INTRODUCTION

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Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II)[1] has been characterized as "the most important zoning opinion since Euclid";[2] "one of the strongest constitutional court decisions since the civil desegregation decisions of the U.S. Supreme Court";[3] and a decision likely to involve the judiciary in "an undesirable intrusion on the home rule principle."[4] While personal opinion as to the merits of *Mount Laurel II* may vary, both supporters and critics of the decision acknowledge that it has dramatically altered the regulation of land use by local governments in New Jersey.

That the changes occasioned by *Mount Laurel II* could be so significant in a state whose courts were pioneers in the area of exclusionary zoning during the past decade gives some measure of the extraordinary forcefulness and thoroughness of this New Jersey Supreme Court decision. While of course not binding on jurisdictions outside New Jersey, it is likely to influence decisions in other states, particularly those which are heavily urbanized.

One of the apparent differences between *Mount Laurel II* and its predecessor decisions is the litigation which it has spawned. Whereas in the past, public interest groups—including most notably the New Jersey Department of the Public Advocate—have carried a large burden of the judicial battle against exclusionary zoning, in the sixteen months since *Mount Laurel II* was decided, over seventy-five cases have been brought against local governments by private property owners or developers. To be sure, the *Mount Laurel II* court tailored the builder's remedy to elicit assistance from the home building industry in compelling municipal compliance. One wonders, however, whether the court could have predicted quite how successful it would be.

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[1] 92 N.J. 158, 456 A.2d 390 (1983).

[2] Franklin, *The Most Important Zoning Opinion Since Euclid*, PLANNING (Nov. 1983).

[3] J. Rodriguez, Commissioner of the New Jersey Department of the Public Advocate, as quoted in the Asbury Park Press, Mar. 18, 1984, at C-1, col. 6.

[4] Annual Message to the New Jersey State Legislature by Governor Thomas H. Kean (Jan. 10, 1984).

This Symposium on *Mount Laurel II* is particularly opportune in light of the national ramifications of the decision itself and the fact that much of the current *Mount Laurel* litigation involves the builder's remedy. Indeed, the issues involved in post-*Mount Laurel II* zoning are complex and, through continuing review by the three regional judges appointed to hear all subsequent exclusionary zoning cases, are constantly evolving. The articles herein cover a wide range of these issues, including various perspectives on the historical progression of the *Mount Laurel* doctrine and its social, political, and judicial influences.

Stanley Van Ness, Commissioner of the Department of the Public Advocate under Governor Byrne, provides an insightful perspective on the legal, political, and social considerations which shaped the *Mount Laurel* doctrine over the past decade and a half. He reflects on the Public Advocate's activism in the exclusionary zoning area during his tenure. Moreover, he measures the impact of this involvement on the provision of affordable housing for lower income households in general and for racial minorities in particular.

Professor Jerome Rose "defines" a handful of new legal concepts invoked in *Mount Laurel II* and in the process describes the particular complications of each in relation to constitutional, fiscal, administrative, political, and socioeconomic issues. Although individually defined, the aggregate of the concepts selected—principles of sound planning, affirmative measures, overzoning, mandatory set-asides, least cost housing, suitability, builder's remedy, excessive restrictions and exactions—provide for a comprehensive discussion of the current state of affairs of *Mount Laurel* litigation and implementation. In characteristic style, Professor Rose concludes by positing three additional terms—"constitutional brinkmanship," "skillful municipal obstinacy" and "waning judicial legitimacy"—by which he expresses distress with the course the New Jersey Supreme Court has taken in *Mount Laurel II*.

Professor John Payne explores the process of judicial decision-making in *Mount Laurel II* through a review of the recordings of oral arguments before the supreme court in October and December of 1980. He sets the historical context within what he describes as the "*Mount Laurel I* Trilogy"[5] and discusses the unique framework speci-

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[5] Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, appeal dismissed and cert. denied, 423 U.S. 808 (1975); Oakwood at Madison, Inc. v. Madison Township, 72 N.J. 483, 371 A.2d 1192 (1977); Pascack Association, Ltd. v. Township of Washington, 74 N.J. 470, 370 A.2d 6 (1977) and its companion case, Fobe Associates v. Mayor of Demarest, 74 N.J. 519, 379 A.2d 31 (1977).

fied by the court for the presentation of the six consolidated cases. Using excerpts from the oral argument, he analyzes the extent to which the decision recognizes a constitutional right to housing and the basis for the court's choices of remedies in post-*Mount Laurel II* cases.

In *A Black Perspective on* Mount Laurel II: *Toward a Black "Fair Share,"* Robert Holmes expands upon the significance of *Mount Laurel II* to the black community. Beginning with the first *Mount Laurel* decision, he notes that the court's definition of the protected class was in terms of economic conditions, not racial characteristics. Based on demographic data from the 1980 Census, Mr. Holmes identifies circumstances under which blacks and other minorities may not share equally with white families of lower income in gaining access to any affordable housing produced as a result of *Mount Laurel II*. He proposes criteria for selecting residents of such housing which would maximize equal access to all members of the protected class, and with conscientious monitoring, would avoid the necessity of additional litigation concerning the specific rights of the minority poor.

Gerald Meisel identifies and analyzes the critical issues which must be addressed by any prospective *Mount Laurel* litigant, whether builder, public interest group, or municipality. In so doing he provides a thorough discussion of the substantial planning and zoning changes created by *Mount Laurel II* and their possible impact on interested parties. Of particular interest to those concerned with the maintenance of affordable housing over time is Mr. Meisel's proposal for the establishment of public trusts to govern resale and rerental of lower income dwelling units. This use of public trusts is likely to be the subject of increasing interest as obstacles to constructing affordable housing are surmounted and attention is focused on occupancy.

The dust from the decision on January 20, 1983 has not yet settled. More issues remain unaddressed than resolved at this point in the post-*Mount Laurel II* era. The process is becoming more predictable—for local government and builders alike—but only barely so. The municipal fair share obligation and the acceptable responses for its satisfaction must become more predictable and consistent in order to achieve broad-based compliance by well-intentioned municipalities and to assure the actual provision of housing for lower income persons.

This Symposium should assist in this effort through the exchange of ideas and concerns of five well-respected and knowledgeable authors. Hopefully, when the dust does settle it will come to rest not on stacks of trial briefs filed by both sides in exclusionary zoning litigation, but on the rooftops of newly constructed, lower income dwellings.