# GUIDELINES FOR THE PRACTITIONER: THE IMPACT OF *MOUNT LAUREL II* ON NEW JERSEY ZONING AND PLANNING PROCEDURE AND PRACTICE

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## I. INTRODUCTION

If the New Jersey Supreme Court, in its landmark 1975 decision of *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I)*[1] established a constitutional right to affordable housing,[2] the ensuing eight years saw little recognition of that right.[3] In 1983, however, in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II)*,[4] the court established procedures and set forth unique remedies designed to breathe life into *Mount Laurel I*.[5] This article will review the substantial changes in New Jersey zoning and planning procedures created by *Mount Laurel II*, and will itemize some of the critical questions which should be considered by *Mount Laurel* litigants.

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[1] 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter cited as *Mt. Laurel I*].

[2] *See id.* at 179-82, 336 A.2d at 727-29. As the *Mount Laurel I* court noted: "It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all land use regulation." *Id.* at 179, 336 A.2d at 727; *see also* Comment, *Exclusionary Zoning: The* Mount Laurel *Doctrine and the Implications of the* Madison Township *Case*, 8 SETON HALL L. REV. 460, 467 n.24 (1977).

[3] *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977) (numerical specification of municipalities' "fair share" obligation not required); Pascack Ass'n, Ltd. v. Mayor of Township of Washington, 74 N.J. 470, 379 A.2d 6 (1977) (zoning ordinance in developed single-family unit township which precluded all multifamily housing upheld in disregard of regional shortage); Fobe Assocs. v. Mayor of Demarest, 74 N.J. 519, 379 A.2d 31 (1977) (zoning ordinance valid despite absolute prohibition of multifamily residential buildings).

[4] 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter cited as *Mt. Laurel II*].

[5] The *Mount Laurel II* court discussed those measures which would be available for municipalities to meet their "*Mount Laurel* obligation." *See generally Mt. Laurel II*, 92 N.J. at 258-78, 456 A.2d at 441-62. Further, the court gave an overview of those remedies available to litigants who successfully challenged exclusionary zoning ordinances. *See generally id.* at 278-92, 456 A.2d at 452-59.

### A. *Prelude to* Mount Laurel II

During New Jersey's post-World War II boom period of suburban expansion, exclusionary zoning[6] proved to be an enormously effective device to bar low and moderate income families from entering suburban communities.[7] Throughout this period the New Jersey Supreme Court sidestepped these local segregative efforts by upholding a series of exclusionary zoning ordinances.[8] By the 1960's, however, the negative results of this municipal practice became disturbingly apparent. As land in suburbia became more scarce and thus more costly, only fairly affluent citizens were able to pay the additional exclusionary zoning "toll" necessary to acquire suburbia's expensive housing. Many of New Jersey's poorer citizens, with little hope that affordable homes would be built for them, found themselves locked into the state's deteriorating older cities. The depth of the housing crisis that developed during the 1960's was underscored by clear warnings which demonstrated the need for change, from the spread of rent control[9] to the Newark riots of 1967.[10] Nevertheless, the

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[6] "Exclusionary zoning" refers to those methods of land use regulation which "have either the purpose or effect of excluding or sharply limiting low- and moderate-priced housing from the municipality in question, and thus that exclude persons of low or moderate income." Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760, 760 n.1 (1976). The term is difficult to define precisely because in a sense all zoning laws are "exclusionary" since they preclude tracts of land from being put to whatever use an owner desires; in the context of "open housing," however, it focuses on discrimination based on differences in wealth or income. *See* Comment, *Exclusionary Zoning and a Reluctant Supreme Court*, 13 WAKE FOREST L. REV. 107, 107 n.4 (1977). *See generally* Burns, *Class Struggle in the Suburbs: Exclusionary Zoning Against the Poor*, 2 HASTINGS CONST. L.Q. 179 (1975); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

[7] FAIR SHARE HOUSING: A CONFERENCE ON NEW JERSEY ISSUES (Rutgers Press, Apr. 1979) [hereinafter cited as FAIR SHARE HOUSING]; Comment, *supra* note 6, at 108.

[8] Historically, the New Jersey Supreme Court has given great deference to municipal zoning determinations. In Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), the court noted that the constitutional revision in 1947 and the revision of the enabling zoning statutes in 1948 had expanded the scope of municipal zoning power. *Id.* at 170, 89 A.2d at 695. Additionally, the court asserted that "by *Art.* IV, *Sec.* VII, *par.* 11 of the *Constitution* of 1947 . . . we are required to construe the constitutional and statutory provisions pertaining to zoning liberally in favor of a municipality." *Id.* Accordingly, the court upheld virtually all "reasonable" uses by a municipality of its zoning powers. *See, e.g.*, Fanale v. Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958) (zoning ordinance prohibiting construction of any multiple family dwelling upheld).

[9] At the time that *Mount Laurel I* was decided, over 110 New Jersey municipalities had rent control ordinances. N.Y. Times, Mar. 7, 1976, § 8, at 1, col. 1. Many authorities have recognized restrictive zoning ordinances as a primary cause of the rent control movement. *See, e.g.*, Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenants Movement*, 28 HASTINGS L.J. 631, 633 (1977).

[10] *See* Comment, *Recovery From Urban Riots—Toward A Comprehensive Plan*, 33 ALB. L. REV. 582 (1969) (discussing better housing as solution for inner city unrest).

New Jersey Legislature, perhaps more sensitive to the desires of suburban voters than to the needs of city dwellers, ignored these omens.

1. Gubernatorial Frustration

The executive was the first branch of New Jersey's government to recognize the need for the construction of affordable housing for low and moderate income groups, and to attempt to fashion a solution. In 1970, Governor William Cahill, in a special message to the New Jersey Legislature, pointed to the "systematic exclusion of many people, including a large segment of our middle income sector"[11] from New Jersey's suburbs, and warned of the "devastating effect" that exclusionary zoning was visiting upon the state's cities.[12] Despite this and similar admonitions throughout his one-term administration, Governor Cahill was generally ignored by the legislature.[13] His successor, Governor Brendan Byrne, responding to the *Mount Laurel I* decision of March 1975, embarked upon an ambitious housing allocation program designed to eradicate exclusionary zoning.[14] Faced with the same lack of legislative enthusiasm as was his predecessor, Governor Byrne decided to take action. In April 1976, he issued Executive Order No. 35, which ordered the Director of the Division of State and Regional Planning to "prepare State housing goals to guide municipalities in adjusting their municipal land-use regulations in order to provide a reasonable opportunity for the development of an appropriate variety and choice of housing to meet the needs of the residents of New Jersey."[15] Governor Byrne took further action in December 1976

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[11] *A Blueprint for Housing in New Jersey*, A Special Message by Governor William T. Cahill, at 11 (Dec. 7, 1970).

[12] *Id.*

[13] *See* FAIR SHARE HOUSING, *supra* note 7, at 33.

[14] *Id.* at 34-35. Governor Byrne noted the socio-political ills which arose in part as a result of exclusionary zoning, including the depressed housing industry, capital expenditures due solely to the distance of suburbs from centers of employment, unemployment among tradesmen, and increased housing costs. *See* First Annual Message to Legislature by Governor Brendan T. Byrne, at 11 (Jan. 14, 1975). In 1975, a report entitled "An Analysis of Low and Moderate Income Housing Needs in New Jersey" was published by the Department of Community Affairs. The report "documented a serious shortage of adequate and affordable housing," which prompted Governor Byrne into action. *See* FAIR SHARE HOUSING, *supra* note 7, at 34.

[15] Exec. Order No. 35, 1976 N.J. Laws 665, *reprinted in* FAIR SHARE HOUSING, *supra* note 7, at 88. Executive Order No. 35 served as notice that the Governor was fully aware of the severe lack of adequate housing in New Jersey and the role which restrictive land use regulations played in exacerbating the shortage. *See id.* at 87. The Director was not only ordered to determine the "state housing need," but also to "formulate a 'State Housing Goal' and allocate this goal to each county or group of counties." *Id.* at 88-89. The Director was to consider county-wide need,

with the issuance of Executive Order No. 46, which ordered the Director of the Division to "review and if necessary modify" the preliminary housing allocation goals drafted in response to Executive Order No. 35.[16] This revised plan resulted in the promulgation of the State Development Guide Plan (SDGP).[17] In 1981, however, Governor Byrne's two executive orders were rescinded by Governor Thomas Kean, who did not share his two predecessors' enthusiasm for the *Mount Laurel I* doctrine.[18]

2. Legislative Inaction

The initiatives taken by Governors Cahill and Byrne failed to inspire action by the New Jersey Legislature. In 1975, Senator Martin Greenberg (D-Essex), a former law partner of Governor Byrne, proposed a Comprehensive and Balanced Housing Plan Bill.[19] This pro-

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employment growth, fiscal capacity, site availability, and other factors in allocating the county housing goals. *Id.* at 89. Further, he was to suballocate housing goals on the municipal level, or delegate this responsibility to each county's planning board. *Id.* at 90-91. Those municipalities which were successful in implementing programs to meet their "fair share" of low and moderate income housing needs were to be rewarded with increased state aid for municipal public works projects. *Id.* at 91-92.

[16] Exec. Order No. 46, 1976 N.J. Laws 685, *reprinted in* FAIR SHARE HOUSING, *supra* note 7, at 93.

[17] N.J.DEP'T OF COMMUNITY AFFAIRS, DIVISION OF STATE AND REGIONAL PLANNING, STATE DEVELOPMENT GUIDE PLAN (May 1980) [hereinafter cited as SDGP]. The SDGP provides a statewide blueprint for future development . . . [as] the only official determination of the state's plan for its own future development and growth." *Mt. Laurel II*, 92 N.J. at 225, 456 A.2d at 423-24. The SDGP was patterned after other regional planning documents, such as those prepared by the Tri-State Regional Planning Association and the Delaware Valley Regional Planning Association. *Id.*, 456 A.2d at 424. Chief Justice Wilentz described the origins of the SDGP as follows:

> The SDGP resulted from an intensive study of all aspects of New Jersey's current growth and development considered in conjunction with the "physical assets" of the state: its natural resources, open spaces, farmland, "infrastructure" (transportation, sewage facilities, water supplies and facilities), including the location of present intensive development, employment centers, community facilities, recreation areas, etc.

*Id.* (footnote omitted).

On the concept map, drawn in conjunction with the SDGP's master plan, the state was divided into six basic areas: growth, limited growth, agriculture, conservation, pinelands, and coastal zones. The concept map made it clear how every municipality in the state should be classified. *Id.* The county concept maps are reproduced in the Appendix to the *Mount Laurel II* opinion. *See Mt. Laurel II*, 92 N.J. at 354-74, 456 A.2d at 491-510.

[18] *See* Exec. Order No. 6, slip form (May 4, 1982). The Governor's executive order, in rescinding Executive Orders Nos. 35 and 46, undermined the Housing Allocation Report (HAR) which had been prepared pursuant to these latter orders. *See Mt. Laurel II*, 92 N.J. at 251, 456 A.2d at 437. The SDGP, however, prepared pursuant to a statutory grant of authority, remained unaffected. *Id.* at 225, 456 A.2d at 423.

[19] S. 505, 198th N.J. Leg., 1st Sess. (1978) (Greenberg Bill), *reprinted in* FAIR SHARE HOUSING, *supra* note 7, at 96-136.

posed legislation, designed to create a "better distribution of housing opportunities"[20] through the implementation of mandatory housing quotas,[21] was initially supported by the League of Municipalities.[22] The League withdrew its support for the Greenberg Bill, however, when its members objected to abandonment of home rule in favor of a housing allocation plan to be prepared by a new entity, the State Council on Housing and Site Location Planning.[23] Ultimately, the proposed legislation died in committee after the $700,000 figure originally appropriated in the bill for county and municipal housing studies was reduced to $75,000.[24]

In 1975, the New Jersey Legislature enacted the Municipal Land Use Law (MLUL).[25] Despite the fact that this legislation was passed after the *Mount Laurel I* decision, the MLUL was merely a procedural device—it "was not a legislative effort aimed at creating balanced housing opportunities in New Jersey."[26] Although it had the opportunity to do so, the legislature did not incorporate the concept of low and moderate income housing into the MLUL as a goal of municipal land use planning and development. Thus today the legislatively created MLUL coexists with the judicial land use law developed in *Mount Laurel I* and *II;* there is no precise synchronization of these two bodies of law.

### 3. Judicial Action and Confusion

In *Mount Laurel I* the New Jersey Supreme Court, filling the void left by the legislature, undertook an activist role in declaring a new principle which placed an affirmative obligation on municipalities to encourage the development of economically diverse communities.[27] Nevertheless, in subsequent decisions the court seemed to re-

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[20] FAIR SHARE HOUSING, *supra* note 7, at 96-97.

[21] *See id.* at 101-02.

[22] *Id.* at 58.

[23] *Id.* at 76. Fred Stickel III, speaking for the League of Municipalities, said that the League believed that "[t]he more that local governments are involved in the planning process, the more effective and acceptable will be the ultimate results." *Id.* Stickel further noted that the absence of local involvement would preclude League approval. *See id.*

[24] *Id.* at 76-77.

[25] N.J. STAT. ANN. §§ 40:55D-1 to -99 (West cum. Supp. 1983-1984) [hereinafter cited as MLUL]. See *infra* notes 37-52 and accompanying text for a discussion of the MLUL.

[26] *Mt. Laurel II*, 92 N.J. at 320, 456 A.2d at 474. The *Mount Laurel II* court noted that the legislative history of the MLUL indicated that it was intentionally separated from S. 505. *See id.*

[27] *See Mt. Laurel I*, 67 N.J. at 174, 336 A.2d at 724-25. The court asserted that every "developing municipality" must "by its land use regulations, presumptively make realistically

treat from this doctrine. In *Oakwood at Madison, Inc. v. Township of Madison*[28] the court subtly altered "the mandate of *Mount Laurel*" by speaking in terms of a municipality's "*bona fide*" efforts at providing "least cost housing"[29] rather than in the *Mount Laurel* court's terms of zoning for low and moderate income housing.[30] In *Pascack Association, Ltd. v. Mayor of Washington Township*[31] the court established an artificial "developing/developed" dichotomy by holding that a moderate to low density, upper-middle income township of mostly single-family homes was not required to zone for middle income multi-family housing despite the deficiency of such housing in Bergen County.[32]

In the wake of the *Pascack* and *Madison Township* decisions, New Jersey's lower courts began to circumscribe the *Mount Laurel I* doctrine.[33] In 1983, however, the New Jersey Supreme Court in

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possible an appropriate variety and choice of housing . . . [and] it cannot foreclose the opportunity . . . for low and moderate income housing and in its regulations must affirmatively afford that opportunity. . . ." *Id.*, 336 A.2d at 724.

[28] 72 N.J. 481, 371 A.2d 1192 (1977).

[29] *See generally id.* at 510-14, 371 A.2d at 1206-08 (comparison of "least cost" housing with "low and moderate income" housing). "Least cost" housing was defined by the *Mount Laurel II* court 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).

[30] *Mt. Laurel I*, 67 N.J. at 174, 336 A.2d at 724. In addition to the "least cost" housing option as a means of escape from *Mount Laurel* obligations, the court noted that it would not "require the trial court to specify a pertinent region or fix a fair share housing quota." *Madison Township*, 72 N.J. at 543, 371 A.2d at 1223. In fact, the court directed that trial courts simply examine whether municipalities have made "*bona fide* efforts toward the elimination or minimization of undue cost-generating requirements." *Id.* at 499, 371 A.2d at 1200 (emphasis in original). One commentator has suggested that the court utilized several practical considerations in *Madison Township* in deciding to restrict its mandate to generalities, including the court's realization that numerical housing goals could not be readily translated into substantive changes in zoning ordinances. *See* Comment, *supra* note 2, at 482.

[31] 74 N.J. 470, 379 A.2d 6 (1977).

[32] *Pascack*, 74 N.J. at 477, 379 A.2d at 9; *see also* Fobe Assocs. v. Mayor of Demarest, 74 N.J. 519, 379 A.2d 31 (1977) ("developed" community's absolute ban on multifamily buildings upheld).

[33] *See* Glenview Dev. Co. v. Franklin Township, 164 N.J. Super. 563, 397 A.2d 384 (Law Div. 1978) (township's failure to shed rural characteristics precludes imposition of *Mount Laurel* obligation), *aff'd in part, rev'd in part sub nom.* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983); Urban League of Essex County v. Township of Mahwah, No. L-17112-71 (Law Div. Mar. 8, 1979 (township's bona fide efforts to meet *Mount Laurel* obligation sufficient even though lowest new housing units in township were priced at $70,000), *rev'd sub nom.* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d (1983); Caputo v. Township of Chester, No. L-42857-74 (Law Div. Oct. 4, 1978) (builder's remedy denied even after ordinance held unconstitutional),

*Mount Laurel II* voiced the belief that there was "widespread noncompliance" with its original mandate, and expressed its determination to use a "strong judicial hand" to accomplish the *Mount Laurel* goal of creating low and moderate income housing.[34] In so doing, the *Mount Laurel II* court identified the SDGP, an executive agency creation, as the proper standard by which to determine a municipality's *Mount Laurel* obligation.[35] Moreover, the court set up "administrative agencies" in the form of judicial panels to implement the mandate.[36]

4. Existing Land Use Law: A Hybrid of Judicial Substantive Law and Legislative Procedural Law

The supreme court implied in *Mount Laurel II* that its decision could operate within the procedural confines of the MLUL.[37] Nevertheless, the court then supplemented existing MLUL procedures by creating a unique three judge super-zoning agency to hear *Mount Laurel II* cases.[38] By giving the *Mount Laurel II* judges authority to supersede exclusionary zoning action undertaken by municipalities under the MLUL, the court overrode the legislature's confidence in municipalities, at least with regard to exclusionary zoning cases.

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*aff'd in part, rev'd in part sub nom.* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

[34] *Mt. Laurel II*, 92 N.J. at 199, 456 A.2d at 410.

[35] *Id.* at 225, 456 A.2d at 423-24. The court asserted that use of the SDGP in *Mount Laurel* disputes would "ensure that the imposition of fair share obligations will coincide with the State's regional planning goals and objectives." *Id.*, 456 A.2d at 423; *see supra* note 17.

[36] *See Mt. Laurel II*, 92 N.J. at 216, 456 A.2d at 419. The court stated that:

> Any future *Mount Laurel* litigation shall be assigned only to those judges selected by the Chief Justice with the approval of the Supreme Court. The initial group shall consist of three judges, the number to be increased or decreased hereafter by the Chief Justice with the Court's approval. The Chief Justice shall define the area of the State for which each of the three judges is responsible: any *Mount Laurel* case challenging the land use ordinance of a municipality included in that area shall be assigned to that judge.

*Id.* The *Mount Laurel II* court expressed the belief that a consistency in analyzing regional need and in determining "fair share" obligations would result from the repeated use of the same judges. *Id.* On June 2, 1983 the supreme court issued an order designating the three judges and assigning each to a particular region. Each judge will be assigned any *Mount Laurel* case filed within his region. *See* 111 N.J.L.J. 638 (June 16, 1983).

[37] *See Mt. Laurel II*, 92 N.J. at 318-21, 456 A.2d at 472-74. The court reviewed excerpts from the legislative history of the MLUL which indicated that the legislature's intent was to create a procedural mechanism and that enactment of the MLUL "was not a legislative effort aimed at creating balanced housing opportunities in New Jersey." *Id.*

[38] *Id.* at 216, 456 A.2d at 419; *see supra* note 36 and accompanying text.

The mechanics of the zoning process under the MLUL are fairly simple. The law provides that a municipality may establish a planning board[39] which is empowered to create, after public hearings, a Master Plan for the use of town lands.[40] This Master Plan, which must be updated every six years,[41] must contain ten statutorily-described elements.[42]

When the planning board completes its Master Plan recommendation, the final plan is forwarded to the municipal governing body, which may then adopt an official map of the municipality.[43] The official map "shall reflect the appropriate provisions of any municipal master plan"[44] submitted by the planning board, but the governing body may reject any portion of that map by a majority vote.[45] Before the official map can be adopted, the planning board has a statutory right to respond to any proposed changes in the Master Plan.[46]

This procedure establishes a six year blueprint for the development and growth of the municipality. The governing body must adopt or amend town zoning ordinances consistent with the Master Plan,[47] although zoning ordinances which are inconsistent with the plan may also be adopted by a majority vote of the governing body.[48] The

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[39] N.J. STAT. ANN. § 40:55D-23(a) (West Cum. Supp. 1983-1984). The planning board would consist of seven or eight members to be chosen from four classes of individuals delineated in the statute. *Id.*

[40] *Id.* §§ 40:55D-25, -28.

[41] *Id.* § 40:55D-89. The statute specifies that a report be prepared to enunciate the problems and goals concerning land development which existed in the preceding reexamination time period; the degree of change in those problems and objectives; the degree of change in the underlying principles on which the master plan is based; and a recitation of recommendations designed to meet the conditions found in the municipality at the time the report is made. *Id.*

[42] *Id.* § 40:55D-28. The master plan serves as a standard of land use and should consist of maps, diagrams, and text in order to convey the municipality's land use and development scheme. Where appropriate, the plan must also include a recitation of the conceptual underpinnings of the plan; a land use plan element; a housing plan element; a circulation plan element; a utility plan element; a community facilities plan element; a recreation plan element; a natural resources conservation plan element; an energy conservation plan element, and a report outlining the technical foundation of the plan. *Id.*

[43] *Id.* § 40:55D-32.

[44] *Id.*

[45] *Id.* If any portion of the map is rejected, however, reasons for so doing must be recorded in the minutes of the meeting of the governing body at which the official map is adopted. *Id.*

[46] *Id.* §§ 40:55D-32, -26.

[47] *Id.* § 40:55D-62.

[48] *Id.* As with the governing body's power to reject the proposed official map, ordinances neither consistent with nor designed to effectuate the plan may be adopted, but the reasons for adoption must be recorded in the minutes of the meeting of the governing body at which the ordinance is adopted. *See supra* notes 44-46 and accompanying text.

planning board is responsible for subdivision control and site plan review, and the zoning board of adjustment is primarily responsible for the granting of variances.[49]

The two *Mount Laurel* decisions supplement this statutory zoning procedure by outlawing zoning which ignores a municipality's duty to absorb its fair share of regional housing needs. *Mount Laurel I* required that a municipality undertake a negative duty: to refrain from engaging in exclusionary zoning practices.[50] Chief Justice Wilentz of the New Jersey Supreme Court went further in *Mount Laurel II* by imposing on municipalities an affirmative duty to take action to assure that their fair share of low and moderate income housing would be built.[51] Further, the court outlined specific judicial remedies to be applied when a municipality fails to meet its affirmative *Mount Laurel II* obligation.[52]

Clearly, the affirmative duty imposed on municipalities by *Mount Laurel II* has altered the task of municipal planning boards to some degree. Similarly, the provision in the decision for judicial relief, should the municipality fail to meet its obligation, alters the position of those who may challenge a zoning ordinance. This article will explore the implications of *Mount Laurel II* on all potential litigants, particularly plantiff-builders.

## II. Questions a Potential *Mount Laurel* Litigant Should Ask

Whether the potential litigant is a municipality, a builder, or a public interest group, it is essential for the party to determine whether the municipality in question is subject to the *Mount Laurel II* obliga-

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[49] *See* N.J. Stat. Ann. §§ 40:55D-25, -37 (West Cum. Supp. 1983-1984) (powers of planning board); *id.* § 40:55D-70, (powers of board of adjustment).

[50] *See Mt. Laurel I*, 67 N.J. at 174-75, 336 A.2d at 724-25.

[51] *Mt. Laurel II*, 92 N.J. at 260-61, 456 A.2d at 442; *see infra* notes 113-14 and accompanying text.

[52] *Mt. Laurel II*, 92 N.J. at 278-90, 456 A.2d at 452-58. The judicial remedies include the power of the trial court to order the revision of the challenged zoning ordinance within 90 days. *Id.* at 281, 456 A.2d at 452. A master may also be appointed by the court to assist the municipality in making the revisions. *Id.* If the revised ordinance fails to meet the *Mount Laurel* requirements, the court may void the existing ordinances, or parts thereof, order the adoption of specific ordinances, require the approval of applications to build certain projects, or order the delay of construction projects in the municipality until the ordinances are satisfactorily revised. *Id.* at 285-86, 456 A.2d at 455. The trial court may also determine that a developer is entitled to a builder's remedy. *Id.* at 278-81, 456 A.2d at 452-53. *See generally infra* notes 93-114 and accompanying text.

tion and, if so, whether that obligation can realistically be fulfilled. In order to do so, it is recommended that the litigant retain a qualified planner who has had experience in state government or in *Mount Laurel* litigation. Specifically, the planner should be asked the following questions:

A. *What is the Impact of the SDGP Designation on this Municipality?*

The SDGP designation for each county serves as the "blue print for implementation of the *Mount Laurel* doctrine."[53] The *Mount Laurel II* court substituted the SDGP standard of "growth areas" for the "developing municipalities" standard that it had set forth in *Mount Laurel I*.[54]

The SDGP is not, however, conclusive as to a municipality's *Mount Laurel* obligation. The court, recognizing that the SDGP was neither intended nor accurately prepared for *Mount Laurel* uses, provided grounds for challenging its validity.[55] If the litigant can show that the SDGP designation for the municipality is "arbitrary and capricious" or that the municipality "has undergone a significant transformation that renders the SDGP's characterization of it inappropriate," the fair share obligation may be eliminated or modified.[56]

The recent case of *Orgo Farms & Greenhouses v. Colts Neck Township*[57] provides the first post-*Mount Laurel II* judicial analysis of the impact of the SDGP designation on the builder's remedy. In *Orgo Farms*, Judge Serpentelli held that the builder's remedy is not restricted to a "growth area," but may, once the developer has satisfied the prerequisites set forth in *Mount Laurel II*,[58] be granted for land located in an area designated a "limited growth area" on the SDGP.[59]

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[53] *Mt. Laurel II*, 92 N.J. at 226, 456 A.2d at 424; *see supra* note 17.

[54] *Mt. Laurel II*, 92 N.J. at 240 n.15, 456 A.2d at 431 n.15.

[55] *Id.* at 239-40, 456 A.2d at 431.

[56] *Id.* at 240, 456 A.2d at 431-32. A third exception would apply if the SDGP concept map was not revised by January 1, 1985. *Id.* A *Mount Laurel* obligation could be imposed by the trial court if "subsequent to the date of this decision the municipality, containing no 'growth area,' encourages or allows commercial, residential or industrial development or, if it contains some 'growth area,' encourages or allows development outside of that area." *Id.* at 240-41, 456 A.2d at 432.

[57] 192 N.J. Super. 599, 472 A.2d 812 (Law Div. 1983).

[58] See *infra* notes 100-01 and accompanying text for a discussion of these requirements.

[59] *Orgo Farms & Greenhouses*, 192 N.J. Super. at 606-07, 611, 471 A.2d at 815. The court noted that the SDGP does not preclude the use of a limited growth area to accommodate growth under all circumstances. Where the facts "*may* demonstrate that a builder's remedy would comport with sound planning and have no negative environmental impact," it would be illogical to conclude that such a remedy should not be available. *Id.* at 606, 471 A.2d at 815 (emphasis in original).

Any municipality or future *Mount Laurel* litigant must therefore address the threshold issue of whether the SDGP designation for the area in which the subject parcel is located may be challenged on any of the grounds set forth by the *Mount Laurel II* court.[60] Further, if the litigant is a developer, he may, on the basis of *Orgo Farms*, obtain a builder's remedy despite the location of the proposed building site in a limited growth area.[61] These determinations should be made by the litigant at the earliest possible stage, preferably prior to filing suit. At least one of the three *Mount Laurel* judges has indicated that it is his policy to hold bifurcated proceedings, thus isolating the issue of the validity of the SDGP designation for separate trial at a very early stage.[62]

B. *What is the Role of State Agencies?*

The New Jersey Supreme Court, in *In re Egg Harbor Associates (Bayshore Centre)*,[63] expanded the holding of *Mount Laurel II* by giving state administrative agencies the power to require the construction of low and moderate income housing as a condition of the agency's approval of a proposed development. In *Egg Harbor* a developer proposed a project which was to be located in the coastal region.[64] The New Jersey Department of Environmental Protection (DEP) had jurisdiction under the Coastal Area Facility Review Act[65] to review and approve the project. The developer challenged the right of the DEP to condition approval of the project upon the developer building ten percent low income and ten percent moderate income housing units.[66] The *Egg Harbor* court, in holding that state agencies, like municipalities, may use their authority over land use to "create housing opportunities for the poor,"[67] concluded that it would be illogical "to hold that the general welfare encompasses the provision of low and moderate income housing at the behest of municipalities, but not of state agencies."[68]

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[60] *See supra* notes 55-56 and accompanying text.

[61] *See supra* note 59.

[62] Comments of Judge Serpentelli at New Jersey State Bar Association Conference, "Litigating the *Mount Laurel II* Case" (Dec. 3, 1983).

[63] 94 N.J. 358, 464 A.2d 1115 (1983).

[64] *Id.* at 362, 464 A.2d at 1117.

[65] N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979 & Cum. Supp. 1983-1984).

[66] *Egg Harbor*, 94 N.J. at 364, 464 A.2d at 1118.

[67] *Id.* at 367, 464 A.2d at 1119.

[68] *Id.* Similarly, a recent application by a developer for a project in New Jersey's Meadowlands was subjected to the condition that the developer set aside 10% low income and 10%

The *Egg Harbor* decision raises the specter of municipalities ceding zoning authority to state administrative agencies, and also increases the possibility of conflicting decisions between state and municipal land agencies.[69] While no such conflict existed in the *Egg Harbor* case, the supreme court, in dicta, suggested that any disputes could be resolved by a cooperative effort on the part of the municipality and the state agency.[70] Whether this cooperation will prove effective in resolving any conflicts that may arise remains to be seen. In light of the *Egg Harbor* decision, however, it would be strongly advisable for the litigating attorney to analyze the role of any interested state agency and, where appropriate, to consider joining that agency as a party to any *Mount Laurel* litigation.

### C. *What is the Role of Other Parties Having a Vested Interest in the Outcome of this Suit?*

Any potential *Mount Laurel* litigant must assess the positions of others who are likely to claim an interest in the suit. Pending lawsuits demonstrate that municipalities, organizations, or individuals who were not originally joined in the litigation are often affected. For example, one pending case began with a single developer suing the Borough of Norwood because his application for permission to subdivide a 151-acre undeveloped site had been denied.[71] After *Mount*

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moderate income housing. This condition was imposed by the Hackensack Meadowlands Development Commission (HMDC), a state agency. The HMDC imposed the 10/10 fair share requirement in compliance with *Mount Laurel II* but subsequently asked the State Attorney General for guidelines regarding the percentage of housing to be set aside for low and moderate income housing. *See* Lynn, *Low-Income Units Likely in Hartz Project*, The Record, Nov. 13, 1983, at A-52, col. 2.

[69] *Egg Harbor*, 94 N.J. at 370, 464 A.2d at 1121. The potential for conflict did not go unnoticed by the court: "As a theoretical proposition, the legislative scheme leaves open the possibility for conflicting decisions from DEP and municipal land use agencies in the coastal zone." *Id.* The court found no such conflict on the issues presented to it. *Id.*

[70] *Id.* at 370-71, 464 A.2d at 1121. The court noted that:

> Any problems arising in future applications may be alleviated if, as is the practice of DEP, staff members meet with the applicant and municipal officials to discuss the effect of development on the municipality's obligation to meet its fair share of low and moderate income housing. In an appropriate case, DEP might even provide testimony in municipal proceedings on the provision of low and moderate income housing. Presumably, as here, municipal officials may also appear at public hearings conducted by DEP. If problems should develop because of the overlapping jurisdiction of the municipality and DEP, the Legislature can resolve the conflict through amendments to the statutory scheme.

*Id.*

[71] Kuhn, *Town Faces $25,000 Bill in Lawsuits on Housing*, The Record, June 30, 1983, at B-3, col. 5.

*Laurel II* was decided, the developer converted the case to a *Mount Laurel* action. Thereafter, the floodgates opened for litigants: Another developer joined the suit and sent a notice to all towns in the area that the decision in the case might affect their "fair share" obligation.[72] Eleven of these towns were granted permission to intervene in the suit on the side of Norwood.[73] Unlike the other towns, however, Englewood sided with the developer, alleging that Norwood's refusal to bear its fair share was depriving Englewood residents of an opportunity to obtain low and moderate income housing in Norwood.[74] Thereafter, Norwood counterclaimed against Englewood, alleging that Englewood was not bearing its fair share.[75] Thus, within a six month period, a suit initially involving one developer and one town had mushroomed into one involving an army of litigants, counsel, and experts.

The suit in *Morris County Fair Housing Council v. Boonton Township*[76] began with the joining of twenty-five municipalities as defendants, some of which were located in "limited growth areas,"[77] and therefore may not have had a fair share obligation. After the *Mount Laurel II* decision, the Public Advocate offered to permit those towns to withdraw from the suit.[78] Even though accepting the offer of withdrawal would have saved each of those towns their share of the substantial expenses for legal and expert witness costs, most of the towns, fearing that they could be adversely affected by the decision in an action to which they were not parties, rejected the Public Advocate's offer for dismissal.[79] The stalemate was eventually broken when

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[72] Kuhn, *Norwood Rejects Mount Laurel Pact; 2nd Suit Filed*, The Record, Sept. 16, 1983, at D-3, col. 1. The second suit was filed by a developer who proposed to build a 144-unit garden apartment complex on a nine-acre site in Norwood. At least 10% of the apartment units were targeted for low and moderate income families. *Id.*

[73] Kuhn, *11 Bergen Towns Join Suit Against Norwood Zoning*, The Sunday Record, Sept. 18, 1983, at A-53, col. 1. The 11 towns intervening in the suit were Hillsdale, Teaneck, Bergenfield, Allendale, Closter, Englewood Cliffs, Cresskill, Northvale, Rockleigh, Harrington Park, and Englewood. *Id.*

[74] *Id.*

[75] Kuhn, *Norwood Zoning Rules Struck Down*, The Record, Dec. 14, 1983, at A-47, col. 1. Although Norwood's ordinances were struck down in December 1983, no decision has yet been rendered in the Englewood–Norwood controversy. *Id.*

[76] Morris County Fair Housing Council v. Boonton Township, No. L-6001-78 PW (Law Div. Morris County filed Oct. 13, 1978).

[77] *Id.*

[78] *Id.*

[79] *Id.*

Judge Skillman agreed to permit the towns to withdraw on the condition that they would not be bound by his decision in the continuing case.[80]

The *Boonton Township* and Norwood cases demonstrate that any *Mount Laurel* suit can become extremely complicated, simply because there are so many parties that may have an interest in the outcome. Another case which illustrates the full range of potential litigants that may join a *Mount Laurel* suit is *Home Builders League of South Jersey, Inc. v. Township of Berlin*.[81] In that case the plaintiffs consisted of three private builders, a trade association (Home Builders), the Public Advocate, and the South Jersey Tenants Association.[82] Defendants, consisting of four municipalities, challenged the plaintiffs' standing. The New Jersey Supreme Court held that all the plaintiffs had standing based on their substantial interest in the outcome of the case and their adverse position to the defendants.[83]

A *Mount Laurel* litigant must therefore anticipate the possibility of participation not only by builders and municipalities, but by public interest, civic, and trade associations as well. Additionally, the litigant should consider actively soliciting participation by those groups in order to reduce legal fees, minimize surprise by identifying his adversaries at an early point in the litigation, and strengthen his bargaining position for settlement.

### D. *What Are the Infrastructure Requirements and Costs?*

A potential *Mount Laurel II* litigant must assess the impact of utility costs to the community if the low and moderate income housing is constructed. The major costs to be evaluated are those for water supply, sewer systems, and garbage disposal. A developer presenting a *Mount Laurel* density bonus proposal seeking builder's remedy relief must include a detailed analysis of infrastructure cost and impact on the community as part of his development proposal. New Jersey's

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[80] *Id.*

[81] 81 N.J. 127, 405 A.2d 381 (1979).

[82] *Id.* at 130-31, 405 A.2d at 383.

[83] *Id.* at 131-35, 405 A.2d at 383-85. The defendants argued that the plaintiffs' standing should be evaluated under the criteria for standing in federal courts as set out in Warth v. Seldin, 429 U.S. 252 (1975). *Berlin*, 81 N.J. at 131, 405 A.2d at 383. The court rejected this argument, noting that under Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 275 A.2d 433 (1971), the New Jersey standing requirements are less stringent than the federal. *Berlin*, 81 N.J. at 132, 405 A.2d at 384.

Environmental Protection Commissioner has stated that the state must establish a means of financing new water and sewer systems and other elements of the infrastructure before any comprehensive housing plan can be put into effect.[84] In the town of Mahwah, one of the defendant municipalities in *Mount Laurel II*, public controversy has arisen over the issue of how the town will raise the revenue necessary to cover the cost of new sewer lines to service its mandated *Mount Laurel II* housing.[85]

These recent developments highlight the need for towns and developers to evaluate the costs of infrastructure items as part of the fair share housing proposal. If the issue cannot be resolved voluntarily, it should be presented for judicial determination. If the town has a municipal utility authority or if the infrastructure item is governed by a state or county administrative agency, the developer should join the appropriate utility agency or authority as a defendant in the lawsuit. In addition, litigants should note that the *Mount Laurel II* court, in denying a builder's remedy, took into account the municipality's lack of a developed infrastructure.[86]

### E. *Can the Proposed Low and Moderate Income Housing Be Built?*

Although Chief Justice Wilentz, in *Mount Laurel II*, stated that the court's goal was to facilitate the building of houses through the enforcement of the New Jersey Constitution, he later pointed out that "actual construction . . . will continue to depend, in a much larger degree, on the economy, on private enterprise and on the actions of other branches of government at the national, state and local level."[87] While the opinion provides the legal mechanism to achieve this goal, it is notably devoid of any specific, detailed analysis of the economic reality of building low and moderate income housing. In its lengthy opinion, the court failed to mention a number of factors which are crucial to the issue of whether a private developer can internally subsidize development of the low and moderate income housing for a particular project: (1) the cost of land, construction, site improvements and infrastructure elements;[88] (2) the marketing impact of

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[84] *State Spurns Court On Suggestion To Revise Housing Guide Plan—Official Calls It No Basis For Zoning Policy*, The Star-Ledger, Oct. 19, 1983, at 10, col. 1.

[85] *Mahwah Delays Vote On Sewer Authority*, The Record, Nov. 18, 1983, at D-3, col. 4.

[86] *Mt. Laurel II*, 92 N.J. at 316, 456 A.2d at 472.

[87] *Id.* at 352, 456 A.2d at 490.

[88] *See* CENTER FOR URBAN POLICY RESEARCH, *MOUNT LAUREL II:* CHALLENGE & DELIVERY OF LOW-COST HOUSING (Rutgers University 1983) [hereinafter cited as RUTGERS REPORT] wherein

joining the construction of low and moderate income housing with the higher priced housing in the project; and (3) the aesthetic impact of the housing mix.

Perhaps the ultimate question arising from the *Mount Laurel II* decision is whether the builder can still earn a satisfactory profit once given the "opportunity" to build low and moderate income housing. One of the basic premises of *Mount Laurel II* is that a builder can construct and sell without profit a certain percentage of low and moderate income housing (for example, twenty percent) and then realize his gain on the sale of the remaining units.[89] There is considerable builder concern in the more prosperous areas of the state that their basic costs will prevent them from earning a fair return on a project in which they are required to build low and moderate income housing. If it is true that a builder cannot earn a satisfactory profit by the construction of low and moderate income housing in "growth designated communities," it may then become economically impossible for a municipality to meet its fair share obligation. This will require the court to permit, as a last resort, the construction of "least cost" housing.[90] Certainly, the scarcity of available housing construction subsidies on the federal and state levels[91] deprives the courts and the building industry of one means of encouraging the construction of affordable housing. This economic reality is a threshold issue in any *Mount Laurel II* case because it may make the builder's remedies illusory. As the *Mount Laurel II* court noted: "If builder's remedies cannot be profitable, the incentive for builders to enforce *Mount Laurel* is lost."[92]

Therefore, any developer who seeks a builder's remedy must analyze the economic factors of his project before he presents a proposal. This will require a comprehensive cost analysis as well as financial, accounting, and tax advice. Further, if the issue is raised in an eventual suit, it may be necessary for the court to retain a financial master to resolve these aspects of the proposal so that the homes can be

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four components of housing cost are outlined: (1) development costs (land, interim financing, public fee, and other soft costs); (2) construction costs (unit construction and improvements); (3) delivery costs (contingency, overhead, and profit); and (4) occupancy costs (principal and interest for purchase money loan, property taxes, maintenance, and insurance). *Id.* at 318-19.

[89] *Mt. Laurel II*, 92 N.J. at 267-74 & n.30, 456 A.2d at 446-50 & n.30.

[90] *See supra* note 29.

[91] *See* RUTGERS REPORT, *supra* note 88, at 86.

[92] *Mt. Laurel II*, 92 N.J. at 279 n.37, 456 A.2d at 452 n.37.

built. The financial master may require that the planning master modify and coordinate his recommendation with cost factors so that a comprehensive, workable builder's remedy can be awarded to the developer of the project.

## III. *Mount Laurel II* Procedure

*Mount Laurel II* establishes a procedure by which a plaintiff can obtain a judicial remedy in response to a municipality's failure to provide an opportunity for the construction of low and moderate income housing. This procedure begins when a plaintiff files suit alleging that a municipality located in a SDGP growth area has failed to satisfy its *Mount Laurel* obligation.[93] The case will then be assigned to one of the three *Mount Laurel* judges.[94] If the judge determines that a defendant has not met its *Mount Laurel* obligation, he can either order the municipality to amend its zoning ordinance within ninety days, or issue a builder's remedy.[95] Only after the town has complied with the trial court's order will it be permitted to appeal.[96]

The trial judge may also appoint a special master to assist the municipality in revising its zoning ordinance.[97] This appointment is not a punitive measure; rather, since the master should be a knowledgeable zoning expert, his appointment provides a means for the court to free itself from overinvolvement in the intricacies of zoning law.[98] Irrespective of whether or not the court appoints a special

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[93] *Id.* at 278-81, 456 A.2d at 452-53.

[94] *Id.* at 216-17, 456 A.2d at 419. The court reasoned that assigning all *Mount Laurel* litigation to a limited number of judges would generate the consistency and predictability needed in order to give the doctrine its full effect. *Id.* at 216, 456 A.2d at 419.

At a recent conference, the *Mount Laurel* judges indicated that they have adopted a procedure which entails early and frequent conferences with the litigants. The judges hope that these conferences will lead to settlements before trial, since the equitable issues arising in *Mount Laurel* cases are especially suited for early disposition. Comments of Judge Serpentelli at New Jersey State Bar Association Conference, "Litigating the *Mount Laurel II* Case" (Dec. 3, 1983); *see Mt. Laurel II*, 92 N.J. at 292-93, 456 A.2d at 459.

[95] *Mt. Laurel II*, 92 N.J. at 278-85, 456 A.2d at 452-55.

[96] *Id.* at 290, 456 A.2d at 458. The court adopted this position because it wished to prevent municipalities from delaying implementation of *Mount Laurel* relief through the institution of lengthy appeals. *See id. But cf. id.* at 290-91, 456 A.2d at 458 (stay can be granted by either trial or appellate court in extreme circumstances).

[97] *Id.* at 281, 456 A.2d at 453.

[98] *Id.* at 283-84, 456 A.2d at 454. Chief Justice Wilentz envisioned the master as:

> an expert, a negotiator, a mediator, and a catalyst—a person who will help the municipality select from the innumerable combinations of actions that could satisfy the constitutional obligation, the one that gives appropriate weight to the many

master, however, it may implement a variety of remedies if the municipality refuses to amend its ordinances within the time allotted.[99]

A builder's remedy is the court-ordered issuance of a building permit to a plaintiff-developer who has successfully challenged a municipal zoning ordinance on *Mount Laurel* grounds.[100] The remedy is issued provided: (1) the builder has proposed a substantial amount of low income housing; and (2) the impact of the proposal on the environment, "or other substantial planning concerns," will not clearly be contrary to sound land use planning.[101]

If a developer successfully challenges a zoning ordinance, a specific builder's remedy must be formulated. There are several problems, however, that the court will face in designing a suitable build-

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conflicting interests involved, the one that satisfies not only the Constitution but, to some extent, the parties as well.

*Id.* at 283, 456 A.2d at 454.

[99] *Id.* at 285-86, 456 A.2d at 455-56. The court may order:

(1) that the municipality adopt such resolutions and ordinances, including particular amendments to its zoning ordinance, and other land use regulations, as will enable it to meet its *Mount Laurel* obligations;

(2) that certain types of projects or construction as may be specified by the trial court be delayed within the municipality until its ordinance is satisfactorily revised, or until all or part of its fair share of lower income housing is constructed and/or firm commitments for its construction have been made by responsible developers;

(3) that the zoning ordinance and other land use regulations of the municipality be deemed void in whole or in part so as to relax or eliminate building and use restrictions in all or selected portions of the municipality (the court may condition this remedy upon failure of the municipality to adopt resolutions or ordinances mentioned in (1) above); and

(4) that particular applications to construct housing that includes lower income units be approved by the municipality, or any officer, board, agency, authority (independent or otherwise) or division thereof.

*Id.*, 456 A.2d at 455.

[100] *See id.* at 279-81, 456 A.2d at 452. The court summarized the arguments for and against a builder's remedy as follows:

Plaintiffs, particularly plaintiff-developers, maintain that these remedies are (i) essential to maintain a significant level of *Mount Laurel* litigation, and the only effective method to date of enforcing compliance; (ii) required by principles of fairness to compensate developers who have invested substantial time and resources in pursuing such litigation; and (iii) the most likely means of ensuring that lower income housing is actually built. Defendant municipalities contend that even if a plaintiff-developer obtains a judgment that a particular municipality has not complied with *Mount Laurel*, that municipality, and not the developer, should be allowed to determine how and where its fair share obligation will be met.

*Id.* at 279, 456 A.2d at 452.

[101] *Id.* at 279-80, 456 A.2d at 452-53. These issues are understandably not addressed until the trial court determines that the town's zoning ordinance violates the *Mount Laurel* doctrine. The supreme court also noted a third issue that will act as a potential precondition to the granting of a builder's remedy: A developer who attempts to use the builder's remedy as an "unintended

er's remedy. For example, a problem could arise from the impact of a sudden surge in construction in a single municipality.[102] Chief Justice Wilentz, in *Mount Laurel II*, suggested that one solution to this problem would be for trial courts to require the builder to phase in the development over time.[103] The court, however, did not resolve several other potential problems.

For instance, one issue that has developed concerns the extent to which a builder must pursue municipal administrative remedies before bringing suit. The *Mount Laurel II* court stated in a footnote that the builder need not exhaust such remedies because zoning and planning boards have no authority to decide constitutional issues.[104] The court, however, also indicated that some attempt to obtain relief without litigation should ordinarily precede the grant of a builder's remedy.[105] Thus, the nature and extent of the extrajudicial efforts required prior to the institution of suit remains an open question, and one that must be resolved. In two pending cases, for example, municipalities have raised the defense that the developers' complaints should be dismissed for failure to apply for a variance.[106]

At this early stage in the implementation of *Mount Laurel II*, there is merit to the court's short-circuiting of municipal administrative procedure since it ensures prompt resolution of the regional fair

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bargaining chip" in negotiations with the municipality will be barred from pursuing or continuing the *Mount Laurel* litigation. *Id.* at 280, 456 A.2d at 452. This latter issue should be dealt with early in the litigation—perhaps upon filing of the pleadings—since the builder's good faith is a threshold issue.

[102] *Id.*, 456 A.2d at 452-53. The court feared that indiscriminately timed builder's remedies would "cause a sudden and radical transformation of the municipality." *Id.*, 456 A.2d at 453.

[103] *Id.* at 218-19, 280, 456 A.2d at 420-21, 452-53.

[104] *Id.* at 342 n.73, 456 A.2d at 485 n.73.

[105] *Id.* at 218, 456 A.2d at 420. The court stated that, subject to sound zoning and planning concepts and the inclusion of an appropriate number of low and moderate income units, builder's remedies would be afforded "[w]here the plaintiff has acted in good faith, attempted to obtain relief without litigation, and thereafter vindicates the constitutional obligation in *Mount Laurel*-type litigation. . . ." *Id.*

[106] Norwood Easthill Assocs. v. Borough of Norwood, No. L-057028-83 (Law Div. Bergen County, filed Nov. 28, 1983) (four actions consolidated); Alfred A. Cullere v. Borough of Ramsey, No. L-077499-83 (Law Div. Bergen County filed Dec. 9, 1983).

Because the municipality's decision to grant a variance would not in every case depend upon a constitutional determination, the question remains whether the municipality should be afforded the opportunity to avoid litigation through the granting of relief on other than constitutional grounds. In those cases in which the municipality decides that there are nonconstitutional bases for relief, the constitutional issue will have been preserved for presentation to the court. Thus, although the court apparently will not require the exhaustion of nonjudicial remedies, it remains to be determined what administrative steps must be taken prior to filing suit.

share issue. As *Mount Laurel II* litigation matures, however, the court expects the determination of regional fair share to be reduced to a conclusive mechanical formula,[107] thus enabling the courts to focus their attention on the builder's remedy. At that point, the need to determine the constitutionality of local zoning ordinances will be less urgent. The court may then wish to revive the practice of requiring the builder to exhaust his administrative remedies under the MLUL before he can file a *Mount Laurel II* suit seeking a builder's remedy. This would enable the court to have the input of the municipal agencies before the action is filed so it can focus on resolving the issues involved in designing the builder's remedy.

Another problem may arise if there is more than one builder involved in the litigation. If together they have requested more than the municipality's fair share allocation, the court must decide what proportion of the remedy should be awarded to each builder. The court may elect to award the remedy on the basis of priority of filing of the complaint. A preferable solution is to adopt the best land utilization proposal to consume the town's fair share allocation, as this would assure the most appropriate sites for construction.

In addition, a problem could arise from the court's emphasis on cost savings to produce low-priced housing.[108] The abolition of cost-producing anti-look-alike ordinances and construction code requirements could result in shoddy, unattractive housing which, in the long run, could lead to future slums.[109] The builder's remedy, once given, irrevocably consumes a portion of the municipality's fair share obligation. It therefore should be awarded only where it can produce qual-

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[107] *See Mt. Laurel II*, 92 N.J. at 216, 456 A.2d at 419.

[108] *See, e.g., id.* at 277-78, 456 A.2d at 451-52 (discussion of "least cost" housing).

[109] As one author has observed:

> Anti look-alike ordinances are designed to provide more attractive housing through a variety of styles. Breaks in multi-family units preclude a barracks-like appearance. Without these provisions developers will construct future slums.
>
> Air conditioning is a necessity in New Jersey during our hot, muggy summers. Poor people also sweat, and those that physically toil are entitled to a cool respite during the night. Money could be saved in the short run if all amenities were excluded, but shoddy housing would be created. The Court cannot allow a denigration of construction standards, in order to initially save a small amount of money, where it will cost more in the long run. American industry has been ravaged by a fixation with short term profits. Hopefully the courts will not fall into the same trap.

Bernstein, *Why Mount Laurel Won't Work . . . Unless*, 112 N.J.L.J. 413, 414 (1983).

ity low and moderate income housing that harmonizes with the community need to produce a suitable housing development.

The *Mount Laurel II* court strongly suggested that municipal planning boards should be "closely involved in the formulation of the builder's remedy."[110] The court failed to recognize, however, that the involvement of municipal planning boards will expand their duties beyond those delegated under the MLUL.[111] Further, since planning board members hold part-time political positions, most of which are filled by mayoral appointment, it is questionable whether they are the appropriate parties to help formulate the builder's remedy. It seems unlikely that part-time political appointees will have the experience in budgeting, in allocating funds, or in hiring the proper personnel to meet the responsibilities involved in creating a builder's remedy. When faced with the complexity of the developer's plan, the conciliatory efforts of the master, and the pressure of the same court that declared their zoning ordinance invalid, the planning board members may be overwhelmed or intimidated.[112]

At the builder's remedy stage, the joint duty of the developer and the municipality is to produce an agreement which will bring about the construction of a substantial amount of low and moderate income housing. The performance of this duty by both parties requires that they use their skills, ingenuity, and experience to create a custom-designed builder's remedy for the particular case. This requires familiarity with the full panoply of incentives recited in the *Mount Laurel II* opinion: mandatory set-asides, zoning for low cost mobile or modular homes, elimination of cost-producing requirements and restrictions, obtaining federal and state subsidies to reduce development costs, the granting of tax abatements and density bonuses,[113] as well as other incentive devices.[114] Although the developer and the town are

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[110] *Mt. Laurel II*, 92 N.J. at 280, 456 A.2d at 453.

[111] *See supra* notes 39-49 and accompanying text.

[112] It should also be noted that since the planning board consists of mayoral appointees, in a town with a bipartisan municipal government, the members of the planning board could reflect the minority party's views rather than those of the majority. It would seem that the governing body of the municipality, which is already a party to the suit, is directly responsible to the voters, and has significant experience in budgetary matters, is the appropriate municipal agency to create a builder's remedy suitable for the community.

[113] *Mt. Laurel II*, 92 N.J. at 258-77, 456 A.2d at 441-51.

[114] *See* Bozung, *A Positive Response to Growth Control Plans: The Orange County Inclusionary Housing Program*, 9 PEPPERDINE L. REV. 819 (1982) (discussing various inclusionary zoning techniques).

adversaries in the litigation, cooperation between them is imperative if a workable builder's remedy is to be produced.

In selecting an appropriate building subsidy, a conflict may arise if the builder proposes that the municipality bear some of the costs. The town may assert that it should not be forced to pass on the costs to its taxpayers, but rather that the builder should assume these costs and transfer them to those buyers who purchase the higher income housing in the development. The parties should be prepared to compromise in order to avoid time-consuming arguments, and should keep in mind that the purpose of the builder's remedy is to ensure that a substantial amount of affordable low cost housing is produced.

While a full review of the various forms of builder's remedies is beyond the scope of this article, it is apparent that the granting of a builder's remedy is critical to the successful implementation of the *Mount Laurel II* doctrine. Success is measured by the construction of affordable low cost housing, and such housing cannot be built unless the court approves a suitable builder's remedy. The builder should develop his remedy proposal at an early stage—preferably before the suit is filed—so that his experts are fully prepared at any stage of the litigation to present the plan to the court or master. The builder should be prepared to prove that he needs specific incentives in order to afford to build the project, and should be prepared to raise objections to obstructive municipal planning or zoning requirements. Given the anticipated difficulty that the municipal planning board will have with this type of proposal, it is important that the builder present a clear plan. Ultimately, if the parties are unable to agree on a mutually acceptable remedy, the court will have to settle the dispute.

## IV. Sale and Resale Restrictions on Lower Income Units

Once a municipality's fair share obligation has been determined, it is responsible both for presently meeting that obligation, and for ensuring that the obligation continues to be met in the future.[115] The *Mount Laurel II* court set forth a number of means by which zoning could be used by a municipality to meet its current fair share obligation.[116] At a minimum, the municipality "must remove all municipally created barriers to the construction of their fair share of lower

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[115] Implicit in the *Mount Laurel* mandate is a duty to ensure that low cost housing is maintained as such, so that the municipality continues to meet its "fair share" obligation. *See Mt. Laurel II*, 92 N.J. at 269, 456 A.2d at 447.

[116] *See infra* notes 120-25 and accompanying text.

income housing."[117] The court interpreted this to mean that a municipality may retain only those zoning restrictions that are necessary to safeguard the public health and safety.[118] Should the removal of zoning restrictions prove insufficient to create a "realistic opportunity" for the town's fair share of lower income housing to be built, however, the municipality would have to take affirmative actions to help bring about that result.[119]

The court mentioned two types of affirmative zoning measures that might be used: incentive zoning and the mandatory set-aside.[120] Incentive zoning programs encourage developers to construct low income housing either by easing density restrictions as more housing is built, or by giving builders a set bonus for erecting low income units.[121] These measures are generally ineffective because, as the court noted, they permit developers to forego the incentive.[122] Mandatory set-asides, which require that a certain percentage of development be devoted to low and moderate income housing, were viewed by the court as more likely to produce the desired results.[123] The *Mount Laurel II* court held that should these affirmative measures fail, the municipality must then zone to accommodate low cost mobile homes.[124] As a last resort, after removing all restrictive zoning and attempting all the affirmative measures described above, a municipal-

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[117] *Mt. Laurel II*, 92 N.J. at 258-59, 456 A.2d at 441.

[118] *Id.* at 259, 456 A.2d at 441. For a discussion of the relationship of zoning restrictions to public health and safety, see generally F. CHAPIN & E. KAISER, URBAN LAND USE PLANNING 48-50 (3d ed. 1979); Williams, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 3 WIS. L. REV. 827, 835-36 (1969). For a critical appraisal of the problems inherent in determining when zoning restrictions are excessive, and thus "barriers" to the expansion of low cost housing, see Rose, *New Additions to the Lexicon of Exclusionary Zoning*, 14 SETON HALL L. REV. 851, 874-76 (1984).

[119] *Mt. Laurel II*, 92 N.J. at 261, 456 A.2d at 442. The court, noting that ordinances which merely permit the construction of low income housing do not often result in the actual building of such developments, emphasized that trial courts should examine the "realities of the situation." *Id.* at 261 n.26, 456 A.2d at 443 n.26.

[120] *Id.* at 265-74, 456 A.2d at 445-50. The court also noted that other techniques, such as zoning for lower cost mobile homes, establishing zones with maximum square footage restrictions, and overzoning, could be employed to assist municipalities in providing their fair share of low income housing. *Id.* at 270, 456 A.2d at 447.

[121] *Mt. Laurel II*, 92 N.J. at 266, 456 A.2d at 445.

[122] *Id.* at 266-67, 456 A.2d at 445-46 (citing Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1067 (1976) (concluding that "[d]evelopers are reluctant to cooperate with voluntary programs because of uncertainty about the profitability of the density bonus")).

[123] *Id.* at 267, 456 A.2d at 446.

[124] *Id.* at 275, 456 A.2d at 450.

ity may meet its *Mount Laurel* obligation by providing "least cost" housing.[125] All of these measures, however, deal only with the initial problem of providing for low income housing in the local zoning scheme. Once that housing has been built, the municipality has a duty to ensure that it is, and continues to be, made available to low income persons.[126]

For example, if a developer builds housing units intended for low income purchasers but does not actually sell them to such buyers, the town will have failed to meet its fair share obligation. Similarly, there must be some mechanism to prevent the future resale or rerental of low income units to nonqualified persons in order to avoid the gradual erosion of the number of units in the municipality devoted to low income housing. These problems were given scant attention in the *Mount Laurel II* opinion, yet their solution is essential to the court's goal of continued availability of low cost housing in all growth communities.

The court recognized these problems in the context of mandatory set-aside programs, stating that "[b]ecause [such a] program usually requires a developer to sell or rent units at below their full value so that the units can be affordable to lower income people, the owner of the development or the initial tenant or purchaser of the unit may be induced to re-rent or re-sell the unit at its full value."[127] Chief Justice Wilentz, characterizing it as a problem "which municipalities *must* address,"[128] then briefly discussed a number of possible solutions.

The simplest method mentioned by the court would be for the builder to construct "lower cost" housing[129] that could be sold to low income purchasers at a price close to market value, thus eliminating the opportunity for the builder or the initial purchaser to profit by selling to higher income persons.[130] The court noted that a more common approach is for the town to require that the prices be maintained at lower income levels, and cited the Cherry Hill and Franklin Township zoning ordinances as examples.[131] As the *Mount Laurel II*

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[125] *Id.* at 277, 456 A.2d at 451; *see supra* notes 29-30 and accompanying text.

[126] *Mt. Laurel II*, 92 N.J. at 269, 456 A.2d at 447.

[127] *Id.*; *see* Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1035 (1976); Rose, *The* Mount Laurel II *Decision: Is It Based on Wishful Thinking?*, 12 REAL EST. L.J. 115, 134-35 (1983).

[128] *Mt. Laurel II*, 92 N.J. at 269, 456 A.2d at 447 (emphasis in original).

[129] The court cited mobile homes and "no-frills" apartments as examples of "lower cost" housing. *Id.*

[130] *See id.*

[131] *Id.* The Cherry Hill ordinance calls for " 'regulations which reasonably assure that the dwelling units be occupied by [lower income persons].' " *Id.* The Franklin Township ordinance

court observed, such ordinances apparently make it the developer's responsibility "to devise the precise mechanism for maintaining the units at lower income levels."[132] The court thus views the municipality as an enforcer of specific regulations created by the developer.

Another mechanism for enforcing a lower income restriction, which had been considered by Princeton Township, was reviewed with approval by the court:

> First, disposition covenants would have been created for all the lower income units binding the owners and renters of such units to sell or rent only at lower income levels. Second, a Public Trust would have been created whose trustees would have administered the covenants and determined what would be "lower income levels" over time.[133]

The disposition covenants would presumably be drafted by the developer, and it would seem appropriate that at least one of the trustees of the Public Trust would be the municipality. Since the court offered no guidance as to the creation or administration of this two-part control mechanism, however, further discussion is warranted.

Certainly, any builder planning to put restrictive disposition covenants in the deeds for lower income units must obtain title company review and approval. The title company will be concerned with the procedure for enforcement of the covenant and the documentation which will be required to certify compliance with the restriction so that it can be removed as a title exception. The restriction also must be drafted to include specific provisions for resale or rerental of the unit by a mortgagee in foreclosure. If this is not done, the unit may not be mortgageable. As noted in a recent study:

> Affordability monitoring entails possible conflict with lender interests. Lenders desire unfettered appreciation of mortgaged properties so as to better protect their security. An inclusionary program cap on the future sales/rental price does not allow this. Important mortgage institutions such as FNMA and FHLMC have indicated their unease with affordability controls which cloud their interest. Both have issued regulations indicating they would not deal in mortgages that carry deed restrictions subordinated (upon

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goes one step further and requires the developer to "demonstrate in writing that the rentals and prices of lower income units remain low enough to benefit lower income persons." *Id.*

[132] *Id.*

[133] *Id.* at 269-70, 456 A.2d at 447.

> foreclosure) to other designees, such as a housing authority—a not uncommon inclusionary program combination.[134]

Since most lenders are engaged in packaging mortgages for sale either to the Federal National Mortgage Association or to other governmental mortgage agencies, the builder, with the lender's assistance, should seek the intended governmental mortgage purchase agency's approval of the deed restriction before it is used.

The functioning of the Public Trust, the second part of the proposed Princeton Township control mechanism noted by the *Mount Laurel II* court, presents different problems. A recent study offers the following analysis:

> In addition to the mechanics, there is also the question of *who* will administer and pay for enforcement of the affordability controls. Possible candidates include the developer, a local housing authority, municipal planning department, or a homeowner's association. Such assumption would ultimately entail hundreds of separate entities doing the monitoring. Besides the diseconomies involved in this approach, there is the further question of permanence (e.g., what happens when a builder goes bankrupt or a housing authority disbands?). Monitoring by one or a limited number of players is called for. The State Department of Community Affairs is a leading candidate. Its involvement in this matter would provide a needed central authority. It would also enable the state to monitor the progress of meeting the Mount Laurel mandate and to see first-hand which bridge strategies are most promising.[135]

It is clear that once a builder has sold the units, he has no vested interest in the future administration of the project. The only interested parties at that point are the municipality, because of its duty to see that its fair share obligation continues to be met; the state, acting in the public interest to preserve affordable housing for low income citizens; and the residents of the project itself.

The roles of these parties favors the creation of a Public Trust in the form of a nonprofit corporation, organized by the builder at the inception of the project, with membership consisting of the builder, the municipality, and the state,[136] all having a one-third vote. As units

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[134] RUTGERS REPORT, *supra* note 88, at 356.

[135] *Id.* at 356-57 (emphasis in original).

[136] The state could be represented by either the New Jersey Public Advocate or some other municipal agency created in the future.

are sold, the builder's interest would diminish until it is entirely replaced by the board of unit owners. The plan will have to be drafted so that the separate interests of both the low and higher income purchasers are compatible. If the project is being built pursuant to a builder's remedy, the court awarding the remedy may also retain jurisdiction for the limited purpose of resolving a dispute if the board cannot reach agreement on an application for resale of a unit. In addition, an appeal procedure would have to be created so that the low income residents seeking resale could challenge the denial, or unfavorable terms of approval, of their resale applications.

Finally, it may be necessary for the board of directors of the project to have a right of first refusal to repurchase at the original price, coupled with a further first option of purchase for other unit owners in the project who can satisfy the lower income standards.[137] This would permit the owner of another unit who had purchased at the market price, and who has since sustained a reduction in income,[138] to remain in the development by the sale or rental of his existing unit, and purchase of the lower income unit at the lower price. Courts will have to explore the resale issue carefully in order to create equitable preemptive purchase rights.

There still remains, however, the problem of the selection and monitoring of the initial low income purchaser. The *Mount Laurel II* court's failure to address this issue specifically raises some serious questions. As one commentator has noted:

> Who will implement the set aside? May the developer choose the low and moderate income individuals, who, although, bona fide low income individuals, may be his friends? May it be an organization such as the Urban League, the Sons of Italy, the Society for the

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[137] *See* RUTGERS REPORT, *supra* note 88, at 388. The Town of East Brunswick has adopted an ordinance permitting the town to purchase low income units on these terms when such units are offered for resale. *Id.* A number of New Jersey municipalities have enacted inclusionary programs which include affordability controls of this type. *Id.* at 385-87.

In the past, condominiums could be subject to similar resale controls, but recent legislation has prohibited condominium boards from imposing restrictions on resale of a condominium unit. *See* N.J. STAT. ANN. § 46:8B-36 (West Cum. Supp. 1983-1984) (establishing presumption of unconscionability for any condominium master deed or by-law recorded prior to Sept. 11, 1980 containing a right of first refusal to buy a condominium unit upon resale, gift, or devise by the owner); *id.* § 46:8B-38 (prohibiting such clauses in condominium deeds or by-laws recorded after 1980).

[138] For example, a reduction in income could occur because of the death of a spouse, retirement, or change of job.

> Absorption of Soviet Emigres, a church, or must the poor people be chosen randomly, in keeping with the gambling mentality in the Garden State that encourages lottery and casino gambling?[139]

Another problem will occur if, after the initial purchase, the lower income buyer has a change in financial status.[140] Suppose that a purchaser inherits wealth, wins the lottery, or receives a substantial raise in salary. Can he continue to reside in the lower income unit, and if so, under what terms? Do purchasers of other units at full market value then have any rights against the town or the low income unit occupant? Does the change in the financial status of the lower income resident remove that unit from the town's fair share obligation and require replacement of the unit?[141] These inquiries indicate the need for post-sale monitoring of the income of the initial purchaser to prevent lower income housing from becoming a windfall for the undeserving.

Although the court was silent on this issue, the Public Trust device seems to lend itself to solving the problem of selecting the initial purchaser as well as to monitoring the resale or rerental of low income units. This mechanism could, as discussed earlier, take the form of a nonprofit corporation, and at this stage, it would determine the eligibility of prospective buyers and would assign the low income units to those who qualify. A good example of the mechanics of this can be drawn from the unreported case of *Allen Dean Corp. & Lynn Ceiswick v. Township of Bedminster*,[142] in which the builder organized a nonprofit corporation consisting of representatives of the builder, the town, and the New Jersey Department of the Public Advocate.[143]

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[139] Bernstein, *supra* note 109, at 414. The author also noted:

> Just as federal subsidies have produced improprieties, I fear that internal subsidies will become a bonanza for corruption. Any proposal that permits the rental or sale of units under market value will be abused. While I detest this result, and the abuse of trust which it will involve, it will inevitably occur. If the Court must allow set asides, it should permit them on a voluntary basis as part of the settlement of exclusionary zoning cases and it should monitor the results. It should not be required statewide before the Court has experience with the working of this novel approach.

*Id.*

[140] See F. CHAPIN & E. KAISER, *supra* note 118, at 504-05 for a discussion of constitutional rights in land use planning.

[141] For a more detailed discussion of these issues see Rose, *supra* note 127, at 115.

[142] No. L-36896-70 (Law Div. filed Sept. 2, 1971).

[143] *Id.*

The corporation would verify the low income status of the prospective purchaser by reviewing his assets, credit, employment, salary, and other income characteristics. If the person qualifies, the board would approve his purchase of the unit. In this manner, the town and the state are assured that the builder will sell the lower income unit to a purchaser who is the intended beneficiary of the *Mount Laurel* doctrine. The *Bedminster* mechanism also incorporates other features. Priority for low income housing is given to qualified persons living within ten miles of the project, and favorable mortgage terms are offered as well.

It is clear from the above discussion that any developer planning to build low income units in a municipality, whether under the town's existing zoning laws or pursuant to a court-ordered builder's remedy, should develop a proposal for the resolution of the selection and monitoring problems. It is in the developer's interest to do so, because if he does not, the void will be filled by a proposal from the municipality, the master, or the court, which the builder may find either impractical or economically unacceptable in light of his plans. The builder should therefore direct his planning expert to carefully develop specific proposals concerning at least three areas.

First, a builder's proposal should set forth procedures to assure that the low cost units which are built will actually be sold to qualified low income buyers. Second, the proposal should detail resale and rerental restrictions to assure that the future disposition of the unit will adhere to the low income purpose of the initial approval. Both of these provisions could be supplemented by a proposed structure for a nonprofit "Public Trust" corporation designed to oversee and enforce the implementation of the restrictions.

If the units are to be built under a mandatory set-aside program, the *Mount Laurel II* court also stated that efforts should be made by "courts, municipalities, and developers . . . to assure that lower income units are integrated into larger developments in a manner that both provides adequate access and services for the lower income residents and at the same time protects as much as possible the value and integrity of the project as a whole."[144] Thus, the builder's proposal under a mandatory set-aside program should also establish that his plans will accomplish these goals. Once a builder has submitted a proposal containing these three elements, he should be able to market

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[144] *Mt. Laurel II*, 92 N.J. at 268 n.32, 456 A.2d at 447 n.32.

the project without fear of excessive disruption of his plans by the court, the master, or the municipality. If changes in the proposal are required in order to assure that the municipality's fair share obligation continues to be met, the builder will at least be aware of them early enough so that a rational decision as to whether to go through with the project can be made.

As a municipality approves fair share construction, the central issue will concern how to allocate the preemptive rights of competing parties for the limited numbers of approved low and moderate income fair share housing units, both at the time of initial sale and beyond. A low cost purchaser could be selected from several sources, such as the regional poor, the indigenous poor of the municipality, residents of the project in which the unit is located, and residents of other low cost housing projects in the municipality. The courts must establish guidelines to resolve the competition for the available low income units. In doing so, it would seem practical to create a preemptive right in favor of low income persons who have resided in the particular municipality for a minimum period of time prior to the unit becoming available. A more difficult issue is the assignment of priority rights among municipal residents who satisfy the criteria. One solution could be the creation of intramunicipal guidelines which might, for example, be based upon need, family size, and stability of income.

The availability of such guidelines, along with the development of viable restrictive disposition covenants in the deeds or leases of low income units, would make the administration of the Public Trust control mechanism a manageable task. By the same token, once such procedures are firmly established, developers will be able to proceed with a reasonable degree of certainty that their building plans will not be disrupted by the need to resolve the problems of the initial selection and future monitoring of low income buyers.

## V. Conclusion

The *Mount Laurel* decisions have established a constitutional right to obtain affordable housing in any New Jersey municipality which has not met its fair share obligation. The ultimate question, however, is whether a substantial amount of housing will result from this constitutional right. Two major obstacles threaten to frustrate this goal. Currently the judiciary stands alone to implement the principle of fair share housing as municipalities, the legislature, and, most recently, the governor, have aligned against it. As judicial panels, serving as "super-zoners," decide a number of important legal issues, a considerable body of law will develop. Hopefully, during this process,

the municipalities and the legislature will cease their opposition to the *Mount Laurel* mandate as they become more comfortable with it. Additionally, it remains to be seen whether builders can earn enough profit when given the chance by *Mount Laurel* judges to construct low and moderate income housing. If such construction is not sufficiently profitable, builders will lack incentive to enforce the fair share mandate.

Finally, the building of affordable housing will hinge, in part, on the role of the attorney. This article has raised the pertinent questions a practitioner must ask and has outlined the zoning and planning procedures he or she must follow in the wake of *Mount Laurel II*. Notwithstanding the existing uncertainties, it should be the attorney's duty to work constructively within the guidelines of *Mount Laurel II*, not only to benefit a particular client, but ultimately to promote the objectives of fair share housing as well.