HOUSING RIGHTS AND REMEDIES: A "LEGISLATIVE" HISTORY OF *Mount Laurel II*

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Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II)[1] is as much a problem in judicial process as it is a problem of zoning and housing law. Whether the decision and its progeny ever help solve, or even mitgate, the land use problems concerning the court, the method by which the New Jersey Supreme Court informed itself and decided these issues will be of continuing interest to students of law and politics.

Another article in this symposium issue will explore at length the proposition that *Mount Laurel II* encroaches, properly or improperly, on the prerogatives of the political branches of the government of New Jersey.[2] While this normative question is an interesting and difficult one, the thrust of my concern here is primarily descriptive. I seek to record the process by which *Mount Laurel II* came to be decided, and to test some aspects of the resulting decision against that decisional process.[3] By doing so, I hope both to illuminate the issues of housing right and remedy referred to in my title, and to invite further inquiry and debate about the *process* of judicial decisionmaking in matters that have strong overtones of legislative policymaking.

The *in camera* deliberations of the supreme court in *Mount Laurel II* are of course beyond our grasp and are likely to remain so. Fortunately, a sound recording of the oral arguments, which took place on October 20-22, 1980, and again on December 15, 1980, has been preserved. Excerpts from these tapes form the principal basis of this article.[4]

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[1] 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter cited as *Mt. Laurel II*].

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

[3] The *Mount Laurel II* decision is quite lengthy and a full survey of all of the interesting aspects of judicial process involved in the decision is most certainly beyond the scope of this article.

[4] A note about methodology is appropriate here. The quotations from the *Mount Laurel II* arguments are based on transcripts prepared by the author from tapes supplied by the New Jersey Supreme Court that are now in the collection of the Rutgers University Mount Laurel

The article is divided as follows: Part I will briefly summarize the state of the *Mount Laurel* doctrine as it had developed between March 1975 and early 1980, and will recapitulate issues presented by the six cases consolidated for argument in *Mount Laurel II*. Part II will then describe and comment upon the unique structure which the court established for the presentation of the six cases. Readers familiar with the actual course of the litigation will find little new here, but recordation of the litigation history seems nonetheless useful since it is only partially recapitulated in the *Mount Laurel II* opinion. This is particularly so with respect to the matters described in Part II.

Parts III and IV will then analyze two areas of doctrinal interest that flow from the subsequent opinion in *Mount Laurel II*, and examine how those areas were treated during the oral arguments in 1980. Part III explores whether the case recognizes a constitutionally-protected right to shelter, while Part IV investigates the broad methodological choices made by the court to fashion a *Mount Laurel* remedy, including the roles of the State Development Guide Plan (SDGP)[5], the 1978 Housing Allocation Report (HAR)[6], and the three special judges designated to hear *Mount Laurel* cases.

Research Center. Because a complete transcript of the argument is not yet available, the extracts will be cited to their approximate locations on each tape. The tapes are numbered consecutively, with the sides designated A and B. Within each tape and side, location has been divided roughly into tenths. Thus, a quotation beginning three-quarters of the way through the second side of the eighth tape would be identified Tape 8(B).7.

It is uniformly possible to identify the attorney speaking at any given point, because this follows the printed order of argument and also because the Justices themselves frequently address the speaker by name. The Justices, however, are less readily identified, since their interruptions do not follow any predetermined course. Because the resulting opinion was unanimous, it has seemed less urgent to make precise identification of the Justices, and the term "THE COURT" will ordinarily be used in order to avoid erroneous attribution of remarks.

It should also be noted that the transcript has been edited to eliminate the customary "ums" and "errs" and false starts of spontaneous speech; where there was any doubt about context or meaning, however, these blemishes have been left intact. The author intends no disrespect of any speaker in these editorial decisions, but thought it preferable to let the reader draw his or her own conclusions at points of difficulty rather than to risk making erroneous changes in substance. Readers interested in obtaining a complete transcript of the oral argument when it is available, for the cost of reproducing it, are invited to contact the author directly.

[5] The SDGP is a statewide planning document which divides the state into a variety of developmental areas. *See Mt. Laurel II*, 92 N.J. at 225, 456 A.2d at 423-24. The SDGP is the "only official determination of the state's plan for its own future development and growth." *Id.*, 456 A.2d at 424. The state is divided on a concept map into six basic developmental areas: growth, limited growth, agriculture, conservation, pinelands, and coastal zones. *Id.* at 226, 456 A.2d at 424.

[6] See *infra* notes 125-39 and accompanying text for a discussion of the HAR.

I. BETWEEN THE *MOUNT LAURELS*

A. *The* Mount Laurel I *Trilogy*

A trilogy of cases marked the New Jersey Supreme Court's handling of the exclusionary zoning problem prior to 1980. The first, of course, was *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I)* [7] which held that "developing municipalities"[8] could not preclude the construction of low and moderate income housing through exclusionary land use regulations.[9]

As befits a landmark case, Justice Frederick Hall's opinion in *Mount Laurel I* was more concerned with explicating the constitutional and social precepts which required the court's action than in giving detailed guidance to the lower courts on matters of implementation.[10] For instance, the court did not attempt to set forth either a general definition of what constitutes a housing region, or a methodology of fair share determination. Thus, the principal accomplishment of *Mount Laurel I* was to serve notice on the municipal law and zoning bars that exclusionary zoning henceforth was illegal in New Jersey, and that the catalogued regulatory practices in which Mount Laurel Township and numerous other municipalities had engaged constituted exclusionary zoning.

The more difficult task of implementation of the *Mount Laurel* doctrine really began with the second case in the trilogy, *Oakwood at Madison, Inc. v. Township of Madison*,[11] decided two years later. The supreme court's first accomplishment in *Madison Township* was a

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[7] 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter cited as *Mt. Laurel I*].

[8] The phrase "developing municipalities" was first used by the *Mount Laurel I* court in reference to those towns which shared Mount Laurel's open spaces and development potential. *Mt. Laurel I*, 67 N.J. at 190, 336 A.2d at 733. In Glenview Dev. Co. v. Franklin Township, 164 N.J. Super. 563, 397 A.2d 384 (Law Div. 1978), *rev'd and remanded sub nom.* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983), the trial court formulated a six-point test based on the supreme court's analysis:

> A developing municipality (1) has a sizeable land area, (2) lies outside the central cities and older built-up suburbs, (3) has substantially shed rural characteristics, (4) has undergone great population increase since World War II or is now in the process of doing so, (5) is not completely developed and (6) is in the path of inevitable future residential, commercial and industrial demand and growth.

Id. at 567-68, 397 A.2d at 386.

[9] *Mt. Laurel I*, 67 N.J. at 174, 336 A.2d at 725.

[10] In fact, Justice Hall's explanation of the doctrine's remedial aspects was remarkably brief, covering just a few paragraphs. *Id.* at 191-92, 336 A.2d at 734. The Justice noted that "[i]t is not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down in this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any such power." *Id.* at 192, 336 A.2d at 734.

[11] 72 N.J. 481, 371 A.2d 1192 (1977).

negative, albeit necessary, one: In light of the intense criticism which had greeted the *Mount Laurel I* decision, *Madison Township* became in effect a rehearing, and the court was at pains to reaffirm in the strongest possible terms its commitment to the legal and social premises of *Mount Laurel I*.

In turning to remedy, however, the *Madison Township* court took a considerably weaker and more cautious course; one which, in some views, belied its affirmation of *Mount Laurel I* and clearly signaled that the doctrine was in trouble.[12] Specifically, the court declined to establish, or to require that the trial court establish, a precise housing region or any numerical fair share quotas.[13] Instead, the trial court was instructed to take into consideration a variety of factors in deciding whether the municipality had made *"bona fide* efforts" to revise (post-litigation) its zoning ordinances to comply with regional fair share needs.[14] In effect, the supreme court committed these questions to the discretion of all the trial judges of the state, apparently hoping to avoid or to minimize future reversals on appeal.

The *Madison Township* court also approved of the concept of "least cost" housing,[15] recognizing that the unsubsidized housing market would be unable to provide new housing within the financial grasp of the poorest segments of the population, regardless of the availability of permissive zoning.[16] At the same time, the court emphatically declined to read into the *Mount Laurel I* doctrine an affirmative obligation on the part of any municipality to seek out subsi-

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[12] *See, e.g.*, Rose, *The* Mount Laurel II *Decision: Is It Based on Wishful Thinking?*, 12 REAL EST. L.J. 115, 117 (1983) (describing *Madison Township* opinion as a tactical retreat from *Mount Laurel I* opinion).

[13] *Madison Township*, 72 N.J. at 498-99, 371 A.2d at 1200.

[14] *Id.* at 514-44, 371 A.2d at 1222-23.

[15] *Id.* at 512, 371 A.2d at 1207. The *Madison Township* court referred to "least cost" housing as the lowest cost housing which can be constructed by private developers absent "publicly assisted means or appropriately legislated incentives," and constructed "consistent with minimum standards of health and safety." *Id.* In *Mount Laurel II* the court defined "least cost" housing as "the least expensive housing that builders can provide 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." *Mt. Laurel II*, 92 N.J. at 277, 456 A.2d at 451 (emphasis in original).

In utilizing and approving the "least cost" housing concept, the *Madison Township* court recognized that lower income persons might not benefit directly from this device. Rather, through the "filtering down" process, " 'families in the moderate income group [would] move into [the] new [least cost] housing created . . . [thus] making available existing housing for lower income families who cannot afford the new.' " *Madison Township*, 72 N.J. at 512, 371 A.2d at 1207 (quoting defendant-municipality's brief). The "filtering down" process, the court recognized, would thus serve to supplement the total supply of available housing and indirectly provide better housing for low income persons. *Id.* at 513-14, 371 A.2d at 1208. For a discussion of the *Mount Laurel II* court's treatment of the "least cost" and "filter down" theories, see *Mt. Laurel II*, 92 N.J. at 278, 456 A.2d at 451-52; *see also* Rose, *supra* note 2, at 74-87.

[16] *Madison Township*, 72 N.J. at 512-14, 371 A.2d at 1207-08.

dies or to take what would otherwise be discretionary steps to provide public or publicly-assisted housing.[17] Finally, the court ordered that the plaintiff, Oakwood at Madison, Inc., be granted what has become known as a "builder's remedy."[18] Oakwood, the court held, was entitled to a permit to build its proposed housing immediately, without regard to the ultimate rezoning of Madison Township.[19] This precluded the municipality from retaliating against the plaintiff by redrawing its zoning map in an otherwise constitutional manner, but omitting Oakwood's site from the high density residential zone. The "builder's remedy" was seen as a "reward" to the plaintiff who had brought a suit in the public interest.[20]

Pascack Association, Ltd. v. Mayor of Township of Washington,[21] and its companion case, *Fobe Associates v. Mayor of Demarest*,[22] form the third branch of the *Mount Laurel* trilogy, *Washington Township* addressed a major loose end of the *Mount Laurel I* case by deciding that an older, built-up suburb, not on the outer ring of growth beyond the central cities, was not a "developing municipality" and therefore was not subject to the constitutional constraints of the *Mount Laurel* doctrine.[23] Moreover, in *Demarest,* the court expanded the logic of *Washington Township* by concluding that a "fully developed" municipality could not be compelled to grant a use variance for multi-family housing on "regional need"[24] grounds. The court reasoned that the inconsistency, found as fact in the proceedings below, between this unwanted type of housing and that of the community's established single-family character justified this exemption.[25]

In *Washington Township* and in *Demarest,* the supreme court again opted for caution, and in doing so significantly limited the scope of the *Mount Laurel* doctrine, since much of the real pressure for lower income housing probably exists closer to, rather than farther from, the central cities—precisely in those older areas exempted by

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[17] *Id.* at 546-47, 371 A.2d at 1224-25.

[18] *Id.* at 551, 371 A.2d at 1227. The builder's remedy is a form of relief which permits a builder-plaintiff to proceed with his proposed development when a zoning ordinance is found invalid. *See Mt. Laurel II,* 92 N.J. at 279-81, 456 A.2d at 452-53; *see also* Rose, *supra* note 2, at text accompanying notes 98-116. In *Mount Laurel II* the court imposed two preconditions on the granting of a builder's remedy: (1) the builder-plaintiff must propose a project which will result in construction of a substantial amount of lower income housing; and (2) the proposed project must accord with sound land use planning. *Mt. Laurel II,* 92 N.J. at 279-80, 456 A.2d at 452.

[19] *Madison Township,* 72 N.J. at 551, 371 A.2d at 1226-27.

[20] *Id.* at 552-53, 371 A.2d at 1227-28.

[21] 74 N.J. 470, 379 A.2d 6 (1977).

[22] 74 N.J. 519, 379 A.2d 31 (1977).

[23] *Washington Township,* 74 N.J. at 485-86, 379 A.2d at 13-14.

[24] Essentially, "regional need" is the burden on a given area to provide for low and moderate income housing. *See Madison Township,* 72 N.J. at 498, 371 A.2d at 1200.

[25] *See Demarest,* 74 N.J. at 532-38, 379 A.2d at 38-41.

Washington Township and *Demarest*. By deciding that the *Mount Laurel* doctrine did not apply to redevelopment of older communities, the court in effect ignored the possibility that such redevelopment, as opposed to static maintenance of present housing types, might occur in the future. Since both Washington Township and Demarest are very small communities with virtually no undeveloped land areas, the decisions involving these communities could have been distinguished on these grounds. In the general mood of retreat which followed *Madison Township*, however, it is not surprising that *Washington Township* and *Demarest* were instead read broadly as confirmation that the New Jersey Supreme Court had abandoned a major part of its commitment to implementation of the *Mount Laurel* doctrine.

This reading was compounded by the introduction in *Washington Township* of what proved to be a fateful procedural miscalculation, one which immediately encouraged foot-dragging in the lower courts. Despite the emphasis in *Mount Laurel I* on the heavy burden which defendant-municipalities would have to bear once their ordinance was shown to have exclusionary features,[26] the *Washington Township* decision appeared eager to defer to local prerogatives, citing with approval a pre-*Mount Laurel* decision in a nonexclusionary case which iterated a conventional "arbitrary and capricious" standard for upsetting a local ordinance.[27] While a deferential standard has much to commend itself generally, it was clearly inconsistent with the aggressive pursuit of a reform doctrine such as *Mount Laurel I*; it is not realistic to expect that trial judges and litigants will continue to spend large amounts of time and money trying these cases, only to face an uncertain future on review, or consistent reversal on deference grounds. As will be noted, these concerns were soon realized in the lower courts.[28]

B. *The Six Cases*

The disarray induced by the New Jersey Supreme Court's indecisive handling of its trilogy of decisions is reflected in the six cases which were consolidated on appeal in *Mount Laurel II*.[29] The lead

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[26] *Mt. Laurel I*, 67 N.J. at 180-81, 336 A.2d at 729.

[27] *See Washington Township*, 74 N.J. at 481, 379 A.2d at 11 (citing Bow & Arrow Manor, Inc. v. West Orange, 63 N.J. 335, 343, 307 A.2d 563, 567 (1973) (municipal zoning ordinances accorded presumption of validity which can only be overcome by affirmative showing that ordinance is arbitrary, capricious, or unreasonable)).

[28] *See infra* notes 29-51 and accompanying text.

[29] 92 N.J. at 158-59, 456 A.2d at 390-91. The six cases are: Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel; Urban League of Greater New Brunswick v. Borough of Carteret; Caputo v. Township of Chester; Glenview Dev. Co. v. Franklin Town-

case, of course, involved Mount Laurel Township itself. After the remand in *Mount Laurel I*, the township had rezoned twenty acres (out of 14,700 in the town) for a high density residential use,[30] but had otherwise done nothing to encourage construction of low and moderate income housing.[31] The plaintiffs again went to court, joined eventually by a private developer who sought to build a mobile home community in the township.[32] The trial court, however, felt bound by the "bona fide effort" standard of *Madison Township*[33] and on that basis found Mount Laurel's modest effort sufficient.[34] The case went up on appeal both to test this conclusion and to examine the methodology used by Mount Laurel in determining that it had a very small "fair share" obligation.[35]

Two other cases presented major issues. In *Urban League of Essex County v. Township of Mahwah*,[36] the trial court had found that the *Mount Laurel* obligation was satisfied by rezoning to permit construction of townhouses selling for over $70,000 per unit.[37] The Township argued that this was the *"least* cost" housing that could be built in the Mahwah area, relying on *Madison Township* for the "least cost" doctrine.[38] In *Glenview Development Co. v. Franklin Township*,[39] the trial court had found that there was no *Mount Laurel* obligation at all, on the basis that Franklin was "rural" rather than developing.[40] *Franklin Township* thus complemented, in a symmetrical fashion, the holdings of *Washington Township* and *Demarest* that "developed" communities need not accept a *Mount Laurel* obligation.[41]

Both Mahwah and Franklin Township won at the trial level. In two other cases, however, builder-plaintiffs were successful. Each of these cases tested various aspects of the remedial powers of the trial

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ship; Urban League of Essex County v. Township of Mahwah; and Round Valley, Inc. v. Township of Clinton.

[30] *Mount Laurel II*, 92 N.J. at 297, 456 A.2d at 462.

[31] *See id.* at 198-99 & 293-95, 456 A.2d at 409-11 & 459-60.

[32] *Id.* at 293-94, 456 A.2d at 459-60.

[33] *See supra* text accompanying note 14.

[34] *Mt. Laurel II*, 92 N.J. at 304-05, 456 A.2d at 465.

[35] See *id.* at 299-303, 456 A.2d at 463-64 for a discussion of the method used by the Township in determining its fair share and the *Mount Laurel II* court's treatment of this issue.

[36] 92 N.J. 158, 322, 456 A.2d 390, 480 (1983).

[37] *Id.* at 333, 456 A.2d at 481.

[38] *Id.*

[39] 92 N.J. 158, 316, 456 A.2d 390, 471 (1983).

[40] *Id.* at 318, 456 A.2d at 472.

[41] See *supra* notes 21-28 and accompanying text for a discussion of the *Washington Township* and *Demarest* cases.

court. *Round Valley, Inc. v. Township of Clinton*[42] involved questions regarding the builder's remedy and the proper use of masters. The "builder's remedy" had been approved in *Madison Township* but with language that suggested it would be an extraordinary remedy.[43] Masters had been used extensively at the trial level in *Washington Township*, but the supreme court's disposition of the case on appeal had made it impossible to review this issue. *Caputo v. Township of Chester* [44] also raised the builder's remedy question, as well as the validity of "large lot zoning."[45]

In many ways, however, the most important of the six cases was *Urban League of Greater New Brunswick v. Borough of Carteret (Urban League)*.[46] The trial judge there was David Furman, whose thoughtful handling of the original Madison Township litigation[47] in the early seventies had laid the foundation for the *Mount Laurel* doctrine even though the *Mount Laurel* case eventually reached the supreme court first. The only multi-defendant litigation among the six cases, *Urban League* was a major effort to improve the efficiency of proof in exclusionary zoning cases. Judge Furman had accepted the county as a housing region, and he had approved a statistical methodology for allocating need that had the virtues of simplicity and clarity rather than planning sophistication.[48]

On both regional definition and allocation methodology, Judge Furman's *Urban League* approach was arguably erroneous, particularly because it took place before the *Madison Township* court articulated the numberless fair share principle.[49] Based on its reading of the latter case, the appellate division reversed Judge Furman's holding. Instead of giving the trial court and the plaintiffs another chance to make their proofs, which would have been the sensible way to handle the problems of still-emerging doctrine, it dismissed the action out-

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[42] 92 N.J. 158, 321, 456 A.2d 390, 474 (1983).

[43] *See Madison Township*, 72 N.J. at 551-52 n.50, 371 A.2d at 1227 n.50.

[44] 92 N.J. 158, 309, 456 A.2d 390, 468 (1983).

[45] *Id.* at 310, 456 A.2d at 468.

[46] 92 N.J. 158, 339, 456 A.2d 390, 484 (1983).

[47] Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d 223 (Law Div. 1974), *aff'd and modified*, 72 N.J. 483, 371 A.2d 1192 (1977).

[48] Judge Furman allocated the major portion of regional need equally among the 11 defendants remaining at the end of the trial, without regard to present population or amount of available land. Urban League of Greater New Brunswick v. Borough of Carteret, 142 N.J. Super. 11, 37, 359 A.2d 526, 526 (Ch. 1976), *rev'd*, 170 N.J. Super. 461, 406 A.2d 1322 (App. Div. 1979), *rev'd and remanded sub nom.* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983). This technique was eventually disapproved by the supreme court in *Mount Laurel II*. *See Mt. Laurel II*, 92 N.J. at 350, 456 A.2d at 489.

[49] *See supra* text accompanying note 13.

right, concluding that the plaintiffs had mischosen their theory and therefore had "failed to prove" any regional housing need.[50] Since the *Urban League* case included Madison Township, whose failure to accommodate "regional need" had already been found by the same trial judge and approved by the supreme court in *Madison Township*, the unsympathetic tenor of the appellate division's viewpoint is readily understood.[51]

The six cases, in short, revealed the full range of problems associated with implementation of the *Mount Laurel* doctrine, problems which the New Jersey Supreme Court had not only evaded in its earlier opinions, but had probably exacerbated by seeming to lack the will to face them. The problem was not limited to the courts, as the next section notes.

C. *The Political Response*

A political response was not forthcoming, despite the court's repeated calls for a political solution to the problem it had identified. *Mount Laurel I* was decided in March 1975. That fall, the New Jersey Legislature enacted a comprehensive revision of the state's zoning and planning statutes known as the Municipal Land Use Law (MLUL)[52] which became effective in 1976. Although the preamble and policy sections of the new law provide verbal recognition of the regional perspective in land use planning to a greater degree than did the old law, the provisions for regional planning were left wholly voluntary as before. Thus, the exclusionary zoning problem was effectively ignored by the legislature, and the legislative history clearly shows that this disregard was intentional.[53]

Despite this, in *Windmill Estates, Inc. v. Zoning Board of Adjustment of Totowa*,[54] the trial judge made an imaginative attempt to

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[50] Urban League of Greater New Brunswick v. Borough of Carteret, 170 N.J. Super. 461, 476-77, 406 A.2d 1322, 1330 (App. Div. 1979), *rev'd and remanded sub nom.* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

[51] This lack of sympathy, bordering on outright hostility, was also apparent in other cases. *See, e.g.*, Round Valley, Inc. v. Township of Clinton, 173 N.J. Super. 45, 51 n.7, 413 A.2d 356, 358 n.7 (App. Div. 1980), *rev'd and remanded sub nom.* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983), where the appellate division ducked the regional need, fair share, and developing municipality questions as "moot," notwithstanding that these critical determinations underlay any remedial order of the trial court, including the specific rezoning problems which the court itself addressed.

[52] N.J. STAT. ANN. §§ 40:55-D-1 to -99 (West Cum. Supp. 1983-1984) [hereinafter cited as MLUL].

[53] *See Mt. Laurel II*, 92 N.J. at 318-21, 456 A.2d at 473-74 (discussion of MLUL's legislative history).

[54] 147 N.J. Super. 65, 74, 370 A.2d 541, 546 (Law Div. 1976), *rev'd*, 158 N.J. Super. 179, 385 A.2d 924 (App. Div. 1978).

read the MLUL *in pari materia* with *Mount Laurel*, and came to the conclusion that the legislature had implicitly adopted *Mount Laurel's* general welfare logic on a statewide basis, without regard to whether a municipality could be characterized as "developing."[55] Accordingly, he ordered relief from exclusionary provisions in the ordinance of a suburban municipality. While still pending on appeal, the *Windmill Estates* holding was specifically disavowed by the supreme court,[56] and on the basis of this "hint," the trial judge was overruled when his decision eventually came before the appellate division.[57] In subsequent decisions, the supreme court would go no further than to suggest that the MLUL was not inconsistent with the holding in *Mount Laurel*.[58]

Reflecting the irrelevance of the MLUL to the exclusionary zoning problem, specific regional zoning legislation was introduced in the New Jersey Legislature;[59] the bill, however, was never enacted into law. In addition, the governor entered the fray, which was somewhat surprising given the obvious political risks involved. Pursuant to Executive Order No. 35, issued on April 2, 1976,[60] a state-wide study of housing needs was undertaken by the Department of Community Affairs, and it was announced that compliance with the fair share allocations that were to result from this study would be used as a basis for awarding discretionary state grants to municipalities.[61]

A draft of the Housing Allocation Report (HAR)[62] resulted from Executive Order No. 35, but to avoid having the matter become an issue in the 1977 gubernatorial election, the study was recommitted by executive order for a further year of study.[63] Although the revised version of the HAR thereafter became publicly available, it never became an operational document, and was eventually withdrawn by a newly elected governor while the *Mount Laurel II* decision was still being written.[64]

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[55] *See id.* at 74-76, 370 A.2d at 546-47.

[56] *Washington Township*, 74 N.J. at 486 n.4, 379 A.2d at 14 n.4.

[57] Windmill Estates, Inc. v. Zoning Bd. of Adjustment, 158 N.J. Super. 179, 385 A.2d 924 (App. Div. 1978).

[58] *See Madison Township*, 72 N.J. at 547 n.47, 371 A.2d at 1225 n.47.

[59] *See* S. 505, 198th N.J. Leg., 1st Sess. (1978).

[60] Exec. Order No. 35, 1976 N.J. Laws 665.

[61] The governor's legal authority to proceed, at least until implementation of the sanctions was attempted, was upheld by the appellate division. *See* Markert v. Byrne, 154 N.J. Super. 410, 381 A.2d 806 (App. Div. 1977).

[62] Department of Community Affairs, *A Revised Statewide Housing Allocation Report for New Jersey* (1978).

[63] Exec. Order No. 46, 1976 N.J. Laws 685.

[64] Exec. Order No. 6 (slip form) (May 4, 1982).

On both the legislative and executive fronts, then, the enunciation of the *Mount Laurel* doctrine did little to focus political attention on the exclusionary zoning problem. Indeed, the apparent political hostility undercut the legitimacy of a purely judicial solution to the problem, to the extent that considerations of "general welfare" may be said to have some relationship to the general attitudes of the populace at any given moment. In this context, the New Jersey Supreme Court's response to *Windmill Estates* looks like a missed opportunity to force the legislature to face the problem, which it would have had to do in order to modify the broad construction placed on the MLUL by the *Windmill Estates* court.[65]

The lesson of the *Mount Laurel* experience in New Jersey between 1975 and 1980 is that in order to provoke political attention to any given problem, a certain judicial aggressiveness must be displayed, and that the failure to be aggressive may result in the waste of such judicial time as is expended on a more modest approach. Whether the New Jersey Supreme Court would be willing to face this imperative, even at the cost of disregarding some aspects of its *Mount Laurel I* trilogy, was the overarching question posed by the six cases taken on appeal in early 1980.

II. Approaching *Mount Laurel II*

The *Mount Laurel II* court was quite differently composed from that which had heard the earlier cases,[66] and its determination to shape the litigation in order to make a significant statement on the exclusionary zoning problem was apparent from the outset. After following the technical procedures necessary to place the six cases before it, but before any briefing other than petitions for certification had taken place, the court itself moved to organize the issues on appeal. By letter to all counsel, the court propounded twenty-four questions (some including subparts) and requested that counsel address only these questions in their briefs.[67] Although the court represented that its list was simply a distillation of the questions included in the certification petitions, the selection and organization of the ques-

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[65] *See infra* note 149. *See generally infra* notes 140-49 and accompanying text.

[66] Only Justices Sullivan, Pashman, and Clifford participated in both decisions. Chief Justice Hughes and Justices Jacobs, Hall, and Mountain on the *Mount Laurel I* court were replaced by Chief Justice Wilentz and Justices Schreiber, Handler, and Pollock. Justice Pashman retired after oral argument and before decision in *Mount Laurel II* but was permitted under New Jersey practice to vote on the final disposition of the case.

[67] Letter from Stephen Townsend, Clerk of the New Jersey Supreme Court, to all counsel (Apr. 28, 1980). The text of this letter, including the 24 questions discussed below, is set out in Appendix A, *infra*.

tions clearly represented the Justices' own sense of what important issues had to be addressed if the *Mount Laurel* doctrine was to work.

The twenty-four questions ranged from narrow to cosmic, constituting an extraordinary compilation of the issues which had brewed in the intervening years. At one extreme were conventional legal questions, dealing with burdens of proof, for example;[68] at the other extreme were open-ended socioeconomic inquiries such as the request to evaluate the validity of the "trickle down" theory of housing supply.[69] In between, a host of questions addressed the effectiveness of the *Mount Laurel* doctrine;[70] the court's proper relationship to the executive and legislative branches;[71] the possibility of reconsidering *Washington Township*;[72] the role of planners;[73] and possible new lines of doctrinal approach.[74]

Briefing proceeded in response to the twenty-four questions and oral argument was set for October 20-22, 1980. These arguments proved to be as novel as the briefing format from which they were derived. The Chief Justice, in his opening remarks on the first morning of the oral argument, directed all counsel to deal solely with the general issues posed by the twenty-four questions, rather than dwelling on the facts of each case.[75] He also required that a particular order of arguments be followed, thus establishing what amounted to a formal program. The court grouped the twenty-four questions into fourteen logical segments.[76] Segments I-III dealt with the scope of the *Mount Laurel* doctrine. Segments IV-VI covered proofs of violation and Segments VII-X covered remedial issues. Segments XI-XIV were described as "policy issues," and served to wrap up the three days of arguments.

As in conventional oral argument, each segment was allotted a specific number of minutes, but there were too many lawyers involved to allow each to participate in every segment. To solve this problem, the litigants were required to divide the argument time amongst themselves. Chief Justice Wilentz noted that:

> [W]hen someone is arguing and represents a plaintiff, or is an *amicus* allied with plaintiff, we are going to assume that he or she

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[68] *See* Appendix A, *infra*, Question (10).

[69] *Id.*, Question (19); see *supra* note 15 for a discussion of the "trickle down" ("filter down") theory.

[70] Appendix A, *infra*, Question (5).

[71] *Id.*, Questions (3), (4), (11), (12).

[72] *Id.*, Question (7).

[73] *Id.*, Question (23).

[74] *Id.*, Question (3).

[75] Tape 1(A).0. The citation system for tape excerpts is described *supra* note 4.

[76] The court's schedule for oral arguments is set out in full in Appendix B, *infra*.

> speaks for all plaintiffs unless something to the contrary is said and the same for someone who is arguing for a defendant. We will assume that the positions taken represent those of all defendants unless something to the contrary is said, or unless it is rather clear to us from our knowledge of the case that that is not the case.[77]

In practice, each segment of the argument was addressed by one lawyer representing poor people, one representing developers, and one representing defendant-municipalities.

The effort to keep the argument on a relatively abstract plane was not wholly successful. Although numerous speakers made reference to the court's request for counsel to proceed without unnecessary reference to the complex facts of specific cases, virtually all chose to present examples involving some aspect of the case in which they had actually participated. This is hardly surprising, both because familiarity invites illustration and because the lawyer selected for each segment was usually the one who had tried the case that raised the issue of that segment most clearly. The *Mahwah* litigants, for instance, bore much of the burden of arguing the least-cost housing problem, and therefore much of the argument in that segment focused on the *Mahwah* facts.

It is difficult to convey the flavor of the arguments, which extended over two full consecutive days and the major part of a third, without having experienced them or having heard the tapes. Two comments, however, fairly summarize them. First, the members of the court clearly had prepared themselves thoroughly and took the oral argument process seriously. Second, the focus of the court was less on typical manipulation of legal doctrine than on exploration of the factual context within which solutions lay. Thus, in Segment III, when the speaker noted for the court that he represented a builder actually seeking to construct *Mount Laurel* housing, the court responded to him almost as if he were an expert witness at a legislative hearing, peppering him with questions about the mechanics of building low-cost housing.[78] The same process occurred with defendant-municipalities in Segment X with respect to the impact of the proposed builder's remedy on local planning concerns.

At the outset, the Chief Justice noted the potential unfairness in the collectivized method of arguing the case:

> We want to assure you . . . that we are not going to lose sight of the fact that ultimately we have six cases before us with particular

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[77] Tape 1(A).0.
[78] Tape 5 (A).2.

> factual issues, particular legal issues, and we will ultimately concentrate on the resolution of those cases. If after all of this we feel that there is any need for further oral arguments in a conventional way about particular cases we will have such argument.[79]

Eventually, the court concluded that a second round of argument on a case by case basis would be desirable, and this was allocated a single day in December 1980.

From December 1980 until *Mount Laurel II* was announced on January 20, 1983, exclusionary zoning litigation in New Jersey ceased for all practical purposes. The case which began with an extraordinary set of judicial procedures thus ended with an extraordinary hiatus during which the court's ability to handle the remedial problem came increasingly into question. Whether *Mount Laurel II* was worth the wait is, in major part, the focus of the present symposium. Part III turns now to some additional fuel for that debate.

III. The Constitutional Right to Housing

Before turning to those parts of the oral argument bearing on the constitutional theory of *Mount Laurel II*, the scene will be set with several colloquies between the court and various speakers about the underlying viability of the concept of nonexclusionary zoning established in *Mount Laurel I*.

A. *The Viability of* Mount Laurel I

The *Mount Laurel II* opinion strongly reaffirms the court's commitment to the underlying concept of nonexclusionary zoning expressed by Justice Hall in *Mount Laurel I*, just as the *Madison Township* decision had done six years earlier.[80] As was noted in Part I above, the litigation history of the *Mount Laurel* doctrine up to 1980 justified concern about whether the court truly intended to stay the course, and thus the language reaffirming the constitutional standard was an important signal of the court's attitude. Unlike the situation at the time of *Madison Township* in 1977, however, the court in 1980 took pains to signal at the argument itself that the *Mount Laurel* concept was not open to question and that the court's focus was on what would be required to implement the doctrine effectively.

The first speaker to address the court was Carl Bisgaier, representing the New Jersey Department of the Public Advocate, which had been involved from the start in the *Mount Laurel* case itself and in

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[79] Tape 1(A).0.

[80] See *supra* notes 11-20 and accompanying text for a discussion of the *Madison Township* decision.

one form or another in most of the other five cases on appeal. After a brief introductory presentation by Mr. Bisgaier, the first question of the court, put by the Chief Justice, was as follows:

> THE COURT: Do you understand that any of the parties here, any of the municipalities here, are urging that *Mount Laurel* be overruled?
> MR. BISGAIER: Directly, no. Effectively, I think it has been overruled in the *Mahwah* case.[81]
> THE COURT: What do you conceive the *Mount Laurel* doctrine to be?
> MR. BISGAIER: I conceive the *Mount Laurel* doctrine to be the mandate that all developing municipalities must act affirmatively to provide a realistic housing opportunity for citizens. Where a fundamental need has been established, that is, the need for shelter, the government can be shown to have the opportunity on the local level to act, to enable shelter to be provided; the government has the constitutional mandate to act. In a nutshell, that [is] . . . the *Mount Laurel* principle.[82]

This exchange illustrates the court's determination both to recognize the existence of the doctrine and to assure its implementation. This sentiment was repeated in the dialogue of several other speakers representing defendant-municipalities; each dutifully concurred that the doctrine itself was not in question, but only the method of implementing it.[83]

The sole exception to this unanimity, offered by John E. Patton in behalf of the Township of Mount Laurel, provides a vivid illustration of why that case remains in the courts after fifteen years of litigation:

> MR. PATTON: Well, I think, Your Honor, if you want to go that far [with affirmative action devices] then I think you have to be honest with yourself and say, we're not dealing with a zoning case anymore, we're not dealing with a housing case anymore, we're involving the judiciary in housing economics. And I simply don't think it's a function of the court, given your example, to start reading all these regulations and creating fair share numbers and creating regions. No, I don't think that's the proper judicial function.

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[81] The case referred to was Urban League of Essex County v. Township of Mahwah, No. L-17112-71 slip op. (Law Div. Mar. 8, 1979), *rev'd and remanded sub nom.* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 339, 456 A.2d 391, 484 (1983).

[82] Tape 1(A).1.

[83] *See, e.g.*, Tape 1(B).8. (response of J. William Barba, representing a large number of individual state legislators as *amici* in support of defendant-municipalities).

> THE COURT: You don't think we should be in this in the first place, which gets to the question of the *Mount Laurel* doctrine itself.
> MR. PATTON: That's right.
> THE COURT: But being in it, and this court having said what it said, and having identified a constitutional shortcoming—you'll agree with that thus far, is that right?
> MR. PATTON: I don't think—
> THE COURT:—Maybe I shouldn't ask that question.
> MR. PATTON:—What you believe is the constitutional shortcoming. I don't believe the *Mount Laurel* decision stands for a constitutional right to housing.[84]

This exchange, which continued for some time in the same vein, suggests that counsel was either alone among his colleagues in misjudging the mood of the court or he was simply reflecting the mood of his client, whose exercise of good faith in complying with *Mount Laurel I* was questioned by the court.[85] At any rate, these questions about *Mount Laurel I* left little doubt about the underlying direction of the court's thinking.

B. *The Constitutional Basis of* Mount Laurel II

1. The Opinion

The court's discussion of the constitutional underpinnings of the *Mount Laurel* doctrine occupies scarcely four pages of the 216-page opinion, serving mainly to reiterate the court's strong commitment to "concepts of fundamental fairness and decency."[86] The opinion names three specific constitutional concepts—the general welfare, substantive due process, and equal protection,[87] but it then ties them into what it describes as a state and local government monopoly on the use of land:

> The basis for the constitutional obligation is simple: the State controls the use of land, *all* of the land. In exercising that control it cannot favor rich over poor . . . . While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.[88]

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[84] Tape 10(B).2.
[85] *Mt. Laurel II*, 92 N.J. at 294-95, 304-05 & n.55, 456 A.2d at 460, 465 & n.55.
[86] *Id.* at 209-10, 456 A.2d at 415.
[87] *Id.* at 208-09, 456 A.2d at 415.
[88] *Id.* at 209, 456 A.2d at 415 (emphasis in original).

The opinion also describes land use controls as affecting "something as fundamental as housing."[89]

The import of these passages is unclear. The emphasis on state monopoly of land use does not suggest any more than that governments should be required to perform neutrally with respect to the housing problem, neither encouraging nor discouraging production of any particular kind of housing units. The reminder that the state does not have the ability or, more accurately, the obligation, to eliminate poverty, would be consistent with this premise.

The long remainder of the *Mount Laurel II* opinion works to the opposite conclusion, however, presaged by the phrase "something as fundamental as housing." The novelty of *Mount Laurel II* lies in its decision to establish performance standards for local governments:

> Satisfaction of the *Mount Laurel* obligation shall be determined solely on an objective basis: if the municipality has *in fact* provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the *Mount Laurel* obligation . . .; if it has not, then it has failed to satisfy it. Further, whether the opportunity is "realistic" will depend on whether there is in fact a likelihood—to the extent economic conditions allow—that the lower income housing will actually be constructed.[90]

Having established such standards, the court then required affirmative steps to reach these goals, through such devices as mandatory set-aside ordinances, tax abatements, and the use of available subsidy funds.[91]

Aggressive affirmative obligations have been imposed upon defendants in the past, most notably in the school desegregation cases in the federal courts.[92] In such cases, however, the defendant's past actions usually have been viewed as having distorted natural forces that would otherwise have been at work in the society; and extraordinary action is justified as a necessary means of restoring a "normal" state of affairs. Affirmative action in the *Mount Laurel II* sense does not depend upon such an argument. The court did not limit its affirmative obligations to cases in which constitutional violations oc-

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[89] *Id.* at 208, 456 A.2d at 415.

[90] *Id.* at 220-22, 456 A.2d at 421-22 (emphasis in original) (footnote omitted).

[91] *See id.* at 258-78, 456 A.2d at 441-52.

[92] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-32 (1971) (equity powers of court included prescribing busing as remedy in school desegregation cases); *see also* Davis v. Board of School Comm'rs, 402 U.S. 33, 38 (1971); E. REUTTER & R. HAMILTON, THE LAW OF PUBLIC EDUCATION, ch. 13, at 622-84 (2d ed. 1976). *See generally* Kurland, Brown v. Board of Education *Was the Beginning—The School Desegregation Cases in the United States Suprme Court*, 1979 WASH. U.L.Q. 309.

cur and, indeed, it could not have done so consistently with the use of the SDGP and with the recognition of the statewide obligation of municipalities to deal with their resident poor.[93] Instead, these devices cause the *Mount Laurel* obligation to be applied to numerous municipalities whose conduct is unconstitutional only because of the objective standard constitutionally imposed upon them.

This point was made early in the oral argument by Carl Bisgaier for the Public Advocate:

> The first question the late Chief Justice Weintraub asked in the *Mount Laurel* argument was . . . [whether] these principles . . . [were] based on a punitive notion—did Mount Laurel do something wrong so we should punish Mount Laurel? Or, did Mount Laurel do something wrong and we should correct that wrong? . . . And the position that was taken, and the position that was upheld in the *Mount Laurel* case, was that the legal obligation to create this housing opportunity arose in the constitution and was an obligation on the part of the municipality.[94]

What emerges, then, is an imperfectly delineated recognition, modified to some unstated extent by economic limitations, of an affirmative obligation on the part of the state and its subdivisions to function as a provider of last resort when the private market fails. This can only mean that *Mount Laurel II* is the seedbed of a state constitutional right to some uncertain form of housing entitlement.

2. The Oral Argument

Can the oral argument help to illuminate in any way this obscure state of affairs? At the outset, the transcript demonstrates that the constitutional problem was clearly presented to the court. In the first presentation of the first day, the Public Advocate's representative, Carl Bisgaier, was asked:

> THE COURT: That's one point, I think, as I read through these five feet of briefs, one sharp difference between the thoughts expressed by your Department and other plaintiffs and the defendants. They read *Mount Laurel*, I think, by saying that it's sufficient, as Justice Schreiber has suggested, that they simply not have exclusionary zoning, and you read it in a manner in which I think is implicit if not explicit in your statement that there's a further obligation, that it's not enough that you don't have exclusionary zoning. You must have a meaningful solution of the problem, go

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[93] *See Mt. Laurel II*, 92 N.J. at 214, 243, 456 A.2d at 418, 433.

[94] Tape 1(A).4.

> further, and there's a variety of remedies that you suggest along those lines. Is that a fair statement or not?
> MR. BISGAIER: It's a fair statement. . . . In 1970 when I met with Ethel Lawrence, [an individual plaintiff], to discuss this problem she was having in Mount Laurel Township, and in 1975 when we were before this court, in 1972 and 1974 when we were before this court, implicit—explicit—in everything that was being said was that government simply cannot sit back when it has the power to do it. To whom else could we look? To whom else are low and moderate income persons to look for the remedy to the conditions under which they are living today? If we can, government has that power. If we can show—and in fact it has been shown in this state and states throughout the country that government has had the power on the local level to enhance the housing opportunities for low income persons—can they not act? Can they constitutionally say: "Well, we have chosen not to."?[95]

Richard Bellman, plaintiffs' attorney in the *Mahwah* case, was asked the question from a different perspective:

> THE COURT: Do I infer . . . that you are saying that the endeavor of housing and providing housing has become so impressed with a public interest and so impacts upon the public welfare that one engaged in that business can justifiably be expected to do it less profitably?—Just as one who runs a nursing home, or an old age home?
> MR. BELLMAN: If it comes to that, yes . . . .[96]

His response, however, which continued after the brief answer quoted above and into a later dialogue with the court, sought to deflect the housing issue back into traditional land use categories:

> MR. BELLMAN: [W]e do this in all cases, we impose exactions, we impose limitations, and this is done by the nature of zoning. When land is zoned for a single house on one acre, that developer is told the profitability that you will gain from your land is one house on an acre. It's always there, it's always a limitation and so to simply add, when creating multi-family classifications, a requirement of low and moderate [housing] which will perhaps lower the profitability—it's doing what has always been done under Euclidean zoning.
> THE COURT: Are you comfortable in characterizing [this extension] as all an aspect of zoning . . .?

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[95] Tape 1(A).3.

[96] Tape 2(B).1. The nursing home reference derives from *In re* Health Care Admin. Bd., 83 N.J. 67, 415 A.2d 1147, *appeal dismissed*, 449 U.S. 944 (1980), in which the court sustained a regulation requiring a certain number of nursing home beds to be provided to the indigent.

MR. BELLMAN: Yes.

THE COURT: [A]s opposed to areas that might otherwise be described as housing or building codes or the like?

* * *

MR. BELLMAN: I'm still troubled by this [claim] that this is a housing and not a zoning case. And I want to emphasize the importance that the plaintiff's attach to Justice Pashman's language in the *Weymouth*[97] case. Justice Pashman, in a decision in which all of the justices joined him, said that the *Mount Laurel* obligation cannot be met if the municipality cannot shape its regulations to specifically address the housing needs.[98] And Justice Pashman also said as a conceptual matter that regulation of land use cannot be precisely disassociated from regulation of land users.[99] Now he was dealing with that of course in the context of retirement communities for the elderly, but why is that a zoning decision and the question of providing housing through land use mechanisms for lower income people becomes a housing mechanism? We say there's no difference and the language in *Weymouth* is extremely critical to what we are asking the court to do in the *Mahwah* case and the other cases before you.[100]

The heart of this issue came on the third day of the oral argument, in a series of dialogues involving several members of the court and S. David Brandt, the attorney for Davis Enterprises, which was the intervenor-plaintiff in the *Mount Laurel* case seeking to provide mobile home units in the township. The first series of questions seems to indicate the court's appreciation that the concept of affirmative measures implies something more than the simple resolution of a zoning controversy:

THE COURT: That depends on what the perception of the constitutional wrong is, obviously. If the perception is that it is to remove exclusionary zoning, one set of consequences flows. If the perception is that it is to go beyond that, to take affirmative steps, then another set of consequences might reasonably flow. Now, with

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[97] Taxpayers Ass'n v. Weymouth Township, 80 N.J. 6, 364 A.2d 1016 (1976). In *Weymouth*, several property owners and taxpayers challenged the validity of a municipal ordinance that permitted mobile home parks only for senior citizens as an exception to the town's general zoning policy which prohibited mobile homes. *Id.* at 15-16, 364 A.2d at 1021-22. Addressing several arguments advanced by the parties, *see id.* at 20-45, 364 A.2d at 1023-37, the court upheld the constitutionality of the ordinances. *Id.* at 54, 364 A.2d at 1042.

[98] *See id.* at 50, 364 A.2d at 1040.

[99] *Id.* at 34, 364 A.2d at 1031.

[100] Tape 2(B).1., .3.

respect to the court's role and the legislature's role, if a constitutional violation is found and there is no remedy, then it seems to me there's no point in—[T]hese questions suggest that in determining the constitutional violation, if you phrase the constitutional mandate as a requirement that the zoning provisions not be restrictive, you might find one kind of remedy by the court, while if you phrase it in terms of a requirement that the housing actually be provided, you might find a different remedy. So that it suggests that perhaps when we get beyond zoning into what's asserted to be "housing," at that point we're intruding on the legislative province.[101]

The response to these tandem questions again deflected the housing basis back to zoning, and led to a wide ranging exchange involving several justices:

MR. BRANDT: Let me try to clarify that, because I do not see the implementation of housing as the issue. If an order says the municipality must amend its zoning ordinance, the municipality can still have an underlying permissible land use, for example, on a tract . . . say the half acre zone, but it may be required to have a second layer of permissible zoning, which is the opportunity level, for low and moderate income people. . . . Now, the court is not ordering that any house be built. The court is simply ordering that a second layer of opportunity be provided so that a developer in the private market, or a limited dividend housing—

THE COURT: —That could be expressed as a zoning provision.

MR. BRANDT: Precisely.

THE COURT: But wouldn't you go farther, or would you? Do you read *Mount Laurel* to be limited so that what we're really concerned about here as a constitutional matter is something that might be called a zoning law? Or would you read *Mount Laurel* at its heart to be especially concerned that government regulations, whatever they be, be affirmatively used to provide for low and moderate income housing?

MR. BRANDT: As I read the case itself, it did not go to the point of saying that the municipality, for example, had to form a housing authority. It specifically indicated it might be a moral obligation, but not a legal requirement.

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THE COURT: Were you going to go farther on that housing-zoning distinction, Mr. Brandt?

MR. BRANDT: I am suggesting, in my answer to the question, that the court is not intruding into the housing field and ordering hous-

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[101] Tape 10(A).3.

> ing, it is taking the municipality to the point where it maximizes the opportunity for housing, by knocking down the barriers, but not saying, this town must form a housing authority today.
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> * * *
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> THE COURT: Mr. Brandt, wouldn't you agree that the constitutional principle enunciated in *Mount Laurel* is simply that it is contrary to the general welfare as provided in the constitution for a municipality to exclude low and moderate income housing within its boundaries? Isn't that simply the entire constitutional principle?
> MR. BRANDT: I would suggest it was also based upon the deprivation of individual personal rights, of persons who—
> THE COURT: All right, supposing we modify it to that extent, but that's the . . . *ratio decidendi* of the case from a constitutional standpoint.
> MR. BRANDT: No doubt about it.
> THE COURT: And secondly,wouldn't you agree that there may be some constitutional violations where there is no judicial remedy?
> MR. BRANDT: But where a remedy is available—
> THE COURT: No, I'm just putting the question to you as an abstract principle.
> MR. BRANDT: Okay. As a matter of abstract principle, I'm sure that there are circumstances when there is a violation without a remedy. But if the remedy is available, I can't imagine your not using it.[102]

Several points emerge from these exchanges between court and counsel. The possibility that the *Mount Laurel* doctrine has housing rights implications beyond simple land use controversies seems to have been recognized all around. Although members of the court pressed counsel to expand upon this theory more than once, only the Public Advocate seemed to have been willing to embrace the idea fully; the other speakers consistently turned the inquiry back to at least an appearance of conventional zoning analysis.

Nor were the Justices themselves wholly enthusiastic about the proposition. The suggestion of rights without remedies implies a legitimate concern that restating the basis of the *Mount Laurel* doctrine might take the court much too far afield in complex doctrinal consequences, and the emphasis on a narrow reading of *Mount Laurel I* highlights this concern. Keeping in mind that *Mount Laurel II* was, against all odds, a unanimous opinion, it may well be that some compromise on this issue was necessary. This increases the significance of the court's observation that the remedial options *could* be stated in a zoning ordinance, and suggests that this was seen as an adequate

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[102] Tape 10(A).2.

basis for decision without confronting the larger and more troubling questions addressed in the oral argument.

It also bears mention, although not specifically noted in the argument, that the "general welfare" standard relied upon in *Mount Laurel I* and *II* was specifically read into the "police power" phrase of the zoning clause of the state constitution,[103] even though it is derived from the broader rights and liberties article.[104] Emphasis on the zoning component of the problem reinforces this constitutional link without seriously limiting the court's remedial powers, as the passage about *Weymouth Township* demonstrates.[105]

That the broad implications of a housing rights theory were not lost on the court, however, is demonstrated by an exchange during the Public Advocate's presentation. He was asked a question about the fiscal impact of *Mount Laurel* on local governments, both in terms of New Jersey's Local Government Cap Law[106] and more generally in terms of possible tax increases if more poor people were resident in a given community. He responded:

> MR. BISGAIER: It is true that for publicly subsidized housing, the payment in lieu of taxes requirement would result in perhaps a lesser tax ratable for the municipality than the municipality might otherwise get, but I don't think it's ever been suggested by anybody that that would be so dramatic as to impact on the caps. And a much more important point [than] that: It's not a question of whether people are going to live. They're alive, and they're going to be living. The question is, whether they're going to be housed adequately. It's not a question of whether they're . . . going to be housed, because they're going to be housed somewhere. Somebody [is going to] experience the impact of [poor] persons living in New Jersey from the tax point of view . . . .
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> MR. BISGAIER: I guess if it could be shown that in a specific municipality, as a result of the introduction of a certain number of

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[103] N.J. CONST., art. IV, § 6, para. 2 provides:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

Id.

[104] *See* N.J. CONST., art. I, para. 1.

[105] *See supra* notes 97-100 and accompanying text (statement of Mr. Bellman).

[106] N.J. STAT. ANN. § 40A:4-45.1-10 (West 1980 & Cum. Supp. 1983-1984). The Act was intended to place limits on expenditures by counties and municipalities. It was enacted as an experiment to take effect in 1978 and to expire on December 31, 1982. An amendment extended

> units, the tax would be impacted in such a way as to require the municipality doing the kinds of things municipalities do when they want to raise more money, my answer would still be, absolutely not[, it may not exclude.] . . . . [T]he court in *Mount Laurel* very specifically talked about the fundamental questions—
> THE COURT: You would say that it's a legislative problem?
> MR. BISGAIER: It's a legislative problem and . . . the fundamental problem here is people. They're the one[s] we are collecting the taxes for.
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> * * *
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> MR. BISGAIER: If they have needs, and the legislature has established a system which is not being responsive to their needs, well, they represent the people and they can change it. I don't believe that is necessary.
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> * * *
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> THE COURT: Wasn't that our basis for Justice Hall's opinion [in *Mount Laurel I*]? He makes it quite clear that the reason you have this practice of exclusionary zoning is for these very . . . fiscal reasons. The very point that the Chief Justice alluded to a moment ago. . . . [Justice Hall] said that was the primary reason why [the] municipality had adopted exclusionary zoning. They didn't want the municipal burdens that came with having people of low income living in the municipality without bringing along comparable ratables.
> MR. BISGAIER: That's the nicest possible way to characterize the municipal intent, that it was based solely on the fear that the tax rate would increase. But in any event, the reality is that somebody in the State of New Jersey is dealing with these tax problems that are raised. In this municipality or in that municipality it's got to be dealt with because . . . these people . . . are alive and services have to be provided to them.[107]

This passage comes close to suggesting that one consequence of the *Mount Laurel* doctrine is that either municipalities or the state will have to shoulder additional financial burdens when poor people are permitted to locate without regard to offsetting tax ratables. Recognition of a constitutionally-based right to housing in some form would of course enhance such an argument.

The court itself strengthened the linkage between the constitutional basis of *Mount Laurel* and fiscal politics in an exchange with

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the effective dates through the year 1983, *see* L. 1982, c. 225, § 1; and in 1983 the law was again amended and made to apply through 1986. 1983 N.J. Sess. Law Serv. ch. 49, no. 2, at 324 (West).

[107] Tape 1(A).9., 1(B).0.

Daniel S. Bernstein, counsel for Piscataway in the *Urban League* case,[108] at a much later point in the argument. In arguing that the HAR should not be used by the courts as a basis for calculating housing need, Mr. Bernstein contended that the Report improperly relieved the City of Newark of the burden of housing its own resident poor.

> MR. BERNSTEIN: There's 2,500 dilapidated buildings [in Newark]. Every time I'm in the courts in Newark I see new commercial facilities. I see—
> THE COURT: Well, they have an allocation to Newark. . . .
> MR. BERNSTEIN: The allocation to Newark, Your Honor, does not even cover the existing need. . . .
> THE COURT: You allocate the overneed to other areas, I assume.
> MR. BERNSTEIN: The overneed is excessive. They assume that Newark cannot rehabilitate its existing structures and if we believe that each municipality has an obligation to take care of at least its own, does Newark have the same obligation, or can Newark say, "We're entitled to the colleges, the commercial structures, the industry, but we won't even rehabilitate existing housing for our own resident poor."
> THE COURT: Do you recognize the possibility that some municipalities may have an economic problem that is such that they cannot accommodate their own resident poor properly?
> MR. BERNSTEIN: We used to talk about fiscal zoning, Your Honor, and the courts invariably said, "You cannot [apply] fiscal zoning."[109] Are we saying that in suburban communities you cannot apply fiscal zoning but in the Newarks of this state fiscal zoning applies?
> THE COURT: Apparently, the planners recognize fiscal capabilities as one of the various considerations in determining region and determining the appropriate allocation of low and moderate income housing.[110]

In a kind of "confession and avoidance" response to these fiscal facts, the *Mount Laurel II* opinion attempts, in a wholly unsatisfactory passage,[111] to lay the fiscal consequences aside by arguing that its earlier school finance decisions, beginning with *Robinson v. Cahill (Robinson I)*[112] in 1973, and the state income tax that resulted from

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[108] See *supra* notes 46-51 and accompanying text for a discussion of the *Urban League* case.

[109] "Fiscal zoning" comprehends zoning employed "as a device to avoid school construction and other governmental costs incident to population expansion." Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 18, 283 A.2d 353, 357 (Law Div. 1971), *aff'd and modified*, 72 N.J. 483, 371 A.2d 1192 (1977).

[110] Tape 11(A).27.

[111] *Mt. Laurel II*, 92 N.J. at 238, 456 A.2d at 430.

[112] 62 N.J. 473, 303 A.2d 273 (1973).

them, had satisfactorily equalized local fiscal capacities. This is simply not true, not even with respect to education,[113] and certainly not with respect to the broad range of other municipal services, most notably public welfare.[114] The court's concern with keeping *Mount Laurel* consequences within some bounds is readily apparent, however, and clearly reinforced its unwillingness to confront the housing right question.

The constitutional dilemma that these passages between court and counsel reflect is best illustrated by a final excerpt from the oral argument. The speaker was Kenneth E. Meiser, also representing the Department of the Public Advocate, who was addressing circumstances under which an ordinance should be found presumptively invalid. He began by emphasizing an objective constitutional test based on whether the defendant-municipality had achieved target numbers of lower-income housing units contained in one of several studies. This test, in modified form, was eventually incorporated into *Mount Laurel II*:[115]

> MR. MEISER: Then, having shown that neither of these two conditions [the target numbers] has been met, the ordinance should be presumptively invalid. We feel that this presumption of invalidity test focuses on the real goal, not whether it's two units per acre, not whether it's 30,000 square feet, but whether low and moderate income people have a realistic opportunity to live in that town.
> THE COURT: You have less confidence in the presumptive invalidity that attaches when restrictive devices are found in the ordinance?
> MR. MEISER: Our feeling is, you've got to look at the ordinance as a whole. If an ordinance is fantastic, but has one restrictive device, if the sum total of the ordinance will allow low and moderate income people in the town, then I'm not very concerned about that one restrictive device. . . .
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> THE COURT: I'll tell you one thing that troubles me, counselor . . . Your approach would almost seem to characterize the ordinance itself as irrelevant. You seem to be focusing on an empirical

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[113] *See* Abbott v. Burke, No. C-1893-80 (Mercer County Ch. Div. May 11, 1984) (seeking further judicial enforcement of school finance remedies provided in Robinson v. Cahill, 69 N.J. 133, 351 A.2d 713 (1975)).

[114] *See* Bonnet v. State, 155 N.J. Super. 520, 382 A.2d 1175 (App. Div. 1978) (challenging state's method of financing public welfare and judicial administrative costs on a county by county basis).

[115] *See Mt. Laurel II*, 92 N.J. at 220-23, 456 A.2d at 421-22; *see also supra* text accompanying note 90.

> test, namely, what do the numbers show, and then you assume that one of the factors that might contribute to those unhealthy numbers is some invalidity in some ordinance, and you immediately cast the burden upon the municipality to prove that its ordinance is otherwise satisfactory. If you're going to proceed with a presumption of invalidity, don't you have to relate the figures as far as housing [is concerned] more closely with the provisions of the ordinance itself?. . . .
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> * * *
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> THE COURT: Do you think that experience now teaches us that . . . where you do not have an adequate number of low and moderate housing units accommodated in a particular municipality, that one reason is almost certain to be the inadequacy of its zoning ordinance?
> MR. MEISER: One reason, yes.
> THE COURT: And that justifies as a matter of common experience now a presumption of invalidity?
> MR. MEISER: In our opinion, yes sir.[116]

C. *Is There a Constitutionally Protected Right to Housing?*

As both court and counsel recognized, the zoning ordinance is one way that a municipality can unconstitutionally interfere with the *Mount Laurel* right, but at the same time it is an empirical result—whether affordable housing exists—that counts. Those who favor more limited judicial activism (within the considerable activism inherent in any view of the *Mount Laurel* doctrine) can argue that *Mount Laurel* litigation should focus on the ordinance, while those looking ahead to the broader implications of a constitutionally recognized right to housing can emphasize the obligation to achieve empirical results. The arguments, like the opinion that flows from them, seek to have it both ways.

Whether there should be a constitutionally recognized right to housing in New Jersey and, if so, the full extent to which *Mount Laurel II* bears on that right, are questions beyond the scope of this paper. The effort here has been descriptive, to demonstrate that the issue is one that was well within the consciousness of the court when it grappled with the six cases, and that the litigation context of the decisions makes it plausible to develop such arguments in future cases.

Questions from the bench do not bind the court to a point of view, of course, nor do observations of counsel necessarily set the

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[116] Tape 3(B).1.

outer limits of what the court considered in its private deliberations. The court, as presently constituted, obviously prefers incremental development of this question, if it is to be developed at all. At the same time, however, the extended debate on this issue during the oral argument suggests more clearly than the final opinion that the incremental possibilities are realistic ones, and invites attention to these possibilities before they are forgotten.

IV. Methodology and Judicial Process

A large portion of the *Mount Laurel II* oral argument was concerned with problems of remedy, since that was the area in which *Mount Laurel I* clearly was inadequate. Consistent with this focus, the opinion in *Mount Laurel II* contains a number of procedural innovations, several of which will be explored here against the background of the argument itself.

Perhaps the most dramatic shift in *Mount Laurel II* was the court's decision to abandon the "developing municipality" approach[117] which had been articulated in *Mount Laurel I*,[118] and which was apparently confirmed by the decisions in *Washington Township* and *Demarest*.[119] In its place, the court placed primary reliance on the SDGP, which designated "growth," "limited growth," and "non-growth" areas,[120] and held that any municipality containing a "growth" area would have a *Mount Laurel* obligation.[121]

At the same time, however, the court declined to permit use of a parallel state document, the 1978 HAR, as the basis for a numerical remedy in *Mount Laurel* cases.[122] The drafters of the HAR had developed a regional fair share methodology and had assigned specific numerical goals for low and moderate income units to each municipality in the state. The report, however, had been treated cautiously by the administration of Governor Brendan Byrne and was thereafter disavowed by the newly-elected Governor, Thomas Kean, in 1982.[123] In lieu of the HAR methodology, or any other, the court decided to assign all future *Mount Laurel* litigation to a maximum of three trial judges, each responsible for a portion of the state, and each expected

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[117] *See Mt. Laurel II*, 92 N.J. at 215, 456 A.2d at 418.
[118] *See Mt. Laurel I*, 67 N.J. at 160, 171, 336 A.2d at 717, 723.
[119] *See supra* notes 21-28 and accompanying text.
[120] *See Mt. Laurel II*, 92 N.J. at 225-36, 336 A.2d at 423-30.
[121] *Id.* at 237, 336 A.2d at 430.
[122] *Id.* at 251, 336 A.2d at 437-38.
[123] *Id.*

to develop sufficient expertise to ensure that a consistent methodology would emerge in due course.

As a matter of legal process, the methodology that results from these decisions is dazzingly inconsistent. On the one hand, in departing from the *Washington Township* and *Demarest* decisions, the court achieved a high degree of certainty in its delineation of the *Mount Laurel* obligation by rescuing from oblivion the executive branch's SDGP; the court also seems to be heading in the same direction in its emphasis on a numerical remedy, by departing from the numberless approach of *Madison Township*.[124] On the other hand, the court implements its insistence on a numerical remedy with a virtually standardless commitment of the problem to the three *Mount Laurel* judges, withholding the guidance and the certainty the HAR could have provided. The oral arguments provide some interesting perspectives on these results.

A. *The Viability of the SDGP and the HAR*

The possible use of the SDGP and the HAR was noted in Questions Eleven and Twelve of the twenty-four questions propounded by the court,[125] and both were specifically mentioned in the Chief Justice's opening remarks.[126] The Chief Justice's request that argument be concentrated in Segment XIII, one of the segments reserved for "policy issues," indicates the importance the court apparently attached to the possible use of the SDGP and HAR.[127]

Plaintiff's argument on Segment XIII was presented by Kenneth Meiser of the Department of the Public Advocate:

> MR. MEISER: Our position on [the HAR] is that it should be deemed presumptively valid as one of the two alternatives which a municipality can utilize in determining its fair share and which is one of two factors the court should look to in determining whether an ordinance is presumptively invalid. The plaintiffs have the burden of showing the municipality has complied with neither the [HAR] nor the proportional regional test. Turning to the State Development Guide, our position is that [it] contains important policies which a court can look to. However, giving full regard to these advantages, the State Development Guide does not assist the court in reaching this quantifiable approximation which we feel is important.

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[124] *See supra* notes 12-15 and accompanying text.

[125] *See* Appendix A, *infra*.

[126] Tape 1(A).0.

[127] *See* Appendix B, *infra*, Segments XI-XIV.

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> MR. MEISER: Now, staying with the State Development Guide for a moment, these principles in it are important. It is also important to realize, though, that the [HAR] was drawn up and claims to be fully consistent with the State Development Guide. Pages 21 to 23 [of the HAR] talk about how the two are consistent, ... So our primary emphasis is on the [HAR], for the reason that we need a quantifiable approximation.
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> Turning back to *Madison* for a moment, there were five different opinions in [that] case. Each of those opinions supported the concept of determining fair share on the basis of a legislative or administrative plan. Over and over the opinions stressed that it's not a judicial function to resolve the highly controversial economic, social, and policy questions encompassed in fair share. In *Madison*, the court recognized the importance of the [HAR] plan, ...[128]

The Public Advocate strongly urged the importance of achieving a numerical solution, thus relegating the SDGP to a distinctly secondary role. The court could "look to" the policies of the SDGP, but it was the HAR, into which the SDGP had been incorporated, that was to be given presumptive effect. Given this strategy, it is not surprising that the remainder of the Public Advocate's presentation focused completely on the HAR.

This focus was also maintained by other speakers in this segment, with the SDGP getting only scattered references. Arnold Mytelka, representing the City of Newark as *amicus*, noted testimony in *City of Newark v. Township West Milford*[129] to the effect that the SDGP growth zones had been developed without any effort to make them conform to the "developing municipality" concept of *Mount Laurel I*.[130] A similar point was made by J. William Barba, the representative of the *amici* state legislators, who criticized the HAR methodology as disregarding the explicit regional definitions of *Madison Township*. An exchange with the court ensued, which led the discussion briefly back to the SDGP:

> THE COURT: Might not that suggest that there was something perhaps unrealistic in the court's original perception of "region," which perhaps ought to be modified in light of the experience of those who are actually dealing with these problems?
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> MR. BARBA: Respectfully, Mr. Justice, I don't think so. I think it's the other way around. The court has applied itself to an attempt to

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[128] Tape 10(B).5.

[129] No.L-25413-77 P.W. (Law Div. Mar. 1981), *aff'd in part, rev'd in part*, No. A-3240-80T2 (App. Div. Apr. 1983), *certif. denied*, 95 N.J. 175, 470 A.2d 403 (1983), *cert. denied*, 104 S. Ct. 1416 (1984).

[130] Tape 11(A).1.

define "region" in *Mount Laurel* and then again in the [*Madison Township*] case—

THE COURT: And now we have experts, authorized by their governmental responsibilities to deal with these problems, and in that particular area of the state those judicial definitions were found to be wanting. There's nothing wrong in the lesson learned from that experience, is there?

* * *

MR. BARBA: The problem that I'm addressing myself to is that the DCA took a very simplistic approach to the designation of counties [as regions]. . . . They don't take into consideration any of the factors that the court wrestled with in attempting to define what the appropriate region is.

THE COURT: Do you suppose the doctrine of separation of powers calls for the court to give some deference to the determinations of these other branches of government? [laughter]

MR. BARBA: The [HAR] was a report that was generated as a result of an executive order issued out of the Governor's Office, and the executive order specifically directs the Director [of the Department of Community Affairs] to do the things the Governor wants him to do. It's not a legislative mandate. The Guide Plan is a legislative mandate to the Department of Community Affairs to do thus and so, and to promulgate rules.

THE COURT: You have a quarrel with the Governor as well as the courts, then.

MR. BARBA: No, I don't. I think the Governor has a large function to play. He's one of the branches of government.

THE COURT: Mr. Barba, in your opinion, how does the Legislature treat these two reports?. . . . They've received it and I'm sure that there's discussion about it—what credence, and how do they treat it by way of, possibly evidence or guidelines or whatever? Is there anything at all you can tell us about its reaction to the filing of these reports, which, as you say, find their genesis in an executive order, not a legislative fiat?

MR. BARBA: First of all, that's not true of the Guide Plan. The Guide Plan's genesis is in legislation. . . .

THE COURT: Thank you, that's right.[131]

Daniel S. Bernstein, attorney for the Township of Piscataway in the *Urban League* case, spent "one and a half minutes" on the SDGP, en route to a much lengthier criticism of the HAR.

MR. BERNSTEIN: I'll just spend one and a half minutes on the State Development Guide. It wasn't meant to be a planning tool, it

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[131] Tape 11(A).3.

> was meant to be a tool for the State of New Jersey in its expenditure of capital funds. Nevertheless, it employs what I've referred to previously as a rational approach. It's been used by most planners, not only in these exclusionary zoning cases, but in regular zoning cases, as an indication of what DCA feels a region should be, what is growth or slow growth, or a conservation area, so I take it that the State Development Guide should be taken as a single factor, certainly not an overwhelming one. As to the [HAR]. . . .[132]

As revealed by the excerpts just set out, the HAR was the subject of at least some criticism on the part of all counsel except the Public Advocate. Mr. Mytelka argued that it was useful, but should be supported by the courtroom testimony of an appropriate DCA official, and should be evidential rather than presumptive. Mr. Barba, representing the legislators, challenged its provenance in an executive order rather than a legislative mandate, and Mr. Bernstein seriously questioned its methodology.

The court seemed less concerned with these arguments than with the question of whether the HAR was sufficiently developed to be judicially noticed as "official" state policy. Mr. Meiser was questioned sharply on this issue:

> MR. MEISER: In *Madison*, the court recognized the importance of the [HAR], but did not give it *prima facie* approval because: "At this point it is only tentative and subject to further public hearings and review". . . .[133]
> THE COURT: Neither of which conditions have been corrected, to the best of my knowledge.
> MR. MEISER: The position of the Department of Community Affairs is that for purposes of use the [HAR] is no longer tentative and is not going to be subject to further public hearings. Now I'd like to get into that for a second—
> THE COURT: I think that's terribly important, because I know of no other instance in state government where the state has acted with respect to land use without first according the public an opportunity to express itself. I refer to CAFRA, the meadowlands, the wetlands, the pinelands, and it just seems to me on something of this magnitude, that public hearings . . . in the fullest sense,—I think as one of the parties suggested here, the planners in their brief, administrative type hearings, with cross examination, explanation of methodology, and so forth, should go forward, and I would solicit your comments in that regard.

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[132] Tape 11(A).4.

[133] Tape 10(B).5 (quoting *Madison Township*, 72 N.J. at 538 n.43, 371 A.2d at 1220 n.43).

MR. MEISER: A little history may be relevant. The Department of Community Affairs did come up with a first preliminary report. The Governor asked them to spend one year revising that plan. They did extensively revise it. They did have extensive input from a number of sources.

* * *

Now, I'm not representing the Department of Community Affairs. I cannot tell you why, or whether they made the decision [that] they would not have full formal hearings the way you want it . . . .

THE COURT: Has the Commissioner signed off on that document?

MR. MEISER: It was released in the form you have as the Department of Community Affairs document. I believe that it has Mr. LeFante's signature on it. The Department of Community Affairs position, which is Mr. LeFante's position, in the Attorney General's brief, is that it's now a workable yardstick for measuring—

THE COURT: A workable yardstick is one thing . . . and I can see where that document would have great utility, but when one starts to accord it, in a judicial proceeding, *prima facie* validity without first having had the methodology explained, [it] seems to me that you're getting into a far different area . . . .

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THE COURT: [There is one thing] that troubles me about this whole thing. I think it's a useful document that should go—be accorded some weight. But when there's some question that the Department has issued it, when there's been no public hearings, I find it genuinely troublesome, when no one in the public has the opportunity—has had the opportunity of prior public hearing or cross examination of the authors of the report before, to accord the document *prima facie* proof of the facts set forth in the document.

MR. MEISER: A public hearing without the right of cross examination comes to an opportunity to comment. I think for a six month or a year period there was such informal opportunity. Whether you feel that the rises to the level of the minimum amount of fairness is a question—

THE COURT: Do you know how much actual public input there was during that period?

MR. MEISER: My understanding is that there was a number of municipalities and a number of planners that were consulted.

THE COURT: But you don't know how many or what the procedure was?

MR. MEISER: There—I can only tell you as hearsay, but I understand they were getting input.[134]

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[134] Tape 10(B).5. In an omitted portion of this exchange, the court also explored with Mr. Meiser the admissibility of the SDGP under the New Jersey hearsay rule, N.J. R. EVID.

Several preliminary observations can be made about these passages. First, there is the obvious irony that the argument focused almost exclusively on the HAR, which the court eventually decided not to incorporate into its methodology, while the SDGP, which was barely mentioned by the parties or the court, became the centerpiece of the *Mount Laurel II* opinion. On the other hand, it seems generally to have been understood that the two documents, both products of the planning apparatus of the Department of Community Affairs, were quite closely related, even though one was mandated by the legislature and the other by the Governor exercising executive authority. In light of this distinction in origin, the doubt that the court expressed when closely questioning Kenneth Meiser about the legitimacy of the HAR's official status undoubtedly bears also on the validity of the SDGP, and the handling of this problem in the opinion deserves scrutiny. Before doing so, however, an additional aspect of the *Mount Laurel II* methodology needs to be introduced.

B. *The "Developing Municipality" Limitation*

Adoption of the SDGP necessarily implies rejection of the "developing municipality" approach which had grown out of *Mount Laurel I*.[135] The *Mount Laurel II* plaintiffs, however, did not sponsor this approach. To the contrary, Carl Bisgaier for the Public Advocate stuck vigorously to the "developing municipality" concept and went to some lengths to distinguish the *Washington Township* and *Demarest* cases in this regard.

> THE COURT: Mr. Bisgaier, are you of the opinion that the principle of *Mount Laurel* as you understand it should only be applied to a developing municipality? Is that still the position of your office?
> MR. BISGAIER: Yes, ... However, in understanding what a developing municipality is, I think we should go to the *Mount Laurel* doctrine itself, which is a principle that arose to deal with governmental action in municipalities that either were experiencing growth or should [have been] experiencing growth—where growth was appropriate. In other words, not to exclude from *Mount Laurel* [those] municipalities which chose not to grow in situations where the housing need was such that the municipalities

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63(15). The court ultimately held that once the document is authenticated under N.J. R. EVID. 67 "no hearsay problems exist." *Mt. Laurel II*, 92 N.J. at 246-47, 456 A.2d at 435.

[135] The *Mount Laurel II* court, however, expressly reserved the "developing municipality" concept for use by trial courts in the event that the legislature invalidates the SDGP. *Mt. Laurel II*, 92 N.J. at 248 n.21, 456 A.2d at 435 n.21.

should have been acting to enable that growth. We believe that the principles enunciated in the *Washington Township* and *Demarest* cases—as those cases are read on their face for what they say—are being essentially perverted by lower court opinions which have expanded the notion to include municipalities which are now undergoing considerable growth, which have the opportunity to undergo further growth, and where the demographic characteristics are such that planning agencies and municipal master planning itself countenances further growth.

THE COURT: But Mr. Bisgaier, why should you reward a municipality which is fully developed, which has carried out these exclusionary practices and has been able to keep out of its town all of these low cost housing situations, why should they be rewarded? That is in effect what you would be doing. Why shouldn't those municipalities also bear their "fair share" of the low cost housing in the particular region in which they are located?

MR. BISGAIER: The answer to that is that such a municipality, which has been exclusionary, and which is in a region where it can be proved that there is a need for growth within that municipality for low and moderate income housing, such a municipality by choosing to refuse to permit such growth where there's opportunity for it, would be inappropriately denied the opportunity for growth. If I can just run down what I believe to be our basic principle—basic position on that, then I think it may become clearer. In *Washington* and *Demarest*, the court found that there were no proofs that there was a resident population in need of housing. The court found that there were no proofs that there were any local employees in need of housing. There was no proof that [infill] or redevelopment was occurring at all, or that [infill] or redevelopment would be appropriate in Washington Township or Demarest Township. And furthermore, the case came up, ironically, with developers in both cases who were choosing to take that little land that was left and provide luxury housing on that land. [It was] hardly a case where there were compelling proofs that Washington and Demarest were failing to respond to low and moderate income housing needs. Our position in that regard is—well, it's a far extension of that case to countenance the position of, say, South Plainfield—where you had a municipality with thousands of employees and vacant land and a substantial resident poor saying, "We're Washington Township. The facts in our case are the same as the court held in *Washington* and *Demarest* and see this article in such and such law journal which cites the six categories that you have to meet before you're a *Mount Laurel* type town or you avoid the constitutional mandate.". . .

THE COURT: [What does the word "developing" mean?] . . . Does twenty percent of developed land mean that that muncipality is no longer developing in any case?—

MR. BISGAIER: It is clear historically, clear factually, that municipalities grow and change and have an ongoing responsibility under the Municipal Land Use Law to consider that growth and consider demographic changes as it goes on, as time passes.—
THE COURT: What do you do with respect to a large municipality geographically, part of which is fully developed and part of which is rural and part of which is "developing"? What happens in that type of situation under the *Mount Laurel* doctrine?

* * *

Would the *Mount Laurel* principle apply at all?
MR. BISGAIER: [Yes.] The evaluation in that case would [depend upon the results of] a reasonable housing need allocation analysis on a regional basis . . . . Having found that there is a need for housing, the question would then be whether the municipality is satisfying it, or whether the municipality has a defense for not satisfying it.
THE COURT: Irrespective of whether it's developing or developed or rural?
MR. BISGAIER: Well, I don't know how you mean . . . those phrases unless one looks at whether growth was occurring, whether or not growth is appropriate. If growth is occurring, the municipality is in the process of developing.
THE COURT: Aren't the labels the enemies here? There's something, it seems to me, simplistic about a rule that says that if you are categorized as developing, you have no obligation. If you're categorized as developed, you have one, when indeed many municipalities are, as Justice Schreiber has indicated, partially developed, partially developing, they may even be rural, ... What you're really, I think, . . . doing [is] addressing the underlying conditions that lead to a conclusion that becomes a label. You're saying [that] if you're developing, if you've got employees, if you're attracting employees, you ought to provide housing for them. If you're in a path of inevitable growth you ought to plan for housing, even though you may be undeveloped now. I guess the question I'm asking, I think which Justice Schreiber is asking, is: How useful are these labels, and do they create more mischief than they're worth?
MR. BISGAIER: I don't think the court ever intended the *Washington Township* and *Demarest* cases to create the kind of labeling that's been going on as a result. I think that the analysis that you just articulated is the analysis the court went through in *Washington Township* and *Demarest.* If you work through that analysis in every case rather than saying, are we developing, . . . are we rural? If we went and looked—is there a resident here . . . in need of housing and is the municipality responding to it? Are there employees here who are in need of housing and is the municipality

responding to it? Is there growth in this municipality? Are they encouraging low and moderate income employees to come in?

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THE COURT: Mr. Bisgaier, I take it that you would accept the "developing" label because you hope that it would be used flexibly to reflect the need for accommodating low and moderate income housing, and I assume that you would also accept the notion that the extent of the fair share of the particular municipality may depend upon some kind of sliding scale of how developing it is or how developing it isn't, which you would translate into how much of the need for low and moderate income housing it should accommodate, and how much need it [should] not. Is that, generally speaking, the reason you're willing to accept that, because you think it's a rather expansive concept?

MR. BISGAIER: Yes.

THE COURT: Do you fear, however, that unless there is a label somewhere, that that expansion of that concept is liable to wind up labeling as "developing" areas that ought to be preserved as open space, areas that ought to be preserved for farming, and that if you tend to make it too flexible you're liable to find out that you're making this one big state with a lot of housing spread around it in a fashion that wouldn't satisfy any [sensible plan]?

MR. BISGAIER: No, I'm not concerned about that . . . because . . . adequate consideration as to the viability of any particular municipality as a rural area is one that can be done, one that's being done. The Department of Community Affairs, in their Housing Allocation Plan, considered this. The State Development Guide, produced by the Department of Community Affairs, considered this . . . and the Department of Commmunity Affairs then filed a brief saying that if you use these documents . . . to evaluate the relative appropriateness of one municipality versus another in determining the extent of the housing obligation of that municipality as you have,—

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THE COURT: [Suppose] there is a regional need, there is a municipality, indeed there are many in New Jersey, the urban centers in particular, which [has] a discernible need for low and moderate income housing, does not have the ability to meet that need, and there are other communities which are not developing, do not have any significant resident poor. Assume those two municipalities were in the same region. Does the non-urban, the suburban municipality, have an obligation to provide housing to the resident poor of the urban area?

MR. BISGAIER: I think an adequate regional analysis would answer that question. I think in some cases the answer is yes, and in

> some cases the answer is no. [When] the Department of Community Affairs did their regional analysis and the Housing Allocation Plan, some element of that was the allocation of low and moderate income units of persons presently in need. . . . But it's very difficult to answer that question as a hypothetical. I believe that it would be the case, as it was the case in Mount Laurel, that their obligation, their regional obligation, extended beyond just responding to the housing needs of the local residents, and if Mount Laurel had no local residents, that regional obligation would have been there still.
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> * * *
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> As to the regional responsibility, our position on that is, if it can be shown, as it appears to have been shown in the *Washington Township* case and *Demarest*, and I distinguish those cases from the reality of the world that's out there, you had a record before you— If it can be shown that there is no regional need for housing in this municipality, that municipality is acting appropriately by not responding to a regional need. Factually, then, I would say that that municipality does not have [a *Mount Laurel* obligation].[136]

Counsel and the court had to some extent exchanged roles in the passages just quoted. Members of the court repeatedly expressed concern about the "mischief" created by the "developing municipality" label, and about the likelihood that it would underinclude appropriate municipalities and thus frustrate the underlying social objectives of the *Mount Laurel* doctrine. Yet when pressed to agree to a point presumably in his favor, the Public Advocate vigorously defended the developing municipality label. Doing so required an extremely labored and unconvincing defense of the *Washington Township* and *Demarest* cases, which he distinguished as failures of proof unrelated to "the reality of the world that's out there."[137] In substantive terms, he proceeds to read so much flexibility into the meaning of "developing municipality" that the label could be applied to almost any municipality in the state, so long as appropriate planning criteria were considered by the court. As so defined, it is difficult to see that the "developing municipality" concept means anything much at all.

It is conceivable that the Public Advocate's defense of the developing municipality concept was simply a deferential bow to the principle of *stare decisis*, a misreading of the justices' willingness to reconsider the doctrinal problems of the concept. Juxtaposed with his Department's lukewarm embrace of the SDGP, however, it is much more likely that the decision to urge retention and redefinition of the

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[136] Tape 1(A).1.

[137] *See supra* text accompanying note 136 for statement of Mr. Bisgaier.

"developing municipality" concept was essentially a political one. Quite frankly, the court had a much better track record than the political branches of government in supporting the interests of low and moderate income housing advocates; retention of maximum judicial involvement and in supervision of the town-specific planning process would better guard against the inherent risk of political compromise were the issue committed to the Department of Community Affairs. Thus, Mr. Bisgaier's repeated response was that the answer depended on a proper regional study *as done by the court.*[138]

This "political" analysis (naturally not explicitly made in the oral argument) also helps to explain how the Public Advocate could urge presumptive effect for the HAR, the twin of the Department of Community Affairs' SDGP. As either the SDGP or the "developing municipality" doctrine could be used to define the existence of a *Mount Laurel* obligation, political control of this definitional process risks putting major segments of the state beyond the court's reach. This risk, manifested in the *Washington Township* and *Demarest* cases, despite their judicialized process, would be avoided in the future by a refined application of the judicial definition, as the Public Advocate argued.

In contrast to these effects, the HAR is essentially a remedial tool which distributes numerical housing goals to those municipalities independently found to have a *Mount Laurel* obligation. Thus, it would come into play only after *Mount Laurel* jurisdiction was perfected, and the court would therefore retain a greater ability to correct errors in the political process as they appeared. Additionally, to the extent that the HAR methodology "incorporates" the SDGP, the court's independent determination of where *Mount Laurel* obligations lie would justify its departure from the HAR in this regard.

As noted, *Mount Laurel II* does not follow the urging of the Public Advocate with respect to either the SDGP or the HAR. To evaluate the court's solution, a look at an additional segment of the argument will be useful.

C. *The Three* Mount Laurel *Judges*

Vesting trial jurisdiction over *Mount Laurel* cases exclusively in three judges, each solely responsible for one group of counties,[139] is

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[138] *Id.*

[139] For a listing of the three *Mount Laurel* judges and the respective counties to which they have been assigned see 111 N.J.L.J. 637 (June 16, 1983).

one of the most singular aspects of the *Mount Laurel II* opinion, yet it is not mentioned in the twenty-four questions and is barely hinted at in the oral argument. In the middle of the second day of argument, during consideration of a number of technical problems involved in the review and revision of unconstitutional municipal ordinances, the following exchange took place between the court and Bertram Busch, attorney for the Township of East Brunswick:

> THE COURT: Counsel, may I ask you this—it's in reference to something you said. Do you think there would be any advantage to the court to establishing a special panel of judges rather than have appeals go to the general appellate division where we have seven or so separate panels—to have a special panel just to hear zoning cases. You mentioned something in that area and I just wanted to see if that was what you were suggesting or something you think—
>
> * * *
>
> MR. BUSCH: I think it would make sense, the way in the federal courts one judge has the case at the trial level from the beginning. I think it would make sense so you would not have conflicting . . .results, although, as I've been reading the appellate division cases, they have interpreted [*Madison Township*] and *Mount Laurel* fairly consistently and somewhat differently from some of the trial judges and differently from the way plaintiffs and their allies would like to see them go. But, sure, I think that a special panel might make sense.
> THE COURT: How about at the trial level?
> MR. BUSCH: Well, I think in effect what you do have—or have had, and I think there was even forum shopping in some cases—I think that some judges are simply equipped to handle it and some are not. I don't know that the supreme court could order each county to have one zoning judge—
> THE COURT: You like the idea of specialists?
> MR. BUSCH: Well, I think it would result in some kind of intelligent and consistent findings in this situation. . . .[140]

The apparently spontaneous suggestion just quoted appears to be the only consideration during the arguments of one of the central features of the resulting decision, one which goes a long way toward reconciling the concerns expressed by the Public Advocate with the approach selected by the court.

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[140] Tape 6(B).3.

D. *Evaluating the* Mount Laurel *Methodology*

Although couched in the language of law, *Mount Laurel II* reveals a supremely political instinct on the part of the court. Despite the Public Advocate's preference for and faith in the judicial system, an understandable attitude given the zoning history that led to *Mount Laurel I*, the court's solution discloses a more sophisticated appreciation of the process problems involved in exclusionary zoning cases.

Use of the SDGP encourages voluntary compliance with the *Mount Laurel* doctrine because it achieves maximum clarity on the most critical question in *Mount Laurel* litigation—whether the municipality is subject to liability. This clarity could not be achieved by court-made doctrine of the sort urged by the Public Advocate. It remains true that many other aspects of *Mount Laurel* methodology remain imprecise, such as how to calculate a specific fair share number. Most noncomplying ordinances, however, are sufficiently noncomplying that advance knowledge of such sources of imprecision is unlikely to encourage recalcitrant municipalities to hold out, but rather will induce settlement on terms that avoid trial of the methodological issues altogether.

Moreover, use of the SDGP contains internal political checks less characteristic of the HAR. By attributing the *Mount Laurel* obligation to the growth areas mapped by the SDGP, the court clearly has relieved a number of communities of the obligation, and these communities can be expected to have some self-interest in protecting the SDGP against legislative hostility. In addition, the "developing municipality" approach is available to the court as a backup technique should the SDGP fail for any reason.[141] As the Public Advocate's argument demonstrates, a very loose interpretation of the "developing municipality" doctrine is possible, one which has virtually no predictive certainty, and the threat of return to this unsatisfactory system surely increases the attractiveness of the SDGP.

Compared to the SDGP, the HAR was a less suitable document in terms of political and judicial process. It distributed housing goals much more widely than the SDGP distributed growth areas,[142] and thus increased the likelihood of a political coalition against its use. Indeed, that coalition succeeded even before *Mount Laurel II* was announced, with Governor Kean's rescission of the executive orders[143]

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[141] *See supra* note 135.

[142] *See Mt. Laurel II*, 92 N.J. at 244 n.17, 456 A.2d at 433-34 n.17 (noting that the HAR would have imposed the *Mount Laurel* obligation upon limited growth areas as well as growth areas).

[143] *See supra* notes 62-64 and accompanying text.

upon which the HAR was based. While the HAR remained physically available to the court, it was so deprived of political legitimacy at that point that its use would have put the court further out on a limb, rather than helping to "co-opt" the political branches, as use of the SDGP had done. Moreover, in the absence of the HAR, there was no fallback technique available to the court comparable to the revival of the "developing municipality" doctrine.

By concentrating the *Mount Laurel* caseload in a small number of trial judges, the court, in a way none of the parties had anticipated or requested, cleverly provided a mechanism for assuring methodological expertise. It allowed a numerical solution to the remedy problem, which was the prime attraction of the HAR, and, as a function of the three judges becoming more informed on the methodological issues, it guaranteed a fairly high degree of certainty and consistency without interminable delays. It also relieved the remainder of the trial system of a class of cases that had been extremely unpopular with the judges assigned to them. Moreover, by offering the prospect of judgments not unlike those that would have been achieved under the HAR, the court implicitly has invited the political branches to rethink their policy of noninvolvement. Should a revived or revised HAR be issued, it could still be given substantial weight in the decisionmaking by the three judges.

The weakest aspect of the *Mount Laurel II* opinion is the defense of the legitimacy of the SDGP. As the above comments suggest, use of the SDGP had important political advantages compared to the HAR, yet the provenance of the two documents was remarkably similar. The oral arguments, in turn, had displayed the court's sensitivity to the legitimacy question, illustrated by the intensive questioning of the Public Advocate on this score.

Against the backdrop of these concerns, the opinion is unconvincing in distinguishing the two plans. The court notes that the SDGP derives from legislative authority and that the legislature was aware of it in published form and had mandated reference to it in master plans prepared pursuant to the MLUL.[144] Conformity to the plan is not binding on municipalities; however, the best the court can do to demonstrate the authoritative nature of the plan is to note the wide consultative process that preceded its publication in final draft form[145] and to assert that the legislature acted "[p]resumably with knowledge of the Division's [of State and Regional Planning] *ongoing* work in preparing the SDGP."[146]

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[144] *See Mt. Laurel II*, 92 N.J. at 225-32, 456 A.2d at 423-27.

[145] *Id.* at 225 n.9, 456 A.2d at 424 n.9.

[146] *Id.* at 228, 456 A.2d at 425 (emphasis added).

This is slender stuff indeed, and perhaps the court should have acknowledged more frankly the limited commitment of the political branches to the planning concepts embodied in the SDGP. The sleight of hand actually engaged in is hardly unknown to the common law process, however, and the point here is not to criticize the approach taken. Rather, the point is to recognize the full scope of the political daring to which the supreme court has committed itself.

One of the twenty-four questions propounded by the court raised the possibility of imposing regional planning responsibilities on the state as a more effective way of achieving *Mount Laurel* objectives.[147] The suggestion merited exactly one sentence in the three days of oral argument, a builder-plaintiff noting that such a drastic remedy was not necessary.[148] Essentially, however, that is what *Mount Laurel II* achieves, not because the court ordered it and not because the legislature wanted it, but because the court did not hesitate to manufacture a legislative policy choice where none existed in fact. Moreover, as the prior discussion has suggested, the context of the SDGP makes it fairly likely that the court's result will not be significantly overturned.

This judicial gambit can be discerned from the opinion alone, but the content of the oral argument throws it into high relief. Even in the face of realistic doubts about the political consensus behind documents such as the HAR or the SDGP, the court is prepared to breathe life into them in order to draw the legislature and the executive into the process of solving the low and moderate income housing problem. That it did not do so with respect to the HAR says more about the utility of the HAR itself than it does about the court's concern for "true" political legitimacy.

This inquiry into the methodology of *Mount Laurel II* suggests the end of the court's naive expectation that a political response will be volunteered, and a determination to stimulate such response however possible.[149] This is not to say that the court relies solely on such quasi-legislative solutions in *Mount Laurel II*. The use of the three

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[147] *See* Appendix A, *infra*, Question (3)[b].

[148] Tape 4(B).9. (Philip Lindeman, Esq.); *cf.* Appendix A, *infra*, Question (3)[b].

[149] That *Mount Laurel II* opinion proceeds consciously on this theory is reinforced by the supreme court's only post-*Mount Laurel II* opinion to date. In *In re* Egg Harbor Assocs. (Bayshore Centre), 94 N.J. 358, 464 A.2d 1115 (1983), the court held that a state statute regulating development in environmentally sensitive coastal zones supported imposition of a 20% *Mount Laurel* set-aside on a new housing development given a permit in the zone. The court's effort to construe the requirement out of the statute, which was adopted prior to *Mount Laurel II*, is unconvincing but again has the effect of building a legislative foundation for the court's decision. *See* Payne, *Doctrine and Politics in Exclusionary Zoning Litigation*, 12 REAL EST. L.J. 359, 363 (1984).

Mount Laurel judges and the virtually unlimited discretion given to them is an aggressive, even outrageous remedy in conventional legal process terms, and would surely not survive judicial review were it a legislative-administrative delegation rather than internal to the judiciary. Even as such, however, this strong judicial remedy implicitly respects the legislative role because, as noted above, the likelihood of effective judicial determination of a regional fair share methodology also increases the likelihood that the political branches will decide of themselves to recapture the initiative, leaving the court to the lesser (and more conventional) role of reviewing for outer limits of acceptability.

After *Mount Laurel II*, in short, legislative and political inaction has become much more costly (to legislators and executives hostile to the *Mount Laurel* doctrine) than before. This is the heart of the court's initiative in *Mount Laurel II* and, if it succeeds, it will chart the way for a new judicial role in stimulating legislative responses to a whole series of complex social problems that might otherwise go unresolved. For those with both a social conscience and a respect for the limits of adjudication in a democratic society, this is a most pleasing possibility.

APPENDIX A

SUPREME COURT OF NEW JERSEY

STEPHEN W. TOWNSEND
CLERK
DAVID A. LAMPEN
DEPUTY CLERK

OFFICE OF THE CLERK
STATE HOUSE ANNEX
P. O. BOX 1480
TRENTON, N.J. 09625

April 28, 1980

Re: A-146 *Urban League of Greater New Brunswick, et al. v. Mayor and Council of Borough of Carteret, et al.*

A-150 *Joseph Caputo & Aldo Caputo v. Township of Chester, Planning Board of Township of Chester*

A-151 *Glenview Development Co. v. Franklin Township Planning Board and Environmental Commission of Franklin Township*

A-173 *Urban League of Essex Co., et al. v. Township of Mahwah*

A-192/193 *Southern Burlington Co. NAACP, et al. v. Mt. Laurel*

A-194 *Round Valley, Inc. v. Township of Clinton, Township Council of Township of Clinton and Planning Board of Township of Clinton*

Dear Counsel:*

In the interests of clarity and efficiency, the Supreme Court has decided to structure oral argument in the six zoning cases listed for May 19 and 20, 1980 around the attached questions. These questions touch upon the critical issues raised by you in each of the cases to be argued and are drawn from information contained in the briefs and appendices submitted by the parties. They do not reflect an attempt to exhaust all issues raised by the facts before the Court, but rather are intended to focus on those areas of exclusionary zoning law that appear, from the record, to warrant a concentration of appellate review and guidance. Obviously, no conclusions about the Court's position on any of these issues should be drawn from the sequence or wording.

Although the Court believes that a carefully organized oral argument in these cases is essential, it considers the necessity to have all important questions before it for resolution to be of equal value. If, after a careful examination of the attached questions, you feel that a critical issue in your case has not been addressed or that you have an objection to a question as stated, please notify me within 7 days of the receipt of this letter.

Oral arguments will be apportioned to avoid repetition. To that end, all counsel eligible to argue will meet in Trenton with me on Monday, May 12, 1980 at 10:00 a.m. in the Supreme Court courtroom to resolve the argument sequence and the apportionment of issues to be discussed. Counsel for plaintiffs and related *amici curiae* shall consult, through Marilyn Morheuser, Esq., among themselves prior to that meeting in order to determine whether they can agree to a division of argument time. Counsel for defendants and related *amici curiae* shall consult through Thomas Farino, Jr., Esq., for the same purpose.

If you have any questions with regard to the above, you may contact me at 609/292-4837.

Very truly yours,
Stephen W. Townsend

Clerk

* (See attached lists).

QUESTIONS

(1) Discuss the application of the duty not to exclude, as first announced in *Mt. Laurel,* to *all types* of housing (i.e., regardless of income level).

(2) Discuss the appropriate procedural posture for the joinder of necessary/desirable parties in an exclusionary zoning suit (for example, neighboring municipalities in a particular county of region).

(3) Discuss the relevance of the Municipal Land Use Law (MLUL), *N.J.S.A.* 40:55D-1, *et seq.* (in particular, the general welfare requirement in *N.J.S.A.* 40:55D-2(a)) in exclusionary zoning cases.

> [a] Does the MLUL adopt the dictates of *Mt. Laurel* and require compliance by *all* municipalities?
> [b] If the MLUL "general welfare" duty is interpreted so that the regional need requirements of *Mt. Laurel* are limited to developing municipalities, is delegation of the zoning power to other municipalities without a concommitant [sic] regional perspective requirement unconstitutional? See *Payne,* 29 Rutgers L. Rev. 803 (1976).
> [c] If the MLUL represents a complete adoption of Mt. Laurel [sic] principles, should the Court adjust its focus in these cases so as to concentrate on violations of the statute?
> [d] Discuss those legislative enactments listed in the *amicus curiae* brief of legislators accepted by Court on April 16, 1980 that are responsive to the exclusionary zoning problem.

(4) Discuss the significance of Executive Order 35. Discuss any other similar initiatives relating to the problems of exclusionary zoning that you may be aware of.

(5) What practical effects have the decisions in *Southern Burlington County NAACP v. Mt. Laurel, Oakwood at Madison v. Madison, Pascack v. Mayor and Council of Township of Washington* and *Fobe v. Demarest* had on either zoning or housing in New Jersey?

(6) Is the underlying goal of *Mt. Laurel*—providing housing opportunities outside urban areas for low and moderate income New Jersey citizens—economically feasible? Will attainment of the goal affect another important goal of this state—to rehabilitate its cities?

(7) Discuss the wisdom of limiting the reach of *Mt. Laurel* to developing municipalities.

> [a] What rationale exists to support such distinction?
> [b] Would the distinction reward those municipalities who have used exclusionary zoning most successfully, either in remaining rural, or becoming developed without providing a variety of types of housing opportunities?

[c] What impact would the distinction have on the Executive's apparent priority to help rebuild urban areas? (See 1980 State of the State message.) Would it add to or subtract from an effort to concentrate on urban problems?
[d] Discuss the function of the six *Mt. Laurel* criteria relating to the "developing" status of a municipality.
[e] Are the criteria (a) conjunctive? (b) merely illustrative?
[f] Can a municipality fit into more than one *Mt. Laurel* category (undeveloped, developing, developed) simultaneously? For example, what is the "duty" of an 80% developed municipality under *Mt. Laurel* ?

(8) Discuss the relevance of "fiscal zoning" to *Mt. Laurel* cases. Should the *Mt. Laurel* doctrine be dependent on a showing of fiscally exclusionary motive or purpose or is the effect of exclusion the only factor to be considered in exclusionary zoning litigation?

(9) Discuss the wisdom of a per se rule against large lot (e.g., 5 acre) zoning.

(10) When, under *Mt. Laurel* , does the presumption of invalidity of an ordinance (based on particular exclusionary characteristics) attach and to what extent? What evidence will rebut such presumption?

(11) Discuss the proper function of the Housing Allocation Plan of the New Jersey Department of Community Affairs Division of State and Regional Planning (Division on Planning) in exclusionary zoning litigation.

[a] Should a demonstration of satisfaction of a particular Division on Planning allocation constitute *prima facie* evidence of compliance with *Mt. Laurel*?
[b] Should fair share orders imposed on non-complying municipalities adopt the Division on Planning's allocation unless the municipality demonstrates that such allocation is inappropriate.
[c] What effect should changed allocation have on a finding of previous compliance?

(12) Discuss the proper function of the State Development Guide Plan in such litigation.

(13) Can and should a fair share/regional need allocation be used to:

[a] meet today's housing needs throughout the State;
[b] remedy prior exclusions by particular municipalites [sic];
[c] meet future demands for housing in New Jersey:
[i] from within the State
[ii] throughout the Northeast Corridor?

(14) Discuss the relevance of an existing county-wide percentage of low and moderate income housing in an analysis of a particular municipality's compliance or non-compliance with *Mt. Laurel.*

—Is the concept of "tipping" relevant in this area?

(15) Discuss the fair share formula introduced in *Mt. Laurel* at 67 *N.J.* 190, and cited by Justice Pashman in *Pascack* at 74 *N.J.* 511.

[a] Should municipalities have an absolute duty to provide an opportunity for housing for all present and potential employees in the region?

[b] Should a change in employment figures affect such litigation?

(16) Discuss the function of the "time of decision" rule (which, when applicable, requires judicial review of a law or ordinance to focus on the version of the law in effect at the time the judicial decision is made).

[a] Is the rule applicable?

[b] If so, should a time limitation on the right to submit amendments to a zoning ordinance be placed on defendant municipalities to avoid dilatory action?

[c] How can time-consuming remands triggered by submission of amended ordinances by avoided?

[d] How can the problems stemming from outdated statistics be avoided?

[e] How does the rule affect the shifting burden of proof in exclusionary zoning cases once a *prima facie* showing of exclusion is made—does submission of an amended ordinance *during trial* return the burden of proving invalidity to plaintiffs? *on appeal? after final appellate review* when compliance with a final judgment is questioned?

[f] When, if ever, should a trial court ignore amendments submitted during litigation and look only at the original ordinance?

(17) Should a trial court retain jurisdiction to rule on orders of compliance after the main case has been appealed?

(18) What function should a showing of good faith or *bona fide* efforts at compliance with existing principles of law play in these cases?

(19) Discuss the validity of a "trickling down" theory in the current housing market.

(20) Discuss the function of "phasing" in a fair share plan.

(21) Discuss the legal and practical implications of the following remedial devices a court might employ in exclusionary zoning cases.

[a] Total invalidation of an ordinance, accompanied by an order to

draft a new ordinance within a certain time period (i.e., 90 days) or be unzoned, see *Orgo Farms*.

[b] Presumptive variances as suggested by Justice Pashman in *Pascack* and *Fobe*.

[c] An order for specific rezoning of plaintiffs' land for multi-family development (Builder's remedy).

[d] Orders to seek subsidies, provide density bonuses, institute rent-skewing.

[e] Specific rezoning for high-density development accompanied by automatic reverter if the development planned is not for low and moderate income units.

(22) Should all remedies developed in these cases be tracked to the level of need in the region and/or municipality, or does Oakwood [sic] suggest the possibility of "numberless" (as opposed to fair share/regional need) remedies?

(23) Discuss the function of expert planners in exclusionary zoning litigation:

[a] At what stage of such litigation should expert planners be utilized?

[b] Should a trial judge delegate rezoning authority to such expert, and embody the product of such rezoning in the trial court judgment?

[c] How should such expert be selected and paid?

(24) Should the trial judge assume a supervisory role over the implementation of his order? If so, how long should such role continue?

APPENDIX B

ARGUMENT SCHEDULE—ZONING CASES ON FOR SEPTEMBER 22-23-24

The argument schedule has been arranged by subject matter in segments. Within each segment, the attorney or attorneys for plaintiffs and related *amici* are listed first. Those arguing for defendants and related *amici* are listed second. There is a total of 14 segments arising out of a four-part outline. The general subjects are as follows:

I. Scope of the Doctrine
II. Causes of Action Maintainable Under the Doctrine and Proofs Required
III. Remedies
IV. Policy Issues

The questions addressed to counsel by the Court have been reallocated to the vaious [sic] segments in accordance with the outline. Each segment will identify those questions which will be covered in parentheses.

SUBJECT	INDIVIDUAL ARGUING	TIME REQUESTED	PARTY REPRESENTED
	(Portion of outline segment to be covered by that arguer follows in parentheses)		(P) = plntfs (D) = defendants (PA) = plaintiff *amicus* (DA) = defendant *amicus*
I. SCOPE OF THE DOCTRINE (Qs #1, 7, 8, 11, 12, 15, 18, 19, 20) General Introduction and Overview			
(1) A. Duty to provide the municipality's fair share of the regional need for low and moderate or least-cost housing opportunities			
1. Limited to developing municipalities? (#7)	CARL BISGAIER (*All*)	40	So. Burlington NAACP, et al. (P)

	SUBJECT	INDIVIDUAL ARGUING	TIME REQUESTED	PARTY REPRESENTED
		(Portion of outline segment to be covered by that arguer follows in parentheses)		(P) = plntfs (D) = defendants (PA) = plaintiff *amicus* (DA) = defendant *amicus*
	2. Requirements for bona fide compliance (#18, 19, 20)	ALFRED L. FERGUSON (*Overview*)		
	3. Relevance of motive for inclusion of restrictive devices in the ordinance (i.e., fiscal zoning, discrimination) (#8, 18)	J. WILLIAM BARBA (*Specific examples*)	10 15	Chester (D) Legislators (DA)
(2)	B. Duty to provide alternatives to substandard housing for the municipality's resident poor (15) 1. Limited to developing municipalities? C. Duty to provide housing opportunities for employees working within the municipality (15) 1. Limited to developing municipalities?	MARILYN MORHEUSER (*All*) WILLIAM C. MORAN, JR. (*All*)	15 10	Urban League of Greater New Brunswick (P) Cranbury (D)
(3)	D. Is the doctrine limited to low and moderate housing? (i.e., Can "least-cost" be luxury; does a duty to provide varied housing opportunities extend to middle income and luxury housing) (1)	RICHARD F. BELLMAN (*All*) MICHAEL J. HERBERT (*Concentration on "middle income"*) E. CARTER CORRISTON (*All*)	40 10 45	Urban League of Essex Co. (P) Round Valley, Inc. (P) Mahwah (D)
(4)	II. CAUSES OF ACTION MAINTAINABLE UNDER THE DOCTRINE, (Qs #2, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22) A. Presumptive invalidity (10) 1. Restrictive devices (a) Is large-lot zoning (i.e., 5 acre) per se invalid? (9) (b) Are prohibitions of mobile homes per se invalid? (c) When will a presumption of invalidity attach?	PROOFS REQUIRED S. DAVID BRANDT (*All*) ALFRED L. FERGUSON (*1.(a)*) J. WILLIAM BARBA (*1.(b)*) JOSEPH L. STONAKER (*1.(c)*)	15 5 10 10	Davis Enterprises (P-Intervenor) Chester (D) Legislators (DA) Plainsboro (D)

SUBJECT	INDIVIDUAL ARGUING	TIME REQUESTED	PARTY REPRESENTED
	(Portion of outline segment to be covered by that arguer follows in parentheses)		(P) = plntfs (D) = defendants (PA) = plaintif *amicus* (DA) = defendant *amicus*
2. Fair share disputes (a) General perception of exclusion ("numberless") (b) Numerical demonstration of failure to provide a fair share of the regional need (13, 14) (5) (c) When will a "presumption of invalidity" attach in a fair share case? (1) How is the relevant region determined? (13, 14, 15) (2) What factors enter into a fair share demonstration/allocation? (22)	KENNETH E. MEISER: *(All)* MARTIN E. SLOANE: *(2.(c)(1))* DANIEL S. BERNSTEIN *(2.(a),(b))* FRANCIS SUTTON *(2.(c))* BARRY C. BRECHMAN *(2.(c)(1))* ROGER M. CAIN *(2.(c)(2))*	30 15 15 15 15 10	Pub. Adv. (PA) Natl. Committee Against Discrimination in Housing, Inc. (PA) Piscataway (D) Clinton (D) So. Brunswick (D) Clinton (D)
B. Limitations on parties (i.e., Can a builder sue without seeking specific-site relief?) (6) C. Joinder of Parties (2) D. Limitations on remedies available (i.e., builder's remedy to a developer who plans to build luxury housing) (21)	PHILIP LINDEMAN, II *(All)* ALFRED L. FERGUSON *(All)*	15 10	Caputo, et al. (P) Chester (D)
E. Effect of time of decision rule on an ordinance under review (16) (7)(8) III. REMEDIES (Qs #10, 16, 17, 21, 22, 23, 24) A. Redrafting of subject ordinance (21, 22) 1. Effect of time of decision rule with respect to a) trial court (17) and b) appellate review (16)	ROBERT BENBROOK *(E.)* ARNOLD K. MYTELKA *(III.A.)* BERTRAM E. BUSCH *(All)*	15 15 35	Glenview Dev. Co. (P) City of Newark (PA) East Brunswick (D)

SUBJECT	INDIVIDUAL ARGUING	TIME REQUESTED	PARTY REPRESENTED
	(Portion of outline segment to be covered by that arguer follows in parentheses)		(P) = plntfs (D) = defendants (PA) = plaintif *amicus* (DA) = defendant *amicus*
B. Appointment of experts; master (23) C. Trial court retention of jurisdiction (24) (9) D. Effect of non-compliance (i.e., time limit on compliance—see *Orgo Farms v. Colts Neck*	ARNOLD K. MYTELKA *(BCD)* CARL BISGAIER *(B—specific examples)* ROGER M. CAIN *(All)* ALFRED L. FERGUSON *(All)*	15 10 10 10	City of Newark (PA) So. Burl. NAACP (P) Clinton (D) Chester (D)
E. Specific-site relief (builder's remedy) 1. When appropriate 2. Proofs required (a) Presumptive entitlement (10) (1) To variance (10) (2) To specific zoning [Burdens of Proof] (b) Limitation—low and moderate income housing only? (with concomitant municipal duty to get subsidies, etc.) (c) Environmental factors (d) Policing of remedy (24)	ARNOLD K. MYTELKA *(All)* MICHAEL J. HERBERT *(All)* RICHARD F. BELLMAN *(2.b)* ALFRED L. FERGUSON *(All)* FRANCIS SUTTON *(All)*	15 30 5 10 15	Newark (PA) Round Valley (P) Urban League of Essex Co. (P) Chester (D) Clinton (D)
IV. *POLICY ISSUES* (Qs #3, 4, 5, 6, 11, 12) A. Practical effect of Supreme Court's decision on exclusionary zoning (5) 1. On construction of new housing (11) 2. On changes (either voluntary or compelled) in zoning ordinances 3. Economic feasibility of providing low and moderate income housing (6) 4. Effect on revitalization of urban areas (6) 5. Effect on preservation of agricultural areas	CARL BISGAIER *(All)* BARRY C. BRACHMAN *(A.1. & 2.)* JOHN E. PATTON *(A.3&4)* RICHARD G. O'BRIEN *(A.5)*	15 10 15 15	So. Burl. NAACP (P) So. Brunswick (D) Mt. Laurel (D) Franklin Twp. (D)

	SUBJECT	INDIVIDUAL ARGUING	TIME REQUESTED	PARTY REPRESENTED
		(Portion of outline segment to be covered by that arguer follows in parentheses)		(P) = plntfs (D) = defendants (PA) = plaintif *amicus* (DA) = defendant *amicus*
(12)	B. Separation of powers questions 1. Responses to exclusionary zoning problem (a) Legislative—Municipal Land Use Law (3) —Other legislation	S. DAVID BRANDT *(All)*	10	Davis Enterprises (P Int.)
		J. WILLIAM BARBA *(All)*	10	Legislators (DA)
		JOHN E. PATTON *(All)*	10	Mt. Laurel (D)
(13)	2. Given the underlying assumptions and initial purposes of the State Development Guide Plan and the Housing Allocation Report related thereto, to what extent can either [sic] or both be adapted to provide the framework for compliance with the obligations of the *Mt. Laurel* doctrine? For instance, given the expressed constitutional and statutory objectives of the *Mt. Laurel* doctrine, would a judgment requiring a particular municipality, found to be in violation of the constitutional obligation, to provide opportunities for housing in accordance with the allocation, tend to serve the policies underlying the constitutional obligation? Given the nature of the plan and allocation, and the constitutional obligation of the *Mt. Laurel* doctrine, what are the advantages and disadvantages of such use of the allocation, and the arguments for and against same?	KENNETH E. MEISER *(All)*	20	Public Advocate (PA)
		ARNOLD K. MYTELKA *(All-different approach)*	10	Newark (PA)
		J. WILLIAM BARBA *(All)*	15	Legislators (DA)
		DANIEL S. BERNSTEIN *(All)*	15	Piscataway (D)
(14)	C. Role of the courts in exclusionary zoning situations 1. Resolution of disputes re: exclusion	MARILYN MORHEUSER *(All)*	20	Urban League of Greater New Brunswick (P)
	2. Implementation and enforcement of fair share plans and builder's remedies	J. WILLIAM BARBA *(C.1)*	10	Legislators (DA)
		ALFRED L. FERGUSON *(C.2)*	10	Chester (D)