Pace Law Review

Volume 6
Issue 2 *Winter 1986*

Article 1

January 1986

Exclusionary Zoning: Mount Laurel in New York?

Terry Rice

PACE LAW REVIEW

Volume 6 Winter 1986 Number 2

ARTICLES

Exclusionary Zoning: Mount Laurel In New York?

Terry Rice†

I. Introduction

The *Mount Laurel* decisions of the New Jersey Supreme Court, *Southern Burlington County NAACP v. Township of Mount Laurel*,[1] constitute the most extreme treatment in the country of the controversial issue of exclusionary zoning. In spite of New York's more traditional approach to the question of the impact of zoning ordinances on housing opportunities, the *Mount Laurel* decisions are stimulating increased pressure on New York courts to react in a manner less deferential to the traditional presumptive authority of a municipality to formulate its own land use policies. Although appellate courts in New York have declined to require that municipalities provide opportuni-

† B.A., College of William and Mary, 1972; J.D., Albany Law School, 1975; Village Attorney, Village of Suffern, New York; Town Attorney, Town of Tuxedo, New York; Private Practitioner, Suffern, New York.

1. The first *Mount Laurel* decision, which will be referred to as *Mount Laurel I*, appears at 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975). The second *Mount Laurel* decision, which will be referred to as *Mount Laurel II*, appears at 92 N.J. 158, 456 A.2d 390 (1983).

ties for the housing of low income individuals, the stage has been set in New York for an attack on zoning laws and restrictions which do not provide for the accommodation of housing for those on the lower stratum of the economic structure or which displace such people in favor of the more wealthy.

In order to assess the possible impact of the *Mount Laurel* decisions on New York law, an understanding of those decisions is necessary. To ascertain the effectiveness of the mandates of the New Jersey Supreme Court the methods and procedures utilized by the *Mount Laurel* trial judges to enforce its obligations must be reviewed. Lastly, the legislative response to the unpopularity of judicial oversight of municipal zoning is instructive. A comprehension of the evolutionary process of combating exclusionary zoning in New Jersey is imperative for anyone proposing a dramatic change in the New York exclusionary zoning law.

II. New Jersey Background

A. Mount Laurel I

In *Southern Burlington County NAACP v. Township of Mount Laurel*,[2] the New Jersey Supreme Court reversed decades of deferential treatment of municipal zoning activities and determined that a developing municipality violated the New Jersey constitutional mandate that zoning authority be exercised in furtherance of the general welfare when it excluded housing for lower income persons. By adopting zoning ordinances that inhibit housing opportunities for the poor and advance local interests at the expense of the rest of the state's citizens, a municipality utilizes the police power for an unconstitutional purpose.[3] The court held that the obligation to exercise zoning authority in furtherance of the general welfare could not be satisfied merely by eliminating exclusionary practices. This obligation could only be satisfied by affording a realistic opportunity for the construction within its borders of its fair share of the present and prospective regional need for low and moderate income housing. According to the court, every developing municipality

2. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

3. *Id.* at 173-79, 336 A.2d 724-26.

was required, through its land use regulations, to make realistically possible an "appropriate variety and choice of housing."[4]

The *Mount Laurel I* court did not, however, define what constituted a "developing" municipality, what the relevant "region" consisted of, the manner in which "regional need" was to be determined, nor how a municipality's "fair share" was to be calculated. Although the decision constituted a strong policy statement and an unequivocal condemnation of exclusionary zoning, the ambiguity of procedures and methods to be employed stimulated both confusion on the part of those municipalities which wished to act in good faith and avoidance in those which intended to preserve the status quo. The ambiguity of the court's holding spawned years of litigation in which the court retreated from its landmark position. The effect of this litigation was to stimulate avoidance of the mandates of the *Mount Laurel I* decision. In a subsequent decision, the court determined that the construction of "least cost" housing[5] was sufficient to satisfy a municipality's *Mount Laurel I* obligation, even if low and moderate income families could not afford to purchase those units.[6] The supreme court further held that precise fair share allocations were not necessary and that the proper inquiry for a court was whether a municipality was making bona fide efforts to remove exclusionary barriers.[7] The court also determined that the *Mount Laurel I* obligation did not apply to fully developed single-family residential communities,[8] and that a fully developed community was not required to grant use variances to permit the construction of multi-family housing.[9]

---

4. *Id.* at 174, 336 A.2d at 724.

5. "Least cost" housing was defined as housing built at the least cost possible. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 512-13, 371 A.2d 1192, 1206-07 (1977). However, in many cases, "least cost" housing is not inexpensive enough for lower income occupancy.

6. *Id.* at 510-17, 371 A.2d at 1206-09.

7. *Id.* at 499, 371 A.2d at 1200.

8. Pascack Ass'n v. Mayor of Washington, 74 N.J. 470, 485-87, 379 A.2d 6, 13-14 (1977).

9. Fobe Assocs. v. Mayor of Demarest, 74 N.J. 519, 379 A.2d 31 (1977).

B. Mount Laurel II

Dissatisfied with the Township of Mount Laurel's lack of progress in meeting the demand for low and moderate income housing[10] and with the "widespread non-compliance with the constitutional mandate of our original opinion,"[11] the Supreme Court of New Jersey determined in *Mount Laurel II* to use "a strong judicial hand" to strengthen and clarify its earlier ruling.[12] Although *Mount Laurel I* prohibited municipalities from employing exclusionary zoning policies, *Mount Laurel II* imposed an affirmative duty on communities to assure that their fair share of low and moderate income housing would be constructed.[13] The *Mount Laurel II* decision, a consolidation of six cases involving a spectrum of *Mount Laurel I* issues, encompassed three and one-half days of oral arguments and twenty-five months of deliberation by the court. The lengthy 216 page decision is, in part, a result of "the court's efforts to overcome municipal resistance by explicitly setting forth what should be done to satisfy the constitutional mandate."[14]

The primary basis for the court's extraordinary determination is its perception of the permissible limits of a municipality's exercise of the police power:

> The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare. When the exercise of that power by a municipality affects something as fundamental as housing, the general welfare includes more than the

---

10. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 198, 456 A.2d 390, 410 (1983). The court observed that:

> After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. 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.

Id.

11. *Id.* at 199, 456 A.2d at 410.

12. *Id.*

13. Meisel, *Guidelines for the Practitioner: The Impact of Mount Laurel II on New Jersey Zoning and Planning Procedure and Practice*, 14 SETON HALL L. REV. 955, 963 (1984).

14. Buchsbaum, *No Wrong Without A Remedy: The New Jersey Supreme Court's Effort to Bar Exclusionary Zoning*, 17 URB. LAW. 59, 61 (1985).

> welfare of that municipality and its citizens: It also includes that of the general welfare — in this case the housing needs — of those residing outside the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional. In particular, those regulations that do not provide the requisite opportunity for a fair share of the region's needs for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection.[15]

The court stated that the basis for this constitutional obligation is that "the State controls the use of land, *all* of the land. In exercising that control it cannot favor the rich over the poor . . . . While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages."[16]

The court emphasized what it saw as the imperative for its obligation to act:

> The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted.[17]

Such a scenario was, in the opinion of the court, not only at variance with the requirement that the zoning power be exercised for the general welfare, but also with "concepts of fundamental fairness and decency that underpin many constitutional obligations."[18] The court declared that the state may not merely authorize municipalities to exercise zoning authority and then disclaim responsibility for problems and consequences which result.[19]

The court recognized that it was venturing into an area which "is better left to the Legislature,"[20] but based this intru-

---

15. *Mount Laurel II*, 92 N.J. at 208-09, 456 A.2d at 415.
16. *Id.* at 209, 456 A.2d at 415.
17. *Id.*
18. *Id.* at 209-10, 456 A.2d at 415.
19. *Id.*
20. *Id.* at 212, 456 A.2d at 417.

sion into the legislative prerogative on its view that the legislature had abrogated its responsibility to protect important constitutional rights. The New Jersey legislature adopted a number of programs to stimulate or subsidize low income housing and had entertained fair share allocation legislation, but had declined to adopt the measure.[21] It certainly can be argued that, by basing its decision on legislative abrogation of responsibility, the court was stretching its authority to the limit. "Acceptance of this argument [abrogation of legislative responsibility] would validate judicial policymaking anytime the legislature fails to adopt a particular program favored by a majority of the court, even though the program does not have the support of a majority of the elected members of the state legislature."[22] Regardless of the implications regarding the judicial legitimacy of its actions, the court determined that the protection of constitutional rights could not await the achievement of a political consensus.[23]

Having determined the existence of a municipal obligation to affirmatively provide a realistic opportunity for a fair share of the region's present and prospective low and moderate income housing, the court held that satisfaction of a municipality's *Mount Laurel* obligation would be determined solely by an objective standard — a municipality would be required to provide its specific numerical fair share.[24] Henceforth, the good or bad faith of a municipality would be irrelevant, as the court repudiated the numberless "bona fide" standard. The housing in question was required to be affordable to those eligible for section 8 housing programs,[25] that is, by low income families (those whose

---

21. *See* Rose, *New Additions to the Lexicon of Exclusionary Zoning Litigation*, 14 SETON HALL L. REV. 851, 886 (1984).

22. *Id.*

> The issue is confounded by the fact that there are no due process or equal protection clauses in the New Jersey Constitution! Nevertheless, the New Jersey Supreme Court, having determined in *Mount Laurel I* that there ought to be such clauses, ruled that those clauses were inherent in the state constitution.

Id. at 865.

23. *Mount Laurel II*, 92 N.J. at 212, 456 A.2d at 417.

24. *Id.* at 221, 456 A.2d at 421.

25. The term "Section 8 Housing Programs" refers to the Federal Section 8 Housing Program, Section 8, U.S. Housing Act of 1937, (P.L. 73-479), as amended by Housing and Community Development of 1974, (P.L. 93-383). The program consists, primarily, of rent subsidies for lower income families and rehabilitation of substandard housing to produce adequate housing for such families. See 42 U.S.C. § 1437a(b)(2) (1937) for the

incomes do not exceed fifty percent of the median income of the area) and moderate income families (those whose incomes are no greater than eighty percent and no less than fifty percent of the median income of the area).[26] The court delineated affordability as requiring that a family pay no more than twenty-five percent of its income for such housing.[27]

In addition to the requirement that certain municipalities satisfy their fair share of the regional need, all municipal land use regulations were required to provide a realistic opportunity for decent housing for its indigenous poor (except where they represent a disproportionately large segment of the population as compared with the rest of the region). "The zoning power is no more abused by keeping out the region's poor than by forcing out the resident poor."[28]

In order to determine which municipalities are required to house the region's poor, the court abandoned the "developing municipality" standard of *Mount Laurel I* and embraced the State Development Guide Plan (SDGP), a state-wide planning document which divided the state into six areas: growth, limited growth, agriculture, conservation, pinelands and coastal zones. "By clearly setting forth the state's policy as to where growth should be encouraged and discouraged, these maps effectively serve as a blueprint for implementation of the *Mount Laurel* doctrine."[29] The *Mount Laurel* regional fair share obligation applies only to communities located wholly or partly in "growth" areas.[30] The intention of the court in utilizing the SDGP was "to

---

Section 8 definitions of "lower income families" and "very low income families" which roughly correspond to the *Mount Laurel* terms "moderate income families" and "low income families."

26. *Id.* at 221 n.8, 456 A.2d at 421 n.8.

27. *Id.*

28. *Id.* at 214, 456 A.2d at 418.

29. *Id.* at 226, 456 A.2d at 424.

30. The SDGP is not, however, conclusive in every case. Recognizing that the SDGP was not specifically prepared for *Mount Laurel* use, a municipality may, in "unusual" cases, prove that "the locus of the *Mount Laurel* obligation is different from that found in the SDGP." *Id.* at 240, 456 A.2d at 431. Such a municipality would be required to demonstrate that the conclusion that the municipality contains a growth area is arbitrary and capricious, or that the municipality has undergone a significant transformation since preparation of the map which renders the designation inappropriate. *Id.* at 240, 456 A.2d at 431-32. A party seeking to vary the SDGP designations has a "heavy burden." *Id.* at 215, 456 A.2d at 418.

channel the *entire* prospective lower income housing need in New Jersey into 'growth areas.' "[31] As a result, in the view of the court, the "obligation to encourage lower income housing, therefore, will hereafter depend on rational long-range land use planning (incorporated into the SDGP) rather than upon the sheer economic forces that have dictated whether a municipality is 'developing.' "[32]

When determining a community's fair share, three issues must be addressed: the relevant region must be identified, the present and prospective housing needs must be determined, and an allocation of those needs among the municipalities involved must be made. While the decision is not quite as vague as *Mount Laurel I* in discussing these issues, it was left to the trial courts to determine the precise parameters of the relevant region, need and allocation. True to its word, however, the *Mount Laurel II* court did provide some guidance in making these determinations. Region was defined to be "that 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."[33] Special circumstances would be required in order for the trial court to vary the definition. In determining fair share, the court favored formulas which accord substantial weight to new employment and tax ratables, while it disfavored formulas that rely upon the effect of past exclusionary practices.

In order to determine these issues and to make fair share allocations, three judges would hear all *Mount Laurel* litigation. It was expected by the court that a regional pattern for each judge's area and, eventually, for the entire state would emerge, resulting in a consistent determination of regional needs. The determination of region and of regional need made by any of the three judges is to be presumptively valid and binding on all municipalities in the region. The court anticipated that, ultimately, "fair share" litigation would be limited to the issue of proper

31. *Id.* at 244, 456 A.2d at 433.

32. *Id.* at 215, 456 A.2d at 418.

33. *Id.* at 256, 456 A.2d at 440 (quoting Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 543, 371 A.2d 1192, 1219 (1977)).

allocation among municipalities.[34] "Along with this consistency will come the predictability needed to give full effect to the *Mount Laurel* doctrine."[35]

C. Required Action

To satisfy its *Mount Laurel* obligations, a municipality must, at the very least, remove all municipally created barriers to the construction of its fair share of lower income housing. To the extent necessary to achieve this, a municipality must remove all zoning and subdivision restrictions and exactions that are not necessary to protect the public health and safety. Compliance with the mandates of *Mount Laurel* may frequently require more than the elimination of unnecessary cost producing restrictions, that is, affirmative measures will be required in order to make housing opportunities realistic. Such measures may include: encouraging or requiring the use of available state or federal subsidies, mandatory set-asides,[36] and overzoning. Recognizing that "the construction of lower income housing is practically impossible without some kind of governmental subsidy,"[37] a trial court may require a municipality to cooperate with a developer's efforts to obtain a subsidy and may require the granting of tax abatements in appropriate situations.

The court determined that because incentive zoning[38] leaves a developer free to build only upper income housing if he so desires, sole reliance on incentive zoning may prove to be insufficient. Mandatory set-asides[39] are considered by the court to be a more effective inclusionary device which a municipality must utilize if it cannot otherwise satisfy its fair share obligation. Mandatory set-asides are favored by the *Mount Laurel* court

---

34. *Mount Laurel II*, 92 N.J. at 216, 456 A.2d at 419.

35. *Id.*

36. A mandatory set-aside is a requirement that developers include a minimum amount of lower income housing in a development. *Id.* at 266, 456 A.2d at 445.

37. *Id.* at 263, 456 A.2d at 444.

38. Incentive zoning is "offering economic incentives to a developer through the relaxation of various restrictions of an ordinance (typically density limits) in exchange for the construction of certain amounts of low and moderate income units." *Id.* at 266, 456 A.2d at 445. Incentive zoning is commonly accomplished by the use of density bonuses that increase density as the amount of lower income housing is increased. *Id.*

39. *See supra* note 36.

when subsidies are not available.[40] The court acknowledged the problem of keeping lower income units available for the poor over time, that is, the owner or tenant of a unit may be tempted to rent or sell the unit at its full value. If a municipality is to satisfy its *Mount Laurel* obligations, it must ensure that those units remain available to those for whom they are intended. There are two methods suggested by the court to ensure availability. First, construction of "no-frills" apartments which would be sold to low income purchasers at a price close to market value thereby eliminating the opportunity of sale to higher income persons, and, second, the use of rent control or covenants and a public trust to ensure that the units are available only at lower income levels.

An additional affirmative measure which the court required a municipality to consider is "overzoning," that is, "zoning to allow for *more* than the fair share if it is likely, as it usually is, that not all of the property made available for lower income housing will actually result in such housing."[41] In addition, the court required that if a municipality has been otherwise unable to meet its *Mount Laurel* obligation, it must zone for low-cost mobile homes:

> [W]e do *not* hold that every municipality must allow the use of mobile homes as an affirmative device to meet its *Mount Laurel* obligation, or that any ordinance that totally excludes mobile homes is *per se* invalid . . . . [I]f compliance can be just as effectively assured without mobile homes, *Mount Laurel* does not command them; if not, then assuming a suitable site is available, they must be allowed.[42]

In the rare instances when special conditions, such as extremely high land costs, make it impossible to otherwise satisfy a municipality's fair share obligation after all alternatives have been explored and all affirmative devices considered, "only when everything has been considered and tried," the *Mount Laurel* obligation may be satisfied by the construction of "least-cost" housing.[43] Although such housing will be unaffordable by those

40. *Mount Laurel II*, 92 N.J. at 267, 456 A.2d at 446.

41. *Id.* at 270, 456 A.2d at 447.

42. *Id.* at 276, 456 A.2d at 450.

43. "Least-cost" housing is the "least expensive housing that builders can provide

in the lower income brackets, it will provide shelter for families who could not otherwise afford housing in the suburban market: "[a]t the very minimum, provision of least cost housing will make certain that municipalities in 'growth' areas . . . do not 'grow' only for the well-to-do."[44] While the form of least cost housing may vary, any municipality utilizing such a measure is required to zone significant areas for housing that most closely approaches lower income housing, that is, in the opinion of the court, mobile homes.

D. Judicial Remedies

If a trial court determines that a community has failed to comply with its *Mount Laurel* obligation, it must order the municipality to revise its zoning law. If the municipality does not comply, the court is empowered to utilize remedies which are radical compared to the customary zoning remedies. In all cases where the successful plaintiff is a developer, a builder's remedy is authorized. The builder's remedy has been defined as "a form of redress by which a builder-plaintiff in exclusionary zoning litigation is compensated for damages suffered as a result of the invalid zoning ordinance by a judicial order permitting him to proceed with his proposed development, subject to prescribed conditions."[45]

When a prevailing plaintiff-developer proposes to construct a project containing a substantial amount of lower income housing, a "builder's remedy" will ordinarily be granted unless the municipality establishes that, as a result of environmental or other substantial planning concerns, the proposed project is contrary to sound land use planning.[46] The public interest is thereby served by encouraging litigation to challenge zoning ordinances not in compliance with the court's mandate. Recognizing that public interest organizations lack the resources to bring a sufficient number of cases to provide effective enforcement of

---

after removal by a municipality of *all* excessive restrictions and exactions and after thorough use by a municipality of all affirmative devices that might lower costs." *Id.* at 277, 456 A.2d at 451. *See also supra* note 5 and accompanying text.

44. *Mount Laurel II*, 92 N.J. at 277, 456 A.2d at 451.

45. Rose, *supra* note 21, at 870.

46. *Mount Laurel II*, 92 N.J. at 279-80, 456 A.2d at 452.

Mount Laurel obligations, the court sought to increase the incentives for developers to pursue *Mount Laurel* litigation by encouraging the award of builder's remedies.

When invalidating a noncomplying ordinance, the trial court is directed to order the offending municipality to incorporate affirmative measures into its new law. The decision specifically requires that the revisions be completed within ninety days from judgment. To facilitate the revision, the court may appoint a special master who is required to make his recommendations and report to the trial court.[47]

If a municipality fails to produce a timely and constitutionally acceptable ordinance, then the court may order far-reaching relief, including:

1. requiring that the municipality adopt particular amendments to enable it to comply with its *Mount Laurel* obligations;
2. delaying certain types of projects or construction until its ordinance is satisfactorily revised or until its fair share of housing is constructed or firm commitments obtained;
3. voiding the municipality's land-use regulations in whole or in part to relax or eliminate building and use restrictions in all or portions of the municipality; and
4. requiring that particular applications to construct housing that includes lower income units be approved by the appropriate municipal agencies.[48]

These remedies, which amount to an intrusion of an unprecedented degree into municipal zoning authority, will be invoked after a municipality's zoning regulations have been found to be constitutionally void and after the municipality has failed to satisfactorily revise its zoning ordinance.

In order to eliminate the potential for years of delay in complying with a municipality's *Mount Laurel* obligation resulting by virtue of appeal, followed by enactment of a second potentially invalid ordinance and another round of time consuming litigation, all questions are to be resolved in one proceeding with but one appeal. Following a court's invalidation of its ordinance, a municipality may revise its ordinance "under protest" and appeal the propriety of the original order that declared the ordi-

47. *Id.* at 281-84, 456 A.2d at 453-55.
48. *Id.* at 285-86, 456 A.2d at 455.

nance to be invalid. A judgment of compliance shall have res judicata effect for a period of six years despite any change in circumstances. This procedure, in the opinion of the court, assures that "the *Mount Laurel* obligation is to provide a realistic opportunity for housing, not litigation."[49]

Although the *Mount Laurel* decisions cut deeply into one of the most imperative preserves of municipal home rule, their requirements do not completely deprive a municipality in a growth area of the power to control the character of its community. Once a municipality has complied with its *Mount Laurel* obligation, it is required to do no more. Having complied, a municipality's land-use regulations may continue to contain restrictive provisions incompatible with the provision of lower income housing, such as bedroom restrictions, large lot zoning, and prohibitions against mobile homes. Such provisions will not be held invalid because of the requirements of *Mount Laurel*. "Municipalities may continue to reserve areas for upper income housing, may continue to require certain community amenities in certain areas, may continue to zone with some regard to their fiscal obligations: they may do all of this, provided that they have otherwise complied with their *Mount Laurel* obligations."[50] Moreover, in order to prevent a drastic change in the character of the community, the court specifically recognized that a municipality may, in appropriate circumstances, be permitted to "phase-in" its fair share of the housing need over a number of years.[51]

Although the court went to great lengths to mollify citizens and government officials, the conclusion is inescapable that the prerogatives of local government in New Jersey has been drastically curtailed. For example, by requiring municipalities to eliminate "excessive" zoning and subdivision restrictions and exactions, the court effectively deprived municipal legislative bodies of the authority to control the character of the community or to require developers to bear the cost of public improvements. "Anti-look-alike"[52] ordinances and similar regulations which at-

49. *Id.* at 352, 456 A.2d at 490.
50. *Id.* at 260, 456 A.2d at 442.
51. *Id.* at 215, 456 A.2d at 420.
52. "Anti-look alike" zoning provisions "seek to prevent ugly and monotonous rows

tempt to preserve a particular aesthetic quality in a community are presumed to be cost-generating devices that, in the view of the New Jersey courts, are not necessary to protect the public health and safety and must, therefore, fail. Similarly, it may be assumed that a New Jersey court may consider the rationale for a number of other restrictions to be insufficiently related to the public health and welfare and to be too costly in terms of development costs to survive its scrutiny. These include minimum lot size, other area and bulk requirements, preparation of environmental impact statements, specifications for road construction, hook-up fees, time consuming application procedures or, perhaps, installation of public improvements. The absence of such regulations certainly makes housing more affordable to the purchaser, but those costs, both economic and societal, must be borne by the taxpayers and residents of the community. Similarly, the requirement that land be "overzoned" in certain circumstances in order to create an oversupply of less costly residential land is the antithesis of sound planning. Comprehensive and rational planning are assigned a subservient position.

The presumptive grant of a builder's remedy to a successful developer-plaintiff who will construct low income housing involves the judiciary in the legislative affairs of a municipality to an unprecedented extent. Moreover, the remedy which, in effect, grants a building permit to the developer, deprives municipal boards from injecting sound planning into the project, and prevents such boards from mitigating undesirable effects of the development.

Although *Mount Laurel II* firmly established the broad parameters to be applied to allegedly exclusionary zoning laws, a myriad of issues remained unresolved. The panel of three *Mount Laurel* trial judges was left to formulate the methodology required to implement the principles announced by the court. Their decisions illustrate the practical difficulties encountered in the enforcement of such a revolutionary "right" and in the

---

of identical houses which are thought to encourage urban decay as well as to mar the beauty of the whole community. A representative section authorizes denial of a building permit where the planned structure is excessively similar to an existing or permitted structure within 250 feet of the proposed site." 1 ANDERSON, NEW YORK ZONING LAW AND PRACTICE § 8.41 (3d ed. 1984).

courts' attempts to bring rationality and predictability to such a controversial and emotional arena. These decisions, until recently unreported, supplement and clarify *Mount Laurel II* and are particularly relevant to any attempt to assess the impact of *Mount Laurel II* on future zoning challenges in New York State. It is the application of the principles announced in *Mount Laurel II* which most clearly reflects the strengths and weakness of this revolutionary decision.

E. Fair Share Determination

1. Fair Share Methodology

The first *Mount Laurel II* case to be fully tried in New Jersey since the *Mount Laurel II* decision was *AMG Realty Co. v. Township of Warren*.[53] This case permitted the court to address the most important of the many issues left unresolved by the *Mount Laurel II* decision, namely, the method of determination of fair share allocation. *Mount Laurel II* established that for exclusionary zoning to be eliminated, voluntary compliance with the constitutional mandate must be encouraged, litigation to vindicate that obligation must be simplified and judicial remedies made more effective.[54] The promulgation of a fair share methodology by Judge Serpentelli, one of the three designated *Mount Laurel* judges,[55] was designed to promote voluntary compliance so that each affected municipality could calculate its fair share obligation and adopt zoning laws to satisfy that obligation.[56]

Similarly, Judge Serpentelli foresaw that setting forth such a methodology would simplify litigation and create a more effective judicial remedy because the most time consuming and expensive aspect of *Mount Laurel II* litigation — the determination of fair share — would be virtually eliminated from controversy. The court recognized that the adopted methodology merely represented the beginning of a refinement process that

---

53. No. L-23277-80 PW (N.J. Super. Ct. July 16, 1984).

54. *Mount Laurel II*, 92 N.J. at 218, 291, 456 A.2d at 420, 458.

55. The three judges designated to hear Mount Laurel disputes are Judges Serpentelli, Skillman and Gibson.

56. AMG Realty Co. v. Township of Warren, No. L-23277-80 PW, slip op. at 10-11 (N.J. Super. Ct. July 16, 1984).

should serve as the impetus for planners and attorneys to improve upon or replace.[57] Realizing that the planning community could have debated over equally reasonable alternatives for years, Judge Serpentelli stated that prompt judicial resolution of the *Mount Laurel II* issues was required to implement the constitutional mandate of *Mount Laurel II*.[58]

2. Region

In order to derive a municipality's fair share allocation, it is first necessary to circumscribe the "region" of which the municipality is a part. The *Mount Laurel II* decision provided only general guidance in defining a region as "that 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."[59] In declining to provide further guidance, the supreme court recognized that the determination of such issue was better left to the experts who would participate in future *Mount Laurel II* litigation.[60]

The experts testifying in the *AMG* trial advanced two conceptual approaches to delineate region, the fixed line and commutershed approaches. "[A] commutershed approach defines a region by starting with the functional center of the municipality and identifying all points that could be reached during a reasonable commuting time by travelling outward in all directions on existing roadways."[61] Such an approach would necessitate separate analysis for each municipality. On the other hand, a "fixed line approach defines a region through rigid lines derived by analyzing the standards for an appropriate region as articulated in *Mount Laurel II*."[62]

In order to define region for the appropriate inquiry, Judge Serpentelli adopted a dual region concept, "widely embraced by members of the planning community as being much more reflec-

57. *Id.* at 78.

58. *Id.* at 78-79.

59. *Mount Laurel II*, 92 N.J. at 256, 456 A.2d at 440 (quoting Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 543, 371 A.2d 1192, 1219 (1977)).

60. *Mount Laurel II*, 92 N.J. at 256, 456 A.2d at 440.

61. *AMG Realty*, No. L-23277-80 PW, slip op. at 12 (N.J. Super. Ct. July 16, 1984).

62. *Id.* at 11-12.

tive of the goals expressed in *Mount Laurel II* than any single region concept,"[63] consisting of a present need region and a prospective need region. Recognizing that there is practical difficulty in formulating one region which would achieve all the objectives of *Mount Laurel II*, the court observed:

> [A] region which focuses on enabling people to live in proximity to their work may satisfy prospective housing demands, but it may be too small to provide the resources necessary to absorb the excess present need generated by the urban areas. Conversely, a region which focuses on providing the resources necessary to absorb the excess present need of the urban areas may be too large to accurately address the prospective housing demand.[64]

The present need region, defined by the boundary of the county in which the municipality is located, is "intended to balance the high levels of need in the older urban core municipalities of that region and the resources to meet that need in the less dense and newer suburban areas of the region."[65]

The prospective need region was determined to be a modified commutershed area which would be large enough to accommodate special commuting patterns or employment concentrations.[66] Such prospective regional need was to be the "commutershed measured in all directions from the functional center of a municipality based on a thirty minute drive time."[67] The functional center is to be the generally recognized commercial-residential core of a community, that is, the "downtown area."[68] In the absence of a commercial-residential core in a community, the functional center is to be considered to be the community's municipal building.[69] Absent either of the above, the functional center is viewed to be the major crossroads within the municipality.[70] The entire area of any county is considered

---

63. *Id.* at 31.
64. *Id.* at 30.
65. *Id.* at 12.
66. *Id.*
67. *Id.* at 13. "The thirty minute drive is measured by the following speeds: 1. 30 miles per hour on local and county roads, 2. 40 miles per hour on state and federal highways, 3. 50 miles per hour on interstate highways, the Garden State Parkway and the New Jersey Turnpike." *Id.* at 14.
68. *Id.* at 13.
69. *Id.* at 13-14.
70. *Id.*

to be within a municipality's commutershed if a thirty minute drive would enter the county at any point.[71]

3. Present Regional Need

A municipality's present need consists of two components: the indigenous need within the municipality, and its fair share of the reallocated excess need of the municipality's present need region. The *AMG* court defined "indigenous need" as "substandard housing currently existing in any municipality."[72] *Mount Laurel II* required all municipalities, regardless of their designation in the SDGP, to provide for their indigenous needs.[73] Since some municipalities have an indigenous need which exceeds their fair share, "[t]hey should not be expected to provide decent housing for a disproportionate share of the need."[74] Accordingly, when the percentage of the total regional housing stock which is substandard is calculated, any municipality whose indigenous need in relation to its housing stock is in excess of that regional need will have its excess assigned to a reallocation pool.[75] Such excess need will be allocated to municipalities which contain an area designated as a growth area in the SDGP.

One of the most persistently contested issues in *Mount Laurel II* litigation has been the identification of substandard units. According to the *AMG* decision, a housing unit is considered substandard if it possesses any of the following characteristics:

1. Overcrowded units - defined as dwelling units occupied by more than 1.01 persons per room.
2. Units lacking complete plumbing facilities for the exclusive use of the occupants.
3. Units lacking adequate heating.[76]

An unduplicated count of such units can be ascertained from the

---

71. *Id.* at 14.

72. *Id.*

73. *Mount Laurel II*, 92 N.J. at 214-15, 456 A.2d at 418.

74. *AMG Realty*, No. L-23277-80 PW, slip op. at 14 (N.J. Super. Ct. July 16, 1984).

75. *Id.* at 14-15. Excess need is reallocated whether the municipality is designated by the SDGP as being in a growth area or not. *Id.* at 14; *Mount Laurel II*, 92 N.J. at 243-44, 456 A.2d at 433.

76. *AMG Realty*, No. L-23277-80 PW, slip op. at 15 (N.J. Super. Ct. July 16, 1984).

1980 census. To obtain the number of substandard units occupied by lower income households, that is, the indigenous need, the *AMG* court held that the number of substandard units must be multiplied by .82, a factor to reflect that eighteen percent of the substandard housing in New Jersey was considered not to be occupied by low and moderate income families.[77]

The court required a number of comparisons in order to determine whether a municipality may transfer a portion of its indigenous need to the excess pool and, if so, the extent to which it may. Initially, the number of substandard units in the present need region must be expressed as a percentage of the total housing stock of the region (denominated as "regional substandard housing percentage"). Next, the number of substandard units for each municipality in the present need region must be calculated as a percentage of each municipality's housing stock (denominated as "municipal substandard housing percentage"). To the extent that the percentage of substandard units in any municipality exceeds the regional percentage, those units are reallocated to the excess pool of present need and will be reallocated to municipalities in growth areas through the utilization of present need allocation factors.[78]

4. Prospective Regional Need

While the methodology of the *AMG* court considers any need generated prior to 1980 which still exists to constitute present need, prospective need refers to the households expected to be formed between 1980 and 1990:[79]

> [T]he prospective need is calculated by projecting population increases by age cohort through the averaging of two projection models, applying a headstart rate to obtain the number of households expected to be formed and by multiplying that number by the percentage of the population which is classified as lower income.[80]

---

77. *Id.*
78. *Id.* at 16.
79. *Id.*
80. *Id.* at 43. *See also id.* at 17.

5. Present Need Allocation

The court relied upon three factors in order to determine the manner in which the surplus present need of municipalities is to be redistributed from the excess pool: growth area, present employment, and medium income. The growth area factor is the percentage determined by dividing the number of growth area acres within a municipality by the number of growth area acres within the present need region.[81] The purpose of the growth factor is to consider the physical capacity of a municipality to provide land for new construction by identifying the areas within a municipality which have been designated by the SDGP as appropriate for development.[82] Although the court recognized that a municipality's ability to accommodate development would be more appropriately measured by examination of the amount of vacant developable land within the growth area, the lack of reliable data prohibits the use of this method.[83]

The present employment component is determined by dividing the total number of 1982 private sector jobs covered by unemployment compensation within a municipality by the total number of covered jobs within the present need region.[84] This component recognizes the concern of the *Mount Laurel II* court that individuals be able to reside in decent housing in the vicinity of their place of employment.[85] It represents the present housing demand to the extent that the existence of jobs creates the need for housing. Judge Serpentelli also noted that this factor "may also reflect a policy of exclusion which has existed for many years because some towns have invited factories but excluded the workers."[86]

The medium income aspect of the formula is the ratio of medium income of a municipality to the medium income of the present need region.[87] *Mount Laurel II* recognized that compli-

81. *Id.* at 18.
82. *Id.* at 49.
83. *Id.* at 50.
84. *Id.* at 18.
85. *Id.* at 51; *Mount Laurel II*, 92 N.J. at 210-11 n.5, 456 A.2d at 415 n.5.
86. *AMG Realty*, No. L-23277-80 PW, slip op. at 51 (N.J. Super. Ct. July 16, 1984).
87. *Id.* at 18. In rejecting objections to the use of an economic factor, Judge Serpentelli determined that, "[w]hile I have some reservations as to whether further experience will demonstrate that this factor will accomplish its objectives, those concerns

ance with its mandates might impose substantial financial burdens on municipalities.[88] The impact of medium income is designed to consider a community's ability to afford the expense of the construction of the public improvements and infrastructure required for high density construction, and to seek to equitably distribute such burdens.[89] Similarly, the factor seeks to identify prior exclusionary practices, and to reward past inclusionary efforts recognizing both that a municipality must plan for all income levels, and that "fairness requires that prior inclusionary construction . . . should be rewarded."[90]

The data used in such calculations must exclude non-growth municipalities from the regional computation. The resulting percentage when multiplied by the regional reallocation pool results in a municipality's fair share of that need.[91]

6. Prospective Need Allocation

The allocation formula employed to allocate prospective regional need utilizes the same three factors as in the present need allocation formula,[92] but includes a fourth determinate, employment growth. Employment growth is the percentage calculated by dividing the covered employment growth from 1972 to 1982 within a municipality by the covered employment growth within the prospective need region for the same period.[93] The employment growth factor is utilized to predict future job growth.[94] The court found that this element accurately measures employment trends, and reflects the land-use policies of a municipal-

---

are overridden by the importance of having an economic indicator which mirrors fiscal capacity, prior exclusion, and most importantly, past inclusion." *Id.* at 54.

88. *Mount Laurel II*, 92 N.J. at 265, 456 A.2d at 445.

89. *AMG Realty*, No. L-23277-80 PW, slip op. at 52 (N.J. Super. Ct. July 16, 1984).

90. *Id.*

91. Because the other factors are expressed as percentages, the medium income ratio must be converted to a percentage. In order to accomplish such a conversion, the first two factors must be averaged to create one percentage which is multiplied by the medium income ratio. The result is averaged along with the first two percentages by dividing the sum of factors one, two and the converted third factor, by three to create a single percentage. The resulting number is multiplied by the total reallocation pool for the region to determine the municipality's fair share of that pool. *Id.* at 18-19.

92. *See supra* notes 81-90 and accompanying text.

93. *AMG Realty*, No. L-23277-80 PW, slip op. at 19 (N.J. Super. Ct. July 16, 1984).

94. *Id.* at 60.

ity.[95] The court considered that the use of the two employment factors in the prospective need formula would mitigate against unfair conclusions which might result from the utilization of only employment growth.[96]

7. Fair Share Calculation

A municipality's fair share allocation can, accordingly, be calculated by utilizing the allocation formulas, and combining the indigenous, the surplus present and the prospective need figures. In addition, however, the court requires that an adjustment be made to the surplus present and prospective need figures to compensate for inadequate vacant developable land, and for vacancy rates.[97] These need determinations are required to be increased by twenty percent to compensate for the loss of housing units resulting from the reduction of fair share allocations due to the absence of adequate developable land in various municipalities.[98] In addition, an unoccupied reserve was mandated by the court to permit mobility.[99] In the event that fair share allocations exactly matched need, one could not move unless someone else vacated their residence to make room for them. Thus, the court provided for sufficient vacancies to facilitate mobility in housing choice by increasing the need factor by three percent.[100]

The *Mount Laurel II* decision authorized the trial judge to allow the fair share obligation to be phased-in over a number of years.[101] Judge Serpentelli, however, was of the opinion that the

---

95. *Id.*

96. *Id.* A municipality which historically had little employment, but experienced a recent, sudden burst of employment might, according to an example posed by the court, be assessed an unrealistically high fair share allocation in the absence of an employment growth factor.

The computation of a municipality's prospective fair share obligation is computed in a manner similar to its present need allocation. The medium income factor must be expressed as a percentage by averaging the first three factors to obtain one percentage which is multiplied by the medium income ratio. The resulting percentage must be averaged with the other three factors by dividing the same by four. The resulting percentage is multiplied by the prospective regional need to obtain the prospective need. *Id.* at 20.

97. *Id.* at 23.

98. *Id.* at 46.

99. *Id.* at 48.

100. *Id.*

101. *Mount Laurel II*, 92 N.J. at 219, 456 A.2d at 420.

circumstances of each case should dictate whether the court should exercise its discretion to permit such deferral of a municipality's obligation — the phasing-in of present need should not be automatic.[102]

Recognizing that the formulas utilized can be challenged for a variety of reasons, the court held that "[t]he pivotal question is not whether the numbers are too high or low, but whether the methodology that produces the numbers is reasonable."[103] Moreover, the methodology must also be "sufficiently structured to produce consistent results and it must be sufficiently flexible to deal with extreme cases at both ends of the spectrum."[104] The

---

102. *AMG Realty*, No. L-23277-80 PW, slip op. at 43 (N.J. Super. Ct. July 16, 1984).

103. *Id.* at 74.

104. *Id.* at 76. The following will illustrate the determination of the "fair share" methodology utilized in *AMG Realty*:

Application of Fair Share Methodology to Warren Township

1. Region

The present need region for Warren (Region I) consists of eleven counties . . . .

The prospective need region for Warren consists of . . . six counties . . . .

2. Regional Need

The indigenous need for Warren is 52. The eleven county reallocated present need pool is 35,014 and the six county prospective need is 49,004.

3. Allocation Factors

-Present Need

Using the eleven county present need region, Warren's fair share of the reallocation pool of 35,014 is 162 for the decade of 1980-1990 based upon the following calculation.

Warren's present need percentage of the present regional need is 1.126% which is arrived at as follows:

Growth Area = 1.780%
Present Employment = .179%
Median Income ratio = 1.45
(1.780 + .179)/2 = .9795 x 1.45 = 1.420%
([this] represents the percentage modified by the ratio)
(1.780 + .179 + 1.420)/3 = 1.126%
Reallocation Excess Pool = 35,014 x 1.126 (fair share %)
Municipal Share = 394
Phased in by one third (394/3) = 131
Additional 20% reallocation (131 x 1.2) = 157
Vacancy allowance (157 x 1.03) = 162
Total Present Need is:
(Indigenous) 52 + (Reallocated Present) 162 = (Total) 214

-Prospective Need

Warren's fair share of the prospective regional need of 49,004 is 732 units for the decade of 1980-1990.

Warren's prospective need percentage of the prospective regional need is 1.208%, computed as follows:

court believed that its methodolgy was flexible and not "blindly rigid" because it permitted the vacant developable land defense and rewarded communities which had made inclusionary efforts through the utilization of the medium income factor and direct credits.[105]

Utilizing the methodology adopted by it, the court determined that Warren Township's total fair share obligation was 946 units.[106] Warren Township would be required to remove all excessive restrictions and exactions precluding construction of its fair share if its ordinances were to be found in compliance with *Mount Laurel II*.[107] The affirmative measures set forth in *Mount Laurel II* would be required if such action failed to generate realistic housing opportunites.[108] It was undisputed among the parties that the Warren Township zoning ordinances could not produce the quantity of units required to satisfy its fair share obligation.[109] Had the ordinance provided for sufficient density, however, it might have been necessary to remove other provisions which might be held to be an excessive restriction or exaction. Among the provisions of the Warren Code which might be considered to be excessive restrictions or exactions are: 1) a requirement that all townhouses contain private garages; 2) a re-

---

Growth Area = 2.556%
Present Employment = .304%
Employment Growth = .428%
Median Income Ratio = 1.41
(2.556 + .304 + .428)/3 = 1.096% x 1.41 = 1.545
([this] represents the percentage modified by the ratio)
(2.556 + .304 + .428 + 1.545)/4 = 1.208%
Prospective Regional Need = 49,004 x 1.208 = (fair share %)
Municipal Share = 592
Additional 20%
Reallocation (592 x 1.2) = 710
Vacancy Allowance (710 x 1.03) = 732
SUMMARY
(Total Present Need) 214 + (Total Prospective need) 732 = (Total Fair Share) 946

Id. at 25-28.

105. *Id.* at 77.

106. The total fair share determination consisted of an indigenous need of 52, *id.* at 26, present regional need of 162, *id.*, and prospective need of 732. *Id.* at 27.

107. *Id.* at 63; *Mount Laurel II*, 92 N.J. at 258-59, 456 A.2d at 441.

108. *AMG Realty*, No. L-23277-80 PW, slip op. at 63 (N.J. Super. Ct. July 16, 1984); *Mount Laurel II*, 92 N.J. at 260-74, 456 A.2d at 442-50.

109. *AMG Realty*, No. L-23277-80 PW, slip op. at 64 (N.J. Super. Ct. July 16, 1984).

quirement that every townhouse have a significantly different design from every other townhouse within 150 feet; 3) excessive setbacks provision which could be cost generating or affect density by severely constraining the site layout; 4) front yard screening; 5) broad discretion to deny site plan if the use is deemed not to be in the public interest; and 6) inadequate flexibility concerning road widths and other multiple dwelling requirements.[110]

Although failing to rule on plaintiffs' allegations that the thirty percent mandatory set-aside for lower income housing provided by the defendant was not feasible, the court concluded that:

> For a mandatory set aside to be effective, the set aside must be reasonable and the unit density must be reasonable. If the set aside is reasonable and the density is reasonable, actual construction will result. If the set aside is too high or the density is too low, no construction will occur because the project must be profitable.[111]

F. Rutgers Report Fair Share Allocation

Subsequent to the *AMG* decision, Judge Skillman adopted a different method of identifying the present need obligation of a municipality other than the *Urban League* analysis utilized in *AMG*.[112] In *Countryside Properties, Inc. v. Mayor of Ringwood*,[113] the court adopted the RUTGERS REPORT[114] as "the most sophisticated and reliable methodology for determining the ex-

---

110. *Id.* at 65-67. In Flama Construction Corp. v. Township of Franklin, 201 N.J. Super. 498, 493 A.2d 587 (1985), the court upheld an ordinance which required an applicant to pay into an escrow fund sums to be expended for professional review of the application as a prerequisite to any action by the planning board or board of adjustment. The ordinance specified the amount to be posted based upon the size and type of development. In rejecting assertions that the ordinance exerted an exclusionary effect on development, the court concluded that "the ordinance neither creates a burdensome financial threshold nor lengthens the approval process . . . ." *Id.* at 506, 493 A.2d at 591-92.

111. *AMG Realty*, No. L-23277-80 PW, slip op. at 67 (N.J. Super. Ct. July 16, 1984).

112. *Id.* at 7-9.

113. Countryside Properties, Inc. v. Mayor of Ringwood, 205 N.J. Super. 291, 500 A.2d 767 (1984).

114. CENTER FOR URBAN POLICY RESEARCH, RUTGERS-THE STATE UNIVERSITY OF NEW JERSEY, MOUNT LAUREL II; CHALLENGE & DELIVERY OF LOW-COST HOUSING (1983) [hereinafter cited as RUTGERS REPORT].

tent of lower income persons occupying deficient housing."[115] The RUTGERS REPORT utilizes seven negative characteristics or "surrogates" of housing surveyed in the 1980 census to identify whether a housing unit should be considered as substandard:

> whether the unit built prior to 1940, is occupied by more than 1.01 persons per room, permits access only by entering through another dwelling, lacks plumbing facilities for the exclusive use of occupants, lacks complete kitchen facilities, or lacks an elevator if located in a more than four story structure.[116]

Any dwelling unit constructed after 1940 is considered to be substandard if two of the other six characteristics are present.[117] Any unit constructed before 1940, however, is considered to be substandard if one of the surrogates exists.[118] The court concluded that the seven surrogate methodology employed by the RUTGERS REPORT is more reliable than the three surrogate *Urban League* approach.[119]

The source of the RUTGERS REPORT information on deficient housing is a five percent sample of New Jersey households conducted by the United States Census Bureau, the New Jersey Public Use sample. Utilizing the computer correlation of the surrogates, the number of deficient homes may be ascertained, as well as the household size and the income levels of the families occupying the units in order to establish what proportion of the units are occupied by lower income families.[120] The Public Use sample is not, however, generally available on the municipal level.

In determining that the RUTGERS REPORT methodology is a more reliable method of calculation of regional need, the court observed that the "most serious weakness in the *Urban League* methodology is its assumption that eighty-two percent of the housing units designated as deficient are occupied by lower in-

---

115. *Countryside Properties*, 205 N.J. Super. at 300, 500 A.2d at 772.

116. *Id.* at 296, 500 A.2d at 770.

117. *Id.* at 300, 500 A.2d at 772; *see also* J.W. Field Co. v. Township of Franklin, 206 N.J. Super. 165, 170, 501 A.2d 1075, 1078 (1985).

118. *Countryside Properties*, 205 N.J. Super. at 305, 500 A.2d at 774; *see also J.W. Field Co.*, 206 N.J. Super. at 170, 501 A.2d at 1078.

119. *Countryside Properties*, 205 N.J. Super. at 304, 500 A.2d at 774.

120. *Id.* at 299, 500 A.2d at 771.

come persons."[121] The court found that the Tri-State Regional Planning Commission determination of eighty-two percent was inaccurate with respect to New Jersey households occupying deficient housing who are lower income persons in that: the study included the entire New York metropolitan area, with New York statistics consequently dominating the statistics, the primary source of information was the 1970 census, and the term "inadequate housing" included units occupied by persons who pay a disproportionate percentage of income for housing or commute an excessive distance to work, characteristics not included in the *Urban League* methodology as constituting part of present need.[122]

Judge Skillman determined that although the RUTGERS REPORT is more reliable for determining the total number of substandard dwelling units occupied by lower income persons, the *Urban League* methodology is appropriate to convert the subregion need to a municipal level. Accordingly, he adopted a methodology which utilizes the *Urban League* methodology to determine the percentage of subregion present need in a particular municipality. That figure is compared to the total present need of the subregion arrived at by using the RUTGERS REPORT methodology. By dividing the deficient municipal housing by the subregion deficiency, the percentage need of the subregional need would be established. The municipality's fair share obligation would be calculated by multiplying that resulting percentage by the number of total subregional deficient units.[123]

In *J.W. Field Co. v. Township of Franklin*,[124] Judge Serpentelli continued "the process of development of a method of fair share allocation,"[125] and modified somewhat the methodology previously adopted in *AMG*. This modification was made in light of subsequent proof of the reliability of the methods used in the RUTGERS REPORT and the criticism of the Tri-State Planning Commission report of determination of the percentage of substandard housing units occupied by lower income persons

121. *Id.* at 300, 500 A.2d at 772.

122. *Id.* at 301, 500 A.2d at 772.

123. *Id.* at 304, 500 A.2d at 774; *see also J.W. Fields Co.*, 206 N.J. Super. at 172-73, 501 A.2d at 1079.

124. 206 N.J. Super. 165, 501 A.2d 1075 (1985).

125. *Id.* at 167, 501 A.2d at 1076.

in *Countryside Properties.*

Judge Serpentelli concluded that the eighty-two percent Tri-State estimate should be replaced by the determination of lower income percentage of occupancy of deficient units advanced by the RUTGERS REPORT.[126] If the three surrogates utilized in *AMG* are income qualified through the use of the RUTGERS REPORT computer tapes, the court's determination is that 64.2% of the deficient units in the appropriate eleven county region were occupied by lower income families.[127] The decrease in this factor resulted in a smaller number of deficient units in the region.[128] Because the pool of present need to be reallocated is determined by the relationship of the regional percentage of deficient housing to regional housing stock, the court required that the excess pool must be recalculated.[129] The court further determined that:

> [T]he same reasons which justify the use of the percentage of deficient units generated by the computer tapes on a regional basis to produce the municipality's *reallocated excess* obligation, also justify the use of the percentage on a subregional basis in order to determine the *indigenous* responsibility of the municipality.[130]

The court found, however, that the balance of the *AMG* methodology is the correct approach to identifying and allocating the indigenous and excess present housing needs.[131] In rejecting the remainder of the RUTGERS REPORT approach, Judge Serpentelli cast doubt upon the validity of a number of the surrogates utilized, particularly the use of the absence of an elevator to determine deficiency of housing, the lack of central heating, and the use of the year 1940 as a consideration of dilapidation.[132] He also found the RUTGERS REPORT approach to be weak in its inability to generate housing numbers for individual municipalities by the use of the seven surrogates, in its inability to disaggregate the subregion numbers, and in the fact

126. *Id.* at 172, 501 A.2d at 1079.
127. *Id.* at 174, 501 A.2d at 1080.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 173, 175, 501 A.2d at 1079, 1080.
132. *Id.* at 175, 501 A.2d at 1080.

that significant delays in receipt of current information existed.[133] On the other hand, the court considered the *AMG* methodology to be superior in that it: utilizes "three simple, direct indicia of substandardness;" the three factors are "individually identifiable in an unduplicated manner in census data" and "can be independently identified for each municipality;" and the three are "clearly reflective of substandardness."[134] Additionally, the court noted that "[t]he use of the heating deficiency factor in *AMG* is more in keeping with a reasonable definition of adequate heating inasmuch as many building codes permit heating through the use of a flue even if central heating units are not utilized."[135]

G. Builder's Remedies and Municipal Compliance

Although the aim of the court in utilizing the SDGP was to channel development into "growth" areas, in *Orgo Farms & Greenhouses, Inc. v. Township of Colts Neck*,[136] the court determined that the location of a developer's property in an area designated as "limited growth" by the SDGP does not preclude the granting of a builder's remedy as a matter of law with respect to the property. The Township had asserted that the granting of a builder's remedy in a limited growth area would violate the pattern of orderly development envisioned by the New Jersey Supreme Court in basing *Mount Laurel* planning on the SDGP. Judge Serpentelli, however, found nothing in the SDGP or *Mount Laurel II* to sustain the Township's position because the "concept maps of the SDGP, by admission of the authors, 'consist of broad, generalized areas without site specific detail or precise boundaries . . . .' "[137]

Among the various rationales advanced by the court in support of its holding is one of strict practicality, that is, the negative impact on the goals of the *Mount Laurel* decision that would result from a contrary decision.[138] The court noted that

133. *Id.* at 175-76, 501 A.2d at 1081.

134. *Id.* at 176, 501 A.2d at 1081.

135. *Id.*

136. Orgo Farms & Greenhouses, Inc. v. Township of Colts Neck, 192 N.J. Super. 599, 471 A.2d 812 (1983).

137. *Id.* at 604, 471 A.2d at 814 (quoting SDGP at ii-iii).

138. *Id.* at 606-07, 471 A.2d at 814. The court offered four reasons for its conclusion:

since less than fifty percent of the land in New Jersey is classified as growth, it was imperative to preserve all appropriate sites for potential development.[139] Moreover, the court found that because the purpose of the SDGP was to control growth, not eliminate it, it was not contemplated that limited growth areas would never accommodate growth under any circumstances.[140]

Judge Serpentelli also found that a contrary decision would be destructive of the mandate that all communities, even those located entirely within limited growth areas, make provisions for their indigenous poor.[141] Were denial of a builder's remedy to be based solely on the SDGP classification, as opposed to the environmental and planning considerations of the third prong of the entitlement analysis, all incentives to provide adequate housing in such areas would be abandoned.[142] "The paradox created is that those least economically able to move would be required to do just that, because the only decent, affordable housing to be built would be in a growth area."[143]

An additional basis articulated by the court for its decision is the absence of any reference to the SDGP classification in *Mount Laurel II's* discussion of entitlement. First, the *Mount Laurel II* court's carefully worded discussion of the elements required as a prerequisite to the award of a builder's remedy did not refer to the SDGP designations.[144] Second, the *Mount Laurel II* court applied those elements to four of the six cases decided without using the SDGP.[145] Finally, the *Mount Laurel II*

---

1. The spirit of the opinion calls for this result.

2. The impact that a contrary result would have on the *Mount Laurel* goals is entirely inconsistent with those goals.

3. The court's discussion of the builder's remedy makes no reference to the SDGP classification.

4. Caputo v. Chester, 92 N.J. 158, 456 A.2d 390 (1983) (*Mount Laurel II*, 92 N.J. at 309, 456 A.2d at 468) suggests the possibility that a remedy is available in a limited growth area. *Orgo Farms & Greenhouses*, 192 N.J. at 605, 471 A.2d at 814.

139. *Orgo Farms & Greenhouses*, 192 N.J. Super. at 606, 471 A.2d at 815.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 606-07, 471 A.2d at 815.

144. *Id.* at 607, 471 A.2d at 815.

145. *Id.* at 607, 471 A.2d at 815-16. The four cases referred to are: Southern Burlington County NAACP v. Township of Mount Laurel; Caputo v. Township of Chester; Glenview Dev. Co. v. Township of Franklin; and Round Valley, Inc. v. Township of Clin-

court meticulously detailed the limits it would impose on the granting of a builder's remedy. "[H]ad the court intended to restrict the remedy to growth areas, it would have done so at this point."[146]

To assure that the decision would not result in bad land use, Judge Serpentelli stated that when a trial court is faced with a demand for a builder's remedy for property located in a limited growth area, substantial weight should, nonetheless, be accorded the SDGP classification as it relates to the environmental and planning concerns of the third prong of the entitlement test.[147] Moreover, the court suggested that it may be appropriate in such situations to reverse the standard burden of proof to require the builder to prove the absence of detrimental environmental and planning effects in order to receive a builder's remedy.[148] While declining to specifically make such a ruling at that time, the court found that a developer seeking a builder's remedy in a limited growth area should be required to participate to a greater extent in assisting the court in its determination of the environmental and planning issues.[149]

The effectiveness of the *Mount Laurel* doctrine depends upon voluntary compliance by municipalities, and the invocation of remedies to assure compliance by recalcitrant communities. It was clearly the aspiration of *Mount Laurel II* to stimulate voluntary compliance with its principles, and to encourage settlement of *Mount Laurel* litigation. A municipality will, however, be hesitant to rezone and take affirmative action unless the trial court ratifies the settlement in a judgment of compliance binding third parties, thereby providing a six year period of repose from *Mount Laurel* litigation. In the absence of such immunity, settling communities would be subject to continuing interference with the zoning process by virtue of subsequent developer claims seeking builder's remedies. In *Morris County Fair Housing Council v. Boonton Township*,[150] Judge Skillman established the

---

ton. These cases are among those consolidated at 92 N.J. 158, 456 A.2d 390 (1981).

146. *Orgo Farms & Greenhouses*, 192 N.J. Super. at 607, 471 A.2d at 816.

147. *Id.* at 611, 471 A.2d at 818.

148. *Id.*

149. *Id.*

150. Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 484 A.2d 1302 (1984).

procedure whereby such proposed settlements may be reviewed by the court.

Although *Mount Laurel II* did not specifically state that a judgment of compliance was intended to be binding on non-parties, the court did provide that upon the issuance of a judgment of compliance, a community would be "free of litigious interference with the normal planning process."[151] Such insulation from litigation is, the court concluded, possible only if a judgment of compliance is binding on non-parties.[152] The court classified *Mount Laurel* litigation as being similar to other representative actions which are binding on non-parties.[153] Because a litigant in a *Mount Laurel* action is granted standing as a representative of lower income persons whose constitutional rights have been violated, and not in an individual capacity, a judgment should be binding upon non-party lower income persons and on other developers.[154]

Although the entry of a judgment of compliance will enable a municipality to engage in long term planning and to construct the necessary infrastructure, the court must ensure that the settlement is in the best interests of those persons whose rights are sought to be protected — lower income individuals. The court observed that the risk of an inappropriate settlement is increased when the action is brought by a developer and not a public interest group since the developer and the municipality have a common interest which may not further the objectives of *Mount Laurel.* The municipality may seek to have a low fair share allocated to it, while a developer may be only interested in the approval of his project. Accordingly, the court determined that notice of a proposed settlement, its terms, and an opportunity to be heard in opposition thereto must be provided to the public, public interest organizations, and property owners who desire to construct lower income housing.[155] If the court deter-

151. *Id.* at 364, 484 A.2d at 1305 (quoting *Mount Laurel II*, 92 N.J. at 292, 456 A.2d at 459).

152. *Morris County Fair Housing Council*, 197 N.J. Super. at 364, 484 A.2d at 1305.

153. *Id.* at 364-65, 484 A.2d at 1305. The court considered Mount Laurel litigation akin to class actions, suits by public officials or agencies which are authorized by law to represent the public or a class of citizens, and taxpayers' actions.

154. *Id.* at 366, 484 A.2d at 1306.

155. *Id.* at 371, 484 A.2d at 1308.

mines that a presentation in opposition to the settlement is inadequate to determine whether the settlement is fair and reasonable, it may appoint a master to make recommendations to the court.[156] "In fact, a master probably should be appointed as a matter of course in any case where a developer is the only party representing lower income persons."[157]

The court rejected the argument that the municipality's precise "fair share number must be determined as a prerequisite to the entry of a judgment of compliance because fair share determinations are the most time consuming and difficult part of *Mount Laurel II* litigation."[158] The court, therefore, held that to require such a determination would be inconsistent with the purposes of settlement of *Mount Laurel* litigation, that is, to save litigation expense, to preserve judicial resources, and to facilitate the early construction of lower income housing rather than interminable litigation.[159]

Having determined that a municipality's ordinance violates the mandates of *Mount Laurel II*, in what priority does the court award builder's remedies among several plaintiffs whose offers to build low and moderate income housing exceeds the municipality's fair share requirement? In *J.W. Field Co. v. Township of Franklin*[160] (*Field II*) Judge Serpentelli enunciated seven policy objectives which must be evaluated to devise a priority system of the award of a builder's remedy. The importance of the first consideration — to encourage builders to institute *Mount Laurel* litigation — is emphasized by the finding that every *Mount Laurel* action since the *Mount Laurel II* decision has been brought by a builder, rather than a non-profit group or public agency.[161] The granting of a builder's remedy is the economic inducement to stimulate developer enforcement of the *Mount Laurel* obligation.[162] It is granted as a matter of course if the builder demonstrates noncompliance of a zoning law, pro-

156. *Id.* at 371, 484 A.2d at 1308-09.

157. *Id.* at 371 n.2, 484 A.2d at 1309 n.2.

158. *Id.* at 371, 484 A.2d at 1309.

159. *Id.* at 372, 484 A.2d at 1309.

160. J.W. Field Co. v. Township of Franklin, 204 N.J. Super. 445, 499 A.2d 251 (Super. Ct. Law Div. 1985).

161. *Id.* at 452, 499 A.2d at 254-55.

162. *Id.* at 452, 499 A.2d at 254.

poses to construct a substantial amount of lower income housing, and the construction can be implemented without substantial negative environmental or planning impact.[163] Second, a "bright line" standard is necessary to avoid confusion, expense and delay because, in the opinion of the court, a builder is less likely to sue if he cannot assess the chances of being awarded a builder's remedy with a reasonable certainty.[164] Third, the award of a builder's remedy must maximize the opportunity for lower income housing while minimizing the impact on the environment.[165] Accordingly, an award of a builder's remedy may be softened by court authorization to phase-in development over a number of years to avoid radical transformation of the community.[166]

Recognizing that the mandate of *Mount Laurel* is to provide housing, not litigation, the court, as a fourth consideration, requires that any priority system will discourage litigation and preserve municipal planning flexibility.[167] Although multiple plaintiffs are generally necessary to ensure prosecution of *Mount Laurel* principles, "[e]xperience has also demonstrated . . . that there is a limit to the number of plaintiffs needed to vindicate the constitutional obligation and that excessive plaintiffs can emasculate the municipal planning options."[168] Fairness and efficiency require the consolidation of all timely filed *Mount Laurel* claims against a particular municipality.[169] Such consolidation, however, undermines the intent of *Mount Laurel II* by making such litigation infinitely more complex and lengthy, and by potentially exposing the municipality to the award of multiple builder's remedies, depriving it of planning flexibility and decreasing the likelihood of dispute settlement.[170] Fifth, although the SDGP designation should not, as a matter of law, be a determinant of the right to a builder's remedy, it must be a factor in determining the priority among the plaintiffs seeking the award

163. *Id.* at 451-52, 499 A.2d at 254.
164. *Id.* at 453, 499 A.2d at 255.
165. *Id.* (citing *Mount Laurel II*, 92 N.J. at 280, 331-32, 456 A.2d at 452-53, 479-80).
166. *J.W. Field Co.*, 204 N.J. Super. at 453, 499 A.2d at 255.
167. *Id.* at 454, 499 A.2d at 255.
168. *Id.* at 454, 499 A.2d at 256.
169. *Id.*
170. *Id.* at 454-55, 499 A.2d at 256.

of a builder's remedy.[171]

One of the prime considerations of the *Mount Laurel II* decision was encouragement of voluntary compliance with the constitutional obligations enunciated therein.[172] Similarly, early settlement of *Mount Laurel* litigation benefits all parties. The avoidance of builder suits and their early settlement enables the municipality to preserve its planning flexibility in response to *Mount Laurel* requirements. For example, where a municipality concedes noncompliance and obtains the court's sanction of its proposed fair share number, Judge Serpentelli has permitted municipal litigants a ninety day period of immunity from the filing of builder's remedy actions in order to facilitate the formulation of their planning response.[173] Such a procedure is permitted once litigation has been commenced or in an action brought by the municipality seeking declaratory relief.[174]

The development of fair share methodologies has increased the impetus for voluntary settlement of disputes because "[m]ost of the reasonable methodologies, to date, have produced fair share numbers within a relatively close range."[175] Moreover, the court held that it will not insist on rigid adherence to its fair share methodology when confronted with voluntary efforts at compliance.[176] In order to provide an incentive for the prompt settlement of *Mount Laurel* litigation, the Serpentelli court will permit flexibility in settlement methods.[177] Accordingly, municipalities that voluntarily undertake to comply with *Mount Laurel* may be entitled to a number of judicial concessions: flexibility in determining fair share numbers, temporary immunity from builder's remedy litigation, and the phasing-in of its fair share requirement beyond 1990.[178] The use of such devices, in the opinion of the court, provides the greatest latitude to communities in planning their method of compliance with *Mount Laurel*, and can remove or substantially ameliorate the overbuilding

171. *Id.* at 455, 499 A.2d at 256.
172. *Mount Laurel II*, 92 N.J. at 214, 456 A.2d at 418.
173. *J.W. Field Co.*, 204 N.J. Super. at 456, 499 A.2d at 257.
174. *Id.*
175. *Id.*
176. *Id.* at 456-57, 499 A.2d at 257.
177. *Id.*
178. *Id.* at 458, 499 A.2d at 258.

which results from the satisfaction of a municipality's responsibility by utilization of twenty percent mandatory set-asides.[179] Alternate methods of compliance are authorized if a municipality seeks to voluntarily comply, but such flexibility is lost if, as a result of litigation, a community's fair share must be satisfied by the use of builder's remedies.[180] A municipality can avoid being placed in the uncomfortable position where the court must prioritize builder's remedies: "[i]ts choice is to seize the initiative through voluntary compliance, early settlement and compliance mechanisms such as phasing or wait to be sued and possibly subject itself to a court imposed priority arrangement."[181]

The seventh policy consideration, actual construction, favors the involvement of multiple plaintiffs in *Mount Laurel* litigation, resulting in greater assurance that *Mount Laurel* construction will take place. Absent such impetus, the mere rezoning of property to comply with a municipality's *Mount Laurel* obligation will not ensure actual construction. Because the mere revision of a zoning ordinance does not ensure that actual *Mount Laurel* construction will occur, the seventh policy consideration is the promotion of actual construction. Since intangibles such as the predilections of property owners, political pressures not to sell property, and property price inflation as the result of rezoning and other factors, may result in an uncertain future for such rezoned land, the involvement of multiple plaintiffs in *Mount Laurel* litigation results in greater assurance that *Mount Laurel* construction will take place.[182]

Utilizing the above policy considerations, Judge Serpentelli devised a four-step system of priorities in the awarding of builder's remedies when multiple builder-plaintiffs have participated in *Mount Laurel* litigation. Initially, a builder must meet the threshold test of entitlement in order to participate in the prioritization process.[183] Accordingly, a builder-plaintiff who does not participate in that portion of a *Mount Laurel* trial in which noncompliance is proved, is not entitled to a builder's

---

179. *Id.*

180. *Id.* at 459, 499 A.2d at 258.

181. *Id.*

182. *Id.* at 459-60, 499 A.2d at 258-59.

183. *See Mount Laurel II*, 92 N.J. at 279-80, 456 A.2d at 452, *see also J.W. Field Co.*, 204 N.J. Super. at 460, 499 A.2d at 259.

remedy.[184] Second, the first builder who files a complaint and establishes entitlement is awarded the first remedy only if the property is located significantly within the growth area.[185]

Third, plaintiffs establishing entitlement shall be awarded builder's remedies based upon the date of the filing of the action if the property is located significantly within a growth area. That order, however, may be varied by the court based upon consideration of whether any project is clearly more likely to result in actual construction, and whether any project is clearly more suitable from a planning perspective.[186] Modification of the established priorities as a result of the potential for construction or site suitability is appropriate only if reasonable persons could not disagree that the order should be adjusted.[187] Lastly, if the award of additional builder's remedies is required to satisfy the community's fair share obligation, parcels in limited growth areas which have satisfied the threshold test of entitlement shall be considered in the same manner as step three above.[188] Because environmental and planning constraints are more imperative in limited growth areas, the third prong of the entitlement test may often preclude the use of limited growth parcels.[189] Utilization of such parcels constitutes a recognition that the SDGP designation of land is not necessarily sufficient to justify the denial of a builder's remedy.

The court rejected the arguments of the plaintiffs that all builders who have established entitlement should receive a builder's remedy even if the municipality's fair share has been exceeded. The "priority arrangement adopted here assumes that no municipality shall be called upon to absorb more than the fair share emanating from the methodology the supreme court utilizes."[190] The exposure to multiple builder's remedies, how-

---

184. *J.W. Field Co.*, 204 N.J. Super. at 460-61, 499 A.2d 259. A plaintiff joined only for the purposes of participating in a court ordered revision of a noncomplaint ordinance would not participate in that portion of the trial in which noncompliance is demonstrated. *Id.* at 461, 499 A.2d at 259. A plaintiff in such a partially consolidated trial will not be entitled to participate in the prioritization process. *Id.* at 460, 499 A.2d at 259.

185. *Id.* at 460, 499 A.2d at 259.

186. *Id.*

187. *Id.* at 462, 464, 499 A.2d at 260, 261.

188. *Id.* at 460, 464-65, 499 A.2d at 259, 261.

189. *Id.* at 465, 499 A.2d at 261.

190. *Id.* at 466, 499 A.2d at 262.

ever, will encourage voluntary municipal compliance with *Mount Laurel II.*

In *Orgo Farms & Greenhouses, Inc. v. Township of Colts Neck,*[191] (*Orgo Farms II*) the court addressed the third prong of the entitlement analysis, the suitability of development. Initially, Judge Serpentelli rejected an attack on the continued viability of the SDGP "limited growth" designation of the land in question. Although the supreme court in *Mount Laurel II* premised the continued viability of the SDGP designations upon its belief that the plan should be revised no later than January 1, 1985,[192] in the absence of evidence demonstrating a significant modification in land use development patterns in the municipality since the promulgation of the SDGP, the court continued to utilize its designations. "The fact that January 1, 1985 has come and gone without the preparation of a new SDGP should not cause the court to throw planning to the wind by allowing this predominantly undeveloped community to experience large scale development in the middle of an essentially rural farm area."[193] The rationale for the *Mount Laurel II* decision, "one of the foremost judicial statements of concern for the protection of the environment and the preservation of natural resources . . . did not evaporate on January 1, 1985."[194]

Finding that *Mount Laurel* should not encourage inefficient use of resources,[195] the court determined that the proposed project at the subject parcel was contrary to sound land use planning and failed to satisfy the third prong of the entitlement test. The developer was not, therefore, entitled to a builder's remedy. The parcel, located in the center of a large limited growth area,[196] was distant from waterlines and other infrastructure,[197] and the proposed one thousand dwelling unit development, hotel, and commercial area would negatively impact the adjacent

191. Orgo Farms & Greenhouse, Inc. v. Township of Colts Neck, 204 N.J. Super. 585, 499 A.2d 565 (1985).

192. *Mount Laurel II,* 92 N.J. at 242, 456 A.2d at 432-33.

193. *Orgo Farms & Greenhouse,* 204 N.J. Super. at 589-90, 499 A.2d at 567.

194. *Id.* at 590, 499 A.2d at 567.

195. *Id.* at 592, 499 A.2d at 568.

196. *Id.* at 589, 592, 499 A.2d at 566, 568.

197. *Id.* at 590-91, 499 A.2d at 567. In order to connect the property to the public water system, 3.7 miles of waterline was required to be installed. *Id.*

farm uses.[198]

The court rejected Orgo's equity arguments that it is entitled to a builder's remedy because it had diligently pursued the litigation for seven years, finding that any sophisticated land developer realizes that zoning litigation is a "risky business."[199] Orgo also asserted that the SDGP designation should not affect its rights because the SDGP was not part of the *Mount Laurel* doctrine when the action was commenced, and because the SDGP was not revised. The court, however, determined that limited growth classification of the land alone was not the basis for the finding that the property was unsuitable. The facts, however, which formed the basis for the classification remained constant even if the classification itself was not to be given the same legal weight.[200]

Lastly, the court found that the issue of whether another competing site would be developed was irrelevant at this stage — "comparative suitability of the two tracts is not the issue."[201] The question was solely whether either or both of the tracts were suitable for *Mount Laurel* construction. Not until the compliance stage would the court examine in depth whether the other parcel presents a realistic opportunity for the construction of lower income housing within the time to be required by the court.[202]

H. Compliance Analysis

In *Allan-Deane Corp. v. Township of Bedminster*,[203] the issue presented to the court was whether the Township had adopted a compliance ordinance that provided a realistic opportunity for the actual construction of its fair share of low and moderate income housing, and whether it had satisfied any builder's remedies which might have been earned. Although all

198. *Id.* The court found that "no amount of innovative planning, buffering or other devices can take away the potential for the disruption of the existing land use pattern in that area." *Id.* at 591, 499 A.2d at 567-68.

199. *Id.* at 593, 499 A.2d at 568.

200. *Id.* at 593, 499 A.2d at 569.

201. *Id.* at 594, 499 A.2d at 569.

202. *Id.* at 593-94, 499 A.2d at 569.

203. Allan-Deane Corp. v. Township of Bedminster, 205 N.J. Super. 87, 500 A.2d 49 (1985).

of the parties agreed that the Township's fair share was 819 units pursuant to the *AMG* methodology, the Township sought either to have the number reduced as a result of its voluntary compliance with *Mount Laurel II*, or court authorization to phase-in the units by requiring that only 656 units be constructed by the end of the decade with the remainder to be built thereafter.

It has been the policy of the Serpentelli court to permit modifications of the fair share number produced by the *AMG* methodology when a municipality has stipulated noncompliance and fair share at an early stage of the litigation, or has sought declaratory relief before litigation was instituted against it, and has in either case agreed to comply within a specified period of time.[204] The court noted that similar adjustments in the fair share number may be made in cases in which equity dictates such an approach.[205] Among the justifications noted by the court for such flexibility is the fact that the *AMG* methodology is not scientifically precise, and merely represents the initial evolutionary stage of the development of a fair share methodology.[206] Second, flexibility in determining a municipality's fair share constitutes an incentive for voluntary compliance.[207] Third, to the extent that the court's flexibility stimulates voluntary compliance, one of the key considerations of *Mount Laurel* will be satisfied — more housing will be constructed in a shorter period of time.[208]

The court determined that the circumstances which authorize fair share flexibility did not exist in the *Allan-Deane* case because the settlement did not occur until more than one year after the matter was remanded for proceedings in accordance with the *Mount Laurel II* decision, more than eighteen months after the *Mount Laurel II* decision, and not until settlement was directed within thirty days or a trial would be held concerning the awarding of builder's remedies.[209]

All parties to the controversy agreed that the court had the

---

204. *Id.* at 106, 500 A.2d at 58.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 106-07, 500 A.2d at 58.
209. *Id.* at 107, 500 A.2d at 59.

authority to cushion the impact of *Mount Laurel* development on a municipality where the impact would cause "sudden and radical transformation[s]."[210] Numbers alone, however, cannot justify a finding of radical transformation.[211] Fair share compliance programs which use the generally accepted mandatory set-aside of four market units to one lower income unit, for example, will necessarily produce high growth percentages.[212] Moreover, absent specific information concerning the actual impact on a community, growth rate comparisons have limited value. That does not mean to say that the court considers such statistics to be worthless — they provide some general guidance to the court in assessing projected growth rates.[213]

The authority to phase-in development as the result of radical transformation of a community is only to be exercised sparingly so as not to dilute the *Mount Laurel* obligation.[214] Although *Mount Laurel II* does not define radical transformation, the court viewed the term in its common sense connotation, that is, "a rapid and extreme change in existing conditions."[215] In measuring the capacity of a municipality to absorb such change in a specified period of time, the court must examine the extent of required capital improvements, institutional and service demands, and unique environmental and planning concerns which might render a community particularly sensitive to sudden growth.[216] The court rejected arguments that a municipality is precluded from raising a defense of radical transformation as a consequence of past failures to accommodate growth.[217] The court additionally rejected the argument that radical transformation had been intensified by Bedminster's choice of its means of compliance by the construction of four market units for each unit of lower income housing.[218]

---

210. *Id.* (quoting *Mount Laurel II*, 92 N.J. at 280, 456 A.2d at 452-53).

211. *Allan-Deane Corp.*, 205 N.J. Super. at 109, 500 A.2d at 60.

212. *Id.*

213. *Id.* at 109-10, 500 A.2d at 60.

214. *Id.* at 110, 500 A.2d at 60 (citing *Mount Laurel II*, 92 N.J. 158, 219, 456 A.2d 390, 420).

215. *Allan-Deane Corp.*, 205 N.J. Super. at 111, 500 A.2d at 61.

216. *Id.*

217. *Id.* at 110, 500 A.2d at 60.

218. *Id.* at 110-11, 500 A.2d at 60. Although the court held that the argument "does not carry the day at this point . . . it may have considerable weight in the future as

Noting that the infrastructure of the Township is extremely limited, its school system compatible with its small size and its municipal service structure very limited, the court concluded that its rural character had not changed significantly in many years and that the fulfillment of its full fair share in this decade would work a radical transformation in the Township.[219] Accordingly, the court determined that the Township was required to provide 656 of the units on or before December 31, 1990, with the remaining 163 units to be provided by December 31, 1994.[220]

To determine whether an ordinance complies with the *Mount Laurel II* mandate that a municipality must provide a realistic opportunity for the construction of its fair share of low income housing, the court devised a three step review to determine if such "likelihood" has been achieved.[221] Initially, it must be determined whether the municipality's ordinances are free from all excessive restrictions and exactions or other cost generating devices that are not necessary to protect health and safety.[222] Second, the court must examine the sites selected or other mechanisms used to achieve compliance to ascertain the likelihood of actual construction within the compliance period.[223] Such review may involve evaluation of site suitability,[224] affirmative measures to encourage low cost housing,[225] alternative compliance mechanisms,[226] project feasibility,[227] and any in-

---

acceptable and realistic alternative modes of compliance are developed." *Id.* at 111, 500 A.2d at 61.

219. *Id.* at 112, 500 A.2d at 61.

220. *Id.* The court emphasized that the 163 unit deferred portion of the 1980-1990 obligation is in addition to any fair share obligation which the Township is determined to have for the 1990-2000 decade. *Id.*

221. *Id.* at 113, 500 A.2d at 62.

222. *Id.*

223. *Id.*

224. A review of site suitability relates to the physical appropriateness of the property. Among the relevant factors in such inquiry are: environmental suitability, availability of infrastructure, proximity to goods and services, regional accessibility and compatibility with neighboring land uses. *Id.* at 115, 500 A.2d at 63.

225. A review of affirmative measures includes examination of subsidies, inclusionary zoning devices, incentive zoning, mandatory set-asides and resale controls necessary to ensure that lower income units will remain affordable. *Id.*

226. Alternate compliance mechanisms are those by which a municipality may avoid 20% mandatory set-aside construction of four market units for each lower income unit, such as commercial incentive zoning which includes lower income housing or projects funded by the municipality. *Id.*

tangibles which may affect the likelihood of development. The mere revision of a zoning ordinance to provide for *Mount Laurel* housing does not guarantee that such housing will actually be constructed. The court must, accordingly, ascertain whether there are any hidden factors in the compliance package which would impair the likelihood of development. Such factors include: individual predilections of property owners, political pressures not to sell, title problems, vested approvals for other uses and the inflation of market prices as a result of *Mount Laurel* rezoning.[228] Lastly, if the sites selected or other mechanisms utilized are realistic, then the court will approve the compliance package.[229]

The court affirmed that it is not its function to substitute its judgment for that of a municipality, absent entitlement to a builder's remedy, when a reasonable compliance package is offered by a municipality, although a number of equally reasonable alternatives are presented.[230] Accordingly, in its examination of a proposed compliance package, the court will not review other sites or mechanisms which may be asserted to be more likely to produce *Mount Laurel* construction. In the opinion of the court, the owner of property excluded from a community's compliance package has not been treated unfairly because "*Mount Laurel* principles exist for the benefit of the lower income households of our state [New Jersey], not for those seeking rezoning."[231]

In addition to the requirement that each site must be realistic, the court emphasized that the total package must demon-

---

227. Project feasibility relates to whether the rezoning and other affirmative measures will result in sufficient profit to make a project a likelihood. The court will review any density bonuses granted as the result of mandatory set-asides to ascertain whether sufficient funds will be generated to provide internal subsidies for the lower income units. Construction will not occur if the set-asides are too high or the bonus too low. The court must also review fee waivers, tax abatements and other municipal actions designed to provide a builder with the assurance of a reasonable profit. *Id.* at 115-16, 500 A.2d at 63.

228. *Id.* at 116, 500 A.2d at 63.

229. *Id.* at 116-17, 500 A.2d at 63-64.

230. "[A] municipality is not required to replace its reasonable approach with another reasonable approach merely because a property owner or owners, not entitled to a builder's remedy are excluded from the package or because it might have been just as reasonable to include them." *Id.* at 132, 500 A.2d at 72.

231. *Id.* at 114, 500 A.2d at 62.

strate reasonable planning. The fact that each site is realistic does not compel the conclusion that the combination will automatically produce an acceptable compliance package. As an example, the court must ascertain that social segregation will not result within individual projects or the community.[232]

The court concluded that the subject ordinance eliminated all unnecessary cost generating devices, provided sufficient affirmative measures,[233] and created zoning for sites which were likely to satisfy the Township's *Mount Laurel* obligation in a timely manner.[234] The court rejected the claims of a competing property owner, Dobbs, that his property, excluded from the compliance package, was more appropriate to provide *Mount Laurel* housing and should, therefore, be substituted for other included parcels. The court also rejected his claim of entitlement to a builder's remedy since he did not intervene in the action until after the ordinance had been found to be noncompliant. Accordingly, he failed to satisfy the entitlement standard for two reasons: he was not a *Mount Laurel* plaintiff, and he did not cause the process leading to the acceptance of a compliance ordinance.[235]

In rejecting arguments that additional overzoning was required, in order to guarantee that the initial phase of the Township's fair share would be satisfied, the court noted that overzoning is not mandated in all cases and should, if required, be directly related to the likelihood of construction of compliance sites.[236] Given the "greater assurance of compliance than is available in the typical case," the court declined to require excessive overzoning in the initial phase which might serve to generate unnecessary growth.[237] The court also refused to order "substantial overzoning" for the deferred obligation at the time of the decision, preferring to assess the need therefor at the time

232. *Id.* at 116-17, 500 A.2d at 63-64.

233. The affirmative measures utilized by Bedminster included: waiver of certain application fees; adoption of a resolution of need; ratification of a tax abatement agreement; assistance to developer in obtaining financing; contributions to defray administrative expenses of nonprofit corporations to maintain the price structure of lower income units and upgrading of sewer facilities. *Id.* at 117-18, 500 A.2d at 64.

234. *Id.* at 136, 500 A.2d at 74.

235. *Id.* at 138, 500 A.2d at 75.

236. *Id.* at 144, 500 A.2d at 78.

237. *Id.*

of the calculation of the 1990-2000 fair share.[238]

Lastly, Dobbs asserted that a portion of the *Mount Laurel* units under construction did not satisfy the affordability criteria of *Mount Laurel II*. The court found that the units could be purchased by lower income families who would not be required to utilize more than twenty-eight percent of their gross income for payments of principal, interest, taxes, insurance and condominium fees, the standard widely accepted in *Mount Laurel* litigation.[239]

I. Fair Housing Act

Responding to *Mount Laurel II's* invitation for legislative action[240] and to the unpopular reaction to *Mount Laurel II*, the New Jersey Legislature approved the Fair Housing Act[241] in 1985 providing an administrative mechanism for assuring compliance with the constitutional mandates of *Mount Laurel II*. The measure indicated the Legislature's preference for the resolution of *Mount Laurel* claims by means of mediation, not litigation.[242] The legislation reflects a desire to provide low and moderate cost housing in accordance with sound planning concepts and regional need.[243]

The Act provides for the creation of the Council on Affordable Housing[244] whose duties include: the determination of housing regions, estimation of present and prospective need for low and moderate income housing, and the adoption of guidelines so that municipalities may determine their present and prospective fair share of the housing need for its region.[245] The Council's mandate is the "administration of housing obligations in accordance with sound regional planning considerations . . . ."[246] A

238. *Id.* at 145, 500 A.2d at 79.

239. *Id.* at 146, 500 A.2d at 79.

240. *Mount Laurel II*, 92 N.J. at 212-14, 456 A.2d at 417.

241. 1985 N.J. Sess. Law Serv. 222 (West).

242. *Id.* at § 3.

243. *Id.* The New Jersey Supreme Court upheld the constitutionality of the Fair Housing Act in The Hills Development Co. v. Township of Bernards, No. A-122-85 (N.J. Sup. Ct. Feb. 20, 1986).

244. 1985 N.J. Sess. Law Serv. 222 (West) at § 5.

245. *Id.* at § 7.

246. *Id.* at § 4(a).

community may elect to submit a "housing element" plan to the Council which must be designed to "meet present and *prospective* housing needs, with particular attention to low and moderate income housing . . . ."[247] A municipality may utilize any technique in the preparation of its housing element which provides a realistic opportunity for the provision of its fair share, including: rezoning to provide economic viability of a development by providing sufficient densities through mandatory set-asides or density bonuses, tax abatements, infrastructure expansion and rehabilitation, and the utilization of municipality-generated funds.[248] A municipality may petition the Council for substantive certification of its housing element, or commence a declaratory judgment action within six years after the submission of its housing element.[249] If no objection is filed with the Council within forty-five days after notice of the submission, the Council must issue substantial certification, and the municipality is permitted forty-five days within which to adopt its fair share housing ordinance.[250] If an objection is filed to a petition for housing certification, the Council is required to mediate the dispute. If the mediation is unsuccessful, a factual hearing is required to be held before an administrative law judge.[251]

Any *Mount Laurel* litigation instituted less than sixty days before the effective date of the Act or thereafter must utilize its administrative provisions if the defendant-municipality so elects. Any exclusionary zoning cases instituted more than sixty days before the Act's effective date may, at the discretion of the trial court, be transferred to the Council. In determining such application, the court is required to consider whether a transfer of the action "would result in a manifest injustice to any party to the litigation."[252]

In a sharp departure from the *Mount Laurel II* decision,

---

247. *Id.* at §§ 9-10.

248. *Id.* at § 11.

249. *Id.* at § 13.

250. *Id.* at § 14. Prior to issuance of a substantive certification, the Council must find that the fair share plan is consistent with the Council's rules, is not inconsistent with achievement of the low and moderate income housing need of the region, and that the achievement of the municipality's fair share is realistically possible by virtue of the elimination of cost generating regulations and affirmative measures. *Id.*

251. *Id.* at §§ 15(a)-(c).

252. *Id.* at § 16.

the Act prohibits the award of a builder's remedy for all suits filed after January 30, 1983.[253] The legislation also authorizes the phasing-in of a municiplity's fair share obligation with respect to any municipality which has an action pending or a judgment entered against it after the Act's effective date,[254] or which had a judgment entered against it prior to the effective date and from which an appeal is pending, or which has instituted an action for a declaratory judgment pursuant to the Act's provisions.[255]

The fair share ordinance of any municipality which has been certified by the Council is considered to be presumptively valid in any subsequent exclusionary zoning action filed against the municipality and the party seeking to rebut that presumption is required to demonstrate by clear and convincing evidence that the housing element and ordinances do not provide a realistic opportunity for the provision of the municipality's fair share.[256]

The Fair Housing Act varies a number of the definitions formulated by the *Mount Laurel* trial judges which may significantly affect a municipality's fair share number. A "housing region" is defined to be "a geographic area of no less than two nor more than four contiguous, whole counties which exhibit significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas" of the Census Bureau.[257] "Prospective need" is considered to be "a projection of housing needs based on development and growth which is reasonably likely to occur in a region or a municipality, as the case may be as a result of actual determination of public and private entities."[258]

---

253. *Id.* at § 28.

254. July 2, 1985. 1985 N.J. Sess. Law Serv. 222 (West).

255. 1985 N.J. Sess. Law Serv. 222 (West) at § 23(a).

256. *Id.* at § 17(a).

257. *Id.* at § 4(b).

258. *Id.* at § 4(j).

III. New York

A. The Berenson Doctrine

New York courts have maintained a far more conservative perspective of the issue of exclusionary zoning.[259] In *Berenson v. Town of New Castle*,[260] the court of appeals enunciated a two part test to examine the validity of an ordinance challenged as exclusionary: First, whether the municipality has provided a properly balanced and well ordered plan for the community. Second, whether consideration was given to the present and future housing requirements of the region.[261] With respect to the first portion of the analysis, the court observed that what may be appropriate for one community may differ substantially from what is appropriate for another. Recognizing that such differences exist between communities, the court stated that although "it may be impermissible in an undeveloped community to prevent entirely the construction of multiple-family residences anywhere in the locality . . . it is perfectly acceptable to limit new construction of such buildings where such units already exist."[262] Accordingly, a trial court must ascertain what types of housing exist in a municipality, their quantity and quality, whether the supply satisfies the present needs of the community, whether new construction is required to fulfill the future requirements of the municipality, and, if so, the form of such new development.

Although zoning has traditionally been considered to affect only land within the community, zoning activities have a substantial impact beyond the borders of the municipality. Accordingly, in examining whether a community has considered regional needs, "there must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met."[263] If the regional and local need for such housing is met by the local community

259. *See* Nolon, *Exclusionary Zoning: New York, New Jersey Cases Compared*, N.Y.L.J., July 2, 1985, at 1, col. 1 and N.Y.L.J., July 22, 1985, at 1, col. 1, for a comparison of the key points of the *Mount Laurel* decision and the *Berenson-Blitz* decisions.

260. Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

261. *Id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 680-81.

262. *Id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 680.

263. *Id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

or by other accessible areas in the community at large, an ordinance may not be held to be invalid on its face. The court observed, however, that since zoning is essentially a legislative act:

> [I]t is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning. While the people of New Castle may fervently desire to be left alone by the forces of change, the ultimate determination is not solely theirs.[264]

In *Robert E. Kurzius, Inc. v. Village of Upper Brookville*,[265] the court of appeals found an ordinance which zoned certain areas of a village for a minimum lot area of five acres to be valid. While emphasizing that it would not "countenance community efforts at exclusion under any guise,"[266] large-lot zoning is, under appropriate circumstances, a legitimate means to advance the public welfare of preservation of open spaces and the protection of the ill-effects of urbanization. The decision added an additional basis upon which a zoning ordinance could be found to be invalid, that is, if it is enacted for an improper purpose. As a result, "[o]nce an exclusionary effect coupled with a failure to balance the local desires with housing needs has been proved, then the burden of otherwise justifying the ordinance shifts to the defendant."[267]

In *Blitz v. Town of New Castle*,[268] the second department rejected the contention that zoning ordinances must affirmatively provide for the creation of all necessary housing and observed that "New York courts have consistently rejected any 'fair share' doctrine which would impose specific unit goals or quotas of housing on a municipality . . . ."[269] Instead, the *Blitz* court determined that it should examine certain "relevant data which may indicate whether New Castle's provisions for housing are at all commensurate with some *general* notion of its ex-

264. *Id.* at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682.

265. Robert E. Kurzius, Inc. v. Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180, *cert. denied*, 450 U.S. 1042 (1980).

266. *Id.* at 344-45, 341 N.E.2d at 683, 434 N.Y.S.2d at 183.

267. *Id.* at 345, 341 N.E.2d at 683-84, 434 N.Y.S.2d at 183.

268. Blitz v. Town of New Castle, 94 A.D.2d 92, 463 N.Y.S.2d 832 (2d Dep't 1983).

269. *Id.* at 98, 463 N.Y.S.2d at 836.

pected contribution to the regional housing need."[270] In calculating the housing needs of the region the court considered the report of a blue ribbon committee which was adopted by the county legislature as the county housing policy to be "the best possible estimate of the housing needs of Westchester County for the coming decade and that as a legislative finding it is entitled to great weight and the presumption of validity."[271]

The court rejected the plaintiff's contention that it is the number of housing units that will actually or probably be built that is determinative of whether the second portion of the *Berenson* analysis has been satisfied and determined that the proper focus of its inquiry is limited to whether the ordinance allows the development of sufficient housing to satisfy any reasonable estimate of the town's proportionate anticipated contribution. The court reaffirmed the holding of *Berenson* that affirmative action is not required:

> [Z]oning ordinances will go no further than determining what *may* or *may not be built*; market forces will decide what will actually be built, . . . our concern is to determine whether, on its face, the amended ordinance will allow the construction of sufficient housing to meet the town's share of the region's housing needs, particularly for multifamily housing, *assuming that such construction be both physically and economically feasible.*[272]

The controversy remained fairly static in New York until the law enunciated in the 1983 *Mount Laurel II* decision began to be asserted in New York land use controversies. In *Suffolk Housing Services v. Town of Brookhaven*,[273] the second department in 1985 declined to "work a change of historic proportions in the development of New York zoning law,"[274] and determined that the *Mount Laurel* decisions' requirement of a constitutional obligation on the part of municipalities to zone for low and moderate income housing is inapplicable in New York. The plaintiffs alleged that the town, through its zoning ordinance, policies and

---

270. *Id.*

271. *Id.* at 98, 463 N.Y.S.2d at 835.

272. *Id.* at 99, 463 N.Y.S.2d at 836.

273. Suffolk Housing Services v. Town of Brookhaven, 109 A.D.2d 323, 491 N.Y.S.2d 396 (2d Dep't 1985).

274. *Id.* at 332, 491 N.Y.S.2d at 402.

practices, had prevented the development of sufficient housing to accommodate its low-to-moderate income population. Utilizing the *Berenson* test, the court found that the ordinance, by virtue of its wide variety of different types and densities of residential housing, provided a properly balanced and well ordered plan for the community, and satisfied the first prong of that analysis.[275] Because the multi-family housing which was permitted in numerous zones required the issuance of a special permit, the court was required to examine the town's actions in order to determine whether the special permit provisions had been applied in a manner which allows for the construction of different types of housing, or was merely subterfuge to impress the courts. Reviewing the statistics of permits granted, the court concluded that the procedure had not been employed as a ruse to prevent the construction of multi-family housing.

With respect to the question of satisfaction of regional housing needs, the court found that *Berenson* "merely requires that a town allow for the construction of different types of housing in sufficient numbers for those people who want and can afford it."[276] The court reiterated its holding in *Blitz* that its review was limited to whether the ordinance allows the construction of sufficient housing to meet the municipality's share of the regional need, assuming that the construction of the units is both physically and economically feasible. The appellate division repudiated the contention that a balanced and well-ordered community requires an array of housing sufficient to meet the legitimate needs of all the town's residents and others at prices they can afford.[277] The court noted that *Berenson* approached the problem of exclusionary zoning solely in terms of traditional zoning and planning considerations, and did not address how such housing would be built, affordability, subsidies, "nor does it purport to mandate that a zoning ordinance make it possible for people of all classes to live in a given community. It merely requires that a town allow for the construction of different types of housing in sufficient numbers for those people who

275. *Id.* at 328-29, 491 N.Y.S.2d at 400.
276. *Id.* at 331, 491 N.Y.S.2d at 402.
277. *Id.*

want and can afford it."[278] In affirming the validity of the town's ordinance, the court noted that the court of appeals has not announced a constitutional obligation on the part of municipalities to zone for low-to-moderate income housing.[279]

The court in *Asian American for Equality v. Koch*,[280] specifically declined to follow the second department's unambiguous rejection of the *Mount Laurel* principles and held that "it is now appropriate to adopt the *Mount Laurel Doctrine* as the law of New York."[281] In *Asian American for Equality*, the plaintiffs challenged New York City's creation of a Special Manhattan Bridge District, alleging that it constituted a plan of neighborhood gentrification in order to exclude and displace low-income Chinese persons from Chinatown and New York City in favor of upper-income individuals. Recognizing a severe housing shortage in the area, the city devised an incentive program to promote residential development, relying primarily upon floor area bonuses to developers who provide certain community facilities, such as community space, rehabilitation of existing housing and subsidized housing. The approval which stimulated the proceeding was the granting of a special permit for the construction of a twenty-one story building containing eighty-seven condominium units ranging in price from $170,000 to $500,000. In order to obtain a floor area bonus, the developer agreed to construct a pool on the premises to be conveyed to the YMCA and to contribute $500,000 for the rehabilitation of subsidy housing.

The court observed that New York's attempts to satisfy the need for adequate housing for low-and-middle income individuals, by focusing on whether there exists a properly balanced and well ordered plan for the development of the community, has not resulted in the construction of such housing. The court found that "[t]he underpinnings of the *Mount Laurel Doctrine* and the *Berenson* doctrine are the same,"[282] that is, that the police power delegation to zone must be exercised for the general welfare of all citizens. The court denied the City's motion to dis-

278. *Id.*
279. *Id.*
280. Asian American for Equality v. Koch, 129 Misc. 2d 67, 492 N.Y.S.2d 837 (1985).
281. *Id.* at 82, 492 N.Y.S.2d at 848.
282. *Id.* at 81, 492 N.Y.S.2d at 847.

miss the complaint finding that a cause of action had been stated under both the *Mount Laurel* and *Berenson* standards.

The history and social structure of Chinatown is such that its residents, most of whom fall into the low-income category, are deeply rooted into the community. It was asserted that the displacement of these residents by the implementation of zoning schemes would be so traumatic, that it would preclude any reasonable opportunity for the future development of low-and-moderate income housing in Chinatown.[283] Thus, although the zoning scheme was designed to aid Chinatown's low-income residents, it would, in essence, be contrary to their general welfare. The court held that if the plaintiffs are able to prove that the amendment would lead to unwarranted displacements, and that it circumvents the City's obligation to affirmatively provide a realistic opportunity for the construction of low-income housing, plaintiffs may prevail at trial.[284] "[T]he zoning power is no more abused by keeping out the region's poor than by forcing out the resident poor."[285] The court rejected the City's argument that the provision of incentive bonuses in the amendment required a holding that it is valid as a matter of law. The *Mount Laurel II* court determined that there may be instances when incentive devices alone may not be sufficient, and that more extensive measures may be required. Accordingly, the court determined that the issue must be explored at trial.[286]

Additionally, the court found that a cause of action under the *Berenson* analysis was stated by the allegations: that the amendment ignored the critical need for low-income housing and would, instead, result only in luxury housing, thereby violating the constitutional mandate that the police power be utilized only in furtherance of the public welfare; and that it does not constitute a well-balanced plan.[287] The court held that although a particular quantitative proportion of various types of housing is not required by *Berenson*, the particular needs of Chinatown

283. *Id.* at 83-85, 492 N.Y.S.2d at 848-49.

284. *Id.*

285. *Id.* at 83, 492 N.Y.S.2d at 848 (quoting *Mount Laurel II*, 92 N.J. at 214, 456 A.2d at 418).

286. *Mount Laurel II*, 92 N.J. 158, 266-67, 456 A.2d 390, 445-46 (1983).

287. Asian American for Equality v. Koch, 129 Misc. 2d at 85-86, 492 N.Y.S.2d at 849-50.

may mandate that a well-balanced plan facilitate the construction of quality low-income housing.[288] Accordingly, issues were raised with respect to the first prong of the *Berenson* test which required resolution at trial. Additionally, the trial court would be required to explore whether the needs of the community can be satisfied by neighboring communities, whether it would be appropriate in view of the unique character of Chinatown, and the possible effects that displacement would have on its residents.[289]

Subsequently, the second department utilized the *Berenson* analysis to determine that an ordinance which excluded multi-family housing for the elderly was not exclusionary. In *North Shore Unitarian Universalist Society v. Village of Upper Brookville*,[290] the court first held that the plaintiffs had failed to prove that the ordinance did not provide for the present and future needs of the village's residents, that is, that it did not constitute a properly balanced and well-ordered plan.[291] With respect to the second *Berenson* prong, the court relied upon the Nassau-Suffolk Comprehensive Development Plan in determining whether the plaintiff proved the existence of a regional need for high-density housing for the elderly, and whether such need was adequately satisfied. The Plan did not designate any high-density development for the village, but recommended low-density development to preserve the village's present open space. Similarly, low-density development was recommended for the village by a water management study which classified the area as a primary source of drinking water for both counties. Furthermore, the court found that the Plan provided for the development of sufficient housing elsewhere, and that the ordinance served a regional need for open space and water preservation.

The court also rejected the contention that the ordinance is insufficient because the Plan's projected number of apartments had not been constructed.

> [A] facially valid ordinance will not be invalidated simply be-

---

288. *Id.* at 88, 492 N.Y.S.2d at 851.

289. *Id.*

290. North Shore Unitarian Universalist Society v. Village of Upper Brookville, 110 A.D.2d 123, 493 N.Y.S.2d 564 (2d Dep't 1985).

291. *Id.* at 125-28, 493 N.Y.S.2d at 565-68.

cause economic forces prevent construction of multi-family housing. Moreover, a requirement that those seeking to build either multi-family housing or age-restricted multi-family housing must first seek a permit to do so does not destroy the presumptive validity of zoning ordinances which do not premap to provide for such housing.[292]

IV. Conclusion

Although there are a number of similarities between the *Mount Laurel* decisions and the New York exclusionary zoning cases, the distinctions are quite profound. Among the common bases in both lines of decisions is the requirement that all zoning regulations be in furtherance of the public welfare. As is evident, however, the two states have interpreted the implications of that mandate in a different manner.

Additionally, the placement of responsibility for the provision of low-cost housing in New Jersey and the placement of responsibility for the furtherance of regional planning in New York has been placed in the legislature, not the courts. The *Mount Laurel II* court recognized that:

> [T]he matter is better left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them . . . . So while we have always preferred legislative to judicial action in this field, we shall continue - until the Legislature acts - to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine.[293]

The *Berenson* court, on the other hand, looked to the New York State Legislature to make appropriate changes in order to foster the development, not of low-cost housing, but of sound regional planning.

Of considerable importance in both instances is the reliance upon regional planning studies. *Mount Laurel*, of course, is premised upon the utilization of the SDGP as a rational long-range land use planning blueprint for future growth, and for the implementation of the *Mount Laurel* doctrine. Although the SDGP

---

292. *Id.* at 128, 493 N.Y.S.2d at 567.

293. *Mount Laurel II*, 92 N.J. at 212, 456 A.2d at 417.

has been criticized as "merely reflect[ing] present development throughout the state, concentrating on 'what is' rather than 'what ought to be,' "[294]— it is, at least, an attempt at rational regional planning. Since the *Berenson* decision, New York courts have, in fact, placed great reliance on various regional planning documents which "illustrate the approach to regional zoning problems which was favored in *Berenson*."[295] In *Blitz*, for example, the court found that the County Board of Legislators responded to the *Berenson* call for legislative action by adopting the report of a blue-ribbon committee, formed to study long-range land use planning as the Board's county housing policy. Thus, the report and its finding of the regional housing need gained further validity.[296] Similarly, in *North Shore Unitarian Universalist Society*, the court, in order to examine whether a regional need exists for multi-unit or high-density housing for the elderly, and whether that need has been satisfied, accorded great deference to the Nassau-Suffolk Comprehensive Development Plan, and, to a lesser extent, a water management study.[297] Such presumptive validity to which planning studies are entitled should serve as a great impetus for the preparation of reports.

Regardless of the underlying similarity of theory, *Berenson* and its progeny and the *Mount Laurel* decisions exhibit many distinctive features which distinguish the course of the judicial determinations. First of all, while *Mount Laurel* has resulted in a veritable revolution in New Jersey zoning planning and procedure, and has certainly increased the housing stock for the poor, *Berenson* has had little effect in New York, with the possible exception of the beleaguered Town of New Castle. While New Jersey communities must provide for their fair share of housing for the region's poor, New York municipalities need merely provide an array of housing as required by regional needs for those who can afford such housing. Equally important, New York courts have refused to adopt a fair share doctrine which would

294. Carton and Brown, *An Open Letter to Municipalities*, III New Jersey State Bar Association, Land Use Section, No. 1, Aug. 1983.

295. Robert E. Kurzius, Inc. v. Village of Upper Brookville, 51 N.Y.2d at 347, 414 N.E.2d at 685, 434 N.Y.S.2d at 184.

296. Blitz v. Town of New Castle, 94 A.D.2d at 97, 463 N.Y.S.2d at 835.

297. *North Shore Unitarian Universalist Society*, 110 A.D.2d at 126-28, 493 N.Y.S.2d at 566-67.

impose specific unit goals or quotas of housing on a municipality, and have examined instead relevant data which may indicate whether a municipality's provisions for housing are commensurate with "some *general* notion"[298] of its expected contribution to the regional housing need. No affirmative obligation is imposed to promote low-income housing. New Jersey communities must satisfy their numerical fair share regardless of bona fide efforts. New York municipalities, on the other hand, need merely provide by their ordinances for the construction of its share of the regional housing need. Moreover, unlike New Jersey townships, New York municipalities are not required to eliminate cost producing regulations which might not serve the public interest.

Will the *Mount Laurel* doctrine become the law of New York? There are a number of reasons why it is unlikely that such an extreme position will be adopted by the New York courts. It can safely be assumed, however, that the *Mount Laurel* decisions will continue to influence the manner in which the courts view the issue of exclusionary zoning disputes. In the first instance, *Mount Laurel II* was the result of the supreme court's perception of "widespread non-compliance with the constitutional mandate"[299] of *Mount Laurel I* on the part of New Jersey's municipalities. The history of exclusionary zoning has been far different in New York - invalidation of a zoning ordinance as a result of exclusionary zoning has been the rarest of exceptions. Only in *Berenson*, when the doctrine of exclusionary zoning was first announced, and in *Asian American for Equality*, an anomoly to date, have ordinances been declared invalid. There has been no history of non-compliance with the less demanding *Berenson* standard. Moreover, the instances in which New York courts have so pervasively intervened in the affairs of a municipality are, indeed, rare. In the field of local zoning, it is virtually unprecedented. Accordingly, the fashioning of such a draconic remedy in New York is unwarranted.

Moreover, the wisdom and legitimacy of mandating that rational planning take a subservient position to a judicially created constitutional right to low-cost housing is, at best, debatable. It

298. *Blitz*, 94 A.D.2d at 98, 463 N.Y.S.2d at 836.
299. *Mount Laurel II*, 92 N.J. at 199, 456 A.2d at 410.

cannot be argued that fundamental fairness requires that a municipality not exclude multiple family housing where a regional need for the same exists, and where valid planning considerations and criteria can be met. To require, however, that a municipality violate its own comprehensive plan and ignore valid zoning regulations, which had previously been considered to be presumptively valid, defies logic. Further, the *Berensen* doctrine certainly is more consistent with traditional notions of providing a rational zoning scheme commensurate with the housing requirements of all segments of the regional community.

Although it cannot be doubted that a significant amount of low and moderate income housing has and will result in New Jersey as a result of *Mount Laurel*, the mandates of *Mount Laurel* may not be the most efficient means to create affordable housing. "As paradoxical as it may seem, one of the most effective methods of undermining the goals of the *Mount Laurel II* decision may be enthusiastic compliance by the municipality."[300] Under such a scenario, utilizing mandatory set asides and overzoning, techniques favored by the New Jersey courts, a municipality could require a high number percentage of mandatory set-asides in virtually all of its undeveloped residential land.[301] "This device will immediately discourage all development by most small builders who do not want to get involved in the potential risk, prohibitive legal fees, and high administrative costs, and unnecessary red tape incurred the implementation of an affirmative measures program."[302] With respect to larger developments, the consequence of such over-enthusiastic compliance would result in "severely limiting the economic feasibility and diminishing, if not eliminating, any developer interest."[303] In short, *Mount Laurel* will only be effective with respect to municipalities which react to its mandates in good faith and for developers who have the stamina to engage in time-consuming and finance-depleting litigation.

It cannot be argued that a severe housing shortage does not exist in New York for those of modest income, as well as for the

300. Rose, *supra* note 21, at 882.
301. *Id.*
302. *Id.*
303. N.Y. Times, Jan. 15, 1986, at B4, col. 3.

rest of society. The *Mount Laurel* decisions are certainly having an impact on how the New York courts view zoning ordinances which fail to allow multiple family housing, particularly when the poor are excluded from a community and when the less fortunate are displaced by housing for the well-to-do. It is equally clear that the influence of *Mount Laurel* will continue to have an impact on the law in New York, particularly since *Berenson* has not produced additional housing for the poor and, in all likelihood, has not resulted in the construction of additional housing of any nature, except in North Castle.

Utilization of *Mount Laurel* standards in New York would prevent many municipalities from preserving the essential character of the community. As suburban sprawl continues to devour open spaces and green areas, city dwellers continue to seek such environments in which to raise families, and natives seek to perpetuate the remaining bucolic elements of the area. Perhaps, what is needed is a mix of communities of varying characteristics to suit the needs and lifestyles of a diverse society, rather than a wide variety of housing in every municipality, be it large or small. Judicial intrusion into a community's development is clearly a remedy of last resort. The type of comprehensive, rational planning illustrated in *North Shore Unitarian Universalist Society* may facilitate such intelligent location of denser development and preservation of green areas. New York should not be permitted to drift in the direction of *Mount Laurel* as the result of legislative default.

Promotion of purely parochial interests, on the other hand, without any semblance of regional concern cannot serve the public interest. Displacement of the poor to pursue gentrification, without efforts to accommodate the resultant homeless must be considered to be the antithesis of sound planning, as well as inhumane. The right of luxury urban development at high density should entail the responsibility for those displaced. Increased densities of market-rate units may provide the capital to renovate dilapitated housing or to subsidize dwelling units.

The *Mount Laurel* trial court decisions discussed herein reflect a very concerted effort by the trial judges to bring rationality and certainty to an uncertain area in which experts can debate the wisdom of various methodologies far into the future. The conclusion must be reached that a fair degree of caprice

must exist in any method chosen. It is clear, however, that planners can construct a model which will bear some relationship to reality. The trial court decisions reveal that after trial and error, a system for allocation, however imprecise, can be implemented which will determine need and allocate the same. The more serious question is whether such an obligation should be imposed, entailing such intrusive interference with functions which have traditionally been considered to be of local concern. The unpopularity of the *Mount Laurel II* decision in New Jersey suggests that the public support for such a supposed constitutional right and the concomitant remedies is clearly lacking. The Fair Housing Act was an effort to escape some of the more intrusive features of *Mount Laurel* litigation with the intention to "put the power to determine housing needs back where it belongs—back in the hands of local, elected officials."[304] Moreover, Governor Kean has proposed a constitutional amendment to eliminate the *Mount Laurel* constitutional obligation to provide low and moderate income housing. Given New Jersey's attempts to circumvent the court mandated *Mount Laurel* obligation, it certainly can be argued that other states can learn from New Jersey's experiences and attempt a different approach to satisfying the housing needs of the citizens of the community and region.

If New Jersey is successful in abrogating the *Mount Laurel* doctrine, the impact of *Mount Laurel* on land use planning will not be significantly lessened. The determination of the existence of such a constitutional right and the judicial administration of *Mount Laurel* litigation should provide guidance to other jurisdictions in coping with that serious dilemma. Although it is recognized that strictly insular zoning must be a relic of the past, the intrusive impact of *Mount Laurel* should be sought to be avoided in the future.

304. *Id.* at B4, col. 4.