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The Selling Out of Mount Laurel: Regional Contribution Agreements in New Jersey's Fair Housing Act

Cover Page Footnote

Associate, Mitchell, Silberberg & Knupp, Los Angeles, California. B.A., 1983, Brandeis University; J.D., 1988, Harvard Law School. I wish to extend special thanks to Professor Duncan Kennedy of Harvard Law School and Martin S. Fox.

THE SELLING OUT OF *MOUNT LAUREL*: REGIONAL CONTRIBUTION AGREEMENTS IN NEW JERSEY'S FAIR HOUSING ACT

Rachel Fox*

I. Introduction

After years of inaction on the issue of exclusionary zoning, the New Jersey Legislature enacted the Fair Housing Act in July of 1985.¹ Previously, exclusionary municipal zoning ordinances were monitored exclusively by the courts pursuant to litigation challenging these ordinances.² Under the Fair Housing Act (the Act), the Council on Affordable Housing (the Council) replaced the courts as the initial arbiter in exclusionary zoning cases.³

In *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*,⁴ the New Jersey Supreme Court established a rule—now known as the *Mount Laurel* doctrine—that requires municipal land use regulations to provide for the construction of low and moderate income housing.⁵ Eight years later, in a rehearing of the same case (*Mount Laurel II*),⁶ the New Jersey Supreme Court “put some steel” into its earlier unheeded decision.⁷ The court set up a system under which adversely affected parties could seek substantial revision of zoning ordinances so as to provide for the building of low and moderate income housing.

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1. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1987).

2. See, e.g., *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter *Mount Laurel II*]; *Pascack Ass'n v. Washington*, 74 N.J. 470, 379 A.2d 6 (1977); *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, cert. denied and appeal dismissed, 423 U.S. 808 (1975) [hereinafter *Mount Laurel I*].

3. N.J. STAT. ANN. § 52:27D-316 (West 1987).

4. 67 N.J. 151, 336 A.2d 713, cert. denied and appeal dismissed, 423 U.S. 808 (1975).

5. See *id.* at 174, 336 A.2d at 724-25.

6. See *Mount Laurel II*, 92 N.J. 158, 456 A.2d 390 (1983).

7. See *id.* at 200, 456 A.2d at 410.

The *Mount Laurel II* court envisioned the abolition of exclusionary zoning as a means of accomplishing three goals. First, it would provide housing for the poor. Second, it would cause the racial and economic integration of New Jersey's municipalities. The consequence of these two goals would be the deconcentration of the urban poor, which would lead to the third goal: the rejuvenation of New Jersey's economy.⁸

The Fair Housing Act essentially codified the *Mount Laurel* Doctrine as it existed after the *Mount Laurel II* decision.⁹ The Act provided the means by which municipalities may fulfill their *Mount Laurel II* obligations.¹⁰ Rather than eliminating exclusionary zoning, however, the Fair Housing Act, through its provision for Regional Contribution Agreements (RCAs), allows this practice to continue so long as each excluding municipality pays for the construction of low and moderate income housing somewhere within a certain radius of its borders. The RCA provisions permit municipalities to trade away up to fifty percent of their low income housing obligations through agreements with other municipalities that have greater low income populations.¹¹ By permitting far less integration than the *Mount Laurel I & II* courts had intended, the RCA provisions deviated from the original *Mount Laurel* doctrine: they compromised the goal of racial and economic integration for the goal of constructing low and moderate income housing.

The New Jersey Supreme Court recently upheld RCAs as "facially" constitutional in *Hills Development Co. v. Bernards Township (Mount Laurel III)*.¹² The court, however, left open the possibility of state constitutional challenges to the Council's implementation of RCAs where such implementation violates certain basic goals of the *Mount Laurel* doctrine.¹³

8. See *id.* at 208-14, 456 A.2d at 415-18.

9. The Fair Housing Act reiterates the *Mount Laurel* doctrine requirement that "every municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families." N.J. STAT. ANN. § 52:27D-302(a) (West 1987) (citing *Mount Laurel I*, 67 N.J. 151, 336 A.2d 713, cert. denied and appeal dismissed, 423 U.S. 808 (1975); *Mount Laurel II*, 92 N.J. 158, 456 A.2d 390 (1983)).

10. See *infra* notes 55-71 and accompanying text for a discussion of *Mount Laurel II* obligations.

11. See *infra* notes 87-101 and accompanying text for a discussion of RCAs.

12. 103 N.J. 1, 510 A.2d 621 (1986) [hereinafter *Mount Laurel III*]. See *infra* notes 102-08 and accompanying text for a discussion of this case.

13. See *infra* note 108 and accompanying text.

Despite the *Mount Laurel III* court's deviation from the original *Mount Laurel* Doctrine, the court did not retreat from the basic goals of that doctrine. If properly implemented, RCAs could further *Mount Laurel's* goal of rejuvenating New Jersey's economy by providing housing directly to those municipalities most in need. As implemented by the Council, however, the RCAs continue to thwart the basic goals of the *Mount Laurel* doctrine and do not meet the constitutional standards set forth in *Mount Laurel III*. The loosely regulated RCA bidding process fails to insure that the transferred housing will be fairly distributed to inner-city areas with the greatest need for low income housing. The present bidding process also threatens the actual construction of transferred housing by creating the potential for misuse of RCA funds. Moreover, as implemented by the Council, the RCAs hinder even the relatively limited racial and economic integration envisioned by the court in *Mount Laurel III*.

Part II of this Article outlines the origins of exclusionary zoning, the *Mount Laurel* doctrine and RCAs.¹⁴ Part III discusses *Mount Laurel's* implicit goal of racial integration.¹⁵ Part IV argues that, as implemented by the Council on Affordable Housing, RCAs thwart the *Mount Laurel* doctrine's explicit goal of revitalizing urban areas and its implicit goal of racial integration of suburban municipalities.¹⁶ In addition, Part IV proposes various alternatives to the unregulated bidding process that will enable the Fair Housing Act (the Act) to achieve the goals of the *Mount Laurel* doctrine more effectively.¹⁷ Part V concludes that, because the RCAs thwart some of the basic goals of the *Mount Laurel* doctrine, the Act can no longer be described as a codification of that doctrine and substantial revisions are required to harmonize the Act, as currently implemented, with the *Mount Laurel* vision.

II. Background: Evolution of the *Mount Laurel* Doctrine

This section discusses the concept of exclusionary zoning and New Jersey's judicial and legislative attempts to alleviate its ill effects through implementation of the *Mount Laurel* doctrine.

14. See *infra* notes 18-108 and accompanying text.

15. See *infra* notes 109-19 and accompanying text.

16. See *infra* notes 120-38 and accompanying text.

17. See *infra* notes 139-40 and accompanying text.

A. Exclusionary Zoning

In the years following World War II, massive migration of New Jersey's upper income residents from its cities to its rapidly developing suburbs led suburban municipalities to employ the practice of exclusionary zoning to prevent the influx of low income residents.¹⁸ Requirements of minimum lot sizes and minimum floor areas, which limit the availability of land, restricted residence in these municipalities primarily to upper income people.¹⁹ The municipalities' authority to zone, their tax structure²⁰ and their concern with maintaining the character of their communities²¹ are all factors that contributed to exclusionary zoning.

The movement of industry and commerce to the suburbs galvanized a concomitant shift of blue-collar jobs away from the cities.²² Zoning ordinances worked to encourage the movement of tax-generating businesses to the suburban areas and discourage the development

18. See McDougall, *The Judicial Struggle Against Exclusionary Zoning: The New Jersey Paradigm*, 14 HARV. C.R.-C.L. L. REV. 625, 626-28 [hereinafter McDougall]. As one commentator has noted:

Following World War II, a variety of forces combined to create a massive wave of suburbanization around northeastern cities. The suburbs offered less expensive land which allowed the employment of new technology. It was also believed that tranquil surroundings would encourage stability, contentment and higher productivity among the workforce.

Id. at 625.

19. See *Mount Laurel I*, 67 N.J. 151, 171, 336 A.2d 713, 723, cert. denied and appeal dismissed, 423 U.S. 808 (1975).

20. In New Jersey, municipal governments have the power to zone real property and to finance public services provided to their residents with taxes on real property. See McDougall, *supra* note 18, at 628.

21. At the time of *Mount Laurel I*, suburban municipal leaders feared social and racial tension more than the financial costs associated with suburban integration. See *Mount Laurel I*, 67 N.J. at 196, 336 A.2d at 736-37 (Pashman, J., concurring). "Many people who settle in suburban areas do so with the specific intention of living in affluent, socially homogeneous communities and of escaping what they perceive to be the problems of the cities." See *id.* at 196, 336 A.2d at 737 (Pashman, J., concurring) (citations omitted). Preservation of the social structure of the community ultimately includes a financial motive as well: homeowners want to protect their investments in expensive homes by avoiding a decrease in property values that would inevitably occur if the urban poor were allowed to move in. Ironically, racial or economic prejudice on the part of these homeowners is arguably the primary reason for the fall in property values that results when the poor move into the community.

22. See *Mount Laurel I*, 67 N.J. at 206, 336 A.2d at 742 (Pashman, J., concurring). "The migration of industry attracted population to the jobs it created in the suburbs while cities were left with a large unemployed population, in many instances heavily black and Latin, whose need for services placed a great weight on the municipal tax base." McDougall, *supra* note 18, at 626-27.

of housing for the people who would be employed by these businesses because these people were viewed as "revenue-absorbers."²³

Exclusionary zoning thus led to the concentration of New Jersey's poor in its cities. Businesses and the middle and upper classes then began to flee to the suburbs to escape increasing urban decay.²⁴ This restricted pattern of development threatened the socio-economic stability of the entire state. Crime and other problems that developed in the urban slums spread outward to the suburbs. This "continuing disintegration of [the] cities encourage[d] business and industry to leave New Jersey altogether, resulting in a drain of jobs and dollars from [its] economy."²⁵

Exclusionary zoning, by limiting the number of residential units per acre of land, artificially maintains reduced prices for the benefit of upper income families on land for which groups of low income families would collectively pay more to live in density housing.²⁶ If a single-family homebuyer and a high density developer were given an equal opportunity to bid for the same lot in a free market without exclusionary zoning, the revenue that the developer would stand to gain from its use of the land would likely exceed the premium placed on exclusivity by the individual family. Therefore, except in those instances where the individual family places an extremely high premium on exclusivity, the developer would outbid the single family. Exclusionary zoning thus, in effect, provides a subsidy to the individual higher income family by sheltering it from competition with developers for use of land.

23. 67 N.J. at 206-07, 336 A.2d at 742 (Pashman, J., concurring). As a result, workers were forced to spend vast amounts of time and money commuting from their homes in the cities to their jobs in the suburbs. This burden was exacerbated by the lack of mass transportation along these routes. *See id.*

24. *See Mount Laurel II*, 92 N.J. at 158, 210-11 n.5, 456 A.2d 390, 415-16 n.5 (1983).

25. *Id.*

26. *Cf. National Land & Inv. Co. v. Kohn*, 215 A.2d 597, 608, 419 Pa. 504, 524 (1965) (land divided into one-acre lots for residential building valued at \$260,000. After a four-acre restriction was imposed upon this same land, however, the number of available building sites decreased by 75% and the value of the land fell to \$175,000). In the absence of exclusionary zoning, a group of lower income people would be able to outbid a higher income individual for a single piece of land. Similarly, a developer would reap greater profits from density housing than from single-family homes on larger lots. Although there is a possibility that, absent exclusionary zoning, the single-family lot purchaser may pay a premium for exclusivity, it is unlikely that any such premium would bring this purchaser's bidding price up to the level that a group of lower income residents would pay for the same lot with density housing.

Moreover, low income residents in density housing, in the aggregate, produce greater tax revenues per acre than upper income residents on single-family lots. Low income residents in density housing, however, also generate a greater burden on public services.²⁷ This public service burden is greater than the tax revenues received from these low income residents. Consequently, the introduction of density housing into a community that was previously limited to upper income residents on single-family lots increases the taxes of the upper income residents.²⁸ By prohibiting density housing, exclusionary zoning thus provides a dual subsidy to upper income families: (1) it maintains the price of land at a level below that which low

27. There is an assumption in the *Mount Laurel* cases and the scholarly work concerning the *Mount Laurel* doctrine that the poor have larger families. Consequently, discussion of the fiscal consequences of admitting the poor often focuses on the burden to the tax base presented by the tremendous influx of children. See, e.g., J. SURENIAN, *Mount Laurel II AND THE FAIR HOUSING ACT 5-6* (New Jersey Institute for Continuing Legal Education 1987) (Mr. Surenian was a law clerk for Judge Serpentelli, one of the three specialized trial judges appointed pursuant to *Mount Laurel II*) [hereinafter SURENIAN].

In addition, wealthy families are more likely to send their children to private schools, thereby imposing less of a burden on the public school system and, in turn, the municipal tax base, than low income families.

It was assumed by residents of excluding municipalities that, in addition to burdening the tax base by sending more children to public school, the poor would bring a need for greater community crime prevention services. The construction of density housing for the poor would require an increase in taxes to support other infrastructure costs such as additional roads, sewers, water systems and other municipal services. See *Morris County Fair Hous. Council v. Boonton Township*, 197 N.J. Super. 359, 367, 484 A.2d 1302, 1306-07 (Law Div. 1984), cited in SURENIAN, *supra*, at 6.

28. The largest municipal expense is the public education of children. Consequently, municipalities used exclusionary bedroom restrictions, as well as other more explicit limitations on the number of children permitted per dwelling unit, to exclude homes for families with several children. The zoning approvals discussed in *Mount Laurel I* are an example of such exclusionary bedroom restrictions.

[The zoning approvals] require that the developer must provide in its leases that no school-age children shall be permitted to occupy any one-bedroom apartment and that no more than two such children shall reside in any two-bedroom unit. The developer is also required, prior to the issuance of the first building permit, to record a covenant, running with all land on which multi-family housing is to be constructed, providing that in the event more than .3 school children per multi-family unit shall attend the township school system in any one year, the developer will pay the cost of tuition and other school expenses of all such excess numbers of children.

Mount Laurel I, 67 N.J. 151, 168, 336 A.2d 713, 721-22, cert. denied and appeal dismissed, 423 U.S. 808 (1975). This practice reflected the view that "the fewer the school children, the low[er] the tax rate." See *id.* at 171, 336 A.2d at 723.

income residents would be willing to pay; and (2) it lowers the amount of taxes paid by upper income residents.²⁹

B. The *Mount Laurel* Doctrine: *Mount Laurel I* & *II*

This section discusses the emergence of the *Mount Laurel* doctrine in *Mount Laurel I*, the New Jersey Supreme Court's subsequent retreat from this doctrine, and the doctrine's forceful reemergence in *Mount Laurel II*.

1. *Mount Laurel I*

In 1975, the New Jersey Supreme Court attacked the practice of exclusionary zoning in *Mount Laurel I*.³⁰ The court pointed out that any zoning ordinance that infringed upon the "general welfare" of the people of the state of New Jersey violated both the Zoning Enabling Act³¹ and the New Jersey Constitution.³² According to the court, "adequate housing of all categories of people is an absolute essential in promotion of the general welfare [which is] required in all local land use regulation."³³ The court found that *Mount Laurel's* exclusionary zoning practices failed to provide such housing.³⁴

Justice Hall ordered that each developing municipality in New Jersey must provide in its zoning regulations the affirmative opportunity for the construction of low and moderate income housing to the extent of the municipality's "fair share" of the "regional" need for such housing.³⁵ The court, however, failed to define these terms.³⁶ Moreover, where a municipality's zoning ordinances are

29. These subsidies are arguably borne by low income families because exclusionary zoning forces greater housing densities and greater service burdens per tax dollar on the communities to which, as a result of exclusion from other communities, low income families are confined. Such overburdening of municipal services without sufficient support from tax revenues inevitably reduces the quality of these services.

30. 67 N.J. 151, 336 A.2d 713, cert. denied and appeal dismissed, 423 U.S. 808 (1975).

31. N.J. STAT. ANN. § 40:55-30 to -51 (West 1967).

32. N.J. CONST. art. 1, § 1; see *Mount Laurel I*, 67 N.J. at 175, 336 A.2d at 725.

33. *Mount Laurel I*, 67 N.J. at 179, 336 A.2d at 727.

34. See *id.* at 151, 336 A.2d at 713.

35. *Id.* at 188, 336 A.2d at 732.

36. As many critics of the *Mount Laurel I* decision have noted, by failing to define "fair share" and "region," and by not ordering a procedure for supervision of municipal ordinances, Justice Hall's decision did not provide a remedy for those adversely affected by exclusionary zoning. Moreover, insofar as the obligation to provide housing applied only to "developing" municipalities, many communities

designed to attract industry and other commerce, the municipality must "permit adequate housing within the means of the employees involved in such uses."³⁷

In his concurrence, Justice Pashman recommended that the *Mount Laurel* obligation be extended to all municipalities in New Jersey.³⁸ In addition, Justice Pashman advocated active judicial enforcement of the *Mount Laurel* mandate³⁹ and proposed an analysis for trial courts to employ when deciding exclusionary zoning cases.⁴⁰

with significant housing needs were exempt from the *Mount Laurel* mandate. The *Mount Laurel II* court explained the ineffectiveness of the earlier *Mount Laurel I* decision in these words:

Although the [*Mount Laurel I*] court set forth important guidelines for implementing the doctrine, their application to particular cases was complex, and the resolution of many questions left uncertain. Was it 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?

Mount Laurel II, 92 N.J. 158, 205, 456 A.2d 390, 413 (1983); see also *Mount Laurel I*, 67 N.J. at 208, 336 A.2d at 743 ("[t]he majority has chosen not to explore . . . either the extent of the affirmative obligation upon developing municipalities or the role of the courts in enforcing those obligations. It also has chosen not to consider the degree to which the principles applicable to developing municipalities are also applicable to rural ones and to largely developed ones"); McDougall, *supra* note 18, at 632 (noting shortcomings of *Mount Laurel I*).

37. *Mount Laurel I*, 67 N.J. 151, 187, 336 A.2d 713, 722, cert. denied and appeal dismissed, 423 U.S. 808 (1975); see *supra* note 23 and accompanying text. Justice Hall condemned the practice of valuing tax revenues more highly than human welfare by limiting the categories of housing permitted within a municipality. He argued that since the power of a municipality to zone, granted by the state's zoning enabling act, derives from the police power of the state, "when [a municipal] regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of a particular municipality cannot be disregarded and must be recognized and served." *Mount Laurel I*, 67 N.J. at 177, 336 A.2d at 726.

38. Justice Pashman wrote:

[D]eveloped suburban municipalities which have availed themselves of the land use controls permitted by statute, and which have not provided sufficient opportunities for development of low and moderate income housing to meet their fair share of regional needs, have both a negative obligation not to use zoning and subdivision controls to obstruct the construction of such housing and an affirmative duty to plan and provide for such housing, insofar as these obligations can be carried out without grossly disturbing existing neighborhoods Occasions . . . arise in every community when land becomes available for development or re-development. It is on these occasions that these obligations come into play most strongly.

Id. at 217-18, 336 A.2d at 748 (Pashman, J., concurring) (emphasis added).

39. See *id.* at 208-09, 336 A.2d at 743.

40. The court should: (1) identify the relevant region; (2) determine the present and future housing needs of the region; (3) allocate these needs among the various municipalities in the region; and (4) shape a suitable remedial order. *Id.* at 215-16, 336 A.2d at 747.

Although the plaintiffs in *Mount Laurel I* represented the black and Hispanic minority poor, the *Mount Laurel I* court did not focus directly on race as a factor in exclusionary zoning. The majority found that the regulations were based on economic and not necessarily racial discrimination because the zoning ordinances excluded nonminority as well as minority low income people.⁴¹ Justice Pashman, however, specifically acknowledged the possibility of a discriminatory motivation behind exclusionary zoning in general, noting that "exclusionary zoning practices are often motivated by fear of and prejudices against other social, economic and racial groups."⁴²

2. Retreat from Mount Laurel I

In two subsequent decisions, the New Jersey Supreme Court limited the *Mount Laurel* doctrine as set out in *Mount Laurel I*. In *Oakwood at Madison, Inc. v. Township of Madison*,⁴³ the New Jersey Supreme Court held that a developing municipality's zoning ordinances need not determine a specific number of units that would constitute its fair share of a particular region's need for low income housing. Rather, zoning ordinances should "realistically [permit] the opportunity to provide a fair and reasonable share of the region's need for housing for the lower income population."⁴⁴

41. See *id.* at 159, 336 A.2d at 717. "We have reference to young and elderly couples, single persons, and large, growing families not in the poverty class, but who still can not afford the only kinds of housing realistically permitted in most places—relatively high-priced, single-family detached dwellings on sizeable lots and, in some municipalities, expensive apartments." *Id.*

The court accepted the municipal counsel's argument that the regulatory scheme was adopted without any specific desire or intent to exclude prospective residents on the basis of race, origin or believed social incompatibility. See *id.*

42. *Id.* at 196, 336 A.2d at 736 (Pashman, J., concurring) (citing NAT'L COMM. AGAINST DISCRIMINATION IN HOUSING, JOBS AND HOUSING: FINAL SUMMARY REPORT ON THE HOUSING COMPONENT 25-29 (1972)); see also *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 562, 371 A.2d 1192, 1232 (1977) (exclusionary zoning is also motivated by long-standing social and racial fears and prejudices) (Pashman, J., concurring). In *Oakwood*, Pashman noted one study which reported that the residents of an "all-white" suburb of Detroit chose to reject all further federal funds for urban renewal, rather than comply with an order to provide housing for minority residents. See *id.* at 562 n.4, 371 A.2d at 1232 n.4 (Pashman, J., concurring).

Justice Pashman acknowledged, however, that there was no racial motivation behind the ordinance at issue in *Mount Laurel I*. See *Mount Laurel I*, 67 N.J. at 196 n.2, 336 A.2d at 736 n.2.

43. 72 N.J. 481, 371 A.2d 1192 (1977).

44. *Id.* at 543, 371 A.2d at 1223. Apparently, the impetus for this decision was the inability of the superior court to set a specific figure for the number of housing units needed in order for Madison Township to fulfill its *Mount Laurel* obligation.

Like the *Mount Laurel I* court, the *Oakwood* court avoided clear definitions of the terms "fair share" and "region."⁴⁵ In addition, the *Oakwood* decision has been criticized for accepting "least cost" housing as a substitute for low and moderate income housing. "Least cost" housing refers to the least expensive housing that could be built after removal of zoning restrictions.⁴⁶ *Oakwood* has generally

45. The court found that precise definitions of these terms could not be formulated by the judiciary and that their formulation was more appropriately the function of an administrative agency created by the state legislature. "Fair share" was difficult to calculate because "numerical housing goals are not realistically translatable into specific substantive changes in a zoning ordinance." *Id.* at 498-99, 371 A.2d at 1200-01. "Region" would have to remain an amorphous concept because:

[T]he breadth of approach by the experts to the factor of the appropriate region and to the criteria for allocation of regional housing goals to municipal "subregions" is so great and the pertinent economic and sociological considerations so diverse as to preclude judicial dictation of any one solution as authoritative.

Id. at 499, 371 A.2d at 1200.

The court thus adopted the vague definition of "region" set forth by the lower court as "the area from which, in view of available employment and transportation, the population of the township would be drawn, absent exclusionary zoning." *Id.* at 537, 371 A.2d at 1219.

Instead of helping municipalities determine their fair share of the regional need by clarifying the terms left undefined in *Mount Laurel I*, the court upheld *Mount Laurel I* but failed to enforce it when a situation arose in which the need to do so was clear. Justice Pashman, the strongest advocate on the New Jersey Supreme Court of specific judicial enforcement of the *Mount Laurel* mandate, stated the following:

[I]f the rights afforded by *Mount Laurel* are to have any real meaning or value, fulfillment of the obligation must be measured in terms of actual production of sufficiently dispersed low and moderate income housing. Judicial relief therefore must be geared toward achieving that goal.

Id. at 578-89, 371 A.2d at 1241 (Pashman, J., concurring & dissenting).

46. *See id.* at 512, 371 A.2d at 1207. "Least cost" housing is generally not affordable to people of low income. Rather, it is available primarily to middle income families who can not afford housing in the conventional suburban housing market. *See Mount Laurel II*, 92 N.J. 158, 277, 456 A.2d 390, 451 (1983). The *Oakwood* majority was sympathetic to the defendant's argument that, due to the insufficiency of governmental subsidies for the construction of low and moderate income housing, it was not economically feasible for private industry to construct such housing. The court held that since zoning changes alone were not likely to produce a substantial amount of low income housing, zoning regulations need only make possible the construction of "least cost" housing, consistent with certain minimum standards of health and safety, to fulfill the fair share requirement. *See Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 510-14, 371 A.2d 1192, 1206-08 (1977).

Although construction of "least cost" housing may not create new units for low and moderate income residents, it would increase the housing supply and indirectly

been viewed as a retreat from *Mount Laurel I*.⁴⁷

In *Pascack Association v. Washington*,⁴⁸ the New Jersey Supreme Court retreated further from the obligation set forth in *Mount Laurel I*. As in *Mount Laurel I*, the zoning ordinance in Washington Township did not provide for low income housing. Nevertheless, the court upheld the ordinance, stating:

Maintaining the character of a fully developed, predominantly single-family residential community constitutes an appropriate desideratum of zoning to which a municipal governing body may legitimately give substantial weight in arriving at a policy legislative decision as to whether, or to what extent, to admit multi-family housing in such vacant land areas as remain in such a community.⁴⁹

In contravention of the *Mount Laurel* principle that zoning by municipalities must be for the general welfare of all the state's citizens,⁵⁰ the *Pascack* court focused on the use of the term "de-

provide housing to these residents through the process of "filtering down." Under the "filtration," "filter down" or "trickle down" theory of housing, it is argued that as new units are constructed for higher income families, previous units become available for those residents of slightly lesser income. See generally HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 161-62 (R. Montgomery & D. Mandelker (1979)); W. SMITH, FILTERING AND NEIGHBORHOOD CHANGE (1964). According to this theory, a shift occurs throughout the housing market, leaving units at the bottom newly available for the lowest income residents in the community. "The shorter the chain, the sooner the needs of the lowest income families are met and presumably the better the facilities made available to them. The shortness of the chain obviously depends on the inexpensiveness of the most recently constructed housing." *Oakwood*, 72 N.J. at 515 n.22, 371 A.2d at 1208 n.22.

The filtration theory has been widely criticized for its tendency to leave low income residents with seriously substandard housing. See, e.g., McDougall, *Mount Laurel II and the Revitalizing City*, 15 RUTGERS L.J. 667, 688-91 (1984) [hereinafter *Revitalizing City*]; Edel, *Filtering in the Private Housing Market*, in READINGS IN URBAN ECONOMICS 204-15 (M. Edel & J. Rothenberg ed. 1972); G. Hawkins, *An Explosion Within: An Alternative Analysis to the Trickle Down Theory of Housing Markets* (1986) (on file with Professor Duncan Kennedy, Harvard Law School).

Moreover, as housing values appreciate, filtering does not provide housing for low income residents in the suburbs. Rather, it exacerbates urban flight, leaving most low income residents in the inner cities. See *Mount Laurel II*, 92 N.J. at 278, 456 A.2d at 451.

47. See generally Rose, *Oakwood at Madison: A Tactical Retreat to Preserve the Mount Laurel Principle*, 13 URBAN L. ANN. 3 (1977). "The basic notion in *Oakwood at Madison*, that towns are more likely to comply with a general instruction to do something, and less likely to comply if they are told exactly what to do, is one of those things which simply passes all understanding." Williams, *The Background and Significance of Mount Laurel II*, 26 J. URB. & CONTEMP. LAW 3, 17 (1984).

48. 74 N.J. 470, 379 A.2d 6 (1977).

49. *Id.* at 483-84, 379 A.2d at 13.

50. See *supra* notes 30-33 and accompanying text.

veloping municipalities" by the *Mount Laurel I* court and affirmed the ordinance on the ground that Washington Township was fully developed.⁵¹

3. *Mount Laurel II*

In the unanimous decision of *Mount Laurel II*,⁵² the New Jersey Supreme Court reaffirmed the principles set forth in *Mount Laurel I* and established a system of judicial enforcement of those principles.⁵³ The opinion began:

51. Once again, Justice Pashman criticized the majority's "developed/developing" distinction as contradictory to the general intent of *Mount Laurel I* to require municipalities to provide for regional housing needs in their zoning ordinances. See *Pascack*, 74 N.J. at 503, 379 A.2d at 23 (Pashman, J., dissenting); *supra* note 35. Justice Pashman advocated applying the obligation to all municipalities, recognizing that municipalities go through various stages of development over time. See *id.* at 503-04, 379 A.2d at 23-24. He went on to attack the majority's failure to define adequately the term "developing municipality" because the continued ambiguity would expand the number of communities that would escape the *Mount Laurel* mandate. See *id.* at 505, 379 A.2d at 24. Furthermore, the label of "developed" under this decision would reward an exemption from the *Mount Laurel* doctrine to any municipality that was able to exclude low income residents until all of its land was developed, thereby encouraging discriminatory zoning in such communities. Moreover, the remaining communities in the region would have a larger "fair share" burden as a consequence. See *id.* at 505-06, 379 A.2d at 24.

52. 92 N.J. 158, 456 A.2d 390 (1983). *Mount Laurel II* resolved six consolidated cases involving challenges to municipal zoning ordinances. See *id.* at 199 n.1, 456 A.2d at 410 n.1.

53. The *Mount Laurel II* court set up a system whereby a special master, appointed by the trial court, would help municipal officials revise a zoning ordinance that had been found by the trial court to violate the *Mount Laurel* doctrine. See *id.* at 281, 456 A.2d at 453. The defendant-municipality would have to submit a revised ordinance within 90 days of the judgment of noncompliance. If the new ordinance was still in violation of *Mount Laurel*, the court would order remedies, such as forced acceptance by the municipality of a court-ordered ordinance or delays in construction of other projects in the municipality until its zoning ordinance was in compliance. See *id.* at 281-90, 456 A.2d at 453-58.

The *Mount Laurel II* court, expressing its desire to cut down on *Mount Laurel* litigation, ordered that there would be just one trial and one appeal in *Mount Laurel* cases. See *id.* at 218, 290, 456 A.2d at 420, 458. Once a municipality was found to be in compliance, the determination would have res judicata effect for six years, giving the municipalities a six-year period of repose. See *id.* at 291-92, 456 A.2d at 458-59. The court held that compliance judgments would have res judicata effect for six years "despite changed circumstances," but added in a footnote that "a substantial transformation of the municipality . . . may trigger a valid *Mount Laurel* claim before the six years have expired." *Id.* at 291, 292 n.44, 456 A.2d at 459, 459 n.44. Note that this period of repose has more resistance to changed circumstances than the res judicata doctrine normally would provide. See Chall, *Housing Reform in New Jersey: The Mount Laurel Decision*, 10 FED.

This is the return, eight years later, of [*Mount Laurel I*]. . . . [T]en years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains blatantly afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to

RESERVE BANK N.Y. Q. REV. 19, 22 n.12 (Winter 1985-1986) [hereinafter Chall].

Mount Laurel II not only ordered judicial enforcement of the *Mount Laurel* doctrine, but specifically delineated judicial remedies for parties challenging exclusionary zoning ordinances. The court expanded the use of the "builder's remedy" created in *Oakwood*. The "builder's remedy" is the court-ordered issuance of a building permit to a developer-plaintiff who successfully challenges the validity of a zoning ordinance under the *Mount Laurel* doctrine. See *Oakwood*, 72 N.J. at 548-51, 371 A.2d at 1226-27. Whereas the *Oakwood* court discouraged the use of the builder's remedy except in rare cases, *Mount Laurel II* held that a builder's remedy should be granted in all cases where a proposed development contained "substantial" low income housing, unless the municipality could establish that the development would conflict with sound land use concerns. See *Mount Laurel II*, 92 N.J. at 279-80, 456 A.2d at 452-53.

The court suggested that a proposed development would have a "substantial" amount of low income housing if 20% of the units would be designated for low income residents. See *id.* at 279 n.37, 456 A.2d at 452 n.37. Thus, a developer would be granted the right to invalidate a zoning ordinance affecting its land and to build at higher densities if: (1) it proved either that the ordinance is facially invalid or that the municipality has failed to provide its fair share of low income housing; (2) it showed that its proposed development would include a substantial number of low income units; and (3) the municipality failed to establish that the proposed development contradicted sound planning or threatened the environment. See *id.* at 279-80, 456 A.2d at 452-53.

The builder's remedy was designed to motivate municipalities to provide their fair share of low income housing on a voluntary basis. If a municipality were to satisfy its housing obligation through mandatory set-asides, it could select where the low income housing would be constructed as well as the set-aside percentage—that is, the ratio between lower and higher income units to be constructed. By contrast, the grant of a builder's remedy enables the builder to construct the density housing wherever the land happens to be located. Moreover, since the *Mount Laurel II* court recommended a 20% set-aside ratio for proposed developments in the builder's remedy context, a community may be forced to absorb a greater number of housing units than it would were it voluntarily to enter into an agreement with a builder and arrange for a different set-aside percentage.

Under a builder's remedy, a municipality is forced to accept four market rate units for every low income unit a developer proposes to provide. The *Mount Laurel II* court, however, cautioned developers that the builder's remedy was not to be used as a threat or "bargaining chip in a builder's negotiations with the municipality," and that the remedy would be awarded in such a way as to assure that low income housing would in fact be constructed. See *id.* at 280-81, 456 A.2d at 452-53. Developers who have no intention of building low income housing and are unable to secure building permits would not be able to benefit from the builder's remedy. The builder's remedy was intended to benefit all parties adversely affected by exclusionary zoning. As one commentator has noted, the builder's remedy "attempts to give developers common interests with civil rights groups, making them willing to bear costs of litigation that the latter groups can not afford." Chall, *supra*, at 19, 22-23.

nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread noncompliance with the constitutional mandate of our original opinion in this case.

To the best of our ability, we shall not allow it to continue. The court is more firmly committed to the original *Mount Laurel* doctrine than ever, and we are determined, within appropriate judicial bounds, to make it work.⁵⁴

The *Mount Laurel II* opinion emphasized the need for the eradication of exclusionary zoning in order to revitalize New Jersey's cities and its overall economy.⁵⁵ Accordingly, Justice Wilentz created

54. *Mount Laurel II*, 92 N.J. at 198-99, 456 A.2d at 409-10. The court was determined to "put some steel" into the *Mount Laurel* doctrine, commenting throughout its lengthy opinion that the nonresponsiveness of the state legislature to widespread exclusionary zoning forced the judiciary to enforce the constitutional obligation of *Mount Laurel I*. The court noted that "it has traditionally been the judiciary, and not the [l]egislature, that has remedied substantive abuses of the zoning power by municipalities" in New Jersey. *Id.* at 213 n.7, 456 A.2d at 417 n.7.

The issue of whether the *Mount Laurel II* court remained "within appropriate judicial bounds" in crafting cures for exclusionary zoning has provoked a considerable controversy. See, e.g., Tarr & Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513 (1984) (discussing arguments against judicial activism by state courts). One commentator wrote:

[A]re the detrimental consequences of exclusionary zoning sufficiently antisocial, evil, and uncivilized, and the causal relationship sufficiently clear for the judiciary to override the decisions of those branches of government which have express constitutional policymaking authority? Or, is the extent of the harmful consequences, when compared to alternative urban policies, sufficiently debatable to withhold judicial intervention?

Rose, *New Additions to the Lexicon of Exclusionary Zoning Litigation*, 14 SETON HALL L. REV. 851, 887-88 (1984) (exclusionary zoning is not a suitable area for judicial intervention since its consequences are not as harsh as those of a "holocaustal" policy) [hereinafter Rose].

55. See *Mount Laurel II*, 92 N.J. 158, 211 n.5, 456 A.2d 390, 415 n.5 (1982). The court explained that:

The provision of lower income housing in the suburbs may help to relieve cities of what has become an overwhelming fiscal and social burden. It may also make jobs more accessible for the unemployed poor. Deconcentration of the urban poor will presumably make cities more attractive for businesses and upper income residents to return to

. . . The damage done by urban blight and decay is in no way confined to those who remain in our cities. It affects all of us. Violent crime and drug abuse spawned in urban slums do not remain within city limits, they spread out to the suburbs and infect those living there. Efforts to combat these diseases require expenditures of public dollars that drain all taxpayers, urban and suburban alike. The continuing disintegration

a framework to achieve this goal. First, the court directed that every zoning ordinance provide a realistic opportunity for "decent housing" for the municipality's present indigenous poor living in dilapidated or overcrowded housing, "except where they represent a disproportionately large segment of the population," as in urban areas.⁵⁶ Where a municipality, usually an urban area, has a greater concentration of inadequately housed poor than the surrounding region, those municipalities containing "growth" areas must provide housing for a portion of the lower income municipality's poor residents.⁵⁷

Second, *Mount Laurel II* rejected the *Oakwood* proposition that a general intent or good-faith attempt in a zoning ordinance to provide low and moderate income housing would be adequate. Rather, the court held that a municipality must "*in fact* [provide] a realistic opportunity for the construction of its fair share of low and moderate income housing"⁵⁸ Compliance with the *Mount Laurel* mandate would require both a specific numerical fair share of units set out

of our cities encourages businesses and industry to leave New Jersey altogether, resulting in a drain of jobs and dollars from our economy. In sum, the decline of our cities and the increasing economic segregation of our population are not just isolated problems for those left behind in the cities, but a disease threatening us all.

Id.

56. See *id.* at 214-15, 456 A.2d at 418. One commentator criticized this "disproportionately large segment" limitation on the obligation to provide housing for indigenous poor, cautioning that it may encourage cities to seek exemption from the *Mount Laurel* mandate. See *Revitalizing City*, *supra* note 46, at 676.

57. See *Mount Laurel II*, 92 N.J. at 226-27, 456 A.2d at 424-25. The existence of a "growth area" is determined by several criteria, including:

- (1) location within or adjacent to major population and/or employment centers;
- (2) location within or in proximity to existing major water supply and sewer service areas;
- (3) location within or in proximity to areas served by major highway and commuter rail facilities;
- (4) absence of large concentrations of agricultural land; and
- (5) absence of large blocks of public open space or environmentally-sensitive land.

SURENIAN, *supra* note 27, at 173.

58. *Mount Laurel II*, 92 N.J. at 221, 456 A.2d at 421-22. The court defined "moderate income families," "low income families" and "affordable housing" as follows:

'Moderate income families' are those whose incomes are no greater than 80% and no less than 50% of the median income of the area, with adjustments for smaller and larger families. 'Low income families' are those whose incomes do not exceed 50% of the median income of the area

. . . [Affordable housing] mean[s] that the family pays no more than 25% of its income for such housing

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

in the ordinance and a "likelihood . . . that the lower income housing [would] actually be constructed."⁵⁹

59. *Id.* at 222, 456 A.2d at 422. Decisions following *Mount Laurel I* have construed its "realistic opportunity" requirement "as requiring a . . . theoretical, rather than realistic, opportunity for low income housing: a municipality had merely to remove from its zoning regulation any restriction against the building of such housing." 92 N.J. at 260, 456 A.2d at 442. The *Mount Laurel II* opinion emphasized that the *Mount Laurel* doctrine requires a municipality to remove such barriers and to take affirmative steps to provide a realistic opportunity for the construction of its fair share of the regional need for low and moderate income housing.

Recognizing that satisfaction of the *Mount Laurel* doctrine can not depend on the inclination of developers to help the poor, the court delineated two types of affirmative measures which a municipality might take. First, municipalities could encourage or even require the use of available state or federal housing subsidies. Second, municipalities could employ inclusionary zoning techniques. *See id.* at 262-77, 456 A.2d at 443-51.

"Inclusionary zoning" includes incentive zoning, such as sliding scale density bonuses and fixed bonuses for participation in low income housing programs, as well as mandatory set-asides. *See id.* at 266-74, 456 A.2d at 443-49. *See generally* R. WILLIAMS, ON THE INCLINATION OF DEVELOPERS TO HELP THE POOR (Lincoln Institute of Land Policy, Policy Analysis Series No. 211, 1985) [hereinafter WILLIAMS]; Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167 (1981); Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015 (1976). A "sliding scale density bonus" increases the permitted density as the amount of low income housing provided is increased. *See Mount Laurel II*, 92 N.J. at 266, 456 A.2d at 445. A "density bonus" reduces the land price per unit of housing by permitting a developer to build more units per acre than otherwise allowed under the municipality's zoning ordinance. *See WILLIAMS, supra*, at 12.

The "mandatory set-aside" is the chief device used by municipalities to bring their regulations into compliance. *See SURENIAN, supra* note 27, at 300. In a mandatory set-aside program, a municipal developer must construct a mandatory percentage of low income units within its development. The set-aside percentage is determined by the municipality. *Id.* at 301. Since the low income units are typically made available at prices well below the cost of their construction, most mandatory set-aside programs include density bonuses as a compensating precaution against the possibility of a challenge by a developer to the straight set-aside program as an unconstitutional taking of property. *See WILLIAMS, supra*, at 15. "Where it can be asserted, however, that there exists no legislatively-vested right to develop land, then the issuance of the building permit itself may be argued as adequate compensation, thus avoiding the takings issue." *Id.*

The *Mount Laurel II* court directed municipalities and courts to order the phase-in of lower income units while other units in a development were being built. Thus, municipalities could avoid the problem of a developer completing the higher income units and then failing to fulfill the obligation to provide the lower income units. *See Mount Laurel II*, 92 N.J. at 270, 456 A.2d at 447.

Mandatory set-asides with density bonuses as a means of subsidizing the construction of low income housing is problematic because it requires a community to accommodate a much greater number of housing units in fulfilling its fair share obligation than it would have to if sufficient government subsidies were available. For example, a municipality found to have an obligation of 200 low income units could be forced to accept 1000 new units under a 20% set-aside program in order

Third, the court rejected the "developing municipality" language of *Mount Laurel I*, which had enabled many municipalities classified as "developed" to avoid the *Mount Laurel* obligation.⁶⁰ The *Mount Laurel II* court extended the obligation to every municipality that encompassed any land characterized by the State Development Guide Plan (SDGP) as a "growth" area.⁶¹ In addition, the court overruled the *Pascack* decision. Although the extent of development in a municipality would be a factor in determining the size of the municipality's *Mount Laurel* obligation and the timing of its implementation, the obligation would still exist for fully developed municipalities, including built-up suburbs and central cities.⁶²

Fourth, the court moved to fill the gap left by *Mount Laurel I* in its failure to define "fair share" and "region."⁶³ The court adopted the *Oakwood* definition of "region"⁶⁴ and designed a special court to hear all *Mount Laurel* litigation.⁶⁵ Over time, this system would reveal a consistent pattern of regions. The major factor to be determined in *Mount Laurel* litigation would then be a particular municipality's fair share of that regional need.⁶⁶ The court required

to get the 200 units built. While 800 higher income units will generate tax revenues, 1000 new units may burden the municipal infrastructure beyond its capacity. Moreover, the creation of 1000 new units would have a far more noticeable impact on the character of the community than would 200 new units. However, because the *Mount Laurel II* court could not allocate state funds to subsidize the construction of the low income units, the court was left with inclusionary zoning techniques as the primary means of accomplishing construction of the units.

60. See, e.g., *Pascack Ass'n v. Washington*, 74 N.J. 470, 379 A.2d 6 (1977). See notes 48-51 and accompanying text for a discussion of this case.

61. See *supra* note 57 for a definition of "growth area." The court emphasized, however, that the State Development Guide Plan (SDGP) should not be "the absolute determinant of the locus of the *Mount Laurel* obligation" because the legislature did not design it for this purpose. Nonetheless, the cases where the locus of the *Mount Laurel* obligation differed from the "growth area" as determined by the SDGP would be rare. See *Mount Laurel II*, 92 N.J. at 239, 456 A.2d at 431.

62. See *id.* at 240-48, 456 A.2d at 431-35. See *supra* notes 36, 51 and accompanying text for a discussion of the court's past treatment of the "developed/developing" distinction.

63. See *supra* notes 35-36, 45 and accompanying text.

64. The *Oakwood* court defined "region" as "the area from which, in view of available employment and transportation, the population of the township would be drawn, absent exclusionary zoning." See *supra* note 45 and accompanying text.

65. See *Mount Laurel II*, 92 N.J. at 253, 456 A.2d at 438-39. Three judges, each to be chosen by the Chief Justice and approved by other members of the New Jersey Supreme Court, would hear all *Mount Laurel* litigation. See *id.*

66. In determining fair share, the court endorsed the use of statewide growth plans developed by agencies such as the Department of Environmental Protection, plans formulated by county planning boards, and population projections developed

that the fair share determinations apportion among low and moderate income housing needs.

Fifth, the *Mount Laurel II* court circumscribed the adequacy of "least cost" housing to fulfill a *Mount Laurel* obligation. Since it benefits primarily middle rather than moderate or low income families, least cost housing is sufficient only in situations where the municipality has removed excessive zoning barriers and exhausted other measures to reduce building costs, yet land prices remain high enough to prohibit the construction of low income housing.⁶⁷

Finally, the court allowed for phase-in programs if the number of units needed would have too radical an impact on community services.⁶⁸ In addition, limits on municipalities' fair share determinations would be allowed if construction of the full number of new units based on regional need would require diminishing environmental land reserves or would adversely affect the environment in some other way.⁶⁹ Under *Mount Laurel II*, once a municipality had fulfilled its *Mount Laurel* obligation, it would be free to zone areas for upper income housing, or in accordance with fiscal obligations.⁷⁰ Such zoning regulations would not be void under the *Mount Laurel* doctrine once the municipality provided for its fair share.⁷¹

As in *Mount Laurel I*, the *Mount Laurel II* court did not directly consider race as an element of exclusionary zoning. Despite Justice Pashman's comments on racism and exclusionary zoning in *Mount Laurel I* and *Oakwood*,⁷² the only mention by the *Mount Laurel II* court of race as a factor in exclusionary zoning was a reference, buried in a long footnote, to a finding by the National Advisory Commission on Civil Disorders that suburban exclusionary zoning was a principal reason why the United States was developing into two societies, "one black, one white—separate and unequal."⁷³

by agencies such as the Departments of Transportation and Energy. The court expressed a preference for fair share formulas that give "substantial weight to employment opportunities in the municipality, especially new employment accompanied by substantial ratables." *Id.* at 256, 456 A.2d at 440.

67. *See id.* at 277, 456 A.2d at 451.

68. *See id.* at 219, 456 A.2d at 420.

69. *Id.* "No forests or small towns need be paved over and covered with high-rise apartments as a result of today's decision." *Id.*

70. *See id.* at 259-60, 456 A.2d at 442.

71. The regulations could be voided for other reasons, however, such as a failure to bear a reasonable relationship to a legitimate governmental goal. *See id.*

72. *See supra* notes 41-42 and accompanying text.

73. *Mount Laurel II*, 92 N.J. at 210 n.5, 456 A.2d at 415 n.5 (citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (U.S. Gov't Printing Office 1968)).

C. The Fair Housing Act and Regional Contribution Agreements

Following the *Mount Laurel II* decision, the specialized trial courts processed exclusionary zoning cases expeditiously and imposed large fair share burdens on municipalities, thus encouraging municipalities to comply voluntarily with the *Mount Laurel* mandate.⁷⁴ As a result, municipalities could no longer avoid compliance by litigating indefinitely in an effort to outspend plaintiffs who had challenged their zoning ordinances.⁷⁵ These municipalities began to put pressure on the Governor and the state legislature to enact legislation that would reduce the number of fair share units imposed by the courts.⁷⁶

In exchange for protection against exclusionary zoning litigation, the Fair Housing Act (the Act),⁷⁷ enacted on July 2, 1985, supplanted the *Mount Laurel II* enforcement mechanisms with new procedures by which municipalities may voluntarily fulfill the requirements of the *Mount Laurel* doctrine.

1. Major Provisions of the Act

The Act established the Council on Affordable Housing (the Council) to determine the fair share housing obligations of municipalities.⁷⁸

74. See SURENIAN, *supra* note 27, at 12-13.

75. Objections to the threat of the builder's remedy, as well as to the mandatory set-aside for its onerous construction ratios that forced cities to accommodate several market units for each low income unit a developer provided, also fueled this political pressure. See *id.* at 14-15.

76. See *id.* at 13. In the Minority Statement on the Fair Housing Act, the Republican minority criticized the specialized trial courts for the size of the housing burdens they were imposing on exclusionary municipalities. See *id.* at 13-14 (citing Fair Housing Act, Minority Statement (1985)).

77. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1988).

78. N.J. STAT. ANN. § 52:27D-307 (West 1988). The Council is empowered to: (1) define housing regions; (2) estimate the present and prospective need for low and moderate income housing at the state and regional levels; (3) adopt guidelines for municipalities to determine their fair share of the regional housing need and methods of adjusting and phasing in their fair shares; (4) provide population and housing projections; and (5) place a limit on the aggregate number of units a municipality may be required to build. See *id.*

The Department of the Public Advocate has objected to the substantive regulations of the Council for its failure to insure the initial and continued affordability and availability of low income housing. The regulations make purchase prices "affordable" only for those families exactly at the 50% and 80% of median income levels, and "almost three-fourths . . . of all low income households in New Jersey have incomes less than 35% of the median." S. Eisdorfer, Initial Comments by the Department of the Public Advocate Upon the Proposed Regulations of the Council on Affordable Housing 4-6 (June 30, 1986) (unpublished manuscript) (available at *Fordham Urban Law Journal* office) [hereinafter Eisdorfer]. Due to

A 1987 amendment to the Council's regulations sets the maximum fair share obligation at 1000 units for a single municipality.⁷⁹ The Act further provides that municipalities may phase in their fair share obligations, but they may also be required to phase in other development simultaneously so as to maintain a balance between the construction of low income units and other development.⁸⁰

financing problems encountered by low income families, rental housing is the only realistic option for most of these families, and the regulations do not require housing plans to include rental housing. Moreover, the resale price controls extend for only 20 years. *See id.* at 8-10.

Despite the *Mount Laurel II* court's rejection of the filtration theory, the Council's housing allocation methodology, set forth in their regulations, assumes a downward filtration:

[The Council's housing allocation methodology] substantially reduces the total unmet lower income housing need by positing that downward filtration will produce a net addition to the housing stock between 1987 and 1988 of approximately 50,000 safe, decent units affordable to lower income households. It is the single largest downward adjustment to the gross need figure proposed by the regulation.

Id. at 12.

Mr. Eisdorfer goes on to illustrate how filtration does not work. Destruction, abandonment and conversion to other uses decreased the low income housing market in Newark by more than half between 1964 and 1981. *See id.* at 13-14 (citing BURCHELL, *THE NEW REALITY OF MUNICIPAL FINANCE: THE RISE AND FALL OF THE INTERGOVERNMENTAL CITY* 145 (1985)). Finally, Mr. Eisdorfer points out the absurdity in the Council's application of filtration: the regulations allocate the units made available by filtration among the municipalities in proportion to the number of multi-family units in each municipality. Wealthy suburbs, where extremely expensive homes constitute the entire housing market, are presumed to have low income units made available by filtration, and this assumption decreases their fair share obligations. *See id.* at 14-15.

79. N.J.A.C. § 5:92-7.1 (1987). Many potential sending municipalities delayed filing with the Council or negotiating with poor communities for RCAs, or both, in anticipation of the passage of this amendment. *See Patterson, Trade-in Deals Help to House the Poor*, *Star-Ledger* (N.J.), May 4, 1987, at 1, col. 1 [hereinafter Patterson]. Thus, the possibility that the numbers would be reduced, like so many other variables in the *Mount Laurel* saga, contributed to delays in construction.

80. N.J. STAT. ANN. § 52:27D-323 (West 1987). Construction of low and moderate income units in inclusionary developments may be phased in according to the following schedule:

<i>Court-Calculated Fair Share Obligation</i>	<i>Phase-in Period</i>
2,000 or more low-to-moderate units	20 years
1,500-1,999 of low-to-moderate units	15 years
1,000-1,499 of low-to-moderate units	10 years
500-999 of low-to-moderate units	6 years
Less than 500 of low-to-moderate units	up to 6 years

See Rose, New Jersey Enacts a Fair Housing Law, 14 *REAL EST. L.J.* 195, 201 (1985) (outlining the guidelines as set out in § 23 of the Fair Housing Act) [hereinafter *Fair Housing*].

Municipalities may voluntarily submit a fair share housing plan to the Council as well as an ordinance with which to implement the plan in a "housing element."⁸¹ The housing element must demonstrate that it will create a realistic opportunity for the provision of low and moderate income housing, using such techniques as mandatory set-asides or density bonuses,⁸² infrastructure expansion (if necessary), guarantees of continued affordability of the units to

81. N.J. STAT. ANN. § 52:27D-309 (West 1987). The housing element should include: (1) an inventory of the municipality's housing stock; (2) a six-year projection of housing scheduled to be built in the municipality; (3) an analysis of the municipality's demographic characteristics; (4) an analysis of the employment opportunities in the community; (5) a determination of the municipality's present and prospective fair share and its ability to accommodate its fair share; and (6) an analysis of the developable real estate in the municipality, including existing structures suitable for conversion. *See id.* § 52:27D-310.

The housing element works as an insurance policy for the municipality against *Mount Laurel* litigation. After filing a housing element, a municipality may be granted a six-year period of repose from *Mount Laurel* litigation by petitioning either the Council for "substantive certification" of its element and zoning ordinances or the superior court for a declaratory judgment that its element and ordinances are not exclusionary. *See id.* § 52:27D-313. "Substantive certification" creates a presumption of validity of the housing element and zoning ordinances that a plaintiff may overcome only by a showing of clear and convincing evidence that the municipality's element and the ordinances designed to implement it are exclusionary. *See id.* § 52:27D-317. Thus, as one commentator has noted, "the Council's administrative process . . . reverses the presumption . . . of municipal wrongdoing—one of the key features of *Mount Laurel II*—to a presumption in favor of the certified zoning ordinance." McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623, 636 (1987) [hereinafter *Litigation to Legislation*].

The Council will grant "substantive certification" if a housing element is found to fulfill a municipality's *Mount Laurel* obligation, unless an objection to substantive certification is filed with the Council within 45 days of publication of the municipality's petition. *See* N.J. STAT. ANN. § 52:27D-314 (West 1987).

The Act established a procedure for mediation by the Council if substantive certification of a housing element is challenged, and review by the Office of Administrative Law if the Council is unable to resolve the matter. *See id.* § 52:27D-315. The Office of Administrative Law must issue its decision within 90 days of transmittal of the case, and the Council makes the final determination on substantive certification. *Id.*

A challenger of a substantive certification may appeal to the superior court only after these administrative remedies have been exhausted. *See* Chall, *supra* note 53, at 25. The Act also provides:

Any exclusionary zoning cases instituted after 60 days before the effective date of the Act are automatically transferred to the jurisdiction of the Council. Any such cases that were in the courts and still unresolved prior to 60 days before the effective date of the Act were to be transferred to the Council if the court found "no manifest injustice would result."

N.J. STAT. ANN. § 52:27D-316 (West 1987).

82. *See supra* note 59 for a definition of these terms.

low income residents, and tax abatements and use of state or federal subsidies for construction of low income units.⁸³

Under the Act, municipalities are not required to raise revenues to fund the construction of low and moderate income housing.⁸⁴ The legislature designated state funds to subsidize the rehabilitation and construction of low and moderate income housing under the Act.⁸⁵ The Act also directs the State Housing and Mortgage Finance Agency to: (1) oversee the construction or rehabilitation of the low income housing; (2) work with cities and developers to market the units in inclusionary developments; and (3) determine tenant eligibility, resale prices and rents.⁸⁶

83. See N.J. STAT. ANN. § 52:27D-311.

84. *Id.* If a municipality misses the deadline established by the Council for the filing of its housing element, its case is dismissed from the jurisdiction of the Council. Those municipalities that give notification of their intent to submit to the jurisdiction of the Council but fail to meet the deadline for filing of the housing element lose the protection offered by the Act, and thus run the risk of exclusionary zoning litigation.

As of January 5, 1987, only 91 municipalities had submitted to the jurisdiction of the Council and had met their deadlines. *January 5th COAH Deadline*, Council on Affordable Housing Newsletter 1 (Jan. 1987). As of January 5, 1987, 80% of New Jersey's municipalities still had the option of voluntarily complying with the Act. See SURENIAN, *supra* note 27, at 462.

It seems that only those municipalities that have been through the courts and those that would have small fair share obligations are submitting to the jurisdiction of the Council. In addition, many municipalities do not see themselves as threatened by litigation. Some argue that the low rate of compliance is attributable to the Office of the Public Advocate challenging many housing elements as insufficient. Therefore, municipalities run a risk of administrative hearings and, possibly, litigation based on their voluntary compliance. Telephone interview with Joanne Harkin, New Jersey Builders' Association (Oct. 1, 1987).

85. See *Fair Housing*, *supra* note 80, at 201; see also Chall, *supra* note 53, at 26. Although *Mount Laurel II* ordered municipalities to take affirmative steps to ease the financial burdens on developers of providing low income housing, the court did not have the power to designate state funds for this purpose. In this respect, the Fair Housing Act (the Act) surpasses the *Mount Laurel* doctrine in its aid to development of low income housing.

The Act set aside \$100 million in state Housing and Mortgage Finance Agency (HMFA) bond revenues to be used for mortgage subsidies, \$15 million from general revenues to be used for various projects, and another \$10 million (\$2 million from general revenues and \$8 million from an increase in the realty transfer tax) to fund various housing and infrastructure costs paid for by the Neighborhood Preservation Program. See *Fair Housing*, *supra* note 80, at 201; see also Chall, *supra* note 53, at 26 (citing Governor Kean's conditional veto message of the bill originally sent to him) (available at *Fordham Urban Law Journal* office). The realty transfer tax was increased for the purpose of funding this program. See *id.* (citing 1985 N.J. Pub. Law, ch. 225).

86. See N.J. STAT. ANN. §§ 52:27D-304, -324 (West 1987); *Fair Housing*, *supra* note 80, at 201-02.

2. Regional Contribution Agreements

The most radical difference between the *Mount Laurel* doctrine and the Fair Housing Act is that the Act allows one municipality—usually a wealthy suburb—to pay another municipality—usually a central city—to absorb half of the former's fair share.⁸⁷ Sections 11 and 12 of the Act permit municipalities to enter into "regional contribution agreements," under which one municipality may transfer up to fifty percent of its fair share obligation to another municipality within its housing region.⁸⁸

A municipality's plan to enter into a regional contribution agreement (RCA) must be submitted in its housing element and must include: (1) the municipality's reasons for entering into an RCA; (2) the agreement between the sending and receiving municipalities; (3) the number of units to be transferred; and (4) an explanation of both the compensation to be provided to the receiving municipality by the sending municipality and the nature and source of the compensation.⁸⁹ The Council will approve by resolution an RCA that is "consistent with sound, comprehensive regional planning" and "provides a realistic opportunity for low and moderate income housing within convenient access to employment opportunities."⁹⁰ A

87. See Chall, *supra* note 53, at 24; *Fair Housing*, *supra* note 80, at 199; *Litigation to Legislation*, *supra* note 81, at 637; Passaro, *Consider the Transfer Option*, 1986 NEW JERSEY MUNICIPALITIES 20, 20; SURENIAN, *supra* note 27, at 553. See generally McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMP. L.Q. 665 (1987) [hereinafter *Compensation for Exclusionary Zoning*].

88. N.J. STAT. ANN. §§ 52:27D-311 to -312 (West 1987). The pre-veto bill would have allowed the transfer of only up to one-third of a municipality's fair share obligation. See *Litigation to Legislation*, *supra* note 81, at 638 n.101.

89. *Transferring Housing Obligations via RCAs*, Council on Affordable Housing Newsletter 5 (Aug. 1986) (available at *Fordham Urban Law Journal* office). The Council then forwards the RCA to the county planning board of the receiving municipality to consider whether the RCA is in accordance with: (1) sound regional planning; (2) the zoning ordinances of both the sending and receiving municipalities; (3) the county plan; and (4) the State Development Guide Plan. The receiving municipality must also submit the RCA plan to the HMFA for review. Finally, if the sending municipality is a defendant in an exclusionary zoning case, the court, in addition to the three agencies, must review the RCA. See N.J. STAT. ANN. § 52:27D-312(b), (c) (West 1987); see also SURENIAN, *supra* note 27, at 556-59.

90. N.J. STAT. ANN. § 52:27D-312(c) (West 1987). The Act mandates that the Council include in its resolution a schedule of contributions to be made annually by the sending municipality. The Department of Community Affairs must receive a copy of the resolution, and it will approve an annual budget of a sending municipality only if the budget provides for the compensation set forth in the resolution. See *id.* § 52:27D-312(d).

municipality may not, however, transfer any of its indigenous need.⁹¹

The receiving municipality may provide lower income housing pursuant to an RCA through: (1) new construction; (2) rehabilitation; (3) conversion of existing housing; (4) conversion of structures previously used for nonresidential purposes; and (5) creation of alternative living arrangements such as boarding homes.⁹² The receiving municipality does not satisfy any portion of its own fair share obligation by accepting units pursuant to an RCA.⁹³

The amount of compensation to be paid under an RCA is based on "a weighted average of the costs of rehabilitation and new construction."⁹⁴ The Act states that the compensation to be paid by a sending municipality 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."⁹⁵ The price does not, however, reflect other

91. See N.J. ADMIN. CODE § 5:92-6.1 (1987). As the Department of the Public Advocate has pointed out, however, although the Act prohibits the use of RCAs to reduce the proportion of the sending municipality's low income population, the regulations do not insure against this potential abuse. See Eisdorfer, *supra* note 78, at 17-18.

92. See N.J. ADMIN. CODE § 5:92-11.2(b), (c); SURENIAN, *supra* note 27, at 560.

93. See N.J. ADMIN. CODE § 5:92-11.3; SURENIAN, *supra* note 27, at 560.

94. See *Compensation for Exclusionary Zoning*, *supra* note 87, at 686 n.158. More specifically, this "weighted average" is based on an average of the median amount required to rehabilitate low and moderate income units and the average internal subsidization required for a developer to provide low and moderate income units in an inclusionary development. See N.J. STAT. ANN. § 52:27D-312(f) (West 1987); see also N.J. ADMIN. CODE § 5:92-11.5 (1987).

The Council's regulations estimate these costs as: (1) at least \$10,000 to rehabilitate a low or moderate income housing unit; (2) \$12,500 to provide a moderate income unit in an inclusionary development; and (3) \$27,500 to provide a low income housing unit in an inclusionary development. See *id.* § 5:92-11.5(b), (c) (1987); see also SURENIAN, *supra* note 27, at 561. These recommended figures have been interpreted as requiring a floor of \$10,000 and suggesting, but not requiring, a ceiling of \$27,000 per unit. See, e.g., *Compensation for Exclusionary Zoning*, *supra* note 87, at 686 n.158.

The Council establishes the duration of the compensation, which may be prorated in municipal appropriations over a period of up to six years. See N.J. STAT. ANN. § 52:27D-312(f) (West 1987).

95. *Id.* "'Infrastructure' refers to sewers, drainage, streets, parking areas, water and power, among other things." *Compensation for Exclusionary Zoning*, *supra* note 87, at 687 n.160.

There seems to be some confusion as to whether the Act intended to include infrastructure costs in the amount to be paid by the sending municipality. Although the language of the statute is relatively clear on this point, one commentator, Professor McDougall, has noted the following:

As part of the agreement, the sending municipality compensates the

considerations such as administrative costs to the receiving municipality of selecting tenants and buyers, costs of maintenance of rental units, cost overruns in construction,⁹⁶ and the cost of increased social services for any new residents transferred to a municipality as a result of an RCA.

Perhaps the most significant characteristic of the RCA procedure is that the sending and receiving municipalities are left alone to negotiate a transfer unit price, subject to the approval of the Council.⁹⁷ In general, the municipality that is able to offer the lowest price will receive the transferred housing. The Act and the Council's regulations thus foster a bidding process among New Jersey's municipalities, with poor communities bidding against one another for much needed housing.⁹⁸

There are two ways in which sending and receiving municipalities find one another: either a poor municipality looks for wealthy municipalities to provide housing for its residents, or a wealthy

receiving municipality in an amount equal to the equity costs the sending municipality would have incurred had it been required to develop lower-income housing units. Payments for infrastructure costs and other development costs are not included in equity costs and thus not required by the Act.

Litigation to Legislation, *supra* note 81, at 637-38. *But see Compensation for Exclusionary Zoning*, *supra* note 87, at 681 n.126 ("compensation may also include an amount for other costs generated by the development, such as infrastructure costs").

As Professor McDougall recognizes at another point, however, one of the failures of the Act is that "costs of project administration associated with rental housing, or costs of homeowner education and assistance associated with housing sold to low income persons, are not included." *Id.*

96. See *Compensation for Exclusionary Zoning*, *supra* note 87, at 687.

97. See *County Review Checklists for RCAs*, Council On Affordable Housing Newsletter 2 (Jan. 1987) (available at *Fordham Urban Law Journal* office).

98. See Patterson, *supra* note 79, at 15, col. 2. One commentator predicted a "bidding war" among sending municipalities based on an assumption that the demand among sending municipalities to transfer their fair share obligations would exceed the supply of low income housing opportunities in receiving municipalities in any given region. See SURENIAN, *supra* note 27, at 561. This commentator foresaw a need for supervision of RCAs by the Council to prevent receiving municipalities from abusing the process. He anticipated the possibility of receiving municipalities obtaining from the sending municipalities compensation far in excess of the amounts suggested by the regulations for the transferred units. Due to recent and severe cutbacks in fair share obligations as a result of the 1987 amendment to the Act, however, the competition is among the receivers, not the senders. See Patterson, *supra* note 79, at 15. For a detailed discussion of the effect of the bidding process on the goals of the *Mount Laurel* doctrine, see *infra* notes 133-39 and accompanying text.

municipality asks poor ones if they need housing.⁹⁹ In determining a transfer unit price, the Council's regulations recommend consideration of: (1) the extent of infrastructure already in place at the particular site within the receiving municipality; (2) the availability of cheap land and structures as a result of tax foreclosures and so forth; and (3) variations in labor costs and median incomes between urban and suburban sites.¹⁰⁰

Based on these criteria, the extent to which a community has deteriorated has a tremendous impact on whether it will be a receiving municipality under the RCA system. A municipality will be more desirable as a receiving municipality if it has a strong infrastructure in place that will be able to accommodate some of the new units, or, at least, serve as a model for another site within the municipality. Similarly, a community that has buildings suitable for rehabilitation and conversion will be more attractive than a community that has reached such a level of deterioration that the structures have either been torn down or need to be torn down. It is generally less expensive to renovate than to construct anew.¹⁰¹

99. Telephone interview with Sidna Mitchell, Public Information Officer, Council on Affordable Housing (Oct. 1, 1987).

The Act states that the Council must maintain a list of municipalities that intend to enter into RCAs as receiving municipalities. See N.J. STAT. ANN. § 52:27D-312(e) (West 1987).

100. See *Compensation for Exclusionary Zoning*, *supra* note 87, at 687 n.161. "Rehabilitation of existing sound structures is ordinarily cheaper than new construction. Deteriorated structures, however, must be razed and cleared to make way for new construction." *Id.*

101. See *id.* In addition, the infrastructure is likely to require less of an investment to be brought into compliance with health regulations at a rehabilitation site than at a site of new construction, where either no infrastructure exists or the old infrastructure has greatly deteriorated.

The city of Orange was able to offer a price of \$14,000 per renovated unit in an RCA with Essex Fells. Newark, which would have had to construct new units, quoted to Essex Fells a price of \$20,000 to \$24,000 per unit and consequently lost to Orange in the deal. See Patterson, *supra* note 79, at 15, col. 1.

These estimates fall far below the costs of renovation and new construction in other cities. The cost of renovating units in New York City under two different programs has recently been estimated at \$65,000 per unit. See Press Releases, The City of New York, Office of Mayor Edward I. Koch, Sept. 29, 1987 & Oct. 27, 1987. See generally DePalma, *Tax Credits Produce Housing for the Poor*, N.Y. Times, Jan. 18, 1988, § 8, at 1, col. 1.

In February 1985, the U.S. Department of Housing and Urban Development estimated that it would require an average of \$26,000 per unit to bring Boston apartments back up to code standards under a renovation program. The actual costs under this program have averaged \$78,890 per unit. GREATER BOSTON COMMUNITY DEVELOPMENT, INC., *Case Study: The Boston Housing Partnership* (Sept. 1987). This information suggests that New Jersey's cities are quoting unrealistically

D. Mount Laurel III and Regional Contribution Agreements

In *Hills Development Co. v. Bernards Township (Mount Laurel III)*,¹⁰² the New Jersey Supreme Court found the Fair Housing Act (the Act) to be constitutional. The court consolidated several challenges to the Act brought by public interest and developer plaintiffs who feared that various provisions of the Act would further delay or hinder the rezoning for which the plaintiffs had fought in the earlier *Mount Laurel* decisions.¹⁰³ The court specifically upheld the constitutionality of: (1) the Act's temporary moratorium on the builder's remedy; (2) the delays in fulfillment of fair share obligations that would result from the establishment of the Council; and (3) the procedure for review of zoning ordinances, insofar as the procedure did not preclude ultimate judicial review.¹⁰⁴

Although the issue of RCAs was not specifically addressed in *Mount Laurel III*, the court generally upheld the constitutionality of all provisions of the Act.¹⁰⁵ In a footnote, Justice Wilentz, writing for the majority, expressed his approval of the treatment of RCAs by the New Jersey Superior Court in *Morris County Fair Housing Council v. Boonton Township*,¹⁰⁶ which held, *inter alia*, that the

low prices to ensure receipt of the RCA money, which they may hope to use for purposes other than construction of the particular development for which the money was targeted.

For a discussion of the misuse of RCA funds, see *infra* notes 124-32 and accompanying text.

102. 103 N.J. 1, 510 A.2d 621 (1986) [hereinafter *Mount Laurel III*].

103. See *id.* at 25, 510 A.2d at 634.

104. See *id.* at 40-45, 510 A.2d at 642-46.

105. See *id.*

106. 209 N.J. Super. 393, 507 A.2d 768 (Law Div. 1985). In *Mount Laurel III*, Justice Wilentz surprisingly glossed over the legislative intent regarding RCAs without mention of the *Mount Laurel* goals of economic and racial integration:

The provisions seem intended to allow suburban municipalities to transfer a portion of their obligation (. . . evincing a legislative intent to encourage construction, conversion, or rehabilitation of housing in urban areas), thereby aiding in the construction of decent lower income housing in the area where most lower income households are found, provided, however, that such areas are "within convenient access to employment opportunities," and conform to "sound comprehensive regional planning."

Mount Laurel III, 103 N.J. at 38, 510 A.2d at 641.

In *Mount Laurel II*, Justice Wilentz had ordered the provision of low and moderate income housing in municipalities that had previously excluded the poor. In *Mount Laurel III*, however, it seems he compromised his *Mount Laurel II* position. Justice Wilentz, like Judge Skillman in *Morris County*, see *infra* note 107, apparently accepted the political reality that led to the enactment of the RCA provisions themselves; while residents of higher income suburbs would fight to

RCA provisions of the Act were constitutional as enacted.¹⁰⁷

While *Mount Laurel III* and *Morris County* upheld the RCA provisions as facially constitutional, neither case precludes challenges to implementation of the provisions by the Council.¹⁰⁸ The RCA

exclude people of low income from their borders, they would be less likely to object to bearing the cost of this housing, through higher rents and purchase prices charged by developers, if the lower income housing were built elsewhere. The RCAs, by permitting up to 50% of a municipality's fair share to be transferred away, would greatly increase the likelihood that the housing would actually be provided. Judge Skillman, however, did not grapple with the overall effect of the implementation of RCAs on the broader goals of the *Mount Laurel* doctrine.

107. *Morris County*, 209 N.J. Super. at 435, 507 A.2d at 791.

108. In *Morris County*, the plaintiffs challenged the validity of the RCA provisions as inconsistent with the *Mount Laurel II* mandate which provided 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." *Morris County*, 209 N.J. Super. at 431, 507 A.2d at 789 (citing *Mount Laurel II*, 92 N.J. at 211, 456 A.2d at 416). The *Morris County* court rejected the plaintiffs' position on three grounds.

First, the Fair Housing Act limits the transfer of a municipality's fair share obligation to a maximum of 50%. The court argued that, insofar as the balance of the housing must still be constructed within the borders of the transferring municipality, "it does not permit a municipality to remain solely an enclave for the rich and middle class." *Morris County*, 209 N.J. Super. at 431, 507 A.2d at 789. However, in conjunction with the 1,000-unit ceiling on fair share obligations imposed by the Council, the RCA provision guarantees that communities with few indigenous poor will have to provide no more than 500 low income units. Thus, the amount of integration that will result under the Act may be even smaller than that envisioned by the *Morris County* court.

Second, the *Morris County* court argued that the possibility of such transfer agreements had not been specifically rejected in either *Mount Laurel I* or *Mount Laurel II*. In support of his contention that RCAs did not contradict the *Mount Laurel* doctrine, Judge Skillman cited language from *Mount Laurel I* in which the court stated that sound planning may require transfer agreements among municipalities. *Mount Laurel I*, 67 N.J. at 189, 336 A.2d at 713, cited in *Morris County*, 209 N.J. Super. at 431, 507 A.2d at 789 (emphasis added). In language not cited by Judge Skillman, *Mount Laurel I* also states that the use of such transfer agreements would be limited to situations where necessary "because of greater availability of suitable land, location of employment, accessibility of public transportation or some other significant reason." *Id.* Under current Council procedures, as long as the Council determines that an RCA provides a "realistic opportunity for low and moderate income housing within convenient access to employment opportunities," N.J. STAT. ANN. § 52:27D-312(c) (West 1987), a municipality's motivation for the transfer will evidently not be questioned. In light of the stated intention in *Mount Laurel I* to eradicate exclusionary zoning, however, it is not clear that Judge Skillman intended to support the current Council procedure, which would allow RCAs whose sole "significant" purpose is the exportation of as much of a municipality's low income housing obligation as possible.

Finally, Judge Skillman upheld the RCA provisions on the assumption that the Council would "exercise [its] approval power in a manner which appropriately implements the objectives of the *Mount Laurel* doctrine." *Morris County*, 209 N.J. Super. at 432, 507 A.2d at 790. Thus, RCAs could still be found unconstitutional

provisions, if insufficiently monitored by the Council, greatly increase the possibility that fair share obligations will be fulfilled without achieving any of the racial and economic integration implicitly espoused by the *Mount Laurel* decisions, and without achieving *Mount Laurel's* goal of revitalizing urban areas.

III. Race Discrimination and the *Mount Laurel* Doctrine

The *Mount Laurel* doctrine does not directly focus on race as a factor in exclusionary zoning.¹⁰⁹ Nonetheless, the goal of racial integration through the eradication of exclusionary zoning is implicit in Justice Pashman's comments in *Mount Laurel I*¹¹⁰ and in the *Mount Laurel II* holding.¹¹¹

Given the extent to which minorities are represented among New Jersey's low income population, it is difficult to imagine that the *Mount Laurel II* court intended the economic desegregation it espoused to benefit exclusively low income whites. The *Mount Laurel II* court sought the "deconcentration of the urban poor."¹¹² According to the New Jersey 1980 Census Counts of Population by Race and Spanish Origin, over seventy-five percent of New Jersey's black population resided in the forty-two urban aid municipalities, as compared with twenty-seven percent of New Jersey's white population.¹¹³ As one commentator has noted, approximately twice as many white as black families living in these municipalities qualified as low income under the *Mount Laurel II* means test, and nearly three times as many white as black families qualified for moderate income housing under the *Mount Laurel II*.¹¹⁴ Thus, low income

if the Council did not follow the objectives of the *Mount Laurel* doctrine in its implementation of RCAs. Given the limited purposes for which the *Mount Laurel I* court envisioned the need for transfer agreements, the RCAs, as implemented, fail to advance important objectives of the *Mount Laurel* doctrine that survived the *Mount Laurel III* decision.

109. See *supra* notes 41-42, 72-73 and accompanying text. See generally Holmes, *A Black Perspective on Mount Laurel II: Toward a Black "Fair Share"*, 14 SETON HALL L. REV. 944 (1984) (doctrine's failure to isolate race as a major cause of exclusionary zoning allows the possibility that the *Mount Laurel* mandate could be fulfilled without housing a single black family) [hereinafter Holmes].

110. See *supra* note 42 and accompanying text.

111. See *infra* notes 112-19 and accompanying text; see also *United States v. Board of Education*, 675 F. Supp. 1407 (S.D.N.Y. 1987). But cf. note 106 (*Mount Laurel III* does not address goals of economic and racial integration).

112. See Holmes, *supra* note 109, at 950.

113. *Id.* at 949 (citing STATE DATA CENTER, NEW JERSEY CENSUS OF POPULATION BY RACE AND SPANISH ORIGIN (Mar. 1981)).

114. See *id.* at 950-51.

black families would be entitled to one-third of the new housing units created pursuant to *Mount Laurel II*, and similarly, moderate income black families would be entitled to roughly one-fourth of the units.¹¹⁵

Although this commentator used these figures to illustrate the possibility that "selection criteria left unmonitored could result in apparent significant success for the *Mount Laurel* mandate without accommodating a single black family,"¹¹⁶ it seems highly unlikely that the court, aware of the concentration of blacks in the cities, intended a racially segregated approach to deconcentration of the urban poor.

Although buried in a footnote, the *Mount Laurel II* court's reference to the relationship between exclusionary zoning and the oppression of racial minorities in American society is indicative of the unspoken theme underlying *Mount Laurel II*.¹¹⁷ It is difficult to imagine that the court would go to such lengths to destroy exclusionary zoning in New Jersey without some desire to alleviate the racial pocketing that existed in the state as of 1980. While the *Mount Laurel* mandate might have been clearer if the court had specifically addressed the race issue, in light of the demographics of New Jersey¹¹⁸ there is no need to do so. It is implicit that a measure of racial integration was intended in the court's holding.

By upholding the constitutionality of RCAs, the *Mount Laurel III* court retreated somewhat from the integration goals of *Mount Laurel II*. RCAs allow a municipality to trade away up to fifty percent of its fair share obligation, and thus, reduce the potential for racial and economic integration of New Jersey's suburbs. The *Mount Laurel III* court pointed out, however, that since the balance of the housing must still be constructed within the transferring municipality, RCAs do not "permit a municipality to remain solely an enclave for the rich and middle class."¹¹⁹ This stance evidences the New Jersey Supreme Court's continued support of at least limited economic and racial integration of New Jersey's wealthier municipalities.

115. See *id.*

116. *Id.* at 950.

117. See *supra* notes 72-73 and accompanying text.

118. See *supra* note 113 and accompanying text; see also Holmes, *supra* note 109, at 949-50 (survey of New Jersey demographics).

119. See *Morris County*, 209 N.J. Super. at 431, 507 A.2d at 789.

IV. Abuses of the RCA System: The Selling Out of the *Mount Laurel* Vision

New Jersey's Fair Housing Act (the Act) adopts the *Mount Laurel* policy of providing housing for people of low and moderate income, but, with the RCA provision, it compromises the goal of the eradication of exclusionary zoning. The Act preserves the redistributive policy espoused by the *Mount Laurel* courts by requiring exclusionary municipalities to pay for the housing burdens they create in other communities. The Act, however, restricts *Mount Laurel's* implicit goal of racial integration. Even though it will help to rebuild some poor communities and may, thereby, promote the return to the cities of some industries that fled urban decay, the Act and the Council's 1000-unit ceiling abandons the *Mount Laurel* vision of a more integrated society. In addition, the present system of implementation offers no guarantee that the funds transferred under an RCA will be used to house low income residents in need of such housing, or that these funds will help to revitalize New Jersey's urban areas.

A. RCAs and Racial Segregation

Although they failed to focus specifically on the importance of race in the exclusionary zoning equation, the *Mount Laurel* courts, in fashioning a remedy for economic segregation in New Jersey, understood that implicit in their remedy was a measure of racial desegregation as well.¹²⁰ Insofar as minorities constitute a large portion of New Jersey's low income inner-city population, economic integration requires a certain amount of racial integration, unless racial discrimination skews the process.¹²¹

By allowing suburban municipalities to pay cities to take half of their fair share obligation, the RCA program in conjunction with the 1000-unit ceiling on fair share obligations, compromises the *Mount Laurel* mandate that municipalities can not exclude poor people. Moreover, while the Act prohibits municipalities from trading away the portion of their fair share that represents indigenous need, the Council's regulations fail to enforce this aspect of the Act.¹²²

Because of this 1000-unit ceiling on fair share obligation, indigenous need will represent a larger percentage of many municipalities' fair shares. The Act, as it has been implemented, thus eschews the

120. See *supra* notes 109-19 and accompanying text.

121. See *id.*

122. See *supra* note 91 and accompanying text.

Mount Laurel goal of integration by allowing a suburb both to exclude low income outsiders and, due to the failure of the regulations to insure against this potential deviation from the mandate of the Act, to expel a portion of the low income families currently residing within its borders.¹²³

123. See *infra* notes 127-32 and accompanying text. This criticism of the Act can not effectively be advanced without addressing the question of whether the integration sought by the *Mount Laurel* courts would benefit low income minorities, as the courts assumed with little analysis. See *Revitalizing City*, *supra* note 46, at 677.

One of the *Mount Laurel* arguments for deconcentration of the urban poor was based on the assumption that allowing low income people to live in the suburbs would facilitate their access to jobs for which they were qualified. See *Mount Laurel I*, 67 N.J. at 172, 336 A.2d at 723 (“[o]ne incongruous result [of exclusionary land use regulations] is the picture of developing municipalities rendering it impossible for lower paid employees of industries they have eagerly sought and welcomed with open arms . . . to live in the community where they work”); see also *Mount Laurel II*, 92 N.J. at 210 n.5, 456 A.2d at 415 n.5 (“[t]he provision of lower income housing in the suburbs . . . may also make jobs more accessible for the unemployed poor”). This assumption has been criticized as ignoring the difficulties the poor could expect to encounter in the suburban job market:

Apparently, the court failed to take into consideration the fact that the obvious problems hindering the urban poor when they seek inner city jobs, including race and sex discrimination, single parent households and poor education and vocational training, will be exacerbated at the affluent suburban level. It is doubtful that there are enough jobs in the suburbs for which inner city people are qualified; some . . . come from families where unemployment is in its second generation.

Revitalizing City, *supra* note 46, at 677. Life in the suburbs could present other financial burdens for relocated poor such as the need for a car and increases in the costs of necessities such as heating, clothing and groceries. *Id.*

Furthermore, the racial discrimination that kept the minority poor out of the suburbs will not disappear when these minorities are moved into the suburbs, at least not at the outset. Arguing in the context of school desegregation, Professor Derrick Bell has noted the following:

White resistance to integrated schools is the same as white resistance to fair employment opportunities for blacks, or to black representation on school boards or jury panels, or black residents in the house next door. The principle is supported, but the practice is avoided and, when necessary, opposed. The North favored school desegregation as long as it occurred in the South. Decent housing for blacks is a worthwhile goal, except in the suburbs where its presence may threaten the affluent white environment.

Bell, *Integration: A No Win Policy for Blacks?*, 11 *INEQUALITY IN EDUC.* 35, 37 (1972) [hereinafter Bell].

The detrimental effects that school desegregation has had on the black community, such as the firing and demoting of black school teachers and administrators, segregation of classes, suspensions and expulsions of black students and psychological damage to black students as a result of racist actions, have their corollaries in the housing integration context. See, e.g., Bell, *The Burden of Brown on Blacks: History-Based Observations on a Landmark Decision*, 7 *N.C. CENT. L.J.* 25, 29,

B. Misuse of the RCA Funds

36 (1975). Professor Bell supports the creation of model all-black schools as an alternative means of achieving an "equal educational opportunity." *Id.* at 36-38. Professor Bell does not argue for the complete abandonment of school desegregation. Rather, he argues that where blacks are unable to achieve in schools to which they are bused, the model all-black school alternative should be available. Professor Bell does support the ideal, albeit difficult to attain, of the "truly integrated school," that is, one which offers an equal opportunity to minorities. *Id.*

One could argue by analogy that the money used to build *Mount Laurel* housing in the suburbs would be better spent constructing model inner city housing developments. Providing the poor with affordable housing in such developments would improve their living standards and, as a result, expand their opportunities to advance economically, perhaps to a stage from which they would be able to move to the suburbs if they should choose to do so.

Central to Professor Bell's criticism of the school desegregation paradigm is that busing is "the only realistic means of desegregating schools given neighborhood patterns in much of the country." *Id.* at 26 n.4. Busing as a means of desegregation creates an unrealistic environment for minority children because it places them in a situation that does not mirror the world around them. *See* Bell, *supra*, at 40-41. Similarly, the white communities into which the minority students are bused have limited exposure to these other racial groups beyond the school context.

In sharp contrast to the busing paradigm criticized by Professor Bell, the *Mount Laurel* doctrine envisions the desegregation of society on a grander scale. As a practical matter, it is easier for whites to withdraw their children from the public schools and to pressure local school boards to discriminate against bused students than it is for them to move to other suburbs when minorities move in. This notion is reinforced by the fact that effective *Mount Laurel II* implementation would place at least some minorities in most of New Jersey's suburbs, so there would be few, if any, suburbs in New Jersey to which minority-fearing whites could flee.

Under the *Mount Laurel* ideal, minorities and whites would eventually be forced to deal with one another in all aspects of their lives and, hopefully, the prejudices fueling discriminatory treatment of low income minorities would break down. As a consequence, equal opportunities for the minority poor would become realistically available. The view that integrated housing patterns would alleviate racial discrimination and improve the status of minorities is, of course, not unique to the *Mount Laurel* court. *See, e.g.,* *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (housing authority's duty to integrate housing projects derived from 1968 Fair Housing Act goals of integrated housing and prevention of segregation).

Speaking of the racially motivated killing of a black man in the all-white neighborhood of Howard Beach in Queens, New York, Mayor Sharpe James of Newark stated: "As long as we allow segregated neighborhoods and schools to exist, we are allowing racism to exist as well. This should be a challenge to government, which controls housing development . . ." *Three Guilty, One Cleared in the Howard Beach Case*, *Star Ledger* (N.J.), Dec. 22, 1987, at 1, col. 6. Insofar as the burden of this forced integration would fall primarily on minorities in that they would be transplanted to potentially hostile suburbs, the Council should develop a system whereby qualified low and moderate income minorities may choose between housing provided in the communities where they currently reside and housing provided in the suburbs. Such a system would allow the minorities to decide for themselves whether to opt for the *Mount Laurel* integrated community or the model inner city communities suggested by Professors Bell and McDougall.

Another possible abuse of the RCA system lies in the use of the transfer unit compensation by the receiving municipality. Under the current system, the state Housing and Mortgage Finance Agency (HMFA) monitors the RCA process to ensure that the compensation received by transferee municipalities is used to build the housing intended for the transferor municipalities.¹²⁴ There is currently a movement, however, to limit the power of the HMFA in the RCA process.¹²⁵ Municipalities that receive housing under RCAs are in need of money for many reasons. The funds from one RCA may be used to supplement the cost of another RCA development for which the municipality, unable to offer a bona fide price that would beat the competition, bid too low a price. Compensation from one RCA could be used to meet the costs of an earlier RCA project that were not included in the transfer unit price in the earlier agreement.¹²⁶

Assuming less good faith on the part of receiving municipalities, one commentator has suggested that these municipalities could "clear out their lower income, service-needy population and use RCA funds to build infrastructure to attract business and the middle class."¹²⁷ Such displacement of the poor has occurred in the past as a result of "urban renewal"¹²⁸ and gentrification,¹²⁹ which are similar to exclusionary zoning in that they are expulsionary.¹³⁰ The RCA funds could be used either to foster the return of businesses to the cities¹³¹ or to augment the gentrification that is already taking place in many of New Jersey's cities.¹³²

124. Telephone interview with Richard Shapiro, New Jersey Department of the Public Advocate (Jan. 14, 1988).

125. *See id.*

126. For a discussion of costs not covered by the RCA program, see *supra* notes 94-96 and accompanying text.

127. *Compensation for Exclusionary Zoning*, *supra* note 87, at 690. Professor McDougall's pessimistic approach derives from his extensive observations of cities' behavior. *See, e.g., Revitalizing City*, *supra* note 46, at 670-75.

128. *See, e.g., Compensation for Exclusionary Zoning*, *supra* note 87, at 690 n.181 (citing *Norwalk Core v. Norwalk Redev. Agency*, 395 F.2d 920 (2d Cir. 1968)), where a municipality was charged with using urban renewal to displace the poor and minorities).

129. *See generally Revitalizing City*, *supra* note 46, at 648-84; *Compensation for Exclusionary Zoning*, *supra* note 87, at 683-84.

130. "Urban renewal is in some ways the mirror image of exclusionary zoning Instead of excluding the poor, the objective is to expel them." *Compensation for Exclusionary Zoning*, *supra* note 87, at 690 n.183 (citations omitted).

131. *Id.*

132. New Jersey's cities have been experiencing gentrification since the early 1980's. For a discussion of the gentrification of Jersey City and Trenton, see *Revitalizing City*, *supra* note 46, at 678-83.

Insofar as the first regional contribution agreement was not given final approval by the Council until March 7, 1988, it is still too early to determine whether these abuses of the program will, in fact, occur. Nonetheless, if the movement to limit the review of the HMFA is successful, the compensation received under RCAs could be used to hurt the very people who the *Mount Laurel* doctrine sought to benefit. Rather than restrict the powers of the Council and the HMFA to govern the use of the RCA compensation, efforts should be made to enhance these powers so as to guarantee proper allocation of the funds that have their source, ultimately, in the *Mount Laurel* doctrine.

C. The Unregulated Bidding Process: Competition Among the Needy

As a result of the unregulated bidding procedure for RCAs,¹³³ municipalities undergoing gentrification are the favored recipients of wealthy municipalities' fair share because the former can bid lower transfer unit prices than other needy municipalities.¹³⁴ Communities experiencing gentrification have buildings available for renovation and their infrastructures are reinforced to accommodate the market-rate tenants and buyers.¹³⁵ Insofar as the recently imposed 1,000-unit cap on fair share obligations represents a substantial decrease in the total number of low income housing units to be built in New Jersey, it is conceivable that those municipalities most in need of the housing will not benefit significantly from the Fair Housing Act because the extent of deterioration in these communities has driven up their housing costs.

The focus of the RCA process is on the ability of the sending municipality to get rid of half of its share, rather than the need of the receiving municipalities to get the housing. Although the RCAs benefit poor municipalities in New Jersey (because they enable housing to be built for the poor), it is the sending, not the receiving,

133. See *supra* notes 97-101 and accompanying text.

134. See *supra* notes 99-101 and accompanying text; see, e.g., Patterson, *supra* note 79, at 15, col. 1. "Several needy towns have discovered they are likely to lose out to cities perceived as 'hot,' like Jersey City, or at least on the way up—and experienced in rehabilitating buildings." *Id.*

135. Frank Nero, Director of New Brunswick's Office of Economic Development, believes his town's "ability to perform" explains its success rate in the bidding for RCAs. "We have really served as a model for a lot of communities. We can give towns something that is real, not something that is make believe." See Patterson, *supra* note 79, at 15, col. 1.

municipalities that wield all the bargaining power.¹³⁶ The way in which the transfer credit prices are determined—without taking into consideration several factors such as the administrative costs to the receiving municipality,¹³⁷ and without subsidizing to equalize variations in the cost of providing housing at different sites—has left the power to determine where the housing is built with the wealthy municipalities.

As a consequence, the Council's regulations fail to ensure that the transferred housing will be spread out among needy communities. Moreover, although there is a 1000-unit cap on the fair share obligation, and a fifty-percent cap on the amount that can be transferred, there is no cap on the amount that one municipality may receive under an RCA.¹³⁸ It seems possible that, unless the RCA program is more tightly regulated and monitored, communities undergoing gentrification could receive most, if not all, of the transferred units. Thus, the RCA program would do little to revitalize areas experiencing urban decay.

136. See generally *Compensation for Exclusionary Zoning*, *supra* note 87, at 690 (RCAs should be more closely regulated to protect the poor because, due to their unequal bargaining position, "cities may accept less compensation than is required to provide affordable housing for their indigenous poor and the 'transferred' poor combined").

Professor McDougall's argument regarding inequality of bargaining power is potent, but he is incorrect in one of his assumptions about the RCAs. Under an RCA, a housing burden is transferred to an area that has a greater housing need and whose fair share obligation is limited by the Act due to the magnitude of the housing crisis in that area. Receiving municipalities want the transferred units to house their own poor. Professor McDougall discusses "transferred poor" and describes the phenomenon of the "cities' acceptance of more indigent residents without sufficient funds to house them." *Id.* at 683. Although it is true that municipalities may accept less money than would be required to provide the transferred housing, receiving municipalities are not being forced to accept more low income residents under RCAs. Pure enforcement of the *Mount Laurel* doctrine would require transferring people from the cities to the suburbs because much of the regional need, which determines a suburb's fair share, is generated by the housing crisis in the cities. By contrast, the RCAs designate the housing to be provided at the sites from which the regional need figures originate.

137. See *supra* note 96 and accompanying text.

138. Susan Oxford, Assistant Deputy Public Advocate for the New Jersey Department of the Public Advocate, offers the following explanation:

"[I]f the RCA involves *rehabilitation*, the Council will examine the receiving community's housing stock to be sure there are sufficient standard units occupied by income-qualified households. If the RCA involves *new construction*, however, there is no restriction on the number of units that a receiving community may agree to construct."

Letter to the Author from Susan Oxford, Assistant Deputy Public Advocate, New Jersey Department of the Public Advocate (Feb. 5, 1988) (emphasis in original).

To avoid the problem of the gentrified communities receiving all of the RCA housing, the Council or the HMFA or both should be empowered to ensure that housing is transferred in amounts proportionate to the need of the various receiving municipalities. Either the bidding process should be eliminated by creating uniformity in the cost of the transferred units incurred by the sending municipality, or the site of the transferred units should be determined by lottery.¹³⁹

One method of bringing about uniformity of cost would be to have the state set a fixed per-unit price that a municipality must pay under an RCA for any transferred low or moderate income unit. The per-unit price could be based on the average cost to supply such units throughout the state. When a municipality chooses to transfer some of its fair share obligation, it would pay an amount equal to the number of units it wishes to transfer multiplied by the fixed transfer unit price into a state trust fund. The trust fund would then be distributed by the Council to the receiving municipalities in amounts proportionate to the size of their housing need relative to other receiving municipalities and in amounts sufficient to cover the costs of construction or renovation of transferred units at the various sites.

Another method of equalizing the bidding power of the receiving municipalities would be to provide subsidies in order to create uniformity of cost for the construction and renovation of units.¹⁴⁰ Once all communities have determined their transfer unit costs, those communities where it will be more expensive to provide the housing will have their transferred developments subsidized so that the cost to the sending municipality will be the same for each low and each moderate income unit transferred, regardless of the site to which it is transferred.

Still another possibility is that the Council could match sending and receiving municipalities, so that one would be required, if it

139. Cf. *Compensation for Exclusionary Zoning*, *supra* note 87, at 694 (maintaining that a "pigovian tax," the primary purpose of which would be to correct inequalities of bargaining power between suburbs and cities, "might help to overcome some of the regional differentiation which hinders the effective use of Regional Contribution Agreements").

140. The subsidies could be raised either by increasing real estate taxes or by requiring developers to deposit funds into a state trust fund that would represent the difference between the developer's actual cost of providing a transferred unit and the average cost of providing low income units in the state. The obvious difficulty with this approach is that it would be nearly impossible to enforce honesty on the part of developers in reporting the actual cost of the construction or renovations, because the higher the quoted price, the less the developer would have to pay into the trust fund.

entered into an RCA, to do so with its assigned municipality. This technique would eliminate the bidding process, but create a windfall for the sending municipality that is matched with a community where it will be less expensive to build housing. There would have to be some method of matching the most desirable location for upper income development with the least desirable location for low income development, so that the municipality that reaps the greatest benefit from new development pays more to provide low income housing.

Insofar as it would be the developers that would stand to gain the most from the new development, developers would provide, as they do under the present RCA system, the funding for the low income housing. As a practical and political matter, however, this procedure would be unenforceable. There are too many variables in determining the most and least expensive places to build before the start of the bidding process, and it is almost a certainty, based on the history of the *Mount Laurel* doctrine, that litigation and administrative proceedings would keep the housing from getting built.

Perhaps the most effective and viable method of spreading out the transferred units would be to select receiving municipalities by lottery. Municipalities wanting to send or receive housing would notify the Council, as they do under the present system, and the Council would match the municipalities by lottery, making sure to distribute the limited amount of housing proportionately, based on need, among the receiving municipalities.

V. Conclusion

Insofar as the Fair Housing Act facilitates the construction of housing for New Jersey's low income population, the Act furthers an important goal of *Mount Laurel*. Clearly, however, because it abandons the goals of economic and racial deconcentration, the Act can no longer be described as a codification of the *Mount Laurel* doctrine. Substantial revisions are required to harmonize the Fair Housing Act as currently implemented with the *Mount Laurel* vision.