

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 50, 275

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TOLL BROTHERS, INC. a Delaware  
Corporation,

Civil Action

Plaintiff/Respondent,

v.

TOWNSHIP OF WEST WINDSOR, a  
municipal corporation of the State of  
New Jersey, located in Mercer County,  
MAYOR AND COUNCIL OF THE  
TOWNSHIP OF WEST WINDSOR and  
THE PLANNING BOARD OF THE  
TOWNSHIP OF WEST WINDSOR,

Defendants/Petitioners.

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BRIEF AND APPENDIX OF *AMICUS CURIAE*  
AMERICAN PLANNING ASSOCIATION AND ITS NEW JERSEY CHAPTER

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## PRELIMINARY STATEMENT

This case presents the first significant review of Mt. Laurel remedies in eighteen years. The American Planning Association and its New Jersey Chapter (collectively referred to herein as the APA) submits this brief to explain the vital importance of the Court's consideration of the State Development and Redevelopment Plan (State Plan) in addressing each of the three certified questions presented on this appeal.<sup>1</sup>

The State Plan was adopted pursuant to the New Jersey State Planning Act (N.J.S.A. 52:18A-196, et seq.) In Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158 (1983) (Mt. Laurel II), this Court relied heavily upon the State Development Guide Plan (the "Guide Plan") as a remedial tool in Mt. Laurel disputes to insure that the imposition of fair share obligations coincided with the State's regional planning goals and objectives. 92 N.J. at 224-225. The Court recognized that (1) the State's legislative direction in the Guide Plan provided practical support for the State's declared policy that municipal land-use regulation should

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<sup>1</sup>The certified questions are: (1) whether the trial court erred in concluding that the Township's ordinances, regulations and site factors prevented a realistic opportunity for development of affordable housing; (2) whether the trial court erred when it considered market demand for particular housing types when it determined that the Township failed to provide a realistic opportunity for the development of affordable housing; and (3) whether the trial court erred in holding that Toll Brothers was entitled to a builder's remedy. Order dated May 22, 2001 on Petition for Certification.

be applied in accordance with regional and statewide planning objectives (92 N.J. at 234); (2) that the Mt. Laurel obligation should be imposed in accordance with sound planning concepts (92 N.J. at 237-238); and (3) that this Court would continue to rely upon revisions of the Guide Plan as long as the procedures by which it was amended and the substantive recommendations it contained demonstrated that it was a sound planning document (92 N.J. at 243, fn. 16).

The Guide Plan has been replaced by the State Plan.<sup>2</sup>

For the reasons stated below, the APA respectfully submits that the State Plan should be accorded the same or greater deference as this Court accorded the State Plan in Mt. Laurel II.

#### **PROCEDURAL HISTORY**

The APA was not a party below and refers to the Procedural History contained in the parties' briefs filed with the Appellate Division and this Court.

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<sup>2</sup>The State Plan is a voluminous document. Relevant portions are included in the Appendix at 2a through 49a. Sharply contrasting the Guide Plan, prepared by the then Division of State and Regional Planning (in the Department of Community Affairs) with virtually no public input, the State Plan was the product of a painstaking and arduous planning process, known as Cross Acceptance, involving thousands of representatives from State, regional, county and local governments and other public and private sector interests, making it the most significant participatory planning effort in New Jersey history.

On July 26, 2001, the APA moved for leave to file a brief and argue orally as *amicus curiae*, which motion was granted by Order dated August 9, 2001 (1a).

### **STATEMENT OF FACTS**

The APA refers to the parties' Statement of Facts in the above briefs on file with this Court.

The APA is a private non-profit educational and research organization incorporated in the District of Columbia. It is the oldest and largest organization in the United States devoted to fostering livable communities through effective, comprehensive land-use planning. The APA has over 30,000 members who work in local government, federal and state agencies, private consulting firms and universities.<sup>3</sup>

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<sup>3</sup>The APA has 46 chapters representing all 50 states, including the New Jersey Chapter. More than 800 of APA's members reside in the State of New Jersey. The APA's purposes and objectives include the advancement of physical, economic and social planning at local, state and national levels. Members of the APA are routinely involved in comprehensive land-use planning and its implementation with land-use regulations. These regulations involve zoning and the location of housing in various residential zoning districts.

Since the 1980's, the APA Board of Directors and its Delegate Assembly composed of State Chapter presidents have periodically adopted policy guides on matters of national importance to planning and the planning profession. In 1999, the APA adopted a Policy Guide on Housing which includes general and specific policies regarding several housing issues, including affordable housing (50a) which parallel those in the State Plan discussed below at page 9 infra.<sup>4</sup>



The APA believes that the certified questions before this Court should be explored within the context of the State Plan and its policies governing provision of adequate housing at reasonable costs. While those policies are broad, they provide valuable information for this Court to consider in reaching a decision.<sup>5</sup>

Given the Court's deference in Mt. Laurel II to the principles that (1) municipal land-use regulation should be applied in accordance with regional and statewide planning objectives (92 N.J. at 234) and (2) the Mt. Laurel obligation should be imposed in accordance with sound planning concepts (92 N.J. at 237-38), resolution of the certified questions in this case should include consideration of the State Plan. The importance of the State Plan as a general policy and planning tool is as great in the context of affordable housing as in any other, and the APA believes that the public interest would be best served by this Court so recognizing.

#### **LEGAL ARGUMENT**

#### **THE STATE PLAN SHOULD BE CONSIDERED IN THE COURT'S RESOLUTION OF THE CERTIFIED QUESTIONS HEREIN AND AS A MATTER OF GENERAL APPLICATION**

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<sup>5</sup>Significantly, factors considered by the Council on Affordable Housing (COAH) in assessing the suitability of a site for affordable housing, is that site's conformance with the State Plan pursuant to N.J.A.C. 5:93-5.4 and 5.6. This was acknowledged in the trial court's decision below. 303 N.J. Super. 518, 546, 551 (Law Div. 1996).

**IN FUTURE MATTERS INVOLVING MT. LAUREL  
REMEDIES**

In Mt. Laurel II this Court recognized the Guide Plan as the [conscious determination of the State, through the Executive and Legislative branches, on how best to plan its future] and that [I]ts remedial use in Mt. Laurel disputes will insure that the imposition of fair share obligations will coincide with the State's regional planning goals and objectives. 92 N.J. at 224-225. Significantly, this Court stated that the Guide Plan [play[ed] an important part in [its] Mt. Laurel II decision[s]] and emphasized its [deference to these legislative and executive initiatives can be regarded as a clear signal of our readiness to defer to more substantial actions.] 92 N.J. at 213.

That time has now come. Much has happened in the legislative arena since Mt. Laurel II, most notably the adoption of the State Planning Act, N.J.S.A. 52:18A-196 et. seq. and the Fair Housing Act, N.J.S.A. 52:27D-307 et. seq. The State Plan is a direct outgrowth of the State Planning Act in which the Legislature, among its findings and declarations, emphasized:

New Jersey, the nation's most densely populated State, requires sound and integrated Statewide planning and the coordination of Statewide planning with local and regional planning in order to . . . provide needed housing and adequate public services at a reasonable cost. . . (N.J.S.A. 52:18A-196(a)).

\* \* \*

[The] urgent importance that the State Development Guide Plan be replaced by a State Development and Redevelopment Plan designed for use as a tool for assessing suitable locations for infrastructure, housing, economic growth and conservation. (N.J.S.A. 52:18A-196(c)).

Consistent with the Legislature's direction calling for a [cooperative planning process that involves the full participation of State, county and local governments as well as other public and private sector interests] (N.J.S.A. 52:18A-196(e)), which became known as Cross Acceptance, the first State Plan was adopted on June 12, 1992 and the second revised State Plan was adopted on March 1, 2001.<sup>6</sup> The objective of the State Plan is to provide a [coordinated, integrated and comprehensive plan for the growth, development, renewal and conservation of the State and its regions. . .] N.J.S.A. 52:18A-199(a).

The State Plan emphasizes that [I]t is intended to serve as a guide for how public policy decisions should be made at all levels of government to achieve the goals of the State Planning Act. [March 2001 State Plan at 4. (3a) Among those goals is [The

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<sup>6</sup>The 2001 State Plan, albeit a refinement, maintains the same policy foundations of the 1992 State Plan.

provision of adequate and affordable housing in reasonable proximity to places of employment... necessary to ensure equal social and economic opportunity in the State... requir[ing] sound planning to ensure an adequate supply of available land that can be developed in an efficient growth pattern.[] (3a)

More specifically, the State Plan contains a series of Statewide Goals and Strategies and Policies including one on affordable housing, which states:

6. Provide Adequate Housing at a Reasonable Cost  
Strategy:

Provide adequate housing at a reasonable cost through public/private partnerships that create and maintain a broad choice of attractive, affordable, ecologically designed housing, particularly for those most in need. Create and maintain housing in the Metropolitan and Suburban Planning Areas and in Centers in the Fringe, Rural and Environmentally Sensitive Planning Areas, at densities which support transit and reduce commuting time and costs, and at locations easily accessible, preferably on foot, to employment, retail, services, cultural, civic and recreational opportunities. Support regional and community-based housing initiatives and remove unnecessary regulatory and financial barriers to the delivery of housing at appropriate locations.<sup>7</sup> (4a)<sup>8</sup>.

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<sup>7</sup>The State Plan divides the State into the following Planning Areas: Metropolitan Planning Area (PA1); Suburban Planning Area (PA2); Fringe Planning Area (PA3); Rural Planning Area (PA4); Rural/Environmentally Sensitive Planning Area (PA4B); Environmentally Sensitive Planning Area (PA5); and Environmentally

Affordable Housing is among the topics discussed under the above Statewide Goal and Strategy which also covers Housing Costs, Housing Location, Housing Stock, Housing by Population Groups and State Housing Policy, as well as cross-references to Related Plans including the Council on Affordable Housing (COAH) Substantive Rules (N.J.A.C. 5:91 et seq.).

Significantly, the State Plan describes the "unique relationship" between the State Planning Commission and COAH "derived from the common origin that both the New Jersey State Planning Act and the Fair Housing Act have in the State Legislature's response to . . . Mount Laurel II. . . ." (48a).

The State Plan notes that this Court in Mt. Laurel II "rel[ie]d on the State Development Guide Plan, which at the time, was the State's blueprint for accommodating projected growth. . . in the absence of a Legislative statement and invited the Legislature to make its own determination." (48a). The legislative response

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Sensitive/Barrier Islands Planning Area (PA5B) (20a-21a).

<sup>8</sup>The APA Policy Guide on Housing parallels the State Plan's goals on affordable housing. See for example, discussion of affordable housing issues in the Policy Guide's Introduction (50a); Background (50a); Location and Diversity of Housing (51a); Healthy Communities (52a); as well as its General Policies 1, 2, 3 and 7 (54a); and Specific Policies on Planning (a) through (d) (55a); Affordable Housing (56a) and Jobs/Housing Balance (57a-58a).

was the adoption in 1985 of the Fair Housing Act, creating COAH, and the State Planning Act, creating the State Planning Commission and calling for the adoption of a State Development and Redevelopment Plan in place of the State Development Guide Plan.

The State Plan was designed to conform to the mandates of the State Planning Act and the Fair Housing Act to "promote a fair distribution of affordable housing throughout New Jersey in locations and patterns that are consistent with the Goals of the State Planning Act" including the Legislature's finding and declaration that "an adequate response to judicial mandates respecting housing for low and moderate income persons requires sound planning to prevent sprawl and to promote suitable uses of land." (N.J.S.A. 52:18A-196(h)). (49a)

Significantly, the Fair Housing Act requires that adjustments to fair share housing allocations be made based upon the same growth management considerations that are the legal foundations of the Goals of the State Plan and specifically requires COAH to rely on the planning designations of the State Plan. More precisely, the Fair Housing Act requires the Council on Affordable Housing to make adjustments to fair share housing allocations whenever, among other things, "the pattern of development is contrary to the

planning designations in the State Plan. (N.J.S.A. 52:27D-307(c)(2)(e)). In furtherance of that Legislative directive, a Memorandum of Understanding, in effect since 1992, between COAH and the State Planning Commission establishes how the State Plan should be used by COAH in meeting its legislative requirements. (49a and 61a).

The State Plan's significance in affordable housing matters is also evidenced by the fact that COAH adopted rules in 1994 which incorporate the Resource Planning and Management Map (now the State Plan Policy Map) as part of the affordable housing allocation formula and encouraged the location of affordable housing in Centers in ways consistent with the Memorandum of Understanding.<sup>9</sup> (49a)

Consistent with the above Legislative directives, COAH's regulations require new construction and zoning for inclusionary developments to conform with the State Plan. N.J.A.C. 5:93-5.4 and 5.6.

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<sup>9</sup>Centers are the State Plan's preferred vehicle for accommodating growth. The concept is discussed at length in the March 2001 State Plan (22a-43a).

Given the major role that the State Plan plays in affordable housing issues, and this Court's earlier heavy reliance upon the Guide Plan in Mt. Laurel II, the time has come for this Court to affirm its commitment to comprehensive and sound land-use planning by recognizing the significance of the State Plan in assessing the appropriateness of Mt. Laurel II remedies as applied herein and to future matters. There is a compelling need for such judicial direction, given the fact that there is a paucity of reported decisions involving the State Plan and none by this Court.<sup>10</sup>

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<sup>10</sup>The only reported decisions involving the State Plan include New Jersey Builders' Assn. v. New Jersey Department of Env'tl. Protection, 306 N.J. Super. 93 (App. Div. 1997) (rejecting an attempt to invalidate the Commissioner's directive to his subordinates that they take the State Plan into account when making decisions and holding that the State Plan, albeit not a regulatory instrument, is a valid planning guide); Beattystown Cmty. Council v. Department of Env'tl. Protection, 313 N.J. Super. 236 (App. Div. 1998) (which skirted consideration of the State Plan in evaluating the impact of a development proposal on an historic district listed on State and National registers and instead relied primarily on state statutes governing review of historic district impacts); Sod Farm Associates v. Springfield Township Planning Bd., 298 N.J. Super. 84 (Law Div. 1995), aff'd 297 N.J. Super. 584 (App. Div. 1996) (which recognized consistency between local planning decisions and the State Plan in upholding zoning ordinance amendments changing the minimum residential lot size from one to three acres); Kirby v. Township Comm. of the Township of Bedminster, 341 N.J. Super. 276 (App. Div. 2000) (upholding zoning amendments permitting one residence for every ten acres and a lot size averaging option, allowing the minimum area of a lot within a development to be reduced to six acres provided the average area of lots throughout the development is ten acres, finding, among other things, that the zoning ordinances advanced the intent of the State Plan for its Environmentally Sensitive Planning Area); and Mount Olive Complex, et al. v. Township of Mt. Olive, 340 N.J. Super. 511 (App. Div. 2001) (affirming the trial court's judgment denying plaintiff a builder's remedy but reversing the judgment invalidating the Township's five acre zoning ordinance, concluding that the ordinance advanced goals of the State Plan and was tailored for that purpose). - 12 -



## CONCLUSION

The APA has long supported the Mt. Laurel doctrine and, in its Policy Guide on Housing (50a), emphasizes the importance of provision for affordable housing within the context of comprehensive land-use planning.

Comprehensive land-use planning fosters affordable housing in many ways including by encouraging communities to deploy scarce infrastructure dollars efficiently to maximize the number of building sites and by making it their goal to lay out zones where affordable housing can be built. Similarly, it can coordinate affordable housing with realistic jobs and transportation to work opportunities for less affluent citizens. Moreover, comprehensive land-use planning is necessary to transpose the public's hopeful rhetoric about affordable housing to realistic housing opportunities.

The State Plan was adopted at the direction of the Legislature to promote and coordinate comprehensive and sound planning at the State, regional and local levels. The State Plan includes, among its Statewide Goals, Strategies and Policies, a specific policy governing affordable housing. Given this Court's earlier reliance upon the Guide Plan in its Mt. Laurel II decision and its

acknowledgment that it would defer to future amendments and substantive recommendations, provided they are based upon sound planning considerations, it follows that this Court should now include the State Plan among the factors it considers in resolving not only the three certified questions herein, but also providing future guidance on the appropriate application of the State Plan in assessing Mt. Laurel remedies.

Respectfully submitted,

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By: \_\_\_\_\_  
Howard D. Cohen

Dated: August 27, 2001