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FAIRLY SHARING AFFORDABLE HOUSING OBLIGATIONS: THE *MOUNT LAUREL* MATRIX

JOHN M. PAYNE*

INTRODUCTION

New Jersey's *Mount Laurel* doctrine[1] requires every municipality in the state to provide a realistic opportunity for the construction of its fair share of the regional need for low- and moderate-income housing. This doctrine is probably the best known affordable-housing initiative of our time, and without a doubt the most ambitious judicial ruling in the field of land use controls since World War II. This Symposium provides a timely reminder, however, that before there was even a trial court decision in the case that became *Mount Laurel I*, Massachusetts led the way with chapter 774, the Comprehensive Permit Law.[2]

My contribution to these thirtieth anniversary proceedings is to share with you the news from New Jersey. The *Mount Laurel* doctrine and the Comprehensive Permit Law are rough contemporaries and comparisons are therefore in order. I cannot offer anything that compares to the wealth of specific data that Dean Krefetz presents in her Article[3] because, surprisingly, there has never been a comprehensive, hard number study of *Mount Laurel*'s results. Still, the outlines are clear, and I will sketch the general picture with a concentration on a broader view.

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1. S. Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*]; S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*].

2. Low and Moderate Income Housing Act, 1969 Mass. Acts 774 (current version at MASS. GEN. LAWS ch. 40B, §§ 20-23 (1998)). This article will observe the proprieties and refer to this law by its "grown-up" title. However, I was in law school some miles east of Springfield in 1969, when chapter 774 was enacted amid controversy. Consequently, the law will always carry for me its cumbersome but wonderfully pointed birth name, the "Anti-Snob Zoning Law."

3. Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. (forthcoming 2001).

Breaking down exclusionary zoning barriers and encouraging the provision of low- and moderate-income housing is a tough business. One of the remarkable things about *Mount Laurel* as well as the Comprehensive Permit Law is that both have survived in illiberal political times for as long as they have. I suspect they have survived because both the New Jersey and Massachusetts approaches have matured, reaching a level of predictable results and few surprises in the current political climate which does not support new initiatives. This is certainly true of New Jersey. In the expectation of better days ahead, however, I propose that we look forward, beyond the focus of local zoning that is at the core of both the *Mount Laurel* doctrine and the Comprehensive Permit Law, to see what else can be done. Drawing on my New Jersey experiences, I will present these suggestions within what I call the *Mount Laurel* matrix.

I. BACKGROUND: THE EVOLUTION OF THE *MOUNT LAUREL* DOCTRINE.

The *Mount Laurel* "story" has been discussed at great length in recent years,[4] and so only the briefest recap is necessary to set the scene here. Although post-war suburban exclusionary policies were driven by a mixture of race and class fears, in 1975, *Southern Burlington County NAACP v. Township of Mount Laurel* (*"Mount Laurel I")* chose the broader focus of income level rather than race, assuming that solving one problem would solve the other at the same time. *Mount Laurel I* also implicitly rejected the Massachusetts approach, pegging the constitutional obligation to "regional *fair* share," rather than to the fixed percentages of chapter 774.

Eight years later, in the face of massive non-compliance, *Southern Burlington County NAACP v. Township of Mount Laurel* (*"Mount Laurel II"*) added a sweeping set of remedies which successfully forced the issue. Although the court retained the "fair share" approach of *Mount Laurel I*, it partially came around to the Massachusetts model (again, without saying so) to the extent that the court required each municipality's fair share to be quantified as a specific number and held that constitutional compliance was to be measured objectively in terms of whether that numerical goal had

4. *See* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996); DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA (1995).

been achieved.[5] The court also embraced the concept of "inclusionary zoning" as a method of compliance for municipalities which otherwise could not meet their fair share obligations.[6] The court held that such municipalities must take affirmative steps to satisfy their obligations.[7] This co-option of the private housing economy also distinguishes the New Jersey approach from that of the Massachusetts approach, which has concentrated on opening the suburban door to public and non-profit developments that are totally occupied by lower-income households.

Mount Laurel II worked as the Supreme Court intended. Within eighteen months after the Supreme Court announced its opinion, specially-assigned trial judges worked out a formula for calculating fair shares.[8] Shortly thereafter, individual municipalities began getting the bad news about specific court-ordered changes in their land use plans. With the handwriting on the wall, the legislature entered the fray with the New Jersey Fair Housing Act of 1985.[9] This Act created a Council on Affordable Housing ("COAH"),[10] to administer a new system of nominally voluntary compliance, backed up by a presumption that municipalities with affordable housing plans certified by COAH would be relieved of litigation in Superior Court.[11] COAH, by administrative rulemaking, left the court-developed procedures for calculating fair share largely intact,[12] but by careful attention to detail, it was able to drastically reduce the estimated need for low- and moderate-income units. Doing so lowered fair share numbers significantly for many communities, thus fulfilling one of the unstated purposes of COAH.[13]

COAH also administers a system known as Regional Contribution Agreements ("RCAs"), which permits suburban municipalities to satisfy up to 50% of their fair share obligation by funding afford-

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5. *See Mount Laurel II*, *supra* note 1, at 421-22.

6. *Id.* at 446-49.

7. *See id.* at 447-48.

8. AMG Realty Co. v. Township of Warren, 504 A.2d 692, 696-704 (N.J. Super. Ct. Law Div. 1984).

9. N.J. STAT. ANN. § 52:27D-301 to -329 (West 1986 & Supp. 2000) (enacted July 2, 1985).

10. *Id.* § 52:27D-305.

11. *See id.* § 52:27D-317.

12. *See* N.J. ADMIN. CODE tit. 5, § 93 (1999) (setting forth the COAH fair share rules in their current form).

13. *See* John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20, 29-30 (1987) (explaining how the fair share numbers were lowered).

able housing in urban areas.[14] *Mount Laurel II* did not address RCAs, and though they are segregative in intent and effect, the New Jersey Supreme Court has avoided the opportunity to declare them invalid.[15] The inclusion of RCAs in the *Mount Laurel* process mandated by the legislature underscores with deep irony the decision made by the court in 1975 not to address the problem of exclusionary zoning as a racial issue.[16]

II. WHAT HAS BEEN ACCOMPLISHED?

There has been no comprehensive study of the results achieved by the *Mount Laurel* doctrine, but several partial surveys, coupled with the informed assessment of affordable-housing advocates in New Jersey, yield a reasonably accurate picture.[17] Since 1985, approximately 15,000 to 20,000 publicly-funded units of affordable low- and moderate-income housing units have been created; this compares favorably with the rate of creation in the heyday of the public-housing program prior to 1985.[18] A largely unintended by-product of the creation of *Mount Laurel* housing has been the creation of a substantial amount of middle-income housing in suburban areas, consisting of market-rate units in inclusionary developments that would not have been permitted by the municipality but for the *Mount Laurel* obligation.[19] In addition, close to $120 million has been infused into urban areas.[20] At the present time, the RCA funds constitute the largest single source of housing subsidy money in New Jersey.

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14. *See* § 52:27D-312.

15. *See In re* Township of Warren, 622 A.2d 1257, 1269 (N.J. 1993) (disposing of the issue on other grounds).

16. *See* John M. Payne, *Lawyers, Judges and the Public Interest*, 96 MICH. L. REV. 1685, 1707-09 (1998) (reviewing HAAR, *supra* note 4 and discussing the race issue).

17. *See generally* John M. Payne, *Norman Williams, Exclusionary Zoning and the* Mount Laurel *Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665 (1996). A more recent study focused on the characteristics of the occupants of the *Mount Laurel* units, rather than the number of units created. *See* Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of* Mount Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268 (1997).

18. COAH's website claims 23,100 *Mount Laurel* units have been built or are under construction. The Council on Affordable Housing, *at* http://www.state.nj.us/dca/coah.htm (last visited Sept. 23, 2000). COAH's monitoring capacity is limited by its very small staff, however, and its counts tend to be a bit optimistic. *See* Payne, *supra* note 17, at 672.

19. *See* Martha Lamar et al., Mount Laurel *at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1260 (1989).

20. *See* The Council on Affordable Housing, *supra* note 18. The Council reports some 6300 RCA units financed with these funds. *See id.*

Most privately-developed *Mount Laurel* units are offered for sale, rather than as rentals, especially those occupied by families. Public subsidies are still available for senior citizen developments, which are often in rental form as a result. *Mount Laurel* units are occupied almost exclusively by non-minority families who previously lived in the suburbs fairly close to the inclusionary development site. Very few households earning less than 40% of the median income have benefited from *Mount Laurel.* One recent study even noted that some minority households (but no non-minority ones) moved from a suburban area to an urban *Mount Laurel* unit.[21]

III. THE *MOUNT LAUREL* MATRIX.

An important distinction between New Jersey's affordable-housing history and that of both Massachusetts and Connecticut is the key role that the New Jersey Supreme Court played in both putting the process into effect and keeping it going. It is this judicial involvement that accounts for the degree of success that the *Mount Laurel* doctrine has enjoyed, for there can be no doubt that the legislature would have abandoned the fair share process altogether had it been constitutionally permissible to do so.

But if judicial involvement is the source of our success, it is also, in the perverse way that so often affects law reform litigation, the source of our failure as well. Court-mandated housing policies lack even the slender political legitimacy that the New England statutes can claim, and without political legitimacy, a process that directly affects so many people and policies in so many ways cannot be self-sustaining. Thus, in recent years, I have tried to puzzle out an approach to housing opportunity that preserves the benefits of judicial enforcement while correcting some of its flaws.

As a threshold matter, any judicially-based housing strategy must note well the source of the legal obligation. *Mount Laurel I*'s "general welfare" theory was straightforward, but in 1975 it could stretch only far enough to require the elimination of barriers to affordable housing. When *Mount Laurel II* went beyond exclusionary zoning and required that local governments use their power affirmatively to facilitate the provision of affordable housing, something more was required doctrinally. It would have been convenient if that "something" had been the court's recognition of a

21. *See* Wish & Eisdorfer, *supra* note 17, at 1296.

constitutional entitlement requiring the government to be the provider of last resort for at least a minimum of human shelter needs, but the New Jersey Supreme Court conspicuously refused to state that such a right exists. Thus, we are left to infer what the "missing" constitutional right that lends support to the judicially-based obligation to act might be.[22]

Although this essay is not the place for an extended exploration of constitutional arguments, I believe that the *Mount Laurel* cases can be interpreted as standing for the "can do" principle—that governments should do all that they can do, within reasonable limits of governmental capacity, to facilitate provision of shelter for those who need it. This hypothesis is implied by the "general welfare" doctrine that underlies *Mount Laurel I*, and it is completely consistent with the court's embrace of inclusionary zoning in *Mount Laurel II* as something within the power of local governments. Inclusionary zoning, after all, requires nothing more than the combination of two standard zoning techniques—density regulation and use regulation.[23]

Viewed through the lens of the "can do" principle, it becomes immediately apparent that different levels of government have the power to accomplish different things in different contexts without a court having to hold governmental actors to a standard beyond their constitutional capacity and without the court transgressing its own limits. Considered this way, the *Mount Laurel* doctrine is not about inclusionary developments, or subsidized housing, or any specific remedy for that matter. Rather, it is about the entire basket of remedies that the creative human mind can comprehend.

Thus reinterpreted, a revised and expanded *Mount Laurel* doctrine can be described as a matrix, as opposed to a linear solution to the problem of affordable housing. As a first attempt to represent the matrix (I will modify it later), we can locate on one axis the major institutions of government involved in providing housing opportunities, and on the other axis, techniques for implementing affordable-housing strategies. There are two cells on each axis: state government and local government on the "institutional" axis, and

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22. *See, e.g.*, John M. Payne, *Reconstructing the Constitutional Theory of* Mount Laurel II, 3 WASH. U. J.L. & POL'Y 555, 555-56 (2000) (presenting a preliminary case for the existence of a constitutional right to shelter within the logic of the second *Mount Laurel* opinion).

23. *See generally* N.J. STAT. ANN. § 40:55D-65(a) (West 1991 & Supp. 2000) (use); *id.* § 40:55D-65(c) (density); DANIEL R. MANDELKER, LAND USE LAW § 5.01 (4th ed., Lexis 1997).

regulatory techniques and subsidy techniques on the "implementation" axis. Thus, the matrix produces four possible combinations: (1) state regulation; (2) state subsidies; (3) local regulation; and (4) local subsidies. This can be rendered graphically:

LEVEL OF GOVERNMENT

TECHNIQUE	STATE	MUNICIPALITY
Regulation	State regulation [Example: N.J. Fair Housing Act of 1985]	Local Regulation [Example: inclusionary zoning ordinance]
Subsidy	State subsidy [Example: low interest loans for first-time homebuyers]	Local subsidy [Example: donation of surplus land to non-profit housing developer]

By definition, the *Mount Laurel* doctrine, and hence *Mount Laurel* compliance, applies to public entities but not to private developers because public entities are bound by the state constitutional obligation to serve the general welfare.[24] Private developers, important as they are to the *Mount Laurel* compliance process, have no direct constitutional obligation under either *Mount Laurel* case. The general welfare restraint, as applied through the *Mount Laurel* doctrine, is an element of the police power, which only government can possess. Since the state constitution cannot bind the federal government, whose constitution apparently does not extend as far as New Jersey's,[25] we are limited to considering only the state and its subdivisions.

In principle, we could further say that the *Mount Laurel* doctrine applies only to the state itself (reversing, in effect, the current compliance regime) because the police power, and hence the general welfare obligation, is an attribute of sovereignty, which the state alone possesses. But, as a practical matter, the state's sovereign power to regulate the use of land is so frequently and thoroughly passed through to the local level of government (a delegation that is unlikely to be reversed anytime soon) that it makes sense to treat local governments as a distinct entity for purposes of constructing a practical and effective approach to *Mount*

24. *See Mount Laurel I*, *supra* note 1, at 725.

25. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972) (stating that the federal constitution does not mandate adequate housing).

Laurel compliance. Agencies of the state, such as the New Jersey Housing and Mortgage Finance Agency, and sub-units of the state, such as counties, are also equally relevant. However, since these agencies and sub-units are sufficiently subject to direct state control, it is possible to speak of "the state" as a generic institution for simplicity of analysis.

Having thus defined the categories, it is nonetheless important to keep in mind that this mode of classification is a matter of analytical convenience, not one of constitutional dimension. Specifically, this means that the state is not free to cast local governments adrift to comply with the *Mount Laurel* doctrine or not as their local inclinations dictate subject to being "caught" by the state courts only if successful litigation is brought.[26] Nevertheless, the state has, in effect, cast local governments adrift throughout the *Mount Laurel* era subject only to the oversight of state courts during litigation.[27] As will be seen, significant aspects of the methodology I propose turn on the primacy of the state's *Mount Laurel* obligation. Thus, the state and its local subdivisions form one axis of the matrix.

Turning to the other axis, there are, broadly speaking, two types of power that either the state or local government can bring to bear on *Mount Laurel* compliance: the power to regulate private activities and the power to raise or spend public resources. Both state and local governments can regulate the activities of the private and semi-private housing market to socially useful ends. Under current regimes of land use policy, however, the heavy lifting of land use regulation is left to the local rather than to the state level, which explains why the *Mount Laurel* compliance system is based on inclusionary zoning—a type of local regulation.

By placing inclusionary zoning within the more complex matrix I have described, it becomes apparent that *Mount Laurel* compliance need not be limited to this technique alone. As a result, I would argue that it is not appropriate for COAH to base its fair share calculations and compliance review procedures primarily on the premise that inclusionary zoning is the primary goal of the process.[28] Local governments have other regulatory techniques availa-

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26. *See In re* Egg Harbor Assocs., 464 A.2d 1115, 1122 (N.J. 1983) (recognizing that "local [zoning] decisions 'must be consistent with statewide policies'") (quoting Lusardi v. Curtis Point Prop. Owners Ass'n, 430 A.2d 881, 886 (N.J. 1981)).

27. *See, e.g.*, *Lusardi*, 430 A.2d at 887 (striking down a local zoning ordinance which conflicted with state priorities).

28. For instance, COAH essentially excuses municipal compliance to the extent that the municipality lacks "developable land" for inclusionary developments, without

ble to them. For instance, rent control is a potentially useful technique in older suburbs where inclusionary zoning usually does not work well because of the lack of large development sites. Additionally, as I have indicated, the state has not only its own regulatory powers but also plenary control over the delegation of regulatory power to local governments. There is much to be explored here under the "can do" principle.

Both state and local governments can also directly subsidize needed housing by building it themselves, by providing cash subsidies to others to build it, or through direct subsidies to households to pay for it. Closely related to this spending power is the power to participate in available direct subsidy programs offered by higher units of government—most notably those of the federal government. This kind of local, state, and federal cooperation regarding public-housing programs (direct subsidy) was very much at the heart of the court's expectations in the early 1970s regarding how *Mount Laurel* would be implemented.[29]

IV. PRIVATE SHARES AND PUBLIC SHARES

A new approach to *Mount Laurel* compliance can be formalized by establishing a two-tier system of constitutional fair share obligations: one a "private share," recognizing the capacity of private markets to meet low- and moderate-income housing needs if regulated in the general interest, and the other a "public share," recognizing the resource capacities that are uniquely governmental. In keeping with the matrix model, we must separately examine the extent to which each type of share, private and public, can be implemented by the state itself and by each municipality acting under appropriate state supervision. The present practice of calculating a single "fair share" obscures the extent of a government's collective ability to meet shelter needs. Instead, we should list separately the public and private strands of "fair share" and require that they be met separately (although not necessarily as a numerical obligation in every instance).

In essence, the two-tier system already exists, albeit only par-

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requiring inquiry into alternative modes of compliance. *See* N.J. ADMIN. CODE tit. 5, § 93-4.1, -4.2(d) (1999).

29. *See Mount Laurel I*, *supra* note 1, at 734 ("We have in mind that there is at least a moral obligation in a municipality to establish a local housing agency pursuant to state law to provide housing for its resident poor now living in dilapidated, unhealthy quarters."); *cf.* N.J. STAT. ANN. § 52:27D-311(a)(7) (West 1986 & Supp. 2000) (authorizing the use of federal or state subsidies for *Mount Laurel* compliance purposes).

tially and in a very chaotic form. The *Mount Laurel* doctrine has concerned itself almost exclusively with one cell of the matrix—private market regulatory strategies at the local level, over-emphasizing inclusionary zoning. Where voluntary compliance has not been forthcoming, the New Jersey courts have been willing to mandate this one form of local regulatory effort. However, inclusionary zoning is not an end in itself; it is only one example of how a local government can use its regulatory power if local governments have a judicially-enforceable constitutional obligation to do as much as they can. Consider some of the other market regulation techniques that might easily be required as part of a *Mount Laurel* compliance program: rent control laws, anti-gentrification laws, restrictions on condominium conversions, and zoning for "mobile" homes.[30] All have the effect of either facilitating a low-cost housing market or preventing the tendency of the market to gravitate towards higher income uses.[31]

In addition to these "private share" regulatory techniques, even at present, a local "public share" can occasionally be added in the form of direct or indirect housing subsidies, but only if the municipality offers to provide them on a voluntary basis. Typically, the public share is in the form of money raised to fund RCAs, but other kinds of funding, such as municipal donation of surplus land to help write down the cost of a development, are also used.[32] Guided erroneously by *Mount Laurel II,* courts have never seen it as their role to order these kinds of "public" shares; therefore, public funds have sometimes been injected into private inclusionary developments to reduce the developer's cost,[33] rather than to make the homes available to more or poorer households than could be served by private development alone. Under the *Mount Laurel* doctrine, public funds should leverage, not take the place of, private effort.

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30. *See Mount Laurel II, supra* note 1, at 450 (endorsing zoning for mobile homes).

31. COAH identifies a further list of local initiatives, although they are less aggressive than the ones given in the text of the *Mount Laurel* compliance program (e.g., group homes and accessory apartments). *See* N.J. ADMIN. CODE tit. 5, § 93-5.8 to 5.12. Housing advocates tend to frown on these COAH-suggested alternatives, because they do not address the core need to provide opportunities for families with children, but this lack of enthusiasm would diminish if there were a broader range of solutions being pursued simultaneously, as proposed by the matrix model.

32. *See generally* N.J. STAT. ANN. § 52:27D-311(a)(5) to (a)(8); N.J. ADMIN. CODE tit. 5, § 93-5.5, 5.7 (municipal contributions).

33. *See, e.g.*, Lamar et al., *supra* note 19, at 1242 (providing an example of a low-income development program which gave its money to lenders who had special lending relationships with developers).

Beyond this, the cells in the proposed matrix are conceptually empty under current interpretations of the *Mount Laurel* doctrine and the state Fair Housing Act. Even if we assume that local zoning will constitute the lion's share of land use regulation, thus shrinking the possibility for a state level "private share," a "can do" reading of the *Mount Laurel* doctrine dictates that the state require all municipalities to prepare and submit fair share plans to COAH, rather than, as at present, leaving compliance voluntary. COAH participation data shows that 128 of New Jersey's 567 municipalities were in compliance in August 1999.[34] This strongly suggests that the incentives for voluntary participation are much too weak to be constitutionally adequate.

However, the assumption that there is local control is far from completely accurate. For instance, states are increasingly imposing direct regulation (or regulatory oversight) in critical areas such as environmentally-sensitive coastal zones.[35] No systematic attention has been paid to the use of inclusionary zoning (or other lower-income housing techniques) in these areas and no decisions require (as opposed to permit) such activities, even though the "realistic opportunities" are large and obvious.[36] Moreover, the state's decisions about the provision of crucial water and sewer infrastructure and road access to major developments certainly determine where and when development can occur; like an increasing number of states, New Jersey now embodies its infrastructure policies in a state master plan, to which *Mount Laurel* criteria have already been joined.[37] Still, enforcement is lacking. The state also regulates condominium conversions, without considering the impact that "going condo" has on poor residents in gentrifying communities.[38]

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34. *See* Payne, *supra* note 17, at 676-77; *128 Municipalities Have COAH's Approval*, NEWSL. (N.J. Council on Affordable Hous.), Aug. 1999, at 2, *available at* http://www.state.nj.us/dca/coah/archive.htm. Many of these "certified" municipalities have very small fair shares, zero in some cases, thus underscoring the weak level of actual compliance.

35. *See, e.g., In re* Egg Harbor Assocs., 464 A.2d 1115, 1116-17 (N.J. 1983).

36. *Id.* at 1122 (holding that a state agency may require inclusionary zoning). The context of the case did not require consideration of the agency's obligation to require inclusionary zoning however.

37. N.J. STATE PLANNING COMM'N, COMMUNITIES OF PLACE: THE NEW JERSEY STATE DEVELOPMENT AND REDEVELOPMENT PLAN (June 17, 1992) (SDRP); *id.* § IV(B)(8), Policy 17 (indicating coordination with Council on Affordable Housing). Not surprisingly, however, the SDRP contrives not to utter the dread phrase "*Mount Laurel*" in its section on housing.

38. *See* Comm. for Hous. Alternatives, Inc. v. Mayor of Jersey City (unpublished opinion), *cert. denied*, 570 A.2d 963 (N.J. 1989) (ruling that the City's attempt to regu-

The potential is even more dramatic if one considers the possibility of a state-level "public share," i.e., an obligation on the part of the state to finance affordable-housing production. The reason that presumably led the *Mount Laurel* court to forgo imposing financial obligations on municipalities applies with much less force at the state level. Local governments, heavily dependent on property tax revenues, cannot realistically be expected to devote substantial sums to social welfare programs. However, the state, with a budget in the billions and with access to elastic revenue sources such as an income tax, is already heavily invested in welfare spending and cannot plausibly avoid review of the way in which it discharges its responsibilities.

Even putting aside for the moment the particularly knotty question of whether a court can or should order *new* state spending on shelter needs, there is much that could be done within existing programs that the state already undertakes voluntarily by more rigorous means-testing. For instance, the New Jersey Housing and Mortgage Finance Agency establishes a threshold income eligibility level for a variety of assisted-housing programs that is not only in excess of the *Mount Laurel* ceiling of 80% of regional median income, but in excess of median income altogether.[39] This reflects the political popularity of directing aid to middle-class voters.

With less boldness than was asked of the two *Mount Laurel* courts, a court today, guided by the "can do" principle and the *Mount Laurel* matrix, could readily hold that the middle-class skew in eligibility limits for these otherwise beneficial housing programs is unconstitutional by analogizing it to the unconstitutional skewing of the land use power found in exclusionary zoning. If the state were then given the choice of targeting a substantial portion of aid to the most needy households, those who are too poor to be served by the market mechanisms of inclusionary zoning alone, it is a fair

late price of rental units converted to condominium status was preempted by state condominium conversion law).

39. In April, 1999, New Jersey median income measured in three- or four-county regions ranged between a low of $43,950 and a high of $69,030 for a family of three, and COAH's 80%/50% ceilings for moderate- and low-income eligibility, respectively, accordingly ranged between $35,160/21,975 and $55,224/34,515. *1999 Regional Income Limits*, NEWSL. (N.J. Council on Affordable Hous.), Apr. 1999, at 2 *available at* http://www.state.nj.us/dca/coah/archive.htm. In July, 2000, HMFA's web page gave income eligibility limits between $66,600 and $92,920 for a variety of assisted programs that are described elsewhere on the website. *See HFMA Home Buyer Mortgage Program: 2000 Income Limits at* http://www.state.nj.us/dca/hmfa/singfam/inc_prch.html (last visited July 23, 2000).

bet that the legislature would choose to do so rather than shutting the programs down altogether.[40] Note that, carefully crafted, the hypothetical judicial ruling I suggest need not cost the state a dime more than it presently appropriates.

In theory, and perhaps in practice, this matrix approach could be expanded to distinguish different components of housing need—determining a "private share" and a "public share" to satisfy each government's obligation to address distinct housing problems, such as substandard housing, cost-burdened households (those living in safe, sanitary housing but paying too high a portion of their income for the "privilege"), and homelessness. Doing so would illustrate that different compliance techniques, at different levels of government, may be best suited to particular types of problems. Substandard housing, for instance, invites a greater emphasis on new construction solutions, such as inclusionary zoning, than does cost burdensomeness, and homelessness might require financial solutions that are largely, if not exclusively, within the capacity of state rather than local government.

Such a detailed, expanded matrix, however, is beyond the scope of this essay. In fact, we may finally conclude it is neither necessary nor desirable to expand the matrix. One of the lessons of the *Mount Laurel* story is the risk of methodological hubris. As an attorney for one *Mount Laurel* plaintiffs' organization in the years immediately after *Mount Laurel II*, I participated in the development of the original fair share formula.[41] It was both a professional challenge and a great deal of fun to be there, but it is difficult to make policy by formula. By contrast, one of the advantages of the Massachusetts Comprehensive Permit approach is its methodological simplicity. To construct every cell of a complex housing needs matrix and fill each cell with exquisitely tailored *a priori* solutions is to risk replicating on a larger scale the error which has led New Jersey to focus solely on inclusionary zoning and miss the bigger picture. My central purpose is to suggest an approach to fair share

40. To give an egregious example, when the state's construction industry was in a serious recession in 1992, the legislature obligingly appropriated $200 million in construction subsidies in what was called the Housing Incentive Finance Act, commonly called the "Fix the Hammer" Bill. N.J. STAT. ANN. § 55:14K-45 to -63 (West Supp. 2000). The Act expressly provided that in assisting developments, "no constraints may be placed on the marketing or pricing policy of a qualified housing developer." *Id.* § 55:14K-50(d).

41. *See* AMG Realty Co. v. Township of Warren, 504 A.2d 692, 694 (N.J. Super. Ct. Law Div. 1984) (using the fair share formula to determine whether the municipal ordinance "fully complies with *Mount Laurel*").

compliance that is more effective than the one currently employed—one that emphasizes the realistic capacity of government to address a broader array of housing needs with a greater selection of compliance techniques. If a more complex expression of this approach ultimately proves useful, it will be more sound to build it piece by piece, after the basics of the private share/public share concepts have become better established.

To summarize, we can restate the matrix, substituting the labels "private share" and "public share" for "regulation" and "subsidy," respectively, with an expanded set of examples which are nonetheless illustrative rather than complete. The shift to "private share" and "public share" labels that are not themselves compliance techniques is intended to emphasize the *idea* behind the label in hopes that useful solutions like "regulation" or "subsidy" do not become ends in themselves as inclusionary zoning has.

LEVEL OF GOVERNMENT

	STATE	MUNICIPALITY
"Private" Share	N.J. Fair Housing Act of 1985 (make compliance mandatory) Critical area zoning Infrastructure regulations Enforce SDRP policies Revise condominium laws	Inclusionary zoning Rent control Condo conversion controls Mobile/modular home zones (N.J.A.C. 5:93-5.8 to -5.12)
"Public" Share	Means-test existing programs Require local participation in existing subsidy programs Prepare shelter plan Expand direct subsidies?	RCA funding Donate surplus land Waive fees/exactions Housing authority Purchase vacant units

V. IMPLEMENTING THE *MOUNT LAUREL* MATRIX

It remains to be considered, however, how "private shares" and "public shares" would be calculated, since some norm is necessary if they are to be implemented by a court. As I have already suggested, the current fair share/inclusionary zoning regime functions *de facto* as a "private share" methodology at the local level, although an unnecessarily narrow one. I have elsewhere argued that an alternative approach, called "growth share," would be preferable because it would minimize the problems of "bad politics"

and "bad planning" that burden the current formulaic approach to fair share in New Jersey.[42] "Growth share" is also a logical component of the matrix approach in that it would encourage a search for compliance solutions that do not depend solely on new construction inclusionary developments. "Growth share" requires further elaboration to be made workable, but for present purposes we need only realize that the "private/local" cell of the matrix can be filled with more than inclusionary zoning and that, however it is filled, inquiry about the full range of *Mount Laurel* compliance possibilities reach beyond that cell.

As to the parallel "private" regulatory share that might be assigned to the state government as part of its newly recognized *Mount Laurel* obligation, I am inclined to leave that to ad hoc determination as specific issues arise, in part because most land use regulation occurs at the local level and also because the concept of "share" is relatively inapposite when the state as a whole is considered; ultimately, the state's share is 100% of the need. *Mount Laurel I* required the elimination of unnecessary, cost-generating features in local ordinances,[43] state statutes, and regulations. Likewise, practices that have adverse affordability consequences should also be subject to judicial review (without a presumption of constitutionality) on a case-by-case basis. One such provision clearly would be the "voluntariness" provision in the 1985 Fair Housing Act.[44]

The real challenge is to find a useful concept of "public shares," which will amount to a judicially-enforceable obligation to subsidize affordable housing. Here, for fiscal capacity reasons, it will be much more meaningful to concentrate our attention on the state's obligations, rather than the municipalities' obligations. Assuming that the state's "public share" obligation has been determined, it may suffice to require as the local "public share" that municipalities cooperate with all applicable state, and federal programs.

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42. *See* John M. Payne, *Remedies for Affordable Housing: From Fair Share to Growth Share*, 49 LAND USE & ZONING DIG. No. 6, at 3-9 (June 1997).

43. *See Mount Laurel I, supra* note 1, at 731-32 (noting that certain local zoning restrictions made it unrealistic for low-and moderate-income families to live in the Mount Laurel area).

44. *See* Comm. for Hous. Alternatives, Inc. v. Mayor of Jersey City (unpublished opinion), *cert. denied.*, 570 A.2d 963 (N.J. 1989).

CONCLUSION

Undoubtedly, the most controversial part of my proposed *Mount Laurel* matrix approach is my suggestion that courts mandate access to the state's fiscal resources to resolve problems of housing affordability. For present purposes, I concede that the judicial process and separation of powers problems that inhere in ordering the state to pay a judicially-determined sum of money are significant enough that this should not be the first initiative upon implementing the *Mount Laurel* matrix, although there is more to be said at some later date about that intriguing question. It is not necessary to go that far. As I have suggested above,[45] there are substantial opportunities to simply require the state to keep its priorities straight within assistance programs that the legislature sees fit to fund.

"Make no little plans." I surely do not expect to see my four-part matrix adopted tomorrow in New Jersey or anywhere else. Keeping it in mind, however, we can discern more clearly how the *Mount Laurel* doctrine could reach its full potential. Perhaps those who gathered for this Symposium, in the spirit of those who dared in 1969 to propose the Comprehensive Permit Law, might be able to take the next steps toward that unimaginably bold goal—fair housing for all.

45. See *supra* notes 39-40 and accompanying text for a discussion of these suggestions.