

Housing Reform in New Jersey: The *Mount Laurel* Decision

New Jersey is in the process of establishing a unique and complex approach to providing low-income housing on a large scale. As a result of a State Supreme Court decision called *Mount Laurel II*, and as modified by the recently enacted Fair Housing Act, many municipalities throughout New Jersey could be obligated under a complex set of procedures and conditions to change their land use laws to encourage the provision of low-cost housing for many thousands of lower-income households.

The ramifications of the *Mount Laurel* decision are difficult to understand because of the multiplicity of issues and objectives—legal, economic, and social—that have evolved over the past 13 years. These issues and objectives include the social policy objectives behind building low-income housing in affluent suburbs, economic questions of financing such housing, technical issues of determining housing needs and assigning “fair share” obligations, and judicial methods for enforcing them. No comprehensive review of these various dimensions of *Mount Laurel* and the Fair Housing Act has yet been published. This article provides an overview of this diverse set of issues and objectives so that all the implications of *Mount Laurel* can be more fully understood.

In 1972, a trial court found that the zoning laws of the township of Mount Laurel excluded housing for poor people, and thereby violated the state constitution.¹ In 1975, the

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¹ Southern Burlington County N A A C P v Township of Mount Laurel, 67 N J 151 (1975) (*Mount Laurel I*). In this article Mount Laurel in normal type refers to the Township, in italics it can refer to the court cases, the mandated housing, or the general doctrine

New Jersey Supreme Court ruled that not only Mount Laurel but *all* “developing” municipalities have an obligation to provide for their “fair shares” of the surrounding regions’ lower-income housing needs. The *Mount Laurel* decision led to a great deal of litigation but little housing, so in 1980 the complaint reached the New Jersey Supreme Court again, in a case quickly labeled *Mount Laurel II*.²

After two years of deliberation, the Court handed down a unanimous decision supporting the challenge to exclusionary zoning practices. The opinion spanned 150 pages, and its emotional language clearly reflected the Court’s dissatisfaction with municipal compliance with the rulings of *Mount Laurel I*. Finding strong measures necessary, the Court imposed a detailed enforcement mechanism intended to reduce the length of litigation and to encourage the provision of housing.

While the decision imposed a strict judicial remedy, the Court expressed a preference for legislative enforcement. In July 1985, New Jersey’s Fair Housing Act was signed into law.³ It set up an administrative process for resolving *Mount Laurel* complaints outside the courts.

The intense controversy over *Mount Laurel* arises chiefly from the magnitude of the obligations it imposes. But the policy debate, complicated by the multiplicity of issues and objectives, is far from resolved. While implementation of the legislative remedy has not yet begun, judicial and legislative

² Southern Burlington County N A A C P v Township of Mount Laurel, 92 N J 158 (1983) (*Mount Laurel II*). Five other cases were combined with the Mount Laurel suit, and the Court indicated its belief that similar violations were widespread. As of the last published count, 135 Mount Laurel-related cases were on Court dockets, involving some 75 municipalities. New Jersey Administrative Office of the Courts, Press Release (June 10, 1985). There were other related State Supreme Court rulings, which are not discussed here

³ Public Law 1985, Chapter 222

action continues. Legal challenges have been raised to some provisions of the legislative approach, and constitutional amendments have been proposed in the legislature

that would abridge the State Supreme Court's power to order *Mount Laurel* remedies. The Governor's recent State of the State address indicated his support for such an amend-

Box 1: Definitions and Details

To encourage compliance with the *Mount Laurel* mandate, and to reduce the scope of testimony and dispute, the Court tried to specify municipal obligations closely. Accordingly, it sought unequivocal definitions to the often-repeated language of the *Mount Laurel* mandate, a realistic opportunity for the construction of a municipality's "fair share" of the present and prospective need for lower-income housing in the surrounding housing region

- A *realistic opportunity* is defined as one that is "at least sensible for someone to use" (page 261). The opinion warned that simply providing developers an opportunity to build low-income housing would not be satisfactory if builders would still choose to build higher-income housing on the property (page 260, footnote), under those circumstances affirmative measures would be required.
- *Lower-income housing* must be "affordable", defined as costing no more than 25 percent of income (page 221).*
- *Lower-income* actually refers to two groups, called low- and moderate-income. Income cutoffs for these groups are defined as 50 percent and 80 percent, respectively, of the area's median income, with adjustments for household size (page 221). † The relative proportions of low- and moderate-income units must be appropriately balanced, as determined by expert testimony.
- *Housing need* refers to low- and moderate-income households currently housed in "dilapidated" or "overcrowded" units (page 243), and to the projected growth of households in these income classes.
- *Present and prospective* refers to the obligation to provide not only for existing lower-income housing need, but also for the housing need projected into the future. It

* In the trial courts the income percentages used to gauge affordability have been 28 percent and 30 percent for owner-occupied and rental housing, respectively.

If provision of housing at these prices is not feasible, municipalities must still provide an opportunity for the provision of "least-cost housing", defined as housing produced at the lowest possible price consistent with sound planning principles and public health and safety. The opinion portrays this measure as a last resort and a remedy which would not be granted lightly.

† These definitions are used by the U.S. Department of Housing and Urban Development to define "low" and "very low" income. Still, the opinion allowed that "other specifications may be more reasonable"

is the *regional* need that must be projected. The Court specified that the objective is not to gauge a municipality's likely future low-income housing needs with population projections based on its own past growth (pages 257-258). Such a procedure would invalidly reward a municipality for its past successful exclusion.

- A municipality's "*fair share*" of these regional needs, although a fundamental concept of the *Mount Laurel* doctrine, is never defined in the opinion. Employment growth (especially if accompanied by growth in tax base) was cited as an example of a "favored" factor (page 256). Factors (not specified) that would allow a community to benefit from past successful exclusion would not be approved. Beyond this characterization, "fair share" is left to determination in trial court based on expert testimony.
- The *housing region* specifies the urban areas from which a municipality derives its housing responsibility. The opinion noted that in earlier cases, the arguments over the specifics had prolonged litigation (page 256). The *Mount Laurel II* decision provided no definitive criteria for regional delineations, but the Court believed that the trial judges hearing these cases would soon reach consensus.
- The determination of *land appropriate for development*, that is, the communities that must grow to accommodate a portion of its region's housing needs, is based on designation of "growth area" in the State Development Guide Plan. †† In *Mount Laurel I* the test of suitability for new lower-income housing was based on whether the municipality was "developing". Even though there were six explicit characteristics of a developing municipality, the Court found that this previous test neither eliminated uncertainty nor guaranteed development only in accordance with "sound planning" (page 224).

†† New Jersey Department of Community Affairs, Division of State and Regional Planning, *State Development Guide Plan* (July 1980). The plan was not created expressly for use in *Mount Laurel* assignments. The decision did not determine which municipalities falling under the jurisdictions of the Pinelands Commission and the Division of Coastal Resources have any obligations.

Litigants can challenge the "growth area" designation only on limited grounds: they must show that the designation is arbitrary and capricious, or that circumstances have changed to render the designation inappropriate. Moreover, the maps must be revised every three years (the first deadline expiring January 1985), or a municipality's designation can be changed based on its actual behavior.

ment. The shift of majority power in the State General Assembly, and strong support in nonbinding referenda for such an amendment indicate that a political battle is certain.

The next section of this article describes the provisions of the *Mount Laurel II* opinion and analyzes its basic objectives. Following that is a similar treatment of the Fair Housing Act which focuses on the similarities and differences with the objectives of the judicial remedy.⁴ The final section summarizes the remaining questions about implementing *Mount Laurel* and the ensuing economic and social consequences.

Mount Laurel II Court Rulings

The *Mount Laurel II* decision went far beyond previous rulings in the detail and severity of its enforcement measures. It called for determination of precise municipal obligations based on specific definitions and formulas, which apply even if exclusionary practices have not been identified in a municipality. In general, the Court ruled that every municipality must provide for its "fair share" of the surrounding region's lower-income housing needs as follows:⁵

- Every municipality in the state must provide "a realistic opportunity for decent housing" for the poor people within its borders living in dilapidated housing (page 214).⁶ A major exception is made for those municipalities in which the concentration of lower-income housing need exceeds that of the surrounding region. These generally urban areas need not provide for all of their "indigenous poor" living in substandard housing.
- In these cases, some other (generally suburban) municipalities in the same housing region are obliged to provide realistic opportunities to build housing for some of those ill-housed poor. Only those municipalities containing land labeled by State land-use policy as "growth areas" have any obligation beyond their "indigenous poor" obligation (page 215).
- Municipalities are obliged to provide not only for their "fair share" of the region's "present" housing needs but also for "prospective needs"—those projected to exist in the future (pages 215-216, 218-219).
- All the lower-income housing under these rulings must

⁴ Comparison of the goals of *Mount Laurel II* and the Fair Housing Act should not be taken as legal analysis or as an opinion on the constitutionality of the Act. Rather, its purpose is to identify the public policy implications of both measures.

⁵ The details and definitions implementing these general characterizations of the rulings are discussed in Box 1.

⁶ Page references in the text refer to the *Mount Laurel II* opinion unless otherwise noted.

be "affordable" to lower-income households (page 221, footnote).

Constitutional motivation

The New Jersey Supreme Court found that the Township of Mount Laurel violated the State Constitution by using its zoning power to exclude poor people.⁷ Noting that a municipality's zoning laws are a police power of the State (albeit delegated to the municipality), the Court ruled that they must be exercised not just for the interest of the municipality's residents, but rather for the *general welfare*:

"When the exercise of that power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare—in this case the housing needs—of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land-use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional. In particular, those regulations that do not provide the requisite opportunity for a "fair share" of the region's need for low- and moderate-income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection" (pages 208–209).⁸

The *Mount Laurel* rulings applied only to low- and moderate-income housing; municipal exclusion of middle- or upper-income housing was explicitly left untouched by this decision. While recognizing that these income groups may also have problems finding housing because of suburban land-use restrictions, the Court wrote that it was the lower-income households that were totally excluded (page 212).

Enforcement and implementation

In *Mount Laurel II* the call for precise obligations came not because the Court believed underlying obligations could be precisely known, but because it believed their specification would best implement the goals of *Mount Laurel* (page 257). Uncertainty in determining municipal obligations, the Court found, weakened the constitutional doctrine (pages 252-253), permitting "paper, process, witnesses, trials and appeals" (page 199) to delay compliance. It was the

⁷ The practice of using land-use regulations to restrict or eliminate lower-income housing is generally called "exclusionary zoning", which the Court's opinion defined as "zoning whose purpose or effect is to keep poor people out of a community" (page 201, footnote). These practices may include minimum lot or house sizes and prohibitions of apartment buildings and trailer parks.

⁸ This finding generated a great deal of resentment on the part of municipalities in part because of the conflict between the principles of "equal protection" and "home rule". The zoning power is delegated to municipalities, and many local government officials argued strongly for the right to set their own policies. Even the *Mount Laurel II* opinion recognized the "fundamental legitimate control of municipalities over their own zoning, and indeed, their own destiny" (page 214).

Court's intention to begin a process that would eventually eliminate this uncertainty (pages 252-253).

To this end, the Court called for assigning "a precise region, a precise regional present and prospective need, and a precise determination of the present and prospective need that the municipality is obliged to design its ordinance to meet" (page 257).⁹ Even the very existence of a remedial obligation could not be readily challenged.

The detail required to specify the obligation without ambiguity demonstrates the complexity of the enforcement problem (Box 1). Nevertheless, under *Mount Laurel II*, determinations of "fair share" remained substantially dependent on expert testimony. The Court relied on the eventual attainment of judicial consensus on the controversial issues.

Sale or rental of *Mount Laurel* units at prices "affordable" to lower-income households, in most instances, will require substantial subsidies. The Court suggested several ways that these housing units might be financed. It noted that government was becoming a less likely source of funds (page 263) and called attention to the devices which did not require explicit government subsidies. The Court's suggestions included:

- *Providing density bonuses to builders.* A density bonus permits a developer to build middle- and upper-income housing at higher densities (either with multifamily buildings or with more single-family units to the acre) than zoning laws would otherwise allow—in exchange for providing additional lower-income housing units, sold or rented below cost (page 266). In practice such arrangements have typically called for one lower-income unit for every four higher-density market-price units. Where market-price units are scarce (due to zoning or other reasons), permission to build such units increases the value of the land; these gains are used to help finance the lower-income units.¹⁰ In the language of *Mount Laurel* implementation, the "density bonuses" are used to generate "internal subsidies" for the "*Mount Laurel* units".
- *Using mandatory set-asides.* If a density bonus does not provide developers sufficient incentive to choose lower-income housing over a middle-income development, the Court ruled that the inclusion or "set-aside" of lower-income units can be required within a land-use zone (page 267).

⁹ This overturned a ruling from the Court's earlier *Madison* decision, which required only a realistic opportunity for some low- and moderate-income housing, and in which precise formulas were deemed unnecessary (page 216). Also see *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481 (1977). The reversal of this and related provisions was emphatic, as the Chief Justice wrote that "*Madison* has led to little but a sigh of relief from those who oppose *Mount Laurel*" (page 252).

¹⁰ This mechanism is described in a slightly different context in the opinion (page 261, footnote).

- *Providing tax abatements.* The ruling expressly permitted a trial court to order tax abatements for lower-income housing (page 264).

- *Obtaining Federal subsidies.* Municipalities can actively seek grants and take actions required for private groups to obtain Federal aid (page 264).

Judicial enforcement measures

The Court also spelled out three judicial procedures to expedite litigation. First, to speed consensus on the many technical issues, New Jersey was divided into three judicial regions, with a single trial judge hearing all *Mount Laurel* cases in a region. Second, *Mount Laurel* cases are generally to be heard with one trial and one appeal. Before *Mount Laurel II*, rulings on technical issues (such as whether the municipality was "developing") were contested individually, leading to many appeals and remands.¹¹ Third, when a technical issue (such as the levels of present and prospective need in a region) is decided, the finding will have "presumptive validity" for other cases in the same region (unless circumstances are substantially different). Municipalities will be allowed to join in cases that would affect their own litigation, but the Court believed that most municipalities will be willing to stay out and abide by the findings.¹²

The Court also took an action which would increase the amount of *Mount Laurel* litigation. One of the most controversial provisions of the *Mount Laurel II* rulings, the "builder's remedy", was adopted to promote challenges to exclusionary zoning ordinances. Under its terms, a court orders that a municipality approve a specific development plan (usually including some kind of density bonus) put forth by a developer-plaintiff. The court may order such a remedy even if the municipality can demonstrate that another site is more appropriate for such a project (as long as the imposed remedy is consistent with sound planning principles [page 280]).¹³ The "builder's remedy" attempts to give develop-

¹¹ If a trial court finds a municipality's zoning invalid, it can order that the code be revised (generally within 90 days). To facilitate this revision the judge can appoint a special master. The master would not have powers beyond making recommendations, expressing opinions, and otherwise assisting the court. After the 90-day period elapses, the court determines whether the new ordinances meet the constitutional test, based in part on the master's testimony.

¹² *Mount Laurel II* also provided some incentive for municipalities to expedite the litigation. When a court finds that a municipality provides for its "fair share" of regional lower-income housing need, it can grant a six-year repose from *Mount Laurel* litigation, barring a "substantial transformation" of the municipality. This is a broader application of the *res judicata* doctrine than usual, since it is less sensitive to changing circumstances in a municipality. This is another example of the Court making a special case of *Mount Laurel* (pages 291-292).

¹³ The opinion warned, however, that the "builder's remedy" should not be construed as an alternative to municipal procedures for seeking zoning variances (pages 280-281).

Box 2: The Review and Mediation Process

The administrative process begins with the municipality filing its "fair share plan" (as part of a "housing element") and a zoning ordinance to implement it, and then seeking the Council's approval or "substantive certification." If no person files an objection within 45 days, the Council reviews the municipality's plan (Section 14). Substantive certification shall then be issued if the Council finds that the municipality's plan and ordinance are consistent with the Council's rules and criteria as well as the provisions in the Act, and that achievement of the municipality's "fair share" is "realistically possible." If approval is denied or conditionally withheld, the municipality has 60 days to revise its petition in a manner satisfactory to the Council.*

If any person does object to subjective certification within the 45 day period, however, the Council must first attempt to mediate a resolution of the dispute between the parties (Section 15). If mediation is successful and the Council finds that its criteria have been met, then it issues a substantive certification.

If the Council's mediation attempts are unsuccessful, however, the matter is transferred to the Office of Administrative Law. The Fair Housing Act stresses expeditiousness, and requires that the evidentiary hearing be held and the initial decision issued no later than 90 days after the transmittal of the matter (unless the Director of Administrative Law extends the time for "good cause shown"). The administrative process ends with the ultimate decision made by the Council, with appeals taken to the Appellate Division of the Superior Court.

* Once certification is granted, the municipality has an additional 45 days in which to adopt the proposed "fair share" housing ordinance approved by the Council.

ers common interests with civil rights groups, making them willing to bear the costs of litigation that the latter groups cannot afford. Without this device, developer-plaintiffs had no assurance that *their* land would be rezoned, even after a successful challenge.¹⁴

Other social objectives of Mount Laurel

In addition to enforcing the underlying Constitutional obli-

¹⁴ To encourage challenges to exclusionary zoning, the Court also stressed the importance of a "liberal approach" with regard to allowing nonresidents to sue. In other contexts it would be necessary first for a nonresident to demonstrate injury resulting from the acts of a municipality. This demonstration was often difficult because of the lack of a direct relationship with the municipality. In *Mount Laurel* cases, however, the Court found that exclusionary zoning by its very nature hurts nonresidents and prevents these direct relationships with the municipality from forming (page 337). A summary of the issues appears in William A. Fischel, *The Economics of Zoning Laws*, (Baltimore: Johns Hopkins University Press, 1985), pages 54-55. Also see *Housing for All Under Law*, (Cambridge, Massachusetts: Ballinger Publishing Co., 1978), pages 98-103.

gation, the *Mount Laurel II* remedies incorporated other explicit and implicit objectives. First, the rulings embodied an explicit policy that poor people should live in adequate housing. Although the Court did not find that exclusionary zoning was solely responsible for the inadequate housing of poor people, it did rule that municipalities collectively must provide at least "a realistic opportunity" for decent housing for *all* lower-income households in the state.

Second, *Mount Laurel* also has the aspect of an income distribution policy. The opinion graphically depicts the disparity of lifestyle between the suburban well-to-do and the urban poor (pages 209-210), the remedy is to require decent housing to be provided at prices far below those typically paid by lower-income households, and generally well below cost.

The most important social policies implemented by *Mount Laurel*, however, explicitly involved land-use. Decrying "roads leading to places they never should be", the Court wrote that "[s]tatewide comprehensive planning is no longer simply desirable, it is a necessity recognized by both the federal and state governments" (page 236). To that end, municipal obligations were designed to be consistent with published state land-use policies. Moreover, allocation of regional need to municipalities was characterized as a problem of "conventional fair share analysis" (page 244), preferably determined by administrative planning agencies (page 250).

Perhaps the most controversial aspects of *Mount Laurel* seem to incorporate land-use policies based on social equity. In fact, "fair share" appears to be fundamentally a socio-economic concept. For one thing, it refers to the social fairness of the geographic allocation of housing, rather than to the equitable assignments of financial costs. The opinion explicitly referred to the fairness of the land-use implications of assigning lower-income housing obligations to municipalities:

"As for those municipalities that may have to make adjustments in their lifestyles . . . they should remember that they are not being required to provide more than their *fair share* [emphasis in the original]" (page 219).

In contrast, the opinion clearly states that "fair shares" of lower-income housing do *not* result in fair assignments of financial costs.

"There may be inequities between and among these municipalities located within growth areas, as there undoubtedly are between all of them and municipalities outside of growth areas, for the tax and other burdens . . . *will not be fairly spread* [emphasis added]" (page 239).¹⁵

To implement its social objectives, the Court ruled that "socioeconomic" zoning, permitting only low-income housing *per se*, may be required if "social goals are to prevail

¹⁵ The Court found that these inequities were the consequence of state land-use policies, and therefore compensation should be determined by the legislature, not the courts.

over neutral market forces" (page 274, footnote). The opinion attributes to municipalities an affirmative responsibility to counter the destructive effects of economic segregation.¹⁶ Accordingly, the Court ruled that "if sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor" (page 211). To this end, the decision calls for affirmative measures when simply removing restrictions on multiunit structures would result in the construction of only high-priced middle-

income housing (page 261). The Court similarly tied a municipality's acceptance of factories to an obligation to provide housing for workers (pages 211, 256)¹⁷

Nowhere does the opinion suggest that these social goals approximate the outcomes that would have prevailed in the

¹⁶ For example, the Court wrote that "[z]oning ordinances that either encourage this process or ratify its results are not promoting our general welfare, they are destroying it [emphasis added]" (page 211, footnote)

¹⁷ The Court, in giving special attention to tax base growth (Box 1), may have sought to assign obligations based on "ability to pay". But the Court's description of the unfairly distributed costs argues against that notion (see above text). The Court may instead have sought to attack the zoning practice of encouraging fiscally profitable land uses at the expense of unprofitable uses, such as lower-income housing. In fact, the Court may have sought to provide fiscal incentives to encourage the construction of lower-income housing, by tying a housing obligation to all desirable commercial and industrial development

Box 3: Legislative Policy on "Fair Share"

Under the terms of the Fair Housing Act, the Council on Fair Housing is responsible for specifying the criteria and guidelines by which municipal housing elements will be judged, subject to several qualifications.

Housing regions, determined by the Council, will consist of two to four contiguous counties that exhibit significant similarities. The regions should approximate Primary Metropolitan Statistical Areas (Sections 4b and 7a).*

The Act also carefully defined the methods for *projecting prospective need* (Section 4j). Estimates are to be made of "reasonably likely" growth based on approvals of development application, real property transfers, and economic projections provided by the State Planning Commission. The governor's conditional veto message (which added this language) stressed the need to avoid abstract or speculative theories.

The Act does not define "fair share", but specifies how these shares must be "credited" and "adjusted" and how they may be "limited", "transferred", and "phased in". "Fair shares" must be computed after *crediting* on a one-to-one basis each current unit of (affordable) lower-income housing of adequate standard (Section 7c). Further, "fair shares" must be *adjusted* to assure suitability of development, including consistency with the designations of the State Development and Redevelopment Plan.[†] Adjustments would be required if providing the full "fair share" obligations would drastically alter the pattern of community development, or if vacant and developable land or adequate public facilities and infrastructure capacities are not available.

The Council also is permitted to place a *limit* on "fair share" allocations (Section 7e), based on a percentage of the housing stock, employment opportunities, or any other criteria it deems appropriate.

A municipality may propose the *transfer* of up to half of its "fair share" to another municipality—probably a central city—by means of a voluntary contract (Section 12).^{††} That is, it can satisfy part of its obligation by paying for housing built in another part of its housing region. This "regional contribution agreement" is subject to Council approval and must be in accordance with "sound comprehensive regional planning" and must provide for "a realistic opportunity for low- and moderate-income housing within convenient access to employment opportunities." If the agreement is subject to the scrutiny of a court, the Act requires challengers to provide "clear and convincing evidence" it is not a valid part of a "fair share" zoning ordinance.

The Act also provides for *phase-ins* of housing obligations provided in inclusionary developments (*i.e.*, those containing a substantial proportion of housing units affordable to a reasonable range of low- and moderate-income households) (Section 23e). Municipalities are given up to 20 years (for 2,000 lower-income units or more), and at least six years (for fewer than 1,000 units), to meet their obligations. "Fair shares", whether or not provided in inclusionary developments, can be phased in with the timing based on the size of the share, infrastructure considerations, available land, likely absorption rates, development priorities, and past performance in providing lower income housing. Trial courts must consider these criteria as well, but retain the right to their own determinations.

* This provision takes a stand on a controversial issue. For example, litigation involving the Township of Warren led to the use of an 11-county area proposed by the challengers.

† Additional factors affecting suitability of development include historic and environmental preservation, and the need for adequate land for open space, recreation, conservation, and farmland.

†† The recommended compensation for the receiving municipality was a weighted average of the costs of rehabilitation and new construction. Payments may also include an amount to pay for infrastructure or other costs generated by the development.

absence of past exclusion.¹⁸ The Court's rulings instead seem to aim for specific land-use allocations that might never have otherwise occurred, even in a non-exclusionary housing market.

Mount Laurel II also allows municipalities some leeway in setting their own socioeconomic land-use policies. The opinion describes the state constitutional obligation to foster the "general welfare" as a regional concept (page 237). Municipalities must provide for a "fair share" of the housing needs of poor people only from the surrounding region, and are explicitly permitted to exclude others under the provisions of *Mount Laurel II*. That is, once a municipality has met its numerical obligation, it may zone with explicit regard to its fiscal situation (pages 259-260).¹⁹ Although numerical obligations are imposed to promote enforcement, once they are met *Mount Laurel II* grants municipalities wide latitude in using their zoning power to influence the socioeconomic pattern of land use. This provision is not just a side effect of *Mount Laurel II*; it plays an important role in its implementation.²⁰

The legislative response

Mount Laurel II expressed the Court's desire for legislative rather than judicial enforcement of the State's constitutional responsibility, and its dissatisfaction with prior legislative inaction (page 213). In July 1985 (over two years later), the Fair Housing Act provided a legislative response to this call.

An administrative alternative to litigation

The Act created the *Council on Affordable Housing* to administer a set of procedures providing an alternative to judi-

cial enforcement (Section 5).²¹ To the municipality, these administrative processes are entirely voluntary. In fact, the Act contains no mechanism to enforce the *Mount Laurel* obligation. Its principal purpose, rather, is to give municipalities an opportunity to keep *Mount Laurel* cases out of the courts (Section 2).

If a municipality submits to the Council its "fair share plan" and corresponding revisions to its zoning ordinance (before certain deadlines), any challengers to municipal zoning ordinances must exhaust the Act's review and mediation process before their complaint can be heard in the Appellate Division of the Superior Court (Box 2).

Cases currently before a court may be transferred to the Council's jurisdiction if the court finds no "manifest injustice" is done (Section 16). Cases instituted after the Act's effective date (or two months earlier) cannot be heard until the administrative remedies are exhausted. Even municipalities not currently subject to *Mount Laurel* litigation may preempt a prospective court challenge by seeking the Council's jurisdiction.²²

The Act took the avoidance of judicial solutions one step further by imposing a moratorium on builders' remedies (defined in the Act as including all court-ordered density bonuses and mandatory set-asides) until the administrative procedures are operational (Section 28).²³ Under its terms, no builder's remedy will be granted to a plaintiff in any exclusionary zoning litigation filed after the *Mount Laurel II* decision, unless a final judgment has already been rendered.²⁴

Assignment of obligations

Under the Fair Housing Act, municipalities propose their own "fair share" plans, subject to guidelines set down by the Council on Affordable Housing. The Council is directed to determine regions, estimate present and prospective needs in each region, adopt the criteria by which "fair shares" are assigned, and review "fair share plans" written by municipalities. It must announce "fair share" guidelines and criteria, subject to specific requirements (Box 3), before August 1, 1986 (Section 7). A municipality's plan must

¹⁸ While the decision calls exclusionary zoning a major cause of socioeconomic segregation, urban economists have argued that market forces, even in the absence of private or municipal discrimination, also lead to such segregation. For example, the standard Alonso-Mills-Muth model of land use leads to separation of high- and low-income households based on income elasticities of travel cost and the demand for housing. See, for example, Edwin Mills and Bruce Hamilton, *Urban Economics* (Glenview, Illinois: Scott, Foresman and Company, 1984). Along similar lines, John Yinger has argued that high-income households are willing to pay more for public services than lower-income households, leading to municipal segmentation along income lines. John Yinger, "Capitalization and the Theory of Local Public Finance", *Journal of Political Economy* 90 (October 1981), pages 917-943.

¹⁹ Municipalities' exclusionary zoning practices must be halted "to the extent necessary to meet their prospective 'fair share' and provide for their indigenous poor (and in some cases, a portion of the region's poor)" (page 259). Practices such as reserving areas for upper-income housing and zoning "with some regard to their fiscal obligations" are expressly permitted once the "fair share" goal is met (page 260). While the opinion observed that zoning laws must satisfy the general test of a "reasonable relationship to [a] legitimate governmental goal", such determinations were said to be beyond the scope of *Mount Laurel*.

²⁰ These continued land-use restrictions may be crucial to the success of density bonuses and mandatory set-asides in financing *Mount Laurel* housing. If middle-class housing is to provide a subsidy for such units, they must earn an above-normal profit. This profit can persist in the long run only with persistent barriers to entry, such as zoning laws whose effect is to enforce scarcity of middle-income housing.

²¹ The Council's membership, nominated by the Governor subject to the approval of the legislature, was required to reflect a specific balance across political parties, geographic regions, and various public and private interests.

²² The advantage is that if the Council approves the plan, municipal compliance with its *Mount Laurel* obligation is granted "presumptive validity" in any potential litigation. Furthermore, a challenger's demonstration that the plan fails to provide for the community's "fair share" requires "clear and convincing evidence". Alternatively, a municipality can seek a declaratory judgment for a six-year repose in the Superior Court, as if the municipality had reached a satisfactory resolution in trial court.

²³ The moratorium expires five months after the Council adopts its criteria and guidelines for determining "fair shares"—which is scheduled to occur no later than August 1986 (Section 7, see also the Governor's veto message (April 26, 1985), pages 6-7).

²⁴ This qualification was added in the Governor's conditional veto message, out of concern for the unconstitutionality of a broader provision which would have reversed prior court rulings.

state its determination of its present and prospective "fair share" for lower-income housing and its capacity to accommodate those shares (Section 10). Detailed analyses and forecasts of the municipality's demographic, housing, and employment characteristics are required in support of the plan.

The Fair Housing Act also allows a municipality to satisfy up to half its "fair share" obligation by paying for housing located in another municipality. These "regional contribution agreements" are subject to Council approval on the basis of several criteria (Box 3).

The Act also assigns a crucial role to the State Planning Commission (Section 7). The legislation creating this body was not enacted until January 1986 (Public Law 1985, Chapter 398). The Commission will project statewide and regional housing needs and demographic changes, and also will devise the State Development and Redevelopment Plan. This land-use document will be the first created with an explicit role in the determination of *Mount Laurel* obligations (Section 7).

When enacting these new procedures, the legislature also provided state subsidies for rehabilitation and new construction of lower-income housing (Sections 20 and 21). First, an estimated \$100 million from tax-exempt revenue bonds from the New Jersey Housing and Mortgage Finance Agency (which must be repaid from project revenues or from taxes) can be used for mortgage subsidies.²⁵ An additional \$15 million from general revenues can be used for rental programs, conversions and moderate rehabilitation, and grants to municipalities or community groups.

In addition, \$10 million was authorized for the Neighborhood Preservation Program, to pay for rehabilitation, conversions, acquisition and demolition, new construction, infrastructure, and other housing costs. Two million dollars of this total is appropriated from general revenues; the rest comes from an increase in the realty transfer tax earmarked for this program.²⁶ Eligibility is limited to municipalities with Council approval of their "fair share plans" or regional contribution agreements.²⁷

Other policy objectives

The general objectives of the Act and the means of achieving them are essentially the same as *Mount Laurel II*, but there are significant differences. On the one hand, the Act's housing and income distribution policies are very similar to those of the Court rulings. Like *Mount Laurel II*, the legislative remedy calls for adequate housing for all lower-income households in New Jersey, provided at the municipal level.

Neither remedy calls for meeting lower-income housing needs through "vouchers" or other rent subsidies to be used for existing housing, wherever the lower-income households choose.²⁸ Similarly, neither method specifically encourages "filtering" (where lower-income households move into existing housing vacated by middle-income households).²⁹ As income distribution policy, the disparity of lifestyle between the urban poor and suburban well-to-do is addressed by providing housing to lower-income households (either sold or rented) below cost.

On the other hand, the Act's land-use policies seem somewhat different from those of the Court rulings. The Act allows a municipality to satisfy up to half its obligation with housing built in urban areas. It is therefore likely that the lower-income housing provided under the Fair Housing Act would be more geographically concentrated in urban areas than under the judicial solution.³⁰ Regional transfers "maximize the number of low- and moderate-income units"; to an extent this may mean a tradeoff of some decentralization of the poor in favor of urban rehabilitation and adequate housing possibly built at lower cost (Sections 2f and 2g).

The use of regional "fair share" transfers indicates an additional policy difference, in that suburbanites are asked to help finance central-city housing. Any geographic allocation resulting from such transfers could have been specified directly with nontransferable "fair shares". Assuming that the allocation satisfies judicial standards of "fairness", the major impact of this device is to redistribute the financial costs from central city to suburb.

Even with these differences from the judicial remedy, financial obligations still depend heavily on "growth area" designation. As mentioned above, the Court believed that this allocation is not fair in a financial sense, and that it was the responsibility of the legislature to correct it. The Act did not address this issue, however, even though broader use of "regional contribution agreements" might have reduced the importance of state land-use policy on municipal financial burdens. Municipalities without land designated as "growth area" could have been assigned regional obligations (rather than responsibility only for their "indigenous" poor) to be satisfied with housing built in other parts of the region.

The legislative solution also incorporates a policy that

²⁸ While vouchers have been used to implement a "fair share" obligation *within* a municipality, the *Mount Laurel* remedies are not set up to allow the geographic distribution of lower-income households to be determined by consumer choice

²⁹ *Mount Laurel II* mentions filtering when it required "least-cost housing" if "affordable" housing were unfeasible (Box 1). Without the obligation for least-cost housing at a minimum, the Court found, filtering would not occur in suburban areas (page 278)

³⁰ This is potentially a big change from the Court's conception. Many communities are likely to seek such "regional contribution agreements". However, it is unlikely that transfers of the full, legislatively permissible 50 percent of all *Mount Laurel* units will either be requested or approved

²⁵ This estimate comes from the Governor's conditional veto message of the bill originally sent to him

²⁶ Public Law 1985, Chapter 225

²⁷ This restriction applies only after the first year after enactment, a period extendable by the Council

communities should be rewarded for any prior provision of affordable lower-income housing. Its one-for-one credit against "fair share" for existing affordable lower-income housing has no counterpart in the *Mount Laurel II* decision. Such credits have been used, however, in the trial courts.

This feature complicates the concept of "fair share". *Mount Laurel II* defines present regional housing need in terms of lower-income households living in inadequate housing (page 243). If "fair shares" before credits add up to the estimated regional need, the sum of municipal obligations after credits for occupied units must fall short of the desired total.³¹

Remaining questions

Politically, legally, and economically, it is difficult to predict what will come of the Fair Housing Act. The Council on Affordable Housing has not yet promulgated its guidelines;³²

³¹ It is possible to design obligations such that after credits, the shares add up properly. But the sum of pre-credit shares then would exceed 100 percent of regional need. This makes the requirement of a "one-for-one" credit less meaningful.

³² Although at the time of this writing the Council's guidelines have not yet been released, examination of an earlier attempt at an administrative solution may suggest what factors municipalities will be expected to incorporate into their "fair share" determinations. A Revised Statewide Housing Allocation Report for New Jersey Division of State and Regional Planning (May 1978) circulated "fair share" formulas for public comment. Its formulas reflected physical capacity (vacant land), ability-to-pay (nonresidential property and personal income), and "relative responsibility" (job growth). Because the legal authority for the document was rescinded in 1982 (moreover, the Division no longer exists), the Court did not use its formulas to allocate "fair shares".

confirmation of its membership was not completed until mid-January 1986. The State Planning Commission was also created only in January 1986, and its membership must be appointed before it can draw new land-use maps. Ten municipalities have already sought Council jurisdiction only to be refused by the courts; the New Jersey Supreme Court heard their appeal in January. As the provisions of the Fair Housing Act phase in, cases approved for transfer may go through an administrative course of two years or longer, only to return to the courts.

The issues discussed in this article will remain in the public debate. Litigants will have to decide whether to seek Council jurisdiction; courts will have to decide whether to approve their requests. The State Supreme Court may rule on the constitutionality of provisions of the Act. The legislature may seek to modify the administrative remedies or to amend the state constitution to specify the *Mount Laurel* enforcement more to its liking. Other states may seek *Mount Laurel*-type remedies.

There are many economic questions as well. It is difficult to estimate how much subsidy will be needed to induce developers to build below-cost, lower-income housing; it is even harder to gauge the long-run effectiveness of density bonuses and other measures in generating such funds. Also unknown are the impacts on housing markets, central city development, municipal finances, and the job prospects of *Mount Laurel* households. Thirteen years after the first trial court ruling, *Mount Laurel's* impact on the New Jersey landscape is still uncertain.

Daniel E. Chall