

THE FAIR HOUSING ACT: MEETING THE MOUNT LAUREL OBLIGATION WITH A STATEWIDE PLAN

Introduction

When the New Jersey Supreme Court fashioned the Fair Share or "*Mount Laurel*" doctrine¹ it was heralded as the most far-reaching zoning reform measure in the United States.² The doctrine would help eliminate exclusionary zoning and promote human equality. Nevertheless, the doctrine was sharply criticized.³ The alarmist called it a socialist plot. The suburbanite labelled it encroachment. The majority of critics concluded that the doctrine was a legislative function usurped by the judiciary. Although the New Jersey Supreme Court urged the New Jersey Legislature to develop a solution to the fair housing dilemma in 1973, ten years later the Legislature had still failed to do so.

Relief came on July 3, 1985, when the Governor of New Jersey signed the Fair Housing Act into law.⁴ The Fair Housing Act is the Legislature's belated answer to the *Mount Laurel* cases. At last the function of land use planning was taken out of the hands of the judiciary and was given back to the municipalities.⁵ Regional and statewide planning would now be overseen by a panel of experts, the Council on Affordable Housing.⁶ Thus, the disjointed results of judicial remedies would be eliminated. Most importantly, the infamous builder's remedy would be abolished.

Although the Act was rendered practically useless by the trial

¹ Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), cert. denied and appeal dismissed, 423 U.S. 808 (1975) (Mt. Laurel I), and Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158, 456 A.2d 390 (1983), (Mt. Laurel II). Simply stated, the Mount Laurel doctrine is the constitutional obligation that a municipality's land use regulations must provide a realistic opportunity for low and moderate income housing.

² N.Y. Times, Sept. 15, 1985, § 1, at 43, col.1.

³ See generally, Hill, *Government Manipulation of Land Values to Build Affordable Housing: The Issue of Compensatory Benefits*, 13 REAL ESTATE LAW JOURNAL 3 (1984).

⁴ 1985 N.J. Sess. Law Serv. 222 (West) (to be codified at N.J. STAT. ANN. 52:27D-301 to -334 (hereinafter cited at N.J. STAT. ANN.)).

⁵ The Star-Ledger (Newark, NJ), July 4, 1985, at 1, col. 3.

⁶ See N.J. STAT. ANN. § 52:27D-305 (West Supp. 1986). The Council's address is 3625 Quakerbridge Road, Trenton, N.J., 08625.

courts⁷ the New Jersey Supreme Court recently vindicated the statute. Its legitimacy having been established, the time has come for its implementation.

Because every municipality with a zoning ordinance must eventually comply with the Act, there is a substantial need for a practical exposition of its provisions. This Note will trace the development of the *Mount Laurel* doctrine and show how it is embodied in the Fair Housing Act. An analysis of the Act's salient features will be followed by a discussion of the recent New Jersey Supreme Court opinion conferring judicial acceptance on the statute.

II. *The Mount Laurel Cases*

In the 1975 landmark case of *Southern Burlington County NAACP v. Township of Mt. Laurel*⁸ (*Mt. Laurel I*), the New Jersey Supreme Court held that a developing municipality may not, through land use regulation, make it physically and economically impossible to establish low and moderate income housing for various categories of persons who need and want such housing.⁹ The court premised its decision on the innovative and expansive use of constitutional law principles.¹⁰ Through these principles, the court concluded that: each developing municipality may not exclude low and moderate income housing, and each municipality has a presumptive obligation to provide, by zoning, a reasonable opportunity for low and moderate cost housing.¹¹

⁷ The two trial judges who have ruled on the Act denied the municipalities' motions to transfer. Thus, the moving municipalities could not utilize the Act and its benefits. See *infra* note 158.

⁸ 67 N.J. 151, 336 A.2d 713 (1975).

⁹ 67 N.J. at 174, 336 A.2d at 724.

¹⁰ The court first found land use regulation to be encompassed within the state's police power as stated in Article IV, section VI, paragraph two of the 1947 New Jersey Constitution. 67 N.J. at 174, 336 A.2d at 724. The court further stated that police power enactments must satisfy the constitutional requirements of substantive due process and equal protection of the laws set forth in Article I, paragraph one of the State Constitution. 67 N.J. at 174-175, 336 A.2d at 725. The court decided that a zoning regulation, like any police power enactment, must promote public health, safety, and the general welfare. 67 N.J. at 175, 336 A.2d at 725. Thus, a zoning ordinance is unconstitutional if it is contrary to the general welfare. *Id.*

¹¹ 67 N.J. at 174, 336 A.2d at 724. The court established a presumption that each municipality "cannot foreclose the opportunity...for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to

While this conclusion appeared rather controversial, the *Mt. Laurel I* court tempered its aggressive constitutional stance that individual municipalities, by themselves, should solve the problem.¹² The court suggested that land use planning should be done on a much broader basis than each municipality separately.¹³ The court further directed township officials to look to the expertise of the municipal planning adviser, the county planning boards, and the state planning agency to decide Mount Laurel Township's fair share of low and moderate income housing.¹⁴ Even at this early date in *Mount Laurel* litigation, the court realized that *Mount Laurel*-type zoning decisions were to be made by groups and not individuals.

The *Mt. Laurel I* court also concluded that the trial court's invalidation of the zoning ordinance *in toto* was too broad.¹⁵ Rather, the court decided that the municipality should act without judicial supervision and amend its land use regulation to allow fair housing.¹⁶ With the aid of hindsight it became evident that without an enforcement mechanism the municipality would not take action, thus assuring the litigation which gave rise to *Mt. Laurel II*.

In 1983, the New Jersey Supreme Court in the case of *So. Burlington Cty. NAACP v. Township of Mount Laurel*¹⁷ (*Mt. Laurel II*), reaffirmed its commitment to the original Mount Laurel doctrine requiring municipalities, through land use regulations, "to provide a realistic opportunity for [low and moderate income] housing."¹⁸ Prompted by widespread non-compliance with the constitutional obligation of *Mount Laurel I* (including the municipality of Mount Laurel)¹⁹ and the resultant mass of protracted

the extent of the municipality's fair share of the present and prospective regional need therefor." *Id.*

¹² The court suggested that land use planning should be done on a regional rather than municipal level. 67 N.J. at 189, 336 A.2d at 732.

¹³ 67 N.J. at 190, 336 A.2d at 733.

¹⁴ *Id.*

¹⁵ The court declared the ordinance to be invalid only to the extent set forth in the opinion. Mount Laurel township was granted ninety days from the date of the decision or such additional time as the court might allow for the township to adopt amendments to remedy the various "deficiencies." 67 N.J. at 191, 336 A.2d at 734.

¹⁶ 67 N.J. at 192, 336 A.2d at 734.

¹⁷ 92 N.J. 158, 456 A.2d 390 (1983).

¹⁸ 92 N.J. at 199, 456 A.2d at 410.

¹⁹ *Mt. Laurel II* arose from the remand of *Mt. Laurel I*. Mount Laurel Township

litigation,²⁰ the court, in a lengthy opinion, attempted “to put some steel into that doctrine.”²¹ The court made it painfully clear that municipalities would have to comply with the now clarified *Mount Laurel* doctrine.²²

Though not theoretically difficult, the holding in *Mt. Laurel I* generated a host of complex implementation problems.²³ Before addressing the problems left unresolved in *Mt. Laurel I* and cases subsequent, the court reiterated the constitutional basis for the doctrine.²⁴ The court began:

The doctrine does not arise from some theoretical analysis of our Constitution, but rather from underlying concepts of fundamental fairness in the exercise of governmental power. 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.²⁵

With the constitutional framework for the *Mount Laurel* doctrine in place, the court exercised care in defining the role of the judiciary

rezoned, a plenary trial was held and the trial court found that such rezoning constituted a bona fide attempt by Mount Laurel to meet its constitutional obligation. Finding this sufficient, the trial court dismissed the plaintiffs' complaint. On appeal the State Supreme Court in *Mt. Laurel II* reversed and remanded for a determination of the municipality's fair share of the regional need and for revision of its ordinance. The court, however, affirmed the grant of a builder's remedy to a developer-intervenor who had attacked the municipality's total prohibition against mobile homes. 92 N.J. at 201, 456 A.2d at 411.

²⁰ *Mt. Laurel II* provides a ready example of the onslaught of litigation after *Mount Laurel I*. *Mt. Laurel II* was accompanied by five cases: *Urban League of Essex v. Tp. of Mahwah*, No. L-17112-71 (Law Div. Mar. 8, 1979); *Glenview Development Co. v. Franklin Tp.*, 164 N.J. Super. 563 (Law Div. 1978); *Caputo v. Tp. of Chester*, No. L-42857-74 (Law Div. Oct. 4, 1978); *Urban League of Greater New Brunswick v. Borough of Carteret*, 142 N.J. Super. 111 (Ch. Div. 1976), *rev'd*, 170 N.J. Super. 461 (App. Div. 1979); and *Round Valley Inc. v. Tp. of Clinton*, No. L-29710-74 (Law Div. Feb. 24, 1978), *rev'd*, 173 N.J. Super. 45 (App. Div. 1980). 92 N.J. at 199 (n.1), 456 A.2d at 410.

²¹ “We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.” 92 N.J. at 199, 456 A.2d at 410.

²² *Id.*

²³ Although the court set forth important guidelines for implementing the doctrine, the application to particular cases was complex and left many questions unresolved: What is a “developing” municipality? What was the “region” and how was it to be determined? How was the “fair share” to be calculated within the region? Precisely what must that municipality do to “affirmatively afford” an opportunity for the construction of lower income housing? 92 N.J. at 205, 456 A.2d at 413.

²⁴ 92 N.J. at 208, 456 A.2d at 415; 67 N.J. at 174, 336 A.2d at 725.

²⁵ 92 N.J. at 209, 456 A.2d at 415.

in its enforcement absent legislation.²⁶ Initially, the *Mt. Laurel II* court was confronted with defining the constitutional obligation. The court discarded the since proven ineffectual “numberless approach”²⁷ of *Oakwood v. Madison*²⁸ in favor of a “bright line” objective test: “if the municipality has in fact provided a realistic opportunity²⁹ for the construction of its fair share of low and moderate income³⁰ housing it has met its *Mount Laurel* obligation to satisfy the constitutional requirement; if it has not, then it has failed to satisfy it.”³¹ The bright line test required that actual numbers of units be built, while the numberless approach did not.

Under *Mt. Laurel II*, plaintiffs are not confined to proofs that a municipality has failed to meet its fair share obligation, but may also demonstrate that its land use regulations are facially invalid.³² The burden then shifts to the municipality to prove that it has satisfied its obligation.³³ If the municipality is unable to meet this burden it must remove restrictive barriers to the construction of low and mod-

²⁶ 92 N.J. at 212-13, 456 A.2d at 417. In an often quoted portion of the opinion the court noted that:

We understand the enormous difficulty of achieving a political consensus that might lead to significant legislation enforcing the constitutional mandate better than we can, legislation that might completely remove this court from those controversies. But enforcement of constitutional rights cannot await a supporting political consensus. 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. That is our duty. We may not build houses but we do enforce the Constitution.

Id.

²⁷ 92 N.J. at 220, 456 A.2d at 421. In essence, the “numberless approach” directed courts to look at the substance of challenged zoning ordinances and to the existence of bona fide efforts toward the elimination of undue cost-generating requirements and meeting the fair share obligation. The *Oakwood* court rejected the notion of resorting to a formulaic estimate of specific fair share numbers. *Id.*

²⁸ *Oakwood v. Madison*, 72 N.J. 481, 499, 371 A.2d 1192, 1200 (1977).

²⁹ The court explained, “whether the opportunity is ‘realistic’ will depend on whether there is in fact a likelihood—to the extent economic conditions allow—that the lower income housing will actually be constructed.” 92 N.J. at 221-22, 456 A.2d at 421-22.

³⁰ “Low and moderate income families” are defined at 92 N.J. 221 (n.8), 456 A.2d at 421-22.

³¹ 92 N.J. at 221, 456 A.2d at 421.

³² Plaintiffs may continue to prove that land use regulations fail to provide a realistic opportunity for low and moderate income housing or that they contain expressly prescribed requirements or restrictions which preclude or substantially hinder the construction of such housing. 92 N.J. at 222, 456 A.2d at 422.

³³ 92 N.J. at 222-23, 456 A.2d at 422.

erate income housing.³⁴ If this does not afford a realistic opportunity for such construction, the municipality is then required to take affirmative measures.³⁵

With the *Mount Laurel* obligation defined, the court concentrated on the initial determination in every fair share controversy: whether the municipality is subject to the obligation.³⁶ The court supplanted the “developing” municipality approach,³⁷ and only applied the *Mount Laurel* doctrine to “growth areas” as designated by the State Development Guide Plan.³⁸

A more perplexing issue confronting the court, however, was the calculation of “fair share.”³⁹ As the court explained: “[d]etermination of fair share has required resolution of three separate issues: identifying the relevant region, determining present and prospective housing needs, and allocating those needs to the municipality or municipalities involved.”⁴⁰

The court took the responsibility to develop fair share calculations.⁴¹ All *Mount Laurel* litigation was directed to three judges, each

³⁴ 92 N.J. at 259, 456 A.2d at 442.

³⁵ 92 N.J. at 261, 456 A.2d at 443. The court explained that “[t]here are two basic types of affirmative measures that a municipality can use to make the opportunity for lower income housing realistic: (1) encouraging or requiring the use of available state or federal housing subsidies; and (2) providing incentives for or requiring private developers to set aside a portion of their developments for lower income housing.” 92 N.J. at 262, 456 A.2d at 443.

For a more detailed discussion of subsidies and incentive zoning, see 92 N.J. at 262-77, 456 A.2d at 443-51.

Mt. Laurel II, in overruling *Vickers v. Gloucester*, 37 N.J. 262, 181 A.2d 129 (1962), held that municipalities that cannot otherwise meet their fair share obligation must provide zoning for low cost mobile homes. 92 N.J. at 275-77, 456 A.2d at 450-51.

³⁶ 92 N.J. at 223, 456 A.2d at 422.

³⁷ 67 N.J. at 160, 336 A.2d at 717; 92 N.J. at 226-27, 456 A.2d at 424.

³⁸ “The State Development Guide Plan (May 1980) [SDGP] promulgated pursuant to N.J. STAT. ANN. § 13:11B-15.52, provides a statewide blueprint for future development. Its remedial use in *Mount Laurel* disputes will ensure that the imposition of fair share obligations will coincide with the State’s regional planning goals and objectives.” 92 N.J. at 225, 456 A.2d at 423. The court expended considerable energy defending the use of the SDGP for this purpose. See 92 N.J. at 226-48, 456 A.2d at 424-35.

³⁹ 92 N.J. at 248, 456 A.2d at 436.

⁴⁰ 92 N.J. at 248, 456 A.2d at 436.

⁴¹ 92 N.J. at 252, 456 A.2d at 438. Indeed, the court recognized that “[t]he situation must be remedied. In the absence of executive or legislative action to satisfy the constitutional obligation underlying *Mount Laurel*, the judiciary has no choice but to enforce it itself.” *Id.*

of whom would be responsible for a particular area of the state.⁴² By assigning these three judges, the court hoped to eliminate inconsistent decisions regarding regions and fair share.⁴³

To assist enforcement of the fair share obligation the court created a series of judicial remedies, the most controversial of which was the "builder's remedy."⁴⁴ The builder's remedy "offered a kind of bounty to the builders who might bring exclusionary zoning suits against townships that had failed to provide lower-income housing opportunities."⁴⁵ The court noted that:

Where a developer succeeds in Mount Laurel litigation and proposes a project providing for a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's project is clearly contrary to sound land use planning.⁴⁶

The court developed the builder's remedy to stimulate the construction of low and moderate units. In fact, the builder's remedy did have the desired result: increasing *Mount Laurel* litigation.⁴⁷

Despite intricate fair share formulations, the court nevertheless persisted in urging legislation.⁴⁸ The court made it evident that this area of social planning was best suited for legislation, but the Justices felt compelled to fill the void maintained by the lack of such legislation. Finally, ten years after the initial *Mount Laurel* litigation,

⁴² 92 N.J. at 253, 456 A.2d at 438. The three appointed judges are Judges Gibson, Serpentelli, and Skillman.

⁴³ The court believed that a regional pattern for the entire state would emerge. Also, it was anticipated that through the three judge system a method for determining a municipality's fair share would be consistent. 92 N.J. at 254, 456 A.2d at 439.

⁴⁴ 92 N.J. at 278-91, 456 A.2d at 452-58. The builder's remedy allows a builder to construct four market-value homes for every affordable home they build. It has been argued that the builder's remedy is a form of spot-zoning, a type of zoning consistently struck down by the court. Statement of Irwin Kimmelman, Former Attorney General of New Jersey, during a Mount Laurel Symposium at Seton Hall Law School. April 2, 1986.

⁴⁵ Mallach, *Blue Print for Delay*, New Jersey Reporter, Oct. 1985, p. 21.

⁴⁶ 92 N.J. at 279-80, 456 A.2d at 452.

⁴⁷ There is no question that developer's appetites were whetted by the builder's remedy. In the two years after the Mt. Laurel II decision, over 100 developers and landowners brought suits seeking a builder's remedy. Mallach, *supra* note 45, at 21. There is also no question that the builder's remedy is one of the most controversial elements of the decision. See The Star-Ledger (Newark, NJ), Oct. 13, 1985, § 1 at 113, col. 3.

⁴⁸ See 92 N.J. at 212-14, 456 A.2d at 417-18.

the Legislature's solution has come in the form of the Fair Housing Act.

III. *Summary of the Fair Housing Act*

While the Fair Housing Act is seminal land-reform legislation, it is as complex and controversial as the dilemma it was devised to untangle. Although the Act is a patchwork effort, all parties agreed that the basic solution lies in the reform of land use regulation. The Act provides that the primary solution to the *Mount Laurel* quandry to provide low and moderate income housing must be met through a municipality's zoning.⁴⁹

The preamble manifests the Legislature's intent in drafting and adopting the Fair Housing Act. The Act directs that the preferred means of addressing the fair share controversies is not through the courts, but via the mediation and review process set forth in the Act.⁵⁰ Further, the Act expresses the Legislature's contempt for the court invented builder's remedy,⁵¹ a judicial remedy that allows a successful plaintiff builder to construct a development which provides a substantial percentage of low and moderate income units and high income units on land owned by the defendant municipality.⁵²

The Council on Affordable Housing

Essentially the Act establishes a procedure to satisfy the *Mount Laurel* obligation through a state agency, rather than the judiciary. Standard for most legislation, the Act defines terms crucial to the operation and interpretation of the statute.⁵³ Con-

⁴⁹ N.J. STAT. ANN. § 52:27D-302(a) (West Supp. 1986). The Legislature agrees with this principle as set forth in *Southern Burlington County NAACP v. Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (Mt. Laurel II).

⁵⁰ N.J. STAT. ANN. § 52:27D-303 (West Supp. 1986).

⁵¹ *Id.*

⁵² Bloomquist, *Solar Energy Development, State Constitutional Interpretation and Mt. Laurel II: Second-Order Consequences of Innovative Policy Making by the New Jersey Supreme Court*, 15 RUTGERS L.J. 573, 587 (1984).

⁵³ The following terms are defined in the Act: "Council" means the Council on Affordable Housing established by the Fair Housing Act, N.J. STAT. ANN. § 52:27D-304(a) (West Supp. 1986); "Housing Region" means a geographic area between two or four contiguous, whole counties which exhibit social, geographic and income similarities, N.J. STAT. ANN. § 52:27D-304(b) (West Supp. 1986); "Low income housing" is housing occupied or reserved for occupancy by families "with a gross household income equal to 50% or less of the median gross household income for

tinuing, the Act institutes the Council on Affordable Housing, a nine member group who are nominated by the Governor and approved by the Senate.⁵⁴ The members are chosen according to three particular guidelines:

(1) four members shall be elected officials representing the interests of local government;⁵⁵ one of this group of four will be a representative of an urban municipality with a population in excess of 40,000 persons and a population density in excess of 3,000 persons per square mile,⁵⁶ no more than one of this group of four may be a representative of the interests of county government.

(2) two members shall represent the interests of households

households of the same size within the housing region in which the housing is located", N.J. STAT. ANN. § 52:27D-304(c) (West Supp. 1986) (This definition is similar to the one formulated for "low income families" in Mt. Laurel II. See 92 N.J. 158, 221, n.8, 456 A.2d at 421 (1983)); "Moderate income housing" is defined as housing occupied or reserved for occupancy by families "with a gross household income equal to more than 50% but less than 80% of the median gross household income for households of the same size within the housing region", N.J. STAT. ANN. § 52:27D-304(d) (West Supp. 1986) (This definition is similar to the one given for "moderate income families" in Mt. Laurel II. See 92 N.J. at 158, 221 n.8, 456 A.2d at 421 (1983)); "Resolution of participation" is the municipality's notification to the Council on Affordable Housing of the municipality's decision to file a fair share housing plan and element with the Council, pursuant to N.J. STAT. ANN. § 52:27D-309(a) (West Supp. 1986), and N.J. STAT. ANN. 52:27D-304(e) (West Supp. 1986); "Inclusionary development" is a development with a substantial percentage of low and moderate income housing units, N.J. STAT. ANN. § 52:27D-304(f) (West Supp. 1986); "Conversion" means the conversion of a substantial percentage of existing structures to low and moderate income units, N.J. STAT. ANN. § 52:27D-304(g) (West Supp. 1986); "Development" means a development governed by the "Municipal Land Use Law" (N.J. STAT. ANN. §§ 40:55D-1 to -106), N.J. STAT. ANN. § 52:27D-304(h) (West Supp. 1986); "Agency" is the New Jersey Mortgage and Housing Finance Agency (N.J. Stat. Ann. § 55:14K-1 to -44), N.J. STAT. ANN. § 52:27D-304(i) (West Supp. 1986); "Prospective need" is a projection of housing needs based on development and expansion which is likely to occur in a region or municipality as a result of actual determinations of public and private entities. Consideration will be given to approvals of development applications, real property transfers and economic projections prepared by the State Planning Commission. N.J. STAT. ANN. § 52:27D-304(j) (West Supp. 1986). The State Planning Commission was established pursuant to P.L. 1985, c. 398. It should be noted that "prospective need" is mentioned, but not defined, in Mt. Laurel I and Mt. Laurel II. See 67 N.J. 151, 188, 336 A.2d at 732 (1975); and 92 N.J. 158, 240, 456 A.2d at 431 (1983).

⁵⁴ N.J. STAT. ANN. § 52:27D-305(a) (West Supp. 1986).

⁵⁵ Ken Gibson, Carol Rufner, Charles Griffith, and Arthur Kondrup.

⁵⁶ Ken Gibson, Mayor of Newark, New Jersey.

in need of low and moderate housing.⁵⁷ Of this group of two, one will represent the interests of the builders of low and moderate income housing and must be an expert in land use practices and housing issues.⁵⁸ The other member from this group shall be the executive director of the New Jersey Housing and Finance Agency, serving *ex officio*.⁵⁹

(3) three members will represent the public interest,⁶⁰ and not more than five of the nine shall be members of the same political party. The Chairman of the Council is to be appointed by the Governor and must be approved by the Senate.⁶¹

The Legislature, by providing these guidelines, hoped to insure fair and non-partisan representation on the Council.

The Council's duties are multitudinous.⁶² By August 1, 1986 the Council must draft and perform the following six functions:

- 1) Determine the housing regions of the State;⁶³
- 2) Estimate the present and prospective need for low and moderate income housing at the State and regional level;⁶⁴
- 3) Provide population and household projections for the State and housing regions;⁶⁵

⁵⁷ Ara Hovnanian and Feather O'Connor. Ms. O'Connor was named the State Treasurer and has been replaced on the Council by Richard Godfrey.

⁵⁸ Ara Hovnanian, Executive Vice President of K. Hovnanian Enterprises, Red Bank, New Jersey.

⁵⁹ Feather O'Connor. See note 57.

⁶⁰ Aldrich Cooper, Roderick McDougal, and William Angus.

⁶¹ Arthur Kondrup is the Chairman of the Council on Affordable Housing.

⁶² See N.J. STAT. ANN. §§ 52:27D-307(a)-(e) (West Supp. 1986); and N.J. STAT. ANN. § 52:27D-308 (West Supp. 1986). The Chairman of the Council has extensive training seminars scheduled to initiate and expose the Council members to the Mount Laurel forum. The training seminars will include speakers from the judiciary, legislative sponsors, the Governor's office, private developers, Department of Environmental Protection officials and municipal attorneys. Telephone interview with Arthur Kondrup, Chairman of the Council on Affordable Housing (Oct. 9, 1985).

⁶³ N.J. STAT. ANN. § 52:27D-307 (West Supp. 1986). On March 17, 1986 the Council adopted a plan which prescribed a six region plan for the state. The groupings are: Bergen, Hudson and Passaic counties in Region One; Essex, Morris, Sussex and Union counties in Region Two; Hunterdon, Middlesex, Somerset and Warren counties in Region Three; Monmouth and Ocean counties in Region Four; Burlington, Camden, Gloucester and Mercer counties in Region Five, and Atlantic, Cape May, Cumberland and Salem counties in Region Six.

⁶⁴ N.J. STAT. ANN. § 52:27D-307(a) (West Supp. 1986).

⁶⁵ N.J. STAT. ANN. § 52:27D-307(b) (West Supp. 1986).

4) Limit, within their discretion, the total number of units which will be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing.⁶⁶ This limit will be decided after analyzing the municipality's percentage of existing housing stock, employment opportunities, and any other criteria the Council deems appropriate.⁶⁷

5) Adopt criteria and guidelines for municipal determination of its present and prospective fair share,⁶⁸ municipal adjustment of the present and prospective fair share,⁶⁹ and the phasing schedule⁷⁰ for present and prospective fair share housing requirements.⁷¹

6) Propose procedural rules in accordance with the "Administrative Procedure Act."⁷²

The Council has seven months in which to meet their obviously complex statutory obligation.⁷³ While this schedule is extremely ambitious, the Chairman of the Council feels that compliance within the time schedule is extremely important.⁷⁴ Indeed, the Act must begin functioning as soon as possible to

⁶⁶ N.J. STAT. ANN. § 52:27D-307(d) (West Supp. 1986).

⁶⁷ N.J. STAT. ANN. § 52:27D-307(e) (West Supp. 1986).

⁶⁸ N.J. STAT. ANN. § 52:27D-307(c)(1) (West Supp. 1986). Under this section a municipality gets a one-to-one credit for every unit of low and moderate income housing in existence at the time of determination of the municipality's fair share.

⁶⁹ N.J. STAT. ANN. § 52:27D-307(c)(2) (West Supp. 1986). Adjustments will be made upon consideration of the need for historical and environmental conservation, N.J. STAT. ANN. § 52:27D-307(c)(2)(a) (West Supp. 1986); the desirability of a coherent pattern of community development, N.J. STAT. ANN. § 52:27D-307(c)(2)(b) (West Supp. 1986); a need for recreational land, N.J. STAT. ANN. § 52:27D-307(c)(2)(c) (West Supp. 1986); a need for preservation of farmland, *Id.*; a need for adequate open space, N.J. STAT. ANN. § 52:27D-307(c)(2)(d) (West Supp. 1986); the requirement that a pattern of municipal development be compatible with the planning designations in the State Development and Redevelopment Plan, N.J. STAT. ANN. § 52:27D-307(c)(2)(e) (West Supp. 1986); the requirement for vacant and developable land, N.J. STAT. ANN. § 52:27D-307(c)(2)(f) (West Supp. 1986); a need for adequate and cost-realistic public facilities and infrastructure capacities, N.J. STAT. ANN. § 52:27D-307(c)(2)(g) (West Supp. 1986).

⁷⁰ The phasing schedule is provided for by N.J. STAT. ANN. § 52:27D-323 (West Supp. 1986), and described *infra*.

⁷¹ N.J. STAT. ANN. § 52:27D-307(c)(3) (West Supp. 1986).

⁷² N.J. STAT. ANN. § 52:27D-308 (West Supp. 1986). The "Administrative Procedure Act" can be found at N.J. STAT. ANN. §§ 52:14B-1 *et seq.* (West).

⁷³ N.J. STAT. ANN. § 52:27D-307 (West Supp. 1986).

⁷⁴ Telephone interview with Arthur Kondrup, Chairman of the Council on Affordable Housing (Oct. 9, 1985).

lend it credibility.⁷⁵

The Housing Element

Aside from the Council's responsibilities, the Act allows a municipality to prepare and file a housing element⁷⁶ with the Council, the primary goal of which is to provide access to low and moderate income housing.⁷⁷ The housing element is the municipality's plan to meet the fair share obligation through land use regulation.⁷⁸ It is noteworthy that the preparation of the housing element is exempt from the Local Budget Law.⁷⁹ In its housing element, the municipality may propose any technique(s) and land use ordinance revisions which demonstrably provide a realistic opportunity for its fair share of low and moderate income housing.⁸⁰ The techniques which municipalities must consider are

⁷⁵ *Id.*

⁷⁶ N.J. STAT. ANN. § 52:27D-309(a) (West Supp. 1986) provides that before November 3, 1985 each municipality which so elects shall adopt a "resolution of participation" and notify the Council thereof. Within five months after the Council's adoption of criteria and guidelines, the municipality must file a housing element with the Council. The Council has until August, 1986, to adopt criteria and guidelines. N.J. STAT. ANN. § 52:27D-307(c) (West Supp. 1986). N.J. STAT. ANN. § 52:27D-304(b) (West Supp. 1986) provides that a municipality may notify the Council at any time after the prescribed four months. Unless such a municipality files a fair share plan and housing element before it is sued for exclusionary zoning practices, the plaintiff is not subject to the exhaustion of administrative remedies requirement of N.J. STAT. ANN. § 52:27D-316 (West Supp. 1986).

⁷⁷ N.J. STAT. ANN. § 52:27D-310 (West Supp. 1986).

⁷⁸ N.J. STAT. ANN. § 52:27D-310 (West Supp. 1986). The element must contain a complete inventory of the municipality's housing stock, N.J. STAT. ANN. § 52:27D-310(a) (West Supp. 1986); a projection of the municipality's future housing stock, N.J. STAT. ANN. § 52:27D-310(b) (West Supp. 1986); an analysis of the municipality's demographic characteristics, N.J. STAT. ANN. § 52:27D-310(c) (West Supp. 1986); an analysis of existing and probable future employment characteristics of the municipality, N.J. STAT. ANN. § 52:27D-310(d) (West Supp. 1986); a consideration of municipal lands or buildings that are most appropriate for construction or conversion to low and moderate income housing, N.J. STAT. ANN. § 52:27D-310(f) (West Supp. 1986); and a determination of the municipality's present and prospective fair share for low and moderate income housing and the municipality's capacity to accommodate its present and prospective housing needs, N.J. STAT. ANN. § 52:27D-310(e) (West Supp. 1986).

⁷⁹ N.J. STAT. ANN. § 52:27D-327 (West Supp. 1986) exempts a municipality from the Local Budget ("Cap") Law (N.J. STAT. ANN. §§ 40A:4-45.1 to 45.5 (West 1980)) for the amount expended by the municipality in preparing and implementing a housing element and fair share plan. This should help to cushion the economic blow of the Fair Housing Act on complying municipalities.

⁸⁰ N.J. STAT. ANN. § 52:27D-311(a) (West Supp. 1986).

listed, although not exhaustively, in the text of the statute.⁸¹ These techniques are borrowed from the affirmative measures suggested in *Mt. Laurel II*.⁸² In addition, the Act enables a municipality, in its housing element, to "propose that a portion of its fair share be met through a regional contribution agreement."⁸³ The contribution agreement allows one municipality to send money and a portion of its housing obligation to another municipality.

As for the mechanics of effectuating such a contribution agreement, a qualified municipality may transfer up to "50% of its fair share to another municipality within its Housing Region by means of a contractual agreement into which two municipalities voluntarily enter."⁸⁴ A municipality that wishes to "send" a portion of its fair share must request that the Council match it

⁸¹ N.J. STAT. ANN. § 52:27D-311(a) (1)-(8) (West Supp. 1986). Techniques advanced by the Act include rezoning for densities necessary to assure economic viability of any inclusionary developments, determining the total residential zoning necessary to assure that the fair share obligation is met, planning for infrastructure expansion and rehabilitation, donating or using municipally owned land or tax abating for purposes of providing low and moderate income housing, utilizing funds obtained from any state or federal subsidy, utilizing municipally generated funds, and proposing to enter into a contribution agreement. N.J. STAT. ANN. § 52:27D-311(a)(1)-(8), (c) (West Supp. 1986).

⁸² See 92 N.J. 158, 262.

⁸³ N.J. STAT. ANN. § 52:27D-311(c) (West Supp. 1986), further states that "[t]he housing element shall demonstrate. . . the manner in which that portion will be provided within the municipality if the regional contribution agreement is not entered into. The municipality shall provide a statement of its reasons for the proposal."

⁸⁴ N.J. STAT. ANN. § 52:27D-312(a) (West Supp. 1986) stipulates that "[e]xcept as provided in [N.J. STAT. ANN. § 52:27D-312(b)] of this section, the agreement may be entered into upon obtaining substantive certification [see discussion of the substantive certification process *infra*] or anytime thereafter." Further, N.J. STAT. ANN. § 52:27D-312(b) (West Supp. 1986) provides that before entry of final judgment or if on appeal before November 3, 1985, a defendant in an exclusionary zoning suit which has not obtained substantive certification may request the court to be permitted to fulfill a portion of its fair share by entering into regional contribution agreements. If the court finds such a request to be reasonable, the court, while retaining jurisdiction, pushes the proposal along to the Council for review and determination of a suitable match with a receiving municipality. *Id.* The court then makes the ultimate determination of whether the agreement provides a realistic opportunity for the provision of low and moderate income housing within the region. *Id.* If the court decides in the affirmative, the sending municipality receives a credit in the amount of housing units contributed in the agreement. *Id.* See note 63, *infra*, for the Council approved Housing Regions.

with a municipality desiring to “receive” such a contribution.⁸⁵ The regional contribution agreement must specify how the housing is to be provided by the “receiving” municipality and the amount of contributions to be made by the “sending” municipality.⁸⁶ The proposed regional contribution agreement is then subject to a bifurcated review: first by the County Planning Board or Agency and then by the Council.⁸⁷ While the county determines that the agreement fulfills the conditions set forth in the Act,⁸⁸ the agreement is also scrutinized by the Council.⁸⁹ As a third and final step, the Council will adopt a resolution which is to include a schedule of the contributions to be appropriated annually by the sending municipality which is filed with the Director of the Division of Local Government Services to ensure its enforcement.⁹⁰

⁸⁵ Under N.J. STAT. ANN. § 52:27D-312(e) (West Supp. 1986) receiving municipalities are drawn from a current list kept by the Council of those municipalities that have filed a statement of intent to receive. *Id.* The filing procedure is left to the Council. A receiving municipality is required to accept only the number of units that it has expressed a willingness to accept in its statement. *Id.* The minimum number of units stated must be reasonable as determined by the Council, but is not to exceed one hundred. *Id.* A receiving municipality is required to submit a “project plan” to the Council, the feasibility of which is in turn reviewed by the New Jersey Mortgage and Finance Agency. *Id.* The municipality is further required to file an annual report with the New Jersey Mortgage and Finance Agency regarding the progress in implementing the project.

⁸⁶ N.J. STAT. ANN. § 52:27D-312(a) (West Supp. 1986).

⁸⁷ N.J. STAT. ANN. § 52:27D-312(c) (West Supp. 1986).

⁸⁸ N.J. STAT. ANN. § 52:27D-312(c) (West Supp. 1986) states that the county planning board of the receiving county shall review the agreement and determine if the plan is in accordance with sound comprehensive regional planning.

⁸⁹ *Id.* This subsection further provides, as a second level of review, that the Council determine whether the contribution agreement constitutes a realistic opportunity for low and moderate income housing with convenient access to employment opportunities. *Id.* If the plan passes both the Council and the county’s review, the plan is approved by the Council. *Id.*

⁹⁰ N.J. STAT. ANN. § 52:27D-312(d) (West Supp. 1986) provides an enforcement mechanism through the Director of the Division of Local Government Services who is given the power to disapprove the annual budget of the sending municipality if it does not include appropriations necessary to meet the terms of the resolution. Under N.J. STAT. ANN. 52:27D-312(f) (West Supp. 1986) “contributions may be prorated for a period in municipal appropriations occurring over a period not to exceed six years and may include an amount agreed upon to compensate or partially compensate the receiving municipality for infrastructure or other costs generated to the receiving municipality by the development.” Here, N.J. STAT. ANN. § 52:27D-311(d) (West Supp. 1986) should be kept in mind: “[n]othing in this act shall require a municipality to raise or expend municipal revenues in order to pro-

After adopting a resolution of participation and filing a housing element, a municipality is to petition the Council for "substantive certification" of its element.⁹¹ The municipality seeking substantive certification must provide public notice of its petition so that objections may be filed with the Council.⁹² If no objection is raised, the Council proceeds to review the petition and may grant, deny, or condition certification upon changes in the element or ordinances.⁹³

If, however, the Council receives an objection to the municipality's petition for substantive certification, a mediation and review process is triggered.⁹⁴ The first stage of this process requires the Council to meet with the municipal officials and the objectors to mediate a resolution to the dispute.⁹⁵ If mediation proves unsuccessful the matter is transferred to the Office of Administrative Law for an expedited hearing and decision.⁹⁶ Addi-

vide low and moderate income housing." *Id.* See also 1985 N.J. Sess. Law Serv. c.222 at 94 (West) (Governor's Reconsideration and Recommendation Statement Senate, Nos. 2046 and 2334—L.1985, c.222) ("Governor's Reconsideration Statement").

⁹¹ Under N.J. STAT. ANN. § 52:27D-313(a) (West Supp. 1986), a municipality which has filed a housing element may, at any time during a six-year period following the filing of the housing element, petition the Council for a substantive certification of its element and ordinances, or institute an action for declaratory judgment granting it a six-year repose in the Superior Court. *Id.* Substantive certification denotes that the municipality's element and plan satisfies the Council's requirements for a fair housing plan. Substantive certification also means that all objections to the plan have been remedied or dismissed.

⁹² N.J. STAT. ANN. § 52:27D-313(a) (West Supp. 1986). "The municipality shall publish notice of its petition in a newspaper of general circulation and shall make available to the public information on the element and ordinances. . . ." *Id.* Objections must be made within forty-five days of publication. N.J. STAT. ANN. § 52:27D-314 (West Supp. 1986).

⁹³ N.J. STAT. ANN. § 52:27D-314(a), (b) (West Supp. 1986) provides that the Council shall issue a substantive certification if it finds that:

a. the municipality's fair share plan is consistent with the rules and criteria adopted by the Council and not inconsistent with achievement of the low and moderate income housing needs of the region as adjusted pursuant to the Council's criteria and guidelines adopted pursuant to N.J. STAT. ANN. § 52:27D-307(c) (West Supp. 1986); and

b. the combination of the elimination of unnecessary cost generating features from the municipal land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible.

⁹⁴ N.J. STAT. ANN. § 52:27D-315(a) (West Supp. 1986).

⁹⁵ N.J. STAT. ANN. § 52:27D-315(b) (West Supp. 1986).

⁹⁶ Under N.J. STAT. ANN. § 52:27D-315(c) (West Supp. 1986), the matter is

tionally, the Act calls for mediation and review of exclusionary zoning cases transferred from the court to the Council.⁹⁷ In summary, there are potentially five steps that a municipality must follow in order to receive substantive certification of its housing element.⁹⁸

What then, are the rewards of substantive certification from the municipality's standpoint? The major benefit is protection from a contractor's suit.

Since one of the underlying purposes of the Fair Housing Act is the removal of Mount Laurel litigation from the courts,⁹⁹ a person who institutes a suit against a "participating" municipality must exhaust the review and mediation process described above before being entitled to a trial.¹⁰⁰ If, however, a municipality

transferred to the Office of Administrative Law as a contested case. See N.J. STAT. ANN. § 52:14B-1 to -15 (West 1975). An evidentiary hearing is then conducted and the initial decision is to be issued no later than ninety days after transmittal of the matter as a contested case to the Office of Administrative Law, unless the time is extended by the Director of Administrative Law for good cause shown. N.J. STAT. ANN. § 52:27D-315(c) (West Supp. 1986).

⁹⁷ The Council shall engage in a mediation and review process in the following situations . . . (2) if a request for mediation and review is made pursuant to N.J. STAT. ANN. § 52:27D-316 (West Supp. 1986). N.J. STAT. ANN. § 52:27D-316(b) (West Supp. 1986) allows any party to an exclusionary zoning suit instituted more than sixty days before July 3, 1985 to file a motion with the court to transfer the case to the Council. The court in determining whether to allow such a transfer must consider whether it would result in a manifest injustice to any party to the litigation. See discussion *infra* as to "manifest injustice". Jurisdiction reverts back to the court if the municipality is delinquent in filing its housing element and fair share plan.

⁹⁸ To recapitulate, under the Act, municipalities will potentially proceed as follows:

1. Adopt a resolution of participation and notify the Council of its intent to submit a fair share housing plan. N.J. STAT. ANN. § 52:27D-309(a) (West Supp. 1986);
2. Prepare and file with the Council a housing element and fair share plan including, if desired, proposal for regional contribution agreements. N.J. STAT. ANN. § 52:27D-309(a)(West Supp. 1986);
3. Petition Council for substantive certification pursuant to N.J. STAT. ANN. § 52:27D-313 (West Supp. 1986), and if objection is made thereto;
4. Engage in a Council-held mediation process with the objectors, N.J. STAT. ANN. § 52:27D-315 (West Supp. 1986), and if this is unsuccessful;
5. Participate in a hearing conducted by the Office of Administrative Law.

⁹⁹ N.J. STAT. ANN. § 52:27D-303 (West Supp. 1986).
¹⁰⁰ N.J. STAT. ANN. § 52:27D-316(b) (West Supp. 1986), reads, "[a]ny person who institutes litigation after May 5, 1985 challenging a municipality's zoning ordinance shall file a notice to request review and mediation with the Council pursuant to [N.J. STAT. ANN. §§ 52:27D-314, 315 (West Supp. 1986)]." If the municipality

does not participate fully under the Act, the requirement to exhaust the review and mediation process expires automatically.¹⁰¹ Similarly, if the Council is dilatory in conducting review and mediation, the parties may move to be relieved from the Council's jurisdiction.¹⁰²

Persons who have filed an exclusionary zoning suit against a municipality with substantive certification and have exhausted the mediation and review process must, at trial, overcome a substantial evidentiary presumption in favor of the validity of the municipality's housing element.¹⁰³ The Council must be made a party in such suits and it may present its reasons for granting

adopts a resolution of participation within the period established in N.J. STAT. ANN. § 52:27D-309(a) (West Supp. 1986), the person must exhaust the review and mediation process of the Council before being entitled to a trial on his complaint. *Id.* The exhaustion of administrative remedy requirement is further qualified by N.J. STAT. ANN. § 52:27D-309(b) (West Supp. 1986).

A municipality which does not notify the Council of its participation by November 3, 1985 may do so at anytime thereafter. N.J. STAT. ANN. § 52:27D-309(b) (West Supp. 1986). In any exclusionary zoning litigation instituted against such a municipality, however, there shall be no exhaustion of administrative remedy requirement pursuant to N.J. STAT. ANN. § 27D-316(b) (West Supp. 1986), unless the municipality also files its fair share plan and housing element with the Council *prior to the institution of litigation.* (emphasis added). *Id.*

¹⁰¹ If a municipality which has filed a resolution of participation pursuant to N.J. STAT. ANN. § 52:27D-309(a) (West Supp. 1986), but does not promptly submit its housing element to the Council before the institution of an exclusionary zoning suit, the obligation to exhaust administrative remedies outlined in N.J. STAT. ANN. § 52:27D-316(b) (West Supp. 1986) automatically expires. N.J. STAT. ANN. § 52:27D-318 (West Supp. 1986). The obligation also terminates if the Council rejects the municipality's request for substantive certification, or conditions certification upon changes which the municipality fails to effectuate within the period established by the Council. *Id.*

¹⁰² The Council has six months upon receipt of a request by a party who has instituted litigation to complete its review and mediation process for the municipality. N.J. STAT. ANN. § 52:27D-319 (West Supp. 1986). If the Council fails in meeting the time restraint, the party may file a motion with a court of competent jurisdiction to be relieved of the duty to exhaust administrative remedies. *Id.*

¹⁰³ In exclusionary zoning suits against a municipality with substantive certification where there is a requirement to exhaust the review and mediation process there is a presumption of validity attaching to the housing element and ordinances. N.J. STAT. ANN. § 52:27D-317(a) (West Supp. 1986). To rebut this presumption the complainant shall have the burden of proof to demonstrate by *clear and convincing* evidence that the housing element does not provide a realistic opportunity for the provision of the municipality's fair share of low and moderate income housing. *Id.* (emphasis added).

This strong presumption also attaches to Council-approved regional contribution agreements. N.J. STAT. ANN. § 52:27D-317(b) (West Supp. 1986).

substantive certification.¹⁰⁴ In fact, substantive certification and the accompanying presumptions all but preclude a successful court challenge.¹⁰⁵ Therefore, such certification has the effect of protecting municipalities from a builder's remedy by keeping the case out of court.

Moratoriums

In response to the public outcry against the judicially invented *Mt. Laurel* doctrine, the Legislature has imposed a moratorium on fair share suits.¹⁰⁶ The Act protects any municipality which has settled a *Mount Laurel* suit before July 3, 1985 from further suits by developers. The protection is in the form of a six-year moratorium on lawsuits affecting the settling municipality.¹⁰⁷ A municipality which has settled a *Mount Laurel* suit is then protected for up to six years from a developer who determines that the Fair Housing Council's rulings are detrimental or inconsistent with the municipality's suit settlement. As a result, a municipality is entitled to a six-year moratorium if it has settled a *Mount Laurel* suit in a region subsequently determined by the Council to need low and moderate income housing. That municipality shall be deemed to have a substantively certified housing element until July 2, 1991, and may not be sued until July 3, 1991.¹⁰⁸

A more controversial moratorium period was levied on the builder's remedy. This moratorium was the subject of great debate between the Executive and Legislative branches.¹⁰⁹ As originally drafted, the Act nullified any judgment which imposed a builder's remedy granted after January 20, 1983.¹¹⁰ The Governor, however, questioned the constitutionality of such a power¹¹¹

¹⁰⁴ N.J. STAT. ANN. § 52:27D-317(c) (West Supp. 1986).

¹⁰⁵ Mallach, *supra* note 45, at 21, 25.

¹⁰⁶ N.J. STAT. ANN. § 52:27D-303 (West Supp. 1986).

¹⁰⁷ N.J. STAT. ANN. § 52:27D-322 (West Supp. 1986).

¹⁰⁸ *Id.*

¹⁰⁹ See 1985 N.J. Sess. Law Serv. c. 222 at 90 (West) (Governor's Reconsideration Statement).

¹¹⁰ N.J. STAT. ANN. § 52:27D-328 (West Supp. 1986); see 1985 N.J. Sess. Law Serv. c.222 at 83-84 (West) (Governor's Reconsideration Statement).

¹¹¹ 1985 N.J. Sess. Law Serv. c. 222 at 90-91 (West) (Governor's Reconsideration Statement).

and recommended that a final judgment¹¹² remain effective. In contrast, a non-final judgment would be paralyzed as to the application of the builder's remedy until five months after the Council adopts its criteria and guidelines.¹¹³ This recommendation was adopted by the Legislature.

Phase-In Schedule

An additional provision of the Act allows various municipalities, involved in Mount Laurel litigation, to demand a time schedule from the court as to when the low and moderate income housing must be approved and built.¹¹⁴ The time frame is denoted as a "phase-in schedule."¹¹⁵ This schedule dictates how long a municipality may take to issue final approvals¹¹⁶ for low and moderate income housing plans.

In formulating the phase-in schedule, the Act prescribes certain factors the court should consider.¹¹⁷ The schedule must provide for preliminary approvals of the developer's plans in

¹¹² Final judgment is defined as "a judgment subject to an appeal as of right for which all right to appeal is exhausted." N.J. STAT. ANN. § 52:27D-328 (West Supp. 1986).

¹¹³ N.J. STAT. ANN. § 52:27D-328 (West Supp. 1986).

¹¹⁴ N.J. STAT. ANN. 52:27D-323 (West Supp. 1986). Four categories of litigation-bound municipalities may elect under N.J. STAT. ANN. § 52:27D-323(a) (West Supp. 1986). The four categories are:

(1) a municipality with a Mount Laurel action pending after July 3, 1985;

(2) a municipality with a Mount Laurel judgment entered against it after July 3, 1985;

(3) a municipality with a Mount Laurel judgment entered against it prior to July 3, 1985 and from which an appeal is pending; and

(4) a municipality which has elected to comply with the Fair Housing Act, has filed a housing element, and within six years from the filing of the housing element has instituted an action for declaratory judgment granting it a six-year repose in the Superior Court pursuant to N.J. STAT. ANN. § 52:27D-313 (West Supp. 1986).

¹¹⁵ N.J. STAT. ANN. § 52:27D-323(b) (West Supp. 1986).

¹¹⁶ "Final approval means the official action of the planning board taken on a preliminarily approved major subdivision or site plan, after all conditions, engineering plans and other requirements have been completed or fulfilled and the required improvements have been installed or guarantees properly posted for their completion, or approval conditioned upon the posting of such guarantees." N.J. STAT. ANN. § 40:55D-4 (West Supp. 1986).

¹¹⁷ N.J. STAT. ANN. § 52:27D-323(a) (1) to (6) (West Supp. 1986). The factors are: the municipality's fair share; the present and prospective community infrastructure; vacant land that can be developed; absorption rate for housing; development priorities among areas of the community; and the municipality's past performances in providing low and moderate income housing. *Id.*

accordance with certain time periods,¹¹⁸ and the preliminary ap-

¹¹⁸ N.J. STAT. ANN. § 52:27D-323(b) (West Supp. 1986). The time periods are set forth in N.J. STAT. ANN. §§ 40:55D-46, 48, 61 (West Supp. 1985). The section entitled "Procedure for preliminary site plan approval" reads:

Upon the submission to the administrative officer of a complete application for a site plan which involves 10 acres of land or less, and 10 dwelling units or less, the planning board shall grant or deny preliminary approval within 45 days of the date of such submission or within such further time as may be consented to by the developer. Upon the submission of a complete application for a site plan which involves more than 10 acres, or more than 10 dwelling units, the planning board shall grant or deny preliminary approval within 95 days of the date of such submission or within such further time as may be consented to by the developer. Otherwise, the planning board shall be deemed to have granted preliminary approval of the site plan. N.J. STAT. ANN. § 40:55D-46(c) (West Supp. 1985).

The section entitled "Procedure for preliminary major subdivision approval" reads:

Upon the submission to the administrative officer of a complete application for a subdivision of 10 or fewer lots, the planning board shall grant or deny preliminary approval within 45 days of the date of such submission or within such further time as may be consented to by the developer. Upon the submission of a complete application for a subdivision of more than 10 lots, the planning board shall grant or deny preliminary approval within 95 days of the date of such submission or within such further time as may be consented to by the developer. Otherwise, the planning board shall be deemed to have granted preliminary approval to the subdivision.

N.J. STAT. ANN. 40:55D-48(c) (West Supp. 1985).

The section entitled "Time periods" reads:

Whenever an application for approval of a subdivision plat, site plan or conditional use includes a request for relief pursuant to N.J. STAT. ANN. § 40:55D-60 (West Supp. 1985) [Planning board review in lieu of board of adjustment], the planning board shall grant or deny approval of the application within 120 days after submission by a developer of a complete application to the administrative officer or within such further time as may be consented to by the applicant. In the event that the developer elects to submit separate consecutive applications, the aforesaid provision shall apply to the application for approval of the variance or direction for issuance of a permit. The period for granting or denying and subsequent approval shall be as otherwise provided in this act. Failure of the planning board to act within the period prescribed shall constitute approval of the application and a certificate of the administrative officer as to the failure of the planning board to act shall be issued on request of the applicant, and it shall be sufficient in lieu of the written endorsement or other evidence of approval herein required, and shall be so accepted by the county recording officer for purposes of filing subdivision plats. . . . [W]henever review or approval of the application by the county planning board is required by [N.J. STAT. ANN. § 40:27-6.3 (West Supp. 1985)] (submission of subdivision application to board for

provals must be given the appropriate status.¹¹⁹ Where appropriate, the phase-in schedule may include a construction plan for the non-low and moderate income units in a development.¹²⁰ Finally, the court may condition the phase-in schedule upon a plan for the construction of other economic and employment development in the municipality.¹²¹

The Fair Housing Act gives special attention to the phase-in schedule of an inclusionary development.¹²² In such cases, the municipality may request the court to issue a separate phase-in schedule for that particular inclusionary development.¹²³ Time guidelines, which allow conscientious planning by the municipality, are provided in the Act based upon the size of the proposed

review and approval; report to municipal authority), in the case of a subdivision, or [N.J. STAT. ANN. § 40:27-6.6 (West Supp. 1985)] (review and approval of site plans for land development along county roads or affecting county drainage facilities), in the case of a site plan, the municipal planning board shall condition any approval that it grants upon timely receipt of a favorable report on the application by the county planning board or approval by the county planning board by its failure to report thereon within the required time period.

N.J. STAT. ANN. § 40:55D-61 (West Supp. 1985).

¹¹⁹ N.J. STAT. ANN. § 52:27D-323(b) (West Supp. 1986). The status of the preliminary grants is defined in N.J. STAT. ANN. § 40:55D-49(a) (West Supp. 1985). According to this subsection, a preliminary approval, for three years after its date of approval, confers on the applicant the right that:

the general terms and conditions on which preliminary approval was granted shall not be changed, including but not limited to use requirements; layout and design standards for streets, curbs and sidewalks; lot size; yard dimensions and off-tract improvements; and, in the case of a site plan, any requirements peculiar to site plan approval pursuant to [N.J. STAT. ANN. § 40:55D-41 (West Supp. 1985)]; except that nothing herein shall be construed to prevent the municipality from modifying by ordinance such general terms and conditions of preliminary approval as relate to public health and safety.

N.J. STAT. ANN. § 40:55D-49 (West Supp. 1985).

¹²⁰ N.J. STAT. ANN. § 52:27D-323(c) (West Supp. 1986).

¹²¹ N.J. STAT. ANN. § 52:27D-323(d) (West Supp. 1986).

¹²² "Inclusionary development" means a residential housing development in which a substantial percentage of the housing units are provided for a reasonable income range of low and moderate income households. N.J. STAT. ANN. § 52:27D-304(f) (West Supp. 1986).

¹²³ N.J. STAT. ANN. § 52:27D-323(e) (West Supp. 1986). The Act directs courts to give special emphasis to the size of the fair share obligation to be met by the inclusionary development, the extent and projected capacity of the applicable infrastructure, and the extent and growth within the municipality during the six previous years. N.J. STAT. ANN. § 52:27D-323(e)(1) to (3) (West Supp. 1986).

inclusionary development.¹²⁴ A final aspect of this type of phase-in schedule is its potential role as a priority listing of developers and sites.¹²⁵ Any plan considering priorities must consider the involved sites suitability as to location, environmental protection principles, sound planning criteria, and the sites' consistency with municipal master plans.¹²⁶ The court must also consider infrastructure capacity, the readiness of a particular developer to begin construction, and any settlements or court orders which list priorities among developers.¹²⁷ Thus, the Act affords a municipality ample "good faith" time to plan and construct inclusionary developments.¹²⁸

Furnishing, Financing, and Managing Fair Housing Developments

While a municipality is not *required* to purchase land to be used for a low and moderate income housing development,¹²⁹ it *may* acquire by gift, lease or purchase property to be used as such.¹³⁰ A municipality, however, may not condemn property for use as a low and moderate income housing development.¹³¹ A municipality may provide for the construction of buildings, and it

¹²⁴ N.J. STAT. ANN. § 52:27D-323 (West Supp. 1983). The following table illustrates the various schedules:

<i>Size of development</i>	<i>Time Allowed*</i>
2,000 or more units	no less than 20 years
1,500 - 1,999 units	no less than 15 years
1,000 - 1,499 units	no less than 10 years
500 - 999 units	no less than 6 years
499 - 1 units	no more than 6 years

*Times begin to run on July 3, 1985.

¹²⁵ N.J. STAT. ANN. § 52:27D-323(f) (West Supp. 1986).

¹²⁶ N.J. STAT. ANN. § 52:27D-323(f)(1) (West Supp. 1986).

¹²⁷ N.J. STAT. ANN. § 52:27D-323(f) (2), (3) (West Supp. 1986).

¹²⁸ N.J. STAT. ANN. § 52:27D-323(f) (West Supp. 1986). It should be noted that the Act insists that a municipality issue expeditious final approvals so as not to defeat a contractor's chances of constructing units.

¹²⁹ N.J. STAT. ANN. § 52:27-311(d) (West Supp. 1986) states that "[n]othing in this act shall require a municipality to raise or expend municipal revenues. . . ." Mt. Laurel II dictated that "[o]nce a municipality has revised its land use regulations and taken other steps affirmatively to provide a realistic opportunity for the construction of its fair share of lower income housing, the *Mount Laurel* doctrine requires it to do no more." 92 N.J. at 259-60, 456 A.2d at 442.

¹³⁰ N.J. STAT. ANN. § 52:27D-325 (West Supp. 1986).

¹³¹ The first draft of N.J. STAT. ANN. § 52:27D-325 (West Supp. 1986) gave a municipality the power to condemn land for such a purpose. The Governor disagreed with this provision, however, and the bill was re-written, so that condemna-

may provide for the maintenance or conversion of buildings to meet its fair share demand.¹³² Finally, the municipality, by resolution, may sell or lease a housing unit according to certain stipulations.¹³³

To provide state financial assistance to municipalities, the Act provides for two funding mechanisms.¹³⁴ These mechanisms are embodied in existing state programs: the Neighborhood Preservation Program¹³⁵ and the New Jersey Mortgage and Housing Finance Agency.¹³⁶ The Neighborhood Preservation Program is appropriated \$2 million from the state General Fund¹³⁷ and an estimated \$8 million generated by an increase in the realty transfer tax,¹³⁸ for a total of \$10 million. With these resources, a Neighborhood Preservation Nonlapsing Revolving Fund is created. This fund is meant to provide grants or loans to municipalities for such things as rehabilitation, conversions, acquisition and demolition costs, new construction, costs for technical and professional services associated with a project, assistance to qualified housing sponsors, and infrastructure and other housing costs.¹³⁹

The New Jersey Mortgage and Housing Finance Agency is appropriated \$15 million from the state General Fund,¹⁴⁰ and is to allocate approximately \$100 million from its building author-

tion was not a device that could be used to acquire land for development. *See* 1985 N.J. Sess. Law Serv. c. 222 at 96 (West) (Governor's Reconsideration Statement).

¹³² N.J. STAT. ANN. § 52:27D-325 (West Supp. 1986). How and what the municipality may "provide" is not defined. Further, this section could be interpreted so as to permit a municipality to set up its own Fair Housing Agency.

¹³³ The sale or lease must be to a low or moderate income household or a non-profit entity. Further, the agreement on sale or lease must guarantee that the unit will remain low and moderate income range for at least thirty years. N.J. STAT. ANN. § 52:27D-325 (West Supp. 1986).

¹³⁴ *See* N.J. STAT. ANN. § 52:27D-320 (West Supp. 1986); N.J. STAT. ANN. § 52:27D-321 (West Supp. 1986); N.J. STAT. ANN. § 52:27D-324 (West Supp. 1986); and N.J. STAT. ANN. § 52:27D-333 (West Supp. 1986).

¹³⁵ The Neighborhood Preservation Program is within the Department of Community Affairs, Division of Housing and Development, established pursuant to the Commissioner's authority under N.J. STAT. ANN. § 52:27D-149 (West Supp. 1985).

¹³⁶ N.J. STAT. ANN. § 55:14K-1 (West Supp. 1985).

¹³⁷ N.J. STAT. ANN. 52:27D-333 (West Supp. 1986).

¹³⁸ P.L. 1985, c. 225 (to be codified at N.J. STAT. ANN. 46:15-5 (West Supp. 1986)).

¹³⁹ N.J. STAT. ANN. 52:27D-333 (West Supp. 1986). *See also* 1985 N.J. Sess. Law Serv. c. 222 at 91-92 (West) (Governor's Reconsideration Statement).

¹⁴⁰ N.J. STAT. ANN. 52:27D-333 (West Supp. 1986).

ity,¹⁴¹ for a total of \$115 million. With these funds the Agency is to award assistance to affordable housing programs under provided guidelines.¹⁴²

The Fair Housing Act provides a managing mechanism for low and moderate income housing developments. The New Jersey Mortgage and Housing Finance Agency¹⁴³ is empowered to establish procedures for financing and may enter into contracts to maintain rent and resale controls.¹⁴⁴ This provision is in response to the *Mt. Laurel II* court's suggestion that such control may be needed so that a municipality can "continue to meet their fair share obligations. . . ."¹⁴⁵ The rent and resale controls will be in the form of eligibility determinations, initial occupants determinations, marketing of units, maintenance of eligibility lists for subsequent renters or purchasers, and the determination of maximum rents or resale prices.¹⁴⁶ This service will not be provided gratuitously.¹⁴⁷

The Legislature devised an Act that would police itself; therefore, status reports are required annually from both the Council and the Agency.¹⁴⁸ The reports are to be given to the Governor and Legislature, and may contain recommendations for revisions necessary to effectuate fair housing. A report must be filed by the Council to the Governor and Legislature within three years of July 3, 1985 concerning the actions to be taken at the state, regional, county and municipal levels for the possible implementation of the Act on a regional, rather than a state basis.¹⁴⁹

¹⁴¹ N.J. STAT. ANN. § 52:27D-321(a) (West Supp. 1986).

¹⁴² See N.J. STAT. ANN. § 52:27D-321 (c), (d), (e), (f), and (g) (West Supp. 1986).

¹⁴³ Referred to in the Act as the "Agency" and hereinafter referred to as the "Agency."

¹⁴⁴ N.J. STAT. ANN. § 52:27D-324. (West Supp. 1986)

¹⁴⁵ 92 N.J. at 269, 456 A.2d at 447. One author believes the case suggests that such controls might be constitutionally mandated. See Buchsbaum, *No Wrong Without a Remedy: The New Jersey Supreme Court's Effort to Bar Exclusionary Zoning*, 17 THE URBAN LAWYER 59, 72 (1985).

¹⁴⁶ N.J. STAT. ANN. § 52:27D-324 (West Supp. 1986).

¹⁴⁷ The Act provides that the Agency may charge the municipality or the inclusionary developer a *reasonable* per unit fee, or the Agency may charge the homeowner a *reasonable* fee when the home is sold. The fees are to be approved by the State Treasurer. N.J. STAT. ANN. § 52:27D-324 (West Supp. 1986) (emphasis added).

¹⁴⁸ N.J. STAT. ANN. § 52:27D-326 (West Supp. 1986). The separate reports are due on July 3, 1986 and every year thereafter.

¹⁴⁹ *Id.*

The Fair Housing Act mandates a municipality which already has a zoning ordinance and master plan to incorporate a housing element that satisfies the Act into that ordinance or plan by August 1, 1988.¹⁵⁰ Some municipalities, however, may have to amend their zoning ordinances before that date. For example, under the Municipal Land Use Law, a municipal governing body must re-examine its master plan every six years.¹⁵¹ Such re-examination must focus on bringing the master plan into accordance with any changes in state, county and municipal policies and objectives.¹⁵² Therefore, if a re-examination last occurred before 1982, the municipality will have to amend its master plan to contain a satisfactory housing element by 1987.

IV. Supreme Court Vindication

The Fair Housing Act solidifies New Jersey's position as a pioneer of creative housing policy.¹⁵³ Only in this state must a municipality provide for the housing needs of low and moderate income families. The Fair Housing Act embellishes the *Mount Laurel* doctrine, taking land use planning into the constitutional arena of equal protection.

The Act allows a state commission to determine the housing needs of the state and then "leave[s] it up to individual municipalities to determine how to meet those housing needs."¹⁵⁴ This process assures a comprehensive statewide plan, and yet maintains an element of home rule in meeting municipal housing needs. The Act gives a community the opportunity to develop the planning strategy, rather than having it forced upon a reluctant defendant municipality, as was the case prior to the Act's passage. Further, the statute assures a municipality that certain mandated criteria will be examined in every housing case.¹⁵⁵

The Act also requires that every municipality comply with the fair housing statute, regardless of whether or not its zoning ordinance has been challenged. This is important because a constitutional obligation should affect all state residents, not simply

¹⁵⁰ N.J. STAT. ANN. § 52:27D-329 (West Supp. 1986).

¹⁵¹ N.J. STAT. ANN. § 40:55D-89 (West Supp. 1985).

¹⁵² N.J. STAT. ANN. § 40:55D-89(c) (West Supp. 1985).

¹⁵³ Rose, *Caving In to the Court*, New Jersey Reporter, Oct. 1985, p.28.

¹⁵⁴ *Id.*

¹⁵⁵ Telephone interview with Arthur Kundrop (October 9, 1985).

the unfortunate who have settled in areas that are attractive to developers.

Most significantly, the Fair Housing Act provides a procedure which will produce realistic numbers of fair housing units. The Council must adjust its decisions on statewide and regional needs. In fact, the Council could condition certification upon unit adjustment three years in the future if information showed that a particular municipality fit into a rapidly "expanding" category. A court, in contrast, cannot readily modify its decision on quantitative housing needs. Indeed, the adjustment ability of the Council is one of the most laudable provisions of the Act.

The Act, however, is not without its critics. Even Senator Wynona Lipman (D-Essex), one of the Act's sponsors, predicted that the Fair Housing Act "will only bring more lawsuits and result in more municipal tax dollars spent in Mt. Laurel litigation."¹⁵⁶ One area that has spawned litigation is the transfer of cases from the court's jurisdiction to that of the Council's.¹⁵⁷

Although the Fair Housing Act did not fare well in its initial judicial examinations,¹⁵⁸ the New Jersey Supreme Court quickly granted certification. Appeals were heard in an expedited manner, and on February 20, 1986 the court handed down an opinion that upheld, and indeed, strengthened the Fair Housing Act.¹⁵⁹

In the decision of *The Hills Development Co. v. Township of Bernards*, the court considered the constitutionality of the Act, while simultaneously providing practical guidance to the *Mount*

¹⁵⁶ Star-Ledger (Newark, NJ), July 4, 1985, p.7, at col.3.

¹⁵⁷ See *Morris County Fair Housing Council v. Boonton*, No. L-6001-78 P.W., L-42898-84 P.W., L-55343-85 P.W., L-29176-84 P.W., L-38694-84 P.W., L-86053-84 P.W., slip op. (Law Div. Oct. 28, 1985); and *AMG Realty Company and Sky Top Land Corp. v. Facey*, No. L-23277-80 P.W., L-67820-80 P.W., C-4122-73, L-56349-81, C-4122-73, L-076030-83 P.W., L-28288-84, L-32638-84 P.W., C-4122-73, L-15209-84 P.W., L-33910-84 P.W., L-54998-84 P.W., L-67502-84 P.W., L-37125-83, L-030039-84 P.W., C-4122-73, L-079309-83 P.W., L-054117-83, L-070841-83 P.W., L-055956-83 P.W., L-59643-83, L-058046-83, L-005652-84, L-6583-84 P.W., L-7917-84 P.W., L-14096-84 P.W., L-19811-84 P.W., L-213070-84 P.W., L-22951-84 P.W., L-25303-84 P.W., L-26294-84 P.W., L-33174-84 P.W., L-49096-84 P.W., L-071562-84 P.W., L-010381-85 P.W., L-20127-75 P.W., L-34263 P.W., L-6404-79 P.W., L-085321-84 P.W. (Law Div. 1985).

¹⁵⁸ *Id.*, all but one of the cases were denied transfer.

¹⁵⁹ *The Hills Development Co. v. Township of Bernards*, No. A-122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, slip op. (February 20, 1986).

Laurel judges and the Council. In addressing these issues the court did not attempt to disguise its enthusiasm for the Act and its procedures.

The constitutionality of the Act was attacked on five counts: (1) the Act created an undue delay in construction; (2) the moratorium invades a constitutional obligation; (3) the Act will manifest no construction; (4) there was an illegal invasion of the court's prerogative writ powers; and (5) there was an improper invasion by the legislature on a judicial remedy. In upholding the Act's constitutionality the court rejected each and every one of these contentions.¹⁶⁰

The court decided that the argument of delay was based upon a false premise that there is a construction timetable implicit in the *Mount Laurel* obligation.¹⁶¹ Not only is there no deadline, but delay in construction is expected.¹⁶² The court expects the Council to use a significant amount of time in molding a statewide plan. The Act will be judged as a "preferred legislative solution," and the question "must be whether [the] Act appears designed to accomplish satisfaction of the constitutional obligation within a reasonable period."¹⁶³ The court concluded that the Act satisfies this requirement.

The court quickly dismissed the claim that the moratorium imposed by the Act¹⁶⁴ on the builder's remedy is unconstitutional because it interferes with a constitutional obligation. The court reasoned that the moratorium was extremely limited, that courts have upheld the Legislature's power to enact a reasonable moratorium, and finally, the builder's remedy is not part of the *Mount Laurel* obligation.¹⁶⁵ The court stated that the goal of fair share housing is constitutionally protected, not the means of achieving that goal. Therefore, the builder's remedy has been removed from the fair share arena.

As to the argument that the Act will result in little or no actual construction of fair share housing, the court stated that this

¹⁶⁰ *Id.* at 53.

¹⁶¹ *Id.*

¹⁶² *Id.* at 55.

¹⁶³ *Id.*

¹⁶⁴ N.J. STAT. ANN. § 52:27D-328 (West Supp. 1986).

¹⁶⁵ *The Hills Development Co. v. Township of Bernards*, *supra* note 159, at 56.

is pure speculation.¹⁶⁶ The Act will not be dismantled unless such a contention is close to a certainty.¹⁶⁷

The court next addressed the argument that the Act was unconstitutional because it interferes with the court's exclusive control over actions in lieu of prerogative writs. Specifically considered were the sections of the Act which establish the burden of proof in judicial proceedings,¹⁶⁸ and the moratorium on the granting of a builder's remedy.¹⁶⁹ The court decided that the Act does not interfere with the right to judicial review.¹⁷⁰ There is nothing in the Act which precludes judicial review once the Council has acted. Further, in the case of a prerogative *writ of certiorari*, which is the relevant writ in this case, judicial review is the relief granted, not the builder's remedy. Thus, there is no such interference with judicial review. As a final boost to the Act on this point, the court concluded that "the legislation before us is new and innovative, and we stand ready to defer, not only to the Legislature, as we do today, but also to the Council, when that body begins to act, at least until 'clear and convincing evidence' leads us to a different course."¹⁷¹

In further deference to the Legislature, the court stated that the Act is presumed constitutional.¹⁷² While not explicitly stated, there seems to be a higher presumption of constitutionality which attaches to legislation requested by a court. This may be a reasonable conclusion since the court refers to the Act's presumption of constitutionality as "the particularly strong deference owed to the legislature relative to this extraordinary legislation. . . ."¹⁷³ The court terms the Act as a legislative response more than sufficient to signal the judiciary's "readiness to defer."¹⁷⁴

The court then discussed the role of the *Mount Laurel* judges

¹⁶⁶ *Id.* at 58.

¹⁶⁷ *Id.* at 58.

¹⁶⁸ N.J. STAT. ANN. § 52:27D-317 (West Supp. 1986).

¹⁶⁹ N.J. STAT. ANN. § 52:27D-328 (West Supp. 1986).

¹⁷⁰ *The Hills Development Co. v. Township of Bernards*, *supra* note 159, at 61.

¹⁷¹ *Id.* at 62. The court also defers to the Council on definitions and issues raised by Judge Skillman in *Morris County Fair Housing Council v. Boonton*, *supra* note 157 at 26-41.

¹⁷² *Id.* at 27.

¹⁷³ *Id.* at 28.

¹⁷⁴ *Id.* at 30; citing 92 N.J. 158, at 212-14 (1983).

in present and future fair housing cases. The direct issue on appeal in each of the twelve cases¹⁷⁵ before the court was the propriety of the trial court's decision on a motion to transfer *Mount Laurel* litigation to the Council¹⁷⁶ as allowed by the Act.¹⁷⁷ Central to the court's resolution of the transfer motions was the meaning of the term "manifest injustice"¹⁷⁸ as it appears in the transfer section.¹⁷⁹ Since most pending *Mount Laurel* litigation is governed by this section¹⁸⁰ the future of the Act was largely dependent upon the supreme court's interpretation of this phrase.¹⁸¹

Against a backdrop of the underlying purposes¹⁸² of the Act, the court focused on the legislative history¹⁸³ of the section to guide it in interpreting "manifest injustice." The court specifically concluded:

. . .that "manifest injustice" should not be determined in the

¹⁷⁵ This case results from the New Jersey Supreme Court's direct certification of the motion for leave to appeal to the Superior Court, Appellate Division filed by the eleven municipalities whose motion for transfer to the Council was denied by the trial court. Because of commonality of issue the court heard five of the above cases (Cranbury, Denville, Randolph, Tewksbury, Bernards).

¹⁷⁶ *Id.* at 31.

¹⁷⁷ N.J. STAT. ANN. § 52:27D-316 (West Supp. 1986).

¹⁷⁸ *The Hills Development Co. v. Township of Bernards*, *supra* note 159 at 39.

¹⁷⁹ N.J. STAT. ANN. § 52:27D-316 (West Supp. 1986).

¹⁸⁰ *The Hills Development Co. v. Township of Bernards*, *supra* note 159 at 70.

¹⁸¹ The efficacy of the Act depends largely upon the ability of municipalities to transfer pending *Mount Laurel* cases to the Council.

There are 567 municipalities in the state, of which approximately 200 are located in growth areas as designated by the SDGP. Ninety of these 200 municipalities are totally developed or urban non-obligational. Of the remaining 110 municipalities, 85 have been sued under the *Mount Laurel* theory. This leaves only 25 to 30 municipalities which are not parties to *Mount Laurel* litigation and free to elect to proceed under the Act. Telephone interview with Henry A. Hill (October 24, 1985). (numbers are approximates).

Thus, if transfer requests were routinely denied, the underlying purpose of the Act—the removal of *Mount Laurel* controversies from the courts—will be frustrated as only a small fraction of New Jersey municipalities will be able to participate. *Id.*

¹⁸² *The Hills Development Co. v. Township of Bernards*, *supra* note 159 at 67-68. Basically the primary purpose of the Act is to bring *Mount Laurel* controversies before the Council thereby taking them out of the courts. See N.J. STAT. ANN. 52:27D-303 (West Supp. 1986).

¹⁸³ *Id.* at 69. In an impressive analysis of the amendments resulting in § 316(a) in its present form the court states: "Before the amendment the presumption was *against* transfer, proof of "facilitation" of lower income housing being required to obtain transfer; after the amendment, the presumption was *in favor* of transfer, proof of manifest injustice being required to prevent it." *Id.*

same way a court decides whether to transfer *any* kind of case to an administrative agency; nor should it be determined by balancing the injustice done by granting transfer against that done by denying transfer. The standard that we adopt measures *only* the injustice caused by transfer and precludes transfer only if that injustice is unforeseen and exceptional.¹⁸⁴

Thus, the court read the section as requiring transfer of *every* pending *Mount Laurel* case except where “a combination of circumstances, unforeseen but nevertheless possible that render transfer *so* unjust as to overcome the Legislature’s clear wish to transfer all cases.”¹⁸⁵

The court specifically held that “delay” in the construction of lower income housing was not manifest injustice under the newly announced “unforeseen and exceptional injustice” standards.¹⁸⁶ The court, in praising the Act, stated:

It would be ironic if the application of this Act, so long in coming, so outstanding compared to the inactivity of other states, were to be characterized as “manifest injustice” simply because, in the most limited circumstances, its remedy was not immediate; and ironic to label the inevitable initial delaying effect of this law, so manifestly just in its unprecedented attempt to provide lower income housing, as manifestly unjust in that very respect.¹⁸⁷

The court reasoned that in light of the overall benefits engendered by the Act’s comprehensive plan for the provision of lower income housing, the Legislature could not have intended delay to be included within the meaning of manifest injustice.¹⁸⁸ The court further found that the Legislature did not intend manifest injustice to be constituted by the following: bad faith,¹⁸⁹ loss of expected profits, loss of the builder’s remedy, substantial expenditure of

¹⁸⁴ *Id.* at 67. The two approaches to manifest injustice rejected by the court were announced respectively by Judge Skillman in *Morris County Fair Housing Council v. Boonton*, *supra* note 157, and Judge Serpentelli in *AMG Realty Co. and Sky Top Land Corp. v. Facey*, *supra* note 157.

¹⁸⁵ *Id.* at 74.

¹⁸⁶ *Id.* at 72. Hence the interpretation by the trial courts of manifest injustice that, in effect, made delay in providing lower income housing the critical factor is incorrect. *Id.* at 70

¹⁸⁷ *Id.* at 71.

¹⁸⁸ *Id.* at 71-73.

¹⁸⁹ The court found that “. . . instances of bad faith are irrelevant” to “manifest injustice.” *Id.* at 73.

funds for litigation purposes, permit applications, on-site and off-site tract improvements, purchase of property or options at an inflated price or contractual commitment.¹⁹⁰

The court did, however, single out a specific consequence of transfer that the Legislature intended to constitute manifest injustice: "a transfer that does not simply *delay* the creation of a reasonable likelihood of lower income housing but renders it practically impossible."¹⁹¹ The court feared that "scarce resources," necessary for the construction of *Mount Laurel* housing, would be depleted in the interim between transfer and the ordinance revision which would ultimately provide for the construction of such housing.¹⁹² To prevent this, the court held that the Council (and the judiciary in the seven months before the Council becomes operative) has the power, upon transfer, to impose conditions to conserve such scarce resources.¹⁹³

Given the court's rather exhaustive list of consequences of transfer that would not constitute manifest injustice and the singular example of a consequence that would constitute such injustice, perhaps section 316 should be amended to read:

In determining whether or not to transfer, the court shall consider whether or not the transfer *would render the creation of lower income housing practically impossible.*

Yet, however the section is read, the court's decision on the transfer question unequivocally gives the "green light" to the Act and the Council.

The most practical portion of the opinion, from the Council's point of view, deals with the interpretation of certain provisions of the Act.¹⁹⁴ Specifically, the opinion discusses the Council's power and past judicial decisions, and how the Council should utilize them. The court believes the Council's greatest asset is encompassed in its

¹⁹⁰ *Id.* at 74.

¹⁹¹ *Id.* at 77.

¹⁹² *Id.* at 30. As an example of "scarce resources" the court explained: "For instance, where there are very few tracts suitable for lower income housing, industrial, commercial, or non-lower income housing development on them could end the municipality's future ability to meet its *Mount Laurel* obligation." *Id.* at 30.

¹⁹³ *Id.* at 86. A definition of a scarce resource might be a resource which further development or use is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future. *Id.* at 87.

¹⁹⁴ *Id.* at 78.

power to grant or withhold substantive certification.¹⁹⁵ This power, along with its variations of conditioning certification, such as including mandatory set asides or density bonuses,¹⁹⁶ accelerated denials,¹⁹⁷ or the numerous other conditions that are possible, can ultimately force a municipality to provide fair share housing.

The court also warns the Council not to allow a municipality to abuse the system.¹⁹⁸ The court rejects the notion that a municipality could transfer their case to the Council, utilize the Act's procedures and then, after a lengthy delay, withdraw from the Act and satisfy neither the common law nor statutory fair housing obligation. The court believes that "the Legislature never intended such a result and [the court] presume[s] the Council will not permit it."¹⁹⁹

The court also ruled that the Council is not bound, where no final judgment has been entered, by any court orders or stipulations.²⁰⁰ Further, the doctrine of collateral estoppel will not apply even if the case transferred was in an advanced stage of litigation or settlement.²⁰¹ Thus, the Council is given a clean slate to begin its attempt at providing a statewide plan for fair housing.

Other commentators have reviewed the effectiveness and viability of the Fair Housing Act. The Act has been criticized as a device to lower the numbers of low and moderate income units²⁰² and as a means to slow down their construction.²⁰³ One writer espouses three criticisms²⁰⁴ of the Fair Housing Act:

- (1) it brings as many municipalities as possible under the Council's jurisdiction;
- (2) it allows municipalities to supply the most miniscule numbers of lower-income housing units; and
- (3) it protects municipalities whose programs have been approved by the Council.

The Act has also been called a suburban stall tactic. The reason can be shown with the following example: A municipality gets sued

¹⁹⁵ *Id.* at 79-80.

¹⁹⁶ *Id.* at 79.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 79-81.

¹⁹⁹ *Id.* at 81.

²⁰⁰ *Id.* at 82.

²⁰¹ *Id.* at 83-84.

²⁰² Mallach, *supra* note 45, at 21, 25.

²⁰³ *Id.* at 26.

²⁰⁴ *Id.* at 25.

by a contractor. The municipality partially complies with the Act and gets transferred to the Council's jurisdiction. The municipality then extinguishes all time limits and then fails to comply with a fair housing plan. The only recourse the contractor has is to sue the municipality a second time. The Council has no power to impose any housing plan or legal action on the offending municipality.²⁰⁵ However, the Council can threaten the municipality with the prospect of having a mandatory set aside included in their certification unless the municipality quickly complies. Thus, such a municipality will be hit with a mandatory set aside by the Council, or if they get sued again by a contractor, with a court imposed mandatory set aside. A municipality will quickly get the idea that voluntary compliance is in its best interest.

The slow down effect and the reduction of actual units brings to light another question: can legislation dilute a constitutional mandate?²⁰⁶ Initially one must decide if the Act gives the municipality the power to plan its housing while also demanding from the municipality low and moderate income housing. Some feel the Fair Housing Act provides the former, but not the latter. To demand low and moderate housing, the Fair Housing Act depends on a judicial monster in the form of a *Mt. Laurel II* lawsuit. Therefore, the Act should be amended to include some type of enforcing mechanism to demand low and moderate income housing from a municipality.

An enigma exists in the remedies provided by both the *Mount Laurel* courts and the Council: adjustment of housing construction cost according to the housing region.²⁰⁷ The problem lies in the calculation of median gross income for low and moderate incomes translated into low and moderate price for housing units in the region. The number is different in various regions of the state. However, the cost of constructing units is relatively the same throughout the state. Therefore, the median income is less in, for example, Atlantic County, hence the housing unit cost is less in Atlantic County, but the construction of that unit is the same as in any other county. The contractor in Atlantic County is obviously dissuaded from building in that county.

The courts cannot address this issue until it is raised in an ad-

²⁰⁵ *Id.*

²⁰⁶ Telephone interview with Henry A. Hill (October 24, 1985).

²⁰⁷ *Id.*

versarial forum. The Council, on the other hand, can anticipate such a problem and resolve it long before a contractor is faced with a cost dilemma. The example thus illustrates a favorable aspect of the Council: the ability to anticipate planning problems. Indeed, the Council does not have to wait for a complaint to be served on a party, but can anticipate problems, hear specialists and technologists trained in the relevant areas, and solve the problem long before it arises in a court.

V. Conclusion

Mount Laurel and its doctrine are being followed by more and more jurisdictions.²⁰⁸ As other jurisdictions look to Mount Laurel for a fair housing obligation, the same jurisdictions will look to the Fair Housing Act for appropriate legislation. Yet the question remains — will the Fair Housing Act work?

The Fair Housing Act needs three elements: judicial recognition, Council initiative and Council responsibility. To be effective, the *Mount Laurel* courts must give deference to the Council, at least initially. This the supreme court has done. If the Council fails, and is too strong an ally of the suburbs, then the courts must intervene, but not until the Council has failed. To not allow the Council this chance would be to violate the court's own *Mount Laurel* decisions that urged legislative action. Thus, the court has said it will allow the Council an opportunity to work.

The real pressure lies on the side of the Council. The Council must act quickly and fairly, and prove itself better than the *Mount Laurel* court system. The Council has a chance to implement a statewide, comprehensive fair housing plan; and they must do just that. Only then will the New Jersey Supreme Court, the New Jersey Legislature, the Governor, and the Council on Affordable Housing be truly vindicated. If this does happen, New Jersey will truly have the fairest housing policies in the

²⁰⁸ *Asian American For Equality v. Edward Koch*, No. 22491/83, slip op. at 23 (N.Y. Sup. Ct. 1985). In the opinion Justice Saxe writes that "it is now appropriate to adopt the *Mount Laurel Doctrine* as the law of New York." See also Williams, *The Background and Significance of Mount Laurel II*, 26 WASH. U.J. URB. & CONTEMP. L. 3, 9 (1984).

United States and will have developed them through interaction of all three branches of government.

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