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Expanding the Boundaries of Law and Cities

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When modern-day presidential candidates press their case to the American people in a national election, they are likely to spend most of their time and energy appealing to suburban voters. Both the substance of their speeches and the location of their campaign stops will reflect the fact that America has become in many ways a nation of suburbs rather than cities.

No observer of the American scene has been more perceptive, and presciently apprehensive, about the implications of this movement of people and jobs to the suburbs than Charles M. Haar, the Harvard Law School professor and author of an important new book entitled *Suburbs Under Siege*.[1] Citing the demographic trends of recent decades, he writes that America has become the "first and premier suburban nation."[2]

For Professor Haar, the most striking and disturbing aspect of suburban growth has been its exclusivity. Poor and minority families

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1. CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996).

2. *Id.* at 4.

remain locked in central cities, frequently excluded by suburban zoning laws that deny them the housing opportunities that have been an integral part of the American dream for half a century.[3]

In the Nation's most suburbanized state, New Jersey, the problem took on such serious proportions that the state's highest court issued a series of landmark judicial decisions. These cases, known as the *Mount Laurel* cases after their namesake suburb, the Township of Mount Laurel, are the subject of Professor Haar's latest book.

Professor Haar tells the story of pathbreaking litigation spanning over a decade in which the New Jersey Supreme Court struck down suburban zoning ordinances that severely restricted lower-income housing development. In its 1975 *Mount Laurel I* decision,[4] the court required suburban zoning ordinances to permit the development of housing for a fair share of the region's lower-income housing needs. In the 1983 *Mount Laurel II* decision,[5] the court went dramatically further and imposed on many suburbs the affirmative obligation to use subsidies and innovative zoning techniques to provide for the construction of lower-income housing.

The importance of these cases, and Professor Haar's book, extends far beyond New Jersey. The *New York Times* reported the *Mount Laurel II* decision on its front page.[6] Other national and specialized trade press publications[7] analyzed these decisions which, for the planning law community, became the spotlight of professional conferences for years. Several other state courts have held that municipalities have an obligation to consider regional housing needs in their zoning ordinances.[8] Other state and federal policymakers are wrestling with ways to reduce

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3. *See generally* ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA (1994); WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDER CLASS AND PUBLIC POLICY (1987).

4. Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975) (*Mount Laurel I*).

5. Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*).

6. Joseph F. Sullivan, *Jersey Ruling Aids Housing for Poor*, N.Y. TIMES, Jan. 21, 1983, at A1.

7. *See, e.g.*, Leonard A. Zax & Jerold S. Kayden, *A Landmark in Land Use*, NAT'L L.J., Mar. 14, 1983, at 11.

8. *See* 3 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND USE PLANNING LAW: LAND USE AND THE POLICE POWER §§ 66.40-.43 (1985).

regulatory and discriminatory impediments to affordable housing developments.[9]

Adding a human dimension that so rarely flows from appellate opinions, Professor Haar tells the story of Ethel Lawrence and her family, the original plaintiffs in the *Mount Laurel* litigation.[10] Ethel Lawrence, born and raised in Mount Laurel, where her family had lived for seven generations, resided in the largely rural area of the township that was home to much of the township's African-American population. She helped found a neighborhood action committee that planned to build about a hundred units of lower-income housing—a development at variance with Mount Laurel's minimum-acre zoning ordinance. After the township refused to amend the zoning ordinance, a group of ministers referred the committee to organizations willing to press the case, including the Southern Burlington and Camden chapters of the NAACP. Ethel Lawrence, together with her daughter, Thomasine, who had moved in with her after living in a converted chicken coop in Mount Laurel, was instrumental in bringing a class-action lawsuit against the town. Ethel Lawrence never dreamed, she reported later, how extensive the lawsuit would be, how much was involved, and how society would react.

After the widely publicized *Mount Laurel I* decision, the Township responded by rezoning three widely scattered plots, constituting less than one-quarter of one percent of its land, to allow for the construction of lower-income housing units. In the eight year period between the two *Mount Laurel* cases, however, not a single unit of lower-income housing was ever built. The new housing that did appear was located in the large subdivisions of upper- and middle-income houses.

The New Jersey Supreme Court announced that it would once more hear the *Mount Laurel* case, and Professor Haar describes the mysterious actions surrounding this pronouncement. After the court took the newer case, it did nothing for two years. Then, in May 1980, the court issued an extraordinary request, sending out a series of twenty-four written interrogatories resembling, as Professor Haar suggests, "the questions a law school professor might include on an examination in a land-use course," asking that the lawyers focus on answering them in their oral

9. *See, e.g.*, Advisory Commission on Regulatory Barriers to Affordable Housing, "NOT IN MY BACKYARD": REMOVING BARRIERS TO AFFORDABLE HOUSING (1991).

10. HAAR, *supra* note 1, at 3-4.

arguments.[11] For example, one question said: "Discuss the function of expert planners in exclusionary zoning cases."[12]

The oral arguments lasted an unprecedented three days in October of 1980. The interested parties and the public awaited the judicial response for years and, once again, nothing happened. Finally, in January of 1983, Chief Justice Robert N. Wilentz delivered the courts' unanimous opinion.[13]

The judges were clearly angered by the fact that *Mount Laurel I* did not result in any lower-income housing development. The Chief Justice complained:

> Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe there is widespread noncompliance with the Constitutional mandate of our original opinion in this case.[14]

The court held that municipal land-use regulations failing to provide for a fair share of the housing needs of lower-income families in the region constituted an abuse of the police power and violated the state constitutional requirements of substantive due process and equal protection.[15] In addition, the court took the far-reaching step of requiring New Jersey municipalities in designated growth areas to use affirmative measures to make it realistically possible for the construction of lower-income housing to occur.[16]

The *Mount Laurel II* court also suggested the use of a "builder's remedy," in which the plaintiff-developer's project is in effect subject to approval by the trial court.[17] This suggestion proved to be one of the most potentially powerful and controversial elements of *Mount Laurel II.*

In a footnote, the court noted that the United States Department of Housing and Urban Development's Section 8 subsidies "remain the most important for aiding new construction."[18] This statement was optimistic

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11. *Id.* at 36.
12. *Id.*
13. *Mount Laurel II*, 456 A.2d 390 (N.J. 1983).
14. *Id.* at 410.
15. *Id.* at 415.
16. *Id.* at 418-19.
17. *Id.* at 452.
18. *Mount Laurel II*, 456 A.2d at 445 n.27.

at best, as the Reagan Administration and Congress had just agreed to end the Section 8 programs for new construction and substantial rehabilitation. The decision to stop new Section 8 funding in the 1980s made meaningful low-income housing development extremely difficult. In light of the changes in federal housing programs, the impact of the *Mount Laurel II* decision would have been much greater had it come down almost a decade earlier.

The *Mount Laurel II* court provided that determination of a locality's fair share of regional lower-income housing needs would be made by one of three trial judges selected by the Chief Justice of the New Jersey Supreme Court.[19] The court intended the specially designated judges to provide consistency and predictability of rules and intended the selected judges to develop special expertise and knowledge for similar cases. One of the great contributions of *Suburbs Under Siege* is that the reader is able to go behind the judicial process and listen in on Professor Haar's conversations with some of these judges about the way this extraordinary series of cases would proceed through the state court system.

As part of the requirement that municipalities take affirmative measures to produce housing, *Mount Laurel II* offered detailed proposals for procedures designed to resolve new cases efficiently. Upon a finding by the trial court that a municipality failed to meet its *Mount Laurel* obligation, the trial court would order the municipality to revise its ordinance within ninety days.[20] To assist in this effort, the opinion suggested the trial court appoint a special master to work with all parties to the litigation and with the court itself in devising appropriate land-use regulations.[21] The New Jersey Supreme Court set the stage for special masters performing vital roles beyond traditional fact finding:

> He or she is an expert, a negotiator, a mediator, and a catalyst—a person who will help the municipality select from the innumerable combinations of actions that could satisfy the constitutional obligation, the one that gives appropriate weight to the many conflicting interests involved, the one that satisfies not only the Constitution but, to some extent, the parties as well.[22]

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19. *Id.* at 438-39.
20. *Id.* at 458.
21. *Id.*
22. *Id.* at 454.

The extraordinary role of the special master was one of keen interest to Professor Haar, who talked with a number of the special masters whose photographs grace the book's pages much like those of the judges do. Indeed, the parties viewed the special masters as an arm of the court, and generally treated them with appropriate respect. Professor Haar quotes one city planner recalling with pleasant surprise the first time he acted as a special master. "'To my astonishment,'" he reminisced, "all the lawyers and officials stood up and most politely waited for me to begin."[23]

Professor Haar's book examines such controversial issues as reconciling the need for communication between the special master and the judge, and *Mount Laurel II*'s mandate denying *ex parte* communications between masters and judges.[24] Professor Haar quotes one trial judge as saying, "that the court could have no contact with the master without involving the parties was absolutely impossible and absurd, and frequently when talking about the potential for settlement and bringing the parties together I had to be able to go to the master and in fact did, as I've told the chief justice."[25]

Professor Haar served as special master to the Superior Court in the *Boston Harbor Clean-up Litigation* for a three-year period, during which he had the opportunity to put many of his ideas into practice and learn first-hand both the limits and great potential of special masters.

Professor Haar describes the group of special masters who operated "in rotation under the orchestration of the *Mount Laurel* judges."[26] He likens the *Mount Laurel* bar and group of experts familiar with the issues to the New York bankruptcy field which "collapses into a small circle of specialist insiders familiar with each other's capabilities, individuals working as much for the respect in future recommendations of their peers as for the temporary client."[27] In this way, the *Mount Laurel* arena has the unifying presence of the same judges, special masters, law firms, and planning experts.[28]

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23. HAAR, *supra* note 1, at 75.

24. *Mount Laurel II*, 456 A.2d at 455 n.40 ("Given the sensitive nature of the function, the master should not communicate privately with the court.").

25. HAAR, *supra* note 1, at 84.

26. *Id.* at 73.

27. *Id.*

28. *Id.*

Professor Haar recognizes the importance of judges expressing their opinions in a manner calculated to educate and persuade. He asks, "who but a dedicated devotee could digest a 250-page opinion in this era of the 10-second soundbite?"[29] He sees the need to condense the court's thesis into a cogent, dramatic argument calling for "a Gettysburg Address of sorts, a powerful statement sustained by the noble American rallying cry of fairness and equality in the exercise of governmental powers."[30] That is, in essence, what the United States Supreme Court did in *Brown v. Board of Education*.[31] Similarly, when Thomas Jefferson wrote "We hold these truths to be self-evident, . . ." he had more of a rhetorical flourish than a lengthy analysis arguing why the propositions were true.

At the same time, the New Jersey Supreme Court had dropped a political bombshell on the Garden State and it was only a matter of time before the legislature responded. The argument against judicial activism has always been that the legislature is more suited to the weighing of complex and intersecting societal interests and striking the appropriate political balance. The judiciary has frequently entered the arena when the legislature has defaulted; however, in the case of exclusionary zoning in New Jersey, the ultimate result of *Mount Laurel II* was to force other more traditional elements of lawmaking to act. Professor Haar quotes one Passaic County mayor as succinctly summing up his feelings toward the seven unanimous justices of *Mount Laurel II*: "They're nuts!"[32]

Thus, in the chapter entitled, "The Legislature Strikes Back . . .,"[33] Professor Haar analyzes how the New Jersey legislature responded. The pivotal statute was the 1985 Fair Housing Act (FHA)[34] which the legislature enacted in order to narrow the reach of the judges. Professor Haar describes a legislature determined not just to supplant the courts as program administrators, but to alter, in significant respects, the nature of the regional fair share housing obligations that could be imposed on communities as a result of *Mount Laurel II*. The FHA directed that the preferred means of addressing fair share controversies thereafter would be through an administrative agency, the Council On Affordable Housing

29. *Id.* at 47.

30. HAAR, *supra* note 1, at 47.

31. 347 U.S. 483 (1954).

32. HAAR, *supra* note 1, at 172.

33. *Id.* at 89.

34. N.J. STAT. ANN. §§ 52:27D-301 to 52:27D-329 (West 1985).

(COAH), composed of nine members selected by the governor, subject to confirmation by the state senate. The New Jersey Supreme Court sustained the Fair Housing Act in 1986 in a case that Professor Haar refers to as *Mount Laurel III*.[35]

Continuing his concern for both the law on the books and the law in action, Professor Haar analyzes the FHA in action. He focuses on the compliance mechanism, known as the Regional Contribution Agreement (RCA), under which a locality, by entering into a contractual agreement, can transfer up to half its *Mount Laurel* obligations to another locality within its region. The only condition is that COAH must approve the RCA before it can go into effect, and such approval must be contingent on a finding that the agreement establishes a realistic opportunity for low-income housing with access to employment and that it "is consistent with sound, comprehensive regional planning."[36]

In the end, Professor Haar points to tangible consequences that bear out the impact of the *Mount Laurel* decisions. He points to the 15,400 affordable housing units in the New Jersey suburbs that had no prospect of being built without the *Mount Laurel* decisions.[37] He also notes zoning revisions that allow for the construction or rehabilitation of some 54,000 additional lower-income housing units in the suburbs, with some seventy-five percent formulated under the aegis of the courts and the balance under COAH's jurisdiction.[38]

Professor Haar believes that the RCA "ended up as the jewel in the crown of the legislative counterreformation."[39] He notes that, in a key divergence between legislative and judicial aspirations for *Mount Laurel* reform, the RCA shifted the rationale of the *Mount Laurel* doctrine away from the broad goal of ending spatial segregation in the region toward a rationale of simply providing low-income housing, even in the cities.

Professor Haar also observes how Mount Laurel found its "key in the builder's remedy, which harnessed the personal profit seeking and affirmative commitment of the private market to meet the affordable housing target."[40] He notes that the timing of the up and down cycles

35. Hills Dev. Co. v. Township of Bernards, 510 A.2d 621 (N.J. 1986).

36. N.J. STAT. ANN. § 52:27D-312(a) (West 1985).

37. HAAR, *supra* note 1, at 131.

38. *Id.*

39. *Id.* at 114.

40. *Id.* at 146.

of New Jersey's housing boom did not coincide with the high point of the remedy and so he concludes that, "[t]he wisdom of co-opting private actions to fuel remedies must wait for the next swing of the business pendulum to be tested fully."[41]

The legacy of *Mount Laurel* that Professor Haar sees is strong, serious, and continuing. He understands judges as social innovators, the courts as instruments of social change, and the judicial process as one that is capable of producing results.

With the publication of *Suburbs Under Siege*, Professor Haar once again mounts a singular horse. Where many law scholars and observers counsel judicial restraint, Professor Haar reminds us of the importance of the judiciary in acting on matters of large public moment such as the efforts by suburban communities to exclude the poor. He also emerges from this volume as overly modest. Where others might have proceeded to highlight their own personal role in the saga, Professor Haar notes his personal contribution only in a single, discreetly-placed footnote.

In fact, Professor Haar played a very important role in the development of this caselaw in New Jersey, going back to a 1953 *Harvard Law Review* article[42] he wrote as a young assistant professor. In that article, Haar criticized the New Jersey Supreme Court's decision to uphold excessive minimum floor space requirements imposed by a growing New Jersey suburb, Paterson. In that case,[43] the New Jersey Supreme Court concluded: "[S]o long as the zoning ordinance was reasonably designed, by whatever means, to further the advancement of a community as a social, economic and political unit, it is in the general welfare and therefore a proper exercise of the zoning power."[44]

This Assistant Professor of Law rejected the court's reasoning: "The New Jersey Supreme Court substituted shibboleths for reasoning, and used liberal shibboleths to attain an illiberal result—a decision which can only still further distort the problems arising from the complex relationship of city and country."[45] Three decades before *Mount Laurel II*, Haar recognized the "need for some type of regional or metropolitan

41. *Id.*

42. Charles M. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953).

43. Lionshead Lake, Inc. v. Township of Wayne, 89 A.2d 693 (N.J. 1952).

44. *Id.* at 697.

45. Haar, *supra* note 42, at 1063.

planning in order that courts may have a standard against which to measure legislative determinations."[46]

Professor Haar held true to the cause, and three decades later the New Jersey Supreme Court came to see the light. This wonderfully written book tells the story of how the court eventually reached his conclusion, bringing to fruition Professor Haar's quest to expand the boundaries of law and cities.

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46. *Id.* The first decision of the United States Supreme Court upholding the validity of comprehensive zoning, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), contained suggestive dicta on the issue of regionalism:

> But the Village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit. . . . It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

Euclid, 272 U.S. at 389-90. Professor Michael Allan Wolf has written of the centrality of the *Euclid* decision in land use planning law and this quotation is just one of many that proves his point. *See* Michael Allan Wolf, *The Prescience and Centrality of* Euclid *v.* Ambler, *in* ZONING AND THE AMERICAN DREAM 252 (Charles M. Haar & Jerold S. Kayden eds., 1989).

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