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GENERAL WELFARE AND REGIONAL PLANNING: HOW THE LAW OF UNINTENDED CONSEQUENCES AND THE MOUNT LAUREL DOCTRINE GAVE NEW JERSEY A MODERN STATE PLAN

JOHN M. PAYNE*

INTRODUCTION

The topic of this symposium is state and regional land use planning, not exclusionary zoning or affordable housing. The Mount Laurel doctrine,¹ which requires New Jersey municipalities to provide opportunities for their “fair share” of the regional need for low and moderate income housing,² is this country’s most widely known judicial exegesis on exclusionary zoning and affordable housing. Nonetheless, the two Mount Laurel cases and the process they have spawned, also constitute a major achievement in the modern history of land use planning.

On one level, the argument is obvious to the point of simplicity. Making provisions for the present and future housing needs of all segments of a state’s population should be a key concern of any legitimate planning process. However, the well-documented problems that have arisen in connection with the implementation of the Mount Laurel doctrine have undercut any praise based solely on the cases’ contributions to housing planning. Non-compliance has always been widespread (particularly early on), and the complex formula and rules that have evolved to

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¹ See Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) [hereinafter Mount Laurel I], rev’d, 456 A.2d 390 (N.J. 1983) [hereinafter Mount Laurel II]. Although Mount Laurel I was reversed by Mount Laurel II in 1983, the Mount Laurel doctrine is derived from sections of both cases.

² See Mount Laurel I, supra note 1, at 724 (concluding that municipalities must implement land use regulations that offer an “appropriate variety and choice of housing” and different types of living accommodations).
administer the "fair share" methodology are, in some respects, the antithesis of sound planning. Although there are many interesting topics that could be discussed here, they are more properly left for an affordable housing symposium.

Instead, the two Mount Laurel cases can be used as the starting point for an exploration of the landscape of state and regional planning. As will be shown, the evolution of the Mount Laurel doctrine is the main reason New Jersey is currently able to enjoy the fruits of an adequate State Development and Redevelopment Plan ("SDRP"). Furthermore, the logic of the Mount Laurel decisions exemplify how state and regional plans, which notoriously suffer from under-enforcement in all but a handful of states, can be made more effective, not only in New Jersey but all around the country.

I. BACKGROUND: THE MOUNT LAUREL DOCTRINE AND THE CONCEPT OF REGIONAL PLANNING

In 1975, the first Mount Laurel case established the necessity for regional planning in New Jersey by placing the constitutional fair share housing obligation in the context of regional housing need:

We conclude that every [developing] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity... for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.

... So, when [land use] regulation does have a substantial external impact, the welfare of the state's citizens beyond the bor-


4 Mount Laurel I, supra note 1.
ders of the particular municipality cannot be disregarded and must be recognized and served.\textsuperscript{5}

In crafting the \textit{Mount Laurel I} opinion, Justice Frederick Hall understood that in order to achieve regional fairness in providing low-income housing opportunities, a planning process would be required:

It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.

\ldots

We have previously held that a developing municipality may properly zone for and seek industrial ratables to create a better economic balance for the community \textit{vis-a-vis} educational and governmental costs engendered by residential development, provided that such was "\*\*\* done reasonably as part of and in furtherance of a legitimate comprehensive plan for the zoning of the entire municipality."\textsuperscript{6}

Hemmed in by land use statutes, there was only so much that the court could do about local zoning. Justice Hall nonetheless dropped broad hints about the necessity for regional planning:

Frequently it might be sounder to have more of such housing, like some specialized land uses, in one municipality in a region than in another, because of greater availability of suitable land, location of employment, accessibility of public transportation or some other significant reason. But under present New Jersey legislation, zoning must be on an individual municipal basis, rather than regionally.

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This Court long ago pointed out "\*\*\* the unreality in dealing with zoning problems on the basis of the territorial limits of a municipality." It is now clear that the Legislature accepts the fact that at least land use planning, to be of any value, must be

\textsuperscript{5} \textit{Id.} at 724–26.

\textsuperscript{6} \textit{Id.} at 728–31 (quoting Gruber v. Mayor & Township Comm. of Raritan Township, 186 A.2d 489, 493 (N.J. 1962)).
done on a much broader basis than each municipality separately. . . . Authorization for regional zoning—the implementation of planning—. . . would seem to be logical and desirable as the next legislative step.  

As the litigation that became Mount Laurel I wound its way slowly through the courts, and especially as it became clear that the Supreme Court would intervene to stop exclusionary zoning, several enlightened proposals to create a state-level planning process were considered. All such legislation languished, however, in the face of implacable opposition from a Legislature dominated by suburban interests. The Governor tried to circumvent legislative inertia by Executive Order, tying discretionary state infrastructure grants to Mount Laurel compliance. Moreover, the Governor established a housing study within the executive branch that eventually resulted in what became known as the Housing Allocation Report ("HAR"), an early form of the fair share formula that eventually emerged from Mount Laurel II. Indicative of the political sensitivity of the issue, however, the HAR was circulated in 1978 not only as a "draft," but with the additional caution that it was "tentative and subject to fur-

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7 Id. at 732 & n.22 (quoting Duffcon Concrete Prods., Inc. v. Borough of Creekskill, 64 A.2d 347, 350 (N.J. 1949)).
8 On the day that Mount Laurel I was announced, March 24, 1975, State Senator Martin Greenberg, a close ally of then-Governor Brendan Byrne, symbolically introduced the Comprehensive Balanced Housing Plan Act; it died in committee. See Oakwood at Madison, Inc. v. Township of Madison, 371 A.2d 1192, 1219 n.42 (N.J. 1977). The bill as proposed would have given the Department of Community Affairs ("DCA") the authority to determine what the local affordable housing needs of the population were and would have authorized the DCA to set zoning requirements for each township accordingly. Id. All the township was required to do under the bill was to leave the housing market unrestricted. Id. See generally MICHAEL N. DANIELSON, THE POLITICS OF EXCLUSION 294–300 (1976) (discussing the opposition the bill faced from the legislature); DAVID L. KIRP ET. AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA 114–19 (1995) (discussing various legislative attempts to open up the suburbs in New Jersey).
9 See Exec. Order No. 35 (N.J. 1976) (ordering the Division of State and Regional Planning to "prepare State housing goals to guide municipalities in adjusting their municipal land-use regulations in order to provide a reasonable opportunity for the development of an appropriate variety and choice of housing to meet the needs of the residents of New Jersey"); see also Exec. Order No. 46 (N.J. 1976) (ordering the Division of State and Regional Planning to review and modify the "preliminary housing allocation goals . . . to assure that they take into account current programs designed to revitalize the cities of New Jersey").
10 See Mount Laurel II, supra note 1, at 422, 433, 437 (discussing the HAR and study).
ther public hearings and review.'

In an important 1977 decision, *Oakwood at Madison, Inc. v. Township of Madison*, the Supreme Court hinted that it would use the HAR as a prima facie fair share guide. Before another case came before the Court, however, the newly elected Governor (a Republican who followed a Democrat) rescinded the Executive Orders on which the HAR was based. Seven months later, in *Mount Laurel II*, the Supreme Court had little choice but to back off.

While public and political attention was concentrated on Senator Greenberg's proposed State Planning Act and the stillborn HAR, a little noticed, statutorily authorized planning effort was proceeding within the Department of Community Affairs, the State Development Guide Plan ("SDGP"). Promulgated without fanfare in May 1980, the SDGP had been adopted administratively to qualify for certain United States Department of Housing and Urban Development grant programs, without political vetting and with only limited uses in mind. Indeed, but for the New Jersey Supreme Court, the SDGP was undoubtedly destined for the apocryphal fate of most mid-century "master

\footnote{11}{*Mount Laurel II*, supra note 1, at 437 (citation omitted) (explaining that the New Jersey Division of State and Regional Planning promulgated the HAR as "[o]ne possible resolution of the fair share issue"); see also *Oakwood at Madison*, 371 A.2d at 1215 n.35, 1217 n.37, 1219 n.42 (explaining how the Division of State and Regional Planning was to allocate regional needs).}

\footnote{12}{371 A.2d 1192 (N.J. 1977).}

\footnote{13}{See id. at 1220 (concluding that the term "region" had been adequately defined by HAR and that the "fair share" plan had received "prima facie judicial acceptance").}

\footnote{14}{See Exec. Order No. 6 (N.J. 1982) (voiding, inter alia, Executive Orders 35 and 46, and any regulations stemming from those orders); see also *Mount Laurel II*, supra note 1, at 437 (explaining that although Executive Order No. 6 did not explicitly prohibit the use of HAR, use of it "would not be in keeping with the spirit of the Governor's Executive Order").}

\footnote{15}{The court in *Mount Laurel II* expressed its frustration with the confusion surrounding the *Mount Laurel I* and *Oakwood at Madison* decisions. See *Mount Laurel II*, supra note 1, at 438. The court admitted having "underestimated the pressures that weigh against lower income housing" and it vowed to "begin a process aimed at ultimately eliminating the uncertainty that surrounds these issues." *Id.*}

\footnote{16}{The New Jersey Supreme Court suggested that the State Development Guide Plan promulgated in May 1980 was a "satisfactory alternative" to *Mount Laurel I*. *Mount Laurel II*, supra note 1, at 423. The court implied that among the problems associated with the original plan set forth in *Mount Laurel I* was a lack of official guidance over future state planning. *See id.*}

\footnote{17}{See H. Gottlieb, *For State Planners It's Policy (and Politics)*, 122 N.J. L.J. 601, 620 (1988) (offering a useful summary of New Jersey planning history).}
plans”—"gathering dust on a shelf." As one disgruntled SDGP opponent later said, invoking the hyperbole that seems to infect most state plan debates, "it was a dictatorial document written in the back room by five people." All of that was changed by Mount Laurel II.

II. JUDICIALLY MANDATED STATE PLANNING

In Mount Laurel II, Chief Justice Wilentz described the SDGP as a "satisfactory alternative" to the loose compliance processes established by Mount Laurel I (and, implicitly, as a satisfactory alternative, as well, to the court undertaking its own planning process). He then inflated the SDGP to an authoritative expression of state policy with respect to where growth (and hence Mount Laurel fair share obligations) should occur. No one was fooled by Chief Justice Wilentz's assertion that the SDGP was a legitimate expression of state policy because it "reflects a great deal of thought, preparation, and participation by a wide variety of interested parties." Conspicuously absent from the Chief's itemization of "interested parties" was the New Jersey Legislature. What he really meant was that, a plan obviously being needed, the SDGP could serve as a legitimate document for judicial use because it was based on "proven sound planning concepts" and was "substantially similar, in concept and approach, to various regional planning documents by other [unofficial] entities, such as the TriState Regional Planning Association."

The SDGP is history, and its failings as a planning document need not be restated here. Crafted in obscurity and never hardened in the crucible of political debate, it was at best a temporary solution that could not have borne for long the weight thrust upon it by the court. But it did not have to, and in its brief trajectory across my story, it is one of the brightest stars. This is so for two reasons.

First, as just indicated, in defending the use of the SDGP, the Mount Laurel II Court solidly reinforced the message of Just-

18 Id.
19 Id.
20 Mount Laurel II, supra note 1, at 426.
21 See id.
22 Id. at 424 n.9.
23 Id. at 424.
justice Hall's Mount Laurel I opinion—the importance of "sound" and "regional" planning as a corollary to the constitutional prohibition of exclusionary zoning. The linkage is made by Chief Justice Wilentz's famous observation in Mount Laurel II, in discussing the constitutional basis of the Mount Laurel doctrine, that "the state controls the use of land, all of the land."24 It is because the state (justly) interferes in the ability of private individuals to make land use decisions solely on their own that land use controls must be made subject to fairness review. Both Mount Laurel decisions—Mount Laurel II explicitly in its use of the SDGP—link constitutional fairness to sound regional planning.25 After Mount Laurel II, one can comfortably assert that regional planning is, if not constitutionally mandated, at least of constitutional significance unless municipalities are willing to give up land use powers altogether.

The other reason that the SDGP is so important to New Jersey's planning history is that in Mount Laurel II the court put the power of the courts behind enforcement of "sound, regional planning."26 Suddenly, a document that its drafters thought would be of bureaucratic use mostly to smooth the way for federal grants, was being pored over by planners, lawyers, mayors

24 Id. at 415.
25 See id. (explaining that the state's constitutional obligation is to fairly allocate use of its lands). A state government cannot favor the rich over the poor, it must be representative of all of its citizens. See id.; see also Mount Laurel I, supra note 1, at 725. It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. These are inherent in Art. I, par. 1 of our Constitution, the requirements of which may be more demanding than those of the federal Constitution. Mount Laurel I, supra note 1, at 725 (citing Robinson v. Cahill, 308 A.2d 273, 277, 281–83 (N.J. 1973) and Washington Nat'l Ins. Co. v. Board of Regents, 64 A.2d 443, 447–48 (N.J. 1949)).
26 Mount Laurel II, supra note 1, at 424. The court in Oakwood at Madison, Inc. v. Township of Madison, 371 A.2d 1192 (N.J. 1977), explained the role of the Division of State and Regional Planning in executing their proposed comprehensive housing allocation plan. See id. at 1217 n.37. Some of the factors that the court took into consideration were "(1) the extent of the housing need in the region; (2) the extent of employment growth or decline; (3) fiscal capacity to absorb the housing goal; and (4) availability of appropriate sites for the housing goal." Id. The court felt that by predetermining the "region," the Division of State and Regional Planning would be able to allocate housing need "with relative fairness to all of the . . . municipalities." Id.
and developers, and was being given effect at the level of individual plots of land in *Mount Laurel* litigation.\(^{27}\)

The combination of these two elements—judicial reliance on and enforcement of a “voluntary” state or regional plan as the means to give content to a vaguely worded constitutional obligation to protect “the general welfare,” provides the model for achieving the goal of meaningful state and regional planning. In New Jersey and many other states, there is little or no political will to do so otherwise. Consider what happened next.

### III. THE STATE PLANNING ACT OF 1995

The SDGP was adopted in May 1980. *Mount Laurel II* made it the centerpiece of fair share planning in January 1983. In July 1984, Judge Eugene Serpentelli, one of the three specially designated *Mount Laurel* trial judges, published the first authoritative judicial opinion on *Mount Laurel II* compliance.\(^{28}\) The decision imposed the first specific fair share obligation on individual municipalities at that time.\(^{29}\) It is no coincidence that during the winter of 1984 to 1985, the New Jersey Legislature finally began to undertake serious, positive negotiations looking towards a statutory implementation of the constitutional obligation declared in the *Mount Laurel* cases.\(^{30}\)

The best known result, the New Jersey Fair Housing Act, became effective on July 2, 1985.\(^{31}\) It established the Council on Affordable Housing (“COAH”), an administrative agency which, in combination with statutory incentives designed to minimize Superior Court litigation, was to oversee most *Mount Laurel* com-

\(^{27}\) See Orgo Farms & Greenhouses, Inc. v. Township of Colts Neck, 499 A.2d 565, 567 (N.J. Super. Ct. Law Div. 1985) (determining that a developer’s entitlement to a builder’s remedy, the most valuable outcome for a private litigant in a *Mount Laurel* case, turned on which “growth” classification the land was assigned by the SDGP).


\(^{29}\) See id. at 694 (holding that the question in *Mount Laurel*-type cases should be whether or not the municipality has a reasonable methodology for determining what is “fair share” of low and moderate income housing).

\(^{30}\) See Gottlieb, supra note 17, at 12.

\(^{31}\) The New Jersey Fair Housing Act essentially codifies the *Mount Laurel* doctrine by outlining the key factors that are imperative to make a comprehensive state planning system effective. See N.J. STAT. ANN. § 52:27D-301 (West 1986).
pliance. Less well known is the fact that simultaneously the Legislature finally passed the State Planning Act, which, in protean form, had been on the table since 1976. Unlike the narrow housing focus of the Fair Housing Act, the State Planning Act looked towards the creation of a comprehensive SDRP to replace the much-maligned SDGP. This plan mandated an active "cross-acceptance" process which insured political visibility and large scale participation of, if not the public at large, then at least those "interested parties" which Chief Justice Wilentz had spoken rhetorically about in 1983.

The State Planning Act thrust New Jersey into the small group of states that were giving serious attention to the process of state and regional planning. There was no groundswell of popular support for state planning; indeed, in a state where "home rule" is a potent political platform, the SDRP continued to be viewed with a good deal of suspicion, if not outright hostility. New Jersey now has an adequate state plan and (perhaps equally important) a sufficiently staffed State Planning Commission. These changes can be attributed to the Supreme Court’s recognition of the importance of good planning. Although the Court grasped for the best plan it could find—the old SDGP—that plan wasn’t very good at all. New Jersey now has a better plan, the SDRP. Faced with a choice, and with the recognition that some plan was going to be implemented, it was obviously in most people’s interest to implement the best one that the political system could deliver.

An “unintended consequence” of the two Mount Laurel opinions—a consequence that in the long run may be more enduring than the specific affordable housing rules of those two cases—is that New Jersey now has a workable state plan. But state courts

34 See N.J. STAT. ANN. § 52:18A-200 (West 1985) ( listing the development and conservation objectives to meet the needs of the State of New Jersey).
35 See Mount Laurel II, supra note 1, at 424 n.9 (discussing the distribution of the preliminary draft of the guide plan to “all State agencies, regional and county planning agencies, all municipalities and public libraries”). The 1992 version of the plan is available on the New Jersey website at <http://www.state.nj.us/osp/ospplan2.htm>.
are not lining up to emulate the *Mount Laurel* cases in their own constitutional rulings, and so the specific history in New Jersey cannot serve as a model for other states in need of better planning. The New Jersey experience can be reinterpreted, however, to give it more general interest, as discussed below.

**IV. IMPLEMENTATION OF THE SDRP**

While the SDRP is undeniably a better state plan than its predecessor, the SDGP, it is far from perfect. Its chief failing is that it lacks a meaningful implementation mechanism for its finely wrought policies. This is no surprise. At the time the SDRP was being formulated, the kind of political consensus that would have resulted in a plan with enforcement "teeth" simply was lacking in New Jersey. The contrast with states whose plans had sufficient enforcement mechanisms is instructive. The strength of Oregon's plan, for example, can be traced to the legislature's recognition of the fact that Oregon's pristine environment would likely attract the attention of many people wishing to migrate from the eastern part of the United States and Northern California. They recognized that without carefully managed growth boundaries, their beauty and the source of their prosperity would soon turn to sprawl.\(^{36}\) Lacking the consensus that Oregon (and to some extent Florida and Vermont as well) had developed, the New Jersey State Planning Act pulls its punches and simply contains no language at all dealing with enforcement of the SDRP. Revealing the underlying politics of state planning, however, the SDRP itself declares explicitly that "[t]he State Plan is not a regulation but a policy guide for the State, regional and local agencies to use when they exercise their delegated authority."\(^{37}\)

New Jersey is probably typical of the ambivalence that most states display towards state and regional planning. In this respect, the current SDRP is procedurally not much of an improvement on its SDGP predecessor. Growth versus no-growth

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\(^{36}\) *See generally* Planning the Oregon Way 71–75 (Carl Abbott et al. eds., 1994) (discussing the historical basis for Oregon's plan and its enforcement mechanisms).

\(^{37}\) New Jersey State Planning Commission, New Jersey State Development and Redevelopment Plan 6 (1992) [hereinafter SDRP] (discussing the proper application of the state plan).
decisions—the essence of modern state planning—are inherently contentious. Landowners and developers stand to gain or lose large profits, municipalities worry about tax ratables, and environmentalists spring to the defense of obscure flora and fauna. Any competent plan must be prepared to at least address these kinds of issues. Moreover, a plan proponent who enters the fray with an a priori understanding that state plan compliance is voluntary (meaning that it can be ignored at will) might as well stay home and write angry letters to the editor instead.

Against this background, some of New Jersey's post-SDRP experience has been predictable. New Jersey's Governor Whitman, an astute reader of the public mood, has drawn national attention and favorable notice locally by inveighing against "sprawl" in her second inaugural address. She has repeatedly called attention to the "smart growth" premise of the SDRP. But when it came time for her to fashion a plan of action, she opted for and successfully passed a dramatic, billion-dollar ten-year bond proposal. The proposal, backed by a dedicated portion of sales tax revenue, was put forth to enable the state to purchase environmentally sensitive land. No hint of giving the SDRP regulatory force ever infiltrated this campaign.

There have been, however, two related lines of activity that give some encouragement to planning advocates. First, backdoor plan enforcement has begun to evolve through incorporation of plan criteria into administrative agency rules that do have the force of law. Second, plan criteria are beginning to be noticed and applied by courts, bringing the process full circle to where it began with Mount Laurel I and II. Neither of these lines of development could be called robust at this point. They do suggest, however, a blueprint for how state and regional planning advocates could devise a campaign for the long haul.

38 Governor Whitman stated, "[s]o often, what was natural land two or three years ago is now a shopping center or a housing development .... Every part of New Jersey suffers when we plan haphazardly. Sprawl eats up our open space. It creates traffic jams that boggle the mind and pollute the air." Christine Todd Whitman, Second Inaugural Address (Jan. 20, 1998) <http://www.state.nj.us/inaug/inaug.txt>.

39 See id. (describing a transformation in New Jersey through adding new homes, redeveloping property, and establishing funds for neighborhood projects).

40 See Jennifer Preston, Referendums on Horse Racing and Open Spaces Approved—the Ballot Questions, N.Y. TIMES, Nov. 4, 1998, at B14 (discussing the ballot initiatives approved by New Jersey voters).
V. INDIRECT ENFORCEMENT OF THE STATE PLAN: ADMINISTRATIVE AGENCY ACTION

Administrative agencies are bound to follow their own regulations. Administrative agencies—most notably the Department of Transportation ("DOT") and the Department of Environmental Protection ("DEP")—control most of the infrastructure construction (highways) and permitting (sewers and water) upon which land development occurs. If these departments conform their infrastructure decision-making to the criteria of the SDRP, the state plan would, for all practical purposes, have the force of law.

The Governor could simply order the executive agencies under her control to implement the state plan by rule making, an action that would seem straightforward in light of her apparent embrace of the SDRP. Not only has that not happened, but the reaction to the one timid step that the DEP has taken indicates the difficulties to be encountered when a formal state plan confronts the mix of law, finance, and politics that governs most agency action. The DEP Commissioner issued an internal order requiring DEP officials to "consider" the SDRP before making regulatory decisions. The New Jersey State Builders Association (which has never seen an acre of the Garden State that it did not consider suitable for development), promptly challenged the order as facially invalid on administrative law grounds. The Builders Association argued that formal rule making was required. Moreover, the Builders Association also pointed to the "not regulatory" language from the plan itself. In its baldest terms, the builders' nonsensical argument was that governmental agencies should not be able to consider the state plan, despite the years of work and millions of dollars it had consumed. In effect, the Builders Association argued that as a matter of law, a master plan could only gather dust on a shelf. The lower courts dismissed the builders' lawsuit, and the Supreme Court declined re-

41 See County of Hudson v. Department of Corrections, 703 A.2d 268, 274 (N.J. 1997) (citing In re Waterfront Dev. Permit, 582 A.2d 1018, 1022 (N.J. Super. Ct. App. Div. 1990) ("'For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate the rules.'" (quoting Pacific Molasses Co. v. FTC, 356 F.2d 386, 389-90 (5th Cir. 1966))); see also In re Cafra, 704 A.2d 1261, 1271 (N.J. 1997) (indicating that administrative agencies must follow their own regulations once promulgated).
view, but only on the basis that until some actual decision was
made by an official after "considering" the SDRP, the issue was
not ripe for review.\footnote{See New Jersey Builders Ass'n v. New
demonstrate[d] that the administrative order under review ha[d] adversely affected
members of the Builders Association").} This is hardly a ringing endorsement of the
value of "sound regional planning."

There is only one explicit, rule-backed agency embrace of the
SDRP and that has come from none other than the COAH, which
oversees the \textit{Mount Laurel} process. By formal rule adoption,
COAH requires that low and moderate-income housing plans be
consistent with the SDRP in order for the municipality to receive
an all-important "Substantive Certification." Substantive Certi-
fication is important, because it is the formal agency action that
pronounces the municipality in compliance with the \textit{Mount Lau-
rel} doctrine.\footnote{See N.J. ADMIN. CODE tit. 5, § 5:93-5.4 (1999) (requiring that new construc-
tion be in conformance with the State Development and Redevelopment Plan).} Although the SDRP does not have the force of law,
the rules of administrative agencies are enforceable. By incorpo-
ration of relevant portions of the SDRP into its own rule structure,
literally the only place in state government where the SDRP can
be enforced, as opposed to talked about, is before COAH. This
fact undoubtedly explains why the Builders Association was so
anxious to prevent even a modest initial foray by the DEP into
incorporating the SDRP policy structure.

The reason why COAH alone of all state agencies has taken
so aggressive a view of the state plan is simple. Because of
\textit{Mount Laurel I} and \textit{Mount Laurel II}, and the legislative enact-
ments that followed, COAH has to have a plan upon which it can
base its allocation of fair share obligations. It would have been
awkward, to say the least, for COAH to have turned its back on
the very plan, the SDRP, that owes its existence to the \textit{Mount Laurel} process.\footnote{See Van Dalen v. Washington Township, 576 A.2d 819, 824 (N.J. 1990) (ac-
knowledging the SDRP as the successor to the SDGP that was mandated to be used
by \textit{Mount Laurel II}).}

There is reason to emphasize COAH's formal, rule-based
adoption of the SDRP beyond the power that it gives the agency
to require plan compliance. It is not unknown for administrative
agencies, beset by the kinds of competing forces described above,
to cut corners in the enforcement of their own rules. Advocates of all stripes, from environmentalists to road builders, have learned how to sue agencies to force them into compliance with their own rules. To take our example, COAH having conferred legally enforceable status on the SDRP by rule making now has to share that enforcement power with private litigants who can ask the courts to apply the rules (and the SDRP) to their benefit. The genie is out of the bottle and cannot be recaptured. This is exactly what has happened.

In as of yet unreported litigation involving Hillsborough Township, New Jersey, 45 COAH "substantively certified" a compliance plan that involved the development of a 3000-unit, age-restricted inclusionary development on a 742-acre site which was located primarily in SDRP Planning Area 4 (rural) and Planning Area 5 (environmentally sensitive). 46 The proposal could not possibly meet the SDRP criteria for the limited, carefully controlled amount of development that is permitted in these planning areas. Initially, however, COAH (with the unfortunate cooperation of the State Planning Commission staff) approached Hillsborough's "plan" in the business-as-usual mode that is all too familiar to land use lawyers. Relying on a series of "waivers" and questionable interpretations of state plan policies, it managed to conclude that the Hillsborough proposal was not inconsistent with the SDRP. At this point, New Jersey Future, a private watchdog group sued, and the pressure that the lawsuit generated eventually forced the township to effectively abandon its own plan. At this point COAH, which had been opposing New Jersey Future's arguments vigorously, had no choice but to rescind the grant of substantive certification. But in a major victory for proponents of the SDRP, COAH went further and in a written decision told Hillsborough that any resubmitted compli-


46 See SDRP, supra note 37, at 110–17 (containing a general description of the rural planning area and the environmentally sensitive planning area).
The Hillsborough saga has been closely followed by the housing and development communities and by the League of Municipalities, and subsequent to the filing of the Hillsborough lawsuit, both COAH and the State Planning Commission have tightened their adherence to state plan policies in the context of inclusionary zoning proposals. Hillsborough is at best a modest first step, but it illustrates how incremental progress can be made. In 1975, Justice Frederick Hall was a visionary on "sound regional planning." Through all the tumult of the ensuing years, however, the core requirement of the plan has been retained. By following a path that is almost wholly unanticipated, New Jersey has now begun to find a way to make its "non-regulatory" SDRP useful in actually guiding growth and change in the state.

VI. Beyond Mount Laurel: Enforcing the State Plan in the Courts

There is, however, a risk in all of this. As noted earlier, New Jersey is singular in its Mount Laurel doctrine, and even if other states were following suit (which they are not), implementation of comprehensive, statewide planning should not be ridden solely on the back of affordable housing initiatives. COAH is, at best, an agency of limited jurisdiction. Indeed, to the extent that statewide planning is anathema to developers, COAH-based enforcement risks providing a perverse incentive to avoid low-income housing to avoid the SDRP. So the question becomes,

47 The COAH decision is unreported.

48 Low-income housing providers complain, not totally without reason, that insisting on compliance with the SDRP through the COAH rules adds an extra hoop to jump through that only inclusionary developers have to endure. Because the SDRP is non-regulatory, they argue, a competing developer could propose luxury-only housing, or a "big box" shopping mall, without having to think twice about statewide planning criteria. What this argument ignores is that without the Mount Laurel/COAH "hook," a municipality might very well say "no" altogether to these alternate forms of development; state plan compliance may be an acceptable price to pay for a developer which has learned (to its profit) that the Mount Laurel doctrine can be used as a wedge to open up an otherwise closed town. This is an argument about affordable housing policy, however, not one about the state plan. To the extent that the current, limited enforcement of the SDRP occurs primarily through COAH is bad housing policy, however, it also is bad planning policy generally, and reinforces the need for a broader enforcement mechanism.
can the evolving techniques by which the SDRP is beginning to be enforced in COAH cases be applied in a more general way?

The answer is "yes," and as intimated above, the Mount Laurel cases provide a model for how. Mount Laurel teaches that land use regulation must conform to the general welfare in order to be constitutional. Application of this "general welfare" criterion is not a special requirement of affordable housing cases alone. Serving the "general welfare" is the ancient formulation that justifies (and therefore becomes a requirement for) any exercise of the "police power," the general power of government to interfere in private decision making.49 It is commonplace in ordinary land use litigation that the challenger asserts that the zoning decision does not satisfy the police power criterion, i.e., that it is arbitrary, and it is just as commonplace that the government responds that its decision does indeed serve the general welfare.

It is also commonplace in land use litigation that, when the general welfare criterion is put in issue, courts tend to defer to the democratic decision making processes, i.e., they give deference to what the government asserts to be the general welfare. This is for the completely practical reason that courts have no adequate way, consistent with representative democracy, to make their own "general welfare" decisions.50 Explicit departure from that judicial norm is one of the things that made Mount Laurel I so controversial. That in turn is why Chief Justice Wilentz strained to find, in the SDGP, a suitable expression of state policy to substitute for the court's own forays into housing planning.

Thus, the general proposition comes to this. All land use disputes put in issue the question of whether the general welfare, as measured not only by local, but also by inter-local, regional, and state concerns, has been served. A properly enacted land use plan is a presumptively appropriate indicator of what land use policies are needed to serve the general welfare, subject to the

49 See Munn v. Illinois, 94 U.S. 113, 147 (1877) (containing a classic statement, drawn from federal law but in explanation of the meaning of the state's police power).

50 See generally DANIEL R. MANDELMER, LAND USE LAW § 1.12 (3d ed. 1993) (discussing how courts generally apply a presumption of constitutionality to land use regulations); Daniel R. Mandelker & A. Dan Tarlock, Shifting the Presumption of Constitutionality in Land Use Law, 24 URB. LAW. 1, 7–8 (1992) (same).
very important qualification that the plan has been drafted, debated, and decided at the level of the jurisdiction whose interests are being asserted. The New Jersey Supreme Court in *Mount Laurel I* reversed the presumption of constitutionality precisely because parochial local interests, rather than the broader regional interests affected by exclusionary zoning, were the only ones engaged in the law-making process.

Courts may not be able to compel the creation of such general welfare plans, but when a sound state or regional plan exists, it should carry, at least to some degree, a presumption that it embodies the constitutionally required attempt to serve the general welfare. When individual land use decisions are challenged, courts should recognize that decisions consistent with a state or regional plan presumptively serve the general welfare, insofar as plan-related issues are before the courts. Conversely, and most importantly, decisions inconsistent with the state or regional plan are presumptively inconsistent with the general welfare and thus should bear a heavier burden of justification. This does not involve judicial usurpation of legislative or executive powers since the plans that are used as reference points remain within the control of the political branches.\(^5^1\)

Without articulating a general theory, and without any SDRP issues having yet reached the New Jersey Supreme Court, the lower courts are nonetheless inching in the direction suggested. In *Sod Farm Associates v. Springfield Township*,\(^5^2\) the Appellate Division affirmed a trial court decision permitting the municipality to change its mind about development along a major highway corridor, relying in part upon the SDRP, which was not in existence when the initial decisions were made. Justifying the reasonableness of the municipality's change of heart, the Appel-

\(^{5^1}\) Rigid boilerplate rules are almost always unworkable in the fluid, policy-driven context of land use law, and I do not mean to suggest that a presumption of constitutionality should operate so mechanically as to preclude any result inconsistent with the plan. Nor do courts apply rules of construction so mechanically very often. Even a plan properly drafted at the appropriate level of regionalism may contain features that are arbitrary or unfair to the point of being invalid, and a court should not hesitate to so rule, just as it would in any other case. Chief Justice Wilentz was well aware of this problem in *Mount Laurel II*, and he was at pains in discussing the SDGP to leave litigants the opportunity to establish in particular situations that the SDGP-based result was inappropriate. *See Mount Laurel II, supra* note 1, at 431-33.

late Division stated, "[o]bviously, when the State Plan targeted Springfield Township to remain rural, the township had to reconsider its earlier planning for a commercial corridor along Route 206."53

More recently, in *Kirby v. Bedminster Township*,54 an unreported trial court decision, a landowner in wealthy, semi-rural Bedminster Township challenged a town-wide rezoning that increased his minimum lot size from roughly six to ten acres. The court, in holding for the municipality, emphasized that Bedminster, virtually alone among New Jersey municipalities, had taken advantage of an option feature of the State Planning Act called "consistency review"55 and had sought from the State Planning Commission a declaration that its land use ordinances (including the challenged rezoning) were consistent with the SDRP. The State Planning Commission had found that they were. Of particular interest in the *Kirby* case is that the court-appointed expert, a careful and well respected New Jersey planner, testified that the plaintiff's land, which was somewhat isolated from the main part of the zone and was close both to an interstate highway and to existing infrastructure in a neighboring municipality, could plausibly have retained its six-acre zoning, although he also found that the ten-acre rezoning was supportable. It was, in the expert's words, a "fairly debatable" choice.56 But in deferring to the municipality's decision, and dismissing the landowner's complaint, the court went on to add that "[i]t is reasonable to consider [the SDRP] as supporting the planning judgment of Bedminster."57

*Kirby*, which is currently pending on appeal, is an especially significant model because it demonstrates not only how the

53 *Id.* at 1060 (rejecting an argument that the township had had improper motives, i.e., that it had acted arbitrarily). The trial judge stated in part that "its designation in the recently completed State Development Plan as a 'Rural Planning Area'... strongly buttress[es] the [Planning] Board's conclusion that preserving and maintaining agricultural lands is a significant zoning and planning policy initiative and not simply a pretextual argument to exclude housing." Sod Farm Assocs. v. Springfield Township Planning Bd., 688 A.2d 1125, 1133 (N.J. Super Ct. Law Div. 1995).


56 See *Kirby*, No. SOM-L-2464-4 PW, at 21.

57 *Id.* at 14.
courts can give practical effect to the concept of state and regional planning, but also, in the consistency review, showing how municipalities can use the state plan positively for their own purposes.\textsuperscript{58} Note also that it would require only a small paraphrase of the actual language quoted above for a different court in another case to say, where the decision was inconsistent with the state plan, "[it] [would not] be reasonable to consider [the SDRP] as supporting the planning judgment" of the municipality.\textsuperscript{59}

These are tantalizing tidbits. \textit{Sod Farm} and \textit{Kirby} hardly add up to a "general welfare" movement in state and regional planning law. But, small as they are, these steps are also very real. The existence of the state plan helped to decide each of the cases, even if the cases might well have been decided the same way without the state plan. Indeed, the interstitial nature of these small steps may be exactly what is required, if adjudication is to eventually prod legislatures, governors, and mayors into taking the regional planning process seriously. Both decisions fit comfortably within the larger framework of land use adjudication, and thus they do not risk the major controversy, and the major obstructionism, that the two \textit{Mount Laurel} cases so famously stirred up.

Justice Frederick Hall, the author of \textit{Mount Laurel I}, seems to have genuinely believed in the idea of state and regional planning. If an unintended consequence of his long fight to establish the \textit{Mount Laurel} doctrine in the field of affordable housing is to establish a foundation of legal principle under the concept of multi-jurisdictional planning generally, his vision will have been well served. Small steps make a long journey.

\textsuperscript{58} I have filed an amicus curiae brief in the Appellate Division on behalf of New Jersey Future (the appellant in \textit{In re Petition for Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County, No. A-5349-95-T1} (N.J. Super. Ct. App. Div. Jan. 7, 1997)), supporting the court's use of the SDRP.

\textsuperscript{59} \textit{Kirby}, No. SOM-L-2464-4 PW, at 14.