THE JUDICIARY'S ROLE IN IMPLEMENTING THE MOUNT LAUREL DOCTRINE: DEFERENCE OR ACTIVISM?

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I. INTRODUCTION

On March 24, 1975, the New Jersey Supreme Court decided *Southern Burlington County NAACP v. Mount Laurel Township*,[1] thereby establishing the *Mount Laurel* doctrine. This case, known as *Mount Laurel I*, was followed by the two supreme court cases that further refined the doctrine: the 1983 case known as *Mount Laurel II*[2] and the 1986 case known as *Mount Laurel III*.[3] At its base, the doctrine requires that every developing municipality in New Jersey provide, through its zoning, a realistic opportunity for its fair share of the region's present and prospective need for lower income housing.[4] The court's determination implicitly ordained that if sound planning allows housing for the rich, it must also allow housing for the poor.[5] If, by the same sound planning principles, it allows factories and commerce, it must find space wherein its workers can affordably live.[6] Since 1975, all three branches of state government have been wrestling with the problem of how to meet the constitutional obligation imposed by *Mount Laurel*.

This Essay seeks to review the *Mount Laurel* doctrine as

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

2 Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter *Mount Laurel II*].

3 The Hills Dev. Co. v. Bernards Township, 103 N.J. 1, 510 A.2d 621 (1986) [hereinafter *Mount Laurel III*].

4 *Mount Laurel I*, 67 N.J. at 174. As the *Mount Laurel II* court observed, the basis for the constitutional obligation is simple: "The State controls the use of land, *all* of the land. In exercising that control, it cannot favor rich over poor. . . . And the same applies to the municipality, to which this control over land has been constitutionally delegated." *Mount Laurel II*, 92 N.J. at 209, 456 A.2d at 415.

5 *Id.* at 211, 456 A.2d at 416.

6 *Id.*

enunciated in *Mount Laurel I* and *Mount Laurel II*; the legislative response as set forth in the Fair Housing Act ("Act")[7] and as upheld in *Mount Laurel III*; and the implementation of the Act by the Council on Affordable Housing ("COAH") as viewed from post-*Mount Laurel III* litigation. Of crucial relevance is the judiciary's role since the supreme court's ringing endorsement, in *Mount Laurel III*, of the legislative response to the *Mount Laurel* mandate. This Essay critically examines New Jersey courts' participation since the passage of the Fair Housing Act to discern whether the judiciary's involvement has been meaningful and whether it is likely to continue, if not increase.

Section II reviews the *Mount Laurel* doctrine established in *Mount Laurel I* and affirmed in *Mount Laurel II*. It also reviews the extraordinary measures the supreme court took in *Mount Laurel II* to enforce the constitutional obligation and ensure that developing municipalities provide their aforementioned fair share. Those measures included adoption of the State Development Guide Plan as a tool for identifying developing municipalities; definition of "fair share," "realistic opportunity" and other key terms; provision for a builder's remedy; and judicial management of all *Mount Laurel* litigation through three specially designated judges. Additionally, a review of *AMG Realty Co. v. Warren Township*,[8] illustrates how the *Mount Laurel* judges implemented *Mount Laurel II* with respect to determination and allocation of fair share.

Section III reviews the 1985 Fair Housing Act, the legislative response to *Mount Laurel*. The Act set forth a statutory scheme intended to satisfy the *Mount Laurel* doctrine's constitutional mandate.[9] That scheme established an administrative agency, COAH, and empowered it to develop and administer a program to enable participating municipalities to meet their constitutional obligation. The Act also sought to abrogate courts' responsibility over *Mount Laurel*-type issues[10] by establishing a mediation and review process at COAH and providing for the transfer of pending litigation to COAH. Finally, the Act provided for a moratorium on the judicially imposed builder's remedy. *Mount Laurel III* affirmed the Act's validity, sanctioned the transfer of virtually all pending litigation to COAH and warned that the judiciary's

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7 N.J. STAT. ANN. §§ 52:27D-301 to 329 (West 1986).

8 207 N.J. Super. 388, 504 A.2d 692 (Law Div. 1984).

9 *Mount Laurel III*, 103 N.J. at 20, 510 A.2d at 631-32.

10 *Id.* at 49, 510 A.2d at 647.

deference to the legislature and COAH in no way signaled its abdication of its role, should the Act result in nothing but delay.[11]

Section IV reviews post-*Mount Laurel III* litigation with respect to COAH's implementation of the statutory scheme set forth in the Act. In examining the post-*Mount Laurel III* cases, this Essay seeks to determine the extent to which courts have deferred to COAH and the statutory scheme for meeting the *Mount Laurel* obligation, have retreated from handling *Mount Laurel* disputes, and have sought to ensure that the constitutional obligation of the *Mount Laurel* doctrine is met.

The Essay concludes that the courts have deferred, to a significant extent, to the legislature, COAH and the statutory scheme. While available evidence suggests that the courts have reduced their involvement in *Mount Laurel* cases where the municipality is a participant in COAH's procedures, it is not possible to conclude that the courts have completely withdrawn from the field due to the large number of non-participant municipalities. The Essay also concludes that courts have, thus far, met their obligation of ensuring that the constitutional obligation is met, although fewer realistic opportunities will likely be created under COAH's methods than would have gone forward had the agenda set by *Mount Laurel II* continued in effect. Finally, the Essay concludes that increased judicial involvement is likely.

II. THEORETICAL BACKGROUND: THE *MOUNT LAUREL* DOCTRINE

A. Mount Laurel I

In establishing what is known as the *Mount Laurel* doctrine, the *Mount Laurel I* court framed the legal issue confronting it as:

> [W]hether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of their income and resources.[12]

The court concluded that every developing municipality in New Jersey must:

> [B]y its land use regulations, presumptively make realistically

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[11] *Id.* at 65, 510 A.2d at 655.

[12] *Mount Laurel I*, 67 N.J. at 173, 336 A.2d at 724.

> possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.[13]

This doctrine, as stated by subsequent cases and commentators, requires that a developing municipality provide, through its zoning, a realistic opportunity for fulfilling its fair share of the region's present and prospective need for lower income housing.[14]

In reaching this result, the *Mount Laurel I* court firmly grounded its decision in the New Jersey Constitution. The court reasoned that land use regulations would come validly within the purview of the police power of New Jersey.[15] With respect to restrictions on the exercise of police power, all such enactments, whether at the state or local level, must at the most elementary level meet the state substantive due process and equal protection requirements.[16] As with all legislative endeavors involving the police power, zoning regulations must also further the general welfare, morals, health and safety. Enactments to the contrary are invalid.[17]

The supreme court clearly viewed the general welfare regulation as transcending municipal boundaries. The court proffered that the effects of regulation on citizens other than those in a distinct municipality should be given due respect.[18] In support of this principle, the *Mount Laurel I* court quoted a 1949 opinion of Chief Justice Arthur T. Vanderbilt:

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[13] *Id.* at 174, 336 A.2d at 724.

[14] Morris County Fair Housing Council v. Boonton Township, 209 N.J. Super. 393, 403, 507 A.2d 768, 773-74 (Law Div. 1985).

[15] *Mount Laurel I*, 67 N.J. at 174, 336 A.2d at 725. Specifically, the New Jersey Constitution authorizes legislative delegation of land use regulation to municipalities. The legislature retains, however, the right to modify or revoke such delegation. In 1928, the legislature delegated zoning powers to municipalities in the Standard Zoning Enabling Act, which was repealed in 1976. *Id. See* N.J. STAT. ANN. §§ 40:55-30 to -45 (repealed 1976). The *Mount Laurel I* court stated "it is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state." *Mount Laurel I*, 67 N.J. at 177, 336 A.2d at 726.

[16] *Id.* at 174, 336 A.2d at 725.

[17] *Id.* at 175, 336 A.2d at 725.

[18] *Id.* at 177, 336 A.2d at 726.

> The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on consideration of geography, of commerce, or of politics that are no longer significant with respect to zoning. The direction of growth of residential areas on the one hand and of industrial concentration on the other refuses to be governed by such artificial lines. Changes in methods of transportation as well as in living conditions have served only to accentuate the unreality in dealing with zoning problems on the basis of the territorial limits of a municipality.[19]

In *Mount Laurel I*, the supreme court observed that the local exercise of zoning powers is potentially unconstitutional where, as in Mount Laurel Township, zoning enactments restrict the availability of housing to limited segments of the population.[20] In examining Mount Laurel's zoning ordinance, the court found that it did not comport with a general welfare standard and was not within the purview of the legitimate orbit of zoning power.[21] Specifically, Mount Laurel's zoning scheme allocated the township's 14,000 acres to three categories of use. Nearly 10,000 acres or about seventy percent was designated residential, 4121 acres or 29.2 percent was zoned for industry and 169 acres or 1.2 percent was zoned for retail business. The court found that zoning nearly thirty percent or 4100 acres of land for industry was unreasonable in that only 100 acres had been developed for industrial purposes in the prior decade.[22]

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[19] *Id.* at 177-78, 336 A.2d at 726-27 (quoting Duffcon Concrete Prods., Inc. v. Cresskill Borough, 1 N.J. 509, 64 A.2d 347 (1949)).

[20] The court declared that:

> It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate housing costs, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.

Id. at 179-80, 336 A.2d at 727-28.

[21] *Id.* at 185, 336 A.2d at 730.

[22] *Id.* at 184, 336 A.2d at 730.

By zoning such a large amount for industry, Mount Laurel had reduced the amount of land available for residential purposes.

With respect to residential zoning, the Mount Laurel ordinance provided only for "single family, detached dwellings, one house per lot," i.e., typical suburban developments.[23] Further, zoning requirements called for minimum lot size of 20,000 square feet, minimum frontage of 100 feet and minimum dwelling floor area of 1100 square feet for a one story dwelling and 1300 for dwellings of more than one story.[24] The supreme court found the cumulative impact of these zoning requirements preclusive of adequate single family housing except for those families of middle-class means and above.[25]

While Mount Laurel provided for some multifamily units by agreement, it did so in a manner that excluded low and moderate income families:[26] by sharply limiting the number of units with more than one bedroom.[27] It then sought to exclude school-age children from occupying any one bedroom apartment and to limit two bedroom units to a maximum of two school-age children.[28] Penalties were imposed on the developer if, in the aggregate, "more than .3 school children per multi-family unit . . . attend the township school system in any one year . . . ."[29] The court found that the intent of the restrictions was to reduce local tax-funded education costs by restricting the number of school-age children in the municipality, a conclusion found not to promote the general welfare.[30]

After finding Mount Laurel's zoning ordinance presumptively invalid, the supreme court considered the principal fiscal reasons advanced by the Township in support of its zoning plan. Mount Laurel asserted that it sought industrial ratables as a means of addressing the increasingly heavy burden of local taxes. The *Mount Laurel I* court found that a municipality cannot both seek the benefits of development and be excused from the burdens. The court, striking a societal balance, mandated that when zoning for industry and commerce to obtain tax advantages, a municipality must also provide for adequate housing stock, theoretically to be used by its

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[23] *Id.* at 163, 336 A.2d at 719.

[24] *Id.* at 183, 336 A.2d at 729-30.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 182, 336 A.2d at 729.

[28] *Id.* at 168, 336 A.2d at 721.

[29] *Id.*, 336 A.2d at 721-22.

[30] *Id.* at 183, 336 A.2d at 729.

employees.[31]

The court, in summarizing Mount Laurel's responsibility, opined that a developing municipality must give potential residents, including lower income families, a realistic opportunity to choose the type of dwelling in which they desire to live.[32] The court held that a municipality should have the initial opportunity to proceed, however, without court intervention.[33] Pursuant to this, the court granted ninety days to Mount Laurel Township to remedy the deficiencies with correcting amendments.[34] If, however, Mount Laurel did not perform, the court indicated that judicial intervention, by a supplementary proceeding, would be the proper course of action.[35]

B. Mount Laurel II

Eight years after the supreme court's *Mount Laurel I* decision, Mount Laurel Township continued to overtly discriminate against lower echelons of society through ordinances designed to exclude poor families considering low income housing stock.[36] Based on its belief that Mount Laurel's inaction was an example of pervasive non-compliance with the *Mount Laurel* doctrine's constitutional mandate, the supreme court consolidated six cases known as *Mount Laurel II*.[37]

In *Mount Laurel II* the court reaffirmed the constitutional basis for the *Mount Laurel* doctrine and its firm commitment to making the doctrine work.[38] Writing for the court, Chief Justice Wilentz also addressed open issues with respect to developing municipalities, determination and allocation of fair share low and moderate income housing needs, mandatory affirmative action and the builder's remedy. In ruling on these issues the supreme court sought to encourage voluntary compliance, simplify litigation and substantially increase the judicial remedy's effective-

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31 *Id.* at 187, 336 A.2d at 732.

32 *Id.*, 336 A.2d at 731-32.

33 *Id.* at 192, 336 A.2d at 734.

34 *Id.* at 191, 336 A.2d at 734.

35 *Id.* at 192, 336 A.2d at 734.

36 *Mount Laurel II*, 92 N.J. at 198, 456 A.2d at 410.

37 As one commentator has noted: "Frustrated by 'widespread non-compliance' with the constitutional obligation it had articulated, and angered at perceived municipal resistance and inactivity by the coordinating branches of government and the private sector, the Court took it upon itself to 'put some steel into [the *Mount Laurel*] doctrine.'" Paula A. Franzese, Mount Laurel III: *The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 32 (1988) (quoting *Mount Laurel II*, 92 N.J. at 200, 456 A.2d at 410).

38 *Mount Laurel II*, 92 N.J. at 199, 456 A.2d at 410.

ness.[39] Finally, with respect to its own role, the court declared that "[w]e may not build houses, but we do enforce the Constitution. . . . The judicial role . . . will expand to the extent that we remain virtually alone in this field."[40] The court then proceeded to develop its own devices for dealing with *Mount Laurel* cases.

1. Constitutional Basis

The *Mount Laurel* doctrine's constitutional basis remains unchanged from its articulation in *Mount Laurel I*.[41] The *Mount Laurel II* court explained that:

> The basis for the constitutional obligation is simple: The State controls the use of land, *all* of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else. The government that controls this land represents everyone. While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.[42]

2. Closing the Definitional Gaps

At the outset, Chief Justice Wilentz raised several questions, the uncertainty of which was an obstacle to effective implementation of the *Mount Laurel* doctrine. Specifically, the *Mount Laurel II* court identified the following issues: the definitions of "developing municipality" and "region," and how the latter is to be determined; the method by which the "fair share" within a region is to be calculated; and the actions that a municipality must undertake to "affirmatively afford" an opportunity for lower income housing to be constructed.[43] Regarding the so-called builder's remedy, the justices sought to determine when a court should order the issuance of a building permit on behalf of a developer who under *Mount Laurel* challenged a zoning ordinance and prevailed.[44] The supreme court also aimed to guide the judiciary in dealing with the complex procedural matters involved in *Mount*

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39 *Id.* at 214, 456 A.2d at 418.
40 *Id.* at 213, 456 A.2d at 417.
41 *Id.* at 208, 456 A.2d at 415.
42 *Id.* at 209, 456 A.2d at 415.
43 *Id.* at 205, 456 A.2d at 413.
44 *Id.*

Laurel litigation.[45]

These questions follow sequentially the issues that must be dealt with in *Mount Laurel* litigation; they will be discussed, in turn, in the remainder of this section.

a. *Developing Municipalities*

The threshold question involves determining the municipality's obligations, if any, under *Mount Laurel*.[46] The previous standard of what constituted a "developing municipality" created much uncertainty. Accordingly, the court adopted the State Development Guide Plan (SDGP) and held that based on the concept map of SDGP, municipalities containing growth areas must meet the prospective need obligations.[47]

The SDGP was the only official document in which the state set forth "a statewide blueprint for future development."[48] The SDGP was developed pursuant to state law by the administrative agency with responsibility for developing a master plan to guide the state's growth.[49] Thus, the SDGP had the benefit of legislative authorization and agency expertise.

The SDGP identified and targeted growth areas appropriate for development. The plan, designed for use as a policy statement regarding the state's development,[50] was used by state agencies to guide their infrastructure investments.[51] Further, municipalities were using the SDGP to proceed in the evaluation of the proper locations for future development and housing stock.[52]

The *Mount Laurel II* court clearly favored the SDGP, with its legislative authorization, agency expertise, presumptive validity and practical use.[53] It was clear to the supreme court that *Mount Laurel*'s prospective need obligations should be coterminous with the state's future development plan.[54] Accordingly, the court held that the *Mount Laurel* obligation applied only to municipali-

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45 *Id.*

46 *Id.* at 223, 456 A.2d at 422.

47 *Id.* at 240, 456 A.2d at 431.

48 *Id.* at 225, 456 A.2d at 423.

49 *Id.* at 225-26, 456 A.2d at 423-24. N.J. STAT. ANN. § 13:1B-15.52 (West 1979).

50 *Mount Laurel II*, at 230, 456 A.2d at 426 (quoting State Development Guide Plan, May 1980, at ii).

51 *Id.* at 235, 456 A.2d at 429.

52 *Id.* at 233, 456 A.2d at 428.

53 *Id.* at 243, 456 A.2d at 433.

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

ties in the SDGP's "growth areas" with provision for certain exceptions.[55] Thus, the court eliminated much uncertainty as to which municipalities faced *Mount Laurel* obligations.

b. *"Fair Share"*

The next step was to determine a given municipality's "fair share" of the *Mount Laurel* obligation.[56] To determine the "fair share," it is necessary to identify the relevant region, determine present and prospective housing needs for that region and allocate such needs on a municipal basis.[57] Recognizing the complexity, magnitude and amount of time required to make a determination, the *Mount Laurel II* court clearly indicated that such determinations are more appropriately ferreted out through administrative agency action because court litigation is both costly and inefficient.[58]

In the absence of action by the executive and legislative branches, however, the judiciary was left to enforce the constitutional obligation underlying the *Mount Laurel* doctrine.[59] The *Mount Laurel II* court chose to restrict all *Mount Laurel* litigation to three judges, selected by the Chief Justice, who would hear cases in one of three designated regions. The court anticipated that a regional pattern would emerge from each of the three areas after several cases were tried, and that a certain consistency would develop, first by region, then statewide.[60] The judges' determinations with respect to region and regional need were, like determinations of administrative agencies, to be deemed presumptively valid.[61]

By utilizing this approach to "fair share," the court expected that it would be able to limit itself to allocative issues within the fair share question in a short period of time leaving all other issues to the coordinate branches of state government.[62] The only

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55 *Id.* at 226-27, 456 A.2d at 424.

56 *Id.* at 248-58, 456 A.2d at 436-41. The court described the calculation of fair share as "[t]he most troublesome issue in *Mount Laurel* litigation . . . ." *Id.* at 248, 456 A.2d at 436. According to the court, determining a municipality's fair share "takes the most time, produces the greatest variety of opinions, and engenders doubt as to the meaning and wisdom of *Mount Laurel*." *Id.*

57 *Id.*

58 *Id.* at 250 (quoting Oakwood at Madison, Inc. v. Madison Township, 72 N.J. 481, 499 n.5, 371 A.2d 1192, 1200 n.5 (1977)).

59 *Id.* at 252, 456 A.2d at 438.

60 *Id.* at 254, 456 A.2d at 439.

61 *Id.*

62 *Id.* at 255, 456 A.2d at 439.

guidance that the supreme court offered with respect to fair share was that it favored formulas in which local employment opportunities factored heavily in the equation.[63] The court explicated that it disfavored formulas that stagnated, by way of present low income resident ratios, the lower income housing market.[64] In addition, the supreme court viewed formulas that unreasonably diminished the lower income housing share, manifested through the municipality's past successful exclusion, as being an untoward result.[65]

c. *"Affording a Realistic Opportunity" for Affordable Housing*

The next step was action. Invoking the court's opinion in *Mount Laurel I*, Chief Justice Wilentz reiterated that municipalities' constitutional obligation of providing realistic opportunities for property development of low and moderate income housing would be satisfied if the municipalities strived to commit an equitable proportion to the regional housing needs now and in the future.[66] Satisfaction of this obligation was to be determined by an objective test. The municipality must have afforded, in fact, realistic opportunities for the development of its fair share of housing serving low and middle income families.[67] Under this objective approach, good faith was now irrelevant and the numberless approach, whereby neither the plaintiff nor the defendant was required to prove a "fair share" figure,[68] was no longer acceptable.[69]

To insure action, the *Mount Laurel II* court gave greater definition to key terms. "Affordable" meant that a family "pays no more than 25 percent of its income for [affordable] housing."[70] The court observed that "'[a]ffirmative,' in the *Mount Laurel* rule, suggests that the *municipality* is going to do something, and 'realistic opportunity' suggests that what it is going to do will make it *realistically* possible for lower income housing to be built."[71]

Thus, municipalities were required to at least neutralize all

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63 *Id.* at 256, 456 A.2d at 440.

64 *Id.*

65 *Id.*

66 *Id.* at 205, 456 A.2d at 413 (citing *Mount Laurel I*, 67 N.J. at 174, 336 A.2d at 724).

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

68 *See* Oakwood at Madison, Inc. v. Madison Township, 72 N.J. 481, 371 A.2d 1192 (1977).

69 *Id.* at 222, 456 A.2d at 422.

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

71 *Id.* at 260-61, 456 A.2d at 442.

barriers that denied the construction of low and middle income housing.[72] If this action alone were sufficient to meet its obligation, consistent with the above definition, then no further action was required. If removal of restrictive barriers alone would not provide a realistic opportunity, however, affirmative measures would be necessary.[73]

The *Mount Laurel II* court envisioned several affirmative measures. Among these proposals were the use of available housing subsidies from the state or federal government[74] and density bonuses, whereby permitted densities were increased proportionate to the amount of lower income housing provided.[75] Chief Justice Wilentz also suggested mandatory set asides of a certain percentage of units for lower income housing[76] and least-cost housing. The court opined that these units should be produced with low cost as the primary objective while still providing the tenants with healthy and safe living arrangements.[77] Such least-cost housing would satisfy a *Mount Laurel* obligation only where all restrictive barriers were removed and all affirmative steps considered.[78]

d. *Builder's Remedy*

Based on the court's prior experience with municipal noncompliance, the Chief Justice recognized that builder's remedies must be fostered so that *Mount Laurel* compliance can be more readily attained.[79] *Mount Laurel II* clarified the conditions under which, and increased the frequency with which, a builder's remedy could be granted.[80]

The supreme court stated that where a trial court determined that a municipality did not meet its *Mount Laurel* obligation, and after being ordered to do so, failed to revise its zoning ordinance, the municipality would be subject to a number of remedies for noncompliance. For instance, a plaintiff-developer proposing construction of a substantial low income housing project is granted a builder's remedy upon the builder's success in a

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72 *Id.* at 258-59, 456 A.2d at 441.
73 *Id.* at 261, 456 A.2d at 443.
74 *Id.* at 262, 456 A.2d at 443.
75 *Id.* at 266, 456 A.2d at 445.
76 *Id.* at 267-68, 456 A.2d at 446.
77 *Id.* at 218, 456 A.2d at 420.
78 *Id.* at 217, 456 A.2d at 419-20.
79 *Id.* at 279, 456 A.2d at 452.
80 *Id.* at 278, 456 A.2d at 452.

Mount Laurel litigation.[81] In rebuttal to this prima facie case, however, a municipality could prove that the developer's proposed project is infeasible under land use planning principles.[82] Thus, the burden for showing that a builder's remedy should be denied shifts to the municipality.

e. *Judicial Remedies and Management of* Mount Laurel *Litigation*

From the outset, the supreme court recognized the sensitivity of the role it prescribed for itself in *Mount Laurel II*. It clearly thought that the legislature should deal with the *Mount Laurel* matter.[83] Chief Justice Wilentz remarked, however, that the judiciary acted:

> [F]irst and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them. . . . So while we have always preferred legislative to judicial action in this field, we shall continue — until the Legislature acts — to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine.[84]

The court, in a prophetic statement, gave notice that its role would expand if the legislative and executive branches continued to stand aside and do nothing. Correspondingly, the court stated that its role would contract to the extent there was an adequate response from the other branches.

To manage effectively *Mount Laurel* litigation in its expanded judicial role, the supreme court took several significant steps. It determined that all *Mount Laurel* litigation would be handled by one of only three judges specially designated by the Chief Justice.[85] Furthermore, such litigation would be managed in a manner that would dispose of all aspects of the case in one trial and one appeal.[86] The supreme court also mandated that the trial court could appoint special masters to facilitate a proper remedy.[87]

The *Mount Laurel II* court expected that a certain degree of consistency and predictability would result from three judges handling

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81 *Id.* at 279-80, 456 A.2d at 452.
82 *Id.*
83 *Id.* at 212, 456 A.2d at 417.
84 *Id.* at 212-13, 456 A.2d at 417.
85 *Id.* at 216, 456 A.2d at 419.
86 *Id.* at 218, 456 A.2d at 420.
87 *Id.*

all *Mount Laurel* litigation.[88] These judges, each assigned a region, would develop a systematic approach for dealing with issues relating to the definition of the region itself, the determination of present and protective need in each region and a methodology for allocating that need on a municipal basis. The court expected that this systematic approach would eventually have a statewide effect.[89]

Special masters were to be liberally used to facilitate court-ordered revisions of municipal zoning ordinances that did not satisfy local *Mount Laurel* obligations. The special masters would combine substantive planning expertise with impartiality and thereby help the parties and the court to satisfy the constitutional obligation.[90] The special master's position was to save the court time and supplement the court's developing expertise by alleviating it of the burden of delving into fine revisions of zoning ordinances.[91]

The supreme court structured future *Mount Laurel* litigation in such a manner as to minimize the constitutional difficulties of zoning compliance.[92] Trial judges were given a strong hand that would enable them to dispose of all issues in one trial and prescribe specific remedies for non-compliance.[93]

The *Mount Laurel II* court did not rush into these actions lightly. Chief Justice Wilentz, recognizing the separation of powers issues, declined to act in such a manner that could be viewed as aggrandizing the court's power at the expense of the executive or legislature.[94] The supreme court had given fair warning eight years earlier in *Mount Laurel I* when it premonished that "[s]hould Mount Laurel not perform as we expect, further judicial action may be sought by supplemental pleading in this cause."[95] The court gave further notice in *Oakwood at Madison, Inc. v. Madison Township*,[96] five years before *Mount Laurel II*, when it declared that:

> In *Mount Laurel* we elected not to impose direct judicial supervision of compliance with the judgement in view of the advanced view of zoning law as applied to housing laid down by [the] opinion. The present case is different. The basic law is by now settled. . . . The focus of the judicial effort after six years of litigation must now be transferred from theorizing

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88 *Id.* at 216, 456 A.2d at 419.
89 *Id.* at 254, 456 A.2d at 439.
90 *Id.* at 283, 456 A.2d at 454.
91 *Id.* at 284, 456 A.2d at 454.
92 *Id.* at 292, 456 A.2d at 459.
93 *Id.* at 285-86, 456 A.2d at 455.
94 *Id.* at 287, 456 A.2d at 456.
95 *Mount Laurel I*, 67 N.J. at 192, 336 A.2d at 734.
96 72 N.J. 481, 371 A.2d 1192 (1977).

> over zoning to assurance of the zoning opportunity for production of least cost housing.[97]

Still, the legislative and executive branches failed to act. Finally, with reluctance, but also with determination, the *Mount Laurel II* court concluded that judicial legitimacy would be at greater risk if it too failed to effectuate the constitution.[98]

C. *Implementation:* AMG Realty Co. v Warren Township

It is useful at this point to review the 1984 case of *AMG Realty Co. v. Warren Township*[99] as a means of understanding how fair share was determined in post-*Mount Laurel II* cases. In *AMG Realty*, Judge Serpentelli, one of the three specially designated *Mount Laurel* judges, set forth a framework for determining fair share and its component subparts: region, regional need and allocation of a fair share of such need. This framework was significant in that it was the first effort to establish fair share and served as a benchmark against which the Fair Housing Act of 1985 and post-*Mount Laurel III* litigation would be evaluated.

With respect to regions, Judge Serpentelli found that there was a need to define a region for both present and prospective needs.

The present need region was to be defined by blocks of counties. The boundaries were intended to strike a housing balance by geographically utilizing the less dense, newer suburban areas of each individual region with the extreme need in older urban core municipalities.[100]

The prospective need regions were to be based on "a modified commutershed area which reflects a predetermined commuting time from the functional center of any given municipality[,] intended to be large enough to account for special commuting patterns or employment concentrations . . . ."[101] The commutershed area would then be determined by a thirty-minute driving radius in all directions from the functional center of the munici-

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97 *Id.* at 552-53, 371 A.2d at 1227-28.

98 *Mount Laurel II*, 92 N.J. at 287, 456 A.2d at 456.

99 207 N.J. Super. 388, 504 A.2d 692 (Law Div. 1984).

100 *Id.* at 399, 504 A.2d at 697-98. The result was four statewide regions: Region I — Bergen, Essex, Hudson, Hunterdon, Middlesex, Morris, Passaic, Somerset, Sussex, Union and Warren counties; Region II — Monmouth, and Ocean counties; Region III — Burlington, Camden, Gloucester and Mercer counties; Region IV — Atlantic, Cape May, Cumberland and Salem counties. *Id.*

101 *Id.*, 504 A.2d at 697-98.

pality.[102] Accordingly, under this approach there would be a different prospective need region for each of the state's 567 municipalities.

With respect to regional need, Judge Serpentelli again determined both a present and prospective regional need. Present need was considered to have been generated before 1980, while prospective need was expected to be generated between 1980 and 1990.[103] Present need consisted of "the indigenous need of a municipality and the fair share of the reallocated excess need of the municipality's present need region."[104] A three step approach was used to determine the present regional need, which was to be reallocated among municipalities in the region.[105]

Prospective need was calculated using both an economic model and a demographic model to project the number of households expected to exist in 1990. The proportion of households required for lower income housing was then determined by multiplying the total 1990 expected households by 39.4 percent.[106]

With respect to allocation, formulas were developed to allocate a fair share of the regional need. Judge Serpentelli allocated present need using three factors: growth area, present employment and median income.[107] Prospective need was based on the above three factors plus employment growth.[108]

The *AMG Realty* court then adjusted the fair share allocation. In recognition of the fact that some municipalities would not

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102 *Id.* at 400, 504 A.2d at 698.

103 *Id.* at 403, 504 A.2d at 699.

104 *Id.* at 401, 504 A.2d at 698.

105 *Id.* at 402, 504 A.2d at 699. The court delineated the steps as follows:

> First, the total number of substandard units in the present need region must be identified and expressed as a percentage of the total housing stock of the region . . . [i.e.,] the regional substandard housing percentage. Second, the total number of substandard units for each municipality in the present need region must be identified and expressed as a percentage of each municipality's housing stock . . . [i.e.,] the municipal substandard housing percentage. Third, any municipality whose percentage of substandard housing exceeds the regional percentage shall have its number of substandard housing units reduced until it conforms to the regional percentage. The units subtracted from such a municipality shall form the pool of present need which will be reallocated to those towns containing any growth area. . . .

Id.

106 *Id.* at 403, 504 A.2d at 700. The *AMG Realty* court commented that the 39.4% figure "has been recognized in *Mount Laurel II* . . . and by most experts as the proportion of units which will be occupied by lower income households." *Id.*

107 *Id.* at 404, 504 A.2d at 700.

108 *Id.* at 405, 504 A.2d at 701.

have an adequate stock of undeveloped land to afford their fair share of lower income housing,[109] a twenty percent adjustment factor was made. Those municipalities without adequate vacant developable land were allowed to reduce their present and prospective need allocation by twenty percent while all other municipalities were required to increase by twenty percent. Next, all the present and prospective need allocation for all municipalities with an obligation was increased by three percent to alleviate problems of an insufficient amount of housing vacancies, which would in turn facilitate choice and mobility in living arrangements.[110]

Finally, the *AMG Realty* court addressed three loose ends. First, all selected urban aid municipalities were exempted from fair share obligations.[111] Second, the court determined that the proportion of lower income housing was to be equally divided between low and moderate income housing.[112] Third, the fair share obligation was to be apportioned with one-third to be met during the first six years.[113]

III. The Legislative and Executive Response to *Mount Laurel*: The Fair Housing Act

A. Background

On January 20, 1983, when the supreme court decided *Mount Laurel II*, it agreed that *Mount Laurel* issues were distinctly legislative in nature, and, in acknowledging the political process, reminded its coequal branches of government that inherent constitutional rights should not go unnoticed while awaiting political unanimity.[114] The court further declared that the courts were bound to enforce the constitution and signaled its readiness to defer to substantial legislative action.[115] The court then proceeded to bolster the constitutional effectiveness of the *Mount Laurel* doctrine.[116]

On July 2, 1985, the state legislature enacted the Fair Housing Act. In so doing, the legislature forged a political consensus that affirmed the constitutional obligation set forth in the *Mount*

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109 *Id.* at 408, 504 A.2d at 702.
110 *Id.*
111 *Id.* at 409, 504 A.2d at 702.
112 *Id.*, 504 A.2d at 702-03.
113 *Id.*, 504 A.2d at 703.
114 *Mount Laurel II*, 92 N.J. at 212, 456 A.2d at 417.
115 *Id.* at 212-14, 456 A.2d at 417-18.
116 *Id.* at 200, 456 A.2d at 410.

Laurel doctrine. The Act created an administrative agency in response to this obligation and enunciated the need for comprehensive regional and statewide planning.[117] Moreover, the legislature explicitly declared its strong preference for the resolution of exclusionary zoning disputes through administrative means rather than litigation. The legislature also declared that it was the intent of the Act to "provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing."[118]

On February 20, 1986, fewer than eight months after its enactment, the Fair Housing Act was held constitutional by the New Jersey Supreme Court in *Mount Laurel III*. Again writing for the court, Chief Justice Wilentz declared that the Act's provisions were intended to meet the constitutional obligations set forth in the *Mount Laurel* cases.[119] The Chief Justice continued that the legislature's duty to effect the constitutional obligations had been satisfied in that it acted on the judiciary's hint for action.[120] The court further opined that manifesting in practice the Act's express intent would effectuate reasonable lower income housing opportunities.[121]

The supreme court clearly recognized that the legislative intent was twofold. The Act was intended to implement the use of an administrative agency in the complex issues surrounding lower income housing to fulfill the constitutional obligations as set forth by the court, and in addition, to use judicial resources most effectively by removing the obligations from the courts and placing the complex determinations with those best suited for the task.[122] With respect to the Act's first intention, the *Mount Laurel III* court readily deferred to the legislature and the administrative agency it created to respond to the *Mount Laurel* obligation.[123] Regarding the second purpose, the court transferred virtually all pending *Mount Laurel* litigation to the Council on Affordable Housing[124] and interpreted the judicially imposed builder's rem-

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117 N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986).

118 *Id.* § 303.

119 *Mount Laurel III*, 103 N.J. at 20, 510 A.2d at 631 (citations omitted).

120 *Id.* at 46-47, 510 A.2d at 645.

121 *Id.* at 21, 510 A.2d at 632.

122 *Id.* at 49, 510 A.2d at 647.

123 *Id.*

124 *Id.* at 53, 510 A.2d at 649. The court concluded that:

> The Legislature intended to transfer *every* pending *Mount Laurel* action to the Council. The exception, where 'manifest injustice' would occur, was based on the Legislature's concern that in some particular

edy so narrowly as to render it virtually inapplicable.[125] Chief Justice Wilentz also issued a warning by asserting that the court would re-enter the equation in the determination of rights if the Act did not further the *Mount Laurel* obligations set forth.[126]

B. Overview of the Fair Housing Act

The Act addressed the legislative intent to bring an administrative agency into the *Mount Laurel* field by establishing COAH and empowering it to develop and administer a program whereby participating municipalities could meet their constitutional obligation under *Mount Laurel*. Specifically, the Act required COAH to determine the state's housing regions,[127] contemplate present and prospective lower income housing needs at both state and regional levels[128] and adopt criteria and guidelines for municipal determination of its present and prospective fair share of the housing need in a given region.[129] Thus, COAH would determine the core factors that would enable a municipality to determine its fair share.

It is significant to note that the Act contained a number of factors that reduced municipal fair share through credits for existing low or moderate housing,[130] adjustment factors for municipalities with little or no room for fair share development[131] and limits on the permissible number of fair share units which may be demanded of a municipality.[132] The statute also allowed a municipality to transfer up to fifty percent of its fair share to another municipality via a contractual Regional Contribution Agreement (RCA) subject to the approval of COAH and the appropriate County Planning Board.[133]

A municipality that chooses to participate may do so by adopting a resolution of participation and notifying COAH of its intent to participate. Thereafter, the municipality must submit a

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> case, there might be a combination of circumstances, unforeseen but nevertheless possible, that rendered transfer *so* unjust as to overcome the Legislature's clear wish to transfer all cases.

Id.

125 *Id.* at 60, 510 A.2d at 652.
126 *Id.* at 23, 510 A.2d at 633.
127 N.J. STAT. ANN. § 52:27D-307(a) (West 1990).
128 *Id.* § 307(b).
129 *Id.* § 307(c)(1).
130 *Id.*
131 *Id.* § 307(c)(2).
132 *Id.* § 307(e).
133 *Id.* § 312.

fair share plan and any ordinances required to implement the housing element.[134] The Act required that for a plan to be valid, the housing element must be promulgated with access to affordable housing in mind.[135]

While municipal participation is voluntary, there are considerable incentives to participate. First, fair share determinations can be reduced as described above. Second, a municipality that files a timely plan can invoke the mediation and review procedures that are prerequisites to litigation.[136] Third, a municipality that has received substantive certification of its housing element and ordinances is granted a six year repose from litigation challenges to its plan.[137] Even if challenged, a COAH-certified plan is presumed valid.[138] Finally, the Act established several financial mechanisms including grants and loan programs.[139]

The Act addressed the legislature's second major goal of removing the judiciary from the *Mount Laurel* field through two provisions. Section 315 established a mediation and review process at COAH. Disputes are first mediated and, if unresolved, are referred to the Council for review and, if necessary, transmitted to the Office of Administrative Law as a contested case. This administrative procedure must be exhausted before litigation can be initiated. Furthermore, the Act sought to drastically reduce *Mount Laurel* litigation in the courts by mandating that all litigation instituted less than sixty days before the effective date of the Act be transferred to COAH. With regard to earlier litigation, any party may move for transfer from the court to COAH.[140] Finally, the statute imposed a moratorium on the controversial and judicially-imposed builder's remedy.[141]

C. Mount Laurel III — *Interpretation of the Act*

Promptly after enactment of the Fair Housing Act, defendant municipalities moved to transfer their cases to COAH. Twelve of those cases became the subject of *Mount Laurel III*, with five representative cases specifically selected for oral argument. The cases raised three significant issues: (1) whether transfer of

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134 *Id.* § 309(a).
135 *Id.* § 310.
136 *Id.* § 309.
137 *Id.* § 313.
138 *Id.* § 317.
139 *Id.* § 320.
140 *Id.* § 316.
141 *Id.* § 328.

pending litigation to COAH would result in manifest injustice;[142] (2) whether the builder's remedy moratorium was unconstitutional;[143] and (3) whether the Act was intended to satisfy the constitutional requirements without delay.[144] Each issue is discussed in turn below.

1. Transfer of *Mount Laurel* Litigation to COAH

Each of the twelve *Mount Laurel III* appeals challenged the trial courts' decisions on motions to transfer to COAH.[145] Transfer had been denied in all but one case, which involved Tewksbury Township. The applicable section of the Act dealing with litigation filed more than sixty days before the effective date of the Act requires that

> any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation.[146]

Accordingly, the first major issue in *Mount Laurel III* was what constituted "manifest injustice."

The plaintiff developers and Public Advocate contended that manifest injustice would result by virtue of delay in providing low and moderate income units, the possibility of increased infrastructure costs and loss of development sites for low income housing developers and the concomitant damages to builders.[147] The supreme court found that there was no constitutional timetable in meeting the *Mount Laurel* obligation.[148] In clear deference to COAH, the court declared that any delay resulting from the Act's implementation was permissible as it marked the time needed for COAH to correctly perform its duties.[149] In addition, the court noted that COAH's time frame could be a more expedient and efficient means to an end than the judiciary's timetable as well as result in more lower income housing than a judicial intervention could achieve.[150] Thus, Chief Justice Wilentz clearly indicated that delay did not con-

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142 *Mount Laurel III*, 103 N.J. at 38, 510 A.2d at 641.
143 *Id.* at 42, 510 A.2d at 643.
144 *Id.* at 41-42, 510 A.2d at 642-43.
145 *Id.* at 26, 510 A.2d at 635.
146 N.J. STAT. ANN. § 52:27D-316 (West 1986).
147 *Mount Laurel III*, 103 N.J. at 25-31, 510 A.2d at 634-37.
148 *Id.* at 40, 510 A.2d at 642.
149 *Id.* at 41, 510 A.2d at 642-43.
150 *Id.*

stitute manifest injustice.[151]

In determining this issue, the supreme court sought to address what it perceived as the legislature's main purposes: to remove the courts from the *Mount Laurel* field and bring an administrative agency into it.[152] By retaining jurisdiction, the court believed that it would thwart the state's intention of individual municipalities having the benefits of promulgating and implementing its own particularized plan.[153] The court determined that if municipalities are not allowed to reap the benefits of their own individualized plan, the Act's growth and its statewide solution would be thwarted.[154] Thus, the court concluded that COAH was to resolve every possible *Mount Laurel* action.[155]

There was, however, one caveat to the transfer. It was necessary to ensure that the scarce resources employed to meet a *Mount Laurel* obligation, such as vacant tracts of land, sewerage capacity, water lines or other public improvements, would still be available at the conclusion of COAH's procedures. Accordingly, the *Mount Laurel III* court allowed parties to seek from the trial court conditions designed to protect the municipality's ability to meet its *Mount Laurel* obligation.[156]

2. Moratorium on the Builder's Remedy

The *Mount Laurel III* court found that the statutory restrictions on the builder's remedy were narrow and extremely limited. Moreover, the court found that the builder's remedy never constituted a part of the constitutional obligation; rather, it was a means to a constitutional end.[157] Accordingly, the supreme court declared that the builder's remedy was unacceptable in the face of the legislative action imposing a moratorium.[158] Again, the court was responsive to the explicit legislative declaration of an intent to provide alternatives to the builder's remedy.[159]

3. Constitutionality of the Act's Fair Share Factor

In upholding the Act, the *Mount Laurel III* court determined

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151 *Id.* at 51, 510 A.2d at 648.
152 *Id.* at 49, 510 A.2d at 647.
153 *Id.* at 52, 510 A.2d at 648.
154 *Id.*
155 *Id.* at 53, 510 A.2d at 649.
156 *Id.* at 62, 510 A.2d at 653.
157 *Id.* at 42, 510 A.2d at 643.
158 *Id.* at 42-43, 510 A.2d at 643.
159 *See* N.J. STAT. ANN. § 52:27D-303 (West 1986).

that the statutory scheme would, if properly implemented, provide a realistic opportunity for a fair share of lower income housing. In so doing, the court clearly deferred to both the legislature and COAH. It gave the newly created agency both time to act and flexibility. The court adopted by reference, however, a number of key findings from *Morris County Fair Housing Council v. Boonton Township*.[160]

That case was the first to interpret the Act. Judge Skillman, one of the three specially designated *Mount Laurel* judges, established certain parameters designed to protect the integrity of the *Mount Laurel* doctrine's constitutional obligations. Those parameters, which relate to the core fair share factors (regions, need and allocation of regional need), are discussed below.

a. *Regions*

In *Mount Laurel II*, the court reiterated its general approval of regions that constituted the fair share housing market area.[161] This definition, as implemented by Judge Serpentelli in *AMG Realty Co. v. Warren Township*, resulted in regions as large as eleven counties.[162] By contrast, the Act defined a housing region as

> a geographic area of no less than two nor more than four contiguous, whole counties which exhibit significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas as last defined by the United States Census Bureau prior to the effective date of this act.[163]

In *Boonton Township*, the plaintiffs argued that the result would be much smaller regions that could produce two types of housing market regions, those solely comprised of urban counties and those with only suburban counties.[164] This instance would, in effect, prevent urban counties from satisfying their low and middle income housing needs.[165] Judge Skillman agreed and stated that if plaintiff's concerns materialized, satisfaction of *Mount Laurel* obligations would likely not obtain in regions uniquely comprised of urban

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160 *Mount Laurel III*, 103 N.J. at 26-31, 510 A.2d at 634-37.

161 *Mount Laurel II*, 92 N.J. at 256, 456 A.2d at 440 (quoting Oakwood at Madison, Inc. v. Madison Township, 72 N.J. 481, 543, 371 A.2d 1192, 1223 (1977)).

162 AMG Realty v. Warren Township, 207 N.J. Super. 388, 399, 504 A.2d 692, 698 (Law Div. 1984).

163 N.J. STAT. ANN. § 52:27D-304(b) (West 1986).

164 Morris County Fair Hous. Council v. Boonton Township, 209 N.J. Super. 393, 424, 507 A.2d 768, 785 (Law Div. 1985).

165 *Id.*

counties.[166]

Thus, the *Boonton Township* court established a constitutional parameter that a two county region consisting of Essex and Hudson counties would be unacceptable. The court then suggested that the region proposed by the Rutgers University Center for Urban Policy Research would satisfy both the legislative directives of the Act and the constitutional objectives of the *Mount Laurel* doctrine.[167]

b. *Prospective Need*

The Act required that COAH, in determining prospective need, consider accepted applications for development, transfers of real property and State Planning Commission projections.[168] In *Boonton Township*, plaintiffs contended that this approach would reward municipalities that had engaged in exclusionary practices and had approved only a small number of development applications in prior years.[169] While the *Boonton Township* court clearly deferred to the legislature, it pointed out that COAH's ultimate obligation was to ascertain the need for low and middle income housing based on probable projections involving development and growth.[170] Judge Skillman suggested that it would be inappropriate for COAH to consider development applications in a way that would understate the growth and development reasonably likely to occur.[171]

c. *Credits*

The Act provided that a municipality's fair share determination would be reduced, using a one-to-one ratio, by current individual units of adequate lower income housing.[172] Additionally included in the "crediting" formula are housing units constructed or acquired pursuant to a housing program that had the specific intention of providing lower income housing.[173] In challenging this provision, the Public Advocate argued that the section would unacceptably dilute municipal fair share obligations. If literally applied, the credits could far exceed statewide need.[174]

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166 *Id.*, 507 A.2d at 785-86.
167 *Id.* at 425-26, 507 A.2d at 786.
168 N.J. STAT. ANN. § 52:27D-304(j) (West 1986).
169 *Boonton Township*, 209 N.J. Super. at 426, 507 A.2d at 787.
170 *Id.* at 426-27, 507 A.2d at 787.
171 *Id.* at 427, 507 A.2d at 787.
172 N.J. STAT. ANN. 52:27D-307(c)(1) (West 1986).
173 *Id.*
174 *Boonton Township*, 209 N.J. Super. at 429, 507 A.2d at 788.

Again, the *Boonton Township* court, while deferring to COAH, established clear parameters. Judge Skillman conceded that the Act's credits sections could be unconstitutional under the plaintiff's interpretation.[175] Judge Skillman reminded COAH that, if at all possible, the legislation must be interpreted in a manner to protect against constitutional infirmity.[176] The court then stated that it would rest on the assumption that COAH will interpret the credits sections with due regard to the *Mount Laurel* constitutional obligations.[177]

d. *Regional Contributions*

The Act allowed for Regional Contribution Agreements (RCAs) which allow a municipality to transfer up to 50 percent of its fair share to another municipality.[178] The *Boonton Township* plaintiffs argued that *Mount Laurel II* established that the poor must have a realistic opportunity to live in areas where sound planning allows the rich and middle class to live[179] and that RCAs contradict this principle. Judge Skillman upheld the Act's RCA provision by pointing out that at least fifty percent of a municipality's fair share must be addressed within the municipality and that such transfers were anticipated with approval in *Mount Laurel II*. More significantly, the *Boonton Township* court again emphasized that all RCAs are subject to approval pursuant to COAH's determination that the Regional Contribution Agreement grants realistic opportunities for lower income housing as well as realistic access to jobs.[180]

4. Deference and the Constitutional Obligation

There are two significant themes in the *Mount Laurel III* decision. First, the court demonstrated considerable deference to the legislature, seeking to uphold the Act at virtually every turn. The court also deferred to COAH by granting to the agency the benefit of every doubt that its actions are constitutionally permissible.

The second major theme is that the supreme court clearly indicated that the constitutional obligation must be met. The

175 *Id.*
176 *Id.* at 430, 507 A.2d at 789.
177 *Id.*
178 N.J. STAT. ANN. § 52:27D-312 (West 1986).
179 *Boonton Township*, 209 N.J. Super. at 431, 507 A.2d at 789.
180 *Id.* at 431-32, 507 A.2d at 789-90 (quoting L.1985, c.222, § 12(c), now codified at N.J. STAT. ANN. § 52:27D-312(c) (West 1986)).

court sought to demarcate for COAH the constitutional boundaries, and to point the agency in directions consistent with both the Act and the constitutional obligation. The *Mount Laurel III* court warned, however, that:

> No one should assume that our exercise of comity today signals a weakening of our resolve to enforce the constitutional rights of New Jersey's lower income citizens. The constitutional obligation has not changed; the judiciary's ultimate duty to enforce it has not changed; our determination to perform that duty has not changed. What *has* changed is that we are no longer alone in this field. The other branches of government have fashioned a comprehensive statewide response to the *Mount Laurel* obligation.[181]

IV. POST-*MOUNT LAUREL III* LITIGATION

Since February 20, 1986, when the Fair Housing Act was upheld in *Mount Laurel III*, there have been three subsequent New Jersey Supreme Court decisions and approximately twelve appellate division decisions relating to *Mount Laurel* issues. For purposes of discussion, these cases have been categorized according to the three basic goals of the Fair Housing Act: first, the establishment of an administrative agency (i.e., COAH) to administer a statewide program to address the *Mount Laurel* doctrine;[182] second, the removal of the judiciary from the *Mount Laurel* field;[183] and third, the satisfaction of the *Mount Laurel* constitutional obligations.[184]

A. To What Extent Have the Courts Deferred to COAH and the Statutory Scheme for Meeting the Constitutional Obligation of Mount Laurel?

It is clear from an examination of a series of post-*Mount Laurel III* cases that New Jersey courts have consistently deferred to COAH and the statutory scheme. For example, in *Bi-County Development Corp v. Oakland Borough*,[185] one of the three designated *Mount Laurel* judges held that COAH's fair share methodology should be followed by trial courts hearing cases where the parties chose not to transfer to COAH. In *Hills Development Co. v.*

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181 *Mount Laurel III*, 103 N.J. at 65, 510 A.2d at 655.

182 *Id.* at 49, 510 A.2d at 647.

183 *Id.*

184 *Id.* at 20, 510 A.2d at 631-32 (citations omitted).

185 Bi-County Development Corp. v. Oakland Borough, 224 N.J. Super. 455, 540 A.2d 927 (Law Div. 1988).

Bernards Township,[186] the appellate division upheld COAH's interpretation of the Act's procedural requirements and afforded the agency a higher level of deference because it was implementing "new and innovative legislation." Certain substantive rules relating to fair share issues were challenged in *Bernards Township v. Department of Community Affairs*[187] and *Carlton Homes, Inc. v. COAH*[188] and upheld by the appellate division with only two exceptions, which were plainly contrary to the Act's literal meaning. In *Van Dalen v. Washington Township*,[189] the supreme court upheld COAH's decision to use the outdated SDGP until the legislatively designated State Department and Redevelopment Plan (State Plan) was completed.

In *Bi-County*, the Borough of Oakland chose to remain in court rather than transfer to COAH for resolution of its *Mount Laurel* litigation. Although indicating its acceptance of COAH's fair share methodology, Oakland sought the benefit of the *Mount Laurel* doctrine's consensus methodology, which allowed municipalities to phase in their reallocated present need fair share obligation over three six-year periods. Thus, Oakland sought both the benefit of COAH's smaller fair share number of 345 units, compared to the court's fair share of 462 units, and the benefit of phasing in the number of units over eighteen years rather than six years. Clearly, Oakland attempted to pick and choose between the court's and COAH's different methodologies, seeking to minimize its fair share liability and maximize the amount of time in which to meet it.

This result was exactly what *Mount Laurel III* sought to avoid. The *Mount Laurel III* court indicated that the legislature envisioned a comprehensive state statutory and regulatory scheme that obtains not in the diversity of court decisions, but under the legislature's central oversight.[190] Moreover, the *Mount Laurel III* court believed that the legislature's intention was that individual municipalities would benefit from an all-inclusive plan and its implementation.[191]

In *Bi-County*, Judge Skillman, quoting from *Mount Laurel III*, indicated that:

> While the Legislature has left a continuing role under the Act

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186 229 N.J. Super. 318, 551 A.2d 547 (App. Div. 1988).
187 233 N.J. Super. 1, 558 A.2d 1 (App. Div. 1989).
188 244 N.J. Super. 438, 582 A.2d 1024 (App. Div. 1990).
189 120 N.J. 234, 576 A.2d 819 (1990).
190 *Mount Laurel III*, 103 N.J. at 22, 510 A.2d at 632.
191 *Id.* at 52, 510 A.2d at 648.

> for the judiciary in *Mount Laurel* matters, any such proceedings before a court should conform wherever possible to the decisions, criteria, and guidelines of the Council. We do not believe the Legislature wanted lower income housing opportunities to develop in two different directions at the same time, contrary to sound comprehensive planning.[192]

Accordingly, Judge Skillman concluded that, absent an arbitrary and capricious showing of the implementation of COAH's methodology, trial courts in *Mount Laurel* adjudications not transferred to the Council should defer to COAH's methodology in their decision.[193] While lacking the jurisdiction of the appellate division to rule on whether COAH's rules were valid, Judge Skillman did determine that Oakland did not demonstrate that the COAH's regulations that calculated Oakland's municipal fair share obligations were unfair in their application.[194] The result signaled that the courts, as pledged in *Mount Laurel III*, would defer to COAH and its methodology, and would seek to achieve consistency within the framework of the statewide statutory scheme.

In *Hills Development*, Bernards Township landowners adjacent to a proposed site for *Mount Laurel* housing challenged COAH procedures and requested a hearing before the Office of Administrative Law. With respect to the procedural aspects, the plaintiff landowners contended that Bernards Township did not properly adopt the housing element prior to submission to COAH and that the municipality further omitted a settlement agreement with a *Mount Laurel* developer from the housing element. Because of these deficiencies, the plaintiffs maintained that Bernards Township's housing element was not properly before COAH and that it was beyond the time when the town could properly submit a housing element to COAH, thus availing itself of the exhaustion of administrative remedies at COAH.

COAH interpreted the applicable statute[195] to mean that "for purposes of filing with the Council, a housing element need only be prepared, and adoption is unnecessary."[196] COAH analogized the process for adopting a housing element to the process for revising a zoning ordinance, as adoption of the element or ordinance are post-

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192 Bi-County Dev. Corp. v. Oakland Borough, 224 N.J. Super. 455, 459, 540 A.2d 927, 929 (Law Div. 1988) (quoting *Mount Laurel III*, 103 N.J. at 63, 510 A.2d at 654).

193 *Id.* at 458, 540 A.2d at 929.

194 *Id.* at 460, 540 A.2d at 930.

195 *See* N.J. STAT. ANN. §§ 52:27D-309, -311 (West 1986).

196 Hills Dev. Co. v. Bernards Township, 229 N.J. Super. 318, 326, 551 A.2d 547, 551 (App. Div. 1988).

hoc revisions of a prior action.[197] The *Hills Development* court agreed and held that such post-hoc adoptions do not affect the element's validity under COAH's review because an adoption prior to submission to the COAH is not required.[198]

More significant than this holding was the substantial deference that the *Hills Development* court accorded COAH: "'[A]n administrative agency's interpretation of a statute it is charged with enforcing is entitled to *substantial* weight.'"[199] Moreover, in *Hills Development*, the appellate division was particularly willing to defer to COAH's interpretation of its own statute because "'deference to an administrative agency is particularly appropriate where . . . new and innovative legislation is being put into practice.'"[200]

With respect to whether the settlement agreement should have been included with the housing element, the *Hills Development* court found that neither the Fair Housing Act nor COAH's regulations required such inclusion. Again, the judiciary deferred to COAH. The *Hills Development* court stated that "[t]he Council's determination that inclusion of the settlement agreement into the housing element is not required for the element to be 'consistent with the rules and criteria adopted by COAH . . ., should be given deference.'"[201]

COAH's administrative rules were directly challenged in *Bernards Township v. Department of Community Affairs*.[202] Specifically, Bernards and Cherry Hill Townships challenged the rules on both substantive and procedural grounds. The appellate division set forth standards for review that assured a strong measure of deference to COAH, afforded presumptive validity to its rules, and upheld all but one of the rules.

Regarding its review of COAH's rulemaking, the *Bernards Township* court set forth three standards:

> First, if the rule is not arbitrary, capricious, unreasonable or irrational, it will be upheld.
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> Second, the rule must carry out the will of the legislature. The regulation must fall within the express or implied grant of power to the agency in the enabling legislation. However, a specific grant of authority is to be liberally construed, unless

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197 *Id.* at 327, 551 A.2d at 552.

198 *Id.* at 329-30, 551 A.2d at 553.

199 *Id.* at 329, 551 A.2d at 553 (emphasis added) (quotation omitted).

200 *Id.* (quoting Newark Firemen's Mut. Benevolent Ass'n v. Newark, 90 N.J. 44, 55, 447 A.2d 130, 135-36 (1982)).

201 *Id.* at 331, 551 A.2d at 554.

202 233 N.J. Super. 1, 558 A.2d 1 (App. Div. 1989).

there is reasonable doubt that the Legislature has vested the particular power in the administrative body.

Third, the rule must be adopted as required by law.[203]

In addition, the appellate division asserted that there was a strong presumption that the rules were valid unless arbitrary or ultra vires and that the plaintiff has the burden of overcoming such presumptions. Finally, the court stated it must defer "to a choice of procedures by an administrative agency to implement legislative policy 'so long as the selection is responsive to the purpose and function of the agency.' "[204]

Subsequently, municipalities challenged the rules relating to credits, the twenty percent maximum set asides, municipal adjustments, distribution of need, three percent adjustments for municipal recreation and vacant land as criteria for distribution of need. In each instance the court upheld the validity of the appellate rule with the exception of the credit section, a ruling that warrants discussion below.

The Fair Housing Act provides that "[m]unicipal fair share shall be determined after crediting . . . each current unit of low and moderate income housing . . . including any such housing constructed or acquired as part of a housing program specially intended to provide housing for low and moderate income households."[205]

In implementing this legislative intent, COAH imposed two conditions on the one-for-one credit provision. First, COAH only credited one-for-one "those housing units created or rehabilitated after April 1, 1980."[206] Second, COAH sought to credit only "such units [that] have been restricted to low or moderate income households . . . ."[207] Regarding the first issue, the *Bernards Township* court accorded COAH considerable deference. It recognized that although COAH did not conduct a literal statutory interpretation, the court found it acceptable to look beyond the language and evaluate the statute's and regulation's purpose.[208] Because it used 1980 census data, COAH had in effect already counted and credited all pre-1980 low and moderate income housing. Thus it was necessary to credit only the post-1980 census lower income housing. The *Bernards Township* court recognized that the result was consistent

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203 *Id.* at 8-9, 558 A.2d at 4 (citations omitted).

204 *Id.* at 9, 558 A.2d at 4-5 (quoting Radiological Soc'y of New Jersey v. New Jersey State Dep't of Health, 208 N.J. Super. 548, 560, 506 A.2d 755, 761 (1986)).

205 N.J. STAT. ANN. § 52:27D-307(c)(1) (West 1986).

206 N.J. ADMIN. CODE tit. 5, § 5:92-6.1(a).

207 *Id.* § 5:92-6.1(b).

208 *Bernards Township*, 233 N.J. Super. at 10, 12, 558 A.2d at 5, 6.

with the legislative intent.[209]

This aspect of the credit section was an area of explicit concern in *Boonton Township* and *Mount Laurel III*. In these cases, the Public Advocate argued that a literal application of credits on a one-for-one basis could result in credits far exceeding statewide need.[210] The *Boonton Township* court agreed that if the Act were so interpreted, the constitutionality of the credits provision would be difficult to sustain.[211] Thus, COAH's action may well have been in response to the court's admonition that COAH was obligated to interpret the legislation so as not to render it constitutionally infirm, and in addition to interpret the credits section to prevent an unconstitutional dilution of *Mount Laurel*'s obligation.[212] Viewed in this manner, the court had an obligation to stretch to uphold COAH's regulation over the language of the statute.

With respect to the second issue, the limitation of credits to housing units that were restricted to lower income households, the *Bernards Township* court found COAH's action to be ultra vires. While this regulation may also have been an effort to prevent dilution of *Mount Laurel*'s constitutional obligations through credits, there was no basis in the Act for imposing such a restriction. Accordingly, the *Bernards Township* court found that because the council had exceeded its legal boundaries, the provision had to be discarded.[213]

There are limits to the courts' willingness to defer to the legislature and COAH as demonstrated in the *Carlton Homes* challenge to COAH's 1,000 unit cap rule. The appellate division, in a strongly worded opinion, declared that:

> The Legislature's enactment of the Fair Housing Act, and the Supreme Court's willingness to defer to the Legislature's choice of mechanisms to be used to satisfy the constitutional obligations did not, however, result in an abdication of the judiciary's obligation to review the reasonableness and constitutionality of the Council's actions.[214]

The *Carlton Homes* court proceeded to find that application of a per se absolute limit of 1000 units on a municipality's fair share obliga-

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209 *Id.* at 12, 558 A.2d at 6.

210 Morris County Fair Hous. Council v. Boonton Township, 209 N.J. Super. 393, 429, 507 A.2d 768, 788 (Law Div. 1985).

211 *Id.*

212 *Id.* at 430, 507 A.2d at 789.

213 *Bernards Township*, 233 N.J. Super. at 13, 14, 558 A.2d at 6, 7.

214 Carlton Homes, Inc. v. COAH, 244 N.J. Super. 438, 449, 582 A.2d 1024, 1030 (App. Div. 1990).

tion "substantially exacerbates disparity in the obligation imposed on various municipalities in the same region and, therefore, clearly demonstrates that the cap is unreasonable."[215] Accordingly, the appellate division would not sustain the cap as a reasonable exercise of COAH's authority under the Act.[216]

COAH was empowered under the Act to adjust municipal fair share if "[t]he established pattern of development in the community would be drastically altered . . . ."[217] The *Carlton Homes* court observed that COAH initially responded by adopting "a post-credit fair share 'cap' of twenty percent of each municipality's 1987 occupied housing stock."[218] The 1000 cap limit was subsequently added to the above provision by amendment, however. The effect was that a municipality would not have a fair share that exceeded twenty percent of its 1987 occupied housing or 1000 units, whichever was lower. The 1000 cap limit, as applied to Middletown Township, reduced its fair share number from 1850 units to 1000, approximately the same as Freehold Township, although Freehold had only one third as many total households.

In striking down this rule, the *Carlton Homes* court made clear that it was the unreasonableness of COAH's action, and not that of the legislature's, which invalidated the rule. The court explicitly stated that "the legislature could not have intended that, under the guise of protecting against a drastic alteration in one municipality, other municipalities would be left in so disparate a position."[219]

The supreme court showed both deference and pragmatism in *Van Dalen*. In that 1990 case, a *Mount Laurel* developer challenged the Council's unwavering position regarding the SDGP as unreasonable because it was based on non-current information.[220] Specifically, the developer contended that defendant Washington Township's growth area, as reflected in the SDGP, was understated and that the Township's fair share obligation should be increased to reflect actual current data.[221]

The *Van Dalen* court found that the Fair Housing Act required COAH to use the unfinished State Plan. COAH's decision to rely on the outdated SDGP until such time as the State Plan was com-

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215 *Id.* at 453, 582 A.2d at 1033.
216 *Id.*
217 N.J. STAT. ANN. § 52:27D-307(c)(2)(b) (West 1986).
218 *Carlton Homes*, 244 N.J. Super. at 450, 582 A.2d at 1030.
219 *Id.* at 453, 582 A.2d at 1033.
220 Van Dalen v. Washington Township, 120 N.J. 234, 245, 576 A.2d 819, 825 (1990).
221 *Id.* at 239, 576 A.2d at 822.

pleted was upheld, however, by the supreme court.[222] In doing so, the *Van Dalen* court reaffirmed the reasons for deference articulated in earlier lower court decisions:

> We are satisfied that deference to COAH's reliance on the SDGP is especially appropriate because the agency is charged with the implementation of the Fair Housing Act, a new and innovative legislative response to deal with the statewide need for affordable housing. Because the legislative scheme is novel, the implementation of its goals is necessarily an evolving process. Accordingly, COAH is entitled to a reasonable degree of latitude, consistent with the legislative purpose, in its effort to ascertain which planning and statistical studies best serve the long-term statutory objectives.[223]

Based on the pragmatic reality that the SDGP was the only "'official determination of the state's plan for its own future development and growth"'[224] and that the "its replacement has not been completed,"[225] the *Van Dalen* court found that it was a reasonable determination for COAH to find that at present it was more advantageous to choose the administrative ease in the SDGP's planning process as compared to the greater precision possibly accruing from a more flexible formulation.[226]

B. *To What Extent Have the Courts Gotten Out of the Field of Deciding* Mount Laurel *Cases?*

It is not clear that the judiciary has left the *Mount Laurel* field. Available evidence suggests that courts have been less involved, but that evidence is less than overwhelming. Moreover, the available evidence only tells part of the story. There are many cases in which the parties chose to remain in court rather than transfer to COAH. Because many of those cases resulted in settlements, their outcomes were not published. Accordingly, one must recognize that the following discussion is limited to the few cases that are available.

Published decisions indicate that the courts have made an effort to facilitate the transfer of cases to COAH. *Mount Laurel III* established the guiding principles that "[i]t was the State's intention that every municipality would have the benefit of this com-

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222 *Id.* at 244, 576 A.2d at 824.
223 *Id.* at 246, 572 A.2d at 825.
224 *Id.* at 241, 576 A.2d at 823 (quoting *Mount Laurel II*, 92 N.J. at 225, 456 A.2d at 424).
225 *Id.* at 246, 576 A.2d at 825.
226 *Id.*, 576 A.2d at 826.

prehensive plan and its method of implementation"[227] and that the legislature intended to transfer all pending *Mount Laurel* actions to the Council.[228]

To eliminate barriers to such transfer, the appellate division held, in *Trieste, Inc., II v. Gloucester Township*,[229] that transfer could not be conditioned on the city's payment of costs. The supreme court has also sought to remove incentives for plaintiffs to litigate by holding that plaintiffs are not entitled to attorney fees.[230] In *Alexander's Dep't Stores of New Jersey, Inc. v. Paramus Borough*[231] the Appellate Division sought to clarify which ancillary issues were appropriate for resolution in the courts. Finally, in *Fair Share Housing Ctr., Inc. v. Cherry Hill Township*,[232] the appellate division established that it will decide controversies that remain unresolved after exhaustion of COAH's procedures and remedies.

In *Trieste II*, Gloucester Township was engaged in *Mount Laurel* litigation prior to the July 1985 enactment of the Fair Housing Act, but delayed its motion to transfer to COAH until March 1986, after the *Mount Laurel III* court determined that the legislature intended all *Mount Laurel* litigation to be transferred unless extraordinary unfairness would result.[233] Gloucester Township's motion to transfer also came twenty days after judgment was entered in favor of plaintiffs on the issue of site suitability.[234] Because the three day hearing on site suitability could have been avoided had Gloucester Township filed a timely motion to transfer, the plaintiffs sought, and the trial court granted, costs (estimated at over $225,000)[235] as a condition of transfer to COAH.

In reviewing the trial court's actions, the appellate division found that there was no statutory deadline requiring a municipality to transfer cases involving exclusionary zoning that were initiated sixty days prior to the Act's effective date.[236] The appellate division recognized that the trial court possessed the inherent

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227 *Mount Laurel III*, 103 N.J. at 52, 510 A.2d at 648.

228 *Id.* at 53, 510 A.2d at 649.

229 215 N.J. Super. 184, 521 A.2d 864 (App. Div. 1987).

230 Urban League of Greater New Brunswick v. Mayor and Council of the Borough, 115 N.J. 536, 559 A.2d 1369 (1989).

231 243 N.J. Super. 157, 578 A.2d 1241 (App. Div. 1990).

232 242 N.J. Super. 76, 576 A.2d 24 (App. Div. 1990).

233 *Trieste II*, 215 N.J. Super. at 186, 521 A.2d at 865.

234 *Id.* at 187, 521 A.2d at 865.

235 *Id.* at 186, 521 A.2d at 864-65.

236 *Id.* at 187, 521 A.2d at 865 (quoting N.J. STAT. ANN. § 52:27D-316(a) (West 1986)).

power to assess costs as a condition of dismissal,[237] but also observed that the exercise of such power in this case resulted in the trial judge retroactively imposing a deadline for moving to transfer to COAH. The appellate court noted that COAH was free to consider the record on the litigated issue of site suitability. The *Trieste II* court then concluded that, in its interpretation of *Mount Laurel III*, courts should allow cases involving exclusionary zoning instituted prior to the Act's effective date to be heard by the Council, without costs.[238] The court further asserted that this would be the case despite the possibility that the municipality had been contumacious and prohibitive.[239]

In *Urban League* the supreme court considered plaintiffs' request for counsel fees under the Federal Fair Housing Act.[240] The court declared that the plaintiffs' request for award of counsel fees failed on two counts.

First, the plaintiffs were required to establish that the economic discrimination established in *Mount Laurel II* constituted racial discrimination under Title VIII of the federal statute.[241] Despite the opportunity to argue the Title VIII action, the plaintiffs failed to do so, a failure that "rather strongly suggests an affirmative decision, if not a knowing acquiescence, in the removal of questions of racial discrimination from the case."[242]

Second, the application for fees must be timely. The *Urban League* court found that the plaintiffs' request for fees, after having made no mention of counsel fees during more than a decade of active litigation, constituted an unreasonable delay for which there was no justifiable explanation.[243] In addition, the court suggested that the undue delay threatened to precipitate unfair surprise.[244] Finally, the *Urban League* court suggested that future awards of counsel fees in *Mount Laurel* litigation would be unlikely.[245] For fees to be properly awarded, it would require a case involving a state claim of the *Mount Laurel* type and an allegation concerning a Federal Fair Housing Act.[246] It was unlikely that

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237 *Id.* at 188, 521 A.2d at 866.
238 *Id.* at 190, 521 A.2d at 867.
239 *Id.*
240 42 U.S.C. §§ 3601-3619 (1988).
241 Urban League of Greater New Brunswick v. Mayor and Council of the Borough, 115 N.J. at 536, 541, 559 A.2d 1369, 1372 (1982).
242 *Id.* at 556, 559 A.2d at 1380.
243 *Id.* at 555, 559 A.2d at 1379.
244 *Id.*
245 *Id.* at 556, 559 A.2d at 1380.
246 *Id.*

the requisite circumstances would exist because *Mount Laurel* claims are largely adjudications before a state tribunal, a court or COAH, under the State Fair Housing Act.[247]

Thus, in *Trieste II* and *Urban League* the court removed costs as a barrier to transfer to COAH and eliminated the award of counsel fees as an incentive for plaintiff litigation of *Mount Laurel* issues.

In *Alexander's*, the appellate division advanced two noteworthy holdings. First, the court declared that taxpayer or neighbor standing cannot be afforded under the *Mount Laurel* doctrine as those two groups of citizens have no judicially cognizable interest in the resolution of *Mount Laurel* litigation.[248] The obvious impact of this holding is that it limits the number of parties who can challenge a *Mount Laurel* action.

The second issue, relating to whether COAH or the courts should decide legal questions of a *Mount Laurel* case, is more complex and warrants greater discussion. The Council granted substantive certification to Paramus's housing element and the municipality subsequently adopted an ordinance incorporating the housing element.[249] Plaintiffs then filed a complaint in lieu of prerogative writ. Among other issues, plaintiffs charged that the agreement between the borough and the developer and the zoning amendments were ultra vires, the governing body improperly entered into a contract not to alter its zoning scheme in the future, the amendments comprised invalid spot zoning, the Borough failed to offer the proposed amendments to the planning board for review, and the ordinance was vague, inconsistent, and ambiguous and, therefore, invalid.[250] In reviewing these complaints, the *Alexander's* court distinguished them from the kinds of legal questions over which COAH has incidental jurisdiction to decide, those being issues that grow directly out of COAH's proceedings.[251] Specifically, the appellate division determined that:

> Four things characterize these challenges; (1) they do not question Paramus's satisfaction of its *Mount Laurel* duties, (2) they are the kinds of attacks on municipal action that neighboring landowners or taxpayers have traditionally made by prerogative writ, (3) they do not directly challenge any deci-

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247 *Id.*

248 Alexander's Dep't Stores v. Paramus Borough, 243 N.J. Super. 157, 165, 578 A.2d 1241, 1245 (App. Div. 1990).

249 *Id.* at 161, 578 A.2d at 161.

250 *Id.* at 161-62, 578 A.2d at 1243-44.

251 *Id.* at 166, 578 A.2d at 1246.

> sion made by COAH, and (4) many of them concern issues that did not ripen until after COAH granted substantive certification, when the governing body took action on the zoning amendments.[252]

The *Alexander's* court determined that COAH's review and mediation procedures did not encompass the jurisdiction to hear and rule on legal issues.[253] Accordingly, the court found that legal issues involving municipal action should be decided by the law division and that COAH proceedings should be left inviolate.[254] The court then held that plaintiffs were not barred from raising these issues in the law division but that the courts would restrain themselves from inviting collateral attacks on the Council's authority.[255]

In *Cherry Hill Township*,[256] the appellate division determined that if COAH's administrative procedures are exhausted without resolution, then the matter properly returns to the courts. *Cherry Hill Township* appears to represent the kind of gross perversion of the process against which the *Mount Laurel III* court warned. Cherry Hill Township transferred its *Mount Laurel* case to COAH, engaged in mediation, petitioned COAH for substantive certification of its housing element based on the mediation agreement and then sought to amend the plan to include unaccepted techniques rejected in the mediation process.[257] When it became clear that Cherry Hill was not going to comply with its plan as submitted, COAH denied substantive certification and returned the matter to the courts' jurisdiction.[258]

The appellate court found that:

> As to transferred cases, the COAH proceeding is a diversion from the Law Division litigation with the objective of resolving the issues within the FHA framework. But it is merely a diversion, i.e., a temporary suspension of the litigation. If the COAH proceeding fails, then the litigation, which has not been dismissed, resumes.[259]

Accordingly, the court ordered the plaintiff's exclusionary zoning suit to resume in the law division.

The available evidence from these several cases indicates that

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252 *Id.*
253 *Id.* at 168, 578 A.2d at 1247.
254 *Id.*
255 *Id.*
256 Fair Share Housing Ctr., Inc. v. Cherry Hill Township, 242 N.J. Super. 76, 576 A.2d 24 (App. Div. 1990).
257 *Id.* at 79, 576 A.2d at 26.
258 *Id.* at 80, 576 A.2d at 26.
259 *Id.* at 82, 576 A.2d at 27.

the courts are willing to facilitate the transfer of cases to COAH. The judiciary has made clear, however, that it retains its right to review the reasonableness and constitutionality of COAH's actions, to decide legal questions that arise from a *Mount Laurel* case but that relate more directly to municipal actions than to COAH proceedings, and to re-enter the scene when exhaustion of COAH's procedures fails to resolve the controversy. Based on these cases and on the knowledge that many cases remained in court rather than transferring to COAH, one cannot conclude that the courts have "gotten out of the *Mount Laurel* field." At best, one may posit that the courts have merely reduced their involvement in the field.

C. *To What Extent Has the Supreme Court Sought to Ensure that the Constitutional Obligation of the* Mount Laurel *Doctrine is Met?*

1. Fair Share

The components of "fair share" include a threshold determination of whether a given municipality has a fair share obligation, and if so, identification of the region to which it belongs; a determination of the present and prospective regional need for low and moderate income housing; and, an allocation of the fair share of that need to the municipality. The result of this effort is quantification of the number of low and moderate income housing units for which a municipality must provide a realistic opportunity through its land use ordinances. This number is then adjusted to account for several capacity and policy considerations.

The fair share number is, at best, a reasoned estimate of a municipality's obligation. The fair share number is by no means a scientific determination. There is a range of reasonable and acceptable fair share methodologies that will pass constitutional muster. With this in mind, it is useful to review the evolution of fair share from *Mount Laurel I* through *Mount Laurel III*.

Mount Laurel I adopted the "developing municipality" standard. If a municipality sought the benefits of growth and development, it could not be excused from its burdens, such as providing opportunities for low and moderate income housing. This approach created much uncertainty and was rejected in *Mount Laurel II* in favor of the State Development Guide Plan, which was the only official document in the state that set forth a statewide blueprint for future growth and development. The Fair Housing Act anticipated that COAH would rely on the State

Plan, to be prepared by the newly created State Planning Commission. Because the State Plan, which was to be completed in 1989, would not be adopted until at least 1993, COAH continued to rely on the SDGP developed in 1980. The supreme court, for largely pragmatic reasons, upheld this exercise of discretion in *Van Dalen*.[260]

In *Van Dalen*, the plaintiff raised several meritorious arguments, such that the SDGP was outdated, that the SDGP understated the Township's growth areas, and that the municipality's fair share burden should be increased.[261] When the new State Plan is released in 1993, and incorporated by COAH, it will reflect growth for the past decade which, in turn, will increase existing municipal fair share numbers. In some cases, it will establish a fair share obligation where none previously existed.

Regions have also evolved from *Mount Laurel II*, which established four regions that range from a high of eleven counties to a low of two counties per region. By comparison, the Fair Housing Act requires that regions consist of no more than four, nor less than two, contiguous whole counties. Opponents claimed that this requirement would have the effect of reducing the total present and prospective regional need, and thus a municipality's fair share of such regional need. The supreme court upheld this provision as facially valid, however, and there has been no subsequent challenge to the actual regional determinations made by COAH.

With respect to the determination and allocation of present and prospective regional need, the Act represents a methodology that results in a lesser numeric need than the methodology adopted by *Mount Laurel II*. The statutory scheme allows a municipality to reduce its fair share through various credits, adjustments and limitations. Thus, the ultimate fair share number under the Act is substantially lower than under the *Mount Laurel II* methodology. For example, in *Bi-County*, Oakland Borough had a *Mount Laurel II* obligation of 462 units compared with only 345 units under the Act.[262] Moreover, Oakland could reduce by up to fifty percent the number of units it had to provide within its own boundaries if it entered into a regional contribution agreement with another municipality. Therefore, the Borough con-

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260 Van Dalen v. Washington Township, 120 N.J. 234, 576 A.2d 819 (1990).

261 *Id.* at 237, 239, 576 A.2d at 820-21, 822.

262 Bi-County Dev. Corp. v. Oakland Borough, 224 N.J. Super. 455, 461, 540 A.2d at 927, 930 (Law Div. 1988).

ceivably would have to provide a realistic opportunity for only 173 units within its border, a reduction of sixty percent from its *Mount Laurel II* obligation.

Despite arguments that such reduction in the fair share number unconstitutionally dilutes the *Mount Laurel* obligation, the appellate division upheld the Act and its implementation by COAH in *Bernards Township* and *Carlton Homes*, with two important exceptions. The more noteworthy case for purposes of this section was *Carlton Homes*, wherein the court squarely addressed the question of constitutional obligation. The appellate division was called upon to decide whether the Council's adoption of a 1000-unit cap complied with the Act and, if so, whether it's operation would further violate the municipality's *Mount Laurel* constitutional obligation.[263] The *Carlton Homes* court asserted that by deferring to the legislature and COAH, it had not abdicated its responsibility to determine the reasonableness, as well as the constitutionality, of COAH's actions.[264] The court then proceeded to find that COAH's 1000-unit maximum fair share was arbitrary, unreasonable and, therefore, invalid.

It is worth noting that in *Carlton Homes* the potential "windfall" to Middletown Township was grossly excessive. Middletown faced a precapped and precredited fair share obligation of 1850 units.[265] Presumably, this figure would have been significantly higher under the *Mount Laurel II* methodology. By imposing the cap, Middletown's precredited fair share was limited to 1000 units. This number could presumably be reduced even further by credits. Finally, if the Township entered into a regional contribution agreement, it could reduce the number of units for which it must provide an opportunity within its boundaries to not more than 500 units. The result was that Middletown could conceivably have reduced its fair share from 1850 units to not more than 500, a reduction of 1350 units, or nearly seventy-five percent.

Thus, with the exception of the 1000 cap limit in *Carlton Homes* and the low income restriction on credits in *Bernards Township*, the courts have been reluctant to find that COAH's actions fail to satisfy the constitutional obligation. Given this clear policy of deference, combined with the broad range of reasonable ac-

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263 Carlton Homes, Inc. v. COAH, 244 N.J. Super. 438, 448, 582 A.2d 1024, 1029 (App. Div. 1990).

264 *Id.* at 449, 582 A.2d at 1030.

265 *Id.* at 452, 582 A.2d at 1032.

ceptability in fair share methodologies, the courts have upheld COAH's determinations in all but the most flagrant cases.

2. Realistic Opportunity

In *Mount Laurel II*, the supreme court defined "affirmative" as being those actions the municipality would undertake and "realistic opportunity" as the likelihood that low and middle income housing will in fact be constructed.[266] It is clear that *Mount Laurel II* achieved significant results. The *Mount Laurel III* decision quantified these results as follows:

> As of the time we entertained oral argument on the case before us (January 6 and 7, 1986), some twenty-two *Mount Laurel* cases had reached virtually final settlement. The total fair share under those settlements was in excess of 14,000 units: given the terms of these settlements, it is highly probable that a substantial portion will be built. Given the sensitivity and dedication of the three *Mount Laurel* judges, we have no doubt that our directions in *Mount Laurel II* were honored scrupulously and that every development they allowed substantially conformed to sound zoning and planning and would have no substantial adverse environmental impact.[267]

The current issues are whether municipalities have taken action since *Mount Laurel III* and, if so, whether any such action has resulted in final fair share settlements that stand a realistic opportunity of actually being built. According to COAH's Monthly Status of Municipalities Report, issued in April 1992, 176 municipalities have voluntarily participated and 133 municipal housing elements have received substantive certification as of March 31, 1991; the result has been 17,365 fair share units.

The judiciary has facilitated these results through its deference and support of COAH as it implements the statutory scheme for meeting fair share obligations under *Mount Laurel*. It has also sought to facilitate a realistic opportunity in two specific cases, *Holmdel Builders Association v. Holmdel Township*[268] and *Tocco v. Council on Affordable Housing*.[269]

In *Holmdel Township*, several municipalities seeking to provide a realistic opportunity for the construction of affordable housing adopted ordinances imposing fees on developers as a condition for

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266 *Mount Laurel II*, 92 N.J. at 260-61, 456 A.2d at 442.
267 *Mount Laurel III*, 103 N.J. at 64, 510 A.2d at 654.
268 121 N.J. 550, 583 A.2d 277 (1990).
269 242 N.J. Super. 218, 576 A.2d 328 (App. Div. 1990).

development.[270] The municipalities also set up affordable housing trust funds and dedicated the developers' fees to such trusts.[271] These ordinances were challenged by several builders' associations as ultra vires, an invalid tax, a taking without just compensation and a denial of due process.[272]

The *Holmdel Township* court defined the primary issue as whether there is statutory authority in the Fair Housing Act, Municipal Land Use Law and general governmental police power that empowers a municipality to erect affordable housing development fees as a prerequisite for development approval.[273] The supreme court characterized the ordinances at issue as affordable housing linkage ordinances. The court found that developers must make an effort to finance affordable housing construction as a precondition to obtaining a building permit or gaining access to density bonuses.[274] The court further opined that Holmdel's ordinance grants developers the opportunity of actually constructing lower income housing units.[275] Proponents of such linkage fees argued that

> commercial developments increase the need for housing in general and thus for affordable housing [and that] any land that is developed for any purpose reduces the supply of land capable of being used to build affordable housing. [C]ommercial development . . . consume[s] land, water, and sewerage capacity that could otherwise be devoted to or held for the satisfaction of the municipality's lower-income-housing obligation.[276]

The court agreed with this reasoning and found that there was a reasonable relationship between the development fees and an authorized purpose, i.e., the providing of a realistic opportunity for the development of affordable housing. The supreme court determined that the development fees can be analogized to mandatory set-asides.[277] In addition, the court found that it was fair and reasonable for the fee requirements to be imposed upon private developers as they possess, enjoy and consume the land that comprises property which can be used for housing stock.[278] Accordingly, the *Holmdel Township* court concluded that development fees, as

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270 *Holmdel Township*, 121 N.J. at 561-62, 583 A.2d at 282-83.
271 *Id.* at 556, 583 A.2d at 280.
272 *Id.*
273 *Id.* at 558, 583 A.2d at 281.
274 *Id.* at 564, 583 A.2d at 284.
275 *Id.*
276 *Id.* at 565-66, 583 A.2d at 284, 285.
277 *Id.* at 573, 583 A.2d at 288 (citation omitted).
278 *Id.*

mandatorily defined, do not violate COAH requirements, satisfy standards of reasonableness as well as meet FHA requirements.[279] The court interpreted them to be other methods suggested by the municipality.[280]

The court deferred to the legislature, however, by stressing that the Fair Housing Act leaves specificities of compliance under the *Mount Laurel* doctrine with COAH, the Council having the sole responsibility for implementation and development of the state's affordable housing policy.[281] The supreme court then proceeded to point the way for COAH by determining that administrative rulemaking would satisfy the interests of fairness and due process, and that, to comply with the FHA inclusionary-zoning measures, the agency's rulemaking must reasonably fulfill its legislative purposes.[282] Finally, the court stated that COAH should promulgate standards for development fees in order that municipalities have guidelines to consider how to employ the fees as exclusionary-zoning devices, under the FHA, when designing their housing elements.[283]

Thus, after reiterating the *Mount Laurel II* goal of encouraging municipalities to fashion other means of satisfying fair share obligations,[284] the *Holmdel Township* court was more than willing to affirm the municipal efforts directed toward that end. While there was no provision in the Act that explicitly empowered COAH to approve development fees, neither was there an explicit prohibition. The *Holmdel Township* court analogized development fees, which had been judicially established in *Mount Laurel II*, to mandatory set-asides[285] and found that these were the primary method of spurring a municipality's willingness to comply.[286]

The court determined that there was a rational relationship between the development fee and the legislative and constitutional goal of providing a realistic opportunity for housing. The *Holmdel Township* court then proceeded to craft the basis of COAH's authority to approve such development fees through the agency's rulemaking powers.

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279 *Id.* at 574, 583 A.2d at 289 (quoting N.J. STAT. ANN. § 52:27D-311 (West 1986)).

280 *Id.*

281 *Id.* at 576, 583 A.2d at 290 (citation omitted).

282 *Id.* at 578, 583 A.2d at 291.

283 *Id.* at 579, 583 A.2d at 291.

284 *Id.* at 556, 583 A.2d at 280 (quoting *Mount Laurel II*, 92 N.J. 158, 265-66, 456 A.2d 390, 445 (1983)).

285 *Id.* at 573, 583 A.2d at 288.

286 *Id.* at 563, 583 A.2d at 283.

COAH has since promulgated rules that establish procedures for retaining development fees.[287] The rules require municipalities to submit such ordinances to COAH for review and approval. To provide relief to the *Holmdel Township* municipalities, the rules established procedures whereby municipalities that collected development fees for affordable housing trust funds prior to the *Holmdel Township* decision could retain such funds. Consequently, by establishing the authority upon which COAH could approve affordable housing linkage fees, the supreme court clearly facilitated a realistic opportunity for the construction of affordable housing.

In *Tocco*, the court also sought to provide such a realistic opportunity by upholding an eighteen-month development moratorium designed to preserve scarce land resources for affordable housing.[288] The plaintiff-builder in *Tocco* appealed COAH's order restraining Cherry Hill from giving a development approval for a two-plus acre parcel.[289] COAH based its determination on its administrative rules,[290] which derived their substantive authority from *Mount Laurel III*. In *Mount Laurel III*, the supreme court remarked that COAH is vested with the authority to require a municipality to provide for the preservation of resources essential in the *Mount Laurel* formula.[291] Thus, relying on *Mount Laurel III*, the *Tocco* court facilitated a realistic opportunity by upholding a development moratorium designed to preserve the necessary land resources upon which affordable housing could be constructed.

On the other hand, the courts have been willing to defer to COAH's approval of measures that, opponents claimed, would not result in a realistic opportunity. In *Carlton Homes*, the plaintiff developers challenged COAH's accessory apartment rule[292] as invalid under a theory that the rule lacked provision for realistic opportunities in the creation of units absent other incentives.[293] That rule established a pilot program whereby municipalities can satisfy their fair shares by promulgating zoning schemes that create accessory apartments in not more than three percent of dwelling units in individual municipalities that are good enough to convert to accessory

287 *See* N.J. ADMIN. CODE tit. 5, § 5:91-15.1 (1992).

288 Tocco v. Council on Affordable Housing, 242 N.J. Super. 218, 224, 576 A.2d 328, 331 (App. Div. 1990).

289 *Id.* at 221, 576 A.2d at 329.

290 *See* N.J. ADMIN. CODE tit. 5, § 91-11.1 (1986).

291 *Mount Laurel III*, 103 N.J. at 61, 510 A.2d at 653.

292 *See* N.J. ADMIN. CODE tit. 5, § 92-16.1 (1989).

293 Carlton Homes, Inc. v. COAH, 244 N.J. Super. 438, 454, 582 A.2d 1024, 1033 (App. Div. 1990).

apartments.[294]

The *Carlton Homes* court determined that deference was particularly appropriate because COAH was implementing new and innovative legislation.[295] Moreover, the court appeared satisfied that adequate safeguards were in place because if the accessory apartment rule failed to provide a realistic opportunity within two years, the municipality would have to pursue alternative methods of meeting the obligation.[296]

Thus, the evidence of these three cases is encouraging. The *Holmdel Township* court, in a creative way, established the basis for upholding affordable housing linkage fees that were designed to provide a realistic opportunity for the actual construction of lower income housing. In *Tocco*, the appellate division clearly preserved the realistic opportunity by upholding COAH's eighteen-month moratorium. In *Carlton Homes* the court was willing to let COAH experiment, with sufficient safeguards, in determining what mechanisms would, in fact, produce a realistic opportunity.

It is too soon to decide whether the concept of realistic opportunity will continue to be viable. Thus far, the judiciary has sought to create and preserve realistic opportunities for the construction of affordable housing. Clearly, continuing efforts will be required.

3. Implementation/Enforcement

In *Mount Laurel III*, the supreme court recognized that "the municipalities' strong preference [is] to exercise their zoning powers independently and voluntarily as compared to their open hostility to court-ordered rezoning . . . ."[297] The court clearly believed that the *Mount Laurel* doctrine's goal would be best served through voluntary compliance with the statutory scheme of the Fair Housing Act, which enjoyed a significant measure of public and municipal acceptance.[298] The court premonished, however, that if the Act prolongs resolution of the issues presented, the courts will again be forced to render help.[299]

Implementation of a constitutional obligation such as *Mount Laurel* is an undertaking of enormous proportion. It is not enough to establish the principle or to define the statutory

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294 *Id.* (quoting N.J. STAT. ANN. tit. 5, § 92-16.2(b) (1989)).
295 *Id.* at 455, 582 A.2d at 1033-34.
296 *Id.* at 455-56, 582 A.2d at 1034.
297 *Mount Laurel III*, 103 N.J. at 22, 510 A.2d at 632.
298 *Id.* at 22-23, 510 A.2d at 632-33.
299 *Id.* at 23, 510 A.2d at 633.

scheme. Nor is the establishment of an administrative agency sufficient. Successful compliance with the constitutional obligation will require continued and determined enforcement by both COAH and the courts. By analogy, the federal courts, nearly forty years after *Brown v. Board of Education*,[300] are still in the business of enforcing school desegregation plans that seek to comply with the landmark case's constitutional principles. It would be naive to think that the simple passing of a law and the establishing of an administrative agency would spur municipalities to comply with the constitutional mandate of *Mount Laurel*.

The problems of implementation are twofold. First, with respect to those municipalities that have chosen to participate through COAH, have the courts been willing to ensure compliance? In *Trieste II*, the court signaled its willingness to impose costs on municipalities that grossly pervert the process. In *Cherry Hill Township*, the court accepted the return of a case for COAH where administrative remedies were exhausted without resolving the issue and reinstated its *Mount Laurel II* procedure for handling such litigation. Finally, in *Hasbrouck Heights*,[301] the court upheld COAH's determination that its substantive certification could be amended, contrary to the mediated agreement, where subsequent legislation relevant to the case would bar imposition of a mediated provision.

Second, how can the courts ensure compliance by those municipalities that have chosen not to participate in COAH's procedures? Such municipalities do not escape a fair share obligation to provide a realistic opportunity by virtue of their non-participation. That certain municipalities are non-participants suggests the need for monitoring with enforcement action likely to follow.

In *Trieste II*, the appellate division demonstrated that sanctions are appropriate for municipalities that subvert the *Mount Laurel* process. Gloucester Township sought transfer from the courts to COAH less than three weeks after the issue of site suitability was adjudicated in the plaintiffs' favor.[302] The appellate division held that the trial court should not have exercised its power to impose costs on the Township as a condition of transfer.

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300 Brown v. Board of Education, 347 U.S. 482 (1954) and Brown v. Board of Education, 349 U.S. 294 (1955).

301 In the Matter of Petition for Substantive Certification of the Borough of Hasbrouck Heights, A-4149-89T2, A-4939-89T2 (N.J. App. Div. June 25, 1991), *certif. denied*, 127 N.J. 554, 606 A.2d 367 (1991).

302 *Id.* at 187, 521 A.2d at 865.

The court issued a stern reminder:

> The [Mount Laurel III] court made it clear, however, that once a municipality transferred its case to the Council an attempt by it to return the case to court shortly before the Council was to take final action "would constitute a gross perversion of the purposes of the Act, as well as an imposition on both the courts and the Council."
>
> Thus by moving to transfer, Gloucester essentially submitted to the ultimate jurisdiction of the Council. Should it later attempt to return the case to court, the court could then consider the imposition of costs.[303]

In *Cherry Hill Township*, the court took the next step and accepted the Cherry Hill case, back from COAH, for adjudication. The Township initially transferred its *Mount Laurel* case from the court to COAH in January, 1986. After exhausting COAH's administrative remedies, Cherry Hill sought to modify its mediated agreement by reinstating techniques eliminated through mediation that were thought to be objectionable.[304] COAH denied the township's motion to amend and granted substantive certification based on the mediated plan.[305] When Cherry Hill refused to adopt the necessary condition for implementation of the mediated housing element, COAH revoked substantive certification and returned the case to the courts.[306]

Cherry Hill sought to appeal COAH's action, but the appellate court found that no resolution of the exclusionary zoning complaint was present and that COAH's order continued to be interlocutory, unappealable unless granted leave.[307] The court then characterized COAH's proceedings as a temporary proceeding outside the court system attempting to resolve the questions presented under the FHA framework.[308] The court noted it temporarily suspended the litigation and that, if the Council's actions failed, court adjudication would resume.[309] Referring to *Mount Laurel II*'s condemnation of "appeal-engendered delay," the court saw no reason to deviate from the approach established in *Mount Laurel II*, that being a proceeding followed by a lone appeal.[310] Finally, before dismissing

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303 *Id.* (quoting *Mount Laurel III*, 103 N.J. at 58, 510 A.2d at 651).

304 Fair Share Housing Ctr., Inc. v. Cherry Hill Township, 242 N.J. Super. 76, 79, 576 A.2d 24, 26 (App. Div. 1990).

305 *Id.*

306 *Id.* at 80, 576 A.2d at 26.

307 *Id.* at 81, 576 A.2d at 27 (citations omitted).

308 *Id.* at 82, 576 A.2d at 27.

309 *Id.*

310 *Id.*, 576 A.2d at 27, 28.

Cherry Hill's appeal as interlocutory, the *Cherry Hill Township* court observed that a municipality's attempt to use the appellate process to achieve delay was an unacceptable result.[311]

At issue in *Hasbrouck Heights* was COAH's controversial determination that a municipality must evaluate improved sites of two acres or less upon the owner's stipulation that the site will be developed with lower income affordable housing.[312] In *Hasbrouck Heights*, there was existing housing that would be demolished to make way for a greater number of affordable units. In response to this politically unacceptable outcome, the legislature enacted Chapter 142, which provides that the Fair Housing Act is not to be interpreted to mandate that a municipality must satisfy a portion of its fair share obligation with property of two acres or less on which a habitable residence is located that would be slated for demolition.[313]

During the mediation, the Borough reluctantly agreed to rezone a tract of less than one acre containing three two-family houses to permit construction of 45 market value units in exchange for the developer's agreement to pay the Borough $180,000 for rehabilitation of existing housing.[314] COAH granted substantive certification to the mediated agreement. The Borough's attempt to adopt the necessary ordinances was at first defective, however, and was subsequently challenged by local opposition. Accordingly, Hasbrouck Heights, like Cherry Hill Township, moved to amend the substantive certification. As in *Cherry Hill Township*, COAH denied the motion and returned the matter to the law division, an action that the Borough appealed. In the interim the above amendment to the Fair Housing Act was enacted. Hasbrouck Heights successfully petitioned COAH to restore the Borough's certification, absent the previous requirement that appellants' site be utilized in its housing element.[315] The *Hasbrouck Heights* court held that the amendment of the terms of the substantive certification was allowed.[316] The court reasoned that:

> COAH furthered a Legislative policy expressed in c. 142. Moreover, elimination of appellants' project did not impair the policies behind the FHA because the project provided no

311 *Id.* at 83, 576 A.2d at 28.

312 In the Matter of Petition for Substantive Certification of the Borough of Hasbrouck Heights, A-4149-89T2, A-4939-89T2, at 6 (N.J. App. Div. June 25, 1991), *certif. denied*, 127 N.J. 554, 606 A.2d 367 (1991).

313 *Id.*

314 *Id.* at 2-3.

315 *Id.* at 5 (citation omitted).

316 *Id.* at 9.

> low or moderate income housing. Appellants only contribution to the affordable housing goals of the FHA was through a payment of $180,000, an amount the Borough now agrees to fund.[317]

It is remarkable that there are so few cases dealing with enforcement action upon the exhaustion of COAH's administrative remedies and the presence of unresolved issues. This development may, in part, be related to the second aspect of the enforcement problem discussed above, namely that municipalities seeking to avoid complying with their constitutional obligation will most likely not participate in COAH's procedures. In those limited cases where the court has been called upon to take enforcement action, municipalities have responded appropriately.

One may anticipate that there will be more cases like *Hasbrouck Heights* as *Mount Laurel*'s implementation phase produces analogous and politically unacceptable results. This trend is more likely to occur when the economy improves and more housing is developed. Moreover, it is likely to occur when the State Development and Redevelopment Plan is released in 1993. The Plan will likely impose greater fair share numbers in many instances and, thus, create fair share obligations in municipalities where none previously existed.

V. CONCLUSION

Several conclusions may be drawn from the above analysis of post-*Mount Laurel III* litigation. First, the judiciary has deferred, to a significant extent, to the legislature, COAH and the statutory scheme for meeting the *Mount Laurel* constitutional obligations. The judiciary has adopted COAH's methodologies as its own in cases that remain in the courts. The courts have upheld COAH's procedural and substantive rules and, in so doing, have indicated that deference to COAH is particularly appropriate due to the agency's implementation of new and innovative legislation.[318] Only when COAH's rules are plainly contrary to the Fair Housing Act have the courts invalidated COAH's rules, and then only in two instances.[319]

Second, less clear is the extent to which the courts have re-

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317 *Id.* at 9-10.

318 *See, e.g.*, Van Dalen v. Washington Township, 120 N.J. 234, 576 A.2d 819 (1990); Carlton Homes, Inc. v. COAH, 244 N.J. Super. 438, 582 A.2d 1024 (App. Div. 1990), Hills Development Co. v. Bernards Township, 229 N.J. Super. 318, 551 A.2d 547 (App. Div. 1988).

319 *See* Bernards Township v. Department of Community Affairs, 233 N.J. Super. 1558 A.2d 1 (App. Div. 1989) (restriction of credits to lower income housing units);

treated from the *Mount Laurel* field. The available evidence, in the form of published opinions, suggests that courts have reduced their involvement in *Mount Laurel* cases. There are, however, only three post-*Mount Laurel III* supreme court and twelve appellate court decisions. The courts have made an effort to facilitate the transfer of cases to COAH by not requiring payment of costs as a condition of transfer. Moreover, the courts have removed the award of attorney's fees as an incentive in Federal Fair Housing Act/*Mount Laurel* claims. The judiciary has been willing to re-enter the field, however, where recalcitrant municipalities seek to pervert the process.

There is no evidence available regarding the number of cases that the courts have handled involving municipalities that chose to refrain from participating in COAH's procedures. Accordingly, a thoroughly informed conclusion concerning the extent to which the judiciary has withdrawn from the *Mount Laurel* field cannot be drawn. It is reasonable, however, to suggest that where municipalities have elected to participate in COAH's procedures the courts have significantly reduced their involvement and deferred to COAH.

Third, the judiciary has sought to ensure that *Mount Laurel's* constitutional obligations are met, recognizing that there is a reasonable range of actions that pass constitutional muster. The available evidence demonstrates that there are significantly fewer fair share obligations under the Fair Housing Act/COAH approaches than under *Mount Laurel II* methodologies. While permitting COAH some latitude in identifying what methodologies constitute realistic opportunities, the courts have been willing to rebuke COAH for seeking to institute a 1000 unit per se limit on a municipal fair share. The courts have also been willing to take necessary enforcement actions in cases where municipalities have exhausted COAH's administrative remedies.

Finally, with respect to the future role of the courts, it is reasonable to posit that the judiciary will increase its involvement in the *Mount Laurel* field. Such involvement is likely for several reasons. First, there is ample precedent for judicial involvement. Second, objective events are likely to require the courts' involvement. Third, policy considerations suggest the need for further involvement.

In *Mount Laurel III*, the supreme court warned that it would

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Carlton Homes, Inc. v. COAH, 244 N.J. Super. 438, 582 A.2d 1024 (App. Div. 1990) (1,000 unit cap on municipalities' fair share obligations).

re-enter the field if the Fair Housing Act resulted only in delay. Indeed, the appellate division has demonstrated its willingness to do so, especially in cases involving recalcitrant municipalities such as Cherry Hill[320] and Gloucester Township.[321] Thus, there is both a basis and a willingness for the courts to re-enter the *Mount Laurel* field.

Several events that will occur in the near future will create conflicts that may need to be resolved by the courts. In 1993, the State Plan is due to be completed and, soon thereafter, the six-year statutory repose from *Mount Laurel* litigation will begin to expire for a number of municipalities. In *Van Dalen*, the supreme court, for largely pragmatic reasons, upheld COAH's decision to continue to use the outdated SDGP in the absence of the new State Plan.[322] In 1993, with a completed State Plan, COAH will be compelled, by both the Act and *Van Dalen,* to apply it. The State Plan will reflect more than a decade of growth and development throughout the state. As a result of this development, fair share obligations will be increased for many municipalities and imposed on other municipalities that were never before obligated under *Mount Laurel.*

Consequently, the State Plan will provide developers and housing coalitions with a basis for seeking to assert higher fair share obligations. Municipalities, which may be expected to oppose the imposition of higher fair share obligations, may find themselves vulnerable to litigation as the six-year statutory repose expires. To the extent that the economy improves during this period the increased housing demand will create yet another pressure. Thus, the confluence of the State Plan's completion, the expiration of the six-year repose for litigation and improved economic conditions will most probably inspire a new round of litigation.

Policy considerations also suggest judicial involvement. The voluntary nature of COAH's procedures will likely emerge as an issue after the State Plan's release. According to COAH's statistics, only 176 municipalities have participated in its procedure. COAH estimates that an additional seventy municipalities have gone to court and then settled instead of availing themselves of

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320 *See* Fair Share Housing Ctr. v. Cherry Hill Township, 242 N.J. Super. 76, 576 A.2d 24 (1990).

321 *See* Trieste, Inc., II v. Gloucester Township, 215 N.J. Super. 184, 521 A.2d 864 (1987).

322 Van Dalen v. Washington Township, 120 N.J. 234, 576 A.2d 819 (1990).

the COAH procedure. Accordingly, there are approximately 320 municipalities that have neither participated through COAH nor resolved their case in court. Once the State Plan is released, municipalities that do not have a regional fair share obligation can be identified and subtracted from this group of approximately 320.

The issue of the remaining municipalities, which may number as many as fifty percent of New Jersey's 567 municipalities, will have to be considered. To the extent that these municipalities have not addressed their constitutional obligation under *Mount Laurel*, the courts may be compelled to act. In *Carlton Homes*, the appellate division indicated that it could not have been the legislature's intention that municipalities would be placed in such an unwavering position[323] by virtue of the 1000 per se fair share limit. Faced with a voluntary non-participation rate as high as fifty percent, the judiciary may be forced to deal with the issue of whether the legislature could have intended such a disparate effect. An even more compelling concern is whether it is possible under COAH and the Act, to meet the constitutional obligation imposed by *Mount Laurel* if as many as half of all municipalities do nothing.

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[323] *Carlton Homes*, 244 N.J. Super. at 453, 582 A.2d at 1033.