

## MOUNT LAUREL III: THE NEW JERSEY SUPREME COURT'S JUDICIOUS RETREAT

Paula A. Franzese\*

In *Hills Development Co. v. Township of Bernards*<sup>1</sup> (popularly denoted *Mount Laurel III*), the Supreme Court of New Jersey wholeheartedly withdrew, if only temporarily, from the controversial area of affordable housing. The decision sustains, in broadest possible terms, the constitutionality of the New Jersey Fair Housing Act (Act),<sup>2</sup> a statutory scheme to replace the judiciary in effectuating the state constitutional requirement that local governments provide a realistic opportunity for the construction of low and moderate income housing.<sup>3</sup> That requirement initially had been articulated by the supreme court in *Southern Burlington County NAACP v. Township of Mount Laurel*<sup>4</sup> (*Mount Laurel I*) and subsequently was fortified with a series of far-ranging remedial prescriptions in the court's second *Mount Laurel* ruling (*Mount Laurel II*).<sup>5</sup>

The legal events that shaped *Mount Laurel III* demonstrate the essential role the judiciary can serve as catalyst for legislative action to remedy exclusionary zoning practices.<sup>6</sup> Moreover, the decision, with its antecedent determinants, illustrates the sepa-

---

\* Assistant Professor of Law, Seton Hall University School of Law. A.B., Barnard College 1980, J.D., Columbia Law School 1983. The author wishes to thank William D. Buckley and Arnold L. Natali, Jr. for their invaluable research assistance.

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

<sup>2</sup> N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986).

<sup>3</sup> *Id.* § 52:27D-302(a). The legislative findings of the Fair Housing Act state in pertinent part:

The Legislature finds that:

a. The New Jersey Supreme Court, through its rulings in *South Burlington County NAACP v. Mount Laurel*, 67 N.J. 151 (1975) and *South Burlington County NAACP v. Mount Laurel*, 92 N.J. 158 (1983), has determined 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.

*Id.*

<sup>4</sup> 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter *Mount Laurel I*].

<sup>5</sup> *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter *Mount Laurel II*].

<sup>6</sup> See McDougall, *From Litigation to Legislation to Exclusionary Zoning Law*, 22 HARV.

rateness as well as the interdependence of the governmental powers and confirms the court's responsive participation in a continuing dialectic with the political branches and with the public. Understood in its historical context, the court's retreat is judicious and predictable.

#### BACKGROUND—THE HISTORICAL SETTING

##### *Mount Laurel I and II*

In 1975, in the groundbreaking decision of *Mount Laurel I*, the Supreme Court of New Jersey declared that the state constitutional requirements of substantive due process and equal protection, as well as the state's inherent police powers to regulate land use for the general welfare, mandate that every "developing municipality" ensure a realistic opportunity for the construction of its "fair share of the present and prospective regional need" for low and moderate income housing.<sup>7</sup> Justice Hall, writing for the majority, added that qualifying municipalities must act affirmatively to provide this opportunity.<sup>8</sup>

The court declined to prescribe remedies to effectuate its broad and undefined mandate, reasoning that:

It is not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any further power . . . .

---

C.R.-C.L. L. REV. 623, 625 (1987) ("The lesson of New Jersey is that the legislature will not act without pressure from the judiciary.").

Exclusionary zoning may be defined as "local land-use controls that have the effect of excluding most low-income and many moderate-income households from suburban communities and, indirectly, of excluding most members of minority groups . . . ." D. MANDELKER & R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 304 (1985).

<sup>7</sup> *Mount Laurel I*, 67 N.J. at 173-75, 336 A.2d at 724-25. The *Mount Laurel I* court did not define what constituted a "developing municipality." (By implication, however, the supreme court noted that the issue of land use regulation would apply to those municipalities "which, like Mount Laurel, have substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth." *Id.* at 160, 336 A.2d at 717.) Nor did the court explain how a municipality's "fair share" was to be computed or how a "regional need" was to be determined. It has been theorized that the court's failure to define its constitutional mandate "slowed voluntary compliance by municipalities because the municipalities remained uncertain as to what their obligations entailed." Tarr & Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 519 (1984).

<sup>8</sup> *Mount Laurel I*, 67 N.J. at 174-75, 336 A.2d at 724-25.

The municipality should first have full opportunity to itself act without judicial supervision.<sup>9</sup>

Significantly, the court encouraged the state legislature to assist in countering local abuses of the zoning power by authorizing regional zoning.<sup>10</sup>

While hailed as a case which could transform land-use law,<sup>11</sup> eight years later little had changed.<sup>12</sup> In 1983, in response to six consolidated cases raising a host of issues concerning the scope and application of the *Mount Laurel* doctrine, Chief Justice Wilentz announced the supreme court's unanimous decision in *Mount Laurel II*.<sup>13</sup> Frustrated by "widespread non-compliance"<sup>14</sup> with the constitutional obligation it had articulated, and angered at perceived municipal resistance and inactivity by the coordinating branches of government and the private sector, the court took it upon itself to "put some steel into [the *Mount Laurel*] doctrine."<sup>15</sup> As "the most discussed case in land-use litigation,"<sup>16</sup> *Mount Laurel II* is the subject of an enormous and diverse body of commentary.<sup>17</sup> For present

<sup>9</sup> *Id.* at 192, 336 A.2d at 734.

<sup>10</sup> *See id.* at 189 & n.22, 336 A.2d at 732-33 & n.22.

<sup>11</sup> *See generally* Note, *Exclusionary Zoning: The View from Mt. Laurel*, 40 ALB. L. REV. 646 (1976); Recent Decision, *Exclusionary Zoning Challenged—New Hope for the Economically Deprived?* 59 MARQ. L. REV. 211 (1976). For a detailed analysis of *Mount Laurel I*, *see generally* AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING (J. Rose & R. Rothman eds. 1977); Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1; Mallach, *Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation*, 6 RUT.-CAM. L.J. 653 (1975); Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803 (1976); Rose, *The Mount Laurel Decision: Is It Based on Wishful Thinking?*, 4 REAL EST. L.J. 61 (1975).

<sup>12</sup> *See* Mallach, *From Mount Laurel to Molehill: Blueprint for Delay*, 15 N.J. REP. 21 (Oct. 1985) ("Looking back in 1983, eight years after the original [*Mount Laurel*] decision, it seemed clear that little lower-income housing had actually been built as a result of the *Mount Laurel* ruling, and not a single unit in Mount Laurel Township itself."); Lynch, *Mount Laurel Update*, 9 SETON HALL LEGIS. J. 575 (1986) ("The *Mt. Laurel I* decision was ignored by everyone.").

<sup>13</sup> *See Mount Laurel II*, 92 N.J. at 158, 456 A.2d at 390.

<sup>14</sup> In *Mount Laurel II* the supreme court observed:

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 our original opinion in this case.

*Id.* at 198-99, 456 A.2d at 410.

<sup>15</sup> *Id.* at 200, 456 A.2d at 410.

<sup>16</sup> Pearson, *State Court Reactions to Exclusionary Zoning*, in 3 ANNUAL SURVEY OF AMERICAN LAW 865, 870 (1984).

<sup>17</sup> *See, e.g.,* Buchsbaum, *No Wrong Without a Remedy: The New Jersey Supreme Court's*

purposes, brief mention will be made of several aspects of the decision that, in retrospect, set the stage for the legislative response and portended the judicial retreat that followed.

Vigorously reaffirming the state constitutional mandate that municipalities "provide a realistic opportunity for [low and moderate income] housing,"<sup>18</sup> *Mount Laurel II* introduced a series of policy prescriptions and remedial measures designed to make that mandate work.<sup>19</sup> In an unprecedented foray into land-use planning and administration, the court "established guidelines and procedures that would ensure active and detailed judicial supervision of local compliance."<sup>20</sup> In this effort the court discarded *Mount Laurel I*'s vague "developing municipality" standard<sup>21</sup> and instead held that the State Development Guide Plan's (SDGP)<sup>22</sup> designations of "growth areas" would determine which municipalities are subject to inclusionary zoning responsibilities for low and moderate income housing.<sup>23</sup> Significantly, throughout the opinion the court stressed its desire that the *Mount Laurel* obligation coincide with comprehensive statewide planning goals.<sup>24</sup>

In a further attempt to promote centralization and consistency, future *Mount Laurel* litigation would be handled by three designated judges charged with responsibility for determining "fair share" for

---

*Effort to Bar Exclusionary Zoning*, 17 THE URB. LAW. 59 (1985); Payne, *Starting Over—Mount Laurel II*, 12 REAL EST. L.J. 85 (1983); Rose, *The Mount Laurel II Decision: Is It Based on Wishful Thinking?*, 12 REAL EST. L.J. 115 (1983); Salsich, *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333 (1984); Williams, *The Background and Significance of Mount Laurel II*, 26 WASH. U.J. URB. & CONTEMP. L. 3 (1984); *Mount Laurel II and Development in New Jersey*, 15 RUTGERS L.J. 513 (1984); *Mount Laurel II Symposium*, 14 SETON HALL L. REV. 829 (1984).

<sup>18</sup> *Mount Laurel II*, 92 N.J. at 199, 456 A.2d at 410.

<sup>19</sup> *Id.* Reaffirming its original *Mount Laurel* ruling, the supreme court in *Mount Laurel II* declared: "We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it." *Id.*

<sup>20</sup> Tarr & Harrison, *supra* note 7, at 515.

<sup>21</sup> *Mount Laurel II*, 92 N.J. at 223-24, 456 A.2d at 422-23. See also note 7 *supra* and accompanying text.

<sup>22</sup> N.J. DEP'T OF COMMUNITY AFFAIRS, DIVISION OF STATE AND REGIONAL PLANNING, STATE DEVELOPMENT GUIDE PLAN (May 1980). The SDGP was promulgated pursuant to N.J. STAT. ANN. § 13:1B-15.52 (West 1979). The SDGP provided a master plan for the state's future development, including maps that set forth "the state's policy as to where growth should be encouraged and discouraged." *Mount Laurel II*, 92 N.J. at 226, 456 A.2d at 424.

<sup>23</sup> *Mount Laurel II*, 92 N.J. at 215, 456 A.2d at 418. Qualifying municipalities would then have to comply with an intricate series of responsibilities. See *id.* Moreover, good faith efforts to construct the requisite number of low and moderate income units would no longer be sufficient. *Id.* at 216, 456 A.2d at 419. Instead, qualifying municipalities would be held to an objective standard of compliance. *Id.*

<sup>24</sup> See *id.* at 226, 233, 456 A.2d at 424, 427-28.

their assigned region, evaluating the merits of challenges to a qualifying municipality's zoning scheme and overseeing the process of promulgating and enforcing conditions to guide and control development.<sup>25</sup> The supreme court armed these designees with an arsenal of remedies to be invoked should a municipal defendant fail to satisfy its *Mount Laurel* obligation.<sup>26</sup> Additionally, the court expressly endorsed the controversial "builder's remedy."<sup>27</sup>

The supreme court acknowledged that its actions in prescribing these broad-based remedial powers resembled "traditional executive or legislative models."<sup>28</sup> Recognizing the inherent limitations of judicial intervention,<sup>29</sup> and unequivocally stating its preference for legislative over judicial action,<sup>30</sup> the court's substantive agenda set out to fill the vacuum created by the coordinating branches' failure to respond meaningfully to the problem of providing a realistic opportunity for the construction of "decent housing for the poor."<sup>31</sup> Concededly, the legislative and executive default that precipitated the court's intervention was attributable in part to "the

---

<sup>25</sup> *Id.* at 253-54, 456 A.2d at 439.

<sup>26</sup> In the first instance, a judicial order would require the offending municipality to revise its zoning ordinance within a specified time period. *Id.* at 278, 456 A.2d at 452. If the municipality failed to rezone satisfactorily within the specified time, the trial court could then implement any of a series of remedies to eliminate the constitutional violation. *Id.* at 285-86, 456 A.2d at 455. These included, inter alia, injunctive relief enjoining all development until the municipality rezoned satisfactorily or until lower income housing was built, *id.* at 285-86, 456 A.2d at 455; a court order requiring that the zoning ordinance incorporate specific "inclusionary devices" such as subsidies, incentive zoning, and mandatory set-asides, *id.* at 262-70, 456 A.2d at 443-47; and appointment of a special master "to assist municipal officials in developing constitutional zoning and land use regulations." *Id.* at 281, 456 A.2d at 453. The master's compensation would be paid by the municipal defendant. *Id.* at 281 n.38, 456 A.2d at 453 n.38.

<sup>27</sup> *Id.* at 278-81, 456 A.2d at 452-53. By means of the "builder's remedy," a builder-plaintiff who waged a successful challenge to an exclusionary zoning ordinance and proposed a development which would provide a substantial amount of lower income housing would be granted a court order permitting him or her to proceed with that development. *Id.* For a discussion of the "builder's remedy," see Buchsbaum, *supra* note 17, at 76-78; Rose, *New Additions to the Lexicon of Exclusionary Zoning Litigation*, 14 SETON HALL L. REV. 851, 870-74 (1984).

<sup>28</sup> *Mount Laurel II*, 92 N.J. at 287, 456 A.2d at 456.

<sup>29</sup> *Id.* at 212, 456 A.2d at 417. The court's intervention was premised on its conviction that: "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." *Id.* at 213-14, 456 A.2d at 417-18.

<sup>30</sup> *Id.* at 212-13, 456 A.2d at 417. The supreme court emphasized that "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." *Id.*

<sup>31</sup> *Id.* at 352, 456 A.2d at 490.

enormous difficulty of achieving a political consensus that might lead to significant legislation enforcing the constitutional mandate better than [the court] can, legislation that might completely remove [the court] from those controversies."<sup>32</sup> The court concluded that enforcement of the constitutional rights at stake could not await a supporting political consensus.<sup>33</sup>

The supreme court's zealous and controversial initiative succeeded in forcing a consensus of sorts. Generating impassioned dissent as well as vigorous praise,<sup>34</sup> *Mount Laurel II* did not inspire a clear consensus on the merits.<sup>35</sup> However, the court's aggressive challenge to the posture of land-use law did provide the executive and the legislative branches with a compelling impetus to act, an impetus rooted at the least in a firm, widely-held resolve to remove the judiciary from the business of administering the *Mount Laurel* obligation.<sup>36</sup>

---

<sup>32</sup> *Id.* at 212, 456 A.2d at 417.

<sup>33</sup> *Id.*

<sup>34</sup> *Mount Laurel II* generated a veritable panoply both of support and criticism. See, e.g., Frizell, *Mount Laurel and Sound Planning*, 112 N.J.L.J. 414-15 (Oct. 13, 1983) (heralding *Mount Laurel II* as "a giant step forward" that "will result in a substantial and sustained improvement in land use planning in New Jersey"); Second Annual Message of Governor Thomas H. Kean to the New Jersey Legislature (Jan. 10, 1984), reprinted in N.J. LEGIS. MAN. 486, 498 (1984) (attacking *Mount Laurel II* as representing "an undesirable intrusion on the home rule principle"). See generally *Mount Laurel II*, 3 N.J.S.B.A., LAND USE LAW SEC. NEWSL. (Aug. 1983), reprinted in 112 N.J.L.J. 393 (Oct. 13, 1983).

<sup>35</sup> See Hill, *Proposed Legislation in Response to Mount Laurel II*, 13 REAL EST. L.J. 170, 174 (1984) ("There is clearly no broad-based political support in New Jersey today at the local level or in the state house for an inclusionary housing program designed to produce significant amounts of low- and moderate-income housing in the suburbs.").

Indeed, the dissension persists, as evidenced by a pending state constitutional amendment that would deprive the courts of the ability to prescribe remedies for violation of the *Mount Laurel* obligation. See S. Con. Res. 87, 202d Leg., 1st Sess. (1986); A. Res. 110-11, 202d Leg., 1st Sess. (1986). Compare Payne, *The Myths of Mount Laurel*, 117 N.J.L.J. 750 (1986) ("The proposed amendment . . . is hardly as innocuous as it appears . . . [W]ithout the possibility of a judicial remedy, there is little likelihood of legislative attention to an unpopular program like affordable housing . . . [I]f the Constitution is amended as the Republicans wish, the [Fair Housing] Act will become a nullity.") with Mercurio, *A Dissent from Mount Laurel*, 117 N.J.L.J. 303, 324 (1986) (calling upon Governor and legislature to support "a constitutional amendment to overrule *Mount Laurel in toto*").

<sup>36</sup> See Hill, *supra* note 35, at 174, where it is suggested that:

[A legislatively-sponsored inclusionary housing] program may be palatable [in New Jersey] only because of increasing recognition that nothing but an affirmative action program designed to produce lower-income housing in the same or greater quantity and the same approximate location as the system which has been enforced on municipalities by the courts is likely to induce the courts to defer to legislative action.

See also Rose, *New Jersey Enacts a Fair Housing Law*, 14 REAL EST. L.J. 195, 211 (1986)



The product of this resolve is the Fair Housing Act,<sup>37</sup> signed into law by Governor Thomas H. Kean, and effective as of July 2, 1985. The Act prescribes "a comprehensive planning and implementation response"<sup>38</sup> to the constitutional obligation to provide "a realistic opportunity for a fair share of [the] region's present and prospective needs for housing for low and moderate income families."<sup>39</sup> As such, the Act unequivocally demonstrates its primary objective to remove the courts from land-use planning.<sup>40</sup>

### *The Fair Housing Act*

The Fair Housing Act is designed to enable every municipality in the state to ascertain and then provide for its fair share of its region's need for low and moderate income housing.<sup>41</sup> The judiciary's use of the SDGP for determining the *Mount Laurel* fair share obligation is replaced with a statewide planning strategy. Essentially, each participating municipality's calculation of fair share is to be adjusted in accordance with a host of factors,<sup>42</sup> one of which is the consistency of the fair share determination with the State Planning Commission's State Development and Redevelopment Plan (SDRP).<sup>43</sup>

The legislature's eagerness to remove the judiciary from this process is reflected by the hallmark of the statutory scheme—the creation of the Council on Affordable Housing (Council), an administrative agency to replace the courts in implementing the *Mount Laurel* mandate.<sup>44</sup> The Council is vested with extremely broad powers. It is responsible for defining housing regions within the state,<sup>45</sup> establishing the present and prospective state

---

("Judges, lawyers, municipal and state officials, citizen groups, media editorials, and academics, as well as the proponents of both the original bill and amended [Fair Housing] Act, all agree that the elimination of the judiciary from land use policy formulation and administration was one of the primary objectives of the Act.").

<sup>37</sup> N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986) [hereinafter Act]. For a detailed examination of the provisions of the Fair Housing Act, see Rose, *supra* note 36, at 195; Note, *The Fair Housing Act: Meeting the Mount Laurel Obligation with a Statewide Plan*, 9 SETON HALL LEGIS. J. 585 (1986).

<sup>38</sup> N.J. STAT. ANN. § 52:27D-302(d).

<sup>39</sup> *Id.* § 52:27D-302(a).

<sup>40</sup> See *id.* § 52:27D-303; see also *infra* notes 44, 48-50, 70-73 and accompanying text.

<sup>41</sup> N.J. STAT. ANN. § 52:27D-307(c).

<sup>42</sup> See *infra* note 56 for a list of these factors.

<sup>43</sup> N.J. STAT. ANN. § 52:27D-307(c)(2)(e).

<sup>44</sup> *Id.* § 52:27D-305.

<sup>45</sup> *Id.* § 52:27D-307(a). The Council has adopted a regional plan for the state. N.J. ADMIN. CODE tit. 5, § 92-2.1. For a description and map of the six regions

and regional need for affordable housing,<sup>46</sup> and promulgating guidelines to assist municipalities within each region to determine their fair share of that region's housing need.<sup>47</sup>

To insure that "resolution of existing and future disputes involving exclusionary zoning"<sup>48</sup> rests with the Council and not with the courts, the statute requires the transfer to the Council of all pending cases except those commenced more than sixty days before the Act's effective date when transfer would result "in a manifest injustice to any party in the litigation."<sup>49</sup> All future controversies are to be resolved in accordance with the Act's "mediation and review process."<sup>50</sup> A moratorium on the builder's remedy is imposed,<sup>51</sup> consistent with the statute's intent to provide "various alternatives to the use of the builder's remedy as a method of achieving fair share housing."<sup>52</sup>

The Act represents an innovative and ambitious undertaking that is not without problems. It has been suggested that elements of the statute invite "bad planning and bad faith planning."<sup>53</sup> The premise that the Act is derivative more of a consensus grounded in an eagerness to eliminate the judiciary from land-use planning than of a firm resolve to achieve the constitutional obligation unfortunately may account for some of its shortcomings.<sup>54</sup>

Whatever the motivation, the statutory scheme seems destined to promote understatement of the true extent of qualifying municipalities' fair share of regional housing needs.<sup>55</sup> The fair

---

determined by the Council, *see* The Newark Star Ledger, Mar. 16, 1986, at 14, col. 3.

<sup>46</sup> N.J. STAT. ANN. § 52:27D-307(b).

<sup>47</sup> *Id.* § 52:27D-307(c). On August 4, 1986, the Council's initial substantive guidelines became effective. 18 N.J. Reg. 1527 (Aug. 4, 1986). *See also* Buzak, *What's New at the COAH*, 119 N.J.L.J. 445 (Mar. 19, 1987) (analysis of new and proposed regulations).

<sup>48</sup> N.J. STAT. ANN. § 52:27D-303.

<sup>49</sup> *Id.* § 52:27D-316.

<sup>50</sup> *Id.* § 52:27D-315.

<sup>51</sup> *Id.* § 52:27D-328.

<sup>52</sup> *Id.* § 52:27D-303.

<sup>53</sup> Lipman, *The "Fair" Housing Act?*, 9 SETON HALL LEGIS. J. 569, 571 (1986). Another commentator has gone so far as to conclude that: "[T]he entire process is rigged. Fair housing, a policy matter of critical public importance, has been taken from the courts and put into the hands of a body which has the power to reward only one group of parties—municipalities." Mallach, *supra* note 12, at 26.

<sup>54</sup> *See supra* notes 35-36 and accompanying text.

<sup>55</sup> *See* Mallach, *supra* note 12, at 25 (The Act "enable[s] municipalities, once under the council's jurisdiction, to gain approval for 'Mount Laurel' programs embodying minuscule numbers of lower-income housing units.").



share allocation process is fraught with the potential for downward modification. For example, once a participating municipality arrives at a number of affordable housing units to represent its tentative fair share, it may then adjust that number downward based upon a myriad of specific as well as open-ended factors.<sup>56</sup> Moreover, the Council may, in its discretion, limit a municipality's fair share on the basis of any other criteria "which the council deems appropriate . . ."<sup>57</sup> Such criteria need not "be general in application or be known to all."<sup>58</sup>

Upon obtaining substantive certification, a municipality may propose that up to fifty percent of its fair share obligation be transferred "to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter."<sup>59</sup> Such "regional contribution agreements" must specify "the amount of contributions" to be made by the sending municipality to the receiving municipality.<sup>60</sup>

Perhaps most troubling is the statute's absence of compliance and enforcement mechanisms. Municipal participation in the affordable housing program is voluntary; the Council has no power to compel involvement.<sup>61</sup> A municipality "which so elects" may adopt a "resolution of participation."<sup>62</sup> It must then

---

<sup>56</sup> See N.J. STAT. ANN. §§ 52:27D-307(c)(2)(a) to -307(c)(2)(d). These factors include preservation of historic sites or environmentally sensitive lands, *id.* § 52:27D-307(c)(2)(a); the "established pattern of development in the community," *id.* § 52:27D-307(c)(2)(b); agricultural and recreational areas, *id.* § 52:27D-307(c)(2)(c); and open space, *id.* § 52:27D-307(c)(2)(d). Subsection -307(c)(2)(b) of the Act, the "established pattern of development in the community," is especially amorphous. The Act offers no guidance to the Council in applying this particularly vague factor. See Lipman, *supra* note 53, at 571.

<sup>57</sup> N.J. STAT. ANN. § 52:27D-307(e).

<sup>58</sup> Lipman, *supra* note 53, at 571.

<sup>59</sup> N.J. STAT. ANN. § 52:27D-312(a). The Council determines the match between the town proposing the transfer (the "sending municipality"), and the town willing to accept the transfer (the "receiving municipality"). *Id.*

<sup>60</sup> *Id.* Regional contribution agreements require Council approval to be effective. *Id.* § 52:27D-312(c). If a municipal defendant has not obtained a substantive certification it may request permission from the court "to fulfill a portion of its fair share by entering into a regional contribution agreement." *Id.* § 52:27D-312(b). Approved agreements enjoy a strong presumption of validity, which may be rebutted only by "clear and convincing" evidence. *Id.* § 52:27-317(b).

<sup>61</sup> *Id.* § 52:27D-302(h). It has been reasoned that: "The only engine which drives the Act's 'voluntary' compliance mechanisms is the immunity which can be gained from litigation." Payne, *supra* note 35 at 750. See also Note, *supra* note 37, at 600 (1986) (The "major benefit" of municipal participation "is protection from a contractor's suit.").

<sup>62</sup> N.J. STAT. ANN. § 52:27D-309(a). "Resolution of participation" is defined as "a resolution adopted by a municipality in which the municipality chooses to pre-

file a "housing element" and a "fair share housing ordinance" to implement the housing element, together with any proposal for a regional contribution agreement.<sup>63</sup>

Upon filing a housing element, the municipality need not take any further action unless it chooses, at any time during a six-year period following the filing,<sup>64</sup> to "petition the Council for a substantive certification of its element and ordinances."<sup>65</sup> The Council must issue a substantive certification if no objection to the certification is filed,<sup>66</sup> if it finds that the fair share plan comports with the Council's rules and criteria,<sup>67</sup> and if the plan makes "the achievement of the municipality's fair share of low and moderate income housing realistically possible . . . ."<sup>68</sup> Once approved by the Council, the municipality has forty-five days in which to adopt its proposed ordinances.<sup>69</sup>

In accordance with the Act's goal of removing the courts from exclusionary zoning disputes,<sup>70</sup> any person who challenges a "participating" municipality's zoning ordinance must exhaust "the review and mediation process of the [C]ouncil before being entitled to a trial on his complaint."<sup>71</sup> Once approved by the Council, a municipality's housing program enjoys a "presumption of validity,"<sup>72</sup> a presumption rebutted only if the complain-

---

pare a fair share plan and housing element in accordance with this act." *Id.* § 52:27D-304(e).

<sup>63</sup> *Id.* § 52:27D-312(a).

<sup>64</sup> *Id.* § 52:27D-313.

<sup>65</sup> *Id.* In petitioning the Council for a substantive certification, "[t]he municipality shall publish notice of its petition in a newspaper of general circulation and shall make available to the public information on the element and ordinances . . . ." *Id.*

<sup>66</sup> Under the Act, "[u]nless an objection to the substantive certification is filed with the Council by any person within 45 days of the publication of the notice of the municipality's petition, the Council shall review the petition and shall issue a substantive certification . . . ." *Id.* § 52:27D-314.

<sup>67</sup> *Id.* § 52:27D-314(a).

<sup>68</sup> *Id.* § 52:27D-314(b).

<sup>69</sup> *Id.* § 52:27D-314.

<sup>70</sup> *Id.* § 52:27D-303.

<sup>71</sup> *Id.* § 52:27D-316(b). Any objections to the petition for a substantive certification are processed in accordance with the provisions of N.J. STAT. ANN. §§ 52:27D-314 to -316. If a timely objection is filed, the Council must, in the first instance, engage in a "mediation and review process." *Id.* § 52:27D-315(a). The Council has six months from receipt of the objection to complete this process. *Id.* § 52:27D-319. If mediation efforts are unsuccessful, the matter is transferred to the Office of Administrative Law as a contested case. *Id.* § 52:27D-315(c). An evidentiary hearing and initial decision must be made within 90 days, unless the time is extended for "good cause shown." *Id.* The final determination on the issue of substantive certification is rendered by the Council after receipt of the Administrative Law Judge's initial decision. *Id.*

<sup>72</sup> *Id.* § 52:27D-317(a).

ant demonstrates, by the enhanced burden of clear and convincing evidence, that the housing element does not provide a realistic opportunity for the provision of the municipal defendant's fair share of low and moderate income housing.<sup>73</sup> These barriers combine to render a certified program unsusceptible to successful legal challenge. While a municipality that attains substantive certification is insulated from future litigation, "a municipality whose plan fails to win approval is no worse off than before."<sup>74</sup> The Council is not empowered to impose sanctions regardless of a community's recalcitrance; "the only recourse, at that point, is for a party to bring a new *Mount Laurel* lawsuit, starting from scratch, against the municipality."<sup>75</sup>

Factors such as these fueled the concern that the statutory scheme "institutionalizes delay as a tactic in dealing with the *Mount Laurel* doctrine."<sup>76</sup> On this basis and several others, the Act met with constitutional and interpretative challenges. These challenges quickly worked their way to the New Jersey Supreme Court in the form of twelve consolidated appeals, each involving the propriety of a trial court's decision on a motion to transfer *Mount Laurel* litigation from the courts to the Council.<sup>77</sup> In a gesture of sweeping and enthusiastic deference, Chief Justice Wilentz, writing for the unanimous court, declared the Act constitutional and transferred jurisdiction of pending litigation to the Council.<sup>78</sup>

### MOUNT LAUREL III

Drawing upon the expressed legislative intent to satisfy the constitutional obligation, as well as the court's own long-expressed preference for a legislative solution, *Mount Laurel III* begins with a ringing endorsement of the Fair Housing Act.

---

<sup>73</sup> *Id.* § 52:27D-317(b).

<sup>74</sup> Mallach, *supra* note 12, at 25.

<sup>75</sup> *Id.* As noted previously, any challenge to a "participating" municipality's zoning ordinance must exhaust the statutorily-prescribed mediation and review process before resorting to the courts. See *supra* note 71 and accompanying text. This obligation to exhaust administrative remedies terminates if the Council rejects the municipality's petition for substantive certification. N.J. STAT. ANN. § 52:27D-318.

<sup>76</sup> Mallach, *supra* note 12, at 25.

<sup>77</sup> *Mount Laurel III*, 103 N.J. 26-31, 510 A.2d 634-37. The supreme court certified all of these appeals directly from the trial courts. In all but one of the lower court rulings, the motion to transfer to the Council had been denied. *Id.* at 26, 510 A.2d at 634-35. Of the twelve appeals, the supreme court chose five for oral argument. *Id.* In the court's view, these cases were "designed and structured to cover all of the issues in all of the cases." *Id.* at 26, 510 A.2d at 635.

<sup>78</sup> *Id.* at 25, 510 A.2d at 634.

The Act that we review and sustain today represents a substantial effort by the other branches of government to vindicate the *Mount Laurel* constitutional obligation. This is not ordinary legislation. It deals with one of the most difficult constitutional, legal and social issues of our day . . . [I]f the Act before us works in accordance with its expressed intent, it will assure a realistic opportunity for lower income housing in all those parts of the state where sensible planning calls for such housing.

Most objections raised against the Act assume that it will not work, or construe its provisions so that it cannot work, and attribute both to the legislation and to the Council a mission, nowhere expressed in the Act, of sabotaging the *Mount Laurel* doctrine. On the contrary, we must assume that the Council will pursue the vindication of the *Mount Laurel* obligation with determination and skill. If it does, that vindication should be far preferable to vindication by the courts, and may be far more effective.<sup>79</sup>

The court's hopeful demonstration of comity is in large part attributable to its perception of the Act as the "response" it had "always wanted and sought."<sup>80</sup> In the court's view, a comprehensive plan for the state would now be implemented by the governmental branches whose policy judgments would command "public acceptance."<sup>81</sup> Hence, the statutory scheme is lauded as representing "an unprecedented willingness by the Governor and the Legislature to face the *Mount Laurel* issue after unprecedented decisions by

---

<sup>79</sup> *Id.* at 21, 510 A.2d at 632.

<sup>80</sup> *Id.* at 65, 510 A.2d at 655. There is significant difference of opinion as to whether the Act represents a good faith attempt at implementation of the *Mount Laurel* obligation or a thinly disguised endeavor to thwart the mandate. Compare Lynch, *supra* note 12, at 578 (Act represents "a giant step" toward solution of *Mount Laurel* mandate.) with Lipman, *supra* note 53, at 571 (several of Act's provisions "place municipalities in the contradictory [sic] and untenable position of using a purported fair share compliance mechanism to thwart the constitution.") and Malach, *supra* note 12, at 27 ("The [A]ct is widely—and accurately—perceived as the ally of those municipalities which have sought, since 1983, to defer, or avoid entirely, their *Mount Laurel* obligations.") and Rose, *supra* note 36, at 214 (Act "adopts a judicially formulated policy based on questionable urban policy premises.").

<sup>81</sup> *Mount Laurel III*, 103 N.J. at 23, 510 A.2d at 633. Significantly the court noted:

When supplemented by the SDRP, the Act amounts to an overall plan for the state . . . [I]t is a plan that will necessarily reflect competing needs and interests resolved through value judgments whose public acceptability is based on their legislative source. Most important of all to the success of the plan is this public acceptance and, hence, the municipal acceptance that it should command.

*Id.*

[the supreme court]."<sup>82</sup> The court urged "particularly strong deference . . . to the Legislature relative to this extraordinary legislation . . . ."<sup>83</sup>

This somewhat self-serving refrain<sup>84</sup> injects itself into virtually every aspect of the decision, sometimes yielding conclusional responses to the issues presented. If nothing else, the court's message is clear: at least for now, achievement of the *Mount Laurel* doctrine's lofty goals will rest with the Council.<sup>85</sup>

### *The Constitutional Challenges*

In assessing the various challenges to the Act's constitutionality, the supreme court in the first instance invoked the "firmly settled" rule "that a law is presumed constitutional."<sup>86</sup> The court reasoned that if "ordinary legislation"<sup>87</sup> is entitled to this presumption, then certainly the Act, an "extraordinary"<sup>88</sup> response to the judiciary's entreaty for a legislative solution to the *Mount Laurel* mandate, is worthy of especially strong deference.<sup>89</sup> The remainder of the court's constitutional analysis rigidly relies on the statute's facial nobility of purpose.<sup>90</sup> Challenges to the Act's subsequent operational impact are quickly disposed of as "speculation."<sup>91</sup> Throughout its decision, the court unwaveringly embraces the legislative scheme while affording the Council tremendous latitude to implement that scheme.<sup>92</sup>

---

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 24, 510 A.2d at 633 (citing *Mount Laurel II*, 92 N.J. at 212-14, 456 A.2d at 417-18).

<sup>84</sup> See *infra* note 89 and accompanying text.

<sup>85</sup> See *Mount Laurel III*, 103 N.J. at 25, 510 A.2d at 634.

<sup>86</sup> *Id.* 24, 510 A.2d at 633 (citations omitted).

<sup>87</sup> *Id.* at 23-24, 510 A.2d at 633.

<sup>88</sup> *Id.* at 24, 510 A.2d at 633.

<sup>89</sup> *Id.* The logic of this premise is unclear, if not dubious. It is well-settled that statutory enactments enjoy a presumption of constitutionality, and "will not be declared void unless . . . clearly repugnant to the [c]onstitution." *Mahwah Township v. Bergen County Bd. of Taxation*, 98 N.J. 268, 282, 486 A.2d 818, 825 (1985) (citations omitted). The court, however, suggests that legislation to answer satisfactorily its call is entitled by definition to some enhanced presumption of validity, simply by virtue of the fact that the court asked and the legislature acceded. The court cites no precedent for its point. If taken literally, it raises significant concerns of legitimacy, especially in the context of the long uneasiness felt at the judiciary's power to compel action by elected officials. See generally Chayes, *The Role of The Judge In Public Law Litigation*, 89 HARV. L. REV. 1281, 1313-15 (1976).

<sup>90</sup> See *Mount Laurel III*, 103 N.J. at 21, 510 A.2d at 632.

<sup>91</sup> *Id.* at 43, 510 A.2d at 643.

<sup>92</sup> Hence, the court noted that: "The work of this Act cannot be judged by what it will accomplish in its first year, nor by its effect on a limited number of municipalities. It is its probable long-term impact and its impact on *all* municipalities that

Thus, the court summarily rejected the first major challenge that the "Act is unconstitutional because it will result in delay in the satisfaction of the *Mount Laurel* obligation."<sup>93</sup> This contention, the court declared, rests on "a totally false premise . . . that there is some constitutional timetable implicit in that obligation."<sup>94</sup> While this "misunderstanding" may have been attributable to the appeals for swift action contained in *Mount Laurel II*, it was not a constitutionally imposed time frame that had inspired that decision's resolve "not to allow any further delay."<sup>95</sup> Rather, "[i]t was the total disregard by municipalities of the judiciary's attempts to enforce the obligation, and the interminable delay where litigation was in process, that formed the background for those comments."<sup>96</sup> For the supreme court, any delays occasioned by the Act's start-up provisions seemed of little moment when compared to the more than decade-long wait for legislative action. Indeed, having extended, in *Mount Laurel II*, "the strongest possible entreaty to the Legislature," the court reasoned that it would be totally inconsistent to rule that "this welcome entry of the Legislature in this area of the law is somehow unconstitutional because the remedies of the Act, so long sought by the judiciary, will somehow not result in ordinances or housing quickly enough."<sup>97</sup>

Further, in the spirit of affording the statutory scheme every positive inference, Chief Justice Wilentz posited that "[t]he delay caused by the Act represents the time needed by the Council to

---

counts." *Id.* at 41, 510 A.2d at 643. The court assured that "[r]evisions, adjustments, fine tuning—all of the techniques available to an administrative agency—can be implemented on a statewide basis as experience teaches the Council what works and what does not." *Id.* at 37, 510 A.2d at 640. Moreover, the court guaranteed that "the judiciary, assuming the statutory plan functions reasonably effectively, will be responsive to the actions of the Council and conform its decisions in this field to the Council's various determinations." *Id.* The latitude afforded the Council reflects in part the court's view of that agency's presumed legitimacy and expertise, "derive[d] from selection by the Governor and confirmation by the senate, in accordance with the will of the legislature." *Id.* at 22, 510 A.2d at 632.

<sup>93</sup> *Id.* at 40, 510 A.2d at 642. Several start-up delays were contemplated by the Act. For example, the Act afforded the Council up to seven months after the last Council member was appointed or until January 1, 1986 (whichever date was earlier) to promulgate its guidelines. N.J. STAT. ANN. § 52:27D-307 (West 1986). Municipalities would then be permitted several months from that date to shape their proposed ordinances and housing elements. *Id.* § 52:27-309(a).

<sup>94</sup> *Mount Laurel III*, 92 N.J. at 40, 510 A.2d at 642.

<sup>95</sup> *Id.* at 41, 510 A.2d at 642.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

do its job well.''<sup>98</sup> Reiterating its preference for legislative action, the court continued:

[I]t is quite possible that the Act will work more quickly than the judicial procedure, will result in more conforming municipal ordinances, in the aggregate, than would be obtained through litigation, and may ultimately result in more lower income housing than the courts could have achieved.<sup>99</sup>

Upholding the Act's moratorium on the builder's remedy,<sup>100</sup> the court rejected the notion that the remedy was part of the constitutional obligation.<sup>101</sup> Rather, the court stated that the builder's remedy was merely a method of achieving the "constitutionally mandated goal" of providing a realistic opportunity for the construction of low and moderate income housing.<sup>102</sup> The court deferred unequivocally to the legislature's judgment that "the builder's remedy has, for the time being, ceased to be acceptable."<sup>103</sup>

Critics of the Act argued that its reliance solely on voluntary municipal participation, coupled with the absence of an assured builder's remedy, would result in little or no construction of affordable housing.<sup>104</sup> The court responded that to the extent that this attack was based only upon speculation, it would not suffice to rebut the (apparently enhanced) presumption of constitutionality.<sup>105</sup> Indeed, the court added that "[i]n many respects the Act promises results beyond those achieved by the doctrine as administered by the courts."<sup>106</sup>

*"Manifest Injustice" of Transfer to the Council*

Having resolved the constitutional challenges, the supreme court turned to the propriety of the trial courts' resolution of the various motions to transfer *Mount Laurel* litigation to the Council.

---

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 41, 510 A.2d at 642-43.

<sup>100</sup> See N.J. STAT. ANN. § 52:27D-328 (West 1986).

<sup>101</sup> *Mount Laurel III* at 42, 510 A.2d at 643. Moreover, the court ruled that the Act's moratorium on the "builder's remedy" does not usurp the judiciary's exclusive powers to prescribe the relief granted in any action in lieu of prerogative writs. *Id.* at 46, 510 A.2d at 645.

<sup>102</sup> *Id.* at 42, 510 A.2d at 643 (quoting *Mount Laurel II*, 92 N.J. at 237, 456 A.2d at 430).

<sup>103</sup> *Id.* at 42-43, 510 A.2d at 643.

<sup>104</sup> *Id.* at 43, 510 A.2d at 643.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 43-44, 510 A.2d at 644.



The court interpreted the operative statutory provision<sup>107</sup> to mean "that transfer [to the Council] *must* be granted unless it would result in manifest injustice to any party to the litigation."<sup>108</sup> To help facilitate the Act's two primary purposes ("first, to bring an administrative agency into the field of lower income housing to satisfy the *Mount Laurel* obligation; second, to get the courts out of that field"),<sup>109</sup> the court ruled that "manifest injustice" must be limited to only "the most extreme situation."<sup>110</sup> Thus, all pending *Mount Laurel* cases would be transferred, "except where unforeseen and exceptional unfairness would result."<sup>111</sup>

---

<sup>107</sup> N.J. STAT. ANN. § 52:27D-316 (West 1986) governs the courts' jurisdiction of pending and future *Mount Laurel* litigation. That section provides in its entirety:

For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation. If the municipality fails to file a housing element and fair share plan with the council within five months from the date of transfer, or promulgation of criteria and guidelines by the council pursuant to section 7 of this act, whichever occurs later, jurisdiction shall revert to the court.

b. Any person who institutes litigation less than 60 days before the effective date of this act or after the effective date of this act challenging a municipality's zoning ordinance with respect to the opportunity to provide for low or moderate income housing, shall file a notice to request review and mediation with the council pursuant to sections 14 and 15 of this act. In the event that the municipality adopts a resolution of participation within the period established in subsection a. of section 9 of this act, the person shall exhaust the review and mediation process of the council before being entitled to a trial on his complaint.

*Id.* (The *Mount Laurel III* court noted the irregular labelling of this subsection, 103 N.J. at 49 n.14, 510 A.2d at 646 n.14.)

<sup>108</sup> *Mount Laurel III*, 103 N.J. at 48, 510 A.2d at 646-47.

<sup>109</sup> *Id.* at 49, 510 A.2d at 647.

<sup>110</sup> *Id.* at 51, 510 A.2d at 648.

<sup>111</sup> *Id.* at 49, 510 A.2d at 647. The sort of "unforeseen and exceptional unfairness [which] would warrant the denial of a transfer motion" does *not* include "[d]elay in the production of housing, loss of expected profits, loss of the builder's remedy, substantial expenditure of funds for litigation purposes, permit applications, on-site and off-site tract improvements, purchase of property or options at an inflated price, [or] contractual commitments." *Id.* at 53-54, 510 A.2d at 649.

As to the inadequacy of delay in construction as a factor to compel a finding of "manifest injustice," the court noted:

It would be ironic if the application of this Act, so long in coming, so outstanding compared to the inactivity of other states, were to be characterized as manifest injustice simply because, in the most limited circumstances, its remedy was not immediate; and ironic to label the inevitable initial delaying effect of this law, so manifestly just in its un-

The court's accommodating endorsement of the legislative scheme carries the opinion to its idealistic end:

By virtue of the Act, the three branches of government in New Jersey are now committed to a common goal: the provision of a realistic opportunity for the construction of needed lower income housing. It is a most difficult goal to achieve . . . .

This [c]ourt will do its proper share in this cooperative effort.<sup>112</sup>

Presuming that the Council would pursue achievement of the constitutional objectives with determination and skill, the court would "do its proper share" by graciously stepping aside.<sup>113</sup>

### MOUNT LAUREL III AND THE BALANCE OF POWER

The *Mount Laurel* trilogy offers an instructive illustration of the separateness as well as the interdependence of the governmental powers. In *Mount Laurel I* the supreme court, implicitly aware of the primarily legislative character of the issues to be resolved, afforded the coordinating branches the opportunity (but apparently not the incentive) to devise an appropriate approach.<sup>114</sup> The studied inaction that followed compelled the court, in *Mount Laurel II*, to fashion a remedial program to effectuate the constitutional obligation.<sup>115</sup>

Certainly *Mount Laurel II* transcended the interests of the litigants themselves. Within the rubric of the traditional separation of powers,<sup>116</sup> the court's bold intervention brought it squarely

---

precedented attempt to provide lower income housing, as manifestly unjust in that very respect.

*Id.* at 51, 510 A.2d at 648.

<sup>112</sup> *Id.* at 63, 510 A.2d at 654.

<sup>113</sup> *See id.* at 63-64, 510 A.2d at 654.

<sup>114</sup> *See Mount Laurel I*, 67 N.J. at 192, 336 A.2d at 734.

<sup>115</sup> *See Mount Laurel II*, 92 N.J. at 212-13, 456 A.2d at 417.

<sup>116</sup> The New Jersey Constitution expressly embraces the separation of powers as part of the state's governmental structure. N.J. CONST. art. III, ¶ 1. As the supreme court has explained:

Governmental checks and balances are an integrated feature of our fundamental organic law. It is a constitutional axiom that each branch of government is distinct and is the repository of the powers which are unique to it; the members or representatives of one branch cannot arrogate powers of another branch. The constitutional spirit inherent in the separation of governmental powers contemplates that each branch of government will exercise fully its own powers without transgressing upon powers rightfully belonging to a cognate branch. Each branch of government is counseled and restrained by the constitution not to seek dominance or hegemony over the other branches.

within the province of the nonjudicial areas of governance, thereby prompting challenges to its legitimacy.<sup>117</sup> Indeed, the judiciary's attempt at implementation of the *Mount Laurel* mandate was assailed as compromising, if not undermining, the appropriate allocation of governmental powers.<sup>118</sup>

Such criticism overlooks the fact that in effectuating those matters implicating both individual rights as well as societal interests, any compartmentalization among the executive, legislative and judicial branches has never been "watertight."<sup>119</sup> In such settings the Supreme Court of New Jersey has approached the separation and allocation of powers with flexibility,<sup>120</sup> mindful of

---

Knight v. Margate, 86 N.J. 374, 387-88, 431 A.2d 833, 840 (1981) (citing N.J. CONST. art. III, ¶ 1). See generally Gwyn, *The Meaning of the Separation of Powers*, in 9 TULANE STUDIES IN POLITICAL SCIENCE (1965); Katz, *The Origins of American Constitutional Thought*, in 3 PERSPECTIVES IN AMERICAN HISTORY 474-90 (1969). For a discussion of the "affirmative activism" of the supreme court in *Mount Laurel II* within the context of the separation of powers, see Tarr & Harrison, *supra* note 7, at 538-42.

<sup>117</sup> Ironically, the unprecedented type of involvement that distinguishes *Mount Laurel II* was motivated in part by the court's concern for its own legitimacy. Adherence to traditional models for separation of powers would have compromised, if not undermined, the court's mandate to enforce the constitution. *Mount Laurel II*, 92 N.J. at 287, 456 A.2d at 456. The court was mindful of the "Catch-22" it confronted: "Judicial legitimacy may be at risk if we take action resembling traditional executive or legislative models; but it may be even more at risk through failure to take such action if that is the only way to enforce the [c]onstitution." *Id.* (footnote omitted).

<sup>118</sup> See, e.g., Rose, *supra* note 36, at 211 ("The formulation of housing and land use policy by the judiciary, no matter how commendable and meritorious that policy is, constitutes a usurpation by the judiciary of the powers of the legislature.").

<sup>119</sup> *Knight*, 86 N.J. at 388, 431 A.2d at 840 (quoting *In re Salaries Probation Officers Bergen County*, 58 N.J. 422, 425, 278 A.2d 417, 418 (1971)). Indeed, "[i]n New Jersey it has traditionally been the judiciary, and not the Legislature, that had remedied substantive abuses of the zoning powers by municipalities." *Mount Laurel II*, 92 N.J. at 213 n.7, 456 A.2d at 417 n.7. Thus, at the least, it has been reasoned that "the court in *Mount Laurel II* was not invading a sphere of governmental policy which had previously been the exclusive preserve of another branch. Although the type of judicial intervention may have been unprecedented, the focus clearly was not." Tarr & Harrison, *supra* note 7, at 540-41.

<sup>120</sup> See, e.g., Kelly v. Gwinnell, 92 N.J. 538, 552-53, 476 A.2d 1219, 1226 (1984) (principles of negligence as well as public policy concerns warranted judicially-imposed liability on social host for injuries caused by guest who becomes intoxicated and drives); *Knight v. Margate*, 86 N.J. 374, 391, 431 A.2d 833, 842 (1981) (statute restricting dealings of members of judiciary with casino entities permissible, as supreme court may "accommodate the lawful and reasonable exercise of the powers of other branches of government even as that might impinge upon the [c]ourt's constitutional concerns in the judicial area"); *State v. Leonardis*, 73 N.J. 360, 369-74, 375 A.2d 607, 611-14 (1977) (court's power to devise pretrial intervention program permissible as representative of cooperative effort among the branches of government).

the "symbiotic relationship between the separate governmental parts."<sup>121</sup> The court's vision of the interdependence among the branches of government appreciates that the governmental functions frequently are complementary.

Still, throughout its foray into land-use planning the court was mindful too of the separateness of the governmental powers. Cognizant of the societal interests implicated by its decision-making, as well as the relative unsuitability of the judicial "devices" for achieving its constitutional mandate, the court in *Mount Laurel II* willingly and repeatedly conceded that the issues it confronted were far more amenable to legislative and executive solution.<sup>122</sup> Signalling its clear readiness to defer, the court submitted that the judicial role could abate as a result of the more political branches' initiative.<sup>123</sup>

Indeed, the court's intervention seemed intended almost as much to help produce that initiative as to vindicate the constitutional rights involved. By placing the issue of affordable housing at the forefront of the state's political agenda, and prescribing aggressive remedies to fill perceived gaps in state policy, the court provided the coordinating branches with the latitude as well as the incentive to act.<sup>124</sup> Part of that incentive undoubtedly

---

<sup>121</sup> *Knight*, 86 N.J. at 388, 431 A.2d at 840. With respect to the separation of powers, the supreme court in *Knight* added: "[I]nvariably some osmosis occurs when the branches of government touch one another; the powers of one branch sometimes take on the hue and characteristics of the powers of the others." *Id.* (citations omitted).

<sup>122</sup> *Mount Laurel II*, 92 N.J. at 212-14, 456 A.2d at 417-18.

<sup>123</sup> *Id.* at 213, 456 A.2d at 417.

<sup>124</sup> Thus understood, the court's involvement illustrates what Professors Porter and Tarr have described as "innovative policymaking." See *Introduction to STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* at xvi-xvii (M. Porter & G. Tarr eds. 1982). With respect to state supreme court policymaking, Professors Porter and Tarr state that:

*Innovative policymaking* refers to policymaking (a) that either overturns an existing state policy or fills a gap in state policy; (b) in which the initiative comes from within the state supreme court, rather than being mandated by either federal authorities or other branches of state government; and (c) that imposes specific policies. Most frequently [the state supreme court's] constitutional interpretation supplies the basis for such policymaking.

*Id.* at xvi. Professors Porter and Tarr note that the effects of such policymaking are twofold:

On the one hand, such policymaking reorders the policymaking priorities of the political branches and affects the distribution of political power by focusing attention on unacceptable inequities in existing policy. On the other hand, rather than usurping the policymaking responsibilities of the political branches, agenda setting gives legislatures and

was grounded in a desire to remove the judiciary from the affordable housing arena.<sup>125</sup> More significantly, by sharply focusing public attention on existing inequities in the state's zoning practices, *Mount Laurel II* caused pressure to bear upon elected officials.<sup>126</sup>

The Fair Housing Act represents the product of "the political pressures on the Legislature 'to do something about *Mount Laurel*.'"<sup>127</sup> Certainly the Act reflects the compromise endemic to the political process. Such compromise seemed compounded in this context by the absence of a sufficiently-mobilized constituency for the substance of the *Mount Laurel* doctrine itself.<sup>128</sup> Yet, for all its potential deficiencies, on its face the statute offers a comprehensive approach to the policy issues and collective interests involved in implementing the right to affordable housing, from the branches of government whose accepted role it is to address such matters.

Against this backdrop, the supreme court's retreat in *Mount Laurel III* is both appropriate and predictable.<sup>129</sup> Having in-

---

executives substantial latitude in devising new—and at times fresh and imaginative—approaches to pressing problems.

*Id.* at xvii (footnote and citations omitted). See also Blomquist, *Solar Energy Development, State Constitutional Interpretation and Mount Laurel II: Second-Order Consequences of Innovative Policymaking By the New Jersey Supreme Court*, 15 RUTGERS L.J. 573, 575-76 (1984).

<sup>125</sup> See *supra* notes 35-36 and accompanying text.

<sup>126</sup> See McDougall, *Exclusionary Zoning Law*, *supra* note 6, at 661:

The *Mt. Laurel* decisions brought the exclusionary zoning problem before the public. Elected officials using zoning ordinances to exclude people were held accountable because of the prolonged attention which court battles focused on the problem. Low- and moderate-income groups were made aware of zoning decisions that escalated housing costs in the suburbs. This exposure, along with the "builder's remedy," compelled the state legislature to act.

*Id.* (footnote omitted).

<sup>127</sup> See Lipman, *supra* note 53, at 570.

<sup>128</sup> See Mallach, *supra* note 12, at 27 ("*Mount Laurel* has no real constituency."); Hill, *supra* note 35, at 174 (noting absence of "broad-based political support" in New Jersey for inclusionary housing program).

<sup>129</sup> The dynamic that underscores the court's withdrawal is not unprecedented. For example, in *Robinson v. Cahill*, the court declared the state's public school financing system unconstitutional. 62 N.J. 473, 303 A.2d 273 (1973), *modified*, 63 N.J. 196, 306 A.2d 65, *cert. denied*, 414 U.S. 976 (1973). Two years later, confronted with legislative inaction, the court prescribed a provisional financing scheme. *Robinson v. Cahill*, 69 N.J. 133, 155, 351 A.2d 713, 724 (1975), *cert. denied*, 423 U.S. 913 (1975). In response, the legislature enacted the Public School Education Act of 1975. N.J. STAT. ANN. §§ 18A:7A-1 to -33 (West 1986). The supreme court subsequently upheld the statute. *Robinson v. Cahill*, 69 N.J. 449, 467, 355 A.2d 129, 139 (1976). The court later enjoined expenditures for public education until the legislature fully funded the financing system established by the statute. *Robinson*

spired a presumptively meaningful response from the branches which, by its own repeated assertions, are best-equipped to effectuate the public policy and community goals at stake, the court stepped aside to afford that response the latitude to succeed.<sup>130</sup> If it was not clear before, *Mount Laurel III* leaves no doubt that the court's attempt in *Mount Laurel II* to implement the constitutional obligation never was intended to usurp the responsibilities of the political branches. Indeed, the preferability of the legislative and executive solution is reiterated no fewer than ten times throughout *Mount Laurel III*.<sup>131</sup>

Surely the court's wholesale validation of the Act may be too optimistic. For example, to predict "that lower income housing should actually be built" because "the Council has the power to refuse substantive certification" and because the Act provides for certain "financial aids to construction"<sup>132</sup> seems tenuous at best. Given the potential for understatement of fair share allocations, as well as the absence of statutory enforcement mechanisms, it seems naive to postulate that "within the not-too-distant future most municipalities subject to *Mount Laurel* obligations will have conforming ordinances in place providing a realistic opportunity for the construction of their fair share of the region's need for low and moderate income housing."<sup>133</sup>

---

v. Cahill, 70 N.J. 155, 160-61, 358 A.2d 457, 459 (1976), *injunction dissolved*, 70 N.J. 465, 360 A.2d 400 (1976). More recently, in the context of a constitutional challenge to the statute, the court held that full effectuation of the statutory scheme mandated exhaustion of administrative remedies. See *Abbott v. Burke*, 100 N.J. 269, 301, 495 A.2d 376, 393 (1985). The *Abbott* court's holding implicitly demonstrates the judicial willingness to defer to the more political branches on matters pertaining to community objectives.

<sup>130</sup> The court's retreat confirms the interdependence as well as the separateness of the governmental powers:

The constitutional obligation has not changed; the judiciary's ultimate duty to enforce it has not changed; our determination to perform that duty has not changed. What *has* changed is that we are no longer alone in this field. The other branches of government have fashioned a comprehensive statewide response to the *Mount Laurel* obligation. This kind of response, one that would permit us to withdraw from this field, is what this [c]ourt has always wanted and sought. It is potentially far better for the [s]tate and for its lower income citizens.

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

<sup>131</sup> See *id.* at 21, 25, 43-44, 46, 46-47, 52, 63, 65, 510 A.2d at 632, 634, 644, 645, 648, 654, 655.

<sup>132</sup> *Id.* at 37, 510 A.2d at 640.

<sup>133</sup> *Id.* at 36-37, 510 A.2d at 640. As of December 1987, 25 of the state's 567 municipalities had received substantive certification; another 58 petitions for substantive certification were pending; and an additional 50 municipalities had filed housing elements/fair share plans but had not yet sought substantive certification.

Yet, to conjecture that the statutory scheme as implemented forecasts problems of meaningful compliance and enforcement does not render the outcome in *Mount Laurel III* any less legitimate. When presented to the court, doubts about the Act's operational effectiveness were speculative at best. Judicial repudiation of the statute would have contravened the presumption of constitutionality<sup>134</sup> as well as compromised the credibility of the court's long-expressed preparedness to accommodate and cooperate with a legislative solution.

The deference that characterizes *Mount Laurel III* implicitly acknowledges that judicial participation, even at its most aggressive, should exist in the form of a continuous and fluid dialogue with the other political components—the legislature and the executive, administrative agencies and the public.<sup>135</sup> The court's endorsement of the Act and attendant retreat reflect a judiciary committed to and capable of responsive participation in such a colloquy.<sup>136</sup> The court candidly declared that it had heard the criticisms engendered by *Mount Laurel II*.<sup>137</sup> Its abdication of a policy-making role seems guided in part by a responsiveness to the possibility, if not the likelihood, that in assuming such a role it had exceeded the range of political tolerance.<sup>138</sup>

---

Telephone interview with Sidna Mitchell, Public Information Officer, Council on Affordable Housing (December 22, 1987).

The Council views the municipal response rate with optimism. "In less than a year after our guidelines were adopted, we have shown that this administrative process can work. The council is meeting its legislative mandate along with a substantial portion of our municipalities and in a very compressed time period." Statement of Arthur Kondrup, Chairman, Council on Affordable Housing, Press Release (May 20, 1987).

<sup>134</sup> See *Mount Laurel III*, 103 N.J. at 23-24, 510 A.2d at 633.

<sup>135</sup> See Chayes, *supra* note 89, at 1316. In the context of examining public law litigation in the federal courts, Professor Chayes astutely noted that "Bentham's 'judge and company' has become a conglomerate." *Id.* The same may be said for the state court arena, "where the ability of a judicial pronouncement to sustain itself in the dialogue and the power of judicial action to generate assent over the long haul become the ultimate touchstones of legitimacy." *Id.* (footnote and citations omitted). To suggest that the New Jersey Supreme Court is a viable participant in the dialogue on affordable housing does not foretell whether the *Mount Laurel* doctrine will sustain itself over the long haul. See *supra* note 35.

<sup>136</sup> Through this critical dialectic may emerge "principle . . . evolved conversationally, not perfected unilaterally." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 244 (1962).

<sup>137</sup> *Mount Laurel III*, 103 N.J. at 63-64, 510 A.2d at 654. The supreme court acknowledged: "We have been criticized strongly for activism in this most sensitive and controversial area. We understand that no one wants his or her neighborhood determined by judges." *Id.*

<sup>138</sup> The court's recognition of the hostility generated by its scheme for imple-



In an insightful discussion of the implications of judicial responsiveness in the context of contemporary jurisprudence, a member of the supreme court wisely observed:

[C]ourts that have exercised initiative in areas that overlap the legitimate concerns of another branch of government, or society as a whole, must be prepared to tolerate and consider the differing views . . . . Depending upon the nature and mix of public and individual issues that are implicated in a given case, a court should be prepared to defend, share, or yield the ground upon which its decision rests.<sup>139</sup>

*Mount Laurel III* reflects this sort of judicial sensitivity. In the area of affordable housing, the court has shared, if not yielded, its ground.

### CONCLUSION

Comprehensive legislative action in "the agitated field of private land use"<sup>140</sup> would not have been forthcoming in New Jersey had the bench not challenged the traditional posture of the law.<sup>141</sup> Arguably, "[e]ven those who believe firmly in traditional separation of powers and the superior ability of the legislature to deal with the complex social and economic problems of exclusionary zoning, may now view judicial activism as a legitimate catalyst to action by the legislature."<sup>142</sup> In the fervent area of affordable housing, this may well be the New Jersey Supreme

---

mentation of the zoning mandate explicitly guides its view that the Act will succeed even without mandatory compliance provisions:

Municipalities will have both the means and motives to determine . . . what is required of them . . . the means consist of the rules, criteria, and guidelines of the Council . . . . The motives are the municipalities' strong preference to exercise their zoning powers independently and voluntarily as compared to their open hostility to court-ordered rezoning; [and their] desire to avoid such litigation [will be] best achieved by voluntary compliance through conformance with the standards adopted by the Council.

*Id.* at 22, 510 A.2d at 632-33.

<sup>139</sup> Handler, *Jurisprudence and Prudential Justice*, 16 SETON HALL L. REV. 571, 595 (1986).

<sup>140</sup> Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1090 (1963).

<sup>141</sup> See McDougall, *Exclusionary Zoning Law*, *supra* note 6; Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234, 256-57 (1973) ("The political resistance to effective regional planning is very powerful. Additional impetus in the form of court-imposed sanctions might be extremely helpful in persuading local officials of the desirability of significant regional policies.").

<sup>142</sup> McDougall, *The Judicial Struggle Against Exclusionary Zoning: The New Jersey Paradigm*, 14 HARV. C.R.-C.L. L. REV. 625, 651-52 (1979) (footnotes omitted).

Court's principal legacy.<sup>143</sup>

While doubts about the Fair Housing Act's operational effectiveness remain, the statute represents a comprehensive statewide effort to remedy exclusionary zoning practices. That the statute was enacted at all amidst the controversy and dissension that pervade the issue truly is "extraordinary,"<sup>144</sup> and a testament to the vital role a court can serve in creating the conditions for legislative action.<sup>145</sup>

While it was the absence of meaningful legislative and executive initiative that in the last analysis legitimized the supreme court's intervention, it is the presence of such initiative,<sup>146</sup> with its resultant statutory product, that renders the court's retreat judicious.<sup>147</sup> "When courts confront novel and significant public questions, eventual judicial response and reaction can be as important as threshold judicial initiative and imagination."<sup>148</sup>

To argue that ultimately the statutory scheme as implemented will provide only a superficial palliative is premature. Moreover, concerns that the true spirit of the *Mount Laurel* mandate will go unserved are allayed in part by the supreme court's demonstrated commitment to a continuing and responsive dialectic aimed at achieving the constitutional objective. As perceived by the court, the separation of powers doctrine "necessarily assumes the branches will coordinate to the end that government will fulfill its mission."<sup>149</sup> Should the legislative effort fail to accomplish its stated goals, the court will reenter the fray.<sup>150</sup>

---

<sup>143</sup> The process of legal change within the context of judicial initiative of course is not unprecedented. See *supra* note 129. Moreover, the political branches' response to issues more amenable to their resolution does not always embrace the judiciary's vision. See, e.g., *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1958) (supreme court's abrogation of the doctrine of charitable immunity). The *Collopy* holding was met with legislation reinstating the doctrine of charitable immunity. See N.J. STAT. ANN. §§ 2A:53A-7 to -11 (West 1986).

<sup>144</sup> See *Mount Laurel III*, 103 N.J. at 24, 510 A.2d at 633.

<sup>145</sup> See McDougall, *supra* note 6, at 660-61.

<sup>146</sup> To hypothesize that the coordinating branches' initiative is not genuine, or is intended to thwart the constitutional mandate, portends judicial reinvolverment. See *supra* notes 53, 55, 80; *infra* note 150.

<sup>147</sup> One is reminded of Justice Cardozo's vision of the judiciary's "chief worth" as "making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and expression, in guiding and directing choice within the limits where choice ranges." B. CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 94 (1921).

<sup>148</sup> Handler, *supra* note 139, at 586.

<sup>149</sup> *Brown v. Heymann*, 62 N.J. 1, 11, 297 A.2d 572, 578 (1972).

<sup>150</sup> *Mount Laurel III*, 103 N.J. at 23, 510 A.2d at 633 ("If . . . the Act . . . achieves

---

nothing but delay, the judiciary will be forced to resume its appropriate role."'). The supreme court admonished that "[n]o one should assume that our exercise of comity today signals a weakening of our resolve to enforce the constitutional rights of New Jersey's lower income citizens." *Id.* at 65, 510 A.2d at 655.