

THE NEW JERSEY FAIR HOUSING ACT
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[After the legislature failed to adopt conflicting resolutions on the *Mount Laurel* doctrine, including a resolution for a constitutional amendment intended to repeal the doctrine, the legislature] enacted a new Fair Housing Act, N.J. Stat. §§_52:27D-301 to -334, in order to satisfy “the constitutional obligation enunciated by the Supreme Court” in the *Mount Laurel* cases and to provide for “resolution of existing and future disputes involving exclusionary zoning” through “the mediation and review process” set forth in the Act rather than by litigation, and “to provide various alternatives to the use of the builder’s remedy as a method of achieving fair share housing.” (*Id.* §_52:27D-303.)

The New Jersey Fair Housing Act establishes a new state agency, a Council on Affordable Housing, with “primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations.” N.J. Stat. §_52:27D-304. This means that the Council, in cooperation with New Jersey municipalities, has the responsibility for dividing New Jersey into “housing regions” and establishing the local “fair shares” of low- and moderate-income housing to be assigned to each municipality. The Council, since its establishment, has divided the state into six regions, each consisting of two to four counties; has established guidelines for determining the fair shares for each municipality; and has made an estimate of the total need for low- and moderate-income housing for the state and for each region. The Council is authorized to certify municipal housing plans, including its fair share estimates, and has the power to modify the fair share estimate submitted by municipalities.

The heart of the New Jersey Fair Housing Act is N.J. Stat. §_52:27D-310, which provides as follows:

A municipality’s housing element shall be designed to achieve the goal of access to affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing, and shall contain at least:

- a. An inventory of the municipality’s housing stock by age, condition, purchase or rental value, occupancy characteristics, and types, including the number of units affordable to low and moderate income households and substandard housing capable of being rehabilitated...
- b. A projection of the municipality’s housing stock, including the probable future construction of low and moderate income housing, for the next six years...
- c. An analysis of the municipality’s demographic characteristics, including but not necessarily limited to, household size, income level and age;
- d. An analysis of the existing and probable future employment characteristics of the municipality;
- e. A determination of the municipality’s present and prospective fair share for low and moderate income housing and its capacity to accommodate its present and prospective housing needs, including its fair share for low and moderate income housing; and
- f. A consideration of the lands that are most appropriate for construction of low and moderate income housing and of the existing structures most appropriate for conversion to, or rehabilitation for, low and moderate income housing, including a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing.

N.J. Stat. §_52:27D-311 requires a municipality to “establish that its land use and other relevant ordinances have been revised to incorporate the provisions for low- and moderate-income housing” contained in its housing plan element; and further requires a municipality, in

preparing the housing plan, to “consider the following techniques for providing low- and moderate-income housing within the municipality, as well as such other techniques as may be published by the council [Council on Affordable Housing] or proposed by the municipality”: ... [These techniques include rezoning at “densities necessary to assure the economic viability” of inclusionary developments; total residential zoning necessary to achieve a municipality’s fair share; measures to keep low and moderate income units affordable; a plan for infrastructure expansion and rehabilitation, if necessary; donation of municipal land; and use of public funds.] Compliance with N.J. Stat. §§_52:27D-310 and -311 is a prerequisite to municipal exercise of the zoning power because *id.* §_40:55D-62 requires municipal adoption of “the land use plan element and the housing plan element” of the municipal “master plan” before the municipality can either adopt or amend a zoning ordinance....

Sections 52:27D-313 and -314 provide for “substantive certification” of municipal housing plan elements if they are consistent with the Council’s criteria and guidelines and “make the achievement of the municipality’s fair share of low and moderate income housing realistically possible.” Section 52:27D-315 requires the Council to engage in a “mediation and review process” ... [when there is an objection to a municipality’s petition for substantive certification or on the request of any person instituting *Mount Laurel* litigation.] If the mediation efforts are unsuccessful, §_52:27D-315 requires the matter to be transferred to the Office of Administrative Law, where it will be heard by an administrative law judge.... And under §_52:27D-317, in any exclusionary zoning case filed against a municipality which has a substantive certification and in which there is a requirement to exhaust the review and mediation process, the validity of the municipality’s “fair share plan” and implementing ordinances will be presumed; the presumption is rebuttable only by “clear and convincing evidence that the housing element and ordinances ... do not provide a realistic opportunity for the provision of the municipality’s fair share of low and moderate income housing.”

Flexibility in achieving the purposes of the Fair Housing Act is provided by N.J. Stat. §_52:27D-312 and -323. Section 52:27D-312 authorizes a municipality, after substantive certification of its housing plan element by the Council on Affordable Housing, to transfer up to fifty percent of its “fair share” housing units (not including any part of its “indigenous need”) to another municipality in the same region by a “regional cooperation agreement,” subject to the approval of the Council and County Planning Board. At least one-half of the units transferred must be in the low-income category. Regional cooperation agreements provide for monetary contributions by the “sending” to the “receiving” municipality (usually \$15,000 to \$25,000 per unit at the present time), and state funds are available to the “receiving” municipality to assist in the rehabilitation of older housing for low- and moderate-income persons. One commentator asserts that “[r]egional contribution agreements ... provide a way for suburban municipalities to compensate cities for the burden they bear as a result of the suburbs’ exclusionary zoning laws” — the burden of absorbing “poor and underemployed people who are drawn to the region by its economic development but who cannot earn wages sufficient to enable them to afford decent housing there” — and concludes that “regional contribution agreements” may well prove ineffective in correcting inequities as between suburbs and central cities. See McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 Temple L.Q. 665 (1987) at 666, 667, 691. Another commentator states that “regional contribution agreements” may aid in the revitalization of the state’s older urban centers, but also observes that, “to the extent the new inexpensive housing is ... placed in older urban centers, the program does not deal with some of the broader issues involved in exclusionary zoning — access to new

suburban jobs and to better suburban schools.” See 3 N. Williams, *American Land Planning Law* §_66.61.50 (1989) (Cum. Supp. at 13 and n. 14)....

The New Jersey Fair Housing Act was challenged almost immediately by land developers and public interest groups who were unhappy with the basic legislative decision to shift control over suburban housing and zoning from the three “*Mount Laurel* judges” provided for in *Mount Laurel II* to the Council on Affordable Housing.... Ultimately, a dozen cases were consolidated for argument and decision. In a unanimous decision, the New Jersey Supreme Court sustained the Act as against all challenges. *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986).

In *Hills*, the court viewed the scheme set up by the Fair Housing Act as thoroughly consistent with the goals the court had sought to achieve in *Mount Laurel II*, and as superior to the scheme of judicial administration established by *Mount Laurel II* to achieve those goals. The court found a legislative intent that all court proceedings should be transferred to the Council on Affordable Housing, and narrowly construed the standard for refusing transfer — “manifest injustice” — as applicable only in exceptional cases where, because of some special circumstance, delay would make construction of affordable housing impossible. The court further held that the Act was not unconstitutional because it would delay fulfillment of the *Mount Laurel* “fair share” obligation too long, noting that there was “no constitutional timetable implicit in this obligation” and that “[t]he delay caused by the Act represents the time needed by the Council to do its job well.”...Although the court recognized that it was possible that “the Act simply will not achieve the construction of lower income housing,” it said that it could not declare the Act unconstitutional on the basis of mere “speculation,” and that the presumption of constitutionality must prevail. But the court indicated that it was not relinquishing its right to reassert judicial control in ringing language:

No one should assume that our exercise of comity signals a weakening of our resolve to enforce the constitutional rights of New Jersey’s lower income citizens. The constitutional obligation has not changed; the judiciary’s ultimate duty to enforce it has not changed; our determination to perform that duty has not changed.