SOUTHERN BURLINGTON COUNTY NAACP v.
TOWNSHIP OF MT. LAUREL (II)
92 N.J. 158, 456 A.2d 390 (1983)

The opinion of the Court was delivered by WILENTZ, C.J.:

This is the return, eight years later, of *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I).* We set forth in that case, for the first time, the doctrine requiring that municipalities' land use regulations provide a realistic opportunity for low and moderate income housing. The doctrine has become famous. The *Mount Laurel* case itself threatens to become infamous. After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of the original opinion in this case....

This case is accompanied by five others, heard together and decided in this opinion. All involve questions arising from the *Mount Laurel* doctrine. They demonstrate the need to put some steel into that doctrine. The deficiencies in its application range from uncertainty and inconsistency at the trial level to inflexible review criteria at the appellate level. The waste of judicial energy involved at every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts. The length and complexity of trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue....

A brief statement of the cases may be helpful at this point. *Mount Laurel II* results from the remand by this Court of the original Mount Laurel case. The municipality rezoned, purportedly pursuant to our instructions, a plenary trial was held, and the trial court found that the rezoning constituted a bona fide attempt by Mount Laurel to provide a realistic opportunity for the construction of its fair share of the regional lower income housing need. Reading our cases at that time (1978) as requiring no more, the trial court dismissed the complaint of the N.A.A.C.P. and other plaintiffs but granted relief in the form of a builder's remedy, to a developer-intervenor who had attacked the total prohibition against mobile homes. Plaintiffs' appeal of the trial court's ruling sustaining the ordinance in all other respects was directly certified by this Court, as ultimately was defendant's appeal from the grant of a builder's remedy allowing construction of mobile homes. We reverse and remand to determine Mount Laurel's fair share of the regional need and for further proceedings to revise its ordinance; we affirm the grant of the builder's remedy....

[The Court's statement of the five companion cases is omitted.]

A. *History of the Mount Laurel Doctrine*

In *Mount Laurel I,* this Court held that a zoning ordinance that contravened the general welfare was unconstitutional. We pointed out that a developing municipality violated that constitutional mandate by excluding housing for lower income people; that it would satisfy that constitutional obligation by affirmatively affording a realistic opportunity for the construction of its fair share of the present and prospective regional need for low and moderate income housing. This is the core of the *Mount Laurel* doctrine. Although the 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 that region? Precisely what must that municipality to do to "affirmatively afford" an opportunity for the construction of lower income housing? Other questions were similarly troublesome. When should a court order the granting of a building permit (i.e., a builder's remedy) to a plaintiff-developer who has successfully challenged a zoning ordinance on *Mount Laurel* grounds? How should courts deal with the complicated procedural aspects of *Mount Laurel* litigation, such as the appointment of experts and masters, the joinder of defendant municipalities, and the problem of interlocutory appeals? These have been the principal questions that New Jersey courts have faced in attempting to implement the *Mount Laurel* mandate, and the principal questions dealt with in this opinion. We begin by examining how some of these questions have been dealt with up to now.

Two years after *Mount Laurel I,* in *Oakwood at Madison, Inc. v. Township of Madison,* 371 A.2d 1192 (N.J. 1977), this Court once again faced the exclusionary zoning issue. We ruled that "fair share" allocations need not be "precise" or based on "specific formulae" to win judicial approval. Instead, the Court explained, a court should look to the "substance" of a challenged zoning ordinance and the "*bona fide* efforts" of a municipality to remove exclusionary barriers in order to determine whether that municipality had met its *Mount Laurel* burden.

With regard to the definition of the "region" from which fair share allocations were to be made, the majority cited with approval the trial court's formulation of a region as the "'area from which, in view of available employment and transportation, the population of the township would be drawn, absent invalidly exclusionary zoning.'" We distinguished this very general standard for determining region from the situation with which we would be confronted if a state planning body promulgated a plan that divided the whole state into regions.

Madison also addressed the nature of a municipality's "affirmative" duty to encourage the construction of lower income housing. The Court reaffirmed that affected municipalities must provide realistic opportunities for their fair share of lower income housing, and required the municipality to provide density bonuses for the construction of multi-bedroom units, while reserving judgment, however, on other affirmative measures (a density bonus allows the developer to build more units per acre if certain kinds of units are included in the project).

An important aspect of the Court's decision was the award of a builder's remedy to the plaintiff-developer. The Court emphasized that the plaintiff, for "six years" and through "two trials and on this extended appeal," had "borne the stress and expense of this public interest litigation." The Court admonished, however, that this kind of remedy should "ordinarily be rare."

Finally, the Court introduced the important concept of "least cost" housing, i.e., housing built at the least cost possible, even though not inexpensive enough for lower income occupancy. Recognizing that even with subsidies and affirmative devices some municipalities simply might not be able to provide a realistic opportunity for the construction of lower income housing, the Court held that under those and *only* those circumstances such municipalities could meet their obligation with "least cost" housing.

Later in the same year that *Madison* was decided, the Court determined which municipalities were subject to the *Mount Laurel* fair share obligation. *Pascack Ass'n, Ltd. v. Washington Twp.,* 379 A.2d 6 (N.J. 1977); *Fobe Associates v. Demarest,* 379 A.2d 31 (N.J. 1977). In *Pascack,* the Court held that "fully developed, single-family residential" communities such as Washington Township did not have any *Mount Laurel* obligation. This holding was reaffirmed in *Fobe* where the Court upheld the decision of the Demarest Board of Adjustment denying a variance sought for multi-family housing given the fact that a "developed"

municipality like Demarest did not have a *Mount Laurel* obligation.[1]

B. *Constitutional Basis for Mount Laurel and the Judicial Role ...*

[The Court reiterated the "general welfare" rationale of *Mount Laurel I.*]

It would be useful to remind ourselves that the doctrine does not arise from some theoretical analysis of our Constitution, but rather from underlying concepts of fundamental fairness in the exercise of governmental power. The basis for the constitutional obligation is simple: the State controls of the use of land, *all* of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else. The government that controls this land represents everyone. While the state may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.

The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted. It is a vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.

Subject to the clear obligation to preserve open space and prime agricultural land, a builder in New Jersey who finds it economically feasible to provide decent housing for lower income groups will no longer find it governmentally impossible. Builders may not be able to build just where they want — our parks, farms, and conservation areas are not a land bank for housing speculators. But if sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor. And if the area will accommodate factories, it must also find space for workers. The specific location of such housing will of course continue to depend on sound municipal land use planning.

While *Mount Laurel I* discussed the need for "an appropriate variety and choice of housing," the specific constitutional obligation addressed there, as well as in our opinion here, is that relating to low and moderate income housing. All that we say here concerns that category alone; the doctrine as we interpret it has no present applicability to other kinds of housing. See *Pascack,* 379 A.2d 6. It is obvious that eight years after *Mount Laurel I* the need for satisfaction of this doctrine is greater than ever. Upper and middle income groups may search with increasing difficulty for housing within their means; for low and moderate income people, there is nothing to search for.

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[1]*Home Builders League v. Township of Berlin,* 405 A.2d 381 (N.J. 1979), rounds out this Court's involvement with the *Mount Laurel* doctrine since 1975. In *Berlin,* the Court invalidated minimum floor area requirements (or "any other factor, such as frontage or lot size") for residential dwellings that were unrelated to the number of occupants living in a dwelling. The Court upheld the trial court's determination that such requirements were *per se* exclusionary under *Mount Laurel*....

No one has challenged the *Mount Laurel* doctrine on these appeals. Nevertheless, a brief reminder of the judicial role in this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is better left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them. We recognize the social and economic controversy (and its political consequences) that has resulted in relatively little legislative action in this field. We understand the enormous difficulty of achieving a political consensus that might lead to significant legislation enforcing the constitutional mandate better than we can, legislation that might completely remove this Court from those controversies. But enforcement of constitutional rights cannot await a supporting political consensus. So while we have always preferred legislative to judicial action in this field, we shall continue — until the Legislature acts — to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine. That is our duty. We may not build houses, but we do enforce the Constitution.

We note that there has been some legislative initiative in this field. We look forward to more. The new Municipal Land Use Law explicitly recognizes the obligations of municipalities to zone with regional consequences in mind, N.J.S.A. 40:55D-28(d); it also recognizes the work of the Division of State and Regional Planning in the Department of Community Affairs (DCA), in creating the State Development Guide Plan (1980) (SDGP), which plays an important part in our decisions today. Our deference to these legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions.

The judicial role, however, which could decrease as a result of legislative and executive action, necessarily will expand to the extent that we remain virtually alone in this field. In the absence of adequate legislative and executive help, we must give meaning to the constitutional doctrine in the cases before us through our own devices, even if they are relatively less suitable. That is the basic explanation of our decisions today.

C. *Summary of Rulings*

....

The following is a summary of the more significant rulings of these cases:

(1) *Every* municipality's land use regulations should provide a realistic opportunity for decent housing for at least some part of its resident poor who now occupy dilapidated housing. The zoning power is no more abused by keeping out the region's poor than by forcing out the resident poor. In other words, each municipality must provide a realistic opportunity for decent housing for its indigenous poor except where they represent a disproportionately large segment of the population as compared with the rest of the region. This is the case in many of our urban areas.

(2) The existence of a municipal obligation to provide a realistic opportunity for a fair share of the region's present and prospective low and moderate income housing need will no longer be determined by whether or not a municipality is "developing." The obligation extends, instead, to every municipality, any portion of which is designated by the State, through the SDGP as a "growth area." This obligation, imposed as a remedial measure, does not extend to those areas where the SDGP discourages growth — namely, open spaces, rural areas, prime farmland, conservation areas, limited growth areas, parts of the Pinelands and certain Coastal Zone areas. The SDGP represents the conscious determination of the State, through the executive and legislative branches, on how best to plan its future. It appropriately serves as a judicial remedial tool. The obligation to encourage lower income housing, therefore, will hereafter depend on rational long-range land use planning (incorporated into the SDGP) rather than upon

the sheer economic forces that have dictated whether a municipality is "developing." Moreover, the fact that a municipality is fully developed does not eliminate this obligation although, obviously, it may affect the extent of the obligation and the timing of its satisfaction. The remedial obligation of municipalities that consist of both "growth areas" and other areas may be reduced based on many factors, as compared to a municipality completely within a "growth area."

There shall be a heavy burden on any party seeking to vary the foregoing remedial consequences of the SDGP designations.

(3) *Mount Laurel* litigation will ordinarily include proof of the municipality's fair share of low and moderate income housing in terms of the number of units needed immediately, as well as the number needed for a reasonable period of time in the future. "Numberless" resolution of the issue based upon a conclusion that the ordinance provides a realistic opportunity for *some* low and moderate income housing will be insufficient. Plaintiffs, however, will still be able to prove a *prima facie* case, without proving the precise fair share of the municipality, by proving that the zoning ordinance is substantially affected by restrictive devices, that proof creating a presumption that the ordinance is invalid.

The municipal obligation to provide a realistic opportunity for low and moderate income housing is not satisfied by a good faith attempt. The housing opportunity provided must, in fact, be the substantial equivalent of the fair share.

(4) Any future *Mount Laurel* litigation shall be assigned only to those judges selected by the Chief Justice with the approval of the Supreme Court. The initial group shall consist of three judges....Since the same judge will hear and decide all *Mount Laurel* cases within a particular area and only three judges will do so in the entire state, we believe that over time a consistent pattern of regions will emerge. Consistency is more likely as well in determinations of regional housing needs and allocations of fair share to municipalities within the region....While determinations of region and regional housing need will not be conclusive as to any municipality not a party to the litigation, they shall be given presumptive validity in subsequent litigation involving any municipality included in a previously determined region.

(5) The municipal obligation to provide a realistic opportunity for the construction of its fair share of low and moderate income housing may require more than the elimination of unnecessary cost-producing requirements and restrictions. Affirmative governmental devices should be used to make that opportunity realistic, including lower-income density bonuses and mandatory set-asides. Furthermore, the municipality should cooperate with the developer's attempts to obtain federal subsidies. For instance, where federal subsidies depend on the municipality providing certain municipal tax treatment allowed by state statutes for lower income housing, the municipality should make a good faith effort to provide it. Mobile homes may not be prohibited, unless there is solid proof that sound planning in a particular municipality requires such prohibition.

(6) The lower income regional housing need is comprised of both low and moderate income housing. A municipality's fair share should include both in such proportion as reflects consideration of all relevant factors, including the proportion of low and moderate income housing that make up the regional need.

(7) Providing a realistic opportunity for the construction of least-cost housing will satisfy a municipality's *Mount Laurel* obligation if, and only if, it cannot otherwise be satisfied....

(8) Builder's remedies will be afforded to plaintiffs in *Mount Laurel* litigation where appropriate, on a case-by-case basis. Where the plaintiff has acted in good faith, attempted to

obtain relief without litigation, and thereafter vindicates the constitutional obligation in *Mount Laurel*-type litigation, ordinarily a builder's remedy will be granted, provided that the proposed project includes an appropriate portion of low and moderate income housing, and provided further that it is located and designed in accordance with sound zoning and planning concepts, including its environmental impact....

We reassure all concerned that *Mount Laurel* is not designed to sweep away all land use restrictions or leave our open spaces and natural resources prey to speculators. Municipalities consisting largely of conservation, agricultural, or environmentally sensitive areas will not be required to grow because of *Mount Laurel.* No forests or small towns need be paved over and covered with high-rise apartments as a result of today's decision.

As for those municipalities that may have to make adjustments in their lifestyles to provide for their fair share of low and moderate income housing, they should remember that they are not being required to provide more than their *fair* share. No one community need be concerned that it will be radically transformed by a deluge of low and moderate income developments. [The Court held that trial judges could phase new housing over a period of years to avoid too-rapid change.] Nor should any community conclude that its residents will move to other suburbs as a result of this decision, for those "other suburbs" may very well be required to do their part to provide the same housing. Finally, once a community has satisfied its fair share obligation, the *Mount Laurel* doctrine will not restrict other measures, including large-lot and open area zoning, that would maintain its beauty and communal character.

Many of these points will be discussed later in this opinion. We mention them now only to reassure all concerned that any changes brought about by this opinion need not be drastic or destructive. Our scenic and rural areas will remain essentially scenic and rural, and our suburban communities will retain their basic suburban character. But there will be *some* change, as there must be if the constitutional rights of our lower income citizens are ever to be protected. That change will be much less painful for us than the status quo has been for them....

[Most of the remainder of the court's long and detailed opinion has been omitted, but some of the highlights are set out below. The court stated it expected the *Mount Laurel* judges to establish the boundaries of regions and determine regional needs, but did not offer any additional guidance on these problems.]

As for fair share, however, we offer some suggestions. Formulas that accord substantial weight to employment opportunities in the municipality, especially new employment accompanied by substantial ratables, shall be favored; formulas that have the effect of tying prospective lower income housing needs to the present proportion of lower income residents to the total population of a municipality shall be disfavored; formulas that have the effect of unreasonably diminishing the share because of a municipality's successful exclusion of lower income housing in the past shall be disfavored.

D. *Meeting the Mount Laurel Obligation*

1. Removing Excessive Restrictions and Exactions

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

2. Using Affirmative Measures

Despite the emphasis in *Mount Laurel I* on the *affirmative* nature of the fair share obligation, the obligation has been sometimes construed (after *Madison*) as requiring in effect no more than a theoretical, rather than realistic, opportunity. As noted later, the alleged realistic opportunity for lower income housing in [Mount Laurel Township] is provided through three zones owned entirely by three individuals. There is absolutely no assurance that there is anything realistic in this "opportunity": the individuals may, for many different reasons, simply not desire to build lower income housing. They may not want to build any housing at all, they may want to use the land for industry, for business, or just leave it vacant. It was never intended in *Mount Laurel I* that this awesome constitutional obligation, designed to give the poor a fair chance for housing, be satisfied by meaningless amendments to zoning or other ordinances. "Affirmative," in the *Mount Laurel* rule, suggests that the *municipality* is going to do something, and "realistic opportunity" suggests that what it is going to do will make it *realistically* possible for lower income housing to be built. Satisfaction of the *Mount Laurel* doctrine cannot depend on the inclination of developers to help the poor. It has to depend on affirmative inducements to make the opportunity real.

It is equally unrealistic, even where the land is owned by a developer eager to build, simply to rezone that land to permit the construction of lower income housing if the construction of other housing is permitted on the same land and the latter is more profitable than lower income housing. One of the new zones in Mount Laurel provides a good example. The developer there intends to build housing out of the reach of the lower income group. After creation of the new zone, he still is allowed to build such housing but now has the "opportunity" to build lower income housing to the extent of 10 percent of the units. There is absolutely no reason why he should take advantage of this opportunity if, as seems apparent, his present housing plans will result in a higher profit. There is simply no inducement, no reason, nothing affirmative, that makes this opportunity "realistic." For an opportunity to be "realistic" it must be one that is at least sensible for someone to use.

Therefore, unless removal of restrictive barriers will, without more, afford a realistic opportunity for the construction of the municipality's fair share of the region's lower income housing need, affirmative measures will be required.

There are two basic types of affirmative measures that a municipality can use to make the opportunity for lower income housing realistic: (1) encouraging or requiring the use of available state or federal housing subsidies, and (2) providing incentives for or requiring private developers to set aside a portion of their developments for lower income housing. Which, if either, of these devices will be necessary in any particular municipality to assure compliance with the constitutional mandate will be initially up to the municipality itself. Where necessary, the trial court overseeing compliance may require their use....

The most commonly used inclusionary zoning techniques are incentive zoning and mandatory set-asides. The former involves offering economic incentives to a developer through the relaxation of various restrictions of an ordinance (typically density limits) in exchange for the construction of certain amounts of low and moderate income units. The latter, a mandatory set-aside, is basically a requirement that developers include a minimum amount of lower income housing in their projects.

(i) Incentive Zoning

Incentive zoning is usually accomplished either through a sliding scale density bonus that increases the permitted density as the amount of lower income housing provided is increased, or through a set bonus for participation in a lower income housing program. See Fox & Davis, 3

Hastings Const. L.Q. 1015, 1060-62 (1977).

Incentive zoning leaves a developer free to build only upper income housing if it so chooses. Fox and Davis, in their survey of municipalities using inclusionary devices, found that while developers sometimes profited through density bonuses, they were usually reluctant to cooperate with incentive zoning programs; and that therefore those municipalities that relied exclusively on such programs were not very successful in actually providing lower income housing. Id. at 1067....

(ii) Mandatory Set-Asides

A more effective inclusionary device that municipalities must use if they cannot otherwise meet their fair share obligations is the mandatory set-aside....

The use of mandatory set-asides is not without its problems: dealing with the scarcity of federal subsidies, maintaining the rent or sales price of lower income units at lower income levels over time, and assuring developers an adequate return on their investments. Fox and Davis found that the scarcity of federal subsidies has greatly undermined the effectiveness of mandatory set-asides where they are triggered only when a developer is able to obtain such subsidies. Where practical, a municipality should use mandatory set-asides even where subsidies are not available....

Because a mandatory set-aside program usually requires a developer to sell or rent units at below their full value so that the units can be affordable to lower income people, the owner of the development or the initial tenant or purchaser of the unit may be induced to re-rent or re-sell the unit at its full value.

This problem, which municipalities *must* address in order to assure that they continue to meet their fair share obligations, can be dealt with in [several] ways...[The] more common approach for dealing with the re-sale or re-rent problem is for the municipality to require that re-sale or re-rent prices be kept at lower income levels....A more sophisticated approach, considered by Princeton Township, would have established disposition covenants..., binding the owners and renters of such units to sell or rent only at lower income levels....

In addition to the mechanisms we have just described, municipalities and trial courts must consider such other affirmative devices as zoning substantial areas for mobile homes and for other types of low cost housing and establishing maximum square footage zones, i.e., zones where the developers cannot build units with *more* than a certain footage or build anything other than lower income housing or housing that includes a specified portion of lower income housing. In some cases, a realistic opportunity to provide the municipality's fair share may require over-zoning, i.e., zoning to allow for *more* than the fair share if it is likely, as it usually is, that not all of the property made available for lower income housing will actually result in such housing.

Although several of the defendants concede that simply removing restrictions and exactions is unlikely to result in the construction of lower income housing, they maintain that requiring the municipality to use affirmative measures is beyond the scope of the courts' authority. We disagree....

The contention that generally these devices are beyond the municipal power because they are "socio-economic" is particularly inappropriate. The very basis for the constitutional obligation underlying *Mount Laurel* is a belief, fundamental, that excluding a class of citizens from housing on an economic basis (one that substantially corresponds to a socio-economic basis) distinctly disserves the general welfare. That premise is essential to the conclusion that such zoning ordinances are an abuse of the zoning power and are therefore unconstitutional.

It is nonsense to single out inclusionary zoning (providing a realistic opportunity for the

construction of lower income housing) and label it "socio-economic" if that is meant to imply that other aspects of zoning are not. Detached single family residential zones, high-rise multi-family zones of any kind, factory zones, "clean" research and development zones, recreational, open space, conservation, and agricultural zones, regional shopping mall zones, indeed practically any significant kind of zoning now used, has a substantial socio-economic impact and, in some cases, a socio-economic motivation. It would be ironic if inclusionary zoning to encourage the construction of lower income housing were ruled beyond the power of a municipality because it is "socio-economic" when its need has arisen from the socio-economic zoning of the past that excluded it.

We find the distinction between the exercise of the zoning power that is "directly tied to the physical use of the property," *Madison,* and its exercise tied to the income level of those who use the property artificial in connection with the *Mount Laurel* obligation, although it obviously troubled us in *Madison*. The prohibition of this kind of affirmative device seems unfair when we have for so long allowed large lot single family residence districts, a form of zoning keyed, in effect, to income levels. The constitutional obligation itself is not to build three bedroom units, or single family residences on very small lots, or high-rise multi-family apartments, but rather to provide through the zoning ordinance a realistic opportunity to construct *lower income housing*. All of the physical uses are simply a means to this end. We see no reason why the municipality cannot exercise its zoning power to achieve that end directly rather than through a mass of detailed regulations governing the "physical use" of land, the sole purpose of which is to provide housing within the reach of lower income families. We know of no governmental purpose relating to zoning that is served by requiring a municipality to ingeniously design detailed land use regulations, purporting to be "directly tied to the physical use of the property," but actually aimed at accommodating lower income families, while not allowing it directly to require developers to construct lower income units. Indirection of this kind has no more virtue where its goal is to achieve that which is permitted — indeed, constitutionally mandated — than it has in achieving that which is prohibited.

3. Zoning for Mobile Homes

As the cost of ordinary housing skyrockets for purchasers and renters, mobile homes become increasingly important as a source of low cost housing.... Therefore, subject to the qualifications noted hereafter, we rule that municipalities that cannot otherwise meet their fair share obligations must provide zoning for low-cost mobile homes as an affirmative device in their zoning ordinances....

E. *Judicial Remedies*

If a trial court determines that a municipality has not met its *Mount Laurel* obligation, it shall order the municipality to revise its zoning ordinance within a set time period to comply with the constitutional mandate; if the municipality fails adequately to revise its ordinance within that time, the court shall implement the remedies for noncompliance outlined below; and if plaintiff is a developer, the court shall determine whether a builder's remedy should be granted.

1. Builder's Remedy

... We hold that where a developer succeeds in *Mount Laurel* litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning. We emphasize that the builder's remedy should not be denied solely because the municipality prefers some other location for lower income housing, even if it is in fact a better site. Nor is it

essential that considerable funds be invested or that the litigation be intensive.

Other problems concerning builder's remedies require discussion. Care must be taken to make certain that *Mount Laurel* is not used as an unintended bargaining chip in a builder's negotiations with the municipality, and that the courts not be used for the builder's threat to bring *Mount Laurel* litigation if municipal approvals for projects containing no lower income housing are not forthcoming. Proof of such threats shall be sufficient to defeat *Mount Laurel* litigation by that developer....

2. Revision of the Zoning Ordinance: The Master

If the trial court determines that a municipality's zoning ordinance does not satisfy its *Mount Laurel* obligation, it shall order the defendant to revise it. Unless it is clear that the requisite realistic opportunity can be otherwise provided, the trial court should direct the municipality to incorporate in that new ordinance the affirmative devices discussed above most likely to lead to the construction of lower income housing. The trial court shall order the revision to be completed within 90 days of its original judgment against the municipality. For good cause shown, a municipality may be granted in extension of that time period.

To facilitate this revision, the trial court may appoint a special master to assist municipal officials in developing constitutional zoning and land use regulations. The use of such special masters, sometimes called "hybrid" masters is not uncommon in litigation resulting in some form of institutional change....

The master will work closely not only with the governing body but with all those connected with the litigation, including plaintiffs, the board of adjustment, planning board and interested developers. He or she will assist all parties in discussing and negotiating the requirements of the new regulations, the use of affirmative devices, and other activities designed to conform to the *Mount Laurel* obligation....At the end of the 90 day period, on notice to all the parties, the revised ordinance will be presented in open court and the master will inform the court under oath, and subject to cross-examination, whether, in his or her opinion, that ordinance conforms with the trial court's judgment. That opinion, however, is not binding on the trial court....

3. Remedies for Non-Compliance

If within the time allotted by the trial court a revised zoning ordinance is submitted by the defendant municipality that meets the municipality's *Mount Laurel* obligations, the trial court shall issue a judgment of compliance. If the revised ordinance does not meet the constitutional requirements, or if no revised ordinance is submitted within the time allotted, the trial court may issue such orders as are appropriate, including any one or more of the following:

(1) that the municipality adopt such resolutions and ordinances, including particular amendments to its zoning ordinance, and other land use regulations, as will enable it to meet its *Mount Laurel* obligations;

(2) that certain types of projects or construction as may be specified by the trial court be delayed within the municipality until its ordinance is satisfactorily revised, or until all or part of its fair share of lower income housing is constructed and/or firm commitments for its construction have been made by responsible developers;

(3) that the zoning ordinance and other land use regulations of the municipality be deemed void in whole or in part so as to relax or eliminate building and use restrictions in all or selected portions of the municipality (the court may condition this remedy upon failure of the municipality to adopt resolutions or ordinances mentioned in (1) above); and

(4) that particular applications to construct housing that includes lower income units be

approved by the municipality, or any officer, board, agency, authority (independent or otherwise) or division thereof....

Judicial determinations of compliance with the fair share obligation or of invalidity are not binding under ordinary rules of *res judicata* since circumstances obviously change. In *Mount Laurel* cases, however, judgments of compliance should provide that measure of finality suggested in the Municipal Land Use Law, which requires reexamination and amendment of land use regulations every six years. Compliance judgments in these cases therefore shall have *res judicata* effect, despite changed circumstances, for a period of six years, the period to begin with the entry of the judgment by the trial court....