NEW ADDITIONS TO THE LEXICON OF EXCLUSIONARY ZONING LITIGATION*

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In January 1983 the New Jersey Supreme Court rendered its decision in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II)*[1] in which it reaffirmed the state constitutional mandate that municipalities provide a realistic opportunity for the construction of low and moderate income housing, and set forth a panoply of judicial remedies to enforce this mandate.[2] Eight years earlier in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I)*[3] the court first held that the zoning ordinance of a developing municipality[4] was invalid if it failed affirmatively to afford an opportunity for an "appropriate variety and choice of housing" to meet the municipality's present and prospective fair share of the low and moderate income housing needed in the region.[5] In *Mount Laurel II* the court determined that the intervening seven or more years had produced litigation instead of housing, thus necessitating more drastic judicial intervention.[6] In the

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

[2] *See id.* at 199, 456 A.2d at 410.

[3] 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied,* 423 U.S. 808 (1975) [hereinafter cited as *Mt. Laurel* I].

[4] As described in *Mount Laurel I*, 67 N.J. at 160, 336 A.2d at 717, a "developing municipality" in New Jersey has: sizeable land area outside the central cities and older, built-up suburbs of northern and southern metropolitan areas; substantially shed any rural characteristics; undergone great population increase since World War II, or is now in the process of doing so; is not completely developed; and remains in the path of inevitable future residential, commercial, and industrial demand and growth. *See also* Glenview Dev. Co. v. Franklin Township, 164 N.J. Super. 563, 567-68, 397 A.2d 384, 386 (Law Div. 1968), *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).

[5] *Mt. Laurel I*, 67 N.J. at 174, 336 A.2d at 724. For an analysis of the *Mount Laurel I* decision, see generally Rose, *The* Mount Laurel *Decision: Is It Based on Wishful Thinking*?, 4 REAL EST. L.J. 61 (1975) (recognizing need for legislative creation of administrative agency as appropriate entity for implementation of underlying policy judgments); *see also* Rose, *Myths and Misconceptions of Exclusionary Zoning Litigation*, 8 REAL EST. L.J. 99 (1979) (elimination of exclusionary zoning results in primary benefit to developers and real estate investors who utilize mythical, moral, and legal justifications to perpetuate their profits). *But see* Mallach, *Exclusionary Zoning Litigation: Setting the Record Straight*, 9 REAL EST. L.J. 275 (1981) (elimination of restrictive zoning provisions threshold step in creating low and moderate income housing opportunities).

[6] *Mt. Laurel II*, 92 N.J. at 198-99, 456 A.2d at 409-10. For an analysis of *Mount Laurel II* and an appraisal of the effectiveness and propriety of the role of the judiciary, see Rose, *The*

process of creating a more effective remedy for enforcement of its decision that exclusionary zoning is invalid under the state constitution,[7] the court created new legal concepts by the use of new judicial language. In addition, new legal phrases have been created *in reaction* to the court's new concepts. This article will discuss both categories of additions to the lexicon of exclusionary zoning litigation.

I. New Legal Concepts Created By Judicial Language

Principles of sound planning (prin'si p'ls • ov • sound • plan'ning), n. Fundamental truths or settled rules of action utilized to describe a systematic, comprehensive, continuous, forward-looking process of analysis of a community's constraints for the purpose of formulating and implementing a plan for the achievement of the goals and objectives of the community.[8]

The court uses variations of the phrase "principles of sound planning," such as "sound municipal land use planning,"[9] "unplanned growth,"[10] "sound planning concepts,"[11] "sound planning,"[12] "requirements of sound planning,"[13] "regional planning goals,"[14] "comprehensive rational plan,"[15] "sensible planning,"[16] "sound planning

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Mount Laurel II *Decision: Is It Based on Wishful Thinking?*, 12 Real Est. L.J. 115 (1983) (court's recognition of state constitutionally protected right to affordable housing based on idealistic economic and political assumptions may result in acceleration of urban flight).

[7] *See Mt. Laurel II*, 92 N.J. at 208-13, 456 A.2d at 415-17. In *Mount Laurel II* the court reaffirmed its earlier finding that the constitutional power to zone, *see* N.J. Const. art. IV, § 6, para. 2, must be exercised for the general welfare:

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

Mt. Laurel II, 92 N.J. at 208-09, 456 A.2d at 415 (citing *Mt. Laurel I*, 67 N.J. at 174, 181, 366 A.2d at 724, 730).

[8] This definition is a composite of definitions of the component words from Webster's Collegiate Dictionary (5th ed. 1944) and J.G. Rose, Legal Foundations of Urban Planning 53 (1979); *see also* J.S. Chapin, Urban Land Use Planning (1965).

[9] *Mt. Laurel II*, 92 N.J. at 211, 456 A.2d at 416.

[10] *Id.* at 236, 456 A.2d at 428.

[11] *Id.* at 226, 237-38, 456 A.2d at 424, 430.

[12] *Id.* at 211, 224, 456 A.2d at 416, 423.

[13] *Id.* at 243, 456 A.2d at 433.

[14] *Id.* at 225, 246, 456 A.2d at 423, 434.

[15] *Id.* at 247, 456 A.2d at 435.

[16] *Id.* at 329, 456 A.2d at 478.

principles,"[17] and "rational long-range land use planning"[18] throughout the decision. The court's frequent use of these phrases to explain and justify major urban policy decisions emphasizes the importance of these "planning" concepts as the fundamental bases of the decision. The validity and meaning of the *Mount Laurel II* decision, therefore, depends upon the validity and meaning of these concepts.

The phrase "principles of sound planning" can be deceptive. It would be erroneous to ascribe to this phrase the same certainty and exactitude that one would attribute to phrases such as "principles of physics" or "principles of sound bridge construction." Yet, the phrase carries with it, and the court utilized it to convey, an implication of unerring, precise, rigorous, and constant truths that are associated with the scientific principles of physics or engineering principles of sound bridge construction. To the extent that the phrase "principles of sound planning" does not provide a similar exactitude, consensus, or general professional acceptance, it must fail as the justification for the major urban policy decisions made by the New Jersey Supreme Court in the *Mount Laurel II* decision.

What are the "principles of sound planning?" Do these principles provide the standards for an objective or scientific evaluation of the constitutionality of municipal land use regulations? These questions direct attention to the underlying theories of the urban planning profession. It would be inappropriate to attempt to describe all such principles in this article.[19] A brief analysis of some of the major principles and components of the concept of urban planning, however, will illustrate the fundamental differences between the "principles of sound planning" and principles of more exact physical sciences.

Before describing the principles of planning, attention must be directed to the fact that the subject of the judicial language is *urban* planning. Although there are some similarities among the various processes of planning, it is clear that the subject under consideration is not corporate planning, family planning, military planning, national resource planning, or any planning other than *urban* planning. The new legal concept on which the court has focused attention deals with "principles of sound [urban] planning."

In spite of the court's authoritative reference thereto, there is no authoritative compendium of "principles of sound [urban] planning."

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[17] *Id.* at 331, 456 A.2d at 480.

[18] *Id.* at 215, 456 A.2d at 418.

[19] For a more complete analysis of the principles of urban planning, see J.S. CHAPIN, *supra* note 8; W.I. GOODMAN & E.C. FREUND, PRINCIPLES AND PRACTICE OF URBAN PLANNING (1968).

Insofar as any compendium exists at all, it would have to be deduced from the definition of "urban planning" and the application of a political philosophy thereto. In defining "urban planning" most members of the profession would agree to the following components:

1. Urban planning is a rational process of analysis of the forces, needs, and constraints that affect the future growth, development, or other changes in the urban area under study.

2. Urban planning is a comprehensive process. It seeks to study, describe and evaluate all relevant forces, needs, and constraints such as the demographic, environmental, economic, sociological, and political forces that will affect future changes in the jurisdiction.

3. Urban planning is a process which proposes a plan for the use of the jurisdiction's land and other resources that is consistent with the relevant forces and constraints disclosed by such study and which seeks to provide a rational and comprehensive balance among the competing community needs and constraints.

4. Urban planning is future-oriented in that it is concerned with designing proposals and programs to meet needs and improve conditions at some time in the future.

5. Urban planning is a continuous process that is intended to be an ongoing activity by which previous plans are updated and modified in response to changing facts and available information.

6. Urban planning is a process that is designed to formulate a plan to achieve the jurisdiction's goals and objectives, protect the public safety and health, and promote the general welfare.[20]

7. Urban planning is an advisory process to assist the appropriately authorized governmental officials in their decisionmaking process. Planners are professionally trained advisers on urban growth and change but are not usually authorized to make policy decisions on behalf of any governmental entity.

The definition of "urban planning" illustrates the potential variance that "sound principles" thereof will encompass depending upon the socioeconomic-political philosophy of the formulation. For example, the prescription of the formulator whose goals are a more equitable distribution of private property and natural resources will vary greatly from the principles formulated by someone whose philosophy

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[20] The importance of *Mount Laurel I* rests, in part, on the court having defined the constitutional obligation to provide for the general welfare as including citizens beyond the borders of the particular municipality. *Mt. Laurel I*, 67 N.J. at 177, 336 A.2d at 726. Thus, a municipality, in regulating land use, must serve the broader public interest of providing an opportunity for housing on a *regional* basis, rather than exercising its zoning authority to further parochial interests. *Id.* at 179, 336 A.2d at 727-28.

favors a maximum of personal freedom and individual enterprise. Therefore, in its application of "principles of sound planning," the decision in *Mount Laurel II* may rest upon little more than a set of undeclared and elusive principles of social, economic, and political philosophy of the members of the court.

Affirmative measures (ə fur′ mə tiv • mezh′ erz), n. positive actions or efforts (similar to "affirmative action") to "afford a realistic opportunity for the construction of the municipality's fair share of the region's lower income housing" when removal of restrictive land use barriers are insufficient to provide such housing.[21]

The court describes three basic types of "affirmative measures" that a municipality can use to make the opportunity for lower income housing realistic. They include (1) encouraging or requiring the use of available state or federal housing subsidies; (2) providing incentives for or requiring private developers to *set aside* a portion of their developments for lower income housing ("mandatory set-asides"); and (3) overzoning, an inclusionary zoning device by which a municipality zones for more than its fair share of the regional housing need.[22]

The court begins its explanation of these measures by conceding that the construction of lower income housing is practically impossible without some form of governmental subsidy.[23] The court recognized that nonaction on the part of municipalities in obtaining these subsidies would make a charade of the *Mount Laurel* principle which requires municipalities to provide a *realistic opportunity* for low income housing through their land use regulations.[24] Consequently, it suggested that eligibility for subsidies could be accomplished through as simplistic a measure as the adoption of a resolution of need or the granting of municipal tax abatements.[25] This would appear to give the trial court the power to require municipalities to adopt these measures, thus assuring good faith cooperation on the part of the municipality in assisting developers to obtain subsidies.[26]

The other types of affirmative measures discussed by the court include "incentive zoning,"[27] "mandatory set-asides," and "overzon-

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[21] *Mt. Laurel II*, 92 N.J. at 261, 456 A.2d at 443.

[22] *Id.* at 262-70, 456 A.2d at 443-47.

[23] *Id.* at 263, 456 A.2d at 444, *see infra* note 60 and accompanying text.

[24] *Mt. Laurel II*, 92 N.J. at 264, 456 A.2d at 444.

[25] *Id.* (citing N.J. STAT. ANN. § 55:14J-6(b), 8(f) (West Cum. Supp. 1983-1984)).

[26] *Id.* at 265, 456 A.2d at 445.

[27] "Incentive zoning" is a zoning technique that offers an increase in permitted density, commonly known as a density bonus, if the developer voluntarily agrees to provide lower income housing. *Id.* at 266, 456 A.2d at 445.

ing." These terms are sufficiently important to justify separate definitions and discussions below.[28]

In adopting the concept of "affirmative measures" as a prerequisite for municipal zoning validity, the court settled a question which was forcefully argued during the four days of oral argument:[29] Whether requiring a municipality to undertake affirmative action, a power usually regarded as uniquely within the legislative process, is beyond the scope of judicial authority as violative of the separation of powers doctrine.[30] An interesting discourse ensued when a Justice posited whether the court, once having determined that there was a violation of the state constitution, had the power to propose ways to avoid that violation.[31] The attorney responded that the principle of separation of powers did not prevent the court from invalidating an unconstitutional ordinance but did prevent the judiciary from providing a legislative or administrative remedy. A Justice pursued this issue and then asked:

> Suppose a court invalidates an exclusionary zoning ordinance and in response, the municipality amends the ordinance. When challenged again, the court invalidates it again. Suppose this procedure is repeated twenty times. Isn't there a point where the court can give the municipality some hint as to what provisions will be acceptable and constitutional?

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[28] See the discussion of "overzoning," *infra* notes 36-42 and "mandatory set-asides," *infra* notes 43-73. "Incentive zoning" will not be given independent treatment because, as the *Mount Laurel II* court recognized, it is not in actuality a viable affirmative measure. *Mt. Laurel II*, 94 N.J. at 266, 456 A.2d at 445 (builders reluctant to cooperate with incentive zoning programs regardless of potential profitability) (citing Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1067 (1977)).

[29] The author attended all four days of oral argument of *Mount Laurel II* before the New Jersey Supreme Court on October 20, 21, 22, and December 15, 1980 and took copious notes of the proceedings. Reference to statements and events during the oral argument is based on those notes. The usual transcript of proceedings as well as a video tape recording was made by or under the direction of the court.

[30] A judicial mandate upon coordinate branches of government to compel the taking of affirmative measures in order to correct constitutional deficiencies is not without precedent. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Brown v. Board of Educ., 349 U.S. 294 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954). Although the courts of New Jersey have been reticent to encroach upon the legislative domain in areas of economic and social welfare, they have done so as a last resort when the legislature has failed to act. *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977); Pascack Ass'n, Ltd. v. Township of Washington, 131 N.J. Super. 195, 329 A.2d 89 (Law Div. 1974), *modified*, 74 N.J. 470, 397 A.2d 6 (1977).

[31] The dialogue set forth in text is an accurate account of the interchange and contains many of the words used by the participants but is not a word-for-word transcript of the statements. *See supra* note 29.

The response of the attorney was:

> No. It is within the power of a court to make any *suggestions* it wants to in *dicta* but under the principles of separation of powers it cannot prescribe ordinance provisions or provide for administrative solutions, such as tax abatements or mandatory set-asides.

At another time in the discussion of this issue one of the Justices asked:

> How do you respond to the argument that the principle of separation of powers applies only to the state branch of government, i.e., the state legislature, the state judiciary and the state governor and does not apply to municipal government?[32]

To which the response was:

> The New Jersey Constitution contains a specific provision giving the legislature the power to delegate its zoning power to municipalities,[33] so whatever principles of separation of powers apply to the state legislature also apply to the municipal governments that exercise that power.

This discourse was picked up by another Justice who, because of the unfortunate form of his question, invited a response that he would probably have preferred to avoid. The question was:

> But after this court has determined that certain forms of restrictive zoning are unconstitutional, what should I do when I see that municipalities are ignoring this constitutional requirement?

The response of the ardent advocate of the principle of separation of powers was:

> Run for the State Legislature! And if you are elected you can engage in the legislative process of devising programs to meet public policy needs.

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[32] In New Jersey, the formal doctrine of separation of powers as applicable to federal and state governments has consistently been held inapplicable to municipalities. *See In re* Shain, 92 N.J. 524, 537, 457 A.2d 828, 835 (1982); Eggers v. Kenny, 15 N.J. 107, 120, 104 A.2d 10, 17 (1954); Wintermute v. Ellenstein, 117 N.J.L. 274, 276, 187 A. 764, 765 (Sup. Ct. 1936); Graziano v. Mayor of Montville Township, 162 N.J. Super. 552, 563, 394 A.2d 103, 108 (App. Div. 1978).

[33] N.J. CONST. art. IV, § 6, para. 2. That provision reads as follows:

> 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 Legislation.

Id.

After this exchange, another Justice, in a mediating tone of voice, asked:

> Why can't this court move as far as a court can go to indicate to the municipality what the solution to the problem is?

To which the attorney responded:

> Who knows what the solution is? The Legislature has adopted many programs to provide housing for low and moderate income persons.[34] Those programs have been only partially successful. . . . Additional action involves public policy decisions involving public expenditures. . . . It is not the function of courts to make these public policy decisions.

In spite of these and other arguments made by counsel in briefs and oral arguments, the New Jersey Supreme Court has decided that unless it requires the use of "affirmative measures," "the constitutional guarantee that protects poor people from municipal exclusionary zoning will exist 'only on paper.' "[35] Therefore, the court has concluded that the use of "affirmative measures" is not beyond the scope of judicial authority.

Overzoning (ō′vēr • zōn′ing), n. "zoning to allow for *more* than the fair share [of regional housing needs] if it is likely, as it usually is, that not all of the property made available for lower income housing will actually result in such housing."[36]

The court uses the term "overzoning" to describe an inclusionary zoning device that municipalities must use to create a "realistic opportunity" for the construction of their fair share of the regional need for lower income housing.[37] The court does not, however, deal with two problems municipalities face in implementing overzoning.

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[34] *See, e.g.*, N.J. STAT. ANN. §§ 55:14J-1 to -58 (West Cum. Supp. 1983-1984) (designed to facilitate construction and rehabilitation of housing projects for families of moderate income by providing for mortgage loans to qualified housing sponsors and exemption of certain housing projects from real property taxation); *Id.* § 40:37A-106 (vests county improvement authorities with powers necessary to undertake, finance, and operate housing projects for families of low and moderate incomes); *Id.* § 17:1B-9.2 (authorizes New Jersey Mortgage Finance Agency to raise funds from private investors and make those funds available through mortgage lending institutions and firms located within state for new residential loans as well as for residential, rehabilitation, and improvement loans); *Id.* § 55:14J-30 (automatically ratifies, validates, and confirms any municipal resolution adopted prior to effective date of act which grants or authorizes tax exemption or abatement for housing projects for low or moderate income families which are financed by New Jersey Housing Finance Agency).

[35] *Mt. Laurel II*, 92 N.J. at 271, 456 A.2d at 448.

[36] *Id.* at 270, 456 A.2d at 447 (emphasis in original).

[37] *Id.*

A. *Planning Board Violations of the "Principles of Sound Planning"*

If the planning board recommends "overzoning" in its land use plan, it necessarily violates that "principle of sound planning" which requires that the use of the municipality's land and other resources be based upon a rational and comprehensive balance among competing needs and constraints. Before proposing a land use plan designating the use of land to best meet the many needs of the jurisdiction, the planning board must consider the potential detrimental impact of the proposed development including traffic problems, flooding, air, water and noise pollution, and tax revenue and expenditures. Implementation of an overzoning device omits this balancing process, thus violating the "principles of sound planning."

Moreover, by adopting the device of "overzoning," the *Mount Laurel II* court made a policy decision that an oversupply of land for high residential use will result in a lower market value of such land and a reduced cost of housing construction, irrespective of other planning considerations. If the planning board bases its recommendation of "overzoning" on this judicial policy decision rather than on its own studies and analyses, the board will be forced to admit the invalidity of its processes and conclusions and to abandon the principle of comprehensive and rational balance itself. This will seriously impair the integrity of the planning process and will make "principles of sound planning" a concept dependent upon the political, social, and economic judgments of the judiciary.

B. *Governing Body Violations of the Municipal Land Use Law*

If the municipal governing body adopts a zoning ordinance which provides for "overzoning" inconsistent with the recommendations of the planning board in the land use element of the master plan,[38] this action may violate the New Jersey Municipal Land Use

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[38] A master plan is a composite of written proposals for the development of a municipality made pursuant to the New Jersey Municipal Land Use Law (MLUL). N.J. STAT. ANN. §§ 40:55D-1 to -99 (West Cum. Supp. 1983-1984) which in pertinent part provides:

> a. The planning board may prepare and, after public hearing adopt or amend a master plan, or component parts thereof, to guide the use of lands within the municipality in a manner which protects public health and safety and promotes the general welfare.
>
> b. The master plan shall generally comprise a report or statement and land use and development proposals, with maps, diagrams and text, presenting where appropriate, the following elements:

Law (MLUL)[39] which authorizes municipal governments to adopt land use regulations.[40] Under the MLUL, the zoning ordinance must be "substantially consistent" with the land use element of the adopted master plan "or [be] designed to effectuate such plan element."[41] The governing body can avoid these provisions, "but only by affirmative vote of a majority of the full authorized membership . . . with the reasons . . . for so acting recorded in the minutes."[42] Thus, by following this statutory procedure it is possible for the governing body to

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(1) A statement of objectives, principles, assumptions, policies and standards upon which the constituent proposals for the physical, economic and social development of the municipality are based;

(2) A land use plan element (a) taking into account the other master plan elements and natural conditions, including, but not necessarily limited to, topography, soil conditions, water supply, drainage, flood plain areas, marshes, and woodlands, (b) showing the existing and proposed location, extent and intensity of development of land to be used in the future for varying types of residential, commercial, industrial, agricultural, recreational, educational and other public and private purposes or combination of purposes, and (c) including a statement of the standards of population density and development intensity recommended for the municipality;

(3) A housing plan element, including but not limited to, residential standards and proposals for the construction and improvement of housing;

(4) A circulation plan element showing the location and types of facilities for all modes of transportation required for the efficient movement of people and goods into, about, and through the municipality;

(5) A utility service plan element analyzing the need for and showing the future general location of water supply and distribution facilities, drainage and flood control facilities, sewerage and waste treatment, solid waste disposal and provision for other related utilities;

(6) A community facilities plan element showing the location and type of educational or cultural facilities, historic sites, libraries, hospitals, fire houses, police stations and other related facilities, including their relation to the surrounding areas;

(7) A recreation plan element showing a comprehensive system of areas and public sites for recreation;

(8) A conservation plan element providing for the preservation, conservation, and utilization of natural resources, including, to the extent appropriate, open space, water, forests, soil, marshes, wetlands, harbors, rivers and other waters, fisheries, wildlife and other natural resources;

(9) An energy conservation plan element which systematically analyzes the impact of each other component and element of the master plan on the present and future use of energy in the municipality, details specific measures contained in the other plan elements designed to reduce energy consumption, and proposes other measures that the municipality may take to reduce energy consumption and to provide for the maximum utilization of renewable energy sources; and

(10) Appendices or separate reports containing the technical foundation for the master plan and its constituent elements.

Id. § 40:55D-28.

[39] *Id.* §§ 40:55D-1 to -99.

[40] *Id.* § 40:55D-62.

[41] *Id.*

[42] *Id.*

"overzone" land for high residential use where such recommendation is not contained in the land use element of the master plan. The governing body will offer as a reason for its divergence from the master plan its obligation to comply with the *Mount Laurel II* decision. Yet, it must be recognized that this provision was added to the state enabling legislation for quite another purpose: to allow an elected local governing body to prevail over a nonelected planning board when there is a difference between them. This raises the question of whether the state legislature intended the provision to authorize municipal governing bodies to reject the land use element of the master plan because of a judicial mandate rather than for reasons of local legislative discretion.

Mandatory set-asides (man′də tôr′ ē • set ə sīdz′), n. a technique of inclusionary zoning and a component of "affirmative measures" necessary for a valid municipal zoning ordinance that requires (as distinguished from a voluntary action) "developers [to] include a minimum amount of lower income housing in their projects."[43]

The court substituted the shorter, catchier phrase "mandatory set-asides" for the more awkward language previously used in the literature: "mandatory percentage of moderately priced dwellings" (MPMPD).[44] One reason why the court found it preferable to create its own phrase may have been an intention to substitute the requirement of "lower income housing" for that of "moderately priced dwelling" contained in the previous MPMPD wording. There are several questions about this particular addition to the lexicon of exclusionary zoning litigation that invite further study and analysis: (1) Is the technique economically feasible? (2) Is it administratively feasible as a judicial remedy? (3) Does the "mandatory" aspect undermine its constitutional validity under the state or federal due process clauses?

A. *Economic Feasibility*

The court cites an economic feasibility study prepared for the Regional Planning Board of Princeton[45] in 1974 to support its assump-

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

[44] *See* Rose, *The Mandatory Percentage of Moderately Priced Dwelling Ordinance (MPMPD) Is the Latest Technique of Inclusionary Zoning*, 3 REAL EST. L.J. 176 (1974).

[45] The author was a member of the Regional Planning Board of Princeton from 1973 until after the Princeton Community Master Plan was adopted in 1980, *see infra* note 52, during which period he chaired the Land Use Committee whose responsibilities included the preparation of the Land Use Element of the Master Plan. *See supra* note 39.

tion that "mandatory set-asides" are economically feasible.[46] This study was designed to determine whether an "internal subsidy" could be created for the construction of low and moderate income housing by the "capture of the increase in land values that occurs when land is rezoned for higher densities."[47] One of the principal assumptions in this study was that land zoned for low density development could be purchased by developers at relatively low cost.[48] The study showed that if the developer purchased land at a lower cost, he could then obtain approval for higher-density development and consequently the value of his land would increase. His per-unit land cost would be reduced substantially by the increased allowable density, thereby creating a "fund" for the "internal subsidy" of a specified amount of low and moderate income housing.[49] The study concluded that it would be economically feasible to create an "internal subsidy" for up to thirty-four percent of the units built, including fourteen percent of *low* income units and twenty percent of *moderate* income units, if the average gross density was increased to 3.2 units per acre.[50]

The presentation of this study to the Regional Planning Board of Princeton in 1974 met with substantial doubt and skepticism. This skepticism increased as time passed and when the Master Plan was finally adopted in 1980, the Planning Board rejected a *mandatory* set-aside and instead recommended a zoning ordinance provision for an *optional conditional* high density program.[51] Designed to provide for the community's present and future local and regional housing needs, the Princeton Master Plan utilizes the designation of appropriate areas as "conditional high density" areas.[52] This designation is one technique of implementing the plan whereby owners of land in these areas are given a choice: They may develop the land as of right at a lower density or they may develop the land at a higher density on condition

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[46] *Mt. Laurel II*, 92 N.J. at 267 n.29, 456 A.2d at 446 n.29 (citing Real Estate Research Corp., Housing Development Program Analysis Draft Report (Nov. 1974) [hereinafter RERC Report] in DEPARTMENT OF COMMUNITY AFFAIRS, THE PRINCETON HOUSING PROPOSAL: A STRATEGY TO ACHIEVE BALANCED HOUSING WITHOUT GOVERNMENT SUBSIDY 13-26 (1977).

[47] DEPARTMENT OF COMMUNITY AFFAIRS, THE PRINCETON HOUSING PROPOSAL: A STRATEGY TO ACHIEVE BALANCED HOUSING WITHOUT GOVERNMENT SUBSIDY 2 (1977).

[48] *Id.*

[49] *Id.*

[50] *Id.* at 3; *see also id.* at Appendix E (computer compilation of data forming basis for conclusions of RERC Report).

[51] REGIONAL PLANNING BOARD OF PRINCETON, PRINCETON COMMUNITY MASTER PLAN (Apr. 1980) [hereinafter cited as PRINCETON MASTER PLAN].

[52] *Id.* at 82.

that a specific number of low and moderately priced units are built.[53]

The recommendation of an "optional-conditional high density" provision rather than a "mandatory set-aside" was based upon the decision of the Princeton Planning Board that there was both a moral and a legal obligation to permit the owners of land in "conditional high density areas" to make some reasonable use of their property if the findings of the "internal subsidy" study turned out to be incorrect.[54] It is readily conceded that the decision of one Planning Board on this issue is far from conclusive. The recommendation of the Princeton Planning Board does, however, call attention to the fact that the evidence cited by the court to support the conclusion that "mandatory set-asides" are economically feasible is less than conclusive.

B. *Administrative Feasibility*

The court described the concept of "mandatory set-asides" as an inclusionary zoning technique that municipalities must use if they cannot otherwise assure the construction of their fair share of lower income housing.[55] It is interesting to note that municipalities must use this technique even though the court concedes that there is a serious question of the administrative feasibility of the technique.[56] In addition to the problem of limited federal subsidies to finance lower income housing[57] there are several administrative problems that must be resolved if this technique is to achieve the court's objectives. An effective administrative mechanism must be created to establish standards and procedures for: (1) determining the eligibility of low income buyers and/or renters and reviewing their continuing eligibility; (2) reviewing of rents through rent control of the lower rental units and regulation of the market rent apartments that are serving to "subsidize" the lower rental units; and (3) approving the purchase and

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[53] *Id.*

[54] *See supra* note 48.

[55] *Mt. Laurel II*, 92 N.J. at 265, 456 A.2d at 445.

[56] *See id.* at 265, 268, 456 A.2d at 446-47. Actually, the court said that "[w]here practical, a city should use mandatory set-asides even where subsidies are not available." *Id.* at 268, 456 A.2d at 446-47.

[57] *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 510-11 & n.20, 371 A.2d 1192, 1206-07 & n.20 (1977); *see also* CENTER FOR URBAN POLICY RESEARCH, *MOUNT LAUREL II*: CHALLENGE AND DELIVERY OF LOW-COST HOUSING 86 (Rutgers University 1983).

the sale prices for subsequent unit sales.[58] The court once again directed attention to the "sophisticated approach" proposed by Princeton Township as a satisfactory resolution to these problems.[59] The mechanism proposed by Princeton,[60] but never enacted into law, consisted of two parts: (1) disposition covenants that would bind owners and renters of such units to sell or rent only to persons at lower income levels, and (2) a "public trust" that would enforce the covenant and deal with the three administrative problems described above.[61] Although many studies and proposals were considered by the Princeton Regional Planning Board, the court focused its attention on this one proposal as an example of a "more sophisticated approach" to solving the administrative issues involved in "mandatory set-asides."[62] When the Princeton Community Master Plan was finally adopted it contained a recommendation for the creation of a "Community Housing Trust" with the power to ensure that subsidized units will continue to be available to eligible lower income purchasers and renters as well as the power to procure additional housing and to buy and sell existing housing.[63]

C. *Constitutional Validity*

The phrase "[m]andatory set-asides" is a euphemism for a judicial requirement that a developer of land contribute the income-producing potential of a specified proportion of his property to pro-

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[58] For a discussion of the problems of administration of the mandatory set-aside and other aspects of the builder's remedy in general, see Rose, *supra* note 6.

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

[60] *See* Miller & Porter for the Regional Planning Bd. of Princeton, A Report Updating and Supplementing Part III of the Princeton Housing Proposal: A Strategy to Achieve Balanced Housing without Governmental Subsidy (Dec. 1979).

[61] *Id.* at 14-25; *Mt. Laurel II*, 92 N.J. at 269, 456 A.2d at 447. Several members of the Regional Planning Board of Princeton, including myself, objected to the use of the phrase, "public trust." Its primary author, the late William Miller, the Planning Board attorney and a well-respected, competent lawyer and amiable fellow, prevailed on this issue. Some of us decided not to "bicker about words" when there were too many other more important and complex issues to be resolved. Nevertheless, the use of the phrase "public trust" as the nomenclature to describe the municipal administrative agency to be created was misleading because the administrative agency would be no more "public" and no more a "trust" than any other regulatory agency. The municipal governing body would have to create an administrative agency with power to control rents, sales prices, initial and continuing eligibility of tenants and to deal with some even more troublesome questions that will arise such as proposals for "affirmative action" to assure racial balance in the projects. An analysis of the political and fiscal feasibility and consequences of such an agency is beyond the scope of this article.

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

[63] PRINCETON MASTER PLAN, *supra* note 51, at 95. On May 22, 1984 the Princeton Township Committee introduced an ordinance known as the "Affordable Housing Ordinance" that in-

vide housing for lower income persons. The court avoided a more emotive phrase that may in many respects provide a more accurate description of the obligation: "mandatory give-aways." The constitutional issue presented is very similar to the issue that would be created if a court, having found that a large proportion of the urban poor are ill-fed, required the municipality to require all (chain) food stores in the city to contribute a specified proportion of their annual sales to provide food for lower income persons. In both cases the issues that arise are whether the requirement violates the due process, equal protection, and taking clauses of the state and federal constitutions.

The issue is confounded by the fact that there are no due process or equal protection clauses in the New Jersey Constitution! Nevertheless, the New Jersey Supreme Court, having determined in *Mount Laurel I* that there ought to be such clauses, ruled that those clauses were inherent in the state constitution.[64] Then, having established the existence of these most fundamental of all constitutional provisions,[65] the New Jersey Supreme Court appears to have freed itself of the annoyance of appeal to the United States Supreme Court of its decisions relating thereto by deciding that the inherent due process and equal protection clauses in the state constitution "may be more demanding" than their federal counterparts.[66] As a result of this casuistry, it can hardly be expected that either clause will provide a basis to challenge the validity of the court's own creation—"mandatory set-asides."

On the other hand, the real due process and equal protection clauses in the Federal Constitution create genuine legal problems. Whenever a police power regulation is challenged under the due process clause, its validity is determined by the judicial process of balancing the general welfare benefits against the detrimental impact

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cludes, *inter alia*, a conditional high density provision. This ordinance, in some modified form, is expected to be adopted after additional public hearings. *See* The Princeton Packet, May 22, 1984 at 14A, col. 1.

[64] *Mt. Laurel I*, 67 N.J. at 174-75, 336 A.2d at 725. The state constitutional provision in which the court has determined the due process and equal protection clauses to be "inherent" provides: "All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, para. 1.

[65] *See* Robinson v. Cahill, 62 N.J. 473, 482, 303 A.2d 273, 277 (equal protection provision "implicit" in New Jersey Constitution) (citing Bailey v. Engelman, 56 N.J. 54, 55, 264 A.2d 442, 442 (1970)).

[66] *Mt. Laurel I*, 67 N.J. at 174-75, 336 A.2d at 725; Robinson v. Cahill, 62 N.J. 473, 482, 490-92, 303 A.2d 273, 282 (state constitutions may be more exacting than Federal Constitution). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

of the regulation on the plaintiff.[67] If, after giving due deference to the legislative prerogative to determine public policy, the court finds that the benefits to the general welfare are insufficient to justify a confiscatory impact upon the plaintiff, a court may find the regulation invalid under the due process clause.[68]

There is still no federal decision dealing directly with this issue. The decision of the Virginia Supreme Court in *Fairfax County Board of Supervisors v. DeGroff Enterprises, Inc.*,[69] is the most frequently cited authority on the issue. In that case the court invalidated a Fairfax County ordinance which required a developer of fifty or more dwelling units to commit himself, before site plan approval, to build at least fifteen percent of dwelling units for low and moderate income housing.[70] The court held that the ordinance exceeded the authority granted to the local governing body by the enabling act because it was directed to socioeconomic objectives rather than the physical characteristics authorized by the state statute.[71] Moreover, the court held that the requirement to rent or sell fifteen percent of the dwelling units at prices not fixed by a free market, violated the state constitutional provision that no property be taken or damaged for public purpose without just compensation.[72] Challenging the mandatory set-aside provision under the federal due process clause will necessitate employment of a similar rationale: The confiscatory impact taken together with evidence illustrating the limited effectiveness of the regulation in achieving its objective raises a question of validity.

A federal equal protection clause challenge requires a showing that the ordinance unreasonably discriminated against the class[73] consisting of developers or owners of real estate and/or the purchasers or renters of the housing units whose prices or rents must be increased to subsidize the housing of low income persons. It is at least debatable whether renters or purchasers of the other units in a housing development are the appropriate persons to bear the costs of providing a fair share of the regional housing needs. Thus, the argument can be made

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[67] *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962) (in evaluating reasonableness of state safety ordinance, Court considered state's police power to protect its citizens and constitutional rights of individuals).

[68] *See Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1472 & n.49 (1978).

[69] 214 Va. 235, 198 S.E.2d 600 (1973).

[70] *Id.* at 238, 198 S.E.2d at 602.

[71] *Id.*

[72] *Id.*

[73] *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

that it is unreasonable to impose the obligation of providing for a "regional" housing need upon this small component of the larger region.

Least cost housing (lēst' • kôst • hou' zing), n. the least expensive housing that builders can provide after the municipality removes all excessive restrictions and exactions and thoroughly uses all affirmative devices that might lower costs.[74]

In *Mount Laurel I* the court required municipal zoning ordinances to provide land for housing for low and moderate income persons.[75] Two years later, in *Oakwood at Madison, Inc. v. Township of Madison*,[76] the court substituted the concept of least cost housing for the *Mount Laurel I* requirement of low and moderate income housing.[77] The *Madison Township* court cited as the reason for the change of criterion the improbability of building low and moderate income housing without substantial government subsidies which were and which remain unforeseeable.[78]

The concept of least cost housing was preserved by the court in *Mount Laurel II*.[79] The most significant aspect of the court's definition of "least cost housing," however, is that it specifically avoids including lower income persons as the beneficiaries of such housing. Indeed, the court conceded that the primary beneficiaries of least cost housing would not be lower income persons who "presumably" could not afford such housing, but those "families who could not afford housing in the conventional suburban housing market."[80]

The court purported to limit the use of the "least cost" test to special conditions, such as where extremely high land costs make it impossible for the "fair share" obligation to be met even after all excessive restrictions and exactions have been removed and after all affirmative measures have been utilized.[81] Despite this limitation, the reaffirmation of the least cost concept in *Mount Laurel II* represents an abandonment of the original *Mount Laurel I* objective of providing housing in the suburbs for lower income persons.

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[74] *Mt. Laurel II*, 92 N.J. at 277, 456 A.2d at 451.

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

[76] 72 N.J. 481, 371 A.2d 1192 (1977).

[77] *Id.* at 512, 371 A.2d at 1207.

[78] *Id.* at 510-11, 371 A.2d at 1206; *see supra* note 57 and accompanying text.

[79] *See Mt. Laurel II*, 92 N.J. at 277-78, 456 A.2d at 451-52.

[80] *Id.* at 277, 456 A.2d at 451.

[81] *Id.* The court further stated that housing for middle income persons would not meet the *Mount Laurel* test unless the "least cost" housing test was met—and that test can only be met if the municipality uses *all* affirmative measures including *overzoning* for mobile homes.

The adoption of the least cost housing standard not only resulted in the abandonment of earlier recognized principles, but also placed the court in the more embarrassing position of accepting the "trickle down" theory, which it prefers to call "filter down,"[82] to explain how lower income persons in the urban areas are going to benefit from the Gordian judicial enforcement system it creates in *Mount Laurel II*. Under this theory, lower income persons would benefit only to the extent that upper income persons, who can afford "least cost housing," move out of their city dwelling units, resulting in an eventual "trickle down" of these units to the lower income city residents.[83] The New Jersey Supreme Court, despite its alleged rejection of the trickle down theory,[84] has promulgated, through its adoption of the least cost housing standard, an urban policy that encourages upper income persons to move from the central cities to the suburbs leaving the urban poor with the problems and costs of the deteriorating older cities.[85]

The court seeks to avoid the consequences of this economic and social reality by creating a nice judicial distinction between the primary obligation of every municipality to provide a fair share of lower income housing and a "supplementary" obligation for "least cost housing" where "special conditions" make it impossible to meet the primary obligation.[86] Only under these "special conditions" is the "least cost-trickle down" theory an acceptable alternative to housing for lower income persons.[87] Thus, the court appears to be faithful to the ideal of providing new housing in the suburbs for the poor while recognizing the economic realities that belie the hope of achieving that ideal.

Suitability (so͞ot′ ə bil i ti), n. having conditions, properties, or characteristics that are appropriate or fitted to the purpose.[88] After the

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[82] *Id.* at 278, 456 A.2d at 451-52.

[83] *See id.*; *see also Madison Township*, 72 N.J. at 513-14 & n.22, 371 A.2d at 1208 & n.22.

[84] *See Mt. Laurel II*, 92 N.J. at 278, 456 A.2d at 451-52.

[85] For an analysis of the dilemma faced by the New Jersey Supreme Court in deciding whether to abandon or reconfirm the "least cost" housing test, see Rose, *supra* note 6.

[86] *See Mt. Laurel II*, 92 N.J. at 277, 456 A.2d at 451.

[87] *See id.*

[88] *See id.* at 232, 456 A.2d at 427 (citing N.J. DEP'T OF COMMUNITY AFFAIRS, DIVISION OF STATE AND REGIONAL PLANNING, STATE DEVELOPMENT GUIDE PLAN (May 1980)); *see also id.* at 237-38, 456 A.2d at 430.

region's future housing need has been forecast, it becomes necessary to allocate the number of units among the municipalities in that region.[89] "Suitability" is the word used to describe the "overall group of factors that must be considered" when making the "fair share" allocation.[90]

The *Mount Laurel* obligation of a New Jersey municipality in a "growth" area is to provide a "realistic opportunity" for the construction of its "fair share" of the future "regional need" for low and moderate income housing.[91] The court recognized that the process of allocating regional need to municipalities should not be accomplished by simplistic methods such as mandating an equal number of lower income units or an equal proportion of units in each municipality or by making the proportion the same as that of the county.[92] Rather, the court determined that the fair share allocation process should involve consideration of an "overall group of factors . . . subsumed in the word 'suitability.' "[93]

Although the court did not set forth the objective elements of suitability,[94] it would appear that in determining the suitability of a municipality for low and moderate income housing the "principles of sound planning" would require consideration of the following factors:[95] (1) employment opportunities; (2) public transportation; (3) adequacy of educational, medical, and social services; (4) adequacy of water and sewage facilities; (5) ecological impact; (6) fiscal capacity of the municipality to provide the requisite services; and (7) present tax rate and the tax burden to be borne by the future low and moderate income residents.

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[89] *See id.* at 256-58, 456 A.2d at 440-41.

[90] *Id.* at 350, 456 A.2d at 489.

[91] *See id.* at 238-39, 256-58, 456 A.2d at 431, 440-41. There are several steps in the process of quantifying the municipality's housing obligation: (1) identifying the relevant region; (2) estimating the municipality's present housing needs and predicting the municipality's future needs; and (3) allocating those needs to the municipalities in the region. *Id.* at 248, 456 A.2d at 436.

[92] *Id.* at 350, 456 A.2d at 489.

[93] *Id.*

[94] Indeed, the court skirted this complex issue with the statement that "these factors have been described and need not be repeated here." *Id.*

[95] Suitability is one of the many factors upon which a fair share allocation may be made. Others include: (1) need for housing, (2) economic and racial integration, (3) equality of distribution of the regional need, (4) population proportions, (5) proportion of existing jobs, and (6) proportion of future jobs. *See* Rose, *Fair Share Housing Allocation Plans: Which Formula Will Pacify the Contentious Suburbs?*, 12 URB. L. ANN. 3 (1977).

It is important for the judiciary and other intervenors in the planning process to recognize that there is no objective method of weighing the relative importance of each of the many factors that determine "suitability." It is precisely for this reason that, once planning studies are made and professional evaluations of those studies are offered, the planning process must be continued in a forum comprised of elected representatives who possess the democratic and constitutional authority to make policy decisions.

This creates a difficult dilemma for the court: If an easy-to-apply allocation formula such as proportion of future jobs or proportion of racial minorities is adopted, a municipality's obligation will be assigned without regard to the "principles of sound planning." If, on the other hand, the allocation formula considers the many factors involved in the "suitability" of each municipality, the judgment of the court on these issues will be vulnerable to attack as an unwarranted intrusion into the legislative process. The court in *Mount Laurel II* attempted to avoid this dilemma by authorizing the appointment of a professional planner as a master to formulate the housing allocation plan.[96] Although the master, as an expert, can bring professional competence and seasoned judgment to the process, in actuality he is no better situated than the court, for he too lacks the authority to make the policy decisions upon which "suitability" must ultimately rest. Moreover, it may be argued that a planner hired and appointed by a court as a master will be no more objective than a planner hired by the developer or the municipality.[97] Each planner will provide his/her expertise to support the goals of his/her client. Neither the allocation recommendations of the court-appointed master nor the ideology of the appointing judge will necessarily lead to either planning truth and justice or wise urban planning.

Builder's remedy (bil dərz • rem ə dē), n. a form of redress by which a builder-plaintiff in exclusionary zoning litigation is compensated for damages suffered as a result of the invalid zoning ordinance by a judicial order permitting him to proceed with his proposed development, subject to prescribed conditions.[98]

The underlying purpose of the builder's remedy is to provide builders with an incentive to challenge exclusionary zoning ordi-

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[96] *Mt. Laurel II*, 92 N.J. at 218, 456 A.2d at 420.

[97] For a discussion of the objectivity of a court-appointed master, see Rose, *supra* note 6, at 126-27.

[98] *See Mt. Laurel II*, 92 N.J. at 279-81, 456 A.2d at 452-53.

nances.[99] The New Jersey Supreme Court has authorized the builder's remedy based upon its determination that without this incentive, many unconstitutional ordinances would remain unchallenged. Thus, where a developer succeeds in *Mount Laurel* litigation and proposes a project which provides a substantial amount of lower income housing, this remedy is granted unless the municipality establishes that environmental or other substantial planning concerns demonstrate that the proposed project is clearly contrary to sound land use planning.[100]

Although the court concluded that a commendable public policy objective underlies the builder's remedy and despite its warning that the decision would not be "a license for unnecessary litigation,"[101] *Mount Laurel II* represents a judicial policy which encourages litigation. This marks a departure from the courts' traditional approach of discouraging parties from instigating or promoting litigation for a reward or a share of the resulting judicial spoils as in champerty and maintenance. Rather than establishing policy that determines the types of issues to be litigated, courts traditionally have served as the forum in which to resolve the issues brought before them. Municipalities are responding to the court's departure by decrying the staggering cost of litigation they face in defending their master plans and land use regulations from attack by profit-inspired and frequently well-financed plaintiff-builders.

The New Jersey Supreme Court's authorization of trial courts to provide a "builder's remedy" not only adds another phrase to the lexicon of exclusionary zoning litigation but has serious implications for the preservation of the principle of separation of powers. The new remedy involves the judiciary in legislative policymaking functions and involves the trial courts in administrative actions beyond the traditional scope of judicial propriety, competence, or mandate. By authorizing the granting of a builder's remedy, the court in *Mount Laurel II* had made it necessary for the trial courts to evaluate the merits of the builder's proposal and to oversee the process of promulgating and enforcing conditions to guide and control the builder's development over a period of time. This process will require (1) personnel, i.e., specially qualified judges and "special masters"; (2) creation of an administrative mechanism; and (3) money.

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[99] During oral argument, the Chief Justice posed several questions to the representative of the Office of the Public Advocate whose answers to those questions made it clear that the Public Advocate's office had insufficient funds to undertake the responsibility of assuring municipal compliance with *Mount Laurel*. *See supra* note 29.

[100] *Mt. Laurel II*, 92 N.J. at 279, 280, 456 A.2d at 452.

[101] *Id.* at 280-81, 456 A.2d at 453.

A. *Personnel*

Experience in New Jersey exclusionary zoning litigation has demonstrated that some judges lack the necessary expertise to review many of the complex issues that arise in this area of the law.[102] To overcome this problem, three specially qualified judges have been designated to handle all *Mount Laurel* litigation in the future.[103] Each judge is exclusively responsible for a particular area of the state. All litigation challenging a land use regulation in a municipality on *Mount Laurel* grounds is to be assigned to a corresponding[104] judge. It is expected that this process will guarantee the smooth implementation of the *Mount Laurel II* mandate.

Even the most competent judge, however, will not have the time or resources required to formulate and administer an appropriate "builder's remedy." Promulgating the details of the builder's development and overseeing the municipal review and approval processes, as well as supervising the builder's performance of his obligations thereunder, will have to be delegated to a professionally competent agent of the court—the "special master." The court delineated the functions of a "special master" appointed to assist a municipality in the revision of its land use laws[105] and authorized trial courts to "freely appoint a master to aid in the implementation of their order."[106] This appointment, as the court clearly stated, does not include a delegation of

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[102] The author has testified as a planning expert in two of the major New Jersey exclusionary zoning cases and has found the dramatically divergent range of judicial competence to be manifest. Also, Judge George Gelman noted in Pascack Ass'n, Ltd. v. Mayor of Township of Washington, 131 N.J. Super. 195, 329 A.2d 89 (Law Div. 1974), *modified*, 74 N.J. 470, 397 A.2d 6 (1977), where he appointed two urban planners to assist the court in formulating an appropriate judicial remedy: "[J]udges have not been known to possess any particular expertise in either zoning, or planning." *Id.* at 207, 329 A.2d at 96. The procedure by which judges are designated in the State of New Jersey does not include compliance with standards to assure that newly appointed judges have competence in planning, zoning, and other forms of land use regulation. *See also* Levin & Rose, *The Suburban Land Use War: Skirmish in Washington Township, New Jersey*, URB. LAND, May 1974, at 14 (discussion from perspective of court-appointed planning consultants).

[103] *Mt. Laurel II*, 92 N.J. at 253, 456 A.2d at 439. The following judges have been assigned all litigation initiated after January 20, 1983 that includes a *Mount Laurel* challenge to land use regulations of a municipality within the judge's district: Judge Stephen Skillman, northern district consisting of Sussex, Warren, Morris, Bergen, Passaic, Hudson, Essex, and Hunterdon Counties; Judge Eugene D. Serpentelli, central district consisting of Ocean, Somerset, Mercer, Monmouth, Middlesex, and Union Counties; Judge Anthony L. Gibson, southern district consisting of Burlington, Camden, Gloucester, Salem, Cumberland, Cape May, and Atlantic Counties. 111 N.J.L.J. 638 (June 16, 1983).

[104] *Mt. Laurel II*, 92 N.J. at 253-54, 456 A.2d at 439.

[105] *Id.* at 281-84, 456 A.2d at 453-55.

[106] *Id.* at 332, 456 A.2d at 480.

judicial power to the special master.[107] The final decision regarding legal compliance of the builder's remedy remains with the judge.[108]

B. *Administrative Mechanisms*

In considering the validity of a builder's *Mount Laurel* challenge, the trial court must initially consider whether the proposed development violates environmental constraints or is contrary to sound land use planning.[109] If either condition exists, the builder will be denied relief.[110] If the builder receives a favorable ruling, the role of the trial court is not terminated: The court will then have a direct and long-term responsibility to assure that the builder's development "provides a substantial amount of lower income housing."[111] To fulfill this obligation the trial court will have to establish standards and an administrative mechanism to (1) determine the eligibility of low income buyers and/or renters and to review their continuing eligibility; (2) review rents and other charges to low income renters; (3) approve purchasers and the initial and subsequent sale prices of housing units.[112] In addition, an administrative mechanism will be needed to respond to the technical legal problems that must be resolved upon such events as mortgage foreclosure, default in rent payments, and death of an owner.

C. *Money*

Administering the builder's remedy will involve both direct and indirect costs. Direct costs include compensation for the services of the special master. This compensation is to be paid in its entirety by the municipality.[113] In addition, the municipality will have to absorb the costs incurred by a unit of government to oversee the administrative problems discussed above. Whether that municipal agency is called a public trust,[114] a public housing authority, or a sub-unit of an existing municipal entity, there will be line and staff personnel as well as overhead costs of operation that will have to be paid out of the

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[107] *Id.* at 284, 456 A.2d at 455.

[108] *Id.* at 332, 456 A.2d at 480.

[109] *See supra* notes 8-20 and accompanying text.

[110] *Mt. Laurel II*, 92 N.J. at 279-80, 456 A.2d at 452.

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

[112] For an analysis of some of the problems involved in the judicial administration of a builder's remedy, see Rose, *supra* note 6, at 115, 132.

[113] *Mt. Laurel II*, 92 N.J. at 281 n.38, 456 A.2d at 453 n.38.

[114] *See supra* note 62 and accompanying text.

municipal budget. Other costs include the services of the planning board attorney, the municipal attorney, and the planning board staff. All of these costs will have both tax rate and spending limitation[115] consequences in many New Jersey municipalities.

Excessive restrictions and exactions (ik ses′ iv • ri strik′ shənz • ənd • ig zak′ shənz), n. inordinate, exorbitant or extravagant restraints or limitations and requirements of a payment when none is due.

> In order to meet their *Mount Laurel* obligations, municipalities, at the very least, must remove all municipally created barriers to the construction of their fair share of lower income housing. Thus, to the extent necessary to meet their prospective fair share and provide for their indigenous poor (and, in some cases, a portion of the region's poor), municipalities must remove zoning and subdivision restrictions and exactions that are not necessary to protect health and safety.[116]

Although the court recognized the difficulty of balancing "the need to reduce the costs of its regulations against the need to protect health and safety adequately,"[117] the Justices were firm in the belief that relatively objective guides existed to resolve this problem.[118] In so holding, the court once again failed to discern the difference between "objective guides" and basic legislative policy decisions that determine the character and amenities of the community.

The problem of defining "excessive restrictions" may be easier for zoning regulations than for subdivision law: maximum number of bedroom restrictions may be excessive; expensive amenities for apartment houses, such as swimming pools and tennis courts may be excessive; minimum floor area requirements may be subject to "objective guides," and determined to be excessive. But even the well-litigated zoning cases leave unresolved many issues for which there are no "objective guides."

A minimum lot size of one acre throughout the municipality may be excessive. Would a lot size of 70 x 100, or 50 x 100, be acceptable?

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[115] New Jersey is one of several states that impose spending limitations on state and municipal governments. N.J. STAT. ANN. §§ 40A:4-45.1 to -87 (1980 & West Cum. Supp. 1983-1984). For an analysis of some of the land use and development consequences of spending limitations, see Rose, *Limitations on State Taxation and Spending: The Impact on Future Land Use and Development*, 9 REAL EST. L.J. 91 (1980).

[116] *Mt. Laurel II*, 92 N.J. at 258-59, 456 A.2d at 441 (footnote omitted).

[117] *Id.* at 259, 456 A.2d at 442.

[118] *Id.*

What proportion of the undeveloped land would have to be allocated to the small lot size? To what extent are front, rear, and side yard set back requirements valid? Would the availability of sewage facilities be relevant? How useful are "objective guides" which apply to all municipalities, but do not consider the unique facts of the particular municipality in issue? Can the relative importance of the many development constraints such as impact on the road system, adequacy of water, sewage, and educational facilities, potential detriment to ecological amenities, or fiscal capacity to provide requisite services, be determined on the basis of "objective guides" or does this determination involve basic legislative policy judgments?

The issue of what would constitute an "excessive" *subdivision* requirement is even less amenable to "objective guides." Under what circumstances are sanitary sewers and storm drainage facilities necessary to protect health and safety? Are sidewalks necessary? Would a requirement of sidewalks on only one side of the street be sufficient to protect the public health? Would narrower and less expensively built roadways protect the public safety? Are street curbs and gutters necessary? Is the requirement of underground electric and telephone utility installations an excessive cost generating exaction?

Are requirements for landscaping and street tree plantings necessary to protect the public health? It seems clear that the next round of *Mount Laurel* battles will be fought on the subdivision front—on the street, on the sidewalks, and behind the bushes, if any, of new developments. There will be heated debates about the "objectivity" of "guides" to determine the necessity for storm drainage, curbs, gutters, sidewalks, and other cost generating subdivision exactions, but it is going to be very difficult to prove that flowers, bushes, and trees are necessary to protect health and safety. It may turn out that the primary accomplishment of this requirement of the *Mount Laurel* decision will be to eliminate the forsythia, the rhododendron, and the flowering dogwood that previously adorned the otherwise bleak countenance of new housing construction in New Jersey.[119]

A more serious consequence of the judicial decree that municipalities must remove "excessive restrictions and exactions" to meet their *Mount Laurel* requirements is the jeopardy it creates for the tradi-

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[119] *See* Rose, *How Will New Jersey Municipalities Comply?*, 35 LAND USE L. & ZONING DIG. (Mar. 1983).

tional grid design (with cul de sac variations) used in suburban subdivisions. Once a trial court enters into the business of determining which subdivision requirements are necessary to protect public health and safety and which are excessive, it is only a matter of time before one of the three *Mount Laurel* judges begins to realize that there is nothing sacrosanct about the traditional subdivision design. It won't be long before someone realizes that most suburban land use regulations require each housing unit to be built on its own individual lot with its own driveway and garage, its own sidewalk, curbs and gutters, landscaping, and individual and repetitive utility connections. It won't be long before someone calculates the cost of an individual garage, sidewalks, utility connections, etc., and realizes that the most effective method of reducing the cost of suburban housing, after reducing the amount of floor area, is to eliminate the individual lot and individual garage and to build housing units with common walls in "quads" (groups of four units), or two story "octi-pads" (groups of eight units). Each multi-unit structure will have a common out-of-doors parking lot, limited, and less expensive sidewalks and landscaping, and less expensive construction and utility connection costs.

Once the trial courts comprehend the significance of these issues they will be ready for the next round of "exclusionary zoning" litigation. The underlying issue will be the same as before, namely, are these the kinds of questions that should be resolved by economic forces, municipal governing bodies, state legislators, or by three specially designated trial court judges?

II. New Legal Phrases Created in Reaction to the Court's New Concepts

The new legal phrases created by the court in *Mount Laurel II* should not be dismissed lightly as innocent lexicographic offerings of an imaginative and poetic judiciary. It is common knowledge to students of philology that the culture, moral system, and aesthetics of a society may be revealed and are influenced by the existence or nonexistence of words. The existence of a word in a society's vocabulary is evidence of that society's awareness of its meaning. The absence of words to describe concepts or relationships is also evidence of the society's social, ethical, and aesthetic concerns. In some primitive societies, where there is no word for "romantic love" or "jealousy," there is little, if any contemplation of the concepts these words describe. The introduction of such phrases as "unjust enrichment," "betterment," "floating value," and "development rights" in the Uthwatt

Report[120] in England in 1942 probably will have a greater long-term effect upon land use regulation and planning than the Town and County Planning Act of 1947[121] enacted to respond to those issues.

The additions to the lexicon of exclusionary zoning litigation described in the first section are more than a collection of selected addendum to a land use law vocabulary list. Taken together they embody a value system, a perspective, and a judicial philosophy. As such, they invite a reaction and response in the form of other phrases that may also be added to the exclusionary zoning lexicon. The following are suggested as the beginning of a list of phrases that will be created in time in response to the court's new concepts: (1) "constitutional brinkmanship," (2) "skillful municipal obstinacy," and (3) "waning judicial legitimacy."

Constitutional brinkmanship (kän'stə tōō'shən əl • brink mən ship'), n. a strategy for achieving an objective by undertaking the risks involved in pressing a cause to the edge of precipitous constitutional consequences, for example, the policy of the New Jersey Supreme Court to pursue its antiexclusionary zoning objectives to the limit of constitutional authority.

The power of state courts to resolve controversial policy issues, and all other matters in their jurisdiction, may be limited by the state and federal constitutions, and within those constitutional limits, by the state legislature. The New Jersey Constitution expressly makes the state supreme court the appellate court of last resort in all issues arising there.[122] When, during oral argument of *Mount Laurel II*, one of the attorneys dared to suggest that the supreme court would exceed its judicial authority under the separation of powers provisions of the state constitution if it ordered the remedies proposed by plaintiffs, one of the Justices put this argument to rest with the following rhetorical question: "Doesn't the constitutional mandate for separation of powers depend upon how it is interpreted by this court?"

Once it is established that the New Jersey Constitution means what the state supreme court says it means, it becomes easy for that

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[120] Expert Committee On Compensation and Betterment, Final Report (Uthwatt Report) Cmd. No. 6386 (1942). For a brief description of some of the new vocabulary introduced in the Uthwatt Report and a short bibliography of articles on the British experiment in land use planning in the 1940's, see Rose, *A Proposal For the Separation and Marketability of Development Rights As a Technique To Preserve Open Space*, 2 REAL EST. L.J. 635, 642-45 (1974).

[121] Town and County Planning Act of 1947, 10 & 11 Geo. 6, c. 51.

[122] N.J. CONST. art. VI, § 2, para. 2.

court to decide that the constitution contains a due process clause and an equal protection clause, even though it does not. Moreover, once the court determines that these provisions exist, it can effortlessly construe them as being more demanding than the due process and equal protection clauses of the Federal Constitution. Through this reasoning process it becomes possible for the court to make legislative policy decisions and to establish an administrative-like mechanism to enforce the legislative-like standards of those policy decisions. While the logic of the court's reasoning is impeccable, the wisdom of its conclusion is uncertain. Nevertheless, the court's reasoning does eliminate one-half of the issue of constitutional brinkmanship: It must be conceded that no aspect of *Mount Laurel II* violates the New Jersey Constitution while that court sits.

The possibilities for constitutional brinkmanship with the Federal Constitution is another matter. It is the United States Supreme Court that has the last word on what that document means. Although it is unlikely that the United States Supreme Court will impose its interpretation of the federal separation of powers doctrine on the state constitutions, the due process clause, the equal protection clause, and the taking provision of the fourteenth and fifth amendments of the Federal Constitution do impose limitations on state excercise of power, including the actions of state judiciaries. Once the trial courts begin to apply the principles and standards set forth in *Mount Laurel II*, then it is only a matter of time before a court will be called upon to impose land use restrictions upon a recalcitrant municipality that has limited the use of land in a way that raises federal constitutional issues. The trial courts will tread on the brink of the constitutional precipice when they impose the concepts of "overzoning" and/or "mandatory set-asides" upon the system of municipal land use regulation.

Adoption of the term "overzoning," because the word itself conveys its inherent vulnerability to the standard of reasonableness required by the concepts of due process of law and equal protection of the laws, was not the wisest of choices. "Overzoning" is a relatively new concept that was introduced in exclusionary zoning litigation and would have been avoided as anathema in the early days of establishing the constitutional validity of zoning laws.[123] "Overzoning" is a con-

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[123] An historical perspective of the extent to which the criteria of valid zoning have changed from the days of its original objectives to today's objectives of "overzoning" may be derived from the analysis of the legal issues before the United States Supreme Court in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), as described in S. TOLL, ZONED AMERICAN (1969).

cept that is contrary to the principles of sound land use planning. It is a technique that does not seek to use the information derived from the studies of the planning process for the purpose of developing a comprehensive and balanced land use plan. Rather, it is a technique that defies the principles of sound planning because it calls for designation of more land for high density residential use than would reasonably be required by the available data.[124] The objective sought by advocates of "overzoning" is clear: to create an oversupply of land for high residential use so as to reduce the market value of such land, thereby lowering the costs of housing for lower income persons. When, and if, a New Jersey court requires "overzoning" to achieve this objective, it may be challenged under the federal due process clause on the grounds that the purpose sought to be achieved by the law is unreasonable. This challenge would be based on the law's intention to lower the market value of plaintiff's land to achieve a purpose, i.e., the financing of housing for lower income persons which would more reasonably be achieved by alternative programs. It would also be challenged under the federal equal protection clause on two grounds: First, that the law discriminates unreasonably against owners of land whose characteristics are not reasonably related to the use assigned by the zoning law, and second, that it imposes upon such landowners a disproportionate obligation to finance lower income housing. Finally, "overzoning" devices would be challenged under the federal taking clause on the grounds that the diminution of the market value of plaintiff's land resulting from the intentionally created oversupply, allegedly intended to promote the public good, constitutes a taking just as effectively as a formal condemnation or physical invasion of the property.[125]

Of course, the New Jersey Supreme Court does not admit that the purpose of "overzoning" is to create an oversupply of high density residential use land to lower the market value. The purpose of "overzoning," as described by the court, is to allow for more than the fair share of the region's housing needs because it is likely that "not all of the property made available *for lower income housing* will actually result in such housing."[126]

This explanation is something less than candid, cogent, or comprehensive and ignores the fact that zoning laws do not specify the economic characteristics of the occupants of land, i.e., zoning laws do

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[124] *See supra* notes 36-37 and accompanying text.

[125] *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (Brennan, J., dissenting).

[126] *Mt. Laurel II*, 92 N.J. at 270, 456 A.2d at 447 (emphasis added).

not designate zones for use for "lower income housing," "middle income housing" or "higher income housing." Zoning laws do specify the permitted density of development. Although there may be a correlation between permitted land use density and housing cost per unit, zoning laws never have been an effective means of assuring that the potentially lower land cost per housing unit, resulting from the economic advantage of building more units on a piece of land, will be passed on by the owners or developers to the housing consumer.

The higher market value of land created by increased zoning density is usually appropriated by the landowner and/or the developer in proportions determined by the relative strength of their bargaining positions. To the extent permitted by the real estate market, the landowner will try to raise his price to reflect the increased zoning density. The relative supply and demand for land in the area will determine the extent to which the landowner will have to share the increased value with the developer-buyer. There is no assurance that land zoned for higher density will be used for lower income housing. Developers usually build higher priced units with their accompanying higher margin of profit as long as there is a market for such units. Only when that demand begins to dry up or where there is an oversupply of land, causing land prices to go down, will there be an economic incentive to build lower priced housing. This lowering of land prices is the objective of "overzoning." It remains to be seen whether the due process, equal protection, and taking provisions of the Federal Constitution allow the New Jersey courts to require municipalities to impose upon a relatively small group of real estate owners, the cost of providing lower income housing to meet regional needs.

Federal constitutional issues will also be invoked if the courts require municipalities to adopt mandatory set-asides. The word "mandatory" has a specific, unrelenting, and almost inherently harsh meaning: It involves something that is required or obligatory; it must be done—there is no opportunity for escape! A mandatory set-aside is a requirement that a developer include some proportion of lower income housing in the project. In effect, the court has made the mandatory set-aside one of the affirmative measures necessary for a valid municipal zoning ordinance. Thus, to be valid, a municipal zoning ordinance must contain provisions that prohibit the use of designated land unless the development includes some proportion of low income housing. Under such law the owner has no choice: If he cannot provide for a specified proportion of lower income housing, he cannot use the land. Once again, the court's choice of words may invite federal judicial scrutiny.

The New Jersey Supreme Court could have avoided this trip to the constitutional brink by adopting the compromise proposed by the Regional Planning Board of Princeton.[127] This group of planners, whose studies and proposals were noted favorably by the court,[128] rejected the mandatory set-aside because it seemed to be too harsh and unreasonable. Instead, the Princeton planners proposed an optional, conditional, high density program.[129] Under this proposal, owners would be given a choice to develop the land as of right at a lower density or to develop at a higher density on condition that a specified number of lower income housing units be included.[130] The court may find it prudent at some future date to redefine mandatory set-asides to include this option and thereby eliminate one component of its constitutional vulnerability.

Skillful municipal obstinacy (skil′fəl • myoo nis′ə p′l • äb′ stə nə sē), n. a strategy adopted by local governments to use imaginative techniques to preserve their concept of their legal right to govern their local affairs, subject to general laws enacted by the state legislature, notwithstanding the decision in *Mount Laurel II*. The word "skillful" is intended to convey a union of both "knowledge" and "readiness." The available techniques will be known to most municipal governing bodies, but only a few will have the "readiness" to use them.

Many municipalities will comply with the law as determined by the highest court in the state. Some will, in all good faith, seek to comply only to be told by the court that good faith is not enough and that they must do more.[131] Other municipalities, currently burdened by high litigation costs, will seek to put an end to those costs by compromising, capitulating, or doing whatever else is necessary. On the other hand, some municipalities may determine that the intricate and complex network of standards, procedures, and remedies set forth in *Mount Laurel II* create a simplistic and unworkable response to an even more intricate and complex network of economic, political, social, and psychological forces, thereby necessitating a response by those municipalities to seek devices and techniques to protect their perceived self interest.

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[127] *See* PRINCETON MASTER PLAN, *supra* note 51.

[128] *See Mt. Laurel II*, 92 N.J. at 266-67 nn.28 & 29, 269-70, 456 A.2d at 445-46 nn.28 & 29, 447.

[129] *See* PRINCETON MASTER PLAN, *supra* note 51.

[130] *Id.* at 94.

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

It is much too soon to compile an exhaustive list of techniques that could be devised to frustrate the judicial aspirations set forth in *Mount Laurel II*. It is likely, however, that some of the following devices will be used in some form.

A. *Enthusiastic Municipal Compliance*

As paradoxical as it may seem, one of the most effective methods of undermining the goals of the *Mount Laurel II* decision may be enthusiastic compliance by the municipality. For example, because the court believes that overzoning and mandatory set-asides are good for lower income housing, a municipality could require such set-asides in most, if not all, undeveloped land appropriate for residential use. This device will immediately discourage all development by most smaller builders who do not want to get involved in the potential risk, prohibitive legal fees, and high administrative costs and unnecessary red tape incurred in the implementation of an affirmative measures program.

Enthusiastic compliance with the law may be pursued even further by providing for the highest reasonable minimum percentage of set-asides for housing for lower income persons. For example, the minimum percentage of set-asides for lower income housing could be raised from twenty percent to thirty percent, or higher, thereby severely limiting the economic feasibility of the project and diminishing, if not eliminating, any developer interest. The judicial remedy for this tactic would require an inordinately expensive and conjectural statistical analysis of the costs and projected revenues to determine the maximum set-aside, if any, that is economically feasible for a given site in a given municipality.[132]

B. *Rent Control*

Although the *Mount Laurel II* decision provides an extensive analysis of many of the complex issues of housing construction and land use regulation, the opinion does not direct attention to the fact that most lower income people have neither the necessary down pay-

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[132] The Regional Planning Board of Princeton paid $28,000 for the economic feasibility study made by Real Estate Research Corporation (RERC) and an additional $10,000 for a legal feasibility study. These costs were subsidized by a grant from the New Jersey Department of Community Affairs. Contracts dated March 1, 1974 are on file at the office of the Regional Planning Board of Princeton.

ment to buy a house, nor a sufficiently large income to maintain one. If any appreciable number of lower income persons are to move to the suburbs, as the court thinks they should, they will have to live in rented housing units.

To entice lower income persons into moving into suburban apartments at reasonable rents and then to permit those rents to be raised to market levels beyond their financial ability would create a cruel hoax. A suburban municipality could decide to eliminate this inequity by enacting a strict rent control law to protect lower income tenants from rising rents.[133] The rent control ordinance would very likely have the additional effect of discouraging the construction of any rental units in the municipality.

C. *Regulation of Mobile Homes*

The most disconcerting consequences of the *Mount Laurel II* decision will not be apparent for another decade or two. The proposed mobile home development in Mount Laurel Township will be placed on rented land.[134] It is inevitable that at some time in the future the owners of the rented land on which the mobile homes are placed will give notice of termination of the lease and require the mobile homeowner-tenants to remove their units from the land. The poor, lower income mobile home owner will probably find that the cost of moving his mobile home to another site, if any are available in the area, may approach or exceed the value of the unit at that time.

To overcome such a gross inequity, a suburban municipality could justify the enactment of a strict "Mobile Home Owner Protection Law" that would, among other things, require (1) a mandatory purchase option to enable the mobile home owner to buy the land at a "regulated" price; (2) in the alternative (but less effective) a long term lease, e.g., fifty or more years; (3) rent control of the land in mobile home parks; and (4) regulation of utility and other charges in mobile

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[133] The legal authority of a New Jersey municipality to enact a rent control law in the absence of enabling legislation has been upheld in Inganamort v. Borough of Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973); *see also* Westchester West No. 2 Ltd. Partnership v. Montgomery County, 276 Md. 448, 348 A.2d 856 (1975).

[134] The entire 456-unit mobile home development proposed for Mount Laurel Township will consist of units sold to families that will not own the land under their homes. The developer estimated (in March 1983) that the monthly rent for the use of the land would be $175.00, but the actual rent "may be higher or lower depending on the total costs of improvements at the entire site." N.Y. Times, Mar. 20, 1983 (New Jersey Section), at 10.

home parks. Although this type of regulation would serve to protect the interests of the mobile home purchaser, it would also operate to eliminate the interest of mobile home park developers in that municipality.

D. *Non-Cooperation with Non-Person Masters*

The New Jersey Supreme Court seems to have overlooked or underestimated the sense of pride, accomplishment, and authority that most municipal officials acquire in the process of running for and being elected to office. In most municipalities, and particularly those in growth areas, to attain this position, the elected official will have put in many long hours in the election process and even more hours of dedication in the public service thereafter. This investment of time and effort creates a sense of responsibility to constituents and a dedication to his/her office.

To many of these municipal officials the court-appointed special master will be a non-person, an interloper, and a foreign agent, without special privileges or rights and without the constitutional or electoral mandate to make public policy decisions. To elected officials, the role proposed by the court for special masters is unacceptable. The elected municipal official may conclude that he is the appropriate party to function as "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 conflicting interests involved,"[135] rather than the "special master" to whom the court assigns this rule.

Therefore, no matter how amiable, competent, and helpful the master may be, some elected officials may resist giving that person any rights, privileges, or courtesies other than those ordered by the court or required by civilized behavior. Moreover, once the agent of the court is permitted to share in the policymaking legislative process, some officials may even conclude not only that their obligation to their constituency has been encroached, but that a basic principle of democracy has been violated. As a result, in a municipality where elected officials take this position, it will be difficult for a "special master" to perform a constructive role. Ultimately, therefore, this position will force the court to move closer to the brink of constitu-

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[135] *Mt. Laurel II*, 92 N.J. at 283, 456 A.2d at 455.

tional confrontation by prescribing the provisions of a land use ordinance and imposing them upon a municipality against the wishes of the elected officials.

Waning judicial legitimacy (wā'ning • jo͞o dish'əl • lə jit'ə mə sē), n. a diminution of the public respect for and a decrease in the public's sense of obligation to be bound by the rulings of courts, resulting from a perception that courts do not themselves conform to and abide by accepted legal principles limiting their authority.

Every perceptive leader and astute executive knows that there is a price that must be paid for the successful accomplishment of an objective that is achieved only after confrontation and the use of raw power. For this reason, most politicians try to avoid confrontations. For this reason, the New Jersey Supreme Court tried to avoid the use of raw judicial power to enforce its 1975 decision in *Mount Laurel I*. After waiting six years for municipalities to comply with its initial ruling, the court has decided in *Mount Laurel II* that it will wait no longer. Now, the court must pay the price of successful enforcement of its decision.

The court expressed its awareness of the risks involved in prescribing remedies that are more like the acts of the legislative and executive branches of government than that of the judiciary. Nevertheless, the Justices balanced that risk against what they perceived to be a greater risk—the legitimacy of their own branch if they failed to take the necessary action to enforce their interpretation of the constitution.

The theory and philosophy of judicial review is a complex subject that cannot be given the attention it deserves in this article.[136] Despite this complexity, the philosophical basis of the *Mount Laurel II* decision rests upon a number of assumptions that should be questioned.

A. *Default of the Legislature*

It is frequently suggested that the judiciary was justified in making the substantive public policy decisions contained in the *Mount Laurel* decisions[137] because the state legislature had defaulted on its

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[136] For a recent incisive analysis of the subject of judicial review, written with wit and style, see J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[137] *See, e.g., Developments in the Law of Zoning*, 91 HARV. L. REV. 1427, 1707-08 (1978) (observing importance of judicial activism in generating social forces necessary to secure integrated housing).

obligation to deal with the problem of adequate housing for lower income persons. This legislative default, the argument proceeds, has created a vacuum that must be filled by the judiciary until the legislature performs its obligation.

At the oral argument, the attorney for a group of state legislators, who were permitted to appear as *amicus*, rejected the position that legislative default justified the making of public policy by the judiciary. The attorney argued that this position was inaccurate, since the legislature had in fact responded to the problem with a wide variety of enactments. Specifically, the legislature has adopted programs to provide housing for lower income persons through a state housing finance agency,[138] direct loans to housing mortgage lenders,[139] state antidiscrimination laws,[140] inner city urban renewal programs,[141] rehabilitation programs,[142] a uniform state building code,[143] and property tax reductions.[144] Moreover, the legislative decision not to adopt a proposed fair share allocation bill was not a default of legislative responsibility, but on the contrary, constituted a decision that the forces supporting such a program are insufficient to prevail in the democratic process.

The argument that judicial intervention is justified by legislative default is too facile and sweeping. Acceptance of this argument would validate judicial policymaking any time the legislature fails to adopt a particular program favored by a majority of the court, even though the program does not have the support of a majority of the elected members of the state legislature. The legitimacy of judicial power will suffer every time the court transgresses the limits of its proper function by adopting a rationale that is inconclusive and debatable.

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[138] N.J. STAT. ANN. §§ 55:14J-4 to -5 (West Cum. Supp. 1983-1984).

[139] *Id.* § 17:16-9. *See generally* New Jersey Mortgage Finance Agency v. McCrane, 56 N.J. 414, 267 A.2d 24 (1970) (Mortgage Finance Agency law valid delegation of legislative power).

[140] N.J. STAT. ANN. § 10:5-12 (West Cum. Supp. 1983-1984); *id.* § 40:37A-133.

[141] *Id.* §§ 52:27D-44 to -58 (state aid for urban renewal projects); *id.* §§ 40-55C-6 & -12 (redevelopment agencies).

[142] *Id.* §§ 55:14J-1 to -57 (New Jersey Housing Finance Agency Law); *id.* §§ 52:27D-52 to -161 (West. Cum. Supp. 1983-1984) (Neighborhood Preservation Housing Rehabilitation Loan and Grant Act).

[143] *Id.* §§ 52:27D-119 to -151 (State Uniform Construction Code Act). *See generally* J.P. Properties, Inc. v. May, 183 N.J. Super. 572, 444 A.2d 1131 (Law Div. 1982) (by enacting Uniform Construction Code state intended to preempt field therefore township manager was without jurisdiction over matters of enforcement and construction).

[144] N.J. STAT. ANN. § 54:4-3.69 (West Cum. Supp. 1983-1984) (improvement of homes in blighted areas); *Id.* § 55:14J-2 (exemption for housing projects for low and moderate income families); *id.* §§ 54:4-3.74 to -3.77 (home improvement deductions).

B. *Elimination of the Evil*

An idealistic court may be willing to suffer the pangs of waning legitimacy if it believes that its decisions make this a better world. If this is the justification of the *Mount Laurel II* decision, then the legitimacy of the court's action will be based upon the extent to which the elimination of exclusionary zoning results, in fact, in the construction of new housing for the poor in the suburbs and improves the lives and opportunities of the majority of lower income urban families who currently are unable to move there. Success of a policy or program is an appropriate standard for the evaluation of a legislative program. The question must be asked whether program and policy success are inappropriate criteria for the evaluation of judicial decisions.

C. *The Holocaust Imperative*

At some point in the philosophical discussion of the propriety of substantive policy decisions by courts, the proponents of judicial intervention will ask whether a court would be justified in invalidating a Holocaustal policy adopted by the other branches of government.[145] Even the most ardent advocates of judicial restraint will be constrained to concede that under some extraordinary circumstances the courts should and indeed must intercede.[146] Once this concession is made, it will become difficult to determine the limits of judicial review.

At what point does the policy of the legislative and executive branches exceed the limits of civilized behavior so as to justify, or compel the judiciary to make substantive policy decisions? More specifically, are the detrimental consequences of exclusionary zoning sufficiently antisocial, evil, and uncivilized, and the causal relationship sufficiently clear for the judiciary to override the decisions of those branches of government which have express constitutional policymaking authority? Or, is the extent of the harmful consequences, when compared to alternative urban policies, sufficiently debatable to withhold judicial intervention?

In prior sections of this article it has been suggested that the wisdom of the court's policy of urban poor diaspora is at least debat-

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[145] J. ELY, *supra* note 136, at 181.

[146] John Ely takes the following position with respect to judicial intervention: "The public has come to expect the Court to intervene against gross abuses. And so the Court must intervene! '*Must* intervene'? I'd argue not . . . . But 'can get away with intervening'? For sure." J. ELY, *supra* note 136, at 48 (footnotes omitted) (emphasis in original) (quoting Karst & Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 79).

able; that a policy which would redirect upper income persons and their financial resources back to the cities where the largest supply of lower income housing already exists, might be a more effective policy to benefit the urban poor; and, that there are serious doubts about the economic as well as the political feasibility of building any significant quantity of new housing for the urban poor in the suburbs. In the last analysis, the judicial legitimacy of *Mount Laurel II* may depend upon whether the evils of exclusionary zoning are sufficiently onerous and the remedies sufficiently workable to justify judicial invocation of the Holocaust imperative.