

## INTRODUCTION

Amici, the Affordable Housing and Community Development Network, the Coalition for Affordable Housing and the Environment, the Association of New Jersey Environmental Commissions, the Regional Planning Partnership and New Jersey Future submit this brief not to advocate for one side or the other but instead to provide an analysis of the questions certified.<sup>1</sup> Amici identify and analyze how the implementation of the Mount Laurel doctrine has, in some instances, strayed from the fundamental, constitutionally-based goals of Mount Laurel II. In Point I, amici conclude that the generally accepted site-specific analysis for assessment of "realistic opportunity" fails to ensure a realistic opportunity for housing for those families with incomes below 40% of median. In particular, amici address the over-reliance on inclusionary new construction as a significant factor in the failure to address the needs of the very low income. In Point II, amici analyze the compliance status of municipalities statewide and assess the effectiveness of the builder's remedy as an incentive to compliance. Amici question whether the builder's remedy is fully achieving its intended goals and offer several recommendations for

---

<sup>1</sup> Given the extensive statements of facts and procedural history provided by the parties and other amici; and further given the stage at which amici entered this case, it would be redundant for amici to include herein another statement of facts and procedural history.

reformulating it to limit abuse of the remedy, improve sound planning, lessen delay and generally increase the production of well-planned housing that is actually affordable to both moderate income and low income families. In Point III, amici assess the role of market demand analysis and conclude that while there is a role for that mode of analysis, it raises different considerations at different stages of builder-initiated litigation. Amici conclude by showing how an alternative, growth-based compliance approach could resolve many of the issues presented by this litigation.

#### **POINT I**

#### **THIS COURT SHOULD CONSIDER WHETHER THE CURRENT STANDARD FOR DETERMINING REALISTIC OPPORTUNITY IS FAITHFUL TO THE FUNDAMENTAL GOALS OF THE MOUNT LAUREL DOCTRINE**

Eighteen years after this Court's historic decision in Southern Burlington County, N.A.A.C.P. v. Twp. of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II), the standard for assessing whether, on a site by site basis, a municipality has created a realistic opportunity has become well-established in the lower courts, despite the fact that this Court has not had occasion to revisit the issue until now. Following Justice Hall's, and later Justice Wilentz', holding that municipalities have a constitutional obligation not to stand in the way of affordable housing, as well as an affirmative obligation to create a

"realistic opportunity" for the construction of that housing, the courts and COAH have identified a list of factors by which to judge municipal performance. These factors have been applied in many cases, and in this case Judge Carchman appears to have properly and exhaustively subjected the West Windsor ordinances to the accepted standard with respect to the Toll Brothers site.

JA-

Amici do not question this site specific analysis so far as it goes, but we urge this Court to correct what has become a glaring omission in the application of the realistic opportunity standard, an omission exemplified by this case. Mount Laurel II is unambiguous in its requirement that a "realistic opportunity" be afforded all households earning less than 80% of regional median income. Id. at 217; 222 n.8. By focusing exclusively on site specific realistic opportunities however, the inquiry has effectively been narrowed to whether an opportunity has been created for private inclusionary developments, developments which are rarely, if ever, affordable to households at or below 40% of median income. See 2001 COAH Handbook at 28A-33A (pricing at 40% of regional median income for sales); id. 34A-39A (45% for rents). As a practical matter, for the poorest households there has been no "realistic opportunity" created by the Mount Laurel doctrine, nor has there been any pretense of doing so. See David L. Kirp et al., Our Town: Race, Housing and the Soul

of Suburbia at 157 (1995)(quoting Ara Hovnanian) "Our Mount Laurel homes... are still not affordable by welfare families or the poor. They are intended for working people-teachers, firemen, nurses."

In light of amici's general agreement with the site specific aspects of Judge Carchman's analysis, amici will address this issue only briefly, in order to concentrate on how to create a realistic opportunity for households not presently served by the existing implementation of the Mount Laurel doctrine.<sup>2</sup>

---

<sup>2</sup> It is important to be realistic about the bricks and mortar "success" of the builder's remedy. As one well known planner and expert in Mount Laurel issues has written: "Mount Laurel has led to impressive affordable housing production compared with other states' efforts. But its voluntary approach and the existing incentives have produced inadequate results, compared with the need for decent affordable housing. Only one-third of New Jersey's needed new affordable units, as calculated by COAH for 1987-1999, have been built or are under construction. Only one-quarter of the substandard units occupied by the poor in 1990, as estimated by COAH, have been rehabilitated. And the COAH definition of housing need does not include the hundreds of thousands of financially needy households who pay more than 30% of their income for housing." David N. Kinsey, Reaffirm Mount Laurel, 165 N.J.C. 619 (Aug. 13, 2001)



A. **Site-specific Realistic Opportunity.**

The range of variables that impact on the development of housing, affordable and otherwise, is contextual, related to "specifics [which] may well vary between municipalities according to peculiar circumstances," Southern Burlington County, N.A.A.C.P. v. Twp. of Mount Laurel, 67 N.J. 151, 181 (1975) (Mount Laurel I). "Realistic opportunity", however, defines a minimum level of consideration that municipalities are obligated to give to the housing needs of the state's lower income residents in their land-use regulations. Creating a "realistic opportunity" is a matter of fact, not of aspiration. Proof of an attempt to comply based on good faith efforts is "irrelevant," 92 N.J. at 220-21. It is well-established that realistic opportunity includes both affirmative and negative obligations:

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.

Mount Laurel II, 92 N.J. at 217; and see Mount Laurel I at 179. The negative obligation requires municipalities to abstain from erecting barriers to the development of affordable housing through land use and building regulations that add unnecessary

and preclusive cost to its production. This implies that "municipalities must remove zoning and subdivision restrictions and exactions that are not necessary to protect health and safety." Mount Laurel II, 92 N.J. at 259; see also Urban League of Essex County v. Twp. of Mahwah, 207 N.J. Super 169, 235 (L.Div. 1984)(ordinance added costs of more than \$3,000 per unit and "were not necessary for the protection of public health and safety"); AMG Realty Co. v. Twp. of Warren, 207 N.J. Super. 388, 445 (L.Div. 1984)(more affordable small lots still "useless for Mount Laurel compliance" because of other burdensome conditions);

Countryside Properties, Inc. v. Borough of Ringwood, 205 N.J. Super. 291, 307 (L.Div. 1984)(40,000 square foot minimum lot sizes and excessive setback in violation of the realistic opportunity standard). The negative obligation also requires the removal of intangible barriers. Because of the potential for abuse, the AMG court found offensive an ordinance provision granting broad discretion to municipal authorities to "deny an application if the use were not in the public interest." AMG, supra, 207 N.J. Super. at 445-46.

Municipalities also must take affirmative measures to provide a realistic opportunity for the development of affordable housing. COAH regulations provide a starting point: "Municipalities shall designate sites that are available,

suitable, developable and approvable. . . ." N.J.A.C. 5:93-5.3(b). Whether a site is suitable and developable is contingent on a site specific assessment of an array of factors. These factors include current use and the related factor of the likelihood of development. In re Petition for Substantive Certification, Twp. of Southampton, 338 N.J. Super 103, 115 (App. Div. 2001 (presence of "substantial commercial structures" on a site designated for inclusionary development a "potentially significant impediment;" see also Quad Enterprises v. Borough of Paramus, 250 N.J. Super 256, 264 (App. Div., 1991) (Two active country clubs on proposed inclusionary new construction are problematic); Allan-Deane Corp. v. Twp. of Bedminster, 205 N.J. Super. 87, 120 (L.Div., 1985)(multiple owners and active residential use of a compliance site posed "significant constraint"). Mount Laurel II also mandates the consideration of topography and environmental constraints. Id. at 122 (nearly 60% of the site steep slopes or flood hazard lands). The willingness of its owner to develop is also a critical aspect of the realistic opportunity inquiry. Countryside Properties, supra, 205 N.J. Super. at 307 (no evidence demonstrating housing built subject to the "RT-40" zone would be affordable to lower income persons even if land were conveyed free to a developer; and no evidence of any specific development plans for this municipally-owned land); Southampton, supra, at 115( COAH should

have determined owners plans for future use of the site and whether they would be interested in using property for high density residential development including affordable housing.); Mahwah, supra, at 187 (rejecting unrealistic assumptions about zoning for accessory uses finding that "homeowners would not convert 1/3 of their \$100,000 homes into rent-controlled apartments.").<sup>3</sup> The availability of infrastructure also figures prominently in the realistic opportunity analysis. Mount Laurel II, 92 N.J. at 298 (Invalidating Mount Laurel's revised land use plan because two of the areas zoned for affordable housing had "no sewer or water connections nearby."); Southampton, supra at 115; Allan Deane, supra, at 122-47.

In Judge Carchman's unredacted opinion he carefully assessed the West Windsor ordinance against the well-established framework of the negative and affirmative obligations and subjected the ordinance to an exhaustive, factor by factor analysis. Judge Carchman reviewed the marketability of the designated housing type, JA- the exclusionary effect of West Windsor's sewer policy, JA116-23, 142, 149; parcel assemblage JA 123-25, 133, 135, 139-42, 147; and the impact of environmental constraints, JA 130-31, 134, 140, 143, 149. The application of these factors resulted in Judge Carchman's conclusion that West

---

3

Obviously, in builder plaintiff litigation, the builder's complaint is presumptive proof of a willingness to develop the site.

Windsor's inclusionary housing plan failed to create a realistic opportunity for the development of its fair share of affordable housing. JA-35.

A. **Realistic Opportunity And The Poorest Of The Poor**

While Judge Carchman's analysis comports with the currently accepted standard, it is noteworthy that the court never considered West Windsor's obligation to explore all available compliance mechanisms, mechanisms that might significantly broaden the range of affordability to reach those households most desperately in need. Almost without conscious consideration, the lower courts (and later COAH) have misinterpreted Mount Laurel II's understandable emphasis on inclusionary zoning, inflating it from a novel, affirmative regulatory device that could be used into the primary means of creating a "realistic opportunity."<sup>4</sup> It is obvious why a builder-plaintiff would wish to advocate this view; inclusionary developments are its stock in trade. But when a municipality is not constrained by a builder's lawsuit (or as to that part of its fair share obligation not satisfied by a builder's remedy),

---

<sup>4</sup> In the experience of amici, inclusionary zoning is the presumptive method of compliance. See, e.g., N.J.A.C. 5:93-4.1(b): "[T]he municipality shall identify sites that are realistic for inclusionary zoning in order to calculate the realistic development potential (RDP) of the community...." Id. at 4.1(c), 4.1(d), 4.2(d), 4.2(f) (maximum set aside of 20%), 4.2(h). An early study found that 74% of units produced were in set aside developments. Martha Lamar et al., Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988, 41 Rutgers L. Rev. 1197, 1210 (1989).

Mount Laurel II is clear that a range of compliance mechanisms is constitutionally acceptable. Deference to municipal site selection and means of compliance is well established in both judicial and administrative practice. See Livingston Builders, Inc., v. Twp. of Livingston, 309 N.J. Super. 370, 381 (App. Div., 1998) ("How Livingston meets its affordable housing obligation is not a Mount Laurel issue.")<sup>5</sup> Despite this latitude, voluntary municipal compliance plans overwhelmingly rely on privately-developed inclusionary new construction.<sup>6</sup> The constitutional dimension of reaching beyond inclusionary zoning where necessary apparently has not been understood by municipalities, by the lower courts, or by COAH. Amici urge that this Court clarify this important point.

The overdependence on zoning for inclusionary new construction raises significant concerns that appear to conflict with the fundamental goals of the Mount Laurel doctrine. The majority of the affordable units in inclusionary developments are offered for sale by the developer. These units and even the few rental units in these developments are occupied predominantly by families well above 40% of median income. As a

---

<sup>5</sup> Municipal preference is obviously constrained, however, by the constitutional standard of realistic opportunity. But See In re Amendments to N.J.A.C. 5:93 (petition for certification pending.)

<sup>6</sup> COAH's data does not differentiate between public and private developments, but in the experience of amici the statement supra is accurate. The Lamar study, surpa note 3, 41 Rutgers L. Rev. at 1210-1215 (1989), equates inclusionary and private developments.

result, the default method of compliance with the realistic opportunity standard results in construction of moderate income housing and housing that is sold or rented at the high end of the low income range.

The reliance on privately developed inclusionary new construction has additional implications for land use policy and compliance with the Mount Laurel doctrine. The economy of scale generally necessary to support inclusionary developments requires the availability of tracts of land of substantial size (varying, obviously, with the allowable density on the site). In order to construct one affordable unit, the tract must be large enough for at least an additional four market rate units. This is a land intensive compliance method, and given the scarcity of large tracts in most older, previously-developed suburbs closer in to center cities, the de facto linkage between Mount Laurel compliance and inclusionary zoning has meant that these developed suburbs are significantly less likely to achieve fair share compliance.<sup>7</sup> See Appendix \*. On the one hand, there

---

<sup>7</sup> It is important here to address a widely held and oft-repeated myth that Mount Laurel compliance is the cause of sprawl. The statistics reveal the truth of the matter and belie the myth. Since 1983, municipalities have authorized more than 610,00 dwelling units, and an estimated 480,000 dwelling units have been built, while only about 26,000 affordable units have been built, a mere 5.4% of total housing production in the same period. See Appendix \*. Meanwhile, a staggering amount of nonresidential development has taken place, including 60 million square feet of office and retail space built during just 1995-2000, without a corresponding contribution to affordable housing production. Id. With responsibility for less than 5.5% of all

are few, if any, private developers in a position to file a "builder's remedy" lawsuit because the builder itself cannot present a suitable compliance site. On the other hand, the absence of the threat of builder initiated litigation significantly reduces the risk to a municipality of non-compliance with its fair share obligation. See infra Point II.

It is hardly surprising that inclusionary zoning has emerged as the default position. There is no construction-related cost to the municipality if the housing is privately constructed, and the fiscal impacts from additional population and demand on municipal services may be less if the poorest of the poor are still kept out. In addition, no matter how intense the political debate over Mount Laurel compliance may sometimes become, by opting for inclusionary zoning the municipality avoids the even more unpleasant battles that would be posed by a proposal for a "housing project" (i.e., one that contains only lower income units). Under COAH's rules, 25% of the Mount Laurel units can be age restricted for seniors. N.J.A.C. 5:93-5.14. This is doubly appealing to the governing body because the public can be reassured that their seniors will have somewhere to go and because a municipality avoids the fiscal responsibility for increasing demands on public schools and

---

residential construction, the Mount Laurel doctrine and affordable housing can hardly be blamed for overdevelopment and poor planning.

other municipal services. In addition, these age restricted developments are more often marketed as rental housing, making them eligible under COAH rules for rental bonus credits that reduce the municipality's numerical fair share obligation. Id. §5.15; 2001 COAH Handbook 24.

This dependence on privately constructed inclusionary new development, with its inevitable skew toward sales of units at moderate income and at the upper range of low income, is neither mandated by, nor consistent with the Mount Laurel doctrine. In Hills Development Co. v. Twp. of Bernards, 103 N.J. 1 (1986), it was in part the flexibility and range of compliance options presented by the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., that led Chief Justice Wilentz to believe that its enactment would essentially sound the death knell for builder-plaintiff litigation:

The difficulties facing any plaintiff attempting to meet such a burden of proof (clear and convincing evidence) are best understood by noting the variety of methodologies that can be used legitimately to determine regional need and fair share as well as the many different ways in which a realistic opportunity to achieve that fair share may be provided. If the Council conscientiously performs its duties, including determining regional need and evaluating whether the proposed adjustments and ordinances provide the requisite fair share opportunity, a successful Mount Laurel suit should be a rarity. There is therefore a broad range of municipal action that will withstand challenge, given this burden of proof. Id. at 35.

Chief Justice Wilentz' prediction of creative - and

voluntary - municipal action has not been borne out. Builder's remedy lawsuits continue to be filed and threatened, see infra, Point II, and even where those lawsuits have not been brought, there has been an unfortunate trend towards municipal inaction and therefore noncompliance. Consequently, inclusionary new construction with a minimal set-aside for affordable units has become the norm and flexibility, though potentially available, is hardly exercised.

Amici do not suggest that building housing for moderate income families, those at the upper end of the lower income range, and housing for impoverished seniors is not an important social goal. Much good has been accomplished for these segments of the Mount Laurel population and private developers have played an important role in achieving these results. But more can be done to create a broader range of realistic opportunities, without driving private developers out of the Mount Laurel compliance process, and there is not a shred of evidence that the Mount Laurel II court intended anything less than a maximum effort to this end. Thus, amici submit that assessing whether a municipality has created a "realistic opportunity" requires more than a site specific analysis focusing on units affordable to a limited range of households at the upper end of the target population.

Mount Laurel II already points the way to what needs to be

done. There, the Court recognized that distinct segments of the lower income population have distinct needs and it established the principle that "realistic opportunity" must be analyzed separately for each of these subgroups.<sup>8</sup> The principle remains sound - without such a requirement, compliance will gravitate to those households most easily served, those at the highest income levels - but experience now demonstrates that a further refinement is necessary, to reach those households below 40% of median income who to date have been effectively ignored.

Amici urge this Court to reaffirm that this poorest group must be served if it is realistically possible to do so. In satisfying the realistic opportunity standard, municipalities may limit themselves to inclusionary zoning only if they can demonstrate that the housing likely to result will be affordable to the full range of Mount Laurel households, zero to 80% of median.<sup>9</sup> Since experience to date suggests that this showing is unlikely, the court should require the municipality to use other affirmative governmental devices at its disposal to make the

---

<sup>8</sup> Mount Laurel II divides fair share into two equal components, 0-50% and 50-80% of median income, 92 N.J. at 221n.8, and requires that each be addressed. Id. at 256-57.

<sup>9</sup> Currently, inclusionary developments need be affordable only to families with incomes at 40% of median or higher. See 2001 COAH Handbook at 28A-39A. Nowhere does Mount Laurel II sanction this 40% floor. Rather, it has evolved in practice as a rough estimate of what private inclusionary developers can do profitably. This housing undoubtedly satisfies a part of the Mount Laurel mandate, but just as undoubtedly, poor households must also be served if means are realistically available to do so.

opportunity realistic for the remainder of the beneficiary class. See 92 N.J. at 217. If, and only if, the court is satisfied that the potential of a multi-dimensional approach has been exhausted should a municipality be permitted to reallocate the poorest segment of its fair share obligation to less-poor households. By a parity of reasoning, in a builder's remedy case such as Toll Brothers', the successful plaintiff should be given an opportunity to demonstrate that it can provide a realistic opportunity for a wider range of households. If it cannot, its remedy should be limited accordingly,<sup>10</sup> and by appropriate procedures the court should require the municipality to address the unmet need by other means, just as it does at present when the builder-plaintiff cannot satisfy the entire inclusionary zoning obligation.

Other means are available. Among the groups joining in this brief is the Affordable Housing and Community Development Network of New Jersey, many of whose constituent members are non-profit housing developers. Instead of being accountable to

---

<sup>10</sup> For instance, if the municipality's fair share obligation is 300 units, of which 100 must address the needs of households below 40% of median income, the builder's remedy plaintiff would be entitled to inclusionary zoning for 1500 units if it presents a realistic plan to meet the full range of need (20% of 1500 = 300), but only 1000 units if it adheres to the present practice of addressing only households above 40% of median income. Approached this way, it might be appropriate to revise the methodology for calculating and adjusting fair share obligations, in anticipation that some compliance not now "realistic" by inclusionary zoning could be encouraged in other, less land-intensive ways. In the first instance, however, this is a matter for COAH and not for this Court.

their investors to return a substantial profit, these housing producers are accountable to their sponsors to deliver as much low cost housing to as many needy families as possible. For these groups, the 40% income threshold is a challenge, not a barrier, and because they typically build on a smaller scale than commercial builders, and devote all of their units to poor households, they use land efficiently and can adapt their operations to sites and communities that inclusionary developers mostly shun. They are also much more likely to offer rental housing, the only form of tenure that is "realistic" for most extremely poor households. In addition, these "social housing" providers are eligible to receive a wide variety of public and private subsidies that can dramatically reduce the cost of development, permitting them to serve much poorer households. If municipalities were required to diligently pursue just these two initiatives as a condition of satisfying the "realistic opportunity" standard - encouraging non-profit developments and cooperating with them in the search for appropriate subsidies - significant progress could be made in expanding the reach of the Mount Laurel doctrine to the very poor.<sup>11</sup>

---

<sup>11</sup> Moreover, by approaching the obligation this way, it would become apparent when a true bottom limit on "realistic opportunity" had been reached, determined on a case by case basis. It goes without saying that a "bottom tier" (below 40%) obligation could be fully satisfied by units affordable at or above this floor, similar to the way the 40% floor now works. Amici urge, however, that no numerical bottom limit be established as a matter of law, because experience teaches that doing so stifles creative efforts to do more.

Taking steps such as these is clearly contemplated by the two Mount Laurel opinions. Justice Hall, in Mount Laurel I, wrote that municipalities should undertake "appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of its fair share of the regional need for low and moderate income housing may be indicated as necessary and advisable." Mount Laurel I, 67 N.J. at 192 (emphasis added). Eight years before Mount Laurel II embraced the concept of inclusionary zoning, he spoke of the "moral obligation" of municipalities to create a housing authority and to apply for financial assistance. Id. at 192. Mount Laurel II, in turn, dramatically expanded the constitutional obligation to act affirmatively, but with the same emphasis on fashioning an effective multi-dimensional compliance strategy to "make the opportunity real." Mount Laurel II, 92 N.J. at 261; id. at 267 ("Sole reliance on 'incentive' techniques (or, indeed, reliance on any one affirmative device) may prove in a particular case to be insufficient to achieve compliance with the constitutional mandate.")

Nor has this Court ever held that use of public subsidies is off limits when evaluating whether a realistic opportunity has been created. This is a particularly important point to clarify, because, as noted, subsidies play a larger role in housing the poorest households, and the "off limits" premise has

sometimes been used to justify ignoring the needs of this large segment of the Mount Laurel population. This Court has stated only a narrow limitation on fiscal responsibility, namely, that the Constitution does not require direct expenditure of municipal funds. See Mount Laurel II, 92 N.J. at 265. Given the limited scope of a municipality's tax base, this is an obvious and appropriate limitation, but prior decisions have made clear that a municipality can be required to take a variety of actions that have fiscal implications. "Where appropriate, municipalities shall provide a realistic opportunity for housing through other municipal action inextricably related to land use regulations." Id. at 264. Municipalities can be required to waive "exactions" to reduce costs, id. at 259, to grant tax abatements, id. at 265, and to donate surplus municipal land. N.J.S.A. 40A:12-21(1).

Although the Constitution does not require municipalities to don hard hats and tool belts, it most assuredly requires municipalities to do much more than just get out of the way. The constitutional requirement to act is vigorously and appropriately exemplified by many aspects of Judge Carchman's critique of West Windsor's ineffective compliance strategy, a strategy that appears to have been designed for inaction instead. What is lacking in Judge Carchman's analysis is appropriate attention to creating a realistic opportunity for

households below 40% of regional median income, an omission that has become part of the conventional wisdom and that now requires this Court's clarification.

**POINT II**  
**THIS COURT SHOULD REFORMULATE THE CONTOURS  
OF THE BUILDERS REMEDY TO REFLECT THE PRACTICAL  
EXPERIENCE OF THE LAST 18 YEARS**

Amici are all deeply engaged in issues of sound planning, a concern that includes both the provision of affordable housing and protection of the environment. They recognize that the underlying purpose of the builders remedy – to provide an incentive for pursuit of the public interest as expressed in the “general welfare” mandate of the Constitution – is a valid one if properly managed. Their experience over the years has produced grave concern, however, about the practical impact of the builder's remedy, both as an incentive and as a disincentive to compliance with the Constitution. In this Point, amici review and comment on publicly available data that throws light on the practical operation of the builder's remedy, to assist the Court in resolving the issues posed by the third certified question.

A. **Mount Laurel II and the Builder's Remedy**

This Court's discussion of the builder's remedy in Mount Laurel II is surprisingly brief given its centrality to the compliance process. 92 N.J. at 279-81. The Court's expectations

in 1983 about how the builder's remedy would work were of necessity quite tentative, because its use had not been favored up to that time. See Oakwood at Madison, 72 N.J. 481 (1981), infra. Over the past eighteen years, a practical version of the builder's remedy has been fashioned by the lower courts, COAH, and the Mount Laurel bar, but no case has presented an opportunity for this court to update its view of the builder's remedy in the light of actual experience.

Toll's claim to a builder's remedy is certainly colorable under current practice.<sup>12</sup> If the Court were to deny Toll its claim, a full analysis would of course be called for because the decision would signal a change of direction by the Court. But it is even more essential that the Court explain its reasoning fully if it sustains Toll's position. A summary disposition upholding the builder's remedy in this case would be understood as a general affirmation of current practices, practices that, as we have just noted, have never received this Court's plenary review. Just as the Court in Mount Laurel II addressed a wide

---

<sup>12</sup> The municipality's history of intransigence, its decision not to submit a "second round" housing plan to COAH, its objective failure to produce the fair share called for in prior plans, and the location of the plaintiff-builder's site in an area appropriate for intensive development, all are consistent with the award of the builder's remedy. On the other hand, Toll's proposal to offer less than a 20% set aside for lower income units is facially inconsistent with Mount Laurel II, and its plans for the site fail to fully exploit its location adjacent to a transportation and employment hub, thus raising a question whether the "sound planning" criterion for award of the builder's remedy has been met. We will more fully address some of these subjects infra.

range of implementation issues, in order to avoid a debilitating period of uncertainty, so too this Court should provide as much guidance as possible at this time. Whether this Court concludes that the public interest is best served by continued adherence to a permissive or, as amici urge, a more limited use of the builder's remedy, it is in the public's interest not to "muddle through."

The New Jersey Constitution does not mandate award of a builder's remedy. Hills, supra, 103 N.J. at 42. The Constitution mandates the creation of a "realistic opportunity" for lower income housing. In a perfect world, compliance with this constitutional mandate would be automatic. Neither remedies nor incentives to pursue remedies would be required. But compliance with the Mount Laurel doctrine has always been resisted, and so a system of remedial incentives has become a regrettable necessity. Construction of that imaginative (and generally successful) system of remedies was the task of the Mount Laurel II decision.

It is important not to confuse the end with the means, however. The builder's remedy can provide an effective incentive to bring the lawsuit that will vindicate the Constitution, but it is an equitable tool, not anyone's entitlement. It looms large in the Mount Laurel II opinion because this Court was understandably anxious to encourage an approach that would work. But equity is

a flexible, discretionary device, and this Court should not hesitate now to draw on the experience of the past eighteen years to place the builder's remedy in perspective. Amici submit that, carefully controlled, the builder's remedy can have a place in the scheme of Mount Laurel enforcement. But we also submit that the builder's remedy has come to dominate the enforcement process to an extent that disserves the underlying constitutional mandate and the public interest.

**A. The Impact of the Builder's Remedy on Municipal Planning Decisions**

The Mount Laurel II Court well understood that the builder's remedy would be "controversial." It said so. 92 N.J. at 279. Nor is the reason for its being controversial hard to discern. When implemented, the builder's remedy can force a municipality not only to accept unwanted lower-income housing, but also to forego the normal municipal prerogative of locating new development where there is "in fact a better site," 92 N.J. at 280. Effectively penalizing the municipality for its unconstitutional behavior, Mount Laurel II allows the defeated municipality only the partial, imprecise and negatively-phrased protection of rejecting a site that is "clearly contrary to sound land use planning." Id.

The builder's remedy presents a structural dilemma. On the one hand, "second best" solutions are not an ideal approach to

the general welfare,<sup>13</sup> and draw criticism on that basis.<sup>14</sup> On the other hand, as we shall show, the builder's remedy produces results, and other methods of enforcing the Mount Laurel doctrine (e.g., making COAH's jurisdiction mandatory, or withholding state aid from non-complying municipalities) are fraught with difficulty. Thus, sparing use of the builder's remedy can be justified on the basis that it is worth the cost of a few "better" sites to achieve broad compliance with the constitutional mandate, particularly if (as Mount Laurel II requires) these sites are not "clearly contrary" to sound planning precepts.

In Mount Laurel II, the Court rejected the holding of Oakwood at Madison that award of the builder's remedy should be "rare." 92 N.J. at 279, quoting 72 N.J. at 551-52, n.50. But this passage need not be overstated, keeping in mind the limited information that was then available to the Court. It certainly is correct that Mount Laurel II intended the builder's remedy to be more freely available than it had been previously, but that does not necessarily mean that the Court intended it to be

---

<sup>13</sup> When less is at stake, conventional land use doctrine almost invariably puts the long-term public interest in "better" planning ahead of even an equitable claim by an individual. Thus, for instance, improperly issued building permits can be revoked despite innocent reliance by the applicant, in order not to disrupt the public's interest in preserving its land use plan. Giordano v. Dumont, 61 A.2d 245 (N.J. 1948).

<sup>14</sup> The problem of "second best" solutions is exacerbated in cases in which more than one developer claims entitlement to a builder's remedy. See infra Point II.B.2.

freely used. Rather, a fair reading of Mount Laurel II suggests that the Court saw the builder's remedy as an incentive to voluntary municipal compliance – that is, municipalities would prefer to retain control over their land use policies, rather than have them disrupted by builder's remedy, and so they would rezone or otherwise create realistic opportunities for lower income housing before a builder plaintiff was able to perfect a lawsuit (and a builder's remedy) against the municipality. The "controversial" builder's remedy, in other words, was to have a kind of in terrorem effect, whose value lay more in its not being used than in its actual use.

This reading makes sense for several reasons. Chief Justice Wilentz wrote for a Court that had a thorough understanding of New Jersey's deep political tradition of local control. Indeed, essentially standardless delegation of land use powers to municipalities is what created the problem of exclusionary zoning in the first place. That municipalities would abandon their jealously-guarded prerogative over the issue of a few lower income households can hardly have been what the court expected. Moreover, the court was acutely aware of the importance of sound planning. Mount Laurel II contains 36 separate passages extolling the virtues of environmental protection, containment of sprawl, and other planning virtues. See Appendix \*\*. In explicitly permitting a builder-plaintiff to

override selection of the "better" site, the court surely understood the planning consequences, but it cannot have intended "second best" planning to become the norm across suburban New Jersey.<sup>15</sup> The "sparing use" interpretation of the builder's remedy is consistent with both the local control tradition and the court's stirring embrace of planning virtue.

**A. The Relationship Between The Builder's Remedy and Municipal Compliance With The Mount Laurel Obligation**

With this constitutional context in place, and keeping in mind that this court has not reviewed the builder's remedy in the years since,<sup>16</sup> it is useful to turn to the available data. Amici's research has identified only eight builder's remedies

---

<sup>15</sup> Care must be taken when characterizing the planning effects of the Mount Laurel doctrine. Although amici would have preferred that more stringent environmental criteria be applied in some individual cases, the principle is well established that a compliance site may be turned down on planning grounds, as Mount Laurel II intended. See Appendix \*. Assuming that that threshold has been satisfied, a higher-density inclusionary development might nevertheless be criticized as a "poor" planning solution, because it strikes a discordant note when inserted into the pattern of low density exclusionary zoning that has persisted since prior to Mount Laurel I. It is the traditional zoning template that constitutes "poor" planning, however, and it would totally defeat the Mount Laurel doctrine to insist that it, and it alone, produce planning solutions that are superior to the norm. West Windsor Township, with its galloping residential sprawl development everywhere but on the Toll site painfully demonstrates this point. It is amici's purpose in this brief to demonstrate that superior planning solutions can be encouraged that will mitigate the potential negative effects of some inclusionary developments while retaining appropriate incentives to enforce the Mount Laurel doctrine.

<sup>16</sup> Cases that might have reached this Court for review, such as Judge Serpentelli's extended consideration of priorities among competing builder-plaintiffs seeking remedies in excess of the municipality's fair share, [cite], were mooted by passage of the Fair Housing Act and the transfers to COAH following Hills.

that have been awarded formally since 1983, one by COAH and the other seven in court; over the same period, COAH has denied eight claims and the courts six. See Appendix \*. This small number, surprising considering the controversy that the builder's remedy has spawned, would seem to be consistent with the "sparing use" interpretation of Mount Laurel II mentioned above. These formally-awarded remedies are not the whole story, however, for the role of the builder's remedy as an incentive requires that court and COAH compliance data also be examined. The data assembled in Appendix \* show that Mount Laurel compliance can be broken down into three groups of municipalities - those that have been substantively certified by COAH [add #], those that have obtained a "judgment of repose" from the Superior Court [#], and those that have done neither [#].<sup>17</sup>

The "no compliance" group can be explained readily, although it is an explanation that will require further consideration, infra. In this substantial group of municipalities, the builder's remedy has utterly failed to provide an incentive to builders to bring the Mount Laurel litigation that they so enthusiastically pursue elsewhere. Lacking any other incentive mechanism that would bring a

---

<sup>17</sup> Two additional groups of municipalities can be identified - those pending either before COAH (#) or before the courts (#). Until final disposition, the impact of these cases cannot be quantified, but additional affordable housing units will undoubtedly result.

different type of litigant into the picture, these municipalities have enjoyed a free ride for almost twenty years, despite the explicit command of Mount Laurel II that every municipality, developing or otherwise, has a fair share obligation. 92 N.J. at 214-15.

Another insidious problem lurks in these non-compliance municipalities. Although difficult to document, it is undoubtedly true that in some instances, a developer has used an implicit or explicit threat of Mount Laurel litigation to secure a desired land use approval that does not include lower income housing. Mount Laurel II anticipated that this might occur and held that a subsequent builder's remedy could be denied upon proof of such a threat, see 92 N.J. at \*\*\*, but it made no specific provision for penalizing a misuse of the Mount Laurel doctrine in collusion, or settlement, with a municipality.<sup>18</sup> The perception that Mount Laurel leads to sprawl development, supra note \_\_\_, can be traced in part to this process.

At the other end of the scale, the large "COAH compliance" group has to be counted in the "success" column, even though COAH has formally awarded the remedy only once. This is, however, a qualified success as we shall explain below. A

---

<sup>18</sup> So far as amici are aware, the "threat" exception to the builder's remedy has never been invoked successfully. Counsel know of two instances in which it has been denied by trial judges. See Urban League of Greater New Brunswick v. Borough of Carteret (Cranbury Twp.) and East/West Ventures, Ltd v. Borough of Fort Lee.

substantial band of suburban municipalities, arranged primarily outside the urban core in northern New Jersey, have submitted themselves to COAH's jurisdiction and have been "substantively certified" pursuant to N.J.S.A. 52:27D-314. There is no reason to believe that these complying municipalities freely embraced the principle of housing opportunity and integration expressed in the Mount Laurel doctrine. Rather, and with good reason, they concluded that they would be vulnerable to a builder's remedy lawsuit. They contain vacant, developable land that is attractive to large scale developers (those most capable of pursuing inclusionary projects) and substantive certification is the only way to protect themselves from such a suit. COAH's monitoring data (Appendix \*) counts \*\* units built or under construction in \*\*\* municipalities that have received substantive certification. To this extent, the threat of the builder's remedy may be said to have "worked" as intended by the Mount Laurel II Court, that is, it has stimulated voluntary (if grudging) compliance without a builder's remedy lawsuit actually having been brought.<sup>19</sup>

---

<sup>19</sup> With respect to those cases that are "pending," protection against the builder's remedy is acquired from the moment of filing a housing plan, even a "paper" plan, and even without petitioning for substantive certification. See N.J.S.A. 52:27D-313 (2 years to file); id. §316(b)(COAH exhaustion). This magnifies the incentive to avoid the builder's remedy, but hardly in a way that immediately furthers construction of affordable housing. COAH also provides other "inducements" of dubious constitutionality to supplement the incentive effect of the builder's remedy. See, e.g., N.J.A.C. 5:93-3.6

The final group of municipalities, those whose compliance has been obtained through court proceedings rather than COAH, can be counted either as a "success" or "failure" of the builder's remedy device, depending upon one's point of view. Almost without exception, these municipalities were brought to court by a builder-plaintiff seeking a builder's remedy.<sup>20</sup> As with the "COAH compliance" group, these municipalities have in the end generated a significant number of affordable housing units, [give #] and it is not inappropriate to credit this accomplishment to the incentive provided by the builder's remedy.

Overwhelmingly, these "court compliance" cases are resolved by settlement or other consensual approaches, rather than going to formal judgment. (The active involvement of court-appointed Masters, another innovation of the Mount Laurel II decision, contributes to this result.) There can be no doubting, however, that these cases settle because of the likelihood that a builder's remedy will be awarded. By settling, the municipality either gains some small leeway in the actual form of the builder-plaintiff's relief, or it concedes the builder's site

---

("substantial compliance" bonus of up to 20%, which assumes that non-compliance with the constitution is the norm).

<sup>20</sup> Amici are aware of only two public interest suits, both filed soon after Mount Laurel II: a 1984 suit by a neighborhood group against Princeton Borough, and a 1985 suit by the Fair Share Housing Center against Cherry Hill.

and focuses instead on the compliance that is required but not covered by the builder's remedy.

If this group of cases demonstrates "success" in terms of housing production, it simultaneously demonstrates the failure of the builder's remedy under the "sparing use" interpretation proposed earlier. In none of these municipalities, compared to those in the "COAH compliance" group, can it be said that the threat of a builder's remedy induced compliance that was even nominally voluntary. In every case, a lawsuit had to be brought first. These [#] municipalities either "miscalculated" (that is, they thought they were unlikely to be sued and therefore had no incentive to go before COAH), or they were so immobilized by political opposition to the Mount Laurel doctrine that they were unable to act even in their own self-interest.<sup>21</sup>

This is not how the Mount Laurel II court intended the builder's remedy to work, we submit, and it has worked a serious practical change in the theory of the builder's remedy. Instead of serving as an incentive to voluntary compliance – that is to say, as a very stringent threat of sanction whose value lies in its not being exercised very often, if at all – the builder's remedy has become the actual method of compliance in a

---

<sup>21</sup> To permit evaluation of this point, Appendix \* maps COAH and court compliance separately. In terms of inducing compliance, amici submit that the COAH compliance data at Appendix \* more accurately reflects the degree of success. The "pending" court cases reinforce this point. See Note 16, supra.

substantial number of cases, a very different role that requires re-evaluation by this Court.

A. **The Builder's Remedy And Inclusionary Zoning**

One further point needs to be addressed in some detail in order to evaluate the builder's remedy data. In practice, the term "builder's remedy" has become synonymous in the public mind with the concept of "inclusionary zoning," a confusion that is not wholly unreasonable. By definition, the private, profit-motivated builder-plaintiff, for whom the builder's remedy device was fashioned, proposes to build an inclusionary development.<sup>22</sup> Thus, whenever a builder's remedy is awarded – or, more importantly, when a builder's remedy influences a voluntary compliance plan or a court-approved settlement – the physical manifestation of that outcome is an inclusionary development somewhere in the municipality.

Reasonable or not, the linkage in the public mind between the builder's remedy and inclusionary zoning has contributed to the limited effectiveness of the builder's remedy as a compliance tool. As open space in our crowded state has diminished since 1983, New Jersey has become increasingly sensitive to issues of "sprawl," defined by the State

---

<sup>22</sup> In theory, there is no reason why a non-profit developer could not also claim a builder's remedy by offering to construct a development that contained 100% low and moderate income units, but amici are not aware of any such cases. One hypothesis might be that non-profit entities are too thinly capitalized to undertake the risk and years of litigation that a builder's remedy strategy might entail.

Development and Redevelopment Plan at 313 (State Planning Comm., 2001)(SDRP) as "typically an automobile dependent, single use, resource consuming, discontinuous, low-density development pattern."

Inclusionary development is not responsible for sprawl. See supra, note 6. Nevertheless, when a community is faced with a builder's remedy lawsuit, the high visibility adversarialness of that process makes it inevitable that concern about sprawl will translate into anger directed at the judge-made builder's remedy. And, of course, these high visibility disputes are not reported only within a single community. The press is filled with anti-builder's remedy rhetoric. Paradoxically, then, concern about poor planning ("sprawl") translates into opposition to inclusionary zoning, which in turn stiffens resistance to voluntary compliance, which opens the door to a builder's remedy consisting of an inclusionary development. In practice, the incentive function of the builder's remedy has become seriously blunted.

Amici recognize the legitimate role for inclusionary zoning in Mount Laurel compliance plans. An innovation of the Mount Laurel II opinion, inclusionary zoning harnessed the private market to the cause of lower-income housing just at the point where public subsidies for such housing had dwindled to the vanishing point, and it is safe to say that the quantitative

accomplishments recorded to date by the Mount Laurel doctrine would not have been possible without "set aside" developments. That said, however, the limits of inclusionary zoning as a compliance technique have become clearer with experience and must now be confronted. As compared with non-profit housing development or other sponsorship by entities who regard affordable housing as the goal, not merely as a means to the end of private profit, inclusionary zoning is an inefficient technique. At any given density, it requires at least four times as much land as would a 100% Mount Laurel development (more if the set aside is allowed to slip below 20%). Moreover, as the Toll application demonstrates, private developers may have market reasons to prefer lower to higher densities, which reduces the efficient use of land even more.

There are also policy costs when inclusionary developments dominate the compliance process. As the Mount Laurel II Court recognized, private developers are in quest of profit, not the public interest, but it thought that the pursuit of the former would produce the latter. What experience teaches is that this yoking of public and private interest only carries so far as the initial land use approval. Except in rare instances, private inclusionary developers have scant interest in such vitally important public interest concerns as promoting racial integration, expanding access to the very poorest households,

providing units for large families, or offering critically needed rental units. And of course, large-scale land developers are not noted for their enlightened approach to protection of open space. Amici do not fault Toll for functioning as a profit maximizer. That is what it is. But were we to start from scratch on the Toll site, and plan it to maximize the public interest (even as an inclusionary development) it would look very different from the development proposed by Toll. See infra at —.

Above, we described the builder's remedy as containing a paradox, in that it ended up undercutting its own incentive mechanism. An even stranger paradox can be discerned from "COAH compliance" data. In that category, the builder's remedy does appear to have had an appreciable degree of success in creating the intended incentive for municipalities. By choosing voluntary, albeit grudging, compliance, "COAH" municipalities dodge the builder's remedy bullet and should be able to minimize or avoid inclusionary zoning solutions altogether, if that is what they wish. Municipalities concerned about overdevelopment can propose compliance strategies to COAH that do not rely on inclusionary zoning, and those municipalities that choose to rely on inclusionary zoning can select the best building sites, presumably the ones that had the greatest degree of community support. With an increase in political participation and

consensus-building should have come a decrease in political opposition and controversy.

Surprisingly, this has not what has happened. There has grown up in the suburbs of New Jersey a widely expressed belief that municipalities "must" use inclusionary zoning, and that COAH will "require" them to rezone highly inappropriate sites, just as if a builder-plaintiff had forced that site on them. Hence, an expansion of the paradox noted earlier: a pseudo-builder's remedy haunts the COAH process, despite the fact that the whole point of the Fair Housing Act and COAH was to provide a alternative to that process.

The reasons for this over reliance on inclusionary zoning lie partly with the Mount Laurel doctrine and partly with COAH. Addressing the root problem of exclusionary zoning, Mount Laurel I and II laid stress on developable land as a measure of a municipality's fair share. This approach was formalized by the original Mount Laurel trial judges in the AMG formula, 267 N.J. Super. at 408, and, with extensive tinkering, COAH has taken the same basic approach. N.J.A.C. §§ 5:93-2.3 and -4.2. COAH's rules emphasize inclusionary solutions more than is necessary, however, and they de-emphasize non-development approaches.<sup>23</sup> Many communities scrimp on planning services and as a result are

---

<sup>23</sup> See supra, footnote 3. For a description of the influence exerted by private inclusionary developers during the critical period when COAH was first codifying its compliance methodology, see Kirp et al., supra, at 155-59.

poorly advised about alternatives, and rezoning is a familiar regulatory technique that does not require officials to evolve more creative strategies from scratch. Reinforcing these factors, it is common for builders to appear before COAH, either as allies of the municipality because their site has been included in the municipality's housing element and fair share plan, or as "objectors," see N.J.A.C. 5:91-4.1, offering other sites for development. Unfortunately, there is also evidence that some municipal officials cynically use COAH and the Mount Laurel doctrine as political cover, blaming the agency and the courts for unpopular land use decisions that they otherwise wish to make.<sup>24</sup>

Amici on these practical dimensions of inclusionary zoning and the builder's remedy not to suggest that either technique be eliminated, but to demonstrate why other remedial techniques, including incentives to other groups to bring enforcement actions in the public interest, need to be reemphasized. Amici earnestly believe that the objectives sought to be achieved by the builder's remedy and by inclusionary zoning can also be achieved by other means that preserve the state's proud national leadership on affordable housing while fitting more easily into our evolving understanding of the dynamics of sound land use

---

<sup>24</sup> Such a misuse of the Mount Laurel doctrine is documented in Judge Mahon's recent determination in Hillborough Alliance for Adult Living v. Twp. of Hillsborough, HNT-L-492-98.

planning. By taking such steps, the court can potentially reduce opposition to the Mount Laurel doctrine and as a result encourage the production of more affordable housing than at present. It is to these matters that amici turn in the next section, keeping in mind our urging that even if this court permits the award of a builder's remedy to Toll, it should provide substantial guidance for future cases as well, both as to the builder's remedy itself and as to alternative compliance techniques.

A. **Reccomendations For A Reformulated Builder's Remedy**

1. Revive the threat exception

Amici commented above on the persistent belief in suburban communities that developers misuse the Mount Laurel doctrine to bully municipalities into rezonings that are contrary to the public interest. A recent survey by amicus New Jersey Future finds that elected officials lament the undue influence developers bring to bear on local planning decisions. See Appendix . One thing is certain - land developers are not unfamiliar with the hard sell, and large profits are a stimulus to aggressive tactics.

The Mount Laurel II Court correctly anticipated that the threat of a builder's remedy might be misused, but misjudged exactly how, focusing on cases where a builder's remedy was subsequently sought rather than the situation where the

municipality yielded and Mount Laurel litigation never ensued.

Id. Thus, a builder otherwise entitled to a builder's remedy could lose it upon proof of an inappropriate "threat." This is commonly referred to as the "threat exception" to the builder's remedy.

This Court should now make clear that the Mount Laurel doctrine may not be used inequitably in any land use application. Just as a builder's remedy may not be improperly obtained, neither should a non-Mount Laurel approval. Affordable housing should be part of the developer's proposal from the start, and once proposed, it should remain a part of the proposal until the land is finally approved (or disapproved) for development. Clarifying these rules would significantly improve the public's confidence in the integrity of the Mount Laurel process.<sup>25</sup>

2. Only One Builder's Remedy Should Be Granted In Any Case

The purpose of the builder's remedy is to induce municipal compliance with the Mount Laurel doctrine. Assuming that it is brought in good faith and pursued diligently, a single lawsuit

---

<sup>25</sup> There is, of course, an inherent threat in the concept of the builder's remedy, the threat of "comply or else." So long as the developer acts equitably by persisting in its effort to build affordable housing, it is squarely within the builder's remedy as stated in Mount Laurel II. Amici do not argue that there is any basis for applying the threat exception under the facts of the Toll case.

suffices to achieve this goal.<sup>26</sup> In Mount Laurel II, Chief Justice Wilentz cautioned that a builder need not have expended substantial amounts of time or effort in order to claim a builder's remedy, see 92 N.J. at 280. What matters is that the litigation provides the catalyst to compliance. By a parity of reason (and also keeping in mind that no plaintiff has a constitutional entitlement to a builder's remedy, Hills, 103 N.J. at 42), there is no justification for the elaborate allocation process Judge Serpentelli thought necessary in J.W. Field Co., Inc., v. Twp. Of Franklin, 204 N.J.Super. 445 (L.Div., 1985)(11 builder-plaintiffs). There is no reason not to award the builder's remedy to the first plaintiff that files a lawsuit meeting the builder's remedy criteria.

By limiting the builder's remedy to a single plaintiff, the inevitable risk to the public interest inherent in requiring development of a "second best" site is minimized. One "second best" development site is certainly to be preferred to three or four or more. Moreover, experience demonstrates that it is considerably more difficult to settle builder's remedy cases where multiple plaintiffs have equivalent claims of entitlement. A municipality that might be willing to compromise on one site

---

<sup>26</sup> Moreover, amici see no point to awarding a builder's remedy to a developer in a lawsuit that is initially brought by a public interest plaintiff. As we explain infra, landowners interested in inclusionary developments can be protected in more appropriate ways in these public interest suits.

is less likely to compromise on more than one, and any plaintiff who is left out of a less than comprehensive settlement has nothing to lose by attempting to set the settlement aside. Cf. Morris County Fair Housing Council v. Twp. of Boonton, 197 N.J. Super. 359 (L.Div. 1984). Settled cases result in faster progress towards affordable housing "in the ground." Limiting any one case to a single builder's remedy would also reduce the perception of (and revulsion towards) the "feeding frenzy" of profit-seekers that contributes to public opposition to the Mount Laurel doctrine.

It is extremely important to emphasize that limiting a case to a single builder's remedy does not in any way prevent the municipality or a court from incorporating other development sites into a compliance plan. Indeed, an integral part of the current compliance process, both in court and before COAH, is for interested property owners to come forward and offer sites for development. Subject to rules of sound judicial management, such parties can be given rights to notice and participation in the remedial process, but they need not expend large amounts of time or money on litigation if they do not choose to do so, and no site thus offered must be accepted on a bare showing that it satisfies the negative ("not contrary to sound planning") criterion of Mount Laurel II for a builder's remedy. Good sites can be selected over poor ones, and the municipality can select

compliance mechanisms that do not require use of inclusionary zoning at all, provided only that the preferred alternative presents a "realistic opportunity."

3. Require Conformity With Principles of Land Use Planning and the State Development and Redevelopment Plan

One of the problems with Mount Laurel II's invocation of "sound planning" is its failure to give specific content to that term. So long as the court only excludes from a builder's remedy those sites that fail to meet a relatively minimal standard of acceptability, a generalization may not have mattered all that much. But if amici persuade that a tighter standard is now appropriate in light of the evolution of the state plan, see infra, and our understanding generally about the threats to the environment from inappropriate development, then it would be useful to provide much more specific guidance as to what kinds of planning constraints operate on a builder's remedy site (or inclusionary sites generally, for that matter).

The importance of doing so is underscored by the popular belief (part of the general negative reaction to the builder's remedy, discussed earlier) that builder's remedy developments are routinely built in wetlands, on steep slopes, and otherwise in environmentally inappropriate locations. It does not matter whether that popular perception is accurate or not. It is surely overstated at the least, but perception is reality for these purposes, and the larger interest of constitutional compliance

would be well served by a set of clarifying rules that could be invoked where necessary to prevent abuse if it does occur, but more importantly to demonstrate that abuse is not the essence of the remedial system.

Amici recognize that a tension has emerged between New Jersey's ambitious, post-1983 State Plan process and the negative formulation of Mount Laurel II, which places the burden on the municipality to show that a builder's remedy site is "clearly contrary" to good planning. Amici submit that, were the Mount Laurel II Court to have formulated its criterion in light of the more sophisticated planning process in place today, it would have chosen to state the planning criterion more positively, and we urge the court to do so now. The "State Plan" is much more than simply the map showing the various planning areas. It is an extensive compilation of policies and guidelines, some of which are expressed in summary form in the planning area delineations, but others which exist independently of the map. Because of the complexity of the SDRP, a variety of different land use solutions may be "consistent" with the plan as to any individual site, and thus we do not anticipate that the requirement of consistency will interpose significant obstacles to Mount Laurel compliance over the long haul.<sup>27</sup>

---

<sup>27</sup> There could be a period of adjustment, however. One reason why sites of lesser planning quality may be offered by a builder-plaintiff is that they cost less to purchase, thereby mitigating some of the economic loss on the non-market rate units. Over time, however, the

Amici submit that, in light of the strong public interests now built into the expanded SDRP, the "clearly contrary" qualification in Mount Laurel II should be eliminated, so that the conventional "preponderance of the evidence" standard would apply or, alternatively, that no burden of proof be allocated, thus emphasizing to all concerned that both interests - affordable housing and sound planning - have strong value to the public.

The following awkward problem arises, however, under the present rules and under any revision that requires some degree of consistency with the SDRP. The Legislature has provided no specific sanction for failing to conform to the State Plan, and the plan itself cautiously states that it is not intended to be a "regulatory" document. SDRP at 11. In the short history of state planning in New Jersey, agencies of government at all levels have disregarded the State Plan distressingly often. The one significant exception is that the Council on Affordable Housing, by its own regulations, N.J.A.C. 5:93-5.4, and by agreement with the State Planning Commission,<sup>28</sup> has undertaken to

---

market will adjust to the site suitability requirements of the SDRP, and the long term benefits should outweigh the short term problems. Moreover, sites that are "good" in planning terms will, under the SDRP, often be appropriate for development at higher densities than would be the case for lesser sites. Properly managed, the profitable exploitation of these higher densities can offset higher initial land costs.

<sup>28</sup> The October 27, 1992 Memorandum of Understanding between the State Planning Commission and COAH is reproduced at pages 61a-63a in the amicus brief of the American Planning Association.

require a significant degree of plan consistency when granting substantive certification. Commendable as this policy is, in the absence of a comprehensive consistency requirement applicable to all land use decisions, the necessity of plan compliance applies only to affordable housing projects, those that almost by definition require the elimination of regulatory hurdles rather than the imposition of additional requirements.

Strengthening the "planning" criteria for a builder's remedy could have the same effect, particularly because it would give municipalities a cynical opportunity to misuse the SDRP. To avoid this, amici submit that in order for a municipality to set up an objection to a builder's remedy site based on plan consistency, it must establish that its municipal land use policies in general are consistent with the Plan. There simply is no equitable basis to hold the affordable housing developer to a tougher standard than the municipality is willing to adhere to generally.

4. Reaffirm the 20% set aside

Mount Laurel II set 20% as the "reasonable" minimum number of affordable units in an inclusionary development to qualify for a builder's remedy. That minimum has now become a de facto maximum, see N.J.A.C. 5:93-4.2(f), 5.6(b)(2), and as the instant case demonstrates, lower set aside percentages have become commonplace. The Court should now clarify that any party

(including a municipal defendant) proposing a lesser percentage has a heavy burden to show that the reduction is necessary in order for the project to remain financially feasible. In addition, if financial infeasibility is initially shown, the court must be satisfied that it cannot be avoided by changing the parameters of the approval in some way (increasing the permitted density on the site, for instance).<sup>29</sup>

5. Revive The Public Interest Role In Mount Laurel Litigation

The builder's remedy is an incomplete solution to the problem of enforcing the Mount Laurel doctrine. Experience to date shows that it is only partially effective in stimulating compliance with the constitution, and at some cost in terms of other important public interests. Amici do not suggest that the Court should discontinue the use of the builder's remedy, but urge that it give fresh consideration to other compliance incentives that will restore balance and permit the builder's remedy to function as we believe the court originally intended. Specifically, amici urge that new incentives be provided to bring public interest plaintiffs back into the litigation process.

The original Mount Laurel case was brought on behalf of low-income households and the N.A.A.C.P. by legal services

---

<sup>29</sup> In Point I, see page \* supra, amici discuss the urgent need to re-stratify the set aside so that households below 40% of regional median income are included in every compliance plan.

attorneys. Private cases were also brought, see Oakwood at Madison v. Madison Township, 72 N.J. 481 (1981), but prior to 1983, there was a rough balance between public and private litigation. All of that changed after Mount Laurel II. Nothing in that case held, or even implied, that public interest litigants were to be discouraged from bringing new Mount Laurel lawsuits, but in fact such suits withered and there was instead an avalanche of builder's remedy suits. See Alan Mallach, The Tortured Reality of Suburban Exclusion: Zoning, Economics and the Future of the Berenson Doctrine, 4 Pace Env'tl. L. Rev. 37, 119 (1986) (140 suits by mid-1985). Pending public interest cases continued, of course, and in some instances these suits made important contributions to the post-Mount Laurel II development of the law, but when they had run their course (or had been dissolved into administrative proceedings before COAH), they were not replaced.

The reasons for the decline of public interest litigation after 1983 are straightforward. The Public Advocate was abolished in 1994, see N.J.S.A 52:27E-51,<sup>30</sup> lawyers trained in the public sector moved to firms representing inclusionary developers, and pro bono representation proved difficult both

---

<sup>30</sup> In fact, intense public opposition to the Advocate's Mount Laurel activities speeded its demise. In 1992, the Legislature stripped the Advocate of the power to challenge Regional Contribution Agreements, L.1992 ch.52 §1, presumably in reaction to In Re Warren Twp., 132 N.J. 1 (1993).

because of the large scope of the cases and because of conflicts with municipal and developer clients. A weakened federal Legal Services Program lost interest because, as discussed in Point One, Mount Laurel failed to serve their very poor clients, and foundations shifted to newer priorities, either because the initial law reform battles had been "won" or because the judicial forum had proven too slow and too controversial. The public interest community understood that there were important cases waiting to be brought, but the resources to do so simply dwindled to the point of vanishing altogether.

As it has evolved in practice since 1983, there is a singular unfairness in the different incentives provided to private- and public-interest Mount Laurel litigants. The builder's remedy is, by definition, irrelevant to public interest litigants who do not themselves build, and the satisfaction of a job well done, a public service goal achieved, does not suffice to provide the infrastructure necessary to maintain the effort. Private litigants, by contrast, are offered exactly what they need to bring lawsuits, the profit against which litigation costs can be written off. Mount Laurel II was keenly aware that builders did not have the public interest at heart. See, e.g., 92 N.J. at 279 n.37 (enforcement tied to profitability). In the scheme of the builder's remedy, service of the public interest is a secondary effect of the plaintiff's

primary motive. To compensate (an ironic word in this context) for the unlikelihood that the builder's remedy plaintiff will fully vindicate the public interest, Mount Laurel II then thrusts the trial judge (normally assisted by a Master) out of its accustomed role of judicial neutrality. Lacking the adversarial voice of a public interest plaintiff, Judge and Master alone must "guard the public interest" against developer "abuse." Id. at 281. See also Morris County Fair Housing Council v. Twp. of Boonton, 197 N.J. Super. 359, 367-68 (L.Div., 1984)(neither builder nor municipality represents public interest).<sup>31</sup>

The discontinuity between the incentives offered public interest and private litigants is thrown into stark contrast by considering how a greater role for public interest litigants would ameliorate some of the problems with the current system of enforcement based on the builder's remedy. Because the public interest plaintiff's "reward" does not flow from building an inclusionary development, but rather from seeing a "realistic opportunity" housing plan put into place, a much wider range of options can be presented for consideration. If inclusionary

---

<sup>31</sup> Perhaps unwittingly, Toll Brothers demonstrated this problem by opposing our motion to appear amici curiae before this Court. Toll is absolutely within its rights to have taken that position, of course, but it obviously was concerned that a wide-ranging presentation from an independent public interest perspective would not serve its self-defined best interests. It is irrelevant whether amici's position, in the end, helps or harms Toll or any other party. It is the silence of the public interest voice in recent years that is of concern.

zoning makes sense (and it often will), proposals from builders can be evaluated, free of the obligation to rezone a marginal site when "better" ones are available. Public interest plaintiffs can propose settlements that rely on land-efficient construction by non-profit developers, and can cooperate with the municipality in the search for other creative solutions. Public interest plaintiffs will be more likely to press for solutions that meet the needs of the poorest households, and for rentals over sales housing. Public interest cases are easier to settle, because there are fewer parties whose interests must be accommodated.

It is of particular importance to note that public interest litigants would be able to sue those municipalities that are not sued by inclusionary developers, those places where land is not typically available in assemblages appropriate for inclusionary zoning, and where the town is functionally immune from Mount Laurel compliance as a result. A public interest litigant would be motivated to find ways to introduce a realistic opportunity for lower income housing in these typically older, more developed communities that are closer to the urban core, better served by transportation and other infrastructure, and more supportive of a heterogenous population. These places are more able to recruit new residents from the cities, one of the stated purposes of the Mount Laurel doctrine. See e.g., 92 N.J. at 209-

211. And these are precisely the communities where, in the overall conception of the SDRP, growth must be concentrated if we are to avoid paving over the entire state. SDRP at 151 (Planning Area policies).

Amici do not romanticize the public interest role. Public interest litigants will be wrong on occasion, the "public interest" may not speak with a common voice on all issues, and practicing the "art of the possible" is in any event an unavoidable necessity. What public interest litigants offer to the process is an open-ended commitment to search for the public good and give it voice in their work, as opposed to the role of the builder-plaintiff who may in the end become the instrument of the public good, but only if the public interest coincides with a narrowed range of options that the builder is able to present to the court. Mount Laurel II's bargain with the development community is not Faustian, but it is incomplete. Restoring a sense of completeness to Mount Laurel implementation is a process that can be begun by the court with its decision in this case.

Just as the promise of site-specific rezoning is the obvious incentive to bring a builder plaintiff into court, so the incentive for the public interest plaintiff is also obvious. Drawing on the extremely successful model of civil rights litigation, 42 U.S.C.A. §1988, amici urge this court to use its

constitutional power to permit the recovery of attorneys fees for successful public interest plaintiffs. Apart from other constitutional sources, [cite], this power lies squarely in the Mount Laurel doctrine, which as construed by the court permits creation of incentives to insure that the constitutional obligation is enforced. The builder's remedy is one such incentive and, as we have explained, a fee shifting rule for public interest plaintiffs would be an exact parallel.<sup>32</sup>

As in all other situations where fee-shifting is permitted, careful judicial supervision is necessary to insure that recoveries are reasonable and serve the interests for which they are recognized, but Mount Laurel cases are no different than any other in this regard. Municipalities are already subject to fee-shifting in a large class of federal and state civil rights cases. Moreover, unlike the typical civil rights case, where the unconstitutional act of an officer or employee may not become known to the municipality until after the fact, the whole point of the Mount Laurel incentive - whether builder's remedy or fee shifting - is to encourage the municipality to comply voluntarily and avoid litigation. Thus, a risk-averse municipality has a very realistic ability to avoid whatever cost

---

<sup>32</sup> An important qualification flows from this concept of parallel remedies. It is amici's view that fee-shifting should not be available to successful builder-plaintiffs, who are more than adequately encouraged by the availability of site-specific rezoning. To add fee-shifting on top of this bounty would accomplish nothing except to increase the already high level of opposition to the builder's remedy.

fee shifting may entail by complying first, an exact parallel to the avoidance of the builder's remedy intended by Mount Laurel II.

### POINT III

#### **THIS COURT SHOULD DISTINGUISH THE ROLE OF MARKET DEMAND ANALYSIS IN THE REALISTIC OPPORTUNITY AND BUILDER'S REMEDY PHASES OF BUILDER-INITIATED LITIGATION**

Having considered the "realistic opportunity" standard and the current practice in awarding of the builder's remedy, it is now possible to briefly address the novel issue presented by this case, namely, Toll Brothers' "market demand" argument. In amici's view, there is no need to treat issues of market demand as a separate step in the Mount Laurel analysis. Rather, market demand can be understood as a relevant factor to be considered both in determining whether the municipal ordinances create a "realistic opportunity" and in whether the successful plaintiff is entitled to a builder's remedy.

#### **A. Realistic Opportunity And Market Demand**

Zoning for uses that are more fanciful than real is, unfortunately, a tradition that pre-dates the Mount Laurel doctrine. See Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 545 (1963)(permitted uses in marshy area included, inter alia, "raising of aquatic plants, fish and fish food," "hunting and fishing preserves," and "public utility transmission lines and substations"). There can

be no doubt that the "realistic opportunity" mandate of Mount Laurel II is not satisfied by a zoning requirement for which there is no market demand. This was established firmly by Justice Hall in Mount Laurel I, where he criticized the township for placing land in a commercial zone far larger than demand for such use would justify. 67 N.J. at 184. Here, the trial court found that there was negligible market demand in West Windsor for "zero lot line" single-family housing in West Windsor. It is unlikely that this finding, standing alone, would suffice to establish that West Windsor's ordinances overall fail to provide a realistic opportunity for lower income housing, but it is a factor tending towards that result.

A closer realistic opportunity question is presented by Toll's assertion that there is no market demand (or was none in 1996) for multi-family dwellings in West Windsor. If this were literally true, the result would be the same as for the zero lot line requirement. But it is facially implausible that there is no demand in the entire housing region for anything other than single family detached homes. Rather, Toll seems to be asserting that at a particular moment in time, the demand for single family detached homes in West Windsor will yield a larger profit margin than would a multifamily project.

It is standard land use law that a landowner is not entitled to the most profitable use of its property, and that a

municipality has wide discretion under the "arbitrary and capricious" standard to require a less profitable use that it believes will better serve the public interest. See Gardner v. New Jersey Pinelands Com., 125 N.J. 193, 210-11 (1991)(citing cases, including Mount Laurel II). It stands to reason, therefore, that at the threshold stage where the "realistic opportunity" standard is being tested, a developer has no claim to the most profitable use of its land, so long as lower income housing can in fact be produced by someone under the municipality's zoning. Absent the special case of a successful builder's remedy claim, profit-motivated preference for single family homes, in and of itself, cannot be dispositive.<sup>33</sup>

---

<sup>33</sup> In 1994, despite the earlier successes of higher-density multi-family inclusionary developments, COAH imposed a new approach in towns with enough vacant land to meet their fair share, requiring that a "substantial" number of single-family detached market rate units be constructed and "favoring" a gross density of 4 units per acre with a 15% set-aside. N.J.A.C. 5:93-5.6(b)(2). (Id. §(b)(1) requires a higher density and omits the single-family requirement when the town receives a vacant land adjustment.) If applicable to the present facts, and if this Court were to defer to COAH's rule, which is non-binding, [cite], Toll's position would be enhanced. Amici submit, however, that §5.6(b) is inapposite. Its planning rationale appears to be that Mount Laurel developments ought to conform if possible to the "existing densities surrounding the proposed inclusionary site," id., i.e., that the "look" of low density sprawl should be maintained. It need not be decided whether preserving sprawl ought to trump a denser development with more affordable units in all cases; Toll's site, wedged as it is between the Route One and Amtrak corridors hardly requires a low density context. The unreported Appellate Division opinion involving these parties that upholds §5.6 facially, does not resolve as-applied issues. Amici note in addition that COAH proceedings have a completely different focus from those before a court; in the latter, the threshold issue is whether the existing land use regulations create a realistic opportunity, a question COAH never confronts in the

Timing is relevant to market demand, however. Housing markets are extremely dynamic, and are almost always moving to some degree along a cyclical path. Moreover, proving market demand to a court's satisfaction will itself take time; by the time a retrospective finding has been made, it is likely that the market will have moved on to a new calculus.

Toll should not be permitted to fix an arbitrary moment in time at which to sample market demand. In addition, it is important to keep in mind that there is no single housing market, but rather an aggregation of demand segments whose ebb and flow may not be completely synchronous. Instead of searching for a false sense of precision, the "realistic opportunity" inquiry should be concerned with how likely it is that housing will be produced under the challenged zoning, and how long it is likely to take. That the zoning has been in place for some time without producing housing is relevant to that inquiry, as is the manner in which the ordinances have been administered, factors that do not tend in West Windsor's favor. Keeping in mind, however, Mount Laurel II's concern about sound planning, there is no justification to set aside a good zoning plan that will take a bit longer to implement but serve the municipality well

---

voluntary appearance of a municipality before it. If the existing regulations are "realistic," the court would not reach the remedial stage at all, regardless of whether the town conforms to §5.6's preferred planning view. Thus, amici submit, the critical questions are those discussed in this Point, without regard to §5.6.

for the long haul, in favor of a lesser development whose only merit is that it can be produced quickly.

A. **Builder's Remedy And Market Demand**

Establishing that the municipality's ordinances fail to provide a "realistic opportunity" is the first step in perfecting a builder's remedy claim, see 92 N.J. at 279, and as just discussed, the builder-plaintiff should have no right to have its own singular marketing preferences prevail at that stage. The situation may change, however, once the unconstitutionality of the municipality's ordinances has been established and the successful builder-plaintiff becomes entitled to site-specific relief.

To put this issue in perspective, it should first be recognized that the facts of the builder's remedy claim in this case are quite unusual. In the more typical builder's remedy case, the municipality's land use ordinances prohibit any type of development that would create a realistic opportunity for construction of lower income housing, and the court is presented with a blank slate when devising a rezoning that will accommodate the builder-plaintiff's project. In West Windsor, by contrast, the existing zoning for plaintiff's site nominally requires a lower income component, and Toll's unwillingness to proceed involves objection to a number of different factors. These include, in addition to the zero lot line requirement,

various procedural and substantive claims of burdensomeness.

Current doctrine is adequate to resolve most of the issues of burdensomeness raised by Toll. What is not settled is whether Toll is also entitled to have some of the townhouse zoning requirement that West Windsor prefers replaced by approval to build detached single family homes, even if the proofs establish that the overall site can be developed profitably under the zoning West Windsor prefers. Is Toll entitled to have a rezoning that will give it the most profitable use of the site, as its "reward" for bringing the lawsuit, or must it be satisfied with any rezoning that would realistically permit it to go forward with development? In other words, is the builder's remedy "project specific" (Toll's position) or only "site specific" (West Windsor's)? The Mount Laurel II opinion, comprehensive as it is, does not squarely address this question. As we have mentioned, in the typical case "site specific" relief has been the principal concern, and it is reasonable to think that that is what the Mount Laurel court also had in mind.<sup>34</sup> Moreover, the

---

<sup>34</sup> Two of the six component cases in Mount Laurel II prompted a specific discussion of the builder's remedy issue. In Mount Laurel Township itself, Davis Enterprises sought to develop an inclusionary mobile home park. 92 N.J. at 307-09. There, however, the underlying zoning was clearly "unrealistic" and so did not present the court with a project-based alternative to the plaintiff's proposal. In Clinton, by contrast, the builder-plaintiff had sold some of its site during the protracted litigation, and it conceded that it would have to propose a new project, working with the town, the court and the master. Id. at 324-28, 330-31. Thus, it too presents a different situation.

Court is quite clear that the defendant's Planning Board is to be "closely involved," 92 N.J. at 280, drawing on the board's "expertise and experience so that the proposed project is suitable for the municipality." Id. At the very least, this means that the victorious builder is not given carte blanche to impose its own project, subject only to the weak constraint that it not be "clearly contrary" to sound planning principles. In its focus on the "suitability" of the project, Mount Laurel II quite predictably was taking the longer view.

Nonetheless, the language just cited also presumes that it is the victorious plaintiff's "proposed project" that will be the subject of the planning board's review, not a newly-conceived plan for the site that could be used by the municipality to frustrate the developer's intentions. Site specific relief is the threshold minimum of the builder's remedy because otherwise the municipality could fully comply by rezoning sites elsewhere in town, leaving the litigated site out completely. By a parity of reasoning, it could be thought that the builder's remedy must be "project specific" if the practical effect of forcing a different project on the builder would be to deny it the ability to build.<sup>35</sup> It is also important to recognize

---

<sup>35</sup> This problem could arise in several different ways. Some builders specialize and might not be able to shift efficiently to building a different kind of product. Even if the developer has the ability to build, the scope of the project or overbuilding elsewhere in the market may threaten saturation and a lessening of demand. Where specialization is the issue, it would become necessary to explore

that a function of the builder's remedy is to give the prospective litigant the up front confidence necessary for it to invest time and money in a lawsuit. The more project specific that assurance is, the more likely that litigation to enforce the constitution will be brought.<sup>36</sup> Amici submit that no categorical rule can be stated that resolves these competing factors. A fact-sensitive balance will be required, guided by this court's articulation of the factors to be considered.

The Toll Brothers facts give some insight into how such a balance might be struck. On the one hand, it is difficult for West Windsor Township to assert an overriding interest in its multi-family zoning, given the large amount of single family development at sprawl-inducing densities it approved elsewhere while dragging its feet on the Toll Brothers site. Moreover, the detached single family housing that Toll seeks to develop apparently would largely replace the alternative form of single

---

whether the right to develop could be sold profitably to a more appropriate entity, such as is commonly done when a non-builder landowner sues, prevails, and then sells to an inclusionary developer. Care would have to be taken, however, to insure that the cost basis of the land does not step up so much when this happens that the financial viability of the inclusionary component becomes questionable.

<sup>36</sup> Amici do not wish to overstress this point, however. Elsewhere in this brief, we have urged the Court to provide incentives for a return of public interest litigants to the Mount Laurel process. To the extent that this occurs, it becomes less necessary to rely so heavily on the builder's remedy, because public interest litigants may be presumed to take up the slack, and because, as we have argued above, litigation controlled by public interest plaintiffs carries a far higher potential for producing affordable housing within optimum sound planning criteria.

family housing (zero lot line) that West Windsor had previously required. On the other hand, Toll is already committed to building a significant amount of multi-family housing on the site, and it is an experienced builder of multifamily housing in New Jersey and elsewhere. In addition, the Toll site appears to be ideally suited from a planning perspective for development a very high density because of its crucial location adjacent to the Princeton Junction transportation hub and its ability to serve the high employment Route One corridor just to the west. Taking the "long view" mentioned above, the contribution a high density development would make to the regional interest in sound planning could be thought to override the short term goal of "punishing" West Windsor for its inconsistent behavior, although this is a very close question given West Windsor's opportunistic manipulation of its land use rules. However, given the generally inequitable conduct of the municipality, and the less-than-optimum planning decisions that it has made township wide, amici conclude that it would take only a relatively modest showing by Toll to override the municipality's preferences. One basis for doing so, for instance, might be to demonstrate that the site is so large that more multifamily housing would be produced than can be profitably absorbed.

## I. The Growth Share Alternative

This brief has drawn extensively on the practical experience of the past fifteen years to sketch a portrait of Mount Laurel compliance, the good it has accomplished, and the room for improvement that remains. For the most part, amici conclusions and recommendations have sought to stay within the four corners of existing doctrine, amplified and explained as necessary, and supplemented by technical changes where improvement might be obtained. Having done so, however, amici seek the Court's indulgence to step back for a moment and examine the larger compliance picture.

Despite Mount Laurel II's efforts to simplify and objectify the process, it remains extremely complicated, time consuming and uncertain. Controversy has not abated. Critics of the Mount Laurel doctrine point to those instances where it has not fully lived up to its promise and argued that the initiative should be abandoned. Its supporters, understandably, are moved to pull the wagons round in defense, for the goal of providing a "realistic opportunity" for all New Jersey households to find decent, affordable housing is truly a worthy one. In recent years, a number of Mount Laurel advocates have sought to resolve these tensions by proposing a different approach, called growth share, that they argue would vindicate the central purpose of the Mount Laurel doctrine with fewer of the negative side effects that have frustrated its complete success. Under the growth share approach municipalities would have a fair share obligation proportional to the growth that they actually experience, rather

than being assigned a number based on an a priori estimate of the community's capacity to grow, an approach that has proven to be both over-and under-inclusive. Initially, a municipality's growth share would be projected from past growth and present policies, but the objective number would be recalculated regularly based on actual development and redevelopment. A version of growth share has been implemented successfully in Montgomery County, Maryland. See David Rusk, Inside Game Outside Game, 178-200, 1999 (discussing Montgomery County, Maryland's experience with growth share).

Amici recognize that the focus of the growth share approach, calculating the threshold fair share in a different way, is not an issue in this case. We briefly call the growth share approach to the Court's attention, because it is striking how many of the issues we have discussed here, issues that are presented by this case, would be ameliorated had the growth share approach been in force and used. Consider, for instance, the following:

\* Market demand. The growth that actually occurs in a community is an objective and reasonably accurate manifestation of demand.<sup>37</sup> If growth is carefully monitored and the "growth share" is attended to continuously as new development is

---

<sup>37</sup> That developers and planners may sometimes miscalculate demand, resulting in a temporary oversupply or undersupply of a particular type of use, is irrelevant. As this case demonstrates, there is a huge margin of uncertainty in trying to project future market demand and then incorporate that projection into the slow pace of litigation while the market continues to evolve and shift.

approved, a high level of consistency between market forces and Mount Laurel compliance can be achieved.

\* Sound planning. Use of the growth share approach would not guarantee sound planning throughout New Jersey, but it would decouple the Mount Laurel doctrine from the perception that it imposes bad planning. The municipality's plan - good or bad - would determine both growth and growth share. In effect, the growth share reformulation of the Mount Laurel doctrine would include a limited but significant "sound planning" criterion - that growth may not occur without making simultaneous provision for lower income housing needs (essentially the holding of Mount Laurel I). In other respects, the vitally important shift to a sound planning paradigm for New Jersey would be worked out in the context of the State Planning Act, not the Fair Housing Act.

\* Non-complying municipalities. As we have explained, the present incentive-based system of enforcement emphasizes inclusionary zoning solutions that are mostly inapposite in the more urbanized parts of the state. By accurately measuring actual growth, including the large amount of redevelopment that takes place in older municipalities, growth share throws a spotlight on development capacity elsewhere and encourages compliance strategies that are related to the forms of development that are actually taking place.

\* Realistic opportunity. Because Mount Laurel compliance would be tied to actual growth as it occurred, the "realistic opportunity" standard could be applied easily by matching compliance mechanisms to the different forms in which growth

actually occurs (e.g., inclusionary components in large developments, development fees in commercial and smaller residential developments). It would be irrelevant for Mount Laurel purposes (though not necessarily under an arbitrary and capricious review of zoning decisions) whether a particular form of development was chosen by the municipality such as zero lot line. The fair share obligation would attach to whatever form of development municipalities and developers eventually settled on. There would be no platform for an argument such as that raised herein by Toll Brothers that a particular form of housing was designated specifically to frustrate the construction of Mount Laurel housing.

\* Builder's remedy. Growth share would not eliminate the use of the builder's remedy. By linking the fair share obligation to a locally-determined growth plan, however, voluntary compliance should be increased, and enforcement by public interest groups would be enhanced because of the simple nature of the proofs required. Thus, reliance on the builder's remedy could be reduced.

\* The "threat" problem. The Mount Laurel doctrine could no longer be used to coerce non-Mount Laurel development approvals under growth share, because every development approval would have a "growth share" consequence, but no development approvals would otherwise be required.

Growth share is an objective method of calculating fair share<sup>38</sup>, and it therefore meets a central criterion of Mount Laurel II, that municipalities have clear and unambiguous notice of their obligation. 92 N.J. at 252-53. Moreover, as the past fifteen years of practice (and COAH's regulations) demonstrate, the growth capacity of the statewide land use system is an important determinant of how much affordable housing can realistically be expected to be produced outside of governmental subsidy programs. Municipalities would continue to be responsible for their indigenous need (or an equitable portion thereof), so the principle of Mount Laurel II that all municipalities statewide have a Mount Laurel obligation would be maintained. In theory, a municipality could escape any fair share obligation above its indigenous need by refusing to grow at all, but experience demonstrates that very few, if any, municipalities, will limit themselves to the rigor of this test. Even if a few do, the practical ability to enforce Mount Laurel everywhere - in growing and redeveloping municipalities in every part of the state rather than mostly in "hot" markets - would far outweigh these small losses.<sup>39</sup>

---

<sup>38</sup> One of amici in this case, New Jersey Future, has carefully studied the growth share approach. In a publication entitled Achieving Genuine Prosperity, New Jersey Future calculated that under a growth share approach, depending on the parameters used, between 95,000 and 140,000 units of affordable housing would have been built between 1985 and 1999. See Appendix

<sup>39</sup> Mount Laurel II provides that once a municipality has satisfied its fair share obligation, it is free to apply land use devices that might otherwise be exclusionary. Growth share imposes a continuous "fair share" obligation, but by deferring throughout to municipal choices about growth or no-growth, it achieves the same end of municipal

The Council on Affordable Housing, is in the process of revising its rules in preparation for promulgation of "third round" fair share obligations. Amici are aware that COAH has a growth share proposal under consideration and would welcome COAH's initiative on the issue. Such initiative may turn on whether the agency can satisfy the doubts expressed by some about whether growth share would be constitutional under the literal language of Mount Laurel II. By using the West Windsor case to make the Mount Laurel doctrine "work" better in light of experience, without this Court questioning in any way the continuing validity of either Mount Laurel I or Mount Laurel II, a strong message would be sent to COAH and everyone else engaged in this important constitutional work that creativity and relentless pursuit of (in Chief Justice Wilentz' word) "results," is the essence of what the Mount Laurel doctrine is truly about.

---

flexibility. Indeed, this provision in Mount Laurel II can be seen as indirectly validating the concept of "growth share."

