific basis in public health and safety to justify the excessive controls that they impose. It's all done under the umbrella of a concept that did not yield to a precise definition: '*the general welfare*'." She then gave me a short but very effective primer on land use controls.

Apparently, over the years since the 1926 *Euclid* decision, municipal use of the zoning power dramatically evolved. Land use controls became far more sophisticated – to the point now where the local government literally controls almost every aspect of land development. Initially, it was just about maintaining distinct areas for different, incompatible "uses" - keeping them apart. It now was used to control the nuts and bolts of land development in almost all respects, and not surprisingly, every one of those nuts and bolts affect cost.

You start out with not just controlling the location of residential uses, but also mandating the location of different *types* of housing - even the total exclusion of small lot single-family housing and multifamily dwellings. Then, you control the "density" of those units; i.e., how many of them are allowed to be built on a lot or a parcel. Land is a finite natural resource. We pretty much aren't growing any more of it than what we've got. By limiting density, you can control how many residential units can be built. Let's take single-family homes. If I have 100 acres that are zoned for residential units and are limited to only one type – detached, single-family units and then I am limited to, say, just building 1 unit per acre, the municipality has already done a lot to drive up cost. The detached single-family unit is probably

the most expensive form of residential structure and the most environmentally bankrupt. Limiting development to that distinct residential use goes a long way to controlling who can afford to live on that land. Limiting how many units can be constructed on an acre further drives up cost. And that's just the opening salvo.

Compare that constraint to a more "inclusive" form of residential use. Just take smaller lot detached single-family housing, say at a density of 5 units per acre. Obviously, I now can put 5 times as many units on the same tract of land. Instead of lots being about an acre per unit, now I can build on lots as small as about 7,000 square feet per unit instead of 43,560 square feet. But there's a lot more, just consider townhouses at 6 to 15 units per acre or apartments at 10 to 20. Clearly, these are far less expensive to build per unit and provide a great savings in land absorption. And we are not even talking about mid-rise and high-rise structures.

Then there are the secondary impacts; like controls that mandate aspects of the unit itself and the location of the unit on the property. Municipalities were regulating the number of bedrooms in a multifamily project, and the minimum square footage of the units, probably one of the most cost-generative impacts. Then they could regulate the height of the building, affecting the number of floors. The building's mass – limitations on lot coverage by impervious surfaces; then, add to the pile property line setbacks for side yards (e.g., eliminating zero lot line units), front yard setbacks from streets, the location of detached garages. Now, throw in street widths, required curbs (Belgian Block or concrete?), concrete sidewalks, on both sides of the street, and their width (3 feet?, how about 4 feet?).

Obviously, all of this affects cost. Here's just one example: there's a lot more street required to service one acre lots than quarter acre lots. More asphalt, more concrete, more sidewalks and curbing, longer sewer and water lines running beneath the ground and laterals running from the house to the large mains in the street. Cost, cost and more cost – ultimately shaping the price of the end-product and the wealth of a potential buyer, the incoming resident. Some ordinances actually went so far as to

preclude who the "user" could be – mandating ownership of the unit by the resident and precluding rentals, even requiring "families" to be groups of biologically-related individuals. Seriously.

Municipal officials, if asked, would justify all of this as *necessary* to support the municipal tax base, which, in New Jersey is largely derived from property taxes, and to protect property values of existing and future residents. In effect, their eyes were not only on ratables but also on the flip side, keeping school age children to a minimum. In one case, I argued that a pregnant woman was about as lethal to municipal officials as a toxic waste dump. The less units, the less bedrooms, the less children. Where multifamily housing was permitted, they might limit them to one-bedroom units and single-family homes might not be permitted to use basements as bedrooms.

So, the more expensive the unit and wealthier the resident, the easier it is to fill government coffers and minimize government cost. Then, you can add as a more transparent justification, the need to keep out the costly "riffraff" and the "types" of families with lots of kids and unrelated families and individuals living together. The concept of the "general welfare" was easy enough to use in this context.

E. Pay No Attention to That Man Behind the Screen

So here is where it all ended up: effectively, there was a man behind a kind of screen dictating everything: *the local government actually was the developer* – determining precisely what could be built and where it would be located - *landowners and builders became, essentially, governmental tools, implementing the governmental program and the policies reflected in the local ordinances*. "We build what they want and where they want it."

If you drive down any street in any of these suburban municipalities, you are not looking primarily at what developers designed and chose to build. You are looking at what they were allowed to build. You are looking at what municipalities told them to build. The builders were not deciding anything. They

were simply implementing municipal policy and decisions. They might as well be public employees working for the local planning department.

All of this was validated in New Jersey in 1952 in cases that permitted very specific land use controls; such as, the imposition of minimum floor areas for a residential unit. *Lionshead Lake v. Wayne Township*,[38] and *Schmidt v. Board of Adjustment of the City of Newark*:[39]

> [S]o long as the zoning ordinance was reasonably designed, by whatever means, to further the advancement of a community as a social, economic and political unit, it is in the general welfare and therefore a proper exercise of the zoning power. The underlying question before us is whether in the light of these constitutional and legislative provisions the zoning ordinance of the defendant township is arbitrary and unreasonable.[40]

In 1977, after New Jersey courts had become more enlightened to the abuse of the zoning power, Linda Pancotto, Ken and I litigated a case for the Public Advocate which resulted in the reversal of this decision in 1979 and invalidated minimum square footage requirements that exceeded minimum standards required for health and safety (the "general welfare" be damned).[41] Legitimate minimums were easy enough to establish through published public health standards. We had the benefit of the Federal Minimum Property Standards that provided minimal requirements for many thousands of

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[38] 89 A.2d 693 (N.J. 1952).
[39] 88 A.2d 607 (N.J. 1952).
[40] *Lionshead Lake*, 89 A.2d at 697.
[41] Home Builders League of S. Jersey, Inc. v. Twp. of Berlin, 405 A.2d 381 (N.J. 1979).

federally-funded housing units that had been constructed throughout the country and in New Jersey.

However, that happened in 1979, and this was 1970 - a light year earlier in land use time given what was to happen in New Jersey in that decade. In 1970, our research demonstrated that the zoning power was virtually sacrosanct. Further, as set forth in the Kerner Commission Report, it had become a powerful weapon which could be, and was being, used to discriminate against the poor and African-American and Hispanic households. The obvious intent was to preclude the construction of affordable housing anywhere in the municipality. With its vast array of judicially sanctioned development controls, any municipality could assure that only middle- and upper-income housing could be constructed. Thus, without saying that they were doing it, in the guise of land use controls supported by some iteration of the "general welfare", municipalities easily could discriminate against the poor and African-American and Hispanic households – and frustrate any effort to provide housing opportunities for them outside of urban areas.

Here's an incredible irony to give a perspective on just how ridiculous all this was. Remember Haddonfield? Well, this crown jewel, home of stately Victorian mansions and one of the best school systems in the State, with its ancient American history and probably the wealthiest regional population, highest property values and greatest tax base – that Haddonfield actually could not be replicated under any of the municipal zoning ordinances that controlled development in New Jersey's suburbs. Haddonfield's lot sizes were too small, setbacks too short, streets too narrow and the like. It even had a mix of duplexes and triplexes scattered among and between single-family homes, in broken-up Victorian structures that had become multifamily uses. The horror of it all.

Well, if things weren't already lined up enough to enable municipalities to dictate land development, those things got decidedly worse. Fortunately, however, they got so much worse as to be, to their ultimate detriment, incredibly transparent. This

would be the rise of a novel and monstrous municipal land use tool; what planners affectionately called “New Towns”.

V. Chapter 5: New Towns — The Final Frontier

Fortuitously, something totally unexpected occurred for me personally. I went on “vacation” to Los Angeles, California. It turned into what might be called “a busman’s holiday”. After randomly chatting with some acquaintances about what we were doing in New Jersey, I was told that it might be interesting for me to visit a massive new development that was being built outside of Los Angeles. So, I did. I went on a side trip to see Westlake Village. This project was so momentous that I could not take it all in. It was an actual, cast-in-municipal-stone, “New Town”. The developers were, literally, building a massive new municipality from scratch. Of course, all of this had been fostered, reviewed and approved in detail by the relevant municipalities in which the lands were located. Municipal officials must have had their hands, fingers and fingernails deeply dug into the planning and design of this place.

What more did we need? Basically, governmental officials would review an application for a large development with no particular restraint or standards. *The municipal governments were engaging in an actual land and development deal!* “You go get the land, come up with a development concept and run it by us. If we like it, you get approvals. If not, you go back to the drawing board, with some additional direction from us, and bring us back something we do like. Then, we will approve it, and you can go and build it.”

I went to the Westlake Village sales office and talked with a young person who was marketing the development that day. I showed interest, and she gave me the grand tour. At one point, I asked about affordable housing, housing for the poor and the like. She laughed and assured me that: “You certainly don’t have to worry about that here.”

That was the truth. Westlake Village’s construction began in the late ’60s. It was designed to be a “refuge” for the wealthy (like the wealthy needed a refuge and from whom and

what?). It succeeded. Today Westlake Village is one of the wealthiest communities in California.[42] It is home to many notable athletes and theater personages. It's 8,000 residents enjoy an average income of almost $200,000.[43] It has virtually no lower income housing and less than 2% of its population is African-American.[44] Sounds like a successful public governmental outcome.

There it was. Just what the Kerner Commission said it would be – a government-sponsored and designed haven for the rich and the White. The key words here are "government" and "sponsored and designed". This scenario was not exactly my image of government working for the "general welfare". To the contrary, the government clearly was working for the welfare of those who needed its support the least – middle- and upper-income households. Public officials certainly were not encouraging or requiring housing for the poor. In fact, they were doing pretty much everything they could to preclude it. Now there's some "general" welfare for you.

Westlake Village was not an anomaly. In effect, it was simply one example of what happens when municipalities really take over – raising their land use powers to an unprecedented and more precise level. At the time, the land use world had become enamored with this new scale of development – "new towns". Reston, Virginia and Columbia, Maryland were the oft-cited examples of what government and the private sector could accomplish when "*working together*".[45] Basically, the normal

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[42] *List of California Locations by Income*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_California_locations_by_income (last visited Dec. 15, 2024) (Westlake Village has a median household income of $115,550).

[43] *Westlake Village, CA*, DATA USA, https://datausa.io/profile/geo/westlake-village-ca/ (last visited Feb. 21, 2025)

[44] *QuickFacts West Lake Village City, California*, U.S. CENSUS BUREAU (July 1, 2024), https://www.census.gov/quickfacts/fact/table/westlakevillagecitycalifornia/PST045224.

[45] *BLVD at Reston Station Demonstrates the Economic Success of Public-Private Partnership for Fairfax County*, FAIRFAX COUNTY: PUBLIC AFFAIRS (Mar.

land use controls were suspended to accommodate these massive development proposals that were intended to create, literally, new towns. Effectively, this gave local government the ultimate power – to review, direct and constrain huge developments and ensure exactly what would be built and what populations would be benefitted. There would be no mystery about the outcome – little or no lower income households, few if any African-American and Hispanic households. It was virtually foolproof, and it did work.

Driving back to Los Angeles, I had a single thought: *This just cannot be legal*.

VI. CHAPTER 6: OR CAN IT?

So, the veil had been removed and the bandage ripped from the skin. Zoning and land use controls were government programs. Any government program is founded on the overarching principle that government must act for the *general* welfare. How could it be legal for government *proactively* to design communities, neighborhoods, and residential units which create housing opportunities just for the wealthy while, at the same time, designing land use controls that effectively excluded the possibility of constructing lower income housing? To the contrary, shouldn't they be proactively implementing controls to generate realistic housing opportunities for the poor? This municipal action was an open, brazen and transparent policy of government discrimination and exclusion. Putting housing aside for the moment, could they do that with access to food?, access to medical care?, access to public education?

New Jersey was already deep into allowing municipalities to use their land use authority to discriminate and exclude. Then, in the late '60s, the Legislature adopted a permissive zoning law that enabled municipalities to approve

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6, 2016), https://www.fairfaxcounty.gov/publicaffairs/blvd-reston-station-demonstrates-economic-success-public-private-partnership-fairfax-county.

"planned unit developments",[46] the State's own moniker for a "new town". Planned unit developments would get away from the precise constraints of zoning and allow the developer great leverage in proposing a new development and the municipality great leverage in enabling projects of a certain size to be designed, relatively freely, by the developers – but to ultimate municipal review and approval. The municipality would then have the unfettered and unregulated opportunity to review and negotiate the deal – partners in crime.

At the time, I was unaware that one municipality within our service area had bought into this planned development, new town, land development option in a big way. This historic farm community was looking to change. It had approved five such developments consisting of about 11,000 units. The housing could accommodate about 50,000 new residents and was staged to occur over twenty years. This awakening, slumbering giant, a budding suburb of Philadelphia in its expanding metropolitan area, was located at Exit 4 of the New Jersey Turnpike, a stone's throw from Philadelphia and with access to Interstate 295, which had turned into a colossal commuter corridor servicing all of South Jersey. The town's fathers (no mothers yet) unabashedly, had exposed its future for all to see: a future that the Kerner Commission explicitly had predicted and warned against. Welcome to Mount Laurel Township.

VII. CHAPTER 7: A SUBURBAN STRATEGY (1970)

Upon returning to New Jersey and my office, I called for a staff meeting and sat down with Peter, Tom, Ken and Carolyn. We had been working tirelessly to support lower income households in Camden and to keep them from being uprooted by Urban Renewal and Highway projects - prong one of the Kerner Commission Report. However, we were not doing anything to provide affordable housing opportunities in the suburbs. Meanwhile, literally, tens, if not hundreds of thousands of units were being proposed, designed and constructed for

[46] N.J. STAT. ANN. § 40:27-6.6 (West 1968)

upper-income households in the suburbs. It wasn't as obvious what was going on when this was being done with piece meal developments pursuant to traditional zoning codes. But now, with this new land use device, it was bald, brazen and completely visible for anyone to see and understand. Further, this was continuing to foster the flight of middle- and upper-class households from the cities. Effectively, we were doing nothing to undermine the continuing development of the "two Americas" in our own backyard – the second prong of the Kerner Commission Report. We all agreed that we should formulate an attack on suburban exclusion fostered by local governments through laws, ordinances and regulations - what we would later learn that others already had described in the catch-all phrase: "exclusionary zoning".

I wanted to go after them, force a confrontation on the fundamental concept that the "general welfare" required government to affirmatively address the housing needs of the poor. Ken, our renegade Harvard law student, was assigned the task of doing the initial research and educating us. It didn't take him all that long. It turned out that New Jersey was something called a "home rule" State, meaning that decisions affecting local development were delegated to municipalities. Further, those decisions were granted extraordinary deference by the courts and were validated if they could be justified for *any* reason. Those seeking to challenge these controls had the heavy burden of proving them to be, basically, irrational.

So, that did not sound all that good, and again I heard that ringing in my ears of the laughter I got from the assortment of builders I had interviewed. I did have a positive take on this. It seemed to me that the visible manifestations of the insidious discrimination could be enough to provide a basis for an attack. In New Jersey, these local powers were derived from the State Constitution, itself, and were delegated to the municipalities by the State Legislature though its Municipal Land Use Law. This was the same Constitution that required "equal protection" and "due process" in the implementation of public policy.[47]

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[47] U.S. CONST. amends. XIV, V.

Ken then shared with us a State Supreme Court decision which seemed to set forth in detail our position almost exactly – as if we had written it ourselves. Ken said that it turned out that a Justice of our Supreme Court was one of the foremost national jurists on the issue of land use, Justice Frederick Hall. He provided us with copies of an opinion written by Justice Hall: this was *Vickers v. Township Committee of Gloucester Township*.[48] Justice Hall assailed the use of these municipal controls and called for them to be reigned in and properly conditioned by the courts. It was an amazing read. This was a broad legal and intellectual attack. It was exactly what we hoped to find. Check it out:

> I suggest only that regulation rather than prohibition is the appropriate technique for attaining a balanced and attractive community. The opportunity to live in the open spaces in decent housing one can afford and in the manner one desires is a vital one in a democracy. It seems contradictory to sustain so readily legislative policy at the state level forbidding various kinds of discrimination in housing … and permitting the use of eminent domain and public funds to remove slums and provide decent living accommodations, … and at the same time bless selfish zoning regulations which tend to have the effect of precluding people who now live in congested and undesirable city areas from obtaining housing … within their

[48] 181 A.2d 129 (N.J. 1962).

> means in open, attractive and healthy communities."[49]

Could it get much better than that? Not really, but there turned out to be one significant problem. After getting over my initial euphoria, I noticed that Ken had provided us with a *minority* decision. Only one other jurist, the Hon. C. Thomas Schettino, had joined Justice Hall's *dissent*. In fact, the Chief Justice, the liberal and highly respected Hon. Joseph Weintraub, had joined in a majority decision ruling the other way. The majority had disagreed with Justice Hall and, in a 5-2 decision upheld the total exclusion of mobile home parks in the defendant Township.[50]

I just said, "Ken, look, what you have here, this decision, it's a *minority* opinion." Everyone in the room let out a collective moan. It had the most negative ramifications. Basically, the Court, in its *majority* opinion, had considered and rejected all of our legal theories – pretty much all of which had been, essentially, set forth in Justice Hall's dissent.

Then we read an earlier decision which set the stage for *Vickers, Napierkowski v. Gloucester Twp*.[51] This case, dealing with discrimination against a single mobile home not located in a mobile home park. The Court, without much expert testimony or consideration of how its concerns might be mitigated, unanimously reversed a lower court ruling, stating broadly:

> The decisions elsewhere highlight the fact that the use of trailers as permanent residences present problems which are ofttimes inimical to the general welfare. In addition to the obvious health and safety hazards there are other considerations which a municipality must take into account in regulating the use of

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[49] *Id.* at 147 (Hall, J., dissenting).
[50] *Id.* at 140.
[51] 150 A.2d 481 (N.J. 1959).

trailers. Two of the basic concepts of sound zoning, encouragement of the most appropriate use of land and conservation of property values, may be undermined by the indiscriminate location of trailers within a municipality. There can be little doubt that the maintenance and use of a trailer in a particular locale would tend to stifle development of the area for residential purposes. And from the point of view of aesthetic considerations (which are inextricably intertwined with conservation of the value of property) trailers may mar the local landscape.

In our view, the refusal of the municipality to permit the isolated and interspersed maintenance and utilization of trailers on individual lots in residence districts is not an arbitrary and unreasonable exercise of the zoning power, even where, as here, the proposed location in its present state and, assuming arguendo that the trial court's prediction is accurate, the reasonably foreseeable future is rural and undeveloped.

Zoning must subserve the long-range needs of the future as well as the immediate needs of the present and the reasonably foreseeable future. It is, in short, an

> implementing tool of sound planning."[52]

Wow. This was so awful as to be almost beautiful. The Court's language contained enough devastating buzz words that the sting might require hospitalization. Check out these judicial chestnuts: "most appropriate use of land", "preservation of property values", "obvious health and safety hazards", "aesthetic considerations", "stifle development of an area for residential purposes". Oops. While the language refers to the impact of trailer homes, it did not seem like a big lift to apply it to municipal programs to cleanse an area of "dilapidated" or unkept housing and undermining the inclusion of lower income housing. Was there really much of a distinction between a trailer home and a unit for a low- or moderate-income household?

OK. So, time to step back. Given our youth, inexperience and innocence, that did not take long. Upon carefully reviewing the context and the facts which provided the basis for the Court's decisions, we decided that it did not appear that the legal theories we intended to rely upon actually had been fully developed. These cases were really about mobile homes and mobile home parks. At the time, people had a real, if not realistic, phobia about prefabricated housing; particularly, if it came with wheels. Justice Hall notwithstanding, these cases were not about the overall impact of local zoning on the poor or discrimination against the poor. We decided to move ahead, damn the torpedoes – obviously, we had nothing left to lose as it all already had been lost. Ken, Caroline and I teamed up to put the case together and, ultimately, to file a complaint. We just needed some good facts, a terrible defendant and an endearing plaintiff. Just a bit of a lift. But, all that was soon to come as the stars would line up just about perfectly.

Vickers was decided in 1962. Then as we were putting our case together something unexpected happened. The New Jersey Supreme Court rendered a decision in a case captioned, *DeSimone v. the Greater Englewood Housing Corp. No. 1*.[53]

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[52] *Id.* at 488.

[53] 267 A.2d 31 (N.J. 1970).

"*DeSimone*" actually involved the construction of a lower income housing project in Englewood *that the municipality had approved*! It was the NIMBYs who appealed that approval. The world turned upside down. Time being important in the context of funding applications, the Supreme Court accelerated the hearing on the appeal.

Two significant aspects of the decision were noteworthy. First, Justice Hall wrote the *majority* opinion, and it was unanimous. It was exactly the same array of Justices that seemingly had gone the other way in *Vickers*. They now, post-riots and post-Kerner Commission, allowed Justice Hall to take the lead on land use and affordable housing issues. Second, Justice Hall wrote something in the decision that was completely excessive and unnecessary. That might not seem all that important, but I felt like he was sending out a message to potential litigants.

Considering that Englewood had approved the project, all Justice Hall had to say was that it had a rational basis to do so and that the objectors had not overcome the strong presumption in favor of the decisions made by the local officials. I guess, in this instance, what was good for the goose, now is good for the gander. Justice Hall did rely on the presumption in favor of municipal action, but he went further. The case involved, in part, the need for a *use* variance from the existing zoning – permission to construct a use (like a multifamily housing project) on land that had *not* been zoned for that use by the Governing Body. "Use variances" are not easy to get in New Jersey, since the zoning ordinance, as it is, expresses the intent of the Governing Body as to what uses should be located where. Zoning Boards of Adjustment are supposed to be very circumspect not to grant use variances that usurp the decisions of the Governing Body. Their traditional, historic role, was just to provide relief where the zoning ordinance might have, inadvertently, effected a "taking" of land which would have triggered a damage action.

The Englewood Zoning Board had granted the variance to allow this multifamily, affordable housing project. That left open an interesting hypothetical question - something courts

are not supposed to ask or answer until the issue is squarely before them. This hypothetical was intriguing. *What would the Court have done if the Board had denied the application? What if it had denied the variance as the objectors argued it should have done?* Justice Hall could not resist answering that hypothetical, and a unanimous Court let him get away with doing so. He opined that, given the State Legislative findings of housing need, *the provision of affordable housing was, itself, a special reason that could justify the grant of a variance*.[54]

He then went even a step further. He offered more of what lawyers call "dicta" - observations that are *unnecessary* to the resolution of the issue before the Court. Generally speaking, judges do not do that. They limit their findings of fact and law only to what is *necessary* to decide the case. Be that as it may, Justice Hall went off the rails and opined that: "In sum, the use variance was properly granted. *In fact, a denial of it under the circumstances and proofs could not well be sustained*."[55] (Emphasis added).

Gotta love language like that: "Could not well be sustained"! Bingo, he appeared to be sending a clear invitation for anyone out there to bring him such a case. We figured that could be us. We pushed on with a lot more hope.

VIII. CHAPTER 8: THE HEAVENLY STARS LINE

A. Finding a Defendant

I know that the law, litigation, is not supposed to work this way, but there was no choice. The archetype is that lawyers wait to be approached by aggrieved parties. Ambulance chasers and product liability actions aside, we are not supposed to crave to litigate an issue, go out and look for a "good" defendant to sue and then, having found one, look for clients that we can represent in a lawsuit. Well, sometimes things have to get flipped in order to move forward. Certainly, no one was

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[54] *Id.* at 38.
[55] *Id.* at 39.

knocking on our door to bring a Constitutional challenge to upend decades of New Jersey Supreme Court and inferior court cases that uniformly validated the local zoning power and the decisions made by local officials; particularly, in our wealthy suburbs.

If there was going to be a case, it seemed pretty clear that we had to manufacture it. So, the next step was to find a good target. My predilection for Haddonfield was rejected by Peter, Ken and Caroline, and, ultimately, I agreed. Notwithstanding its history and stature, it really did not present the world with a picture of a new future since it was almost entirely developed and actually looking not to change at all. So, we looked for municipalities in our service area that were developing and that were approving planned unit developments. Ken and I researched local municipalities that had approved such developments. We found several in our service area that were promising. We knew absolutely nothing about any of them.

We needed some local input and, fortunately, we had CRLS attorneys and staff in local offices throughout our region that could help. We needed a good defendant and an appropriate plaintiff or two. I sent out a notice to all of our branch offices to see if anyone had contacts in any of the municipalities we had identified and, particularly, potential clients who were having housing issues.

Almost immediately, the heavens opened up. I got a call from our Burlington City office. "You should meet with this Moorestown minister, Stuart Wood. He's dealing with this issue right now." I had never heard of him and had no idea what issue he was dealing with; although, it sounded kind of familiar. A meeting was set up, and the stars began to line up in an incredible way.

Déjà vu all over again. Haddonfield all over again. Reverend Wood informed us that he had been working with a local, African-American group in one of our target municipalities, Mount Laurel Township. The group, the Springfield Action Association, had obtained "seed money" from the State Department of Community Affairs to develop a plan to construct just 36(!) lower income units in the Springville area of

Mount Laurel Township. They had an option on land, but the Township refused to cooperate, and had been mortifying and humiliating to him personally and to the local African-American residents in public meetings and private conversations. At this point, the group had lost its option and had given up. He considered the matter done, with no hope of resurrection.

More "good" news was that, at the same time it thwarted this modest effort, the Township was going about approving a massive planned development, the Larchmont PUD – one of five in the Township. That development easily could have provided sewer and water service to their location on Hartford Road. Also, the Springville area was home to many indigent, African-American residents, some literally living in converted chicken coops. They likely would be forced from their "homes" and would have to relocate out of the Township. This dislocation already had been going on for some time.

Incredibly, it got "better". It turned out that Mount Laurel was home to a strong African-American population, *dating back to before the Civil War*. This place had been a waystation on the "underground railroad", harboring fleeing slaves.[56] They had an historic church, Jacob's Chapel, A.M.E. Church, that dated back to the mid-1860s. Adjacent to the Church was a graveyard, circa 1811(!) which was one of the first African-American graveyards, the "Colemantown Negro Cemetery". Here were buried the deceased members of African-American Civil War regiments. A local Quaker, Albert Jacobs, gifted the land for the church building. It has been an active church at this location for over 100 years. Can it get any better? Yes, it can.

The African-American residents had been highly respected and politically powerful in the Township when it was a simple farm community. Then came the very recent influx of new housing. That housing, affordable to middle- and upper-income migrants from the city, was almost exclusively occupied by Whites. The governing body was now controlled by the new

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[56] *Jacob's Chapel*, NEW JERSEY HISTORIC TRUST: FUNDED SITES, https://www.nj.gov/dca/njht/funded/sitedetails/jacobs_chapel.shtml (last visited Dec. 15, 2024).

residents who "knew not Joseph".[57] They were not supportive of providing affordable housing for their indigenous poor, let alone the regional poor. The African-American, long-term residents were literally told by the Mayor: "If you cannot afford to live here, move to where you can afford to live."[58] No need to wonder where that was.

Talk about laying out your future – over 11,000 new units, probably up to 50,000 new residents, and nothing for the poor, not even for their own indigent residents. Not even 36 units. Okay. Part I done. We had found a perfect Township to sue. Now, all we needed was one perfect plaintiff willing to do it – we found twelve.

B. Finding a Plaintiff—Or Twelve

The matriarch of the Mount Laurel African-American community was Mary Robinson. Reverend Wood suggested we meet with her. I enthusiastically agreed, and he set up a meeting the next night at the home of Mrs. Robinson's daughter, Ethel Lawrence. Peter and I went there, and met our future.

There were several people at Mrs. Lawrence's home, all had been involved in the failed attempt by the Springville Action Association to build affordable housing. I had gained a lot of knowledge since my Haddonfield experience, and I now knew the drill. I told them that what they experienced was common throughout New Jersey and the country and recently had been exposed by a Presidential Commission. I said that the current state of the law would provide them no relief. There was no quick fix. If they wanted to deal with this, they would have to commit to a long fight that probably would require a New Jersey Supreme Court decision. They could expect no support locally or help from the State Legislature.

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[57] *Exodus* 1:8 (King James).

[58] Martina Manicastri, *A History of the Mount Laurel Doctrine*, FAIR SHARE HOUS. CTR. (Oct. 28, 2022), https://www.fairsharehousing.org/a-history-of-the-mount-laurel-doctrine/.

I could tell that things were getting pretty uncomfortable in the room. They seemed to understand what was coming next. So, I let it drop:

"If you want to do something about this, you are going to have to sue the Township, spell out who you are and what has happened to you and ask for judicial relief. Litigation is your only realistic option – if you can call it that. Frankly, legally things are so bad right now, I have no idea whether it is possible to prevail and if you did, what relief you would get. Also, I imagine you may be the target of some local animosity, but I think I can take care of that."

Someone said, "How are you going to do that?"

"We probably can line up some institutional groups, like the NAACP, to participate. They would be untouchable by any local attack, and would make any threats against an individual plaintiff irrelevant to the case proceeding."

Frankly, I was making some of this up as I was going along, but it did seem right. We had strong connections with these groups, and they were fearless and aggressive.

"Of course, our representation would be entirely free."

This proposal, obviously, was a heavy lift for them. Let's see. You got, Peter and me, two young, inexperienced White attorneys from a poverty program in Camden, who they had never met, telling them that they should sue their home Township with little hope of success, and, by the way, the litigation might take years. Stepping back, other than the intrigue of the undertaking, it didn't seem all that promising.

At first, Mrs. Robinson was opposed, and she also was very upset. She said that this was her town. She had grown up here. Her children and grandchildren lived here, most of the family and all of her friends. She could not imagine suing her own town. More Haddonfield déjà vu. Things were looking bad until, without a millisecond going by, they changed abruptly.

A young woman got up and said, "Grandma, right, I'm living here, but I'm living in a converted chicken coop on well water and an outhouse! Our people have been leaving. I'm going to have to leave. They kept us from getting decent housing. That's who they are. Why do you care what they think?"

That turned out to be Mrs. Robinson's grandchild, Thomasine Lawrence. Then another, very powerful-looking woman stood up. She was riveting – exuding total confidence and simply statuesque in appearance. As she rose, everyone quieted down and took notice. She clearly was a leading figure. Actually, we were in her house. This was Thomasine's mother and Mrs. Robinson's daughter, Ethel.

"Momma, I am not going to disagree with you in front of these young men, but we have to talk about this after they leave. I just do not see that we really have a choice. We do this, or we give up. And I just cannot see us giving up. If someone, like this boy, has a hammer, we might as well let him swing it. This is our town, where we live, where our ancestors lived and are buried, and we should fight to keep it a place where we can stay. We won't be suing our town. We will be suing theirs. We need to get our town back."

That would be the incredible Ethel Lawrence. Mrs. Lawrence was the fifth generation of her family that called Mount Laurel home. She would be the rock that kept this case on solid footing and my mental state from totally deteriorating for the next fifteen years.

It was clearly time for us to go. There was not much more for me to say anyway, and they really wanted us to leave so that they could talk about what to do. Mrs. Robinson thanked us for coming and said only that she would get back to me. So, Peter and I left and met with our staff to consider how to proceed.

The facts here were incredible. We could not have written a better scenario. Just starting with the bald fact that these officials were permitting, helping design and approving 11,000 units for newcomers while, at the same time, refusing to help their own citizens build just 36 units of affordable housing. Almost an unbelievable script. As it turned out, Mount Laurel had made a big mistake and would regret not supporting that modest proposal. We would get them for doing this, but that would take a really long, long time.

I got a call from Reverend Wood the next day. Mrs. Lawrence wanted to meet with us. Peter and I met with them immediately. Mrs. Lawrence said that she asked around and

gotten very positive feedback about us. However, she still needed additional assurance. She asked one question:

"How committed are you to this? I am not going to bring my family and friends into something like this without knowing for sure that you are going to stay with it until it's done. I know this is exciting for you to do, but the long haul is something different. My whole life and the lives of my people has been a long haul. I know how that can get as time grinds on. I need an absolute commitment that, no matter what, once we start, you will see this through to the end. If you will commit, then we will commit."

Seemed reasonable enough. Had I known I was committing to over fifteen years of litigation, just to get the door open, let alone actually to get the housing built, I might had been more daunted, but I did not have that clairvoyance.

"I and the staff at CRLS are totally committed and will stay with the case until it is done. Wherever I might go, if at all possible, I personally will continue to work on this case, and there are others who feel the same and will do the same. The legal representation will be there to the end."

She didn't skip a beat.

"OK, then we will do it. I will be a plaintiff, my daughter, Thomasine, will be one and so will my Aunt Catherine. What else do you need?"

Here are some interesting facts that we did not know at the time. Ethel Lawrence's "Aunt Catherine" was Catherine Still. Mrs. Still, was a direct descendant of Dr. James Still, a huge historic notable in the area – "the Black Doctor of the Pines."[59] He was almost totally self-educated and became a respected botanist and doctor. Also, get this: the Robinson/Lawrence clan was well-represented in the National Football League! Mary Robinson's son, Ethel Lawrence's brother, is Dave Robinson. He was a linebacker for the Green Bay Packers for about a decade and, ultimately was inducted into the National Football League

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[59] Janet Jackson- Gould & Janet Carlson-Giardina, *Dr. James Still Office Historic Site Overview*, NEW JERSEY STATE PARK SERVICE: HISTORIC SITES, https://www.nj.gov/dep/parksandforests/historic/drjamesstill.html (last visited Dec. 15, 2024).

Hall of Fame.[60] I met him once at the Day Care Center where Mrs. Lawrence worked. Kids were climbing all over him, and I believe he actually picked up and carried about ten of them at one time.

Our thoughts on this case had advanced a lot. I told Mrs. Lawrence that we envisioned three different individual plaintiff classes. First, local residents like herself. Second, prior residents who had been effectively forced to leave because of substandard housing conditions or dislocation by private developers. Third, we would have Camden, "regional", residents sue to obtain access to suburban housing opportunities. To insulate all of the individual plaintiffs, we would seek institutional help, with the first named plaintiff being such an institution.

"OK. That all sounds right."

"You three are perfect as our local resident plaintiffs, but I need you to find some former residents willing to sue. Meanwhile, we will deal with getting our "regional" plaintiffs and the institutional plaintiffs. I will prepare a draft complaint for you to review, and we will file here, in the State Superior Court in Mount Holly."

"That will be Judge Martino. He's no fool. He knows all about us. Finding people will not be a problem. I will get you some names, and you will let me know when you are ready."

That did not take long. Within days, we had met with and signed up three refugees from Mount Laurel, all indigent, all having been "forced out", all living in nearby communities and all wanting to return. We knew who we wanted as our "regional" individual plaintiffs. They were local Camden activists and happy to oblige. Peter had them signed on immediately. That left the institutional plaintiffs.

I wanted more than one. I did not want to take the chance of any one of a class of plaintiffs creating a problem down the road. We knew these groups, and they knew us. We had worked together on several projects; particularly, the Camden Urban Renewal and Highway work. We decided to go after three and

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[60] *Dave Robinson*, PRO FOOTBALL HALL OF FAME, https://www.profootballhof.com/players/dave-robinson/ (last visited Dec. 15, 2024).

Peter got them all to sign on, which they did eagerly: the Southern Burlington County NAACP (which included Mount Laurel in its service area), the Camden County NAACP and the Camden County CORE ("Congress on Racial Equality").

We were set. Plaintiffs representing local need. Plaintiffs representing the displaced poor. Urban plaintiffs representing regional need. Institutional plaintiffs that clearly would have a legitimate interest in the subject matter. They all would pass New Jersey's relatively modest standard for "standing" – the requirement that, in order to be a litigating party, you must have a requisite interest in the subject matter of a case before being allowed to sue.

As an aside, we also committed to help the individual plaintiffs on any legal issue that we could. For example, Ken had been working with a coalition of tenant organizations that included representative activists who supported lower income tenants and had joined with the New Jersey Tenants' Organization, an advocacy group of relatively wealthy tenants that arose out of the plethora of Fort Lee multifamily, luxury rental housing. They proved to be a formidable coalition. Among the legislation that Ken helped write and that they sponsored and got adopted was the New Jersey Rent Receivership Act.[61] This law, adopted on June 21, 1971 (shortly after the filing of the *Mount Laurel* complaint), allowed for tenants in substandard housing to put their rent into receivership to force the upgrade of their housing conditions. I filed the first receivership case putting Thomasine's converted chicken coop into receivership. This led to her getting indoor plumbing and clean well water. Also, many years later, after leaving government and pursuing the actual development of affordable housing, my partners and I had the financial opportunity to finance an upgrade for Mrs. Lawrence's home; including substantial interior improvements and a connection to public water and sewer.

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[61] N.J. STAT. ANN. § 2A:42-85

C. The Defendants

We sued the Township, its Governing Body, its Zoning Board of Adjustment and its Planning Board. They were no brainers. Then we considered suing the developers of the planned developments in the Township. That would be a longshot since the developments had been tentatively approved, and they, arguably, had done nothing wrong and had "vested" rights.

Peter and I knew one of the major developers, Richard Goodwin. He was working on the Ramblewood PUD and the massive Larchmont PUD. I knew him from a prior matter that was totally amicable. We met with him and asked if he would modify has plans to include some affordable housing. That was a total non-starter. We offered that we could get rid of some of the exactions that the Board had gotten from him as a condition of his approvals – like giving them a fire truck and thousands of dollars for the schools. He just could not see doing anything that might jeopardize his projects. We told him we might sue him. That ended the conversation, as he then referred us to his lawyers.

Peter and I, and my Penn Law Property Professor, Jan Krasnowiecki, a nationally recognized land use expert, met with his legal team - attorneys at a major Philadelphia firm. We went to their offices and like six or seven lawyers came in. After listening to me, they just thought the idea that Goodwin had any exposure was laughable. So, that did not go anywhere.

We did sue all the developers, but the court dismissed them without much reflection. We let it drop and did not raise the issue on appeal. Our thought was that, given the length of time these projects would be developed, they would surely have to come back in for modified approvals. If so, we could attack when they did. Furthermore, until we obtained a viable change in the law, the developers were effectively out of reach. Once we did, they came out of the woodwork looking to benefit from our success and participated in the settlement to construct affordable housing in the Township. After all, it now was "wanted" and they had just the land on which it could go.

IX. CHAPTER 9: THE FILING (1971)

Frankly, when we were considering where to file suit, we had not been specifically concerned about the location of the municipality that we ended up attacking; that is, the County in which it was situated. We certainly were not ethically above "forum shopping"; that is, picking a defendant located in a vicinage that had a "good" judge. For this case it didn't seem all that important since we figured there was little or no chance of winning at the trial level. Our goal would be to create the best evidential "record" (testimony and documents) that we could and hope to win on appeal. On the other hand, the trial judge, as later events would clearly demonstrate, could be a big factor in our ability even to create a good record.

We had a five-County program. Each County had its own slate of trial court judges. There was a big difference in one respect and that would be the Assignment Judge. Every County in New Jersey has a designated Assignment Judge. This jurist is the top judicial dog of a particular County. As the name implies, this judge has the authority to "assign" cases among the various judges who populate the bench in his or her County. Of course, the Assignment Judges can choose to keep most any case they want for themselves. A case like this, a constitutional attack on the municipal zoning power, was almost certainly going to be kept by the Assignment Judge for adjudication.

The Assignment Judge in Camden County, W. Orvyl Shalick, ruled over several of the Counties in our service area. He seemed openly to despise Peter and me and to disdain the legal services program. He never openly expressed much empathy for our indigent White, African-American or Hispanic clients. We felt, for sure, that he would have been a disaster and might make it difficult for us to get the evidence that we needed to put on the record for appellate review.

As if things had not been going well enough, Mount Laurel was not located in one of our three Counties under Shalick's domain. It was located in Burlington County, a totally different vicinage, and under the auspices of a different

Assignment Judge, the Hon. Edward V. Martino. As Mrs. Lawrence had intimated, Judge Martino was of an entirely different stripe. He certainly was known as conservative politically, but he had qualities that were extremely appealing to us: he was smart, he was a committed jurist, he would not allow politics to affect his decision, and he most certainly knew all about Mount Laurel Township - its past and recent history. He would know its African-American population and their extraordinary rich back story and current housing conditions. Also, it was most likely that he would know about Mary Robinson and the Lawrences.

Ken and I did consider suing in Federal Court. However, with the retirement of Earl Warren and the placement of Warren Burger on the Supreme Court, federal doctrine did not seem like something that would be expanded to support our legal theories. Also, the existing cases set a difficult standard for proof of discrimination. The prevalent doctrine held that, for discrimination to be unconstitutional, it had to be intentional.[62] Simply proving that, regardless of intent, discrimination was an ultimate effect, would not be enough.

The strategic question of whether to file in Federal or State Court was easily resolved by mutual agreement among the staff. We believed that we had a much better chance by keeping the courts focused on interpreting the New Jersey Constitution and laws. Although a Federal Judge would have the power to rule on New Jersey law, that would be done very conservatively, if at all. We simply did not want to struggle with a Federal Judge who might be reluctant to break new ground interpreting State law. On the other hand, we determined to include Federal Constitutional and legal challenges alongside claims arising under the State Constitution and laws. This was, to some extent, deference to the fact that, across the nation, others were pursuing this line of attack and, during the course of our case, might actually prevail. Also, New Jersey judges would be free to apply Federal Constitutional and legal principles if appropriate.

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[62] *See* Wright v. Rockefeller, 376 U.S. 52 (1964); Akins v. Texas, 325 U.S. 398 (1945).

Ultimately, as the case developed, the New Jersey Judges relied almost exclusively on State law. This had the additional benefit of foiling an attempt by the defendants to obtain a United States Supreme Court appeal, which they did seek, since there were no Federal Constitutional or legal decisions for our Federal Supreme Court to review.

Writing the first draft of the complaint was a lawyer's dream. My mentor, and a CRLS Board Member, was Joe Rodriguez. Mr. Rodriguez was one of the most prestigious litigators in our region, if not the State. He later would become the State Public Advocate and then a Federal District Court Judge. You could hardly meet a nicer, more genuinely caring individual. And one who was so incredibly smart. Peter and I met with him, and he provided a lot of guidance and specific advice, both before our filing the complaint and then before and during the trial.

Mr. Rodriguez was all about complaints. He advised all the attorneys that this was the one document every trial judge would read. This was an opportunity to set the table for the plaintiff's case – the facts supporting the grievance, the law that was allegedly violated and the remedy being sought. I had waited a long time to do this, and it was a thrill.

I detailed all of the history, alleging that the Township had been delegated its power to zone with the absolute constitutional constraint that it be exercised to benefit the general welfare of *all* citizens and provide for equal protection and fundamental due process.[63] It was not hard to demonstrate that Mount Laurel had directed its efforts to the general welfare of just middle- and upper-income households, while doing nothing for the poor. Since the Township was being proactive, we alleged that it had to be proactive for the poor as well.

Our most novel claim was that the Township had an obligation that went beyond the needs of its existing (and former) residents.[64] We argued that there was a regional need

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[63] Complaint at 10, 13-14, S. Burlington Cnty. NAACP v. Mount Laurel Twp., 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972).
[64] *Id.* at 30.

for housing, which could be assessed, and then distributed among the region's municipalities on a "fair share" basis and that Mount Laurel was required to do that assessment and provide those opportunities.

Ken, Caroline and I went over the drafts and finally settled on a proposed document to file. Even though they were not lawyers, I indicated on the Complaint that they helped draft it. The final document was detailed and covered 32 pages. I ran that by Peter, Tom and Mr. Rodriguez. All approved. Lastly, I took it to Mrs. Lawrence, who reviewed it thoroughly and immediately approved. We then filed. Just for a bit of irony, as the timing was right, I wanted to file it on Law Day, May 1, 1971, but that turned out to fall on a Saturday, so I had to settle for May 3. We then waited to see how the lawyers on our Board would react. However, with Mr. Rodriguez in our corner, we did not expect a problem, and none occurred.

X. CHAPTER 10: THE FIRST TRIAL (1972)

Mount Laurel in 1972 was represented by an exceptional lawyer of undeniable integrity, John F. Gerry. Mr. Gerry ultimately would be elevated to be a judge in the Federal District Court in Camden. His defense of the Township's was direct and to the point. He argued that it had the legal right to do what it was doing which, basically, was to focus on the fiscal health of the Township and the protection of property values of existing and future residents. Since, in New Jersey, municipal financing was largely a product of revenue collected from the real estate tax, Mount Laurel was committed to assuring that development in the Township would generate the maximum tax ratables possible. It was focused on creating residential, commercial and industrial developments which would do just that and to generate and preserve property values. Since lower income housing clearly would not do either, Township officials would be foolish to zone for it and were not doing anything unlawful or unconstitutional by not zoning for it. There is nothing in the law that mandates that a municipality must zone for every conceivable use. Basically, he argued forcefully that the

Township's intent was rational even if the effect could be construed as discriminatory. The developers simply argued that they had done nothing wrong and had land use approvals that were lawfully obtained.

The litigation quickly entered the "discovery" phase in which both sides could seek whatever factual information was available from the other and depose (take sworn testimony) from potential fact and expert witnesses. I filed a demand for the production of copies of all of their relevant records, minutes of meetings of the Governing Body, the Planning Board, the Zoning Board of Adjustment and any department responsible for code enforcement and social welfare. I wanted copies of all proceedings, applications and decisions, permits and approvals. It would have taken them a decade to deliver all of that to us.

Mr. Gerry called and said just that. While he acknowledged that we surely were entitled to get the documents, they simply could not take the time and the expense to provide them. In order to avoid seeking judicial review of our discovery demand and the Township's refusal to comply, he proposed something unique. He offered me a desk in the municipal building and free access to all of their files – no questions asked. No one would be looking over my shoulder or monitoring what I reviewed or copied. I accepted.

For several weeks, I worked at my own desk in the Mount Laurel municipal building. The staff was cordial and provided me with whatever I requested. I went through years of hearings, minutes and applications. It was a treasure trove of supporting facts. Many statements were being made as to the intent of the municipality and how its plans would be implemented. Hearings on applications and plan reviews were replete with proof of active bargaining between the developers and the Township. The Boards extracted enormous concessions in return for the approvals - most everything except a commitment to provide affordable housing.

I suppose the most damning evidence were the words of Township officials addressing the existing neighborhoods that suffered from blighted and unsound housing conditions. They actually felt no qualms in stating that their goal was to demolish

all of these units. In order to avoid having to deal with the process and cost of relocating any tenants, they determined to do nothing while units were occupied – no inspections, no orders to vacate and the like. They openly strategized that they would just wait until a property was vacated before acting to shut it down and demolish it. Also, they would do nothing to achieve an upgrade to the housing conditions through building code enforcement. The strategy was very successful as tenants did vacate and leave, and since they left "voluntarily", no relocation assistance had to be provided. Once the tenant left, the Township officials acted quickly to have the buildings taken down.

I detailed all of my findings in a document called a Demand for Admissions. A "Demand" is a simple request that requires the other side to provide yes or no answers as to whether each fact set forth in the Demand is true or false. There was no getting around their providing answers, and there was a stiff penalty for not responding truthfully. Mr. Gerry would not play games with this and had no choice but to provide an accurate response. After his staff took a quick review of the initial demands, they "admitted" to the truth of everything in the document. I guess he figured I had copied and referenced everything accurately.

With the Answer to the Demand for Admissions, my trial work was going to be minimized. We would not need to call any fact witnesses. The Township did not dispute who the plaintiffs were and their housing conditions as set forth in the Complaint. They basically knew who they were, their history and current living conditions. The Township really preferred that they not testify. From my perspective, their Answer to the Demand for Admissions provided all the salient facts we needed to demonstrate intentional discrimination against the poor.

We would need an expert to testify that the standards in the zoning and subdivision ordinances were excessive and unduly cost-generative. We had to establish that affordable, low- and moderate-income housing could not be built under this array of land use controls. We had a witness, Leon Weiner, a highly respected, national developer of affordable housing who

was working on projects in Camden. He agreed to testify for us. Peter, however, decided to orchestrate a public lynching of the man at a meeting in Camden that Mr. Weiner had put together to talk about his work with representatives of the local community. It did not go well. The hostility was palpable and, after vocally attacking the man, the public walked out in an obvious orchestrated action. Peter got up and left with them. He was so happy with the result. I could hardly believe it. I figured correctly that this was not going down well with Mr. Weiner. Expectedly, the fallout from that debacle came the next day. Mr. Weiner called me and pointedly accused us, including me, of being despicable people for blindsiding him like that. Further, he would not provide any testimony in the *Mount Laurel* case. He hung up before I could say anything. Not like I had anything worth saying. I could hardly blame him.

Somewhat of a panic set in as this was shortly before the trial was to start, and we desperately needed to replace him immediately. We were able to do that with a planner who would evolve into a personal friend and business associate of mine. In October, 1971, an unexpected event occurred. A decision came down from North Jersey which addressed some, but not all, of the issues we were raising. It was the first trial court decision in the *Madison Township* case.[65] Unbeknownst to us, a private attorney, Fred Mezey, representing a developer along with a group called the Suburban Action Institute ("SAI") which joined the suit on behalf of six lower income plaintiffs, represented by Lois Thompson, had filed an exclusionary zoning case against Madison (now "Old Bridge") Township. They won.

When Mr. Weiner dropped out as a witness, I figured these guys might provide us with a replacement. I called them and spoke with Paul Davidoff, the head of SAI. As it turned out, I was not inventing the wheel, just ignorant that others were already out there doing the same thing. Mr. Davidoff was an extraordinary academic, a nationally respected planner and a formidable advocate for integration and opening the suburbs to

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[65] Oakwood at Madison, Inc. v. Madison Twp., 283 A.3d 353 (N.J. Super Ct. Law Div. 1971).

affordable housing. We developed a great rapport and worked together on affordable housing issues in New Jersey for many years until his untimely death. Mr. Davidoff recommended that we use a planner, Peter Abeles, who had given testimony in the *Madison* case. He had been extremely impressed with Mr. Abeles' testimony and, coming from Mr. Davidoff, I figured correctly that was high praise. What he didn't tell us, and I never dreamed to ask, was that Mr. Abeles had testified as the *municipal planner*, not theirs - a time bomb waiting to go off that I had no idea was even there.

So, I called Mr. Abeles and told him of our need for an expert. He was extremely affable and happy to oblige. Unfortunately, he lived in New York City and suggested we come up and talk at his home. We had no choice. Peter O'Connor and I drove up to New York in a snow storm, interviewed him and hired him. Mr. Abeles, as they say, had the personability of one who could sell coal in Newcastle. Judges loved him. He provided great, convincing and decisive testimony essentially tearing apart the municipal land use code and the actions of public officials in the treatment of the resident poor. Incredibly, it never came out that he had testified for Madison Township on the municipal side.

The trial lasted just four days. Ken worked with me on the preparation and sat beside me at the counsel table. Peter, who had developed a very close relationship with Mrs. Lawrence and her family, maintained client contact and orchestrated getting Mrs. Lawrence and some of her supporters to the courthouse. She attended every day. Her just sitting there with her almost Romanesque stature was enough to level the playing field.

As I had never actually done a trial remotely as complicated as this, I needed a lot of procedural help from Mr. Rodriquez. I didn't even know how to get a document, like the Answer to our Demand for Admissions, into evidence. He literally had to set forth in writing precisely what I had to say.

Our direct case went in easily and very smoothly except for my lack of courtroom etiquette. At one point during my examination of a witness, I was standing next to the court's

bench and had my elbow on the desk. Mr. Gerry whispered for me to come over and advised that Judge Martino really did not like anyone touching and certainly did not like anyone leaning on his bench. Mr. Gerry knew that, pretty much, I had no idea what I was doing and acted almost in a fatherly way during the trial. He was, basically, a real gentleman.

Peter Abeles covered the field of what was wrong with the zoning ordinance, subdivision ordinance, PUD approvals and the like. He opined the obvious: there was no possibility of constructing affordable housing under this regulatory regime unless the Township demanded that it be done as part of the approvals. During the course of the two trials, other experts supported our work as well, Alan Mallach, Mary Brooks, David Kinsey, Yale Rabin. Truthfully, we had no trouble finding people wanting to support this effort.

XI. CHAPTER 11: THE FIRST TRIAL COURT DECISION (1972)

Judge Martino didn't waste much time. His decision came down shortly after the trial ended. He also had a sense of history and released the opinion on Law Day, May 1, 1972, almost exactly one year after the complaint had been filed. The ruling actually gave us a partial victory - far more than we had expected given the status of the law at that time. We had done a pretty thorough job on the issue of the plight of the indigent poor. Going back to my experience of doing building surveys in Hoboken, at one point I had most of our staff out in Mount Laurel going over the entire Township, looking for and documenting deteriorating or dilapidated, occupied housing. We had forewarned and gotten approval from the local police, and they did not interfere.

Our proofs and Judge Martino's obvious personal knowledge led him to rule against the Township on our allegation that it had an affirmative obligation to support housing opportunities for the local poor and to work to upgrade their housing conditions. He also mandated that they provide opportunities for former indigent residents who had been "forced" to leave and who wished to return.

His factual findings came right out of the Answers to our Demand for Admissions. Later, he said privately, that the Township could not possibly prevail once he had read their answers:

> Minutes of various Township Committee meetings expressing the attitudes of the members of the Governing Body were introduced into evidence. Early in 1968 the Mayor, when a discussion arose as to low-income housing, stated it was the intention of the Township Committee to take care of the people of Mount Laurel Township but not make any area of Mount Laurel a home for the county. A Committeeman added that it was the intent of the Township to clear out substandard housing in the area and thereby get better citizens. At a later meeting of the Township Committee in 1969, a variance to permit multi-family dwelling units was rejected because the Committee did not see a need for such construction. At a meeting in 1970 a Committeeman, during a discussion of homes being run down and worthless, indicated that the policy was to wait until these homes were vacant before the Township took action, "because if these people are put out on the street they do not have another place to go." At another meeting in September 1970 a Township Committeeman, when referring to pressure from the Federal and

> State Governments to encourage low-cost housing, retorted that their most useful function was to evaluate and screen away all but the most beneficial plans. He added, "We must be selective as possible approving only those applications which are sound in all respects. We can approve only those development plans which will provide direct and substantial benefits to our taxpayers." All through the various admissions permitted to be introduced into evidence, the evidence clearly indicates the attitude of developers who proposed various developments which were not concerned with people of low incomes. Every proposal made leaned in the direction of homes for only those of high income.[66]

However, having made these findings, he would not support our fair share regional need argument. The remedy he provided was for the Township to assess only the housing needs of its existing residents living in substandard conditions, former residents wishing to return and projected employees of retail and industrial developments that exist or would be constructed in the municipality.[67] There was no requirement otherwise to assess regional need and provide housing opportunities for a fair share of that need.

This was a big, but fully anticipated setback, as it thwarted our effort to address the economic and racial disparities detailed by the Kerner Commission and prevalent in

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[66] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 290 A.2d 465 (N.J. Super Ct. Law Div. 1972).
[67] *Id.* at 473-474.

our region. The decision ran directly contrary to the Commission's finding that, by using existing land use law, suburban municipalities were deliberately creating, fostering and enforcing regional locational patterns of racial and economic discrimination. On the positive side, given the disparity between his ruling and the ruling in Madison, it was likely that the cases would be heard, probably together, by the Supreme Court to resolve any inconsistencies.
The Township appealed and so did we.

XII. CHAPTER 12: *MOUNT LAUREL I (1975)*

Three years passed before an appellate decision would be rendered. The appeal presented a major strategy question. By the time we had completed our trial work, the SAI's *Madison Township* case had been expedited for a hearing by the Supreme Court. I felt that we had a far better factual record and, of course, very much wanted to participate in that hearing. Also, as groundbreaking as that trial court decision was, it did not provide any specificity regarding key elements of the remedy. Although it did rule on the need for a regional approach to zoning, without much more, the court simply ordered the Township to rezone.

So, we filed an emergent motion seeking an order that would allow us to bypass the Appellate Division and appeal directly to the Supreme Court. We sought to have our appeal joined with the pending *Madison Township* appeal.

The motion for direct relief and joinder of the hearings was granted. Ken and I prepared and filed our appellate brief. We focused heavily on the facts. Part of our trial court presentation was a series of graphics showing how, over time, the economic and racial patters in our region had changed. Each municipality was depicted on a regional map, with maps going back several decades. The historic fact was that not long ago there was general inclusivity – economic and racial profiles were largely identical among the region's municipalities. The time changes showed how the demographics of the location of the poor and African-American and Hispanic households in the

region had gradually morphed to the pattern of racial and economic segregation that existed in the 1970's. Clearly, the driving force behind that change was the municipal use of the Municipal Land Use Law and selective code enforcement strategies to funnel the wealthy in and the poor out.

As a result of the great migration of African-Americans from the south in the early and mid-20th Century, and Puerto Rican emigres relocating from the Island, the fodder for segregation was overwhelming. They had no place to go other than to our urban areas. "Integration" was accurately described by the radical organizer and theorist, Saul D. Alinsky, this way: a 'racially integrated community' is a chronological term timed from the entrance of the first Black family to the exit of the last White family.[68] And the same was true in reverse, as the municipalities that were welcoming the White flight implemented programs which, effectively, amounted to "racial, economic and ethnic" cleansing.

A. The First Supreme Court Hearing (March, 1973)

Since the *Madison* case had been first in line, it would be the first heard in the consolidated appeals. I met with the attorneys for the Suburban Action Institute, Lois Thompson and Dick Bellman. Mr. Bellman would be doing the argument. He was a superb lawyer whose private practice focused on employment discrimination. I, on the other hand, was barely out of law school and had only once argued a case before an appellate court, let alone the Supreme Court.

We went over how best to present the case, and as Mr. Bellman would be going first, I didn't figure I would have much to add. Things didn't go all that well. Mr. Bellman was given a pretty rough time. As soon as I got up, I was confronted by one

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[68] *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, HEARINGS (1959) ("The principal reason for flight is the belief that the neighborhood will soon be all Negro, and that the family which remains, will be a white minority of one. The coming of the first Negro family symbolizes the beginning of the end. This has been the white experience, and the white population, like any population, acts on the basis of what experience has taught it.")

of the Justices focusing on regional need and fair share methodologies. I was grilled on issues of taxation and the existing legal standard that anything that could justify local municipal action would be acceptable, regardless of secondary and tertiary consequences. I didn't do all that well either. After the hearing, we felt pretty awful. Ken, having witnessed the ordeal, confirmed how miserably the argument had gone.

Sometimes you get a second chance. Miraculously, that happened here. After a while, we got a notice that the Court wanted the matter reargued. Apparently, there were open questions and, before ruling, the Justices wanted to hear from us again. My preparation for that included a daunting experience. All Supreme Court arguments are recorded. Ken insisted that we see if they would allow us to listen to the tapes of the first argument. No harm in asking. We called the Supreme Court Clerk's office, and he agreed. We were given a time to come and listen to them in the courtroom.

One thing you never want to listen to is a recording of yourself having a really bad day. On the other hand, this was a great opportunity, and it proved extremely helpful. Ken and I sat alone in that vast, historic courtroom under the gaze of portraits of prior members of the Court and listened and learned. We came up with effective strategies to address the Court's questions. It proved extremely important and hugely helpful. Although we did not know it at the time; as it turned out, the *Madison Township* case would implode, and Mr. Bellman would be gone. Suddenly I learned at the hearing that I would be lead counsel and would open the argument, supported by two *amici* presentations. Had Ken and I not listened to those tapes, I would have been incredibly unprepared. But we did listen, and we did cover the field of potential responses, and this time I felt truly ready to deal with whatever concerns the Justices raised.

B. The Second Hearing (January 8, 1974)

In the time between the hearings, about *nine months*, the *Madison Township* case dissolved. Between the two dates for oral arguments, Madison Township totally rezoned, as directed

by our own Peter Abeles. They argued that this was in response to the trial court decision. Although, no one advised the Court of this fact until the second hearing, it effectively meant that the *Madison Township* appeal was "moot". Since the original trial court decision and the ensuing appeal were based on an ordinance that no longer existed, the appeal was effectively withdrawn. The Chief Justice was clearly furious because, as you can imagine, the Court and its staff had spent good deal of time preparing to address the facts of that case and the decision below. Regardless, there was nothing the Court or Mr. Bellman could do. So, the first thing that happened at the hearing was that the *Madison Township* case was remanded back to the trial court to review the new ordinance, and the Chief admonished the Township that once a new trial court decision was rendered, if an appeal was taken, it was not to rezone until that appeal had been heard and decided.

So, that left just us. Professor Norman Williams, who participated as one of the *amici*, later wrote the following:

> *Mount Laurel* became the leading case in an odd way. It was long thought that the leading case for the great reversal would be one brought against Madison Township in Middlesex County, usually referred to as *Oakwood at Madison.* This case was argued first before the whole New Jersey Supreme Court in March, 1973, along with another case from South Jersey which had not received much public attention (Mount Laurel). At the end of that term the two cases were set down for reargument the following year, presumably because the personnel on the court were changing, and it was deemed wise to let the new judges decide how they wanted to deal with this

> complex problem. At the second oral argument in January, 1974, however, *Oakwood at Madison* fell apart in extraordinary fashion. Suddenly everyone in the courtroom realized that the vehicle for the great reversal would be the relatively unknown case from South Jersey. *Mount Laurel* had been brought by lawyers working for Camden Legal Services, and was directed against a township just entering a period of large-scale development, with some scattered rural slums remaining from an earlier period, characterized by a lot of migratory agricultural labor. To these lawyers (led by Karl [sic] Bisgaier) belongs all the credit that the great reversal came at all, or at least that it came without several years of further delay. [69]

Thus, it happened that the *Mount Laurel* case became the only matter before the Court, and I would be getting up first to respond to the Court's concerns. One strategic decision that worked in our favor was the presence of Professor Williams. He was a national expert on land use law and a professor at Rutgers University. When I was preparing for the trial and learned of his existence, Ken and I went up and met with him. He was very helpful. As a throwback to a former non-computer era, his office was littered with copies of land use decisions from all over the country, with multiple, colored tags containing numeric categories. He also had overflowing containers of 3x5 cards filled with his scribblings. Professor Williams was writing his

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[69] Norman Williams Jr., *The Background and Significance of* Mount Laurel II, 26 J. URB. & CONTEMP. L. 3, 7-8 (1984).

great treatise on land use, and this was how he had to organize his notes.

Professor Williams, on behalf of an organization called the Public Interest Research Group, had been admitted as an *amicus* to present oral argument in the *Madison Township* case.[70] Also, a fellow Legal Services lawyer and personal friend, Melville De Miller, on behalf of the State Legal Services Housing Task Force, had also been granted *amicus* status in that case. Basically, an *amici* presentation simply means that the Court accepted the non-party as representing a group with a legitimate interest in the outcome and worthy of being heard as a "friend of the court". Well, with the demise of the *Madison Township* case, that effectively, eliminated the *amici* as well since neither had moved to be *amici* in our case. So, I approached Professor Williams and Mr. Miller in the hallway and told them that I intended to make an oral motion to have them accepted by the Court as *amici* in our case. Of course, they were thrilled. I informed the Court Clerk of this decision and made the motion as soon as the Court reconvened. Mount Laurel had no legitimate basis to object. The motion was summarily granted. I was no longer going to be hanging out there alone.

This time the argument went extremely well. Having listened to the tapes of the first argument and Ken and I going over all of the questions, I had ready and reasonable answers at the second hearing. After it was over, we felt pretty confident that something good was going to happen.

However, initially, the only thing that happened was that over a year passed without the Court releasing a decision. Not a great sign.

C. The First Decision, Mount Laurel I (March 24, 1975)[71]

Finally, in March, 1975, *two years* after the first argument and three years after our trial, we were apprized that a decision had been sent out and would be available the following day.

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[70] *Id.* at 3.

[71] *Mount Laurel I*, 336 A.2d 713 (N.J. 1975).

Peter O'Connor and I went to the Camden Post Office first thing in the morning and got a copy. Sitting on the Post Office garage platform wall, I read it and was amazed. I turned to Peter, handed him the decision and just said, "We won". It was what you might reasonably describe as a "blockbuster". It set New Jersey land use law on its ear. Justice Hall now was writing for the majority, and the majority was a *unanimous* Court. The basic ruling was that all New Jersey municipalities had an affirmative obligation to address the needs of their indigenous poor.[72] This was, essentially, an affirmance of that part of Judge Martino's trial court decision. But Justice Hall was hardly through with Mount Laurel Township.

The nuclear bomb came second. The Court ruled that Mount Laurel and all "developing" municipalities in New Jersey had an affirmative obligation to provide realistic housing opportunities for a fair share of their region's poor.[73] They were required to assess that need, calculate their fair share and address it.[74]

We were ecstatic. Ethel Lawrence was jubilant. Then, in short order, reality sank in as things all around fell apart.

The Court, as most courts do, having articulated a new mandate, left it up to municipalities to act in good faith to implement it.[75] There was nothing definitive in the decision on

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[72] *Id.* at 724 ("We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing.").

[73] *Id.* at 731-732 ("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.")

[74] *Id.* at 732-734.

[75] *Id.* at 734 ("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

numerous critical issues: how do you define a "developing" municipality; what are the geographic "regions"; how do you assess housing "need"; over what period of time is that need to be assessed; how do you calculate "fair share"; does it have to be a precise number; what does it mean to "affirmatively" provide "realistic" housing opportunities to respond to the municipal "fair share"? Do you have to grant tax abatements to satisfy federal and state affordable housing funding preconditions? What represents "good faith" and how do you know it when you see it?

All of that was left to trial court judges to figure out, and they were totally unprepared, uneducated on the subject matter and sorely put to the test.

XIII. CHAPTER 13: "GOOD" FAITH COMPLIANCE

Between the Court's decision in 1975 and the second Supreme Court hearing on the second round of appeals in 1980, for five years, every aspect of the 1975 decision was the subject of intense litigation. It was not going well. I doubted that a single affordable home was constructed as a result of the first decision or that a single New Jersey municipality acted in good faith to comply. Perhaps the worst of them was Mount Laurel, itself. Mount Laurel's "compliance" plan was plainly disgusting and an obvious contemptuous affront to the Supreme Court - at least obvious to everyone except our new trial judge.

Several cases actually found there way up to the Supreme Court again.[76] Decisions came down on issues like whether this

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extent of judicial power in the field or to exercise any such power…. The municipality should first have full opportunity to itself act without judicial supervision. We trust it will do so in the spirit we have suggested, both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of its fair share of the regional need for low and moderate income housing may be indicated as necessary and advisable.").

[76] *See* Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 364 A.2d 1016 (N.J. 1976) (challenging a zoning ordinance permitting the development of mobile home parks for the exclusive use of the elderly); Fobe Associates v. Mayor and Council and Bd. of Adjustment of Borough of Demarest, 379 A.2d 31 (N.J. 1977) (challenging a zoning ordinance

or that municipality was "developing". In one case I had, a municipality argue that it was "developed", not "developing".[77] I asked their planner if he could honestly take the position that municipal development was immutable and not subject to change, even radical change, over the years. He thought so. He then could not quite answer this question: "When in the history of a municipality like, say, New York City, would he state that it was fully developed?" The point was that you could not simply look at available vacant land. The concept of a municipality being "fully developed" and, therefore, not likely to experience additional development activity was absurd. The issue was not just the availability of vacant land, but also the probability that developed land would be the subject of redevelopment.

Ironically, the most upsetting decision post-*Mount Laurel I* was the ultimate ruling in the *Madison Township* case, itself.[78] The Township's "new" compliance plan was challenged and ultimately set aside by the trial court.[79] As previously admonished, the township did not rezone prior to the Supreme Court hearing. The Supreme Court heard argument in that case on the issue of what constitutes a valid compliance plan. We, the Public Advocate, participated as *amicus*.

Incredibly, the decision was written by an Appellate Division judge, Milton B. Conford, temporarily assigned to the Court to cover a vacancy. The majority came up with a doctrine that municipalities simply had to remove all unnecessary barriers to the construction of less expensive housing, referring to it as the removal of "undue cost-generating restrictions" and enabling the construction of "least cost housing".[80] The idea being that if minimal standards were set, developers could build less expensive homes. This fantasy was inadvertently revealed

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prohibiting multi-family residential buildings); Pascack Ass'n, Ltd. v. Mayor & Council of Washington Twp., Bergen Cnty., 379 A.2d 6 (N.J. 1977).

[77] Pascack Ass'n, Ltd. v. Mayor & Council of Washington Twp., Bergen Cnty., 379 A.2d 6 (N.J. 1977).

[78] Oakwood at Madison, Inc. v. Madison Twp., 371 A.2d 1192 (N.J. 1977).

[79] Oakwood at Madison, Inc. v. Madison Twp., 320 A.2d 223 (N.J. Super. Ct. Law Div. 1974).

[80] *Madison Twp.*, 371 A.2d at 1227-28.

to be illusory by the Court itself as it opined that not all developers would take advantage of this "opportunity", so the Township should "overzone."[81]

The fundamental error here was that, while it might be true that by removing controls that resulted in unnecessary costs, developers could build less costly housing, that did not mean that the housing would be less expensive to the consumer. The sale cost and the rental price would still be keyed to what the top of the market would bear. That was just fundamental pricing economics. This remedy would not, and did not, lead to the construction of housing for the poor or "least cost" to the buyer or tenant. Further, the Court did not require the assessment of a precise fair share allocation.[82] All of this just managed to achieve a bare majority of the Justices in favor:

> However, we deem it well to establish at the outset that we do not regard it as mandatory for developing municipalities whose ordinances are challenged as exclusionary to devise specific formulae for estimating their precise fair share of the lower income housing needs of a specifically demarcated region. Nor do we conceive it as necessary for a trial court to make findings of that nature in a contested case. Firstly, numerical housing goals are not realistically translatable into specific substantive changes in a zoning ordinance by any technique revealed to us by our study of the

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[81] *Id.* at 1256-57 (Pashman, J. concurring in part).

[82] *Id.* at 1222 ("The number and variety of considerations which have been deemed relevant in the formulation of fair share plans is such as to underscore our earlier observation that the entire problem involved is essentially and functionally a legislative and administrative, not a judicial one.").

data before us. There are too many imponderables between a zone change and the actual production of housing on sites as zoned, not to mention the production of a specific number of lower cost units in a given period of time. Municipalities do not themselves have the duty to build or subsidize housing. Secondly, the breadth of approach by the experts to the factor of the appropriate region and to the criteria for allocation of regional housing goals to municipal "subregions" is so great and the pertinent economic and sociological considerations so diverse as to preclude judicial dictation or acceptance of any one solution as authoritative. For the same reasons, we would not mandate the formula approach as obligatory on any municipality seeking to correct a fair share deficiency.

We are convinced from the record and data before us that attention by those concerned, whether courts or local governing bodies, to the substance of a zoning ordinance under challenge and to bona fide efforts toward the elimination or minimization of undue cost-generating requirements in respect of reasonable areas of a developing municipality represents the best promise for adequate productiveness without resort to

> formulaic estimates of specific unit "fair shares" of lower cost housing by any of the complex and controversial allocation "models" now coming into vogue.[83]

This was a major retreat. Further, the Justices were all over the map, with several concurring and dissenting opinions. Hardly the unanimous majority that supported the *Mount Laurel* decision just two years earlier.

One Justice, Moris Pashman, issued a blistering dissent.[84] Justice Pashman was the most reliable advocate for the poor and African-American and Hispanic households on the Court. His dissent proved to be a worthwhile exercise. It reminded me of the role that U.S. Supreme Court Justice Harlan played in his dissenting opinion in *Plessy v. Ferguson*.[85] He provided the framework for the Court's later reversal in *Brown v. Board of Ed.*[86] Justice Pashman provided the vision of what the Court could and should be doing. It would just take another six long years of failure before we got there.

XIV. CHAPTER 14: THE PUBLIC ADVOCATE WEIGHS IN

In 1974, New Jersey Governor Brendan Byrne, riding on a platform of "Government Under Glass" in the wake of the

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[83] *Id.* at 1200.

[84] *Id.* at 1229 ("I differ with the majority, however, as to the nature and scope of judicial remedies made available for the trial court during the remedial stages of the litigation. In cases of this nature, I conceive that powerful judicial antidotes may become necessary to eradicate the evils of exclusionary zoning. For this reason, I would proceed less gingerly than the majority; I would go farther and faster in outlining for the trial judge the full arsenal of judicial weaponry available for this purpose. I will first analyze the need for stronger, more effective judicial relief in exclusionary zoning cases and then enumerate the various remedial weapons which are or should be available to the trial judge upon remand.") (Pashman, J., dissenting in part).

[85] 163 U.S. 537, 552 (Harlan, J., dissenting).

[86] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Nixon debacle, created the Department of the Public Advocate.[87] The Department's mandate was to serve the "public interest" *as perceived by the Public Advocate*.[88] The Governor appointed Stanley C. Van Ness to the new Cabinet level position. Mr. Van Ness was then the State Public Defender and about as highly a respected lawyer and human being as one could hope to meet in New Jersey.

At about the same time I was ready to move on, having been the CRLS Director for too long. My litigation work was being shelved by administrative demands and grant applications and funding. In just two years, we had expanded dramatically with several, new specialty divisions – like Senior Citizen Rights, Welfare Rights, Tenant Rights, Family Rights and Child Care. The money was there, and we went for it and got it. The demands of running what had become one of the largest law firms south of Trenton were totally undermining my ability to practice law. And I wanted to be practicing law.

I gave the Board written notice of my intent to resign, agreeing to stay on until they hired a replacement. That same day, I got a call from Judy Yaskin, a member of our Board and New Jersey's First Assistant State Public Defender. Judy was a neighbor and a friend and supported the work we were doing, no matter how controversial. She and Mr. Rodriguez stood up to the withering attack the program faced from Vice President, Spiro Agnew – without blinking.

Ms. Yaskin asked if I had any plans, and I said that I did not. I literally was just thinking of returning to a staff attorney position at CRLS. She then told me about this new Department. She was going to be the Assistant Commissioner to Stanley Van Ness, and she thought I might want to join. The Department had a litigating Division, Public Interest Advocacy ("PIA"), and there was an open position for a Deputy Director. Her close friend, another Public Defender, Art Penn, would be the Division Director, and she recommended we meet. I said that having just

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[87] Frederick D. Murphy, *Government Under Glass*, BLACK ENTERPRISE, July 1977, at 45.

[88] Department of the Public Advocate Act of 1974, ch. 27, N.J. Laws 67.

resigned from an administrative position, the last thing I wanted was a position like "Deputy Director" which would require me to do administrative work. She assured me that would not be the case. Mr. Penn would handle all of the administrative end. I could supervise the litigation.

So, I took a look. The statutory scope of this Division's power was incredible. Litigation could be undertaken on behalf of aggrieved plaintiffs, but also, just in the name of the Public Advocate. The only statutory constraint was that the litigation be in the "Public Interest", as perceived by the Public Advocate.[89] Further, this was a ticket into any on-going litigation in which the Public Advocate wished to participate as an *amicus*. It was unlikely that any court would choose not to hear from the State's public interest "watchdog". Also, we would have the resources of the entire State Government - just consider for a moment what the meant: access to support from staffs of the Department of Environmental Protection, Health and Human Services, Transportation, Economic Development – the whole nine yards of the State Administration.

I met with Mr. Penn and that was the start of a lifelong friendship. Art proved to be everything that Ms. Yaskin had promised. Still, I really never thought that someone like me, with my politics, would ever end up working for a government agency. I was very concerned that there would be too many political constraints. Art assured me that would not happen. He turned out to be correct. Mr. Van Ness was beyond reproach. Nothing and no one could divert him from doing what he believed was the right thing to do.

I gave Art our CRLS annual publication of the work that we had done and our on-going cases. I asked him to share that with Mr. Van Ness and see if there was anything there, any litigation that we had brought, which he would be uncomfortable supporting. I was most concerned about the *Mount Laurel* case which was then on appeal. He quickly assured me to the contrary. So, I met with Mr. Van Ness and was

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[89] Department of the Public Advocate Act of 1974, ch. 27, § 30, N.J. Laws 67, 77.

incredibly impressed. He had only one rule, which I violated by accident only once, "You do your talking only in court. I do all of the talking outside of court."

One concern was that Mr. Van Ness insisted that at least half of our attorney positions be offered to lawyers in the Public Defender system. The problem was that these attorneys knew little or nothing about Civil Litigation, being trained as "defenders". There is a radical difference between the two, certainly in the context of aggressive advocacy. Completely different mindsets. But, that was not going to dissuade Mr. Van Ness.

I was able to mitigate my concerns by filling the non-PD slots with known entities. I insisted that Ken Meiser be offered a position in PIA, and others from Legal Services Programs, like Steve Blader from Mercer County's Legal Services program. Mr. Van Ness did not care. He said that was for Art to decide. Art agreed, and Ken and I both left CRLS and headed up to Trenton.

At about the same time, Peter O'Connor left CRLS as well. He started his own practice, focusing on the provision of affordable housing developments. He then achieved his greatest contribution - creating a non-profit, the Fair Share Housing Center to maintain pressure on "*Mount Laurel*" compliance.[90] He and I had considered the need for such an entity years before. We prepared a proposal and applied for funds to the Ford Foundation. We were invited up to New York to meet with their personnel. I thought that things went very well, but shortly after the meeting we were informed that our application had been rejected. Things turned out a lot better when Peter continued to pursue this after we had some successes with the *Mount Laurel* litigation and the fact that this housing effort was going to have a State-wide impact. He and Linda Pancotto, who was then working for him on a Vista grant, again journeyed up to New York, but the grant application was again rejected by Ford. However, as *Mount Laurel* and affordable housing had become a major State issue and a kind of cause célèbre, he was able to

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[90] *Our Story*, FAIR SHARE HOUSING CENTER: ABOUT US, https://www.fairsharehousing.org/about/ (last visited Feb. 4, 2025).

achieve funding from New Jersey foundations and launched what has become an incredibly successful housing advocacy program, the Fair Share Housing Center.

The Center was recognized by the Supreme Court for its work[91] and was later active in a myriad of lawsuits and settlements of *Mount Laurel* litigation.[92] Peter also decided to work on the development side and created an entity to get affordable housing approved and constructed, Fair Share Housing Development ("FSHD") which now manages several projects in Mount Laurel, Camden and Cherry Hill. We are getting somewhat ahead of the chronology.

All of this attorney dislocation and relocation left a major hole at CRLS for land use litigation. There was no one left. So, the first case taken by the Division of Public Interest Advocacy was the representation of the plaintiffs in the *Mount Laurel* case. Everyone consented to the substitution of counsel. Peter would be treated as "Of Counsel". Now, compliance issues would be handled by the State Public Interest Watchdog, further infuriating the Township.

XV. CHAPTER 15: MOUNT LAUREL TOWNSHIP REVISITED *MOUNT LAUREL II,* THE SECOND TRIAL (1978)

The *Mount Laurel* case, itself, was remanded back to the trial court in Mount Holly.[93] The Township would be given the opportunity to rezone, and having been given that opportunity, it would do so with a vengeance. The rezoning was so outrageous that I thought it bordered on open contempt. Three

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[91] *See* In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel. New Jersey Council on Affordable Housing
Add to Keep List, 110 A.3d 31, 42 (N.J. 2015) (recognizing Fair Share Housing Center's standing to represent the public's interest in municipal compliance with affordable housing obligations).

[92] *Mount Laurel IV*, FAIR SHARE HOUSING CENTER: ABOUT US, https://www.fairsharehousing.org/about/ (last visited Feb. 4, 2025).

[93] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 391 A.2d 935 (N.J. Super. Ct. Law Div. 1978).

small sites, largely undevelopable, were zoned for affordable housing.[94] They had, literally, rezoned only 20 acres of the municipality's 14,300 acres.[95] The actual sites were unsupportable. Here's one example: the "R-5 "district". This "district" actually was one tiny parcel that literally was located in the midst of an approved industrial park that bordered Mount Laurel and Moorestown.[96] Its only access was through that commercial development.[97] It was in an area of the Township with no adjoining residential zoning or development and separated from most of the Township by the New Jersey Turnpike and Interstate 295. It was largely consumed by wetlands.[98] The icing on the cake was that it was in the right-of-way of a proposed extension of the Hi-Speed Line commuter rail system connecting to Philadelphia. With that prospect on record, no financial institution would offer to support a residential development at that location.

I met with the attorney for the owner of the parcel, Frank Wisniewski. He assured me that the last thing that was going to happen on that site was a residential development. Even if it otherwise made sense, no commercial developer would want to create a residential development with potential objectors and complainers to whatever would be going on in the industrial park. He said that he had spoken to Mount Laurel's attorney, Jack Trimble, about this. He told Mr. Trimble that there was no way it ever would be developed. He said that Mr. Trimble told him that the Township could care less, it was simply looking for the worst possible parcels to rezone and preferred that no development occurred. I asked him if he would testify to that conversation, and he agreed - if he were subpoenaed. I was truly surprised to encounter such a stand-up commercial lawyer. His testimony would not endear him or his client to the Township. I handed him a subpoena the next day and added him to our witness list.

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[94] *Id.* at 944.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*

Another nuance occurred with the appearance of a regional developer, Roger Davis. He was represented by a highly respected local land use lawyer, David Brandt. Mr. Davis had proposed a mobile home park in Mount Laurel that would provide "least cost" units. His project had been rejected, and he wanted a remedy that would enable him to build. We decided to support his intervention in the case if he committed to provide affordable, not just "least cost", housing. I felt that having a developer who would actually deliver something at the end of the day was extremely appealing and would resolve issues like: "Will this work?".

As obvious as the Township's lack of compliance was, we were faced with a serious problem. Judge Martino had retired and a far more conservative and politically connected judge, Alexander A. Wood, now was assigned to handle the remand. He would be "monitoring" Mount Laurel's "compliance" and any litigation that might ensue. He was a known disaster for us, completely unreliable and deferential as possible to municipalities.

Jack Gerry was gone as well. He now was a Federal District Court judge. So much for a continuation of our gentleman's decorum. Unlike the first trial, Mount Laurel now chose not to rely only on its local counsel and brought in a reputed "attack dog", North Jersey litigator, John Patton. As it turned out, he did have a lot of bark, but not much bite – at least in this litigation. His cross-examination of our witnesses seemed totally unimpactful.

There was nothing that we could do but prepare a strong case, get it on the record, lose as quickly as possible and appeal. The first trial lasted just four days. This one would be far longer and far more complicated, as we had to come up with a plan to address the calculation of regional need and a fair share allocation model, and definitive models for what constituted creating a realistic housing opportunity. Again, none of this had been clarified by the Supreme Court. Also, we had to attack the sites selected by the municipality and offer an alternative plan. That would mean a lot of diverse expert testimony.

Peter O'Connor offered the use of his Cherry Hill office to me, as I was now located in Trenton and needed someplace local to do my work. Then, he offered something, actually someone, who proved much more valuable. While Ken was available within PIA to help with any legal research; the actual trial work was another thing entirely. Fortunately, Peter suggested that a VISTA attorney assigned to his office, Linda Pancotto, might like the opportunity to work on the trial. Ironically, Linda had been an intern law clerk for none other than Judge Jack Gerry. Peter and she both agreed that she would devote all of her time to the *Mount Laurel* case through the completion of the trial. She and I then prepared for the trial, undertook the depositions of the Township's witnesses, prepared the direct examination of our witnesses and the cross-examination of the Township's witnesses. Linda, Ken and I worked on pre-trial briefs and motions.

We had four expert witnesses: Peter Abeles, Alan Mallach, Yale Rabin, and Mary Brooks. This time, Ethel Lawrence also testified. Our experts were excellent, their direct testimony covered the field as well as we could have expected. Testimony was provided on how the local officials had ignored the needs of the poor. Proofs of a way to calculate "fair share" were presented.

Peter Abeles was awesome, as usual. He tore apart the zoning standards and the sites chosen by the Township for the location of affordable housing. He, of course, felt the need to lighten things up. Here's a taste of Peter Abeles' humor: on direct examination, he testified that the noise from the highway and potential speed line traffic on the R-5, industrial park site could get up to 90 decibels. The Judge asked him: "Just how loud is that?" Circumstantially, the noon fire department horn went off, temporarily deafening everyone in the courtroom. Peter testified: "Just about that loud, Judge." I said, "Mr. Abeles, the court reporter cannot and does not record sound." He amplified, so to speak.

Mr. Abeles, as charming as he could be, could also be incredibly mischievous. He took a big risk that astonished me, but there was nothing I could do except watch it unfold and

await the disaster that surely would follow. Mr. Patton had numeric tags with paper clips all over a printed deposition that he handed to Abeles. He asked him to read a portion of it out loud into the record. There was an objection, and Judge Wood deliberated on how to respond. While he did, Mr. Abeles sat on the witness stand with the deposition and went about removing and pocketing at least half of the paper clips and tags. I kept shaking my head. He just kept smiling at me. I couldn't believe what I was seeing. Why Patton didn't call him out on that, I cannot imagine. I guess he just didn't realize it had happened The Judge surely would have gone out of his mind and might have dismissed Mr. Abeles as a witness and struck his testimony. Well, fortunately, it all just passed unnoticed. As we left for the day, Mr. Abeles reached into his pocket and handed me what looked like about a 1,000 paper clips which I hurriedly took and pocketed so no one would see what he was doing.

Speaking of striking testimony, the most disturbing event occurred upon the testimony of Mr. Wisniewski about his conversation with Mr. Trimble. On direct examination, he went over it all. He referred to Mr. Trimble as "a responsible municipal official" without naming him directly. Mr. Patton was to do the cross-examination, but Mr. Trimble freaked out and insisted on doing the cross himself. He specifically asked Mr. Wisniewski to identify the person on the record. His response was, "That person was you, Mr. Trimble". Then the Judge freaked out, walked off the bench and called us all into chambers.

Judge Wood, exhibiting a complete lack of judicial decorum, temperament and wisdom and a great deal of bias, said that the testimony about Mr. Wisniewski's conversation with Mr. Trimble was inappropriate since Mr. Trimble was an attorney in the case. I noted that being an attorney, even an attorney in the case, did not insulate his statements from being entered into evidence and considered by the court. We had named Mr. Wisniewski as a witness, and the Township had not sought to question him in pre-trial depositions. The Judge said it was too prejudicial. I responded that this was not a jury trial with lay people considering evidence. As he, the Judge, would be

considering the evidence, he certainly could rise above being affected by prejudice in weighing the value of the evidence. Further, I said that I would not object to a short delay to give the Township the opportunity to take Mr. Wisniewski's deposition prior to continuing his cross-examination. Lastly, I pointed out that it was Mr. Trimble that got his name on the record, not me or Mr. Wisniewski. Frankly, this was boiler plate rules of evidence and there was no possible basis to strike this part of Mr. Wisniewski's testimony.

The Judge would not relent. He clearly cared only about Jack Trimble's stature with his municipal clients. He said that if we did not agree to strike this testimony, he would declare a mistrial, and we would have to start from scratch. He would not strike the testimony without my consent. Further, he could not guarantee when such a major case would fit into his schedule - so we could anticipate a long delay. We were apoplectic. This already had been a long trial, all of our direct testimony was in, but the Township had not presented its defense. The idea of going through it all again just for Mr. Wisniewski's testimony about the conversation was truly daunting. Then the Judge leaned over and, in front of everyone, said, "Look, you have nothing to lose. I have heard the testimony. I'm not going to forget it, like it or not." Incredible, was he saying that he would consider what he had heard even though it would no longer be on the record and had not been subject to completed cross-examination or counter-testimony, if any, from Mr. Trimble? I did not believe him for a second. Nevertheless, there was no appeasing him.

We huddled and considered that we had no reasonable option. We needed to get this trial over with, take our anticipated loss and move for an expedited appeal. Other cases were going up to the Supreme Court, and we needed this trial to end to be able to consolidate with them. This particular revelation in Mr. Wisniewski's testimony was not crucial. I spoke with him, and he said that he understood and that I should just do what I think was best for the plaintiffs. The man just oozed integrity. So, we agreed to strike the testimony. Whether I really had much choice, even if we made the correct decision

under the circumstances, it was one that I have always regretted. Some years later, when I was in private practice with Flaster, Greenberg, P.C., I asked Mr. Wisniewski to join me in establishing a land use practice for that firm. He did, and we worked together as law partners for several years.

The testimony of the municipal experts was disgustingly biased and unrelated to relevant facts and scientific justification. I suppose in order to impress us, a named principal of the land use planning firm that advised the Township testified. He opined on several of the controls, contradicting basic accepted, published national minimal standards that are designed by scientists and planning experts to protect health and safety. He even seemed a bit at sea in talking about the various areas of the Township. On cross-examination, I took a little risk, deciding to ask some questions that I did not know for sure how he would respond (thus violating a basic principle of cross-examination - never to ask a question if you don't know how the witness *must* answer). With a map of the Township up on a board, I asked him if he could identify the different named communities that composed the Township of Mount Laurel, like Rancocas Woods, Masonville and Springville. You would think that a municipal planner should be able to do that before he opines what's best for the community. Well, he could not. So much for his knowledge of the Township. These areas were developed with almost none of the standards that he was saying were essential. Rancocas was a treasure to the Township and the location of the homes of municipal officials – but it had narrow streets, no sidewalks, no curbs, small lots. On his direct examination, he opined that the municipality could not approve mid-rise or high-rise structures since it did not have the firefighting capability. As Exit 4 of the New Jersey Turnpike was located within Mount Laurel, I asked him if he was familiar with and could identify the hotels located at that exit. He could not. He had to acknowledge that they were mid- to high-rise structures. He admitted that, clearly, if the Township could address fire issues at those commercial ratables, it should be able to do the same thing for a residential building of the same height. He was a terrible witness.

The Township had their actual planner, Lou Glass, as a witness to justify the standards in their ordinance. Expert witnesses are really not supposed to "side" with their client. Of course, except for a few, planners like David Kinsey, Betsy McKenzie and Alan Mallach, they almost always do side with the clients who are paying their way. Kinsey was impossible to "feed". He expressed his expert opinion, like it or not. I trusted him and figured we would use him, like it or not. He became the go-to planner for the Fair Share Housing Center and for my affordable housing efforts after I left the Public Advocate. Dr. Kinsey was open to discussion, but ultimately told you what he would say and that was that. He was very difficult to cross-examine - basically, it would be hard to find inconsistencies in his testimony with his prior writings, testimony and the like. The ancient Roman educator, Marcus Fabius Quintilianus is quoted as saying something like "liars have to have good memories".[99] People who tell the truth, do not. That's because, while it's hard to remember your lies, one can easily repeat the truth.

I won't say that Lou Glass would lie, but he certainly did not have a great memory. He seemed to take things to an extreme in the other direction, appearing to me as being openly biased in favor of whatever his client chose to do, whether he may have agreed with it or not, and whether it had any scientific basis or not. He testified on the full scope of the Township's land use controls - things like lot size, setbacks, sidewalks – the soup-to-nuts of development standards. All of this, he opined, was essential to the protection of public health and safety.

I was so angry that, in preparation for his cross-examination, I found out where he and his family lived in a Pennsylvania suburb of Philadelphia and drove out to his house. If I actually had the right place, it turned out to be located on a lot that was much smaller than anything permitted in Mount Laurel and on a street that was much narrower and which had no sidewalks. It was completely bereft of anything like the

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[99] QUINTILIAN, INSTITUTIO ORATORIA IV (H.H. Butler ed., Loeb Classical Library 1920) (n.d.)

standards he was saying were necessary health and safety minimums.

As his cross-examination ensued, he ultimately figured out what I had done and basically lost it on the stand. There was not much he could say to defend his position given that he was raising his own family in a house which existed under extremely less onerous land use restraints. There was no way he could justify living with his wife and children under conditions that were below those he was opining were necessary to protect their health and safety. He melted away. At least I thought so, until I read Judge Wood's horrendous decision.

XVI. CHAPTER 16: *MOUNT LAUREL II* — SECOND TRIAL COURT DECISION (1978)

I hope, in light of the pathetic state of our United States Supreme Court, that there is no one out there who still believes in "blind justice" or that it doesn't really matter who the judge is. There is, of course, that Greek goddess of human justice, Justitia. She is everywhere holding the scales of justice and carrying a sword at her side. The sword is to let you know what happens if you fail to be just. She is now usually shown blindfolded. People incorrectly assume that is to keep her honest, not actually knowing who the litigants are – "blind justice". But the truth is that the adornment of the blindfold came centuries after she was deified and represented in Greco-Roman art and sculpture. In fact, this change in apparel was fostered as a way she could be protected from actually seeing all of the injustice that was being done in the world.

Here, you just need to read and compare the trial court opinions by Judge Martino and Judge Wood in the *Mount Laurel* case.[100] The former was a man of great integrity, the latter wrote a decision that, although he got some grace from the Supreme Court, in my opinion, was a disgrace. As little hope as we had

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[100] *Compare* S. Burlington Cnty. NAACP v. Mount Laurel Twp., 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972), *with* S. Burlington Cnty. NAACP v. Mount Laurel Twp., 391 A.2d 935 (N.J. Super. Ct. Law Div. 1978)

that we could prevail before this Judge, his actual decision was shocking. He basically validated everything that the Township had done and was dismissive of all of our expert witnesses. It was truly disgusting. Ironically, out of nowhere, he decided to support the Davis mobile home park, and essentially, ordered the Township to approve it in ninety days. Justice for the corporate sector, injustice for the disenfranchised poor and African-American and Hispanic households. America, greatest country on Earth.

When the Judge's clerk called to say that we could pick up the decision at the courthouse, Linda and I drove out and prepared for the worse. We got it, read it, and our self-preparation notwithstanding, we stood there just stunned. It was a total fiasco. We lost everything. All that work, all those years, and after the presentation of a truly foolproof case, we, basically, had gotten nothing. The reality of it was extremely difficult to comprehend.

Certainly, one of the worst experiences for me in my career up to then and to this day, was having to drive out to Ethel Lawrence's home and apprise her of the result. Linda and I did that, heading right to her home from the courthouse. Mrs. Lawrence was incredible. Her religious vision came to bear. She was absolutely convinced that we would win this case. She said to "trust in the Lord, and the Lord will deliver". I'm thinking, maybe you could have the Lord to be so good as to send an angel or two to hammer this awful Judge before he rendered this even more awful decision. The fact is that we were devastated. Mrs. Lawrence spent more time consoling us than we had to do to console her. Recognizing the condition we were in, she sat us down, made some coffee and let us chill for a while, all the time thanking us, praising us and trying to convince us that we would be okay and that, in the end, we would win. If there is anyone who might be thinking that doing this case was thrilling, I suggest you imagine what it was like to experience that loss and, as it turned out, to endure a five year wait to see it overturned. Five years. What were you doing five years ago?

We appealed. The Township did as well with regard to the Davis mobile home park.

XVII. CHAPTER 17: SO, WHAT'S IN THE PUBLIC INTEREST?

With the temerity of a previously spanked adolescent who now had gotten away with emptying the cookie jar, Mount Laurel decided to double down. Its leaders just could not miss an opportunity to embarrass themselves publicly. The Governing Body was apoplectic that the plaintiffs were now being represented by the State Public Advocate. So, they decided to sue the Department, challenging Mr. Van Ness' decision to represent the plaintiffs. They sought to undermine the Department, arguing that the relevant legislation had failed to establish clarity and standards in granting the Public Advocate the right to sue "in the public interest", as he perceived it. This, of course, in contradistinction to the well-defined concept of "in the general welfare" on which they were relying. The Township complained that we had refused to finance their defense. We had rejected its request that we appoint and pay for a special counsel to represent their "competing public interest".

That case was brought right up to the Supreme Court on an expedited basis. Art Penn argued the matter for the Department. The Supreme Court unanimously held that the legislation was specific enough and that Mr. Van Ness' decision to represent the *Mount Laurel* plaintiffs was not arbitrary or capricious and certainly served a public interest.[101] These were the Court's last words on the subject:

> The vital need to hold the government accountable to those it serves and the *need to provide legal voices for those muted by poverty and political impotence cannot be overemphasized*. The Public Advocate goes far toward satisfying these needs, thereby nourishing and revitalizing our political system. The legislative definition of

[101] Mount Laurel Twp. v. Dep't of Pub. Advoc., 416 A.2d 886 (N.J. 1980).

> "public interest" constitutes a realistic attempt to create an effective advocate for the general public. The legislature could have delineated particular substantive areas and thus limited the Public Advocate, but it chose not to do so, a decision which was clearly within its prerogative. Plaintiffs' real complaint here is that the Public Advocate is free to litigate cases which do not fit into the plaintiffs' ideological mold. The Constitution, however, is not bound to any one group's vision of the political order. Although public interest may elude a universally satisfactory definition, see, e.g., Cahn & Cahn, "Power to the People or the Profession? The Public Interest in Public Interest Law", 79 Yale L.J. 1005 (1970), we cannot say that the creation of the Department of the Public Advocate is unconstitutional. Indeed, the Public Advocate admirably furthers the principles embodied in our Constitution.[102] (Emphasis added).

The winds of change rattling through the Halls of Justice.

XVIII. CHAPTER 18: MORRIS COUNTY TO THE RESCUE

After the trial court decision and given what was going on throughout the State, I was pretty depressed about the anemic condition of the once vaunted "*Mount Laurel* Doctrine".

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[102] *Id.* at 893.

So were Ken and Linda, as was anyone with knowledge and who cared about the poor and this effort to provide them decent housing. Things seemed to be falling apart. We had the uncomfortable feeling that the issue of affordable housing was dramatically losing steam. Certainly, if we ever had any momentum or hope of getting realistic compliance, that was gone. At the time, four cases challenging compliance plans were coming up through the appellate process. And now, so was ours. We needed a splash – something that would shake things up and convince the Supreme Court, the Legislature and municipalities that the issue was not going away and that they had to do a lot more if there ever was going to be compliance. They had to provide clarity in the doctrine to facilitate consistent and non-conflicting trial court review and significant exposure for recalcitrant municipalities.

My thought was to sue someone, someone big. Further, the lawsuit had to showcase the need for state-wide controls, fair share planning and compliance methodologies. Ken and Linda agreed. We first considered, and rejected as too political and unwieldly, suing the Legislature. But then we quickly came up with a good idea of who that someone might be. So, we met with Mr. Van Ness and Art Penn, and they approved our plan.

Morris County New Jersey is perhaps the wealthiest county in the State and a largely conservative, Republican bastion. An attack there by the Public Advocate would send shock waves throughout the State. We were certain that none of the municipalities had made anything like a good faith effort to comply with the 1975 "*Mount Laurel*" decision. So, we decided to sue, in one case, every municipality in the County. Now, that would create a splash.

Linda said we could simply focus on the newly approved "State Development Guide" published by the Department of Community Affairs.[103] This document provided a map of the whole State by municipality, delineating, in part, what those planners determined were State Growth Areas. So, we singled out those municipalities in Growth Areas. We then visited the

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[103] N.J. DEP'T OF CMTY. AFFS, NEW JERSEY STATE DEVELOPMENT GUIDE PLAN (1977).

"developed" municipalities for signs of potentially developable areas; like, for example, golf courses, large retail or commercial buildings that were vacant, for sale or underutilized. Our planning experts reviewed what there was of compliance plans in each of the targeted municipalities. They determined that 27, yes, 27, were clearly vulnerable to suit. So, we did just that. The State Public Advocate, in a single complaint, filed suit against 27 Morris County municipalities.

To put it mildly, the governing bodies of the municipalities that were sued went ballistic. They uniformly did not like being individually, let alone collectively, targeted. So, they sued us, the Public Advocate Department, taking the position that we were not acting in the public interest. As this was an appeal from an administrative decision, the case went directly to the New Jersey Appellate Division. Art represented the Department and obtained a resounding victory. Reading the decision, I had to consider how far we actually had come from the pre-*Mount Laurel I* view of the "public interest". Just check out this first quoted paragraph:

> It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation.
>
> It is quite apparent that in arriving at his decision to institute the litigation, the Public Advocate properly adhered to the statutory guidelines for the exercise of his discretion in the matter. In the circumstances these guidelines sufficiently circumscribe the exercise of that discretion while properly allowing for the meaningful effectuation of the policy of the legislation. We discern

> no constitutional infirmity in N.J.S.A. 52:27E-31.
> The decision of the Public Advocate under review is affirmed. [104]

The "*Morris 27*" litigation, filed by the State's Public Advocate, was somewhat of a game changer. It was front page news everywhere. If the municipalities in Morris County were going to have their feet put to the fire, the rest of the State was not going to be spared. Also, by bringing them all in, the pressure was created for the approval of a uniform fair share plan and compliance program. The county judge handling the matter was the Hon. Robert J. Muir. He was an excellent judge, and although with a deep Republican political background, he was totally fair and of the highest integrity.

I was really thrilled to meet Judge Muir. First, of course, we would have as our trial venue the incredible Morris County courthouse and his heritage courtroom. This was the location of the 1935 Charles Hauptmann, Lindbergh kidnapping trial. Hauptmann was found guilty and executed. Hopefully, that would happen to the defendants in our case. Also, for more recent notoriety, Judge Muir, himself, had presided over the tragic case of *Karen Ann Quinlan*. He opined that it would be inappropriate to remove life support from a live human, even one who, according to the medical experts was, effectively, brain dead, incompetent and in a persistent vegetative state with no hope of recovery.[105] The New Jersey Supreme Court reversed; yet, explicitly complimented Judge Muir on his decision.[106] Ms. Quinlan, despite all of this, lived comatose for almost ten additional years! In a meeting with me and one of the municipal attorneys, a close friend of his, the Judge said that he thought about the case just about every day, and he was heartbroken just having to listen to the testimony, let alone having to rule, especially against the wishes of her family. "Those poor people."

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[104] Borough of Morris Plains v. Dep't of Pub. Advoc., 404 A.2d 1244, 1249-50 (N.J. Super. Ct. App. Div. 1979) (citing S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713, 727).
[105] Matter of Quinlan, 348 A.2d 801 (N.J. Super. Ct. Ch. Div. 1975).
[106] Matter of Quinlan, 355 A.2d 647 (N.J. 1976).

The *Morris County 27* organizational hearings before Judge Muir were kind of a carnival but a lot less fun; except for us. We were pretty much enjoying the chaos. All 27 municipalities were well-represented. The Judge did his best to take control and attempted to put some commonality to the anticipated discovery and trial(s). However, it was clear that, without guidance from the Supreme Court, he might totally lose his mind. The law, as it stood, was simply too inscrutable and unwieldly. He could not possibly hear separate testimony from each defendant on issues like "fair share", "developing municipality", compliance mechanisms, good faith, etc., etc. He needed a more definitive decision from above. That would soon happen, as the Supreme Court really had no choice and brought up the four pending appeals.

XIX. CHAPTER 19: *MOUNT LAUREL II (1983)*

A. The Second Supreme Court Appeal and Argument; Are We Even Going To Be Invited?

I filed a motion with the Supreme Court to expedite our case, to bypass the Appellate Division, and to consolidate our appeal with the other four cases. Seemed like a no-brainer. Not quite. Much to my shock, the motion was *denied* without comment. Once I got off the floor and back in my chair, got over the shock and smoldering anger, I prepared and filed a motion for reconsideration - probably the first time in history that had ever happened on such a discretionary court decision. I simply pointed out that we were representing the *original Mount Laurel* plaintiffs. *They had litigated this issue now for the better part of a decade.* It was unseemly for them to be put aside while other cases would proceed ahead of them. Also, there was the fact that we, their counsel, were the State Public Advocate and surely would be allowed participation as the matter was clearly in the public interest. Certainly, it had to be a given that we would be allowed in as an *amicus*, so it was kind of absurd not to let us in as client advocates for the original plaintiffs.

To his credit, the Chief Justice quickly reversed the decision. He brought up our case, consolidated it with the others and placed us at center stage to be the lead case and for us to be the attorneys who would initiate the argument - to be the first to be heard. Frankly, when the ultimate decision came down, captioned with our clients as the named plaintiffs, I felt vindicated that the right plaintiffs were being respected. This was their case, win or lose, and Ethel Lawrence and the others deserved that recognition.

B. The Supreme Court Brief

The filing of a Supreme Court brief is always a daunting task. This was particularly true in our case as we had an enormous record and there were so many relevant issues to be resolved. The brief must set forth the facts as presented in the record of the trial below and the legal arguments relied upon to prevail. For us, I felt that the Statement of Facts was critical. We had to juxtapose the lack of clarity in *Mount Laurel I* with what Mount Laurel, itself, had done and how the previous decision had led to this inevitable failure to achieve compliance. I argued that whatever the Supreme Court thought it might have achieved in *Mount Laurel I,* it could not possibly have intended this result; yet, the decision's lack of clarity and the Court's misguided trust in municipal good faith were the reasons it failed. We had to prove that.

Foremost, our brief had to be readable and every line annotated with a reference to the record below. We had a great, but huge record. There were voluminous transcripts of testimony, about 30, covering all of the trial dates. Further, there was a massive number of exhibits, presented in a "Joint Appendix" – the document agreed to by both parties which presented the non-testimonial evidence. It was over 700 pages long. The record seemed impenetrable. Someone had to make it totally accessible and supportive of an irrefutable narrative of what had happened and of our position.

Linda Pancotto just said, "I can do that. I'll do it." No argument there. She had spent a year working under Judge

Gerry in the Federal District Court. That meant reviewing innumerable trial briefs, detailing the trial record and setting the table for the Judge. She had the incredible patience that it would take to go through everything and sort it out, organize it and present it coherently. It wasn't going to be easy. I wanted a complete Statement of Facts, and I wanted every sentence and reference explicitly cited to a Transcript page and line and/or a specific page of the Joint Appendix. I didn't want the Justices or their Law Clerks to have any difficulty finding support for every statement in our factual presentation. Linda would have to organize the record and spell out our case as clearly as possible.

The ironies abound. Jack Gerry, Mount Laurel's former counsel and now a Federal Court Judge and who had hired Linda, had inadvertently helped prepare her for the daunting task of writing the most important part of our Supreme Court brief. She undertook the task of making our massive trial record readable, accessible, well-documented and compelling. Linda literally disappeared into her office behind a closed door for the better part of two months. All I had to do was work with her on some of the structure and a little of the content. When she was done, she emerged with an extraordinary document. The final Statement of Facts was over 100 pages of a 130-page brief. The Chief Justice later complimented us, saying that this was one of the best submissions he had ever read.

One problem with such an extensive record is that the most obvious and significant facts can be lost in the complexity of the entirety. We needed a way to get the picture vividly across of what was going on in a simple, clear and definitive manner. So, we did something unusual. Instead of just referring to the record below and identifying the referenced documents, we decided to bring it home. A picture can truly be "worth a thousand words", and in this case, it surely was. Instead of just referring to them and citing them, we included in the brief photo copies of three maps that had been admitted into evidence. The first was an aerial of the vast land area of the Township and, as dots on the map, the tiny isolated "affordable housing Districts". The second map was a detail of one of the sites, the R-5 Zone, showing all of the constraints to development. The Third was a

map of the Township showing the massive approved planned unit developments and depicting, and thus juxtaposing, the tiny affordable housing sites. The maps alone probably would have won the case for us.

Ken and I worked on the Legal Argument and the needed remedy. We all reviewed the final draft of the legal argument. It was a commendable job, but frankly, for anyone who read the Statement of Facts that preceded it, the legal argument was mere surplusage.

C. The First Hearings — October 20, 21, and 22, 1980

The Supreme Court courtroom at the first hearing was mobbed with attorneys, reporters and a "sold-out" general public audience. The argument went extremely well. As I was the attorney representing the *Mount Laurel* plaintiffs and the attorney from the Public Advocate and since our case was the first listed, everyone agreed that I would initiate the argument. We had several goals. First, we needed to get the Court to clarify the doctrine. We needed a means to get uniformity throughout the State on issues like fair share enumeration and compliance mechanisms. Second, we needed a ruling that compliance was an affirmative obligation and that municipalities had to be proactive to create the realistic opportunity for actual affordable housing, not "least cost" housing. They should be required to provide for and approve whatever was reasonable to enable the projects to be built. This went beyond zoning. They had to comply with State and Federal preconditions to the approval and financing of an affordable housing project. This meant granting tax abatements and the adoption of appropriate resolutions, like a resolution of need.

Third, of critical importance, we needed the creation of a class of plaintiffs incentivized and financially capable of suing. The Chief asked why we could not do it - the Public Advocate and the legal services attorneys. I pointed out that most of the attorneys were just out of law school and very few of the attorneys had land use experience. Further, the programs could not possibly afford to retain counsel or finance the litigation. I

said that the same was true of the Public Advocate. The Division of Public Interest Advocacy had just nine attorneys with a very broad mandate. Even if all of them were forced to work on *Mount Laurel* compliance hearings, the number would be far short of what was necessary and contrary to the broad mandate in the Legislation.

"So?", the Chief asked. Fortunately, this issue succumbed to an easy and unavoidable solution. We needed only to point to the Davis intervention in our case, and the fact that Judge Wood actually provided Davis with a site-specific remedy. The answer was obvious: there was no better class of plaintiffs to carry the ball than those who would have a financial stake in the outcome: the builders. However, they had to be incentivized to sue recalcitrant municipalities. It would take a lot to convince them to litigate. They would need the requisite interest in land, the ability to carry the property for what might take years and the financial backing to undertake expensive litigation. They needed a big enough carrot to convince them to be the Court's "boots on the ground". The fact was that the necessary remedy was right before the Court – the imposition of a "builder's remedy" – and Roger Davis should get the first one for his mobile home park - if he agrees to provide affordable housing as part of the larger project.

Our position was that the Court must establish an easily obtainable, profitable outcome to attract developers to sue so that there would be clear and unavoidable exposure to recalcitrant municipalities. Hopefully, that exposure alone would encourage voluntary compliance without the need for a compelling lawsuit. The solution was simple and easy to implement: if a developer would commit to providing a percentage of affordable units (20% sounded good) and if the developer established municipal non-compliance, and if the developer litigated to achieve compliance, then the developer's own development proposal would have to be approved. The only municipal defense would be that there were public *health and safety* issues. Merely arguing that the development was contrary to the "*general welfare*" would not be accepted. If the

Court bought into this proposal New Jersey land use law would flip a full 180 degrees.

I also took direct aim at the *Madison* case standard of "least cost housing".[107] There was nothing wrong with mandating minimal standards, but that alone would not result in affordable housing. At best, it would just make construction less expensive for developers to build middle- and upper-income housing. I pointed to the mass of municipal attorneys on the other side of the room and stated that there could be only one reason that they uniformly were here supporting the "least cost" doctrine and that reason was that it did not produce affordable housing. Nothing else could possibly get them to reach a unanimous agreement.

Lastly, it was important to frame the case as being about real people, real households, children and the elderly poor. The issue was not whether they were going to live, but how and where they were going to live. These were the people who were most affected by a concept like "the general welfare". While numbers mattered, these numbers were human beings in need of help to get something as basic as decent shelter for them and their children.

Supporting argument followed from Dick Bellman, Marilyn Morehouser and many other amici presentations. There was a veritable slew of attorneys arguing on the other side, representing municipalities, "leagues" and even a bunch of Republican Assemblymen who joined together to be heard denigrating the need to address the housing crisis. It was an incredible show.

D. The Second Hearing — December 15, 1980

There was no question that the Justices were upset and frustrated that the 1975 mandate had been largely ignored and certainly not implemented. They appeared ready to correct that problem. They did call us back for additional argument providing issues that the Court wanted addressed. Singular

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[107] Oakwood at Madison, Inc. v. Madison Twp., 371 A.2d 1192 (N.J. 1977).

among these were compliance mechanisms, such as, whether municipalities had to agree to Federal requirements for the provision of Federal funding. As "out there" as that may seem, it was relatively easy to address. Failure to comply with these requirements, such as tax abatements would mean no Federal support for affordable housing developments. Importantly, since these were *government* standards and were used to provide thousands of housing units throughout the country, it was hard to envision how a municipality in New Jersey could argue they were contrary to health, safety and the ever-elusive, "general welfare".

The second argument occurred on December, 15, 1980. It was all positive and looked extremely promising. We left the argument, as we had after the second *Mount Laurel I* hearing, feeling like something good was going to happen, finally. But, déjà vu. Nothing happened – months went by with no word from the Court. You cannot imagine what that can do to a person. Mrs. Lawrence insisted that it was okay. She said that we had to realize how long her people had suffered, and they still suffered. If the Justices need this time to do the right thing, then it would be worth the wait. She could wait – as the rest of us were going out of our minds.

XX. CHAPTER 20: THE SECOND SUPREME COURT *MOUNT LAUREL* DECISION, JANUARY 20, 1983 (THAT DATE IS NOT A TYPO)

Measuring the delay in getting a decision from the Supreme Court in months turned out to be overly optimistic. We would be waiting for *over two years*. In anticipation of a decision, various groups would schedule conferences to address the Court's rulings. These either were cancelled or transformed into informational, educational presentations and prognostications. As time went on, there was a great deal of speculation, but no one truly knows what is happening in the Court's Conference Room as the Justices deliberate. Recall, that the *Madison Township* Justices were split over how to address the issue and

had failed to reach anything like a decisive, unanimous decision. So, it appeared that might be happening again.

Then, on January 20, 1983, the decision finally came down.[108] It was, once again, *unanimous*. *Twelve* years had passed since the filing of our Complaint, but, finally, we appeared to have what was needed to set the stage for compliance and the provision of the actual construction of affordable housing.

The victory was epic. We got everything we asked for – everything. And, then we got much more. The bottom line was that the Justices were extremely angered by the fact that their prior decision had been so openly flaunted.[109] There was no question that they were not going to allow that to happen again and that it was "pay back" time. Talk about awakening a sleeping giant and dealing with its terrible resolve. As for the lack of clarity in the *Mount Laurel I* decision, Chief Justice Wilentz and his Associate Justices now covered the landscape completely, leaving nothing to the imagination. Truthfully, nothing. There would be no need to litigate over what the Court meant.

Some of the best of it all, and something we were particularly gratified to read, was what the Court had to say about Mount Laurel, itself. The Justices provided the following as to its "compliance" plan that had been validated by Judge Wood:

> We find that the amended ordinance falls far short of what was required, that it neither corrects the particular deficiencies of the prior ordinance nor otherwise affirmatively provides a realistic opportunity for Mount

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[108] *Mount Laurel II*, 456 A.2d 390 (N.J. 1983).

[109] *Id.* at 410 ("After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case.").

> Laurel's fair share of lower income housing. *It is little more than a smoke screen that attempts to hide the Township's persistent intention to exclude housing for the poor.* (Emphasis added).
>
> In our original decision we gave Mount Laurel the opportunity to amend its ordinance. Stating that "[w]e trust it will do so in the spirit we have suggested ...," Mount Laurel I, 67 N.J. at 192, we declined to impose any judicial supervision over the municipality's efforts to comply. Our trust was ill placed. Therefore, to assure compliance with our mandate, all further proceedings to conform to today's decision shall be strictly supervised by the trial court, including not only any further litigation that may be required by this opinion, but all municipal action needed to conform to this and the trial court's judgment.[110]

It was so incredibly justifying of the effort Linda put into the Statement of Facts. The Court just outright copied sections of our brief and decimated the "sites" for affordable housing that were part of the municipal plan:

> The zone designated R-5, consisting of 13 acres, allows the construction of townhouses and garden apartments with a maximum of 10 units per acre. It is owned by an industrial developer, is totally surrounded by

[110] *Id.* at 460.

> industrially zoned land, virtually isolated from residential uses, has no present access to other parts of the community, no water or sewer connections nearby, is in the path of a proposed high speed railroad line, and is subject to possible flooding. It would be hard to find (other than R-6) a less suitable parcel for lower income or indeed any kind of housing. Furthermore, as one of plaintiffs' experts pointed out, no experienced industrial developer would allow this parcel to become a pocket of protesting residents objecting to the planned industrial uses surrounding them. Mount Laurel II, at pp: 297-298[111]

While the Court's specific assault on Mount Laurel's contemptuous plan was particularly satisfying, its generic holdings were incredible. It held that:

> 1. *Every* municipality has an affirmative obligation to assess the housing needs of its indigenous poor and devise a program to address those needs.[112]
>
> 2. *Every* municipality has an affirmative obligation to address its fair share of the regional need for affordable housing and devise a *proactive* program to address their fair share.[113]
>
> 3. *As a precondition of the right to zone*, municipalities were required

[111] *Id.* at 462.
[112] *Id.* at 418.
[113] *Id.*

to adopt a Land Use Plan Element and a Housing Plan Element to their Master Plans, detailing the foregoing.[114]

4. *Approximations and good faith were deemed irrelevant. The obligation was to be calculated as a specific number, and it was either lawfully addressed in its entirety or the municipality would be deemed non-compliant, regardless of their intentions.*[115]

5. *There would be no municipal "grace period" to achieve compliance*. Municipalities had ample time to comply and would be held accountable if they were sued prior to attaining compliance.[116]

6. Lawsuits alleging non-compliance could be filed by public interest groups, but also by landowners and developers who could propose specific developments on their property, designed in a manner that was totally unrelated to, or controlled by, existing zoning.[117]

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[114] *Mount Laurel II* at 418.

[115] *Id.* at 422.

[116] *Id.* at 456 ("It is now five years beyond Madison. The direct orders we issued to the municipality then, 72 N.J. at 553, 371 A.2d 1192, may appropriately now be issued by trial courts initially and with complete specificity. And that which we intimated in Madison might be the ultimate outcome after so many years of litigation—adoption by the trial court of a master's recommendations to achieve "compliance," id. at 553–54, 371 A.2d 1192—may now be the appropriate initial judicial remedy at the trial level.").

[117] *Id.* at 452.

> 7. *Builder's remedies were to be readily granted*. If the landowner/developer was successful in proving non-compliance and if they completed the case until the court deemed the municipality compliant, their development proposal would be deemed approved unless the municipality could demonstrate that it clearly would be contrary to public health and safety and/or would create demonstrable environmental degradation that could not be remedied. *There would be no defense by the municipality that the plan was contrary to the general welfare*.[118]
>
> 8*. Upon proving non-compliance, the presumption of validity that always had attached to municipal decisions would be reversed, and the presumption would favor the plaintiff/developer and their proposed development.*[119]

All of this was what we had hoped to achieve (like on Christmas Day), but the Court was not finished. It went off on its own. None of the litigants' attorneys, including me, had proposed what the Court now imposed:

> 9. *Three "Mount Laurel" trial judges would be appointed to handle all* <u>*Mount Laurel*</u> *cases*, and the cases would have a special and separate docket number.[120]

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[118] *Id.*

[119] *Id.* at 465-466.

[120] *Mount Laurel II* at 459.

> 10. Each *Mount Laurel* judge would have jurisdiction over a separate regional area as designated by the Court and handle all cases filed within their vicinage.[121]
> 11. <u>*Mount Laurel*</u> *Judges could freely appoint experts, "Masters", to work with the courts* and with the parties to foster compliance and, hopefully, settlements. The Masters would be paid by the defendant municipality and would be independent experts that could provide testimony.[122]
> 12. *The Chief then appointed three of the State's most prestigious and widely respected trial court judges to the task: the Hons. Anthony Gibson, Eugene Serpentelli and Stephen Skillman.* Generally speaking, their work and their demeanor achieved broad approval by attorneys for both the municipalities and the plaintiff litigants. *They clearly were the Supreme Court's surrogates, saddled with the task of validating and implementing what the Court had directed. There was no question that they would do just that. Failure was not an option.*

We were, to say the least, euphoric. Ironically, the first cold water thrown on the decision was by Stuart Hutt, counsel to the New Jersey Builder's Association. Circumstantially, soon after the decision was rendered, he spoke at a preplanned Builder's Association meeting and offered the view that no

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[121] *Id.*
[122] *Id.*

builder would be willing to take the risk. “It is not going to work.”

Mr. Hutt would soon be proven wrong. Within a year of the decision, over ninety *Mount Laurel* lawsuits had been filed. Developers from all over the State, Nation and Canada decided things were looking good in New Jersey and got their hands on New Jersey properties, often in our most “exclusive” municipalities, and sued. Soon, a state-wide fair share plan was agreed upon. Then, through court decisions and settlements, massive compliance was achieved as builder’s remedies had become commonplace and included a commitment to provide affordable housing as a condition of their development approvals.

POSTSCRIPT

A. Compliance

As Mr. Hill predicted, the State’s municipalities succumbed to the inevitable bludgeoning. The three *Mount Laurel* judges did their job, implemented compliance as the Chief Justice had ordained and granted municipalities no quarter. After a century of dominating the courtroom with blanket presumptions supporting whatever they did, it was fantastic to see the tables turned so dramatically. Certainly, there were extraneous issues to resolve, like could there be multiple builder’s remedies in one case? Several municipalities had been sued by multiple developers. I think tops was six. The answer, was “yes”, they could.

Resolving the issue of a formulaic fare share plan and providing specific numbers for municipal compliance was a major task. Judge Serpentelli literally convened a hornets’ nest of municipal, public interest and builder planners and lawyers in his courtroom and threatened to keep them there until they reached agreement on a formula. Under the auspices of his Master, Carla Lehrman, they did. The ensuing “consensus

methodology" or "Lehrman model" became the standard.[123] It was tweaked by ensuing cases, but generally held its own and pumped out numbers for every municipality in the State. A notable humorous result was the effect of the formula's use of employment data as one of its allocation factors. Princeton Borough found itself to have a very large fair share number which turned out to be due to very high employment - which clearly could not possibly have been located within its borders. It turned out that just about every major corporate enterprise that lined the Route 1 corridor in West Windsor had used a Princeton Post Office Box as its corporate headquarters to be able to identify themselves as being "located in Princeton". Nice for West Windsor's fair share numbers, but very bad for Princeton's. So, adjustments had to be made.

Deservedly, municipalities were targeted in inverse relationship to their wealth. As one should have expected, the more prosperous towns were the most attractive to "rapacious" developers. Builders could option land zoned for 2-acre, even 10-acre, single-family lots, propose a development at six or more units per acre and ultimately prevail in *Mount Laurel* litigation, or as often was the case, settle. Municipalities had lost control over land use policy.

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[123] Judge Gibson, Judge Serpentelli, and Judge Skillman came to rely on three data points to determine need: (1) overcrowded units, (2) units lacking "complete plumbing facilities for the exclusive use of the occupants," and (3) "units lacking adequate heating." AMG Realty Co. v. Warren Twp., 504 A.2d 692, 699 (N.J. Super. Ct. Law Div. 1984). In that case Judge Serpentelli noted, "Reliable data refers to the best source available for the information needed and the rejection of data which is suspect. The need to make as few assumptions as possible refers to the desirability of avoiding subjectivity and avoiding any data which requires excessive mathematical extrapolation. An internal system of checks and balances refers to the effort to include all important concepts while not allowing any concept to have a disproportionate impact." *Id.* at 726.

B. The Council on Affordable Housing — Mount Laurel III and Mount Laurel IV

1. Mount Laurel III (1986)

Things were not going all that well for the municipal side, so they meekly, but aggressively, turned to the Legislature for help. The fact is that for many years, the Legislature had been kicking around legislation that would provide for State-wide housing planning and support for affordable housing development. Not surprisingly, due to municipal objections, those efforts never got anywhere. Well, the landscape now was very different as municipalities were begging for relief generally and, particularly, from builder's remedies. They got it with the adoption of the Fair Housing Act which created the Council on Affordable Housing ("COAH").[124] COAH was granted the power and mission to assess fair share obligations and compliance methods and to review voluntarily submitted compliance plans. Its staff would work with municipalities to "fix" the plans. Ultimately, the plans would be submitted to the COAH Board for review and approval. Once its plan was approved by COAH, the relevant municipality would obtain a "repose" from further litigation, similar to the Judgement of Repose granted by the courts.

One incredible nuance was the adoption by the Legislature of a provision providing for "Regional Contribution Agreements".[125] These enabled wealthy suburban municipalities, essentially, to barter away up to 50% of their obligation to provide affordable housing by paying financial contributions to other municipalities to build them. Of course, this would be tempting only to poor urban municipalities. The concept was clearly contrary to the effort to regionalize the location of housing opportunities for the poor. Regardless, it would be upheld by the Court. To their credit, many urban municipalities refused to cooperate with suburban efforts to

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[124] New Jersey Fair Housing Act, N.J. STAT. ANN. § 52:27D-301 (West 1985).
[125] *Id.* at § 52:27D-312.

"sell" the housing obligation. However, others, in need of financial support in their own communities, could not resist taking the funds.

Developers and affordable housing advocates challenged aspects of the COAH legislation and the matter quickly came before the Supreme Court for review. In *Hills Development Co. v. Bernards Township,* (commonly referred to as *Mount Laurel III*),[126] the Court heard argument on the issue of the viability of COAH as a compliance mechanism. Many land use attorneys participated; including, but not limited to: myself, Ken Meiser, Art Penn, Henry Hill, John Payne, Guillet Hirsch, Stephen Eisdorfer and many more on both the affordable housing advocate side and the municipal side.

The Court quickly validated the law. It essentially, if only temporarily, washed its hands of the need for judicial monitoring and assuring the implementation of municipal compliance. The Court justified a *moratorium* on builders' remedies, giving time for COAH to get its act together.[127] Somewhat shockingly, it ruled *retrospectively*, validating the anticipated mass transfer of pending litigation to the new Council. Full disclosure: this included a matter that was being actively litigated and pursued by my own development company. The only basis to avoid a transfer would be proof that the transfer would result in a "manifest injustice".[128] The Court determined that the mere loss of a potential builder's remedy in pending litigation was not tantamount to such an injustice.[129]

Thus, developers, who had engaged in the compliance process, financed land acquisition, undertook expensive and time-consuming litigation and compliance proceedings, who were actually fulfilling the intent of *Mount Laurel II,* were out in the cold. Since COAH did not provide for builder's remedies, this left (very unfairly) developers, like my own company, with nothing to show for undertaking the litigation. The developers effectively lost everything that they had put into the process.

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[126] 510 A.2d 621 (N.J. 1986).
[127] *Id.* at 652.
[128] *Id.* at 631.
[129] *Id.* at 647-48.

Some of the language in the opinion, which was so dismissive of the builder's concerns, was the height of judicial arrogance and indifference and lacked basic judicial integrity. Check this out:

> The impact of transfer on a builder, of course, is somewhat different. The builder's loss of expected profits is discordant, under these circumstances, with the connotations of "manifest injustice." *That loss is a risk to which builders are regularly exposed in a variety of circumstances.* (Emphasis added).
>
> It has been suggested that there is a different kind of injustice here, for, as some have put it, this Court in Mount Laurel II "invited" the builders to bring these suits, solicited the "help" of the builders in our effort to vindicate the constitutional obligation. In effect, we are said to have asked them to join in a struggle to vindicate a constitutional interest. Those assertions remind us of the opposite claim, which is that we invented the remedial doctrine not for the benefit of the poor, but for the benefit of the builders. The truth is that we devised a remedy that we believed would be effective. We concluded that if it were possible for builders to profit from lower income housing, they would pursue it, and further concluded that such pursuit was likely to increase compliance with Mount Laurel. We did not "hope" the

> builders would join in this effort, we expected that they would. Nevertheless, there is an obvious basis to a builder's claim that pursuit of this litigation was justifiable, but if that suggestion is intended to create the image of an estoppel, there is no substance to it. *If there is any class of litigant that knows of the uncertainties of litigation, it is the builders. They, more than any other group, have walked the rough, uneven, unpredictable path through planning boards, boards of adjustments, permits, approvals, conditions, lawsuits, appeals, affirmances, reversals, and in between all of these, changes in both statutory and decisional law that can turn a case upside down. No builder with the slightest amount of experience could have relied on the remedies provided in Mount Laurel II in the sense of justifiably believing that they would not be changed, or that any change would not apply to the builders.* (Emphasis added) If ever any doctrine and any remedy appeared susceptible to change, it was that decision and its remedy. The opinion itself constituted the strongest possible entreaty for legislative change.[130]

Well, it turns out that we can add the lack of judicial integrity to the pitfalls of that "rough, uneven, unpredictable

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[130] *Id.* at 649-50.

path" that builders have to traverse. As someone who was burned by this judicial lack of judiciousness, I for one would take umbrage at the thought that the Court, having lured builders into the process with the promise of a builder's remedy and not having suggested that it could be divested at the whim of the Legislature, would so cavalierly wash their hands of any obligation to those who carried *their* ball for *them* when no one else would or could. Without the builders litigating, there had not been and would never have been municipal compliance. Further, there never would have been a "COAH."

Once COAH had been established and numbers assessed, municipalities that did not submit to its jurisdiction were still vulnerable to litigation. A multitude of municipalities submitted to the jurisdiction of the Council and got out from under the sword of Damocles that the *Mount Laurel* builder's remedy created.

2. Mount Laurel IV (2015):

The truth is that initially COAH did a pretty good job; however, with the addition of the Regional Contribution loophole the opportunity to provide family affordable housing in the wealthier suburbs in the first two rounds of fair share compliance was severely marginalized. Ultimately, COAH's effectiveness was undermined and eviscerated by, ironically, a Democratic Administration. In the effort to achieve positive social change, it is particularly depressing when people in power, in this case elected and appointed Democrats, who you expect will support the effort, actually act aggressively to undermine it. When Susan Bass Levin was the Democrat appointee to head the New Jersey Department of Community Affairs and became the *de facto* head of COAH, the handwriting, so to speak, was on the wall.

Ms. Levin was no stranger to the *Mount Laurel* case. She was the former Mayor of Cherry Hill which had been the target of affordable housing litigation by several developers: including, Peter O'Connor. When asked to comment by the press, Peter trashed her appointment, after which he was tormented by the

administration in his attempts to get State financing for his own development projects; particularly, the Short Hills project in, of all places, Cherry Hill. Ms. Levin absolutely despised Peter, and it was a long time before the Short Hills project actually got built. However, Peter being the tenacious soul that he is, the project now stands.

The Democrat Administration did successfully torture the system to the point of oblivion. For one thing, COAH failed to provide timely updates. It's failure to do so was the subject of litigation.[131] Arguing before the Appellate Panel, I was asked what the problem is. I answered by pointing to the DAG representing COAH and said that her job is delay and she has no downside – you are unlikely to fine, disbar or otherwise penalize her or her boss. So, the real problem is you and your failure to come up with an effective consequence. After that assessment settled in among the judges and lawyers, I was asked what that consequence might be. I suggested giving them 30 days to adopt the rules or the task will be handed over to Judge Serpentelli. After all, he did this before in single day. The decision came down giving COAH 90 days.

The delay wasn't the only issue as COAH came up with bizarre methodologies and, basically, fell apart. The coup de grace did come under a Republican Governor, Chris Christie. COAH became so ineffective that, ultimately, the Supreme Court gave up on it. Kevin Walsh of the Fair Share Housing Center argued that case and successfully led the way for the Court to bury the agency.[132]

In what is commonly referred to as *Mount Laurel IV,* the Court had no choice but to recognize that COAH had become an ineffective entity, and it reinstituted judicial review of municipal compliance.

> Fair Share Housing Center (FSHC) filed the present motion in aid of litigants' rights because COAH

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[131] In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 855 A.2d 582 (N.J. Super. Ct. App. Div. 2004)

[132] In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel N.J. Council on Affordable Hous, 110 A.3d 31

> failed to promulgate the Third Round Rules*. We thus are in the exceptional situation in which the administrative process has become nonfunctioning, rendering futile the FHA's administrative remedy.* (Emphasis added) The FHA's exhaustion-of-administrative-remedies requirement, which staves off civil actions, is premised on the existence of a functioning agency, not a moribund one.
>
> Due to COAH's inaction, we agree that there no longer exists a legitimate basis to block access to the courts.[133]

In any event, regardless of this tortured history, the *Mount Laurel* Doctrine survived and still abides, and municipal compliance is still under the gun of potential litigation and the fear of litigation. Affordable units are still being planned, approved and constructed. Even Haddonfield complied, at least to the extent of allowing an elderly project. It has had to negotiate with the FSHC to resolve the remainder of its *Mount Laurel* obligations.

C. The Attorneys

1. Me

Before *Mount Laurel II* came down in 1983, I had resigned from the Department of the Public Advocate. With the political change in the Administration in 1982, from Democrat to Republican, Stanley Van Ness would be gone, and I was definitely targeted for removal. Ironically, the new Governor appointed my friend and mentor from Camden, Joe Rodriguez, as the new Public Advocate. He asked me to stay. I was two feet

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[133] *Id.* at 34.

out the door by then and not interested in looking back, but agreed to stay for up to six months or any earlier time that he felt comfortable with my leaving. I ultimately left and opened my own private practice while considering my options.

At the time, there was a growing negative consensus among developer lawyers that the *Mount Laurel II* decision had not provided a sufficient incentive for their clients to take the bait. This was truly infuriating, given our efforts and the Court's commitment. I was totally blindsided by the fact that the very community chosen to benefit the most economically from the work, who we had argued that the Court should task with compliance, was now undermining the decision.

Then, unexpectedly, the door opened for me to pursue the *Mount Laurel* remedy with my own development company. Peter Abeles called and wanted to aggressively promote compliance himself. He had access to a Chicago equity firm willing to finance inclusionary developments in New Jersey. He asked me to join as lawyer and principal. Sounded great but he was a planner and I was a land use lawyer and neither of us had any business acumen – certainly something we would need to deal with venture capitalists.

Ken Schuman, my close, personal friend since 6th Grade, was a graduate of the Columbia Business School and had been the Economic Development Commissioner under Mayor Koch in New York. Ken had a strong business background, working at the investment banking firm, Lehman Brothers, but also a person with a fundamental caring for the poor. My father had earlier helped him get a job at the Hudson Guild Neighborhood House, and he also taught disadvantaged poor and African-American and Hispanic households in a New York public grade school. The timing was perfect and, when I explained to him what we were proposing to do, Ken joined as well. He provided the critical corporate/business background knowledge that we desperately needed.

The three of us created Affordable Living Limited Partnership and, later, American Newlands Limited Partnership. We raised several million dollars over the years and optioned land in many municipalities. We then sued under

Mount Laurel, obtained approvals and contracted with builders to take over the project and build the inclusionary developments. Several thousand units were built through our work, virtually all of which had large affordable housing components.

A disgruntled Morris County State Legislator, still chaffing from my work with the State, actually filed an ethics complaint against me as a former State employee, "using the *Mount Laurel* case to my advantage". The charge made the front page of the Newark Star-Ledger.[134] Art represented me and experienced the ignominy of also being charged after he revealed his participation in some of our work. The filing of the ethics complaint was political and had no merit. As former State employees, we were not privy to any undisclosed information or data, had no advantage from our work with the State and were not doing anything that about 100 other attorneys were also doing in New Jersey. Further, we were simply following and fulfilling a clear directive from a State Supreme Court decision which we had not written or controlled and which was public knowledge and open to anyone to read and seek to implement. The charges against us were summarily dismissed without a hearing. The dismissals didn't quite get the publicity as had the charges. They were reported in a tiny article in the back pages of the Newark Star-Ledger. The bad news gets prominently displayed on the front page, while the good news is buried somewhere as filler in the back.

2. Peter O'Connor

After *Mount Laurel I* was decided. Peter had left CRLS and opened his own law firm to work on affordable housing development and related issues. Earlier when we were still at CRLS, we had envisioned the need for an advocacy group, a Center, to monitor the state-wide implementation of *Mount*

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[134] Robert Schwaneberg, *State to Review Case Against 2 Advocate Aides*, STAR-LEDGER, Aug. 1, 1985, at 1.

Laurel I litigation. Ultimately, Peter was able to achieve such funding.

The Fair Share Housing Center was created in 1975, and, initially led by Peter, became a major watchdog and implementer of the *Mount Laurel* Doctrine. The Supreme Court, in *Mount Laurel IV*, recognizing the work of the Center, required all filings of *Mount Laurel* cases to be copied to the Center and granted the Center broad standing to participate, as an *interested party*, in any case it chose to do so.[135] The Court, however, did not provide for the Center to be paid for its work. As things evolved, a ready source of funds for the Center emerged as many settlements were conditioned on payments to the Center for the work it had done.

Peter left working at the Center in 2015 as it became ensconced in litigation. He turned his attention to the full-time work of being a non-profit, affordable housing developer. In June of 1986 he created FSHD and has functioned as its Executive Director ever since, constructing and managing several developments which provide 100% affordable housing units.

After Peter left, the Center then would be led by two extraordinary attorneys: first by Kevin Walsh and then by its present Director, Adam Gordon. They carried on the work with incredible energy. The Center grew tremendously in size and influence and helped getting the Legislature to approve additional implementing legislation.

3. Linda Pancotto

After being second chair to me on the second *Mount Laurel* trial court hearing, Linda did not continue her work with Peter after her Vista term ended. Art and I offered her a position with the Public Advocate, which she accepted and that led to her appellate work on the *Mount Laurel II* case. She left the Public

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[135] In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel. New Jersey Council on Affordable Housing
Add to Keep List, 110 A.3d 31, 42 (N.J. 2015).

Advocate in 1980. Once I left, she came back to work as a project manager on *Mount Laurel* applications and developments generated by the corporate entities I had established with Ken Schuman and Peter Abeles. She monitored the professional work and kept the projects moving.

4. Ken Meiser

Ken left the Public Advocate's Office around the time that I did. He made what turned out to be a professional mistake working as counsel to then Mayor Susan Bass Levin in Cherry Hill. They were about as close to oil and water as two people possibly could get. We often met, and I strongly encouraged him to leave. Fortunately, he was able to do so and joined our friends, Dave Frizell and Harry Pozycki, in their Metuchen Law Firm. This change enabled him to do real estate and land use work, often representing *Mount Laurel* developers. He ultimately joined Hill Wallack, Henry Hill's law firm, and was provided with an ample workload of affordable housing developers to represent. Ken recently passed away. He was one of the most intelligent people I have ever met and covered that with a genuine caring heart. I don't think he ever got the recognition he deserved; particularly, for his work on the *Mount Laurel* and related cases and tenant's rights advocacy.

D. The Mount Laurel Case

In the *Mount Laurel II* decision, the Supreme Court again remanded the actual Mount Laurel case, itself, to the trial court with instructions to resolve the dispute pursuant to the standards set in the Supreme Court decision. Fortunately, by virtue of the appointment of the three standing *Mount Laurel* Judges, we would not have to deal with Alexander Wood as our trial judge. The Public Advocate's representation became secondary on reaching a settlement; although, Ken continued to participate, and I worked on settlement implementation. Peter O'Connor effectively took over the direct representation on the remand with the intent of settling the case and, in part, having

FSHD participate in the construction of affordable housing in the Township to assure that the units would be affordable to very low income families.

Although a good friend of Peter's, Joe Rodriguez was adamant that the Public Advocate could not be involved in a settlement process that would result in an order granting one of the attorneys in the case the right to do development approvals. This was addressed by the ultimate settlement language that provided for the *Mount Laurel* plaintiffs to have the right to designate a developer for part of the implementation plan and removing Peter as a direct beneficiary.

In 1985, the case was finally and formally settled. Mount Laurel agreed to provide a realistic housing opportunity to develop 995 units of affordable housing (somewhat in excess of the 36-unit debacle that set off the litigation). FSHD would play a major development role, designated by the plaintiffs as the non-profit housing provider. Over fifteen years had passed since the Township had foolishly undermined the goals of its own residents to build those 36 affordable units. Had it given Mrs. Lawrence and the Springville Action Association the support that they deserved and should have gotten from responsible government officials, Mount Laurel would not have become the poster child of economic and racial discrimination in New Jersey.

E. The Ethel R. Lawrence Homes

One remarkable result of the litigation and the settlement was the construction, by Fair Share Housing Development, of the Ethel R. Lawrence Homes in Mount Laurel. It is such a shame that Mrs. Lawrence did not live to see this housing that was named in her honor.

I represented FSHD in obtaining the local approval for the development. The outpouring of hundreds of angry residents led the fire marshal to insist that the hearings be conducted in the Middle School. It was packed. At one point, while doing the presentation, I was literally being poked in my back by someone seated behind me. I turned and found myself

staring into the eyes of a grey-haired, very frail, elderly woman, surely from the nearby age-restricted housing. She looked up at me, a little shaken, but with the nerve to opine: "You are scum". I politely asked her not to poke me again, and she didn't.

The hearing drew a huge audience. It was incredible how motivated people seemed to be to stop this development. At one point, in the hallway, a very old man, breathing through a portable oxygen device tottered in, ironically being supported by an African-American nurse. I couldn't believe it. I went over to them and told him that he was not needed here and should go home. Without a response, the nurse did a 180 and took him away. One objector actually questioned why we would call the project, "Homes", since that conjured up, in her mind, ghetto housing. Some men threatened Peter, that they would be waiting for him outside. They did not, but all of this set a very disturbing tone. Truthfully, it was a little frightening, but there was a contingent of the local police ready to deal with any problem that might arise. None did.

Phil Caton, the court's Master, testified. He made it clear that the Board absolutely had to approve this project. It was part of the settlement and presented no planning, health or safety issues of any concern. One of the Board members was a hold out. She apparently anticipated running for Mayor. The Board caucused and made it clear to her that the decision was going to be unanimous one way or the other, and if it were denied, the Township would be exposed to endless, expensive litigation, leading to the inevitable approval of the project. She relented.

After all was said and done, the project was unanimously approved. It was April 12, 1997, *twenty-six years* after the complaint was filed. The approval was of sufficient national interest that it, and some of the back story, was reported in the New York Times.[136] The reporter quoted an angry resident shouting at the Board members after the approval vote: "You are history!". Well, in fact they were, but not the "history" he was talking about.

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[136] Ronald Smothers, *Ending Battle, Suburb Allows Homes for Poor*, N.Y. TIMES, Apr. 12 1997 at 21.

After the creation of the Fair Share Housing Center, the Ethel R. Lawrence Homes is truly Peter's crowning achievement. It has become a showcase of what a 100% affordable housing project could look like and how incredibly successful it could be. 140 affordable units, on the sixty-acre site, provide just a magnificent environment for the lower-income residents. Appropriately, it was constructed under the watchful eyes of another Lawrence. Mrs. Lawrence's daughter, Ethel, was retained by FSHD as the Project Director.

The development contains an educational center for all the children, appropriately named after Peter's mother, Margaret Donnelly O'Connor, where the kids can go after school and are supported and their school work monitored. There are outdoor and indoor recreational facilities. Peter's administrative offices also are on site, and the development is under the watchful eye of Debbie DelGrande, his right and left hands. They keep a close rein on the project, the residents and the children. In retrospect, the public opposition was totally misguided, as many now acknowledge. The project has been hailed by local officials as a huge success for its attractiveness, maintenance, lack of crime, and proactive connection with the public schools and the local administration. There is no shortage of notables who visit - politicians, dignitaries, academics and intellectuals, all of whom openly express their disbelief that they are looking at a 100%, family, affordable housing project. But that's Peter, always eschewing the cheaper sedan for the Cadillac. It would be well worth anyone's time to visit it.

The Ethel R. Lawrence Homes is the focus of a book addressing it as a breakthrough in suburban integration. *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb*,[137] Saul Alinsky's admonition about integration to the contrary, no one is moving out of Mount Laurel as a result of the introduction of affordable housing into the Township.

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[137] DOUGLAS S. MASSEY, ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB (2013).

F. Affordable Housing

The *Mount Laurel* decision has spawned the construction of tens of thousands of low- and moderate-income housing units, often in locations that never would have permitted the housing absent the mandate and the builder's remedy. A huge secondary impact has been the development of tens of thousands more multifamily and small-lot, single-family units. This occurred since the "builder's remedy" required developers, generally, to provide up to twenty percent of the total units as affordable. This left 80% free-market units. Since many municipalities preferred "inclusionary developments" to 100%, stand-alone affordable housing projects, the former proliferated throughout the State, again in locations that otherwise never would have permitted such "intense" development. These projects often provided housing opportunities that otherwise would never have been provided for middle-income households.

G. Related Cases

The Supreme Court now had a new sensitivity to the implications on the poor of governmental action in the area of land use. This led to a number of other cases after *Mount Laurel I* which were not directly related to *Mount Laurel* implementation, *per se*. However, the cases addressed specific land use controls that affected housing for the poor and the ability of the poor to access affordable housing. The following are a few examples of matters that I worked on:

1. Homebuilders League

In *Home Builders League of South Jersey, Inc. v. Township of Berlin*,[138] four years after *Mount Laurel* I, the Court finally put to bed the power of municipalities to control minimum habitable house/unit sizes. Such regulations clearly impacted directly on cost. The Public Advocate intervened. I argued for the Department. Linda and Ken assisted in writing the brief. The Court stated that:

> We have experienced that change in conditions which has been reflected in pertinent legislative and judicial attitudes. Zoning which excludes low and moderate income families for fiscal purposes has been condemned as contrary to the general welfare. [. . .]
> Rather, the ordinance appears to be directed solely toward economic segregation. Under these circumstances and in the absence of proofs showing a connection between the minima and the legitimate purposes of zoning (public health, safety and welfare), such as would be established by an occupancy relationship, the provisions must fall.[139]

2. State v. Baker

In *State v. Baker*,[140] the Court addressed municipal attempts to control the actual occupants of housing. The Public Advocate was granted leave to

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[138] 405 A.2d 381 (N.J. 1979).
[139] *Id.* at 392-393
[140] 405 A.2d 368 (N.J. 1979).

appear as *amicus curiae*. I argued for the Department, and Linda and I did the brief. This was an attempt by municipalities to directly control the “users” as opposed to the “uses”. Towns did this by limiting permitted occupancy to the residents’ *legal or biological relationship*. This form of discrimination precluded biological or legally unrelated lower income persons and families from living together to financially afford shelter. It affected unrelated couples and single parents living with their children and an unrelated support person or “significant other”. It also directly affected LGTBQ+ households. The Court opined that issues of overcrowding and the like could be directly controlled by specific ordinances that reflected scientific standards generated by public health organizations. The Court stated that:

> The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many uses which defeat that goal. Plainfield's ordinance, for example, would prohibit a group of five unrelated "widows, widowers, older spinsters or bachelors or even of judges" from residing in a single unit within the municipality. [. . .] Regulations based upon biological traits or legal relationships necessarily reflect generalized assumptions about the stability and

> social desirability of households comprised of unrelated individuals, assumptions which in many cases do not reflect the real world.[141]

3. Homes of Hope

After *Mount Laurel II,* an issue remained as to whether municipalities that achieved compliance would have any further obligation to support applications for affordable housing that were not part of the approved plan. Basically, under *DeSimone*, variances were to be freely granted for government funded, 100% affordable housing projects. Was that still true for a *Mount Laurel* compliant municipality? In *Homes of Hope, Inc. v. Eastampton Twp.*,[142] the Appellate Division ruled that, even if a municipality has been certified as having satisfied its *Mount Laurel* obligation, an application for a use variance for affordable housing was still a special reason, as set forth in the *DeSimone* case,[143] and the municipal *Mount Laurel* compliance certification did not impact on whether the application should be approved.[144]

I represented, briefed the matter and argued as counsel for the Fair Share Housing Center which had been granted *amicus curiae* status. We provided the Court with ample proof that the statewide fair share housing numbers were based on a need assessment representing just a fraction of the actual need. This was a result, in part, of the compromises reached in the creation of the Lehrman fair share methodology. For example, "cost-burdened" households were not included in the need assessment. These are households paying a substantially greater portion of their income for shelter than was consistent with national standards. There were hundreds of thousands of such households in New Jersey. Including them in the Lehrman

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[141] *Id.* at 371-372.
[142] 976 A.2d 1128
[143] DeSimone v. the Greater Englewood Housing Corp. No. 1, 56 N.J. 428 (1970).
[144] *Homes for Hope*, 976 A.2d at 1130.c

methodology would have generated a more accurate, but an incredibly high calculation of need. However, although they were not included in the need assessment, we had to recognize that these were households actually in need of shelter that they could afford and would be motivated to seek such units when they became available – thus competing with households that actually were included in the need assessment. Ironically, since many already were living in municipalities or close to those that would be providing new affordable housing, they might well be the first in line to capture access to those new units even though they were not part of the need assessment.

The Court ruled in our favor, stating that:

> The issue presented is whether affordable housing continues to constitute an inherently beneficial use for purposes of obtaining a use variance, N.J.S.A. 40:55D-70d(2), after the municipality in which the property is located has met its fair share obligation under the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 to -329.19, and its concomitant regulations. We conclude that a municipality's compliance with the FHA by meeting its fair share obligation does not impact affordable housing's inherently beneficial use status for purposes of obtaining a use variance. Affordable housing continues to foster the general welfare and constitutes a special reason to support a use variance. [. . .]
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> A COAH certification does not mean that a municipality has reached a limit for affordable housing. Neither the FHA, nor Mount Laurel I or II, explicitly or implicitly

supports the Board's argument that once a municipality's Mount Laurel obligation has been fulfilled, a need for low- or moderate-income housing no longer exists. It is beyond question that even if a municipality meets its Mount Laurel obligation, substandard housing will continue to exist. Providing affordable housing to meet that need, on a case-by-case basis, continues to foster the general welfare, regardless of a COAH certification, so as to constitute a special reason to satisfy the positive criteria. The "[g]eneral welfare, as that concept is used in the determination of whether special reasons exist under [N.J.S.A. 40:55D-70d] for granting a use variance, comprehends the benefits not merely within municipal boundaries but also those to the regions of the State relevant to the public interest to be served."[145]

[145] *Id.* at 1130, 1134 (quoting Kunzler v. Hoffman, 225 A.2d 321 (1966).

ETHEL LAWRENCE, IN MEMORIAM

It has been about fifty years now since the idea of the *Mount Laurel* litigation first germinated in my head and was formulated into a lawsuit with the support of Peter, Ken, Carolyn and Tom. None of us possibly could have imagined that we would be doing this for decades when we first met with Mary Robinson and her daughter, Ethel Lawrence. They not only agreed to pursue the case, but Mrs. Lawrence agreed to be a plaintiff and brought in her own daughter and Aunt as additional plaintiffs. Mrs. Lawrence became a vital support-person for all of us and an active spokesperson for the effort; which included her often doing public presentations, at least once at Harvard. She died in 1994. She did live to see her efforts succeed on paper, but she did not live long enough to walk about, through and around the Ethel R. Lawrence Homes. That would have been an awesome day for her and for all of us. It was decidedly unfair that she was not able to see this gem of a project, which carries her name, constructed and occupied and so hugely successful in the Township she loved most of all. Even after all that she had endured and how miserably the local officials had treated her, her family and her community, she was undaunted in her love for Mount Laurel Township. It was, after all, her ancestral home. In the end, it was Ethel Lawrence who would provide Mount Laurel with its most important and incredible gift – social inclusivity and harmony.