

A BLACK PERSPECTIVE ON MOUNT LAUREL II: TOWARD A BLACK "FAIR SHARE"

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Although the minority poor continue to be acutely disadvantaged in the search for decent housing, the New Jersey Supreme Court in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II)*¹ declined to recognize race as a significantly distinct variable affecting access to housing. The failure to recognize this variable may explain why the court did not design a remedy tailored to the particular needs of the minority poor.

A good starting point in analyzing the value to the black community of *Mount Laurel II* is a review of the New Jersey Supreme Court's stated definition of its intended protected class. In 1975, the court reviewed an argument that certain land use regulations of Mount Laurel Township unconstitutionally precluded substantial segments of the population from residing there by failing to allow for affordable housing. Justice Hall, writing the majority opinion in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I)*,² declared that "[p]laintiffs represent the minority group poor (black and Hispanic) seeking such quarters . . . [b]ut they are not the only category of persons barred from so many municipalities by reason of restrictive land use regulations."³ It was the majority's conclusion that the court should broaden the scope of its inquiry to encompass all those persons who, like the minority poor, were similarly precluded from living in Mount Laurel "because of the limited extent of their income and resources."⁴

Justice Hall's final blow to any individualized protection for the original plaintiff minority group poor is contained in his words, "we accept the representation of the municipality's counsel at oral argument that the regulatory scheme was not adopted with any desire or intent to exclude prospective residents on the obviously illegal basis of

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¹ 92 N.J. 158, 456 A.2d 390 (1983).

² 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

³ *Id.* at 159, 336 A.2d at 717 (footnote omitted).

⁴ *Id.*

race, origin or believed social incompatibility.”⁵ That is, black and Hispanic poor were thrown in with the lot of all other members of New Jersey society that might be excluded from housing opportunity on the basis of their economic condition. Thus, early in the opinion, it was evident that *Mount Laurel I* would not specifically expand the scope of civil rights for minorities in New Jersey.

Despite the expansion of the protected class and the resulting dilution of minority rights in *Mount Laurel I*, the New Jersey Supreme Court has acknowledged, on more than one occasion, that exclusionary zoning is indeed a racial problem. In his *Mount Laurel I* concurrence, Justice Pashman made it clear that the court was mindful of the negative aspects of including racial minorities in a broader economic protected group. While he accepted Mount Laurel Township’s representations⁶ regarding unlawful racial discrimination, he pointed out that “exclusionary zoning practices are also often motivated by fear of and prejudices against other social, economic, and racial groups.”⁶ Shortly thereafter, Justice Pashman wrote a concurring opinion in *Oakwood at Madison, Inc. v. Township of Madison*,⁷ the first significant test of *Mount Laurel I*. In *Madison Township*, Justice Pashman reiterated his observation that “[e]xclusionary zoning is also motivated to a large extent by long-standing social and racial fears and prejudices.”⁸

Finally, the court’s unanimous 1983 decision in *Mount Laurel II*, written by Chief Justice Wilentz, although containing no discussion of purposeful racial discrimination in the enactment of exclusionary zoning ordinances, did in part suggest that there may be a constitutional basis for deconcentrating New Jersey’s cities. Significantly, *Mount Laurel II* referred to a conclusion of the National Advisory Commission on Civil Disorders by noting that “suburban exclusion [is] one of the principal causes making America ‘two societies, one black, one white—separate and unequal.’ ”⁹

Notwithstanding clear indications that it was aware that racial discrimination exacerbates the problems inherent in a minority group’s search for decent affordable housing in New Jersey, the supreme court has consistently defined the protected class in terms of

⁵ *Id.*

⁶ *Id.* at 196, 336 A.2d at 736 (Pashman, J., concurring) (footnote omitted).

⁷ 72 N.J. 481, 371 A.2d 1192 (1977).

⁸ *Id.* at 562, 371 A.2d at 1232 (Pashman, J., concurring in part, dissenting in part) (footnote omitted).

⁹ *Mt. Laurel II*, 92 N.J. at 210 n.5, 456 A.2d at 415 n.5 (quoting Report of The National Advisory Commission on Civil Disorders 1 (1968)).

economic condition for purposes of the *Mount Laurel* doctrine. An hypothesis quickly emerges from these findings: Any judicial remedy that purports to serve black or Hispanic interests yet does not specifically take into account race and racial discrimination is reasonably certain to fall short of providing adequate protection for these minority groups. For the minority poor the demon has two heads: one economic, the other racial.

That race is indeed a factor to be considered independent of economic status, and that the minority poor are sufficiently distinguishable from the poor generally as to require a particularized remedy, are amply supported by statistical data. Race, as will be shown, is a significant and distinct variable. From a national perspective, one cannot ignore the overwhelming likelihood that in 1984, blacks will "be discriminated against seventy-five percent of the time in the rental housing market"; they will receive "thirty percent less value for their housing dollar"; they "are twice as likely to live in substandard housing";¹⁰ and they will earn only sixty dollars for every one hundred dollars earned by whites.¹¹ It is also significant that the ratio of the rise in the cost of housing to the rise in household incomes is far less favorable for black households than for white households.¹²

A 1983 report of the National Urban Coalition points out that "[b]etween 1970 and 1980 the median income of all [home] owners ([including] those who were [still paying for] their homes) rose 104 % while the estimated value of [those] homes rose an alarming 300 %."¹³ The report goes on to suggest that "for Black owners, the rise in median income for the same period was 106 %, while the rise in the estimated value of their homes was [only] 213 %."¹⁴ For the nation's black renters, the situation follows a similar pattern. According to The National Urban Coalition report:

Between 1970 and 1980 the median income for all renters rose about 66 %. For Black renters the increase was about 74 %. During the same period, the median increase in rent for all renters was 123 %, while the increase for the Black renters was 129 %. This problem is particularly acute for the Black community when it is noted that 56.1 % of all Black households were renter households.¹⁵

¹⁰ The National Urban Coalition, Peoples Platform (draft) 39 (May 30, 1983).

¹¹ *Id.* at 5.

¹² *Id.* at 95.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Of equal importance to a concern for housing affordability is a consideration of housing availability. The National Urban Coalition offers the following observation with regard to this concern:

Generally, the housing supply in a given market is expanded by new construction, diminished by demolitions and other losses, and either increased or decreased by conversions and mergers. A recent analysis by the Bureau of the Census indicates that "the ability of households to avoid the adverse effects of loss of a dwelling removed from the (housing) inventory or to take advantage of newly constructed housing opportunities is strongly influenced by income levels and location of residence." Both of these factors " . . . work to the disadvantage of Black households in gaining access to a full range of housing opportunities. Many Black households continue to have lower incomes than whites and to reside in older housing located in the more central portions of metropolitan areas (where demolition or other forms of loss are more likely and where new construction—particularly of units at costs that many Blacks can afford—is less likely)." The lack of availability is made worse when the impact of displacement (essentially private sector-induced) is considered. The Bureau of Census noted " . . . during the past decade, Black central-city households were displaced from housing at over four times the rate of white central-city residents. By comparison, during the 1960's, the Black displacement rate was about 2.6 times the white rate."¹⁶

In order to compare the extent of the economic and housing plight of New Jersey's blacks to that of other residents of limited economic means, we must understand what protections and social goals the court set out to accomplish. As suggested earlier, the *Mount Laurel I* court took judicial notice of the fact that only a handful of New Jersey's low and moderate income residents could gain access to "many municipalities [because] of restrictive land use regulations."¹⁷ Consequently, the court held that "a developing municipality . . . 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 . . . including those of low and moderate income."¹⁸

For those who expected the landmark *Mount Laurel I* case to result in the opening up of the suburbs to many who had been

¹⁶ *Id.* at 95-96.

¹⁷ *Mt. Laurel I*, 67 N.J. at 159, 336 A.2d at 717.

¹⁸ *Id.* at 187, 336 A.2d at 731-32.

previously excluded, the result was indeed disappointing. A flood of lengthy and expensive litigation followed *Mount Laurel I*, as New Jersey's more affluent communities strenuously resisted the "undesirable" implications of the new law, analyzing and debating its every detail and weakness. Eight years later, the supreme court endeavored to clarify, once and for all, what was intended by the *Mount Laurel* doctrine. In *Mount Laurel II*, the court declared: "[T]he State controls the use of the land, *all* of the land. . . . It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else."¹⁹

The court found that, in order to satisfy the constitutional requirements of equal protection and substantive due process, the general welfare must be furthered. This would be accomplished through deconcentrating the urban poor by producing low and moderate income housing units in the suburbs. The underlying theory is that the concentration of poverty in urban areas produces social problems which have a negative impact on the state as a whole; therefore, the removal of such concentrations would have widespread positive impact.²⁰

The court further developed this definition of a constitutional basis and social goal in a footnote that reads in part:

The provision of lower income housing in the suburbs may help to relieve cities of what has become an overwhelming fiscal and social burden. It may also make jobs more accessible for the unemployed poor. Deconcentration of the urban poor will presumably make cities more attractive for businesses and upper income residents to return to.

Cities, while most directly affected, are not the sole victims of exclusionary zoning. The damage done by urban blight and decay is in no way confined to those who must remain in our cities. It affects all of us. Violent crime and drug abuse spawned in urban slums do not remain within city limits, they spread out to the suburbs and infect those living there. Efforts to combat these diseases require expenditures of public dollars that drain all taxpayers, urban and suburban alike. The continuing disintegration of our cities encourages business and industry to leave New Jersey altogether, resulting in a drain of jobs and dollars from our economy. In sum, the decline of our cities and the increasing economic segregation of our population are not just isolated problems for those left

¹⁹ *Mt. Laurel II*, 92 N.J. at 209, 456 A.2d at 415.

²⁰ *Id.* at 210 n.5, 456 A.2d at 415 n.5.

behind in the cities, but a disease threatening us all. Zoning ordinances that either encourage this process or ratify its results are not promoting our general welfare, they are destroying it.²¹

In a subsequent footnote, the court set forth a means test for defining low and moderate income. Moderate income was defined as no greater than eighty percent and no less than fifty percent of the median income of the area with adjustments for smaller and larger families. Low income was defined as not exceeding fifty percent of the median income of the area.²² While it seems clear that the court intended the new law to have the effect of deconcentrating urban poverty, it is not as clear whether the court was fully aware of the demographics regarding the poor living in New Jersey's cities. Presumably, the court considered the racial minority plaintiffs before them to be reasonably protected as part of the larger low to moderate income group of which they were a part.

A common perception is that the terms "urban" and "poor" are synonymous with racial minorities. The following data²³ should enlighten many:

- Over fifty-five percent of the 925,000 black residents of New Jersey are concentrated in the ten most populated urban aid municipalities.²⁴
- Over seventy-five percent of the total black population in New Jersey reside in all forty-two urban aid municipalities.
We may conclude that, characteristically, New Jersey's black residents are urban dwellers. Further,
- Only eleven percent of the 6,127,070 white residents of New Jersey live in the ten most populated urban aid municipalities.
- Only twenty-seven percent of the total white population in New Jersey reside in all forty-two urban aid municipalities.

We may conclude from this that, characteristically, New Jersey's white residents are not urban dwellers. In order to assess the demographics accurately, however, overall composition must be considered:

²¹ *Id.* (citations omitted).

²² *Id.* at 221 n.8, 456 A.2d at 421 n.8.

²³ The figures herein are calculated from data derived from STATE DATA CENTER, NEW JERSEY 1980 CENSUS COUNTS OF POPULATION BY RACE AND SPANISH ORIGIN (Mar. 1981).

²⁴ The term "urban aid municipality" refers to any of the 42 municipalities in the State of New Jersey which receive state aid for the purpose of maintaining and upgrading their municipal services, and offsetting local property taxes, pursuant to N.J. STAT. ANN. § 52:27D-178 (West Cum. Supp. 1983-1984).

- In terms of the overall composition of the ten most populated urban aid municipalities in New Jersey, the results are forty-four percent black and fifty-six percent white.
- In terms of the overall composition of all forty-two urban aid municipalities, the results are thirty-one percent black and sixty-nine percent white.

Therefore, while a greater proportion of blacks than whites live in New Jersey's urban areas, there are still significantly more white than black urban dwellers.

Similarly, with regard to income, the number of urban whites far exceeds the number of urban blacks who are eligible for housing pursuant to the *Mount Laurel II* means test:²⁵

- 13,200 black families in the ten most populated urban aid municipalities in New Jersey qualify as low income. 16,506 white families qualify in this category.
- 18,183 black families in all forty-two urban aid municipalities in New Jersey qualify as low income. 37,803 white families qualify in this category.
- 15,331 black families in the ten most populated urban aid municipalities qualify as moderate income. 27,014 white families qualify in this category.
- 20,907 black families qualify in all forty-two urban aid municipalities as moderate income. 59,934 white families qualify in this category.

One could speculate from these demographic data that selection criteria left unmonitored could result in apparent significant success for the *Mount Laurel* mandate without accommodating a single black family. If it is correct to conclude that one of the *Mount Laurel II* court's principal aims was the integration of economic classes throughout New Jersey by way of the deconcentration of urban areas, then based on the above calculations, blacks should occupy any new units created pursuant to the new law in the ratio of 2.1:1 or 3.1:1 white to black.

More specifically, in the category of low income, using the ten most populated urban aid municipalities, a ratio would be created of about 1.1:1 white to black. Using all forty-two urban aid municipali-

²⁵ The figures herein are calculated from data derived from STATE DATA CENTER, NEW JERSEY 1980 CENSUS OF POPULATION AND HOUSING, MUNICIPAL PROFILES, VOLUME V: INCOME AND POVERTY ESTIMATES FOR FAMILIES, HOUSEHOLDS AND PERSONS, Parts A and B (June 1983) [hereinafter cited as MUNICIPAL PROFILES].

ties, the ratio would be closer to 2.1:1 white to black. Similarly, in the category of moderate income, using the ten most populated urban aid municipalities results in a ratio of 2.1:1 white to black, and using all forty-two urban aid municipalities results in a ratio of about 3.1:1 white to black.

Therefore, unless other criteria for reaching the protected class are advanced, facially neutral selection criteria which, when applied to applicants for "*Mount Laurel*" housing tend to upset the ratios set forth above, should be regarded as suspect and rejected as constitutionally impermissible. Aside from a criterion which gives preference to indigenous poor—that is, applicants who currently live in the project area and also live in substandard housing—or to others who are unable to afford to reside in the community where they work, other criteria are likely to prove counterproductive to the goals expressed consistently throughout the entire line of *Mount Laurel* decisions.²⁶

Justice Hall, in *Mount Laurel I*, squarely addressed this problem and gave clear guidance for the structuring of any selection process:

Much industry and retail business, and even the professions, have left the cities. Camden is a typical example. The testimonial and documentary evidence in this case as to what has happened to that city is depressing indeed. For various reasons, it lost thousands of jobs between 1950 and 1970, including more than half of its manufacturing jobs. . . . A large segment of retail business faded away with the erection of large suburban shopping centers. The economically better situated city residents helped fill up the miles of sprawling new housing developments, not fully served by public transit. In a society which came to depend more and more on expensive individual motor vehicle transportation for all purposes, low income employees very frequently could not afford to reach outlying places of suitable employment and they certainly could not afford the permissible housing near such locations. These people have great difficulty in obtaining work and have been forced to remain in housing which is overcrowded, and have become more and more substandard and less and less tax productive. There has been a consequent critical erosion of the city tax base and inability to provide the amount and quality of those governmental serv-

²⁶ The mere proximity of an applicant's workplace to the project, and any criterion which fails to give preference to applicants whose current housing is either substandard or located in urban municipalities, are but a few examples of this shortcoming. See *Mt. Laurel I*, 67 N.J. at 187, 336 A.2d at 731; *Mt. Laurel II*, 92 N.J. at 210 n.5, 456 A.2d at 415 n.5; see also *Madison Township*, 72 N.J. at 556-58, 371 A.2d at 1229-30 (Pashman, J., concurring in part, dissenting in part) (citations omitted).

ices—education, health, policy, fire, housing and the like—so necessary to the very existence of safe and decent city life. This category of city dwellers desperately needs much better housing and living conditions that is available to them now, both in a rehabilitated city and in outlying municipalities.²⁷

Judicial concern for the needs of city-dwellers, however, did not end with Justice Hall's opinion. In *Madison Township*, Justice Pashman offered similar guidance when he observed:

Exclusionary land use practices also contribute directly to the rigid and relentless deterioration of our cities. In recent decades industry and a large number of retail businesses have moved out of the city and relocated in suburban shopping centers and industrial parks. Meanwhile, lower income employees have been forced to remain in the cities. This phenomenon in turn causes two developments—an increase in unemployment among low income workers who cannot afford to reach the new sources of suitable employment and a critical erosion of the urban tax base. . . .²⁸

Concern for commuting distances clearly is not intended to render life easier for one who has already escaped the city's grip. It is instead a reference to the enhancement of job opportunity that closely follows an expansion of housing opportunity. The remedy is intended to expose low income workers to greater job markets by reducing the financial and practical limitations of commuting. A low income applicant who lives within the walls surrounding the cities should be given a higher priority status than one who lives outside those walls.²⁹

Blacks generally do not work in suburban communities in and around areas where *Mount Laurel* housing might be and is being built. This is because of the combined effect of (1) the current lack of affordable housing in those communities; (2) an inability to afford long commutes; and (3) racial discrimination which has blocked them from access to the few jobs and affordable housing units that may have existed.

Placing emphasis on the proximity of the workplace to the project site only perpetuates the vicious cycle which the *Mount Laurel* doctrine seeks to eliminate. Moreover, it produces a constitutionally indefensible "Catch 22": One needs a house near a job but one first needs

²⁷ *Mt. Laurel I*, 67 N.J. at 172-73, 336 A.2d at 724.

²⁸ *Madison Township*, 72 N.J. at 558, 371 A.2d at 1230 (Pashman, J., concurring in part, dissenting in part) (citations omitted) (emphasis supplied).

²⁹ *Cf. id.* (Justice Pashman noted that exclusionary zoning "builds a wall around the cities over which only the well-to-do can escape").

the job to qualify for access to such a house. Notwithstanding their economic limitations, white applicants, unrestrained by racial prejudices, may well have escaped many of the indicia of substandard living. To deviate from the strictest interpretation of the court's mandate is to greatly skew the selection process in favor of whites as opposed to racial minorities. For similar reasons, racial minorities can be properly protected within a group of economically disadvantaged persons only if the "means test" measures actual economic worth and not merely current income. Although a given family satisfies the *Mount Laurel II* means test in terms of current income, if it does not have substandard assets and does not live in a substandard house located in a substandard area, its members are not in that class of persons whose interest the *Mount Laurel II* decision intended to protect. Hence, such a family should not be favored.

The fundamentally fairest combination of criteria must remain the genuinely low or moderate income family living in an urban area in a substandard dwelling. Given the clear state of the law in New Jersey which disallows the use of quotas to remedy even intentional discrimination,³⁰ and the absence of supportive language in *Mount Laurel II* which would have created racial preferences in selection criteria, this first order priority both satisfies the court's stated aims and maximizes the odds that the benefits to a black family will be equal to those accruing to other members of the protected class. If these fundamental rules are not adhered to in the design of selection criteria, blacks will be better off arguing for an open lottery system based only on a fair means test and designated regions of which the project area is a part. At the very worst, at least statewide, blacks make up one in every six low income residents, and one in every nine moderate income residents.³¹

If the tenets of *Mount Laurel II* are carried out in spite of existing negative attitudes and inclinations regarding racial integration, a black "fair share" of newly created units might represent a reasonable expectation. If the inclusion of blacks and other minorities in the larger group of economically disadvantaged persons totally ignores the effects of racial discrimination, however, then a terrible irony will result: The court which espoused so vigorously the legal principle that when determining the validity of land use regulation,

³⁰ Cf. *Lige v. Town of Montclair*, 72 N.J. 5 (1976) (use of racial quota remedy violates N.J. CONST. art. I, para. 5; art. VII, § I, para. 2).

³¹ Calculated from data derived from MUNICIPAL PROFILES, *supra* note 25 and accompanying text.

the “effect” and not necessarily the “intent” is controlling, will have failed to remedy the effects of a long recognized constitutional wrong on members of the *Mount Laurel* protected class.

In that event, the original plaintiff minority group poor (blacks and Hispanics) described by Justice Hall would have to return to the court and insist this time that their more individualized interests and rights be focused upon.