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Chase Hamilton

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Fair Share: Reinvigorating the Twin Cities' Regional Affordable Housing Calculus

Chase Hamilton[†]

Introduction

The Metropolitan Council of the Twin Cities (Council), an administrative body of seventeen appointed officials, presides over the metropolitan area comprising Minneapolis-St. Paul.¹ Empowered with the ability to “review all proposed matters of metropolitan significance,” the Council maintains broad statutory authority to shape regional development, particularly in the realm of land-use planning.² From 1970 to 1986, the Council affirmatively wielded this review power from above, subjecting comprehensive local planning to high scrutiny and often withholding state and federal grants until local government proposals included a fair share of affordable housing.³ The first iteration of the Council used its review power to “help implement the goal of a better distribution of housing types and costs throughout the area,”⁴ and its policy plan for the region placed the Twin Cities at the forefront of socioeconomic and racial integration.⁵

[†] J.D. Candidate, University of Minnesota Law School, 2018; B.A., Tulane University, 2014. The author expresses his appreciation to Professor Myron Orfield for his invaluable mentorship and expertise, without which this Article would not have been possible. The author would also like to thank the staff and editors of the *Journal of Law & Inequality: A Journal of Theory and Practice* for their assistance in preparing this Article for publication.

1. *Who We Are*, METRO. COUNCIL, <https://metro council.org/About-Us/The-Council-Who-We-Are.aspx> (last accessed Feb. 18, 2018).

2. MINN. STAT. § 473.173 (2017).

3. See William C. Johnson, *Growth Management in the Twin Cities Region: The Politics and Performance of the Metropolitan Council*, CTR. FOR URB. AND REG. AFF. 77 (1998) (explaining the Council’s considerations during the grant and loan approval process); see also INST. ON METRO. OPPORTUNITY, WHY ARE THE TWIN CITIES SO SEGREGATED? 13 (2015), <https://www1.law.umn.edu/uploads/ed/00/ed00c05a000fffeb881655f2e02e9f29/Why-Are-the-Twin-Cities-So-Segregated-2-26-15.pdf> (describing the Council’s use of state funds to incentivize integration during municipal growth).

4. Metropolitan Council, *Housing Development Guide* 44 (1985).

5. See, e.g., Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 919–21 (2006) (describing the early successes of the Council in utilizing housing policy to

The statutory framework that founded and emboldened the Council in 1976 remains in force, but the Council's commitment to integration in the past decade has been anything but forceful. Once feared for its review and suspension policies, the Council now operates in an advisory capacity, one which has allowed political and commercial interests to shift affordable housing allocations away from suburban areas and toward central cities, where neither the infrastructure nor the tax base can hope to absorb affordable housing.⁶ Since 2014, the Metropolitan Interfaith Council on Affordable Housing (MICAHA) has characterized this transition as one of neglect, whereby the Council refuses to exercise its full authority to combat rising de facto segregation in its seven constituent counties.⁷

To reverse this pattern of re-segregation, the Metropolitan Council must once again utilize the full authority accorded by the Metropolitan Land Use Planning Act (LUPA)⁸ to provide for regional affordable housing needs and compel local governments to allocate their fair share of units. In particular, the Council should use inclusionary zoning to achieve a threshold percentage of affordable units in all proposed municipal developments that reach its review board. Inclusionary zoning, while a radical departure from current Council policy, remains a viable housing mechanism, one that the architects of LUPA expressly contemplated in 1974.⁹ By coordinating the regional distribution of affordable housing in this way, the Council can work in tandem with local government units to foster heterogeneous, equal-opportunity communities in the Twin Cities.

affirmatively further integration in the Twin Cities).

6. See INST. ON METRO. OPPORTUNITY, *supra* note 3, at 13–15 (describing the internal philosophy of the Council over time and how modern policy directs affordable housing units to central cities).

7. See Complaint at 2, Metropolitan Interfaith Council on Affordable Housing v. Minnesota, filed with H.U.D. on Nov. 10, 2014, https://dk-media.s3.amazonaws.com/AA/AV/micah-org/downloads/292213/Complaint_Final_Filed_2014_11_10.pdf (alleging that “[the State of Minnesota has] adopted, maintained, and enforced policies and practices with respect to land use and housing programs that have the purpose and effect of limiting the development of affordable housing in high-opportunity, majority-white communities and steering such units to low-opportunity, high-poverty communities, furthering racial and ethnic segregation in the Twin Cities region of Minnesota.”).

8. MINN. STAT. §§ 473.851–871 (2017).

9. § 473.859, subd. 2 (“A land use plan shall also include a housing element containing standards. . . including but not limited to the use of official controls and land use planning to promote the availability of land for the development of low and moderate income housing.”).

Part I of this Article examines the discretionary authority accorded to the Council under LUPA. Part II examines the seminal fair-share case, *South Burlington County NAACP v. Mount Laurel*,¹⁰ and the burgeoning movement toward burden-sharing amongst interdependent municipalities. Part III reflects upon the legislative history and early implementation of LUPA, both of which seized upon the Mount Laurel Doctrine and, consequently, demonstrated the ability of the Council to wield affirmative governmental devices to facilitate socioeconomic and racial integration.

I. Regional Burden-Sharing: Statutory Underpinnings

A. Toward Regional Governance

In 1967, the Minnesota Legislature recognized the need for a “regional planning and coordinating body,” one that would help facilitate the growth of Minneapolis-St. Paul, a metropolitan area consisting of nearly three hundred separate local units of government.¹¹ Shared challenges, such as transit, wastewater collection and treatment, and affordable housing, transcended local borders and demanded coordination at a regional level.¹² The entity that emerged, not without controversy,¹³ was the Metropolitan Council of the Twin Cities, a public corporation and political subdivision of the state, tasked with overseeing regional governance and operations.¹⁴

The Metropolitan Council presides over sixteen geographic districts, each represented by one governor-appointed member.¹⁵ On behalf of the State of Minnesota, these unelected officials

10. *S. Burlington Cty. NAACP v. Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975).

11. *History of the Council*, METRO. COUNCIL (2016), <https://metro council.org/About-Us/Publications-And-Resources/History-of-the-Council.aspx> (noting how then-Governor Harold LeVander backed this vision of regional development by explaining that the Council “was conceived with the idea that we will be faced with more and more problems that will pay no heed to the boundary lines which mark the end of one community in this metropolitan area and the beginning of another.”).

12. See Heidenreich et al., *The Metropolitan Council*, 40 WM. MITCHELL L. REV. 160, 163 (2013) (describing the shared problems that drove the Minnesota Legislature to consider a regional growth strategy).

13. See ARTHUR NAFTALIN & JOHN BRANDL, PUB. NO. 08-80-058, THE TWIN CITIES REGIONAL STRATEGY 24 (1980) (describing the suburban communities’ desire to remain both fiscally and administratively distinct from the urban core and fierce opposition to the Council at the time of its inception).

14. § 473.123.

15. *Id.* at subd. 3(a).

possess wide discretion on “matters of metropolitan significance”¹⁶ and are afforded considerable insulation from the public.¹⁷ Together, these appointed officials are granted those powers deemed “necessary or convenient” to carry out the Council’s enumerated duties and responsibilities as codified by law.¹⁸

The Council can best be understood as a steward of regional growth, and its operations inform prospective development at the local level. From above, the Council sets the tone for growth with its decennial comprehensive development guide for orderly and economic development of the metropolitan area, as ordered by statute.¹⁹ This comprehensive guide, the Metropolitan Development Guide, must recognize “physical, social, or economic needs of the metropolitan area and those future developments which will have an impact on the entire area,” including land use.²⁰ With the issuing of the Metropolitan Development Guide, the Metropolitan Council communicates its vision for the trajectory of the region and its objectives for the future.²¹

B. *The Metropolitan Land Use Planning Act (LUPA)*

With the enactment of LUPA in 1976, the Minnesota Legislature provided the Council with the tools to realize its decennial vision.²² Acknowledging the interdependence of local government units in the Twin Cities, LUPA endeavors “to protect the health, safety and welfare of the residents of the metropolitan

16. § 473.173, subd. 1.

17. § 473.141, subd. 5 (providing that the Council Chairman serves “at the pleasure of the governor”); § 473.123, subd. 2 (providing that the governor appoints members and that initially the terms of appointees were staggered based on whether they represented even- or odd-numbered districts and that after the first staggered term for even- and odd-numbered districts passed, members would serve for a four-year term). This provision has been subject to much controversy, particularly with regard to the Council’s accountability and representativeness over the years. *See, e.g.,* MYRON ORFIELD ET AL., REGION: PLANNING THE FUTURE OF THE TWIN CITIES 79 (2010). Efforts to amend § 473.123 reached the Minnesota Senate in 1997 but were ultimately blocked by Governor Arne Carlson. *See, e.g.,* David Chanen, *Senate OKs Bill to Make Met Council Elected Body; Carlson Says He’ll Veto*, STAR TRIB. (Minneapolis), May 13, 1997, at B3.

18. § 473.129, subd. 1.

19. MINN. STAT. § 473B.06, subd. 5 (2017) (requiring the Council to “prepare and adopt . . . a comprehensive development guide for the metropolitan area.”).

20. *Id.*

21. *See, e.g.,* METRO. COUNCIL, THRIVE 2040, [https://metro council.org/Planning/Publications-And-Resources/Thrive-MSP-2040-Plan-\(1\)/ThriveMSP2040.aspx](https://metro council.org/Planning/Publications-And-Resources/Thrive-MSP-2040-Plan-(1)/ThriveMSP2040.aspx) (last accessed Feb. 18, 2018) (outlining the Council’s concerns and aspirations for regional development through 2040).

22. *See* MINN. STAT. § 473.851 (2017) (stating the legislative intent behind LUPA).

area and to ensure coordinated, orderly and economic development.”²³ LUPA grants the Metropolitan Council substantial deference in coordinating and compelling growth at the regional level,²⁴ and the Council may use this explicit statutory authority to direct housing efforts in two important ways.

First, with the Council at the helm, LUPA required all local government units within its purview to submit a comprehensive plan for growth management, with regard to land use, public facilities, and urbanization, through 1990.²⁵ Local government units are directed to craft “standards, plans and programs for providing *adequate housing opportunities to meet existing and projected local and regional housing needs*.”²⁶ This land use plan, when implemented, must be tailored to provide “sufficient existing and new housing to meet the local unit’s share of the metropolitan area need for low and moderate income housing.”²⁷

Upon receipt, the Council is responsible for reviewing and reconciling these many comprehensive plans.²⁸ The standard of review utilized by the Council for each comprehensive plan submission is whether “the plan is more likely than not to have a substantial impact on or contain a substantial departure from metropolitan system plans.”²⁹ If the Council finds in the affirmative, it may request any modifications necessary to bring the plans into conformity with the Metropolitan Development Guide, prepared by the Council to “recognize and encompass physical, social and economic needs of the metropolitan area.”³⁰ No local government may implement its comprehensive plan before receiving the Council’s statement and incorporating any modifications requested therein.³¹

23. *Id.*

24. See § 473.854 (providing guidelines for the Council and the ability to create, amend, and enforce comprehensive plans).

25. § 473.859, subd. 1.

26. *Id.* at subd. 2 (emphasis added). This language is strikingly similar to that found in *South Burlington County NAACP v. Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983). The historical implication of this phrase necessarily informs the reading of LUPA with regard to inclusionary zoning and other affirmative housing mechanisms. See discussion *infra* Part II(B).

27. § 473.859, subd. 4(3).

28. MINN. STAT. § 473.175, subd. 1 (2017).

29. *Id.*

30. MINN. STAT. § 473.145 (2017); see also MINN. STAT. § 473.175, subd. 3 (2017).

31. § 473.175, subd. 2. After a successful first round of comprehensive planning, the Minnesota Legislature mandated decennial review, requiring each local government to review, amend (if necessary), and submit its comprehensive plan to the Council at least once every ten years. MINN. STAT. § 473.864, subd. 2 (2017). This requirement remains in place, compelling local governments to periodically

In addition to comprehensive planning, LUPA grants the Council discretionary authority in the disbursement of state and federal funding to local entities.³² Applications by local entities are expected to specify the activities for which the funds will be used, as well as any persons involved in the proposed activities.³³ The Council may “reasonably request” any other information it deems relevant to aid the approval process.³⁴ This informational review is curtailed only by the requirement that the Council must base its decision on “the recipient’s demonstrated need and available financial resources.”³⁵ As discussed below, however, this criteria is neither exhaustive nor narrowly construed by Minnesota courts; rather, the Council may consider a local government’s affordable housing performance in its final analysis.³⁶

In short, LUPA grants the Council broad authority to shape regional housing distribution as it sees fit. The Council is not limited to mere suspension of new development; indeed, the Council may use state and federal funding to actively incentivize local implementation of housing initiatives.³⁷ Both tools, explicitly granted under LUPA, were utilized by the Council for a decade to harmonize “local and regional housing needs.”³⁸

The text of LUPA remains intact, though its meaning remains hotly contested.³⁹ In broad terms, the courts must adjudicate the Council’s role in combatting the crisis of racial and socioeconomic stratification across the seven-county area.⁴⁰ This Article contributes to Metropolitan Council scholarship by testing the outer limits of LUPA; in particular, this Article advocates for a holistic reading of LUPA and, in light of legislative intent and relevant case

reassess their priorities and confirm that such plans comport with evolving regional needs. *Id.*

32. MINN. STAT. § 473.171 (2017).

33. MINN. STAT. § 473.867, subd. 3 (2017) (“Grants and loans shall be made subject to contracts between the council and the recipient specifying the use and disbursement of the funds and, for loans, the terms and conditions of repayment, and other appropriate matters.”).

34. *Id.*

35. *Id.*

36. See discussion *infra* Part II.

37. MINN. STAT. § 473.171 (2017).

38. § 473.859, subd. 2(c).

39. See Complaint, *supra* note 7; Complaint, Metropolitan Interfaith Council on Affordable Housing v. City of Minneapolis, filed with H.U.D. on Mar. 30, 2015, https://dk-media.s3.amazonaws.com/AA/AV/micahorg/downloads/294541/MICAH_Complaint_to_HUD_-_Mpls_and_St_Paul_filed_March_30_2015.pdf.

40. See Complaint, *supra* note 7.

law, asserts that the Council has authority to impose mandatory inclusionary zoning requirements upon constituent municipalities.

II. The Burden-Sharing Revolution: *Mount Laurel*⁴¹ and Beyond

While LUPA remains largely intact, the authority of the Council to affirmatively shape the regional housing market remains contested. Certain language in LUPA, however, is particularly instructive as to the Minnesota Legislature’s intent. The phrase “existing and projected local and regional housing needs”⁴² tracks almost *identically* with core phrasing in fair-share case law of the time period. The following discussion argues that, by deliberately using these words, LUPA imports the full weight and the legacy behind them.

A. *The Mount Laurel Doctrine*

In 1975, the New Jersey Supreme Court began laying the groundwork for a regional housing strategy. In doing so, the Court was forced to reconcile many of the same local and regional tensions that underlie the Twin Cities’ affordable housing debate, and the doctrine⁴³ that emerged was integral in establishing fair-share housing policies nationwide. While *Mount Laurel I* first explored the relationship between local and regional need,⁴⁴ *Mount Laurel II* is credited with operationalizing this concept and, in doing so, created concrete regulatory tools to ensure the proliferation of low- and moderate-income housing.⁴⁵ The language with which the New Jersey Supreme Court harmonized local and regional housing policy will prove instructive in interpreting Minnesota Statute § 473.859,⁴⁶ which tracks the iconic language of *Mount Laurel I*.

i. Mount Laurel I

Mount Laurel I arose in the midst of a housing “crisis,” one characterized by a “desperate need for housing, especially of decent living accommodations economically suitable for low and moderate

41. S. Burlington Cty. NAACP v. Mount Laurel (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975).

42. § 473.859, subd. 2(c).

43. The so-called “Mount Laurel Doctrine” is the result of two New Jersey Supreme Court cases. See *Mount Laurel I*, 336 A.2d 713; S. Burlington Cty. NAACP v. Mount Laurel (*Mount Laurel II*), 456 A.2d 390 (N.J. 1983).

44. *Mount Laurel I*, 336 A.2d at 724.

45. *Mount Laurel II*, 456 A.2d at 448.

46. § 473.859, subd. 2.

income families.”⁴⁷ Though Defendant Mount Laurel was but one municipality, the Court acknowledged the regional breadth of the problem,⁴⁸ and this profoundly shaped the issue moving forward. Furthermore, the Court looked to the historical growth of Mount Laurel as a blossoming industrial node, one which drew prospective residents of mixed socioeconomic and racial backgrounds out of central cities, like Camden, and into the promising township.⁴⁹ It was through these broader frames of analysis that the Court boldly confronted segregative patterns of development in the South Jersey metropolitan area.

In 1972, Mount Laurel enacted a zoning ordinance to guide land use in that age of unprecedented growth. The ordinance delivered a simple injunction to future developers: future residential growth was limited to single-family detached dwellings.⁵⁰ Other types of dwellings—including multi-family garden apartments, mobile home parks, and multi-family dwellings—were strictly forbidden.⁵¹ The plaintiffs, predominantly Black and Hispanic “outsiders,” challenged this restriction on the grounds that it constructively excluded low- and medium-income residential arrangements.⁵² In this way, the case involved two issues of import: whether townships, like Mount Laurel, had the authority to prohibit certain types of housing, and whether said townships are obligated to “make realistically possible an appropriate variety and choice of housing.”⁵³

While the Court acknowledged that Mount Laurel’s zoning policy was grounded in a manifest desire to “keep down local taxes on *property*,”⁵⁴ it nevertheless grappled with the classist undertones of the ordinance in practice. The land-use regulations perpetuated de facto segregation of various categories of persons, for whom it became “physically and economically impossible to provide low and moderate income housing.”⁵⁵ Though stopping short of statements

47. 336 A.2d at 716–17 (quoting Governor William T. Cahill’s messages to the New Jersey Legislature).

48. *Id.* at 716 (“The implications of the issue presented are indeed broad and far-reaching, extending much beyond these particular plaintiffs and the boundaries of this particular municipality.”).

49. *Id.* at 717.

50. *Id.* at 729.

51. *Id.*

52. *Id.* at 717–18.

53. *Id.* at 724.

54. *Id.* at 723 (“There cannot be the slightest doubt that the reason for this course of conduct has been to keep down local taxes on *property*.”) (emphasis in original). The implication is that multi-family development will cause taxes to increase.

55. *Id.* at 724.

of class animus, Mount Laurel conceded that the necessary result of a tax-minimization policy was that “low and moderate income housing [would be] intentionally excluded.”⁵⁶ Insofar as single-family dwellings constitute the most expensive type of housing possible for prospective buyers,⁵⁷ entire swaths of the population were left without “pecuniarily feasible”⁵⁸ housing options.

Finding such displacement untenable, the Supreme Court invalidated the zoning ordinance and set forth the gold standard for regional housing strategy.⁵⁹ The Court declared that developing municipalities must make “realistically possible” an appropriate variety and choice of housing.⁶⁰ More importantly, the Court held that a developing municipality must “affirmatively afford th[e] opportunity [for low- and moderate-income housing], at least to the extent of the municipality’s *fair share of the present and prospective regional need therefor*.”⁶¹ The larger implication of *Mount Laurel I*, then, was that municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate. In particular, a municipality cannot expand in a policy vacuum; rather, each locality has an “affirmative obligation to cooperate, where appropriate, in regional planning efforts.”⁶²

While the fair-share formula arising in *Mount Laurel I* would require further clarity from the New Jersey Supreme Court,⁶³ the sentiment was a revolutionary one: regional land-use planning bodies may subvert local autonomy in order to improve general welfare in the aggregate. *Mount Laurel I* established a persuasive fair-share standard,⁶⁴ and it remains a “cornerstone of land use courses in all of our nation’s law schools.”⁶⁵

56. *Id.* at 729.

57. *Id.*

58. *Id.* at 729 (“Certainly, [single-family dwellings] are not pecuniarily feasible for low and moderate income families, most young people and many elderly and retired persons . . .”).

59. *Id.* at 724–25.

60. *Id.* at 724.

61. *Id.* (emphasis added).

62. *Id.* at 744 (Pashman, J., concurring).

63. *S. Burlington Cty. NAACP v. Mount Laurel (Mount Laurel II)*, 456 A.2d 390, 410 (N.J. 1983).

64. Courts in Oregon and New York have relied upon *Mount Laurel I* in shaping fair-share obligations within their own states. See discussion *infra* Part III(C).

65. *Mount Laurel Doctrine*, FAIR SHARE HOUSING CTR., <http://fairsharehousing.org/mount-laurel-doctrine> (last accessed Feb. 4, 2018).

B. *Mount Laurel II*

Despite the rousing symbolic victory for affordable housing advocates in *Mount Laurel I*, the immediate results were neither uniform nor satisfying.⁶⁶ Though many municipalities amended their zoning ordinances to account for local and “regional need,” the Mount Laurel Doctrine lacked clarity as to what those terms meant.⁶⁷ In reference to *Mount Laurel I*, lower courts had many operational questions, among them: What is a “developing” municipality? What constitutes a “fair share” of affordable housing? How should municipalities calculate such a figure? In 1983, the New Jersey Supreme Court revisited the controversial Mount Laurel Doctrine to resolve these questions and definitively authorize inclusionary zoning among qualifying municipalities.⁶⁸

Mount Laurel II clarified the original Mount Laurel Doctrine by creating a fair share formula to measure each municipality’s obligation to provide affordable housing. Principally, *Mount Laurel II* enjoined all municipalities “to provide a realistic opportunity for the construction of their fair share of the region’s present lower income housing need generated by present dilapidated or overcrowded lower income units.”⁶⁹ The Court envisioned a system led by regional need, to which each municipality’s personal contribution was anchored.⁷⁰ In doing so, the Court dispensed with the “developing” municipality designation, instead requiring

66. *Mount Laurel II*, 456 A.2d at 411 (“[W]e are far from where we had hoped to be and nowhere near where we should be with regard to the administration of the [D]octrine in our courts.”). Notably, Mount Laurel had not yet rescinded its exclusionary ordinance, and the Court suspected “widespread non-compliance” with the Mount Laurel Doctrine throughout the region. *Id.* at 410.

67. *Id.* at 410 (“[The six cases appearing before the court] demonstrate the need to put some steel into that [D]octrine. The deficiencies in its application range from uncertainty and inconsistency at the trial level to inflexible review criteria at the appellate level.”).

68. *See id.* at at 409–11.

69. *Id.* at 433.

70. *Id.* The Court recognized that each municipality has distinct spatial limitations which influence its capacity to absorb new affordable units. For this reason, certain areas within the region may demand higher shares of affordable units. For example:

[m]unicipalities located in ‘growth areas’ may, of course, have an obligation to meet the present need of the region that goes far beyond that generated in the municipality itself; there may be some municipalities, however, in growth areas where the portion of the region’s present need generated by that municipality far exceeds the municipality’s fair share. *Id.*

contribution by “all municipalities,” according to individualized capacity assessments.⁷¹

With the relevant stakeholders identified, the Court faced its greatest challenge: creating a workable fair-share formula.⁷² At the regional level, planners must complete the three following tasks: “identifying the relevant region, determining its present and prospective housing needs, and allocating those needs to the municipality or municipalities involved.”⁷³ The Court ultimately delegated the task to the judiciary, whose adjudication of the Mount Laurel litigation would inform determinations as to regional need.⁷⁴ Though plotting the spatial dimensions of each region would be left to the panel, the Court offered a guiding principle: a region is a “general area which constitutes, more or less, the housing market area of which the subject municipality is a part, and from which the prospective population of the municipality would substantially be drawn, in the absence of exclusionary zoning.”⁷⁵ As to the fair share assessment, the Court offered the following suggestions:

Formulas that accord substantial weight to employment opportunities in the municipality, especially new employment accompanied by substantial ratables, shall be favored; formulas that have the effect of tying prospective lower income housing needs to the present proportion of lower income residents to the total population of a municipality shall be disfavored; formulas that have the effect of unreasonably diminishing the share because of a municipality’s successful exclusion of lower income housing in the past shall be disfavored.⁷⁶

Though local governments were responsible for carrying their fair share of regional need (as determined above), the Court realized the need for incentive alignment. Invalidation of restrictive municipal zoning practices alone would not bring about the constitutionally-mandated housing opportunities, nor would planners meet inclusivity goals without some meaningful stick or

71. *Id.* at 408, 433. “[T]he fact that a municipality is fully developed does not eliminate this obligation although, obviously, it may affect the extent of the obligation and the timing of its satisfaction.” *Id.* at 418.

72. *Id.* at 436.

73. *Id.*

74. Specifically, *Mount Laurel II* litigation would appear before an expert panel of three judges, each of whom were assigned to a particular subsector of New Jersey. The hope for this panel was that “a regional pattern for the entire state [would] be established, as [would] a fairly consistent determination of regional needs on both an area and statewide basis.” *Id.* at 439.

75. *Id.* at 440 (quoting *Oakwood at Madison, Inc. v. Madison*, 371 A.2d 1192, 1223 (N.J. 1977)).

76. *Id.*

carrot to guide them.⁷⁷ Rather, the Court reasoned, local government units must sufficiently coerce (or, at the very least, induce) compliance through regulatory land-use controls.⁷⁸ At this critical juncture, the Court authorized the use of *affirmative governmental devices* to make affordable housing opportunities realistic. While the Court identified lower-income density bonuses⁷⁹ and mandatory set-asides⁸⁰ as viable devices, it did not limit the regulatory ingenuity of local governments, which were authorized “to create other devices and methods for meeting fair share obligations.”⁸¹ Armed with these affirmative devices, communities could (and do) meet their fair share obligations in furtherance of the regional housing strategy.⁸²

Although *Mount Laurel II* was not decided until 1983, years after the drafting of LUPA, its treatment of the core phrase “fair share of the present and prospective regional . . . need” is instructive.⁸³ Recognizing the need for clarity, the Court elucidated a two-tier planning strategy: enlist a regional body to determine the needs of the regional population, and then empower local governments with the affirmative tools necessary to address them. The usage of density bonuses and mandatory set-asides to induce affordable housing on the ground injected the Mount Laurel Doctrine with a dose of realism sufficient to overcome the perverse

77. *Id.* at 442–43.

78. As the Court wrote, this realist approach was critical to resolving the judgement-compliance gap: “If it is plain, and it is, that unless we require the use of affirmative measures the constitutional guarantee that protects poor people from municipal exclusion will exist ‘only on paper,’ then the only ‘appropriate remedy’ is the use of affirmative measures.” *Id.* at 448.

79. A density bonus “permits [a] developer to build more total units than the local land use plan would normally allow, in return for building a specified number of below-market rate units.” MINN. HOUSING FIN. AGENCY, STUDY OF INCLUSIONARY HOUSING INITIATIVES 7 (2002).

80. In a municipality imposing mandatory set-asides, new residential developments over a certain number of units must “set aside” a minimum threshold percentage of low- to medium-income units. See Rosalind M. Mytelka & Arnold K. Mytelka, *Exclusionary Zoning: A Consideration of Remedies*, 7 SETON HALL L. REV. 1, 12 (1976). Montgomery County, Maryland is a prime illustration of a mandatory set-aside municipality: for every new development of fifty or more units, fifteen percent of the units must be affordable, relative to local market rate for moderately-priced houses. MINN. HOUSING FIN. AGENCY, *supra* note 79, at 8.

81. *Mount Laurel II*, 456 A.2d at 445. The New Jersey zoning framework “permits any *reasonable* scheme which comports with the legislative standards and thus leaves ample room for new ideas.” *Kozesnik v. Montgomery*, 131 A.2d 1, 9 (N.J. 1957) (emphasis added).

82. See *Mount Laurel II*, 456 A.2d at 442–52 (describing the use of various affirmative measures, including case studies demonstrating the benefits and drawbacks of each).

83. *Id.* at 413.

incentives of a tax-led system. This mode of incentive alignment, says *Mount Laurel II*, is necessary to empower local governments to shoulder their fair share of regional need.⁸⁴

III. Nesting LUPA Within the Affirmative Burden-Sharing Revolution

The present iteration of the Council has maintained the position that it may not affirmatively require local communities to provide affordable housing in this way.⁸⁵ In the alternative, the Council relies upon *Alliance for Metropolitan Stability v. Metropolitan Council*⁸⁶ for the proposition that the Council maintains discretion with respect to how it fulfills its statutory responsibilities, so long as the Council acts with a “good faith belief that it is reflecting the legislative intent of new regulating legislation.”⁸⁷ As discussed above, LUPA was passed in an era of regionalism, which directly infiltrated the language of LUPA and belies any assertion of mere coincidence. The following analysis will make the case that the *Mount Laurel II* interpretation of “adequate housing opportunities to meet existing and projected local and regional housing needs”⁸⁸ is dispositive, given the force of this language in other jurisdictions, the findings of LUPA’s principal architect, and past Council behavior. This evidence points to a single conclusion: a good-faith interpretation of LUPA *must* give way to inclusionary zoning.

A. *The Unique Municipal Interdependence of the Twin Cities Heightens Regional Authority to Coordinate Growth*

Shortly before the drafting of LUPA, the Minnesota Supreme Court heard *Burnsville v. Onischuk*,⁸⁹ a case that underscored the

84. *Id.* at 448.

85. *See, e.g.*, EDWARD G. GOETZ, KAREN CHAPPLE & BARBARA LUKERMANN, THE AFFORDABLE HOUSING LEGACY OF THE 1976 LAND USE PLANNING ACT 16 (2002) (“[The Council] can’t say . . . [local governments] have to provide affordable housing. All we can say is that [they] have to provide the opportunity to not discriminate against affordable housing.” (quoting an unnamed Metropolitan Council staff member)).

86. *See generally* All. for Metro. Stability v. Metro. Council, 671 N.W.2d 905, 921 (Minn. Ct. App. 2003) (finding that, where the Minnesota Legislature has left aspects of LUPA undefined, the implication is that the Council has regulatory discretion to interpret and execute the law).

87. *Id.* at 909.

88. MINN. STAT. § 473.859, subd. 2(c) (2017).

89. *See* 222 N.W.2d 523 (Minn. 1974) (finding that a statutory revenue-sharing scheme did not rise to the level of unconstitutional lack of uniformity in taxation).

need for cooperation among neighboring communities in the Twin Cities. In construing the controversial Metropolitan Fiscal Disparities Act,⁹⁰ the Court was forced to determine whether local communities could be required to deposit a percentage of their commercial and industrial property tax revenue into a regional fund.⁹¹ Under the Metropolitan Fiscal Disparities Act, this regional tax revenue pool was reallocated to constituent municipalities “in direct relation to need and inverse relation to fiscal capacity.”⁹² This redistributive model endeavored to align incentives among the many local communities that would otherwise engage in a race-to-the-bottom to capture commercial-industrial value by the continual lowering of local tax rates.⁹³

The lower court held that this cooperative policy violated the General and Uniform Clause of the Minnesota Constitution, which requires that “taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes.”⁹⁴ This lower court abided by the classic interpretation of such uniformity clauses,⁹⁵ which treated local governments as separate but indiscriminate entities for tax purposes. Under such an interpretation, no local community could be forced to share the growth of its commerce and industry with other communities within a predefined region; indeed, local governments were pitted against their neighbors, each embracing growth for growth’s sake.⁹⁶ As *Citizens League* explained at the time, “[w]ithout [the Fiscal Disparities Act], local governments in the Twin Cities area [were] unwilling captives of the local property tax structure—compelled to

90. See 1971 Minn. Laws Extra Session at 2286–99 (instituting a redistribution system for revenues among local governments in the Twin Cities metropolitan area).

91. In particular, the act contemplated “pooling 40 percent of the increase throughout the area of all commercial-industrial valuation subsequent to January 2, 1971.” *Onischuk*, 222 N.W.2d at 525.

92. *Id.*

93. *Id.*

94. *Id.* at 527; see also MINN. CONST. art. 10, § 1 (noting that the Minnesota Constitution has been revised since *Onischuk* and now reads “Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes . . .”).

95. As Professor Myron Orfield points out, “[s]uch efforts had always been voided by Minnesota courts and famously disallowed in the neighboring state of Wisconsin in the leading case of *Buse v. Smith* [74 Wis. 2d 550 (1976)] in which a state wide [sic] school property tax sharing system was declared unconstitutional under Wisconsin’s very similar Uniformity Clause.” Letter from the Inst. of Metro. Opportunity to Libby Starling (Nov. 15, 2013) at 24, <https://www.ramseycounty.us/sites/default/files/Departments/2014%20Analysis%20of%20Impediments%20comments.pdf>.

96. *Id.*

make decisions and take actions to increase their tax base, without significant regard for orderly development, either in their own communities or in the metropolitan area.”⁹⁷

Recognizing this misalignment of incentives, the Minnesota Supreme Court pivoted sharply, holding that the “viable, fluid, and transient” nature of society warranted a modern reading of the Uniformity Clause.⁹⁸ The interdependence of the many municipalities was the centerpiece of the Court’s decision, which made clear that local development was no longer a zero-sum game:

The seven-county metropolitan area, it is pointed out, has a high degree of mobility and political, social, and economic interdependence. There is an increasing use of facilities in one municipality by those who reside or work in a different municipality. The payment of taxes in a metropolitan area may have only slight relationship to the use and enjoyment which residents make of other areas in the district.⁹⁹

In other words, the fluid interaction of citizens across traditional urban and suburban lines distorted the traditional calculus of tax contribution. What were once silos of development were now sharing resources and opportunities, so it followed that the tax revenue generated from this regional system should also be shared.¹⁰⁰ The equalizing effect of the Fiscal Disparities Act helped lessen the siren song of commercial-industrial development for communities, which could now pursue amenities of a different sort, including affordable housing for the region’s low-income and moderate-income residents.¹⁰¹

In *Onischuk*, the Minnesota Supreme Court rejected the assertion that municipalities were discrete, independent governments for the purposes of the Uniformity Clause.¹⁰² Without a moderating influence from above, local government units are wont to compete for high-value tax uses, whether commercial-industrial or residential, at the expense of low-income and moderate-income residents.¹⁰³ While this case concerned only the Fiscal Disparities Act, the subtext of this opinion is hard to miss: regional prosperity

97. Brief for Citizens League as Amicus Curiae Supporting Defendants-Respondents at 12, *Burnsville v. Onischuk*, 222 N.W.2d 523 (Minn. 1974).

98. *Onischuk*, 222 N.W.2d at 532–33.

99. *Id.* at 532.

100. As the Court noted, “residents of highly developed commercial areas *do* enjoy direct benefits from the existence of adjacent municipalities which provide open space, lakes, parks, golf courses, zoos, fairgrounds, low-density housing areas, churches, schools and hospitals.” *Id.* at 532 (emphasis added).

101. *Id.*

102. *Id.* at 532–33.

103. *Id.*

may require the dilution of local autonomy. In pushing back against this race-to-the-bottom, *Onischuk* represented a sea change in interdependency and burden-sharing across the Twin Cities.

The *Onischuk* Court recognized the perverse incentives created by a tax-minimization growth strategy: (a) capture high-value land, (b) exploit this land in the most lucrative fashion (whether residential or commercial-industrial), and (c) use this revenue to offset property tax rates for all residents.¹⁰⁴ This strategy had the effect of frustrating “well-considered housing policies for both low-income and moderate-income residents”¹⁰⁵ of the Twin Cities region, just as it did one year later in Mount Laurel Township. *Onischuk* boldly recognized the give-and-take between neighboring municipalities, and this holding underlies the statement of “interdependence” in LUPA just two years later.¹⁰⁶ The interdependence of the Twin Cities, as enshrined in *Onischuk*, must underlie any reading of Minnesota statutes enacted in its wake.

*B. LUPA’s Visionaries Intended to Impose Integrative,
Fair-Share Housing Obligations upon the Council*

After the New York Court of Appeals upheld a staged growth system in *Golden v. Planning Board Town of Ramapo*,¹⁰⁷ the Council was emboldened to move forward with its own vision for regional planning.¹⁰⁸ To that end, the Council sought out Robert Freilich, a notable land use scholar who had successfully designed the *Ramapo* system,¹⁰⁹ to “study and recommend a legal policy for regional growth in accordance with the Council’s decision to pursue growth in a timed and sequential manner.”¹¹⁰ Submitted to the Council in January 1974, the final report was highly influential in sculpting LUPA.¹¹¹ A close examination of Freilich’s findings helps

104. *Id.* at 529.

105. *Id.* at 532; *see also* S. Burlington Cty. NAACP v. Mount Laurel (*Mount Laurel D*), 336 A.2d 713, 723–25 (N.J. 1975).

106. MINN. STAT. § 473.851 (1976).

107. 285 N.E.2d 291 (N.Y. 1972).

108. *See* discussion *infra* Part I; Letter from the Inst. of Metro. Opportunity, *supra* note 95, at 19.

109. *Ramapo*, 285 N.E.2d at 291–94.

110. Robert H. Freilich & John W. Ragsdale, Jr., *Timing and Sequential Controls — The Essential Basis for Effective Regional Planning: An Analysis for the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009, 1009 (1974).

111. Letter from the Inst. of Metro. Opportunity, *supra* note 95, at 19.

to breathe further life into the words of LUPA, particularly as they pertain to fair-share housing policy.

Robert Freilich had no doubt that his recommendations would be controversial, noting that “the control of growth . . . arouse[s] deep emotions and strong concerns, because the solution to the problem seems to strike at the very basis of American tradition: absolute ownership of private property.”¹¹² The idea of external actors dictating local growth was anathema to American land-use jurisprudence, which had, since *Euclid* in 1926, accorded such powers to local government units.¹¹³ Freilich expressly lamented this fragmentation of authority, which “in many instances . . . is an active impediment to the goals of effective land use control.”¹¹⁴ Such a task, Freilich argued, was best surrendered to a regional body, empowered by statute to coordinate shared resources.¹¹⁵

Prior to LUPA, the Council was sorely limited in its ability to enact meaningful change on the ground. Though its foundational statutes accorded substantial oversight of sewage and waste control across the seven-county area, the remainder of its influence was illusory: it could review and recommend strategy but lacked an affirmative stick-and-carrot strategy with which to compel local cooperation.¹¹⁶ Noting the Council’s agentic limitations,¹¹⁷ as a creature of the State, Freilich set forth specific criteria that would underpin the forthcoming LUPA.

In order to give all residents a “realistic opportunity”¹¹⁸ to live in functional neighborhoods, Freilich argued that the Council *must* be empowered to “review comprehensive planning of local

112. Freilich, *supra* note 110, at 1089.

113. *Village of Euclid, v. Ambler Realty Co.*, 272 U.S. 365, 389–90 (1926) (finding zoning ordinances to be constitutional, provided they reasonably flow from a locality’s police power).

114. Freilich, *supra* note 110, at 1089.

115. *Id.* at 1013. In making the case for consolidated land-use authority, Freilich appealed to the interdependency theory found in the recent *Onischuk* decision, stating “[i]t is becoming increasingly apparent that there are many advantages to control at a higher level over land use problems. A number of crucial land use problems are not local in either effect or origin, and the scope of effective regulation must be commensurate with them.” *Id.*

116. As Freilich observed at the time, “the Council stands in the unenviable position of a coordinator with very limited means to enforce coordination upon those who do not wish to cooperate. . . . Apart from sewage and solid waste control, however, the Council’s powers are basically restricted to review and recommendation.” *Id.* at 1021–22.

117. “The Council, as a creature of the legislative will, can exercise only those powers delegated to it.” *Id.* at 1021.

118. *S. Burlington Cty. NAACP v. Mount Laurel (Mount Laurel II)*, 456 A.2d 390, 433 (N.J. 1983).

communities to insure that local plans and implementing ordinances are in accord and consistent with regional planning, particularly housing and capital improvements.”¹¹⁹ This comprehensive review power, which was formally codified in Minnesota Statute § 473.859, aimed to harmonize local plans with the regional scheme, which was, itself, “far less likely to be influenced by parochial considerations, and far more likely to be in accord with the scope of the problem.”¹²⁰ With this broader view of the moving parts, the Council could quarterback affordable housing allocation, siting low-income and moderate-income housing in participating municipalities,¹²¹ while suspending further development in localities too concerned with property tax minimization to welcome the region’s poor.

While no doubt progressive, this housing policy would help realize a core objective of the Metropolitan Council, as stated in 1973: “To decrease residential segregation by race, class and income level. To reduce the concentration of lower income families and individuals in the older areas of the region and increase housing choice for lower income persons throughout the area.”¹²² Freilich stressed that, for such a vision to be realized, the Metropolitan Council required the ability to integrate once-segregated suburbs from above, even those composed of well-off and historically White residents, in order to spread the wealth of opportunity that lay there.¹²³ Such “fair share” plans, in Freilich’s eyes, were not mere options but were, rather, a necessity if the Council was to accomplish its stated objectives.¹²⁴ This particular sentiment of targeting suburbs as the next frontier for affordable housing was taken to heart by the Council in its early years with stunning results.¹²⁵

In conclusion, research behind LUPA devoted considerable time and energy to remediating racial, class, and income disparity in the Twin Cities. Freilich’s core contention, that effective growth requires a heavy-handed regional organ, is spelled out in the report. The comprehensive review authority that logically emerged from

119. Freilich, *supra* note 110, at 1090.

120. *Id.* at 1027.

121. *Id.* at 1084.

122. TWIN CITIES METRO. COUNCIL, DISCUSSION STATEMENT ON METROPOLITAN DEVELOPMENT POLICY 14 (Oct. 17, 1973) [hereinafter DISCUSSION STATEMENT].

123. Freilich stated plainly that “[t]he provision of low-moderate income housing, particularly job-linked housing in the suburbs, is now necessary to avoid further concentration and blight in the core.” Freilich, *supra* note 110, at 1084–1085.

124. *Id.*

125. See discussion *infra* Part III(D).

that premise found its way into the language and sentiment of LUPA, tracking almost exactly with Freilich's demands. While the applications of this power were many, Freilich saw its unique potential to erase firmly-entrenched neighborhood patterns and to instead facilitate the sharing of valuable regional opportunities in land and employment. These precepts must continue to guide an honest reading of LUPA as intended by its drafters.

C. The Words "Fair Share of the Present and Prospective Regional Need"¹²⁶ Trigger Fair Share Housing Obligations

As discussed above, case law immediately preceding LUPA laid the foundation for a viable regional affordable housing strategy. By requiring interdependent¹²⁷ municipalities to shoulder their "fair share of the present and prospective regional need"¹²⁸ for affordable housing, the *Mount Laurel* formula imposes affirmative obligations upon local and regional planners. In recognizing the fluidity of modern society, the *Mount Laurel* cases¹²⁹ pushed back against parochialism, encouraging growth in a manner that ensures families of all socioeconomic strata the "realistic opportunity" to live in the communities of their choosing.¹³⁰ The near-identical phrasing in LUPA should import the full legacy of these cases and, consequently, authorize the same affirmative solutions to racial and socioeconomic segregation.

The enduring legacy of certain legal phrasing is supported by the canons of statutory interpretation, rules of construction "of sufficiently frequent use in the past to give them a reliability, a validity independent of the reasoning on which they rest."¹³¹ One such canon, as articulated by scholar Karl N. Llewellyn, may be stated as follows: "Words and phrases which have received judicial construction before enactment are to be understood according to

126. *S. Burlington Cty. NAACP v. Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 724–25 (N.J. 1975).

127. *Burnsville v. Onischuk*, 222 N.W.2d 523, 532 (Minn. 1974).

128. *Mount Laurel I*, 336 A.2d at 724.

129. *Id.*; *S. Burlington Cty. NAACP v. Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983).

130. *Mount Laurel II*, 456 A.2d at 433.

131. Michael Sinclair, "Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," *Pairs Thirteen to Sixteen*, 53 N.Y.L.S. L. Rev. 953, 954 (2008). As Sinclair explains, these canons are aids to judicial interpretation and have persuasive value, unless "trumped by express statutory language or by clear evidence of legislative intent to the contrary." *Id.*

that construction.”¹³² Case law can prove immensely helpful in construing certain phrases which reappear, time and time again, in similar statutes. As Felix Frankfurter once opined most eloquently, “[w]ords of art bring their art with them,”¹³³ and both courts and legislatures must presume that such art is imported intentionally into a statute when written.¹³⁴

When applied to the words “fair share of the present and prospective regional need therefore,” this canon is instructive. This phrase, as written in *Mount Laurel I*¹³⁵ and clarified in *Mount Laurel II*,¹³⁶ authorizes housing as a regional system, one that may be coordinated forcefully from above to ensure stability and participation among all constituent municipalities. The Mount Laurel cases, together, constitute one of the most famous doctrines, in all of land-use law, the Mount Laurel Doctrine, and their contribution was a groundbreaking one.¹³⁷

In step with the canon of “Words Judicially Defined,” other jurisdictions have seized upon the key language of the Mount Laurel Doctrine to give their own land-use statutes meaning. In *Seaman v. City of Durham*,¹³⁸ the Land Conservation and Development Commission of the State of Oregon (LCDC) grappled with the scope of its fair share statute and turned to *Mount Laurel I* for guidance.¹³⁹ Municipalities within the Portland Metropolitan

132. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 403 (1950). This is derived from Henry Campbell Black’s canon of “Words Judicially Defined,” which is stated as follows: “Words and phrases in a statute which have received a settled judicial construction before its enactment are to be understood according to that construction, unless the statute clearly requires them to bear a different meaning.” HENRY CAMPBELL BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF LAWS* 186 (2d ed. 1911).

133. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

134. Sinclair, *supra* note 131, at 958.

135. S. Burlington Cty. NAACP v. Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 724–25 (N.J. 1975).

136. *Mount Laurel II*, 456 A.2d at 433.

137. Norman Williams, renowned land-use scholar, characterized *Mount Laurel I* as “the most important zoning case since [*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)].” Norman Williams, *A Major Transition in American Planning Law*, 27 LAND USE L. & ZONING DIG. 33, 33 (1975). Indeed, this holding questioned the sanctity of local zoning authority established in *Euclid*, instead situating questions of police power and general welfare at the regional level. *Id.*; see also *Village of Euclid*, 272 U.S. at 389–90. Civil rights advocates were similarly awestruck by the radical potential of *Mount Laurel I*, which has been called “one of the most significant civil rights cases in the United States since *Brown v. Board of Education* [347 U.S. 483] (1954).” *Mount Laurel Doctrine*, *supra* note 65, at 1.

138. 1 LCDC 283, 288 (No. 77-025) (1978); see also BLACK, *supra* note 132.

139. *Seaman*, 1 LCDC at 290.

Area are required to submit comprehensive plans that account for “adequate numbers of housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.”¹⁴⁰ At issue was a Durham, Oregon zoning ordinance that, much like that passed by Mount Laurel Township in the early 1970s, encouraged an impermissible level of “economic and social homogeneity” that would cause ripple effects through the regional housing market.¹⁴¹ Drawing from the language of *Mount Laurel I*, the LCDC declared the ordinance invalid, finding that “planning jurisdictions must consider the needs of the relevant *region* in arriving at a fair allocation of housing types” and that “each town [must] provide[] its fair share of low-cost housing needed by the region.”¹⁴² A similar deference to Mount Laurel’s fair share legacy has appeared in New York,¹⁴³ New Hampshire,¹⁴⁴ and Rhode Island.¹⁴⁵

As mentioned above, Minnesota Statute § 473.859 tracks this storied language almost exactly when it requires local government units to craft comprehensive plans ensuring “adequate housing opportunities to meet *existing and projected local and regional housing needs*.”¹⁴⁶ Upon completion, a local comprehensive plan is submitted to the Council, which must give approval only if the plan comports with the regional allocation strategy.¹⁴⁷ By assigning this statutory obligation to the Council, LUPA effectively requires the Council to ensure the fair allocation of affordable housing

140. *Id.* at 289.

141. *Id.* at 291.

142. *Id.* at 290 (emphasis added).

143. *Berenson v. New Castle*, 67 N.Y.S.2d 669, 677 (N.Y. App. Div. 1979) (remanding a dispute over zoning to the Town Board for appropriate “fair share” analysis and directing the Town Board to rezone plaintiffs’ property for multi-family use).

144. *See Beck v. Raymond*, 394 A.2d 847, 852 (N.H. 1978) (“An ideal solution to the problem of parochial growth restrictions is effective regional or state-wide land-use planning . . . insuring that each municipality bears its *fair share* of the burden of increased growth.” (emphasis added)); *see also Britton v. Chester*, 595 A.2d 492, 495 (N.H. 1991) (drawing upon *Mount Laurel I & II* and *Beck* to impose fair share obligations upon the Town of Chester).

145. Municipalities in Rhode Island are required to prepare similar comprehensive plans, which must include “the identification of existing housing patterns, an analysis of *existing and forecasted housing needs*, and identification of areas suitable for future housing development or rehabilitation.” R.I. GEN. LAWS § 45-22.2-6(b)(6) (2011) (emphasis added). Such existing and future housing analysis take into account “local, regional, and statewide concerns.” *Id.* at (b)(7).

146. MINN. STAT. § 473.859, subd. 2(c) (2017) (emphasis added).

147. § 473.858.

opportunities, even at great financial and political cost to local politicians.

D. The Council Has Wielded Affirmative, Interventionist Powers in the Past

In its early form, the Council exhibited top-down control over the regional housing market, ensuring that low-income and moderate-income families had a “realistic opportunity”¹⁴⁸ to find affordable housing. The Council’s forceful approach to comprehensive planning placed the Twin Cities at the forefront of neighborhood integration in LUPA’s first decade.¹⁴⁹ The affirmative policy described below, grounded in LUPA, undermines the Council’s present contention that it never had *Mount Laurel*-type powers; rather, the evidence suggests that the Council had, and still has, broad authority to enforce local fair-share goals.

i. Comprehensive Planning Power

As discussed in Part I, each local government unit is required to submit a comprehensive plan that delineates its growth strategy for the coming decade.¹⁵⁰ Clearly stated in LUPA is the requirement that such plans contain “standards, plans and programs for providing *adequate housing opportunities to meet existing and projected local and regional housing needs.*”¹⁵¹ Just as the *Mount Laurel* Doctrine enjoins local cooperation in regional housing distribution, LUPA requires municipalities within the seven-county area to shoulder their fair share of present and future regional need. In step with the realism expressed in *Mount Laurel II*, LUPA provides a meaningful compliance mechanism: suspension of local development unless and until the comprehensive plan is modified to reflect regional targets for matters of metropolitan significance.¹⁵²

The Minnesota Supreme Court affirmed the Council’s right to effectively suspend local development under Minnesota Statute § 473.175 in *City of Lake Elmo v. Metropolitan Council*.¹⁵³ In order to

148. *S. Burlington Cty. NAACP v. Mount Laurel (Mount Laurel II)*, 456 A.2d 390, 433 (N.J. 1983).

149. Orfield, *supra* note 5, at 919–920; *see also* Edward G. Goetz, Karen Chapple & Barbara Lukermann, *The Rise and Fall of Fair Share Housing: Lessons from the Twin Cities*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 251 (Xavier de Souza Briggs ed., 2005).

150. § 473.859, subd. 1.

151. *Id.* at subd. 2 (emphasis added).

152. MINN. STAT. §§ 473.173, 473.851, 473.859, subd. 2(c) (2017).

153. 685 N.W.2d 1 (Minn. 2004).

predict and manage population growth, the Council mandated that Lake Elmo, a rural town within its jurisdiction, accommodate a minimum of three housing units per acre by 2040, in accordance with the Council's Regional Blueprint.¹⁵⁴ Lake Elmo resisted this density requirement, arguing that such a mandate would threaten the "essential character of [its] community" and that the Council had not been granted explicit statutory authority to compel local density minimums.¹⁵⁵ The court disagreed, reasoning that the Council's supervision of "orderly and economical development, public and private, of the metropolitan area," in conjunction with Minnesota Statute § 473.175, grants the Council authority to reign in any local comprehensive plan that substantially departs from the Council's system plans.¹⁵⁶

The broader implication of *City of Lake Elmo* is that the Council's blueprint for development takes primacy in any number of strategic areas, named or otherwise, and can enjoin local governments to shoulder their fair share of regional burdens.¹⁵⁷ More specifically, the Council can publish density requirements and effectively suspend local development until housing is adequately provided for.¹⁵⁸ As demonstrated in *City of Lake Elmo*, the Council's enforcement arm is not limited to those growth sectors identified in LUPA, but rather applies to any local initiative deemed incompatible with regional development.¹⁵⁹ This language is, and *has been*, sufficient to force developing municipalities in the Twin Cities to shoulder their fair share of affordable housing.

During the First Wave of housing policy under LUPA,¹⁶⁰ spanning from 1971 to 1982, the Council used this comprehensive review power to increase low- and moderate-income housing across the region.¹⁶¹ In the first three years of this period, the Council

154. *Id.* at 6.

155. *Id.*

156. *Id.*

157. MINN. STAT. § 473.175 subd. 3 (2017). This power of persuasion can be, and has been, used to ensure affordable housing throughout the seven-county area. See Orfield, *supra* note 5, at 920–923 (describing the Council's use of its authority to encourage subsidized housing development in the suburbs and the inner city).

158. § 473.175 subd. 3.

159. *City of Lake Elmo*, 685 N.W.2d at 6.

160. See Edward G. Goetz, Karen Chapple & Barbara Lukermann, *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 LAW & INEQ. 31, 43 (2004) (describing the three "waves" of Council policy, each delineating a distinct strategy to addressing the Poverty Housing Industry).

161. Trudy McFall, *A Regional Housing Strategy: From Plans to Implementation* 11 (1975) (unpublished manuscript) (on file with author).

drafted two Allocation Plans indicating where and to what extent the region could grow its affordable housing stock.¹⁶² In doing so, the Council examined the capacity of each of the Twin Cities' nine subsectors, looking primarily for communities that were "well-serviced and with good proximity to metropolitan services and facilities."¹⁶³ For this reason, the prioritization scheme largely mirrored the so-called rings of suburban development, with each successive community away from the urban core more capitalized than the one before it. Then Council Regional Director Trudy McFall affirmed this relationship, stating that the inner-ring, developing suburbs with "less proximity to employment, shopping and service concentrations, receive lower priority," while established suburban communities along the outer ring were prime candidates for affordable housing.¹⁶⁴

These Allocation Plans, which codified the Council's regional housing strategy, provided clear direction for local governments in preparing their own comprehensive plans.¹⁶⁵ As discussed above, these comprehensive plans must reference sufficient existing and new housing to meet the local unit's share of the metropolitan area need for low- and moderate-income housing, and the Council may suspend local development that "substantially departs" from the regional scheme.¹⁶⁶ In reviewing this requirement under Minnesota Statute § 473.851, the Council had two critical housing considerations in mind.¹⁶⁷ First, the Council consulted the community's quantifiable goals for affordable housing and determined whether these plans comported with the Council's targets for the corresponding priority ring.¹⁶⁸ Second, the Council looked for a concrete plan to reduce the cost of market-rate housing, a prerogative required of all communities, regardless of priority ring.¹⁶⁹ First Wave comprehensive plans often satisfied these considerations by referencing the Council's allocation plan, as local governments could easily discern what the Council was looking for,

162. *Id.*; Orfield, *supra* note 5, at 920–921.

163. McFall, *supra* note 161, at 11. This reflected the Council's commitment to placing low- and moderate-income units in communities that could support new growth.

164. *Id.*

165. *See, e.g.*, Goetz, Chapple & Lukermann, *supra* note 160, at 48 (explaining how the Council's regional plan shaped future local planning in regard to low-income housing).

166. MINN. STAT. §§ 473.851, 473.859, subd. 2(c) (2017).

167. *See* McFall, *supra* note 161, at 17–18.

168. *Id.*

169. *Id.* at 18.

in terms of regional housing development.¹⁷⁰ Using LUPA, the early Council could and, in fact, did suspend comprehensive plans that departed from the First and Second Allocation Plans.¹⁷¹ Given the historical deference shown to the Council in determining compatibility, this suspension power represents a unique affirmative governmental device, of the sort contemplated by *Mount Laurel I*.

ii. State Grant Oversight

LUPA accords an additional affirmative device to the Council under Minnesota Statute § 473.171.¹⁷² As discussed in Part I, the Council may review *all* applications for state grants and loans “submitted in connection with proposed matters of metropolitan significance.”¹⁷³ This statutory device is considerably stronger than that under the comprehensive plan review; indeed, as the overseer of all state grants, the Council has leverage to induce local compliance.

From 1976 to 1982, the Council drew upon LUPA to create Policy 13/39,¹⁷⁴ which governed the disbursement of federal and state funds to local governments in the seven-county area. In reviewing applications for state or federal grants, “priority for such requests would be given based on the community’s housing performance.”¹⁷⁵ Under Policy 39, the Council was empowered to examine not only the merits of an application itself, but the applicant’s “plans and programs to provide such housing opportunities [for low- and moderate-income persons] in the future.”¹⁷⁶ This second component provided a strong incentive structure: without opening their land to low- and middle-income units, local communities could not secure outside funding for vital infrastructure, such as sewers, parks, and highways.¹⁷⁷

In determining housing performance, the Council examined a variety of measures, among them the amount of low- and moderate-

170. See Goetz, Chapple & Lukermann, *supra* note 160, at 48.

171. See McFall, *supra* note 161, at 17 (describing the leverage of the Council in compelling compliance with the regional plan).

172. MINN. STAT. § 473.171 (2017).

173. *Id.* at subd. 1.

174. As Professor Myron Orfield of the Institute for Metropolitan Opportunity explained, the policy described here was initially named Policy 13 but was later renumbered Policy 39. Letter to Starling, *supra* note 95, at 23. This Article will hereinafter refer to the policy as “Policy 39.”

175. See McFall, *supra* note 161, at 8.

176. Metro Council, *supra* note 4, at 45.

177. McFall, *supra* note 161, at 8.

cost market-rate housing in the existing housing supply, the amount of subsidized housing in the community, and plans for future affordable housing sites.¹⁷⁸ After the assessment, a local community was given a composite score and ranked alongside all other constituent communities, and this public index was consulted in funding decisions.¹⁷⁹ Once published, this index provided transparent feedback to local governments, which were encouraged to compete amongst each other in neighborhood integration.¹⁸⁰ This public index also served expressive functions; over time, it demonstrated the Council's commitment to affordable housing, a message that communities took seriously.¹⁸¹

While the Council has discontinued Policy 39, the power to review applications for state grants and loans remains firmly embedded within LUPA.¹⁸² Quizzically, the Council argues to the contrary, claiming that this review process was solely authorized by the now-repealed OMB Circular A-95 review power¹⁸³ over federal grants.¹⁸⁴ This assertion, however, is misguided. A-95 review pertained only to the Council's review of federal funds and, though funds are no longer within the purview of the Council, had no impact upon the Council's review of *state* grants and loans, as codified by a wholly distinct provision in LUPA.¹⁸⁵ This issue remains to be litigated, but its resolution in favor of the complainants would lend credence to the idea that the powers to withhold state funding from local entities until they become "fair-share" compliant remain in force.

178. *Id.* at 10.

179. *Id.* This policy was heralded as "highly successful" by the LCDC in *Seaman v. City of Durham*, 1 LCDC 283, 290 (No. 77-025) (1978).

180. See McFall, *supra* note 161, at 10.

181. *Id.* at 9.

182. MINN. STAT. § 473.171, subd. 2 (2017).

183. See Memorandum on Delegation of Authority Under Intergovernmental Cooperation Act (Nov. 8, 1968), 33 Fed. Reg. 16,487-01 (Nov. 13, 1968); Federal and Federally Assisted Programs and Projects (A-95 Rules), 38 Fed. Reg. 32,874-881 (Nov. 13, 1973); Exec. Order No. 12,372, 47 Fed. Reg. 30,959 (July 12, 1982); Exec. Order No. 12,416, 3 C.F.R. 1983 (Apr. 8, 1983).

184. According to the Council's 2040 Housing Policy Plan, from 2014, "actions in 1998 and 1999 eliminated [the Policy 39 fair share plan] from the metropolitan development guide." METROPOLITAN COUNCIL, HOUSING POLICY PLAN 18 (2014), <https://metro council.org/METC/files/e3/e3202e04-5ed7-48a3-81b9-e0e5a9c83b2b.pdf> (last accessed Mar. 6, 2018).

185. *Id.*

Conclusion

The Council has been granted extraordinary authority over the spatial and demographic development of the Twin Cities. This Article has attempted to nest LUPA within the prevailing trends in regional governance at the time of LUPA's passage. The uniquely interdependent nature of the Twin Cities, as established in *Onischuk*,¹⁸⁶ signaled to LUPA visionaries, like Robert Freilich, the need for a robust burden-sharing framework, one that can divert resources like housing to the region's most vulnerable residents as needed. Such an interpretation is supported by the statutory language that emerged and the pattern of Council behavior that followed from 1976 to 1982.

The departure from early affordable housing strategy has revealed, unsurprisingly, that the free hand of the housing market has always led to the same place: a tale of two cities (or three, or four). Without an affirmative Council, local governments have proven incapable of ensuring equitable development. In order to open the doors of opportunity and access to the Twin Cities' most prosperous neighborhoods, the Council must once again harness its full statutory authority as a regional land-use planning body.

186. *Burnsville v. Onischuk*, 222 N.W.2d 523, 532–33 (Minn. 1974).