

# The New Jersey Supreme Court Writes Another Chapter In The Mount Laurel Doctrine

Kevin J. Moore

SILLS CUMMIS & GROSS P.C.

In its decision this September in *In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing*,<sup>1</sup> the New Jersey Supreme Court has written another, though likely not the final, chapter in New Jersey's long and often ambivalent and conflicted struggle to provide low and moderate income housing<sup>2</sup> in its suburban communities. In order to understand the importance of the Court's decision and its consequences, one must understand the history of New Jersey's judicially created, constitutional, municipal low and moderate income housing obligation, known as the "Mount Laurel Doctrine."

In the 1970s, the zoning ordinances of New Jersey's rural and suburban municipalities were exclusionary and limited development to single family homes on relatively large lots and to non-residential development.<sup>3</sup> In response, in 1975, in *Southern Burlington County NAACP v. Twp. of Mount Laurel*<sup>4</sup> ("Mount Laurel I"), the New Jersey Supreme Court held that the zoning ordinances of developing municipalities that failed to provide a realistic opportunity for the construction of those municipalities' present and prospective fair share of their regions' need for low and moderate income housing contravened the general welfare and were, thus, unconstitutional.<sup>5</sup> However, there was no significant municipal or legislative response to the Court's ruling and zoning ordinances remained exclusionary.<sup>6</sup>

Therefore, in 1983, in *Southern Burlington County NAACP v. Twp. of Mount Laurel*<sup>7</sup> ("Mount Laurel II"), the Court reaffirmed its holding in *Mount Laurel I*<sup>8</sup> and expanded the constitutional municipal obligation to provide for a realistic opportunity for low and moderate income housing to all municipalities, not just to developing municipalities.<sup>9</sup> In *Mount Laurel II*, the Court further held that the amount of each municipality's fair share of the prospective need for low and moderate income housing had to be a definite, quantifiable number that did not change regardless of how much or how little a particular municipality grew.<sup>10</sup> The Court also held that private litigants could enforce this fair share

obligation through "builder's remedy" lawsuits.<sup>11</sup> The Court left the specific methodology for determining the definite quantifiable number of a municipality's low and moderate income housing fair share obligation to three designated trial level judges who would hear all of the builder's remedy lawsuits in the State.<sup>12</sup> All three trial judges developed essentially the same methodology for determining the municipal fair share obligation.<sup>13</sup>

In 1985, in response to the proliferation of builder's remedy lawsuits arising from the Court's decision in *Mt. Laurel II*, the New Jersey Legislature enacted the New Jersey Fair Housing Act (the "FHA")<sup>14</sup>. The FHA created a process whereby a municipality could, but was not required to, prepare a "housing element,"<sup>15</sup> providing for its present and prospective fair share of its region's need for low and moderate income housing.<sup>16</sup> The FHA further provided that a municipality could obtain "substantive certification" of this housing element from an administrative agency, the New Jersey Council on Affordable Housing ("COAH").<sup>17</sup> If a municipality obtained substantive certification and complied with the provisions of its housing element, it was essentially immune from builder's remedy lawsuits for six years.<sup>18</sup> In 2001, the Legislature amended the FHA to increase this time period to ten years.<sup>19</sup>

Under the FHA, COAH was charged with adopting regulations setting forth the standards for municipalities to follow in preparing their housing elements and in obtaining substantive certification.<sup>20</sup> These standards included the methodology for determining each municipality's fair share of the prospective regional need for low and moderate income housing.<sup>21</sup> From 1987 until 1999, in its "First Round Rules"<sup>22</sup> and "Second Round Rules,"<sup>23</sup> COAH utilized the methodology that the *Mount Laurel* trial judges developed to determine municipal fair share obligations.<sup>24</sup>

However, since 2004, COAH has, through two sets of its "Third Round Rules,"<sup>25</sup> sought to determine the amount of the prospective component of each municipality's fair share obligation based directly and solely on the municipality's growth.<sup>26</sup> Since New Jersey's intermediate appellate court has struck down COAH's Third Round Rules implementing growth share twice, once in 2007<sup>27</sup> and again in 2010,<sup>28</sup> COAH's attempts to implement growth share have created a great deal of uncertainty for real estate developers, affordable housing advocates and municipalities.

This September, in *In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing*,<sup>29</sup> the New Jersey Supreme Court temporarily ended



Kevin J. Moore

this uncertainty. Specifically, the Court reaffirmed *Mount Laurel II*'s constitutional mandate that municipalities provide a realistic opportunity for the construction of their present and prospective fair share of the need for affordable housing.<sup>30</sup> However, the Court held that *Mt. Laurel II*'s definitive, quantifiable numerical remedy for determining this obligation is not constitutionally mandated.<sup>31</sup>

Nevertheless, the Court held, as a matter of statutory construction, that COAH cannot, under the FHA, use a growth share approach to determine the amount of a municipality's prospective fair share obligation.<sup>32</sup> Specifically, the Court stated that the FHA requires that each municipality's prospective fair share obligation must be a definite, quantifiable number.<sup>33</sup> The Court further held that the FHA requires that COAH determine each municipality's prospective fair share obligation based on the prospective affordable housing needs of the affordable housing region in which that municipality is located.<sup>34</sup> The Court determined that COAH's Third Round Rules did not require that each municipality's fair share obligation be a definite, quantifiable number<sup>35</sup> and further that the Third Round Rules determined the prospective fair share obligation on a statewide rather than on a regional basis.<sup>36</sup> The Court held that, thus, COAH's adoption of the Third Round Rules exceeded COAH's authority under the FHA and was *ultra vires*.<sup>37</sup> The Court, therefore, invalidated COAH's Third Round Rules and ordered COAH to adopt new Third Round Rules using a methodology for determining the prospective municipal fair share obligation consistent with the methodology of the Round 2 Rules.<sup>38</sup> The Court Ordered that COAH do this within five months of the Court's decision.<sup>39</sup>

The Court's decision has, therefore, temporarily put an end to growth share and provided certainty to the New Jersey real estate development industry. However, since the Court invalidated the growth share methodology on a statutory rather than on a constitutional basis, the Legislature is free to amend the FHA to implement some form of growth share methodology. Indeed, the Court invited the Legislature to do so.<sup>40</sup>

This aspect of the Court's decision is understandable. The Court was reluctant to confine the Legislature to the "straightjacket" of a single thirty-year-old remedy to meet the constitutional obligation to provide a realistic opportunity for the construction of low and moderate income housing.<sup>41</sup> Further, the Court did not mandate that the Legislature adopt a growth share approach.<sup>42</sup> Rather, the Court held that the *Mt. Laurel II* remedy to provide a realistic opportunity for the construction of low and moderate income housing was not the exclusive mechanism open to the Legislature.<sup>43</sup>

Thus, under the Court's decision, the Legislature can implement a

growth share approach, but is not required to do so.<sup>44</sup> However, a growth share approach increases a municipality's low and moderate income housing obligation on a unit by unit basis for each unit of market rate housing and for each set number of square feet of non-residential development that it allows to be built. This will tend to discourage municipalities from zoning for and approving new development. In conclusion, the Legislature should consider these negative impacts on development when deciding if and how to implement a growth share approach.

1. (A-90 to 94-10) (067126) (2013).

2. Low income housing is housing affordable to a household with a gross income of fifty percent or less of the median income in the region in which it is located, and moderate income housing is housing affordable to a household with a gross income of more than fifty percent but less than eighty percent of the median income in the region in which it is located. See N.J.A.C. 5:80-26.2.

3. See *Southern Burlington County NAACP v. Twp. of Mount Laurel*, 92 N.J. 158, 198, 210 n. 5 (1983) ("Mount Laurel I").

4. 67 N.J. 151 (1975).

5. *Id.* at 174.

6. 92 N.J. at 198-199.

7. 92 N.J. 158 (1983).

8. *Id.* at 199.

9. *Id.* at 215.

10. *Id.* at 215-216 and 257-258.

11. *Id.* at 279-281.

12. *Id.* at 216.

13. In the *Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by New Jersey Council on Affordable Housing*, 390 N. J. Super. 1, 17 (App. Div. 2007), cert. denied, 192 N.J. 72 (2007); see e.g. *AMG Realty Company v. Township of Warren et al.*, 206 N.J. Super. 388 (Law Div. 1984).

14. N.J.S.A. 52:27D-301 et seq.

15. N.J.S.A. 52:27D-310.

16. N.J.S.A. 52:27D-311.

17. N.J.S.A. 52:27D-313.

18. *Id.*

19. *Id.*

20. N.J.S.A. 52:27D-307.

21. *Id.*

22. N.J.A.C. 5:92-1.1 et seq.

23. N.J.A.C. 5:93-1.1 et seq.

24. In *re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing*, (A-90 to 94-10) (067126), slip op. at 14 (2013).

25. N.J.A.C. 5:94-1.1 et seq. and N.J.A.C. 5:97-1.1 et seq.

26. *Id.*

27. See *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by New Jersey Council on Affordable Housing*, 390 N.J. Super. 1 (App. Div. 2007), cert. denied, 192 N.J. 72 (2007).

28. See *In the Matter of the Adoption of N.J.A.C. 5:96 & 5:97 by New Jersey Council on Affordable Housing*, 416 N. J. Super. 462 (App. Div. 2010).

29. In *re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing*, (A-90 to 94-10) (067126) (2013).

30. *Id.* slip op. at 7.

31. *Id.*

32. *Id.* slip op. at 60.

33. *Id.* slip op. at 36-37.

34. *Id.* slip op. at 48.

35. *Id.* slip op. at 35.

36. *Id.* slip op. at 33.

37. *Id.* slip op. at 8, 60.

38. *Id.* slip op. at 59-60.

39. *Id.* slip op. at 59.

40. *Id.* slip op. at 6-7.

41. *Id.*

42. *Id.* slip op. at 6-7, 41.

43. *Id.* slip op. at 6-7, 41-46.

44. *Id.*

**Kevin J. Moore** is Co-Chair of Silles Cummis & Gross's Land Use and Redevelopment Practice Group and argued *In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing* on behalf of NJ-NAIOP before the New Jersey Supreme Court. He is a Member of the firm's Real Estate Department. He focuses on solar energy law, redevelopment, land use, affordable housing, incentives and commercial real estate law. The views and opinions expressed in this article are those of the author and do not necessarily reflect those of Silles Cummis & Gross P.C.

Please email the author at [kmoore@sillscummis.com](mailto:kmoore@sillscummis.com) with questions about this article.