Solar Energy Development, State Constitutional Interpretation and Mount Laurel II: Second-Order Consequences of Innovative Policymaking by the New Jersey Supreme Court

Robert F. Blomquist
Valparaiso University School of Law

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SOLAR ENERGY DEVELOPMENT, STATE CONSTITUTIONAL INTERPRETATION AND MOUNT LAUREL II: SECOND-ORDER CONSEQUENCES OF INNOVATIVE POLICYMAKING BY THE NEW JERSEY SUPREME COURT

Robert F. Blomquist*

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* B.S. Economics, University of Pennsylvania (Wharton School) 1973; J.D., Cornell Law School, 1977. The author is a member of the firm of Davis, Reberkenny & Abramowitz, P.A., in Cherry Hill, New Jersey, and has advised numerous New Jersey municipalities on solar planning and zoning techniques.
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The New Jersey Supreme Court's unanimous decision in *Southern Burlington County NAACP v. Township of Mount Laurel* (Mount Laurel II) is a remarkable instance of judicial policymaking and a veritable lodestone of general and specific policy prescriptions for municipal governments, developers, and trial courts. The ruling initiates several structural changes in the horizontal relationships between the judicial, executive and legislative branches of state government, as well as in the vertical relationships between state and local governments. Some of these changes are starkly political in nature. Mount Laurel II also establishes an elaborate matrix of priorities between competing social and economic concerns in New Jersey.

Invoking the state constitution's requirements of fundamental fairness, substantive due process and equal protection and the state's inherent police powers to control the use of land for the general welfare, the New Jersey Supreme Court in *Mount Laurel II* actively initiated far-ranging changes in numerous areas of the law including land use planning, appellate procedure, remedies, evidence, local government and administrative law. Indeed, *Mount Laurel II* is a quintessential example of what Professors Porter and Tarr have

2. The New Jersey Supreme Court set forth the constitutional basis for the *Mount Laurel* doctrine as follows:

   The constitutional basis for the *Mount Laurel* doctrine remains the same. The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare. When the exercise of that power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare — in this case the housing needs — of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional. In particular, those regulations that do not provide the requisite opportunity for a fair share of the region’s need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection. *Mount Laurel I*, 67 N.J. at 174 and 181.

termed innovative policymaking — the most potent form of state supreme court policymaking.

Government by judiciary necessarily causes many consequences and costs throughout the policy landscape. Not only are the immediate Mount Laurel II litigants — the numerous municipalities, assorted developers and public interest groups involved in the consolidated review — affected by the decision, but a number of non-parties are also directly touched by the ruling. This is a result of the supreme court’s statewide regional model of inclusionary zoning. Less obvious but equally important are what Donald Horowitz has termed second-order consequences of judicial forays into social policymaking.


Although in some sense all [state supreme court] policymaking entails innovation, as used here innovative policymaking refers to policymaking (a) that either overturns an existing state policy or fills a gap in state policy; (b) in which the initiative comes from within the state supreme court, rather than being mandated by either federal authorities or other branches of state government; and (c) that imposes specific policies. Most frequently [state] constitutional interpretation supplies the basis for such policymaking.

Id.

4. Id. Professors Tarr and Porter categorize five major types of state supreme court policymaking other than innovative policymaking. The other types of policymaking are the following: agenda-setting policymaking (forcing political authorities to find alternative means of pursuing policy objectives); complementary policymaking (rulings that either aid state legislative goals or relieve state legislators of the onus of taking politically awkward stands); elaborative policymaking (extension of precedent enunciated by the United States Supreme Court by state supreme courts); restrictive policymaking (limitation and/or evasion of policies developed by the United States Supreme Court); and institutional policymaking (judicial activity directed toward preserving the autonomy and integrity of courts and the judicial process). Id. at xvii-xviii.

5. In addition to the municipal litigants, developers, and public interest groups before the court in Mount Laurel II, virtually every municipality in the state as well as any developer interested in constructing new buildings anywhere in the state will be affected by the decision. Moreover, public interest groups and non-profit organizations that view any municipal activity as impeding the goals and purposes of Mount Laurel II have standing to challenge the municipality in future litigation. See, e.g., N.Y. Times, Feb. 29, 1984, at A1, col. 1.


Horowitz notes that:

Costs may show up only much later and in more far-flung forums than benefits.
These second-order consequences are particularly troublesome because they involve unanticipated social costs, which may surface much later and in different forums than benefits of the decision.\(^7\)

This Article focuses on the second-order consequences, unforeseen by the judiciary, that will result from *Mount Laurel II*. These consequences will be accompanied by social costs in such diverse policy areas as educational finance, local government autonomy and patterns of energy development and use within the state. The purpose of this Article is twofold. First, it is to explain why *Mount Laurel II* presents the prospect for such perplexing and far-flung second-order consequences. Second, it is to explore in detail one disturbing example of the decision's unforeseen consequences: the prospect that development of a promising source of alternative energy — solar space and water heating in buildings — will be stifled at the local level without a corresponding mandate at the state level, resulting in continued and aggravated dependence on electricity, fossil fuels and other non-renewable sources of energy for the long-term future.\(^8\)

In its first section, the Article discusses the basic holdings and policy mandates of the *Mount Laurel II* decision.\(^9\) In its second section, the Article defines the concepts of second-order consequences and postulates likely zoning and land use second-order consequences of the case.\(^10\) The Article focuses on the specific area of solar energy development in New Jersey in its third section.\(^11\) Particular concern is given to the implications of *Mount Laurel II* on municipal willingness to encourage, through appropriate land use regulations, solar energy use in residential and commercial structures. In the next section, the Article provides a further inventory of possible second-order consequences of the *Mount Laurel II* ruling, viewed from a political as well as a socio-economic perspective.\(^12\) Finally, the Article concludes with some pragmatic proposals for minimizing second-order consequences when state supreme courts engage in innovative policymaking.\(^13\)

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Put differently, costs may be more widely shared than benefits, and they are certainly less easily verifiable than at least the intended benefits are, since they are typically unintended and therefore not targeted for inclusion in reports and other monitoring efforts.

**COURTS AND SOCIAL POLICY**, at 293.

8. See *infra* notes 191-200 and accompanying text.
9. See *infra* notes 14-74 and accompanying text.
10. See *infra* notes 75-112 and accompanying text.
11. See *infra* notes 113-200 and accompanying text.
12. See *infra* notes 201-50 and accompanying text.
13. See *infra* notes 251-63 and accompanying text.
I. Mount Laurel: Holdings and Policy Mandates

A. Judicial Motivations for the Decision

Mount Laurel II was a decade in the making. This single fact explains much about the decision: over time, the New Jersey Supreme Court witnessed its promising constitutional seed emerge as a stunted sapling. Rather than uproot its doctrine and start from scratch—a course some commentators predicted would occur—the court, in a surprising move, performed radical surgery, transplanting its transmogrified doctrine to richer soil.

The court was frustrated by the lack of implementation of the constitutional doctrine it first articulated in Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I) from its inception in 1975. That seminal case held in broad and undefined terms that a developing municipality violates the state's constitutional mandate to exercise zoning powers for the general welfare when it fails to affirmatively afford "a realistic opportunity for the construction of its fair share of the present and prospective regional need for low- and moderate-income housing." Notwithstanding that a considerable cause of Mount Laurel I's implementational difficulties were of the court's own making, the supreme court in Mount Laurel II, while implicitly acknowledging the deficiencies of its past decisions, downplayed the


[S]ome observers are predicting that, given the substantial change in the court's composition since 1975 (only three of the original seven justices remain) and the substantial problems which have been encountered in administering the Mount Laurel mandates, the court may use this occasion to abandon or substantially alter its original position on exclusionary zoning.

Id.


significance of doctrinal confusion. Instead, the court placed the primary blame for the failure to get lower-income housing built on what it perceived to be the proximate cause of the lack of progress: municipal resistance and abuse of the legal process. Mount Laurel Township itself triggered palpable anger on the part of the court. In the first paragraph of its decision, the court stated:

The [Mount Laurel I] doctrine has become famous. The Mount Laurel case itself threatens to become infamous. After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case.

This opening statement set the tone for what was to follow. Another motivation for the scope, detail and potency of Mount Laurel II was the New Jersey Supreme Court's perception of unjustified failure by the legislature and appropriate state administrative agencies to enforce the mandate of Mount Laurel I. The court was clearly disappointed by the unwillingness of the more political branches of state government to give quantifiable substance to judicial concepts of "region" and "fair share" in order to foster actual construction of low- and moderate-income housing in municipalities throughout the state.

The court's implicit recognition of doctrinal confusion, anger at perceived municipal evasiveness, and impatience with inaction by coordinate branches of government was joined with a general concern for its own judicial legitimacy. This last concern had two distinct dimensions: first, a defensive resolve that court orders be obeyed by responsible officials, and second, a positive vision of the court as an essential formulator of major state policy initiatives. Indeed, the latter aspect of the New Jersey Supreme Court's weltanschauung had considerably matured and enlarged over the eight years between Mount Laurel I and Mount Laurel II. Taken together, these judicial
motivations created an irresistible force which resulted in a truly unique and momentous decision.23

B. Essential Mandates

In order to understand fully the second-order consequences of *Mount Laurel II*, the fundamental holdings of the decision must first be surveyed. Each of the seven major holdings of *Mount Laurel II* will be discussed in this section of the Article. More specific and less obvious principles of the decision are addressed in Sections III and IV of the Article.

1. Suspension of "Developing Municipality"
   Benchmark and Replacement by State Development Guide Plan "Growth Areas"

The most significant result of the *Mount Laurel II* decision is the elimination, for the foreseeable future,24 of the six-part *Mount Laurel I* "developing

of the life support system of a comatose young woman without civil or criminal liability on the part of any participant in the process); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (court rejected the United States Supreme Court's more restrictive standard and held that the waiver standard under the search and seizure provision of the state constitution applied to consent searches, thus placing the burden on the state to demonstrate knowledge of a right to refuse consent); Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975) (court fashioned limited-use immunity respecting the use of prisoner's statements in prison disciplinary proceedings in subsequent criminal prosecutions based on extraconstitutional considerations of fairness and rightness); Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975) (after three years and five intervening rulings coupled with endless legislative, executive and judicial negotiations, the supreme court made a final last-ditch response to legislative intransigence by enjoining the expenditure of school funds until the legislature enacted the state's first income tax law), cert. denied, 414 U.S. 976 (1976); and State v. Gregory, 66 N.J. 510, 333 A.2d 257 (1975) (through the exercise of "broad administrative and procedural powers vested" in the court, the New Jersey Supreme Court made an exhaustive reassessment of the prohibition against double jeopardy requiring compulsory joinder of offenses based on the same conduct or arising from the same criminal episode).

23. Chief Justice Wilentz, writing for a unanimous court, commented on the six consolidated cases that made up *Mount Laurel II* and noted:

[These cases] demonstrate the need to put some steel in [the Mount Laurel] doctrine. The deficiencies in its application range from uncertainty and inconsistency at the trial level to inflexible review criteria at the appellate level. The waste of judicial energy involved at every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts. The length and complexity of trials is often outrageous, and the expense of litigation is so high that a real question develops whether a municipality can afford to defend or the plaintiffs can afford to sue.

*Mount Laurel II*, 92 N.J. at 200, 456 A.2d at 410-11 (emphasis provided; footnotes omitted).

24. The court indicated that while it was replacing the *Mount Laurel I* test with
the use of the SDGP to determine a municipality's constitutional obligation, if the state takes action causing the use of the SDGP to become inappropriate for Mount Laurel purposes, the trial court must "revert to the prior 'developing' tests to determine whether the Mount Laurel obligation applies." Id. at 248 n.21, 456 A.2d at 435 n.21. These tests, however, would be modified under Mount Laurel II as follows: developed municipalities, including the central cities and built-up suburbs, will be subject to the Mount Laurel obligation. Id. The court noted that

[the] most significant question in such cases will ordinarily be whether there is any land available for development, and, if not, what kind of remedy is appropriate to assure that as land becomes available, a realistic opportunity exists for the construction of lower income housing, assuming it is otherwise suitable for that purpose.

Id. The court also subjected "developing" municipalities to the Mount Laurel obligation and disavowed that "the so-called six criteria must be satisfied to characterize a municipality as developing." The court noted that "[a]ny combination of factors demonstrating that the municipality is in the process of significant commercial, industrial or residential growth or is encouraging such growth, or is in the path of inevitable future commercial, industrial or residential growth will suffice." Id. (emphasis in original).

25. The six criteria of a "developing municipality" require that the municipality:

(1) [have] a sizeable land area, (2) [lie] outside the central cities and the older built-up suburbs, (3) [have] substantially shed rural characteristics, (4) [have] undergone great population increases since World War II or is now in the process of doing so, (5) not [be] completely developed, and (6) [be] in the path of inevitable future residential, commercial and industrial demand and growth.

Id. at 223-24, 456 A.2d at 422 (quoting Glenview Dev. Co. v. Franklin Township, 164 N.J. Super. 563, 567-68, 397 A.2d 384, 386 (Law Div. 1978)).

26. The terms "low" and "moderate" income housing had not been defined by the supreme court prior to Mount Laurel II. In Mount Laurel II, the court borrowed from the definition contained in the Federal Section 8 Housing Program as follows:

"Moderate income families" are those whose incomes are no greater than 80 percent and no less that 50 percent of the median income of the area, with adjustments for smaller and larger families. "Lower income families" are those whose incomes do not exceed 50 percent of the median income of the area, with adjustments for smaller and larger families. See, 42 U.S.C. §1437a(b)(2) (1982 Supp.), in which these definitions are used to define income standards for the Section 8 housing subsidy program. Our phraseology differs from that in the Section 8 program, which defines "lower income families" as analogous to our moderate-income families, and "very low income families" as analogous to our "low income." 42 U.S.C. §1437a(b)(2) (1982 Supp.).
ment Guide Plan (SDGP), promulgated by the New Jersey Department of Community Affairs.\textsuperscript{27} The \textit{Mount Laurel} obligation does not extend to municipalities which contain only areas designated by the SDGP as non-growth areas. Non-growth area designations include "open spaces, rural areas, prime farmland, conservation areas, limited growth areas, parts of the Pinelands and certain Coastal Zone areas."\textsuperscript{28} As a result of these designations the obligation of \textit{Mount Laurel II} applies to New Jersey's central cities and developed suburbs.\textsuperscript{29} Those who seek to escape the consequences of the SDGP designation bear a heavy burden.\textsuperscript{30}

2. Universal Obligation of All Municipalities to Provide Realistic Opportunity for Resident Poor

Notwithstanding the court's approach of limiting responsibility for present and future \textit{regional} housing needs of lower-income persons to SDGP "growth areas," the court took an expansive view of municipal responsibility for providing housing for indigenous poor.\textsuperscript{31} Each of New Jersey's 567 municipalities now must provide a realistic opportunity for decent housing of its indigenous poor. There is an exception, however, where the poor represent a disproportionately large segment of the municipal population as com-

\textsuperscript{27} \textit{Mount Laurel II}, 92 N.J. at 215, 456 A.2d at 418.
\textsuperscript{28} \textit{Mount Laurel II}, 92 N.J. at 215, 456 A.2d at 418.
\textsuperscript{29} \textit{Mount Laurel II}, 92 N.J. at 215, 456 A.2d at 418.
\textsuperscript{30} \textsuperscript{24}
\textsuperscript{25} \textsuperscript{22}
\textsuperscript{26} \textsuperscript{21}
\textsuperscript{27} \textsuperscript{18}
\textsuperscript{29}
\textsuperscript{22}
pared with the rest of the region. The exception to this universal municipal responsibility would apply to most of the state’s urban areas, which currently house substantial percentages of poor people.


Under Mount Laurel I and its progeny, a municipality could defend an exclusionary zoning attack by showing a good faith effort to comply. Mount Laurel II rejects this “numberless approach” in future litigation. Now, in the typical case, a plaintiff’s proofs will involve evidence of a municipality’s fair regional share of low- and moderate-income housing on an immediate basis, as well as in the medium-range future. In atypical situations, plaintiffs will be able to establish a prima facie case of unconstitutional exclusionary zoning by proving that the pertinent municipal ordinance is “substantially affected by restrictive devices.” In such a case, the plaintiff’s proof creates a presumption that the ordinance is invalid. To overcome this presumption the local government must show quantitative compliance with its regional fair share obligation.

4. Calculations of Regional Fair Share are Binding on Parties and Presumptively Valid for Non-Parties

A limited number of specialized Mount Laurel judges, designated by the Chief Justice, will decide exclusionary zoning litigation arising under Mount Laurel II. Determinations of region and regional housing need will be binding on all municipalities party to such lawsuits. These judicial determinations will also have presumptive validity for non-party municipalities.

5. Municipal Responsibilities in Meeting the Mount Laurel Obligation

A municipality subject to a Mount Laurel II obligation has a panoply of interconnected hierarchical responsibilities. These responsibilities — starting with the most basic — are discussed here in turn.

First, all municipalities subject to the Mount Laurel obligation must

32. Id. at 214-15, 456 A.2d at 418.
33. See id. at 220, 456 A.2d at 421.
35. Mount Laurel II, 92 N.J. at 216, 456 A.2d at 419.
36. Id.
37. Id. at 216-17, 456 A.2d at 419.
38. Id. at 216, 456 A.2d at 419.
eliminate unnecessary cost-producing requirements\textsuperscript{39} by removing zoning and subdivision restrictions and exactions that are not necessary to protect health and safety.\textsuperscript{40}

Second, unless removal of restrictive barriers will provide a realistic opportunity for the construction of the municipality’s fair share of the region’s lower-income housing need, affirmative measures are required.\textsuperscript{41} These measures include, but are not limited to the following: (a) municipal cooperation with developers’ attempts to obtain state and federal housing subsidies;\textsuperscript{42} (b) provision of lower-income housing through a local housing agency;\textsuperscript{43} (c) employment of “inclusionary devices” such as (i) lower-income density bonuses for developers (i.e., incentive zoning that increases the permitted density as the amount of lower-income housing provided is increased)\textsuperscript{44} and (ii) mandatory set-asides\textsuperscript{45} accompanied by continued municipal regulation of resale so that the designated housing units will continue to be occupied by lower-income persons,\textsuperscript{46} and municipal supervision of the phase-in of lower-income units as the development progresses;\textsuperscript{47} (d) zoning substantial areas for low cost mobile homes and other types of low cost housing;\textsuperscript{48} (e) establishing maximum square footage zones;\textsuperscript{49} and (f) “overzoning” for lower-income housing.\textsuperscript{50}

\textsuperscript{39} Id. at 217, 456 A.2d at 419.
\textsuperscript{40} Id. at 259, 456 A.2d at 441.
\textsuperscript{41} Id. at 261, 456 A.2d at 443.
\textsuperscript{42} Id. at 262, 456 A.2d at 443. This responsibility potentially would create additional responsibilities on the part of a municipality such as enactment of a “resolution of need” stating that “there is a need for moderate-income housing” in the municipality, N.J. STAT. ANN. § 55:14J-6(b) (West Supp. 1984-1985), and granting of tax abatements to developers to comport with state or federal regulations, see, e.g., 42 U.S.C. 1437f (Supp. 1982) (section 8 federal low- and moderate-income housing programs); N.J. STAT. ANN. § 55:143-8(f).
\textsuperscript{43} Mount Laurel II, 92 N.J. at 263, 456 A.2d at 444. While the New Jersey Supreme Court indicates that creation of a housing authority is not a requirement for municipal satisfaction of its Mount Laurel obligation, id. at 264, 456 A.2d at 444, the clear implication of the court’s decision is that such a step by a municipality would go far toward meeting the affirmative action requirements and may, indeed, be required. See generally id. at 277-78, 456 A.2d at 451 (all affirmative measures possible are required before least cost housing is acceptable in meeting a municipality’s Mount Laurel obligation).
\textsuperscript{44} Id. at 266, 456 A.2d at 445.
\textsuperscript{45} Id. at 267-70, 456 A.2d at 446.
\textsuperscript{46} Id. at 270, 456 A.2d at 447.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 274-77, 456 A.2d at 450-51.
\textsuperscript{49} Id. at 270, 456 A.2d at 447. Maximum square footage zones are defined by the court as “zones where developers cannot build units with more than a certain footage or build anything other than lower income housing or housing that includes a specified portion of lower income housing.” Id. (emphasis in original).
\textsuperscript{50} Id. “Overzoning” is defined by the court as “zoning to allow for more than the fair share [of a municipality’s Mount Laurel obligation] if it is likely, as it usually is, that not all of the property made available for lower income housing will actually result in [the construction] of such housing.” Id. (emphasis in original).
Third, assuming that all restrictions and exactions have been removed from the zoning ordinance and all affirmative measures have been attempted, then a municipality may satisfy its Mount Laurel obligation by merely "supplementing whatever lower income housing can be built with [providing realistic opportunity for the construction of] enough 'least cost' housing to satisfy the fair share." The court defines least cost housing stringently: the least expensive housing that builders can provide after the municipality removes all excessive restrictions and exactions and after the municipality has used all affirmative devices that might lower costs.

While the Mount Laurel obligation could conceivably be satisfied by a local government's successful accomplishment of a lower-level responsibility on the hierarchy, this is by no means guaranteed. A municipality may not find out whether it has fulfilled its constitutional obligation until its zoning ordinance is challenged in court and a judgment rendered on compliance or non-compliance. Accordingly, from a litigation-avoidance standpoint, a municipality will have a strong incentive to attempt to simultaneously meet all of the court-imposed hierarchical responsibilities, even though the lower-level responsibilities are theoretically mutually exclusive.

51. Id. at 277, 456 A.2d at 451. One of the difficulties in fully comprehending the Mount Laurel II decision is reconciling the court's "Summary of Rulings," id. at 214-20, 456 A.2d at 418-21, with the substantive discussion in the remainder of the opinion. In some cases, the summary contains different language and leads to possibly different interpretations than the actual text of the opinion. See infra note 58.

52. 92 N.J. at 277, 456 A.2d at 451. The court presumes that such housing will be inexpensive enough to provide shelter for families who cannot afford housing in the conventional suburban market, although it will be unaffordable for those in the lower-income brackets. Id. The court states that at the minimum, "provision of least cost housing will make certain that municipalities in 'growth' areas of this state do not 'grow' only for the well-to-do." Id. Thus, the court expressly rejects a "filter down" or "trickle down" approach to providing housing for lower-income families, noting that this theory is defective in light of the general trend of housing now being built in suburban communities such as Mount Laurel Township to appreciate rather than to become affordable over time for lower-income families. According to the court's logic, "Only if municipalities like Mount Laurel begin now to build lower income or least cost housing will some part of their housing stock ever 'filter down' to New Jersey's poorer families." Id. at 278, 456 A.2d at 452 (emphasis in original). It is not clear why lower cost or least cost housing is expected to depreciate in value when other housing has appreciated over time. The court's assumption is premised on continued regulation by municipalities of resale price ceilings and rentals for housing built pursuant to Mount Laurel II. This, however, would present economic disincentives for owners or developers to fully maintain and operate the housing in the first place, for the same reasons that rent control, in general, has created disincentives for upkeep, ownership and maintenance. See generally C. Baird, Rent Control: The Perennial Folly 54-81 (1980). See also J. Fried, Housing Crisis U.S.A. 35-39 (1971) (discussing specific disincentives regarding New York's rent control experience); D. Mandelker, Housing Subsidies in the United States and England 19-20 (1973) (discussing specific problems regarding England's rent control disincentives). For a general history of rent control measures throughout the world, see 13 Encyclopedia of the Social Sciences 292-95 (1953).

53. See Mount Laurel II, 92 N.J. at 258-60, 456 A.2d at 441-42.
6. Potent Judicial Remedies for Municipal Failure to Meet Mount Laurel Obligation

In the event that a municipality which includes a growth area or otherwise is subject to a Mount Laurel II obligation is challenged in a lawsuit, the trial judge will make a threshold determination of ultimate fact: whether the zoning ordinance, taken together with any affirmative measures initiated by the municipal government, provides a realistic opportunity for meeting the municipality's fair share of the region's present and prospective low- and moderate-income housing needs. If the trial court makes a determination that the municipal defendant has not satisfied its Mount Laurel obligation, the court is required to order the municipality to revise its zoning ordinance, within a specified time period. If the municipality fails to adequately revise its ordinance within the specified period, the trial court must implement the following remedies for non-compliance.

54. Even though a municipality is not in a "growth area" on the SDGP, it could nevertheless be subject to a Mount Laurel obligation. See infra notes 236-50 and accompanying text.


56. Id. The court's opinion is confusing with regard to this initial time period for municipal revision of a constitutionally infirm zoning ordinance and whether a master may be appointed by the trial court, against the wishes of a municipal defendant, immediately following the judicial determination of ultimate fact that the municipality has failed to meet its Mount Laurel obligation. The court, on the one hand, clearly states that:

If a trial court determines that a municipality has not met its Mount Laurel obligation, it shall order the municipality to revise its zoning ordinance within a set time period to comply with the constitutional mandate; if the municipality fails adequately to revise its ordinance within that time, the court shall implement the remedies for non-compliance outlined below. . . .

Id. (emphasis added). At first blush, it would seem that a municipality may be given a flexible time period, set by the trial court, to modify its zoning ordinance on its own initiative. This time period, subject to a reasonableness standard, might be several months in duration. It would also seem from the above-quoted language that a trial court would not have the discretion, immediately after its initial determination of non-compliance, to order a master to "assist" the municipality. A municipality, of course, would have an economic incentive to avoid a master, since it would ultimately have to pay for the master's services. See id. at 281 n.38, 456 A.2d at 453 n.38. However, a later portion of the court's opinion confuses the holdings. Under the heading "Revision of the Zoning Ordinance: The Master," the court states:

If the trial court determines that a municipality's zoning ordinance does not satisfy its Mount Laurel obligation, it shall order the defendant to revise it. Unless it is clear that a requisite realistic opportunity can be otherwise provided, the trial court should direct the municipality to incorporate in that new ordinance the affirmative devices discussed above most likely to lead to the construction of lower income housing. The trial court shall order the
(a) Builder's remedy

This remedy allows a successful plaintiff builder to construct a project which provides a substantial amount of lower-income housing on land owned by the defendant municipality. It is granted by the trial court unless the municipality "establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." 57 Trial court determinations of whether a builder's remedy should apply would be made on a case by case basis, 58 although the supreme court, in expressly overruling a portion of its decision in Oakwood at Madison, Inc. v. Township of Madison, 59 stated that where the builder proposes a viable project, the builder's remedy should be granted in order to make these remedies more readily available. 60

(b) Order to revise the zoning ordinance, order appointing a master

A trial judge faced with a non-complying municipal defendant is also given authority under Mount Laurel II to (1) order the defendant to change its zoning ordinance by a date certain; (2) order that specific affirmative devices such as mandatory set asides, subsidies, and other inclusionary zoning devices previously discussed be incorporated into the new zoning ordinance; and (3) order the appointment of a special master to assist municipal officials in developing constitutional zoning and land use requirements. 61

Id. at 281, 456 A.2d at 453 (emphasis added). The confusion between the two passages of the opinion arises because the supreme court instructs the trial court to order completion of the revised zoning ordinance "within 90 days of its original judgment against the municipality" and allows the appointment of a master. However, such a construction directly contradicts the more flexible self-revised approach allowed by the first passage.

57. Id. at 279-80, 456 A.2d at 452.
58. While the textual discussion in Mount Laurel II does not contain the language "case by case," the language is contained in the "Summary of Rulings." Id. at 218, 456 A.2d at 420. This is a recurrent problem in interpreting the Mount Laurel II opinion.
59. 72 N.J. 481, 551 n.50, 371 A.2d 1192, 1227 n.50 (1977).
60. Mount Laurel II, 92 N.J. at 279, 456 A.2d at 452.
61. Id. at 281, 456 A.2d at 453. The master's services would be paid for by the defendant municipality. Id. at 281 n.38, 456 A.2d at 453 n.38.
In the event that a defendant municipality under an order to revise its zoning ordinance either fails to submit a revised ordinance within the time specified by the court order, or fails to satisfy the trial court that the revised ordinance meets the *Mount Laurel II* obligation, the trial court has great judicial power to force compliance by issuing such orders as are appropriate including any one or more of the following:\(^{62}\)

1. that the municipality adopt such resolutions and ordinances, including particular amendments to its zoning ordinance, and other land use regulations, as will enable it to meet its *Mount Laurel* obligations;
2. that certain types of projects or construction as may be specified by the trial court be delayed within the municipality until its ordinance is satisfactorily revised, or until all or part of its fair share of lower income housing is constructed and/or firm commitments for its construction have been made by responsible developers;
3. that the zoning ordinance and the land use regulations of the municipality be deemed void in whole or in part so as to relax or eliminate building and use restrictions in all or selected portions of the municipality (the court may condition this remedy upon failure of the municipality to adopt resolutions or ordinances mentioned in (1) above); and
4. that particular applications to construct housing that includes lower income units be approved by the municipality, or any officer, board, agency, authority (independent or otherwise) or division thereof.\(^{63}\)

The supreme court acknowledged that the aforementioned coercive remedial powers, authorized after previous court orders have been violated, are more of an administrative and legislative nature than of a judicial nature, and that these potential remedies go beyond the ken of traditional judicial remedies.\(^{64}\) Moreover, basing its sweeping remedial changes on the mandate of the New Jersey Constitution, the court frankly admits that it is risking its judicial legitimacy with this mandate.\(^{65}\)

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62. *Id.* at 285-86, 456 A.2d at 455. The court's language, "including any one or more of the following," would seem to limit a trial court's discretion to the particular orders enumerated by the court. However, in light of the considerable discretion and power vested in *Mount Laurel II* trial courts by the supreme court's opinion, it is arguable that the court would tolerate other types of coercive orders not specifically enumerated in the opinion.

63. *Id.*

64. *Id.* at 287, 456 A.2d at 456.

65. *Id.* Compare this statement to the court's concern about its power to undertake unconventional remedies in institutional litigation. *Id.* at 288-90, 456 A.2d at 457-58.
7. Modification of the Usual Appellate Rules
and Common Law Doctrine

The supreme court substantially modified the usual rules of appellate procedure and the res judicata effect of compliance judgments in future Mount Laurel litigation. Regarding the former modification, the court held that barring the most unusual circumstances, the judiciary should handle Mount Laurel II cases to dispose of the litigation in all of its aspects with one trial and one appeal with stays and interlocutory appeals being the rare exception rather than the rule. Thus, if a municipality takes an appeal, all aspects of the case will be considered by the appellate court including both the correctness of the lower court’s decision on invalidity, the scope of the remedies imposed on the municipality, and the validity of the ordinance adopted after the determination of invalidity. The court chose to take this approach, despite the prospect that if the appellate court finds that the trial court’s initial determination of failure to comply with Mount Laurel was wrong from the outset, “all of the steps subsequently taken by the municipality to comply . . . may have been wasted energy.”

The second modification alters the usual rule that the common law doctrine of res judicata does not apply to all situations, such as a judicial determination of municipal compliance with its Mount Laurel obligation, where circumstances may have changed after the date of entry of the judgment. The court, borrowing the six year period for municipal reexamination and amendment of its land use regulations set forth in the Municipal Land Use Law, held that “[c]ompliance judgments in [Mount Laurel] cases . . . shall have res judicata effect, despite changed circumstances, for a period of six years,

66. Id. at 290-91, 456 A.2d at 458. The greatest modification was in the area of interlocutory appeals. The standard practice is to allow interlocutory appeals to the appellate division or to the supreme court. See generally N.J. Cr. R. 2:2-4, 2:2-5, 2:3-1, and 2:5-6 (1984). Moreover, pursuant to common law exceptions to the final judgment rule, courts in the past have allowed appeals of orders which are apparently interlocutory but actually final. See, e.g., Kriegsman v. Kriegsman, 150 N.J. Super. 474, 375 A.2d 1253 (App. Div. 1977) (a trial court order relieving or declining to relieve counsel during the pendency of an action is appealable); State v. Evangelista, 134 N.J. Super. 64, 338 A.2d 224 (Law Div. 1975) (an order of the juvenile court waiving its jurisdiction is appealable). The court’s modification of appellate procedures, however, leaves intact the ability of a Mount Laurel II trial court to certify an interlocutory order pursuant to N.J. Ct. R. 4:42-2 (1984).
68. Id. at 290-91, 456 A.2d at 458.
69. Id. at 218, 456 A.2d at 420. The court’s standard for allowing an exception to its stay of an interlocutory appeal ruling is vague. See id.
70. Id.
71. Id. at 290, 456 A.2d at 458 (emphasis added).
the period to begin with the entry of judgment by the trial court." The ruling, however, was weakened by the court's footnote reference that "a substantial transformation of the municipality . . . may trigger a valid Mount Laurel claim before the six years have expired."

To summarize, the supreme court made radically new law in Mount Laurel II in seven major holdings. Most significantly, the court replaced the "developing municipality" standard with a new benchmark which looks to whether any portion of a New Jersey municipality is in a "growth area" as designated in the State Development Guide Plan; the court mandated that all municipalities in the state, no matter what planning regions are designated in the SDGP, must provide a realistic opportunity for housing for their indigenous poor; and the court ruled that a defendant municipality can no longer escape the imposition of judicial remedies in future Mount Laurel litigation by asserting a good faith defense. The next three sections of this Article explore the second-order consequences of Mount Laurel II.

II. SECOND-ORDER CONSEQUENCES

A. Overview

Major judicial policy decisions such as Mount Laurel II involve secondary repercussions which are unanticipated and ignored in judicial monitoring and follow-up. These repercussions entail social costs that are more difficult to verify than the decision's intended benefits and cause widely borne social costs which may surface much later than the ruling itself. Second-order consequences also may have negative synergistic effects as one consequence affects others. Moreover, while an appellate court, such as the New Jersey Supreme Court in its Mount Laurel II decision, might flag a number of potential effects in the course of its policymaking decision, these judicially acknowledged repercussions may still constitute second-order consequences when the full dimensions of the impact are not considered in the decision in chief.

74. Id. at 292 n.44, 456 A.2d at 459 n.44 (emphasis added). The court presumed a six-year period of municipal immunity from other Mount Laurel II suits following a compliance judgment. The court ignored the fact that the six year planning cycle could be substantially different from the six-year period following a judgment of compliance. For example, if a particular municipality adopted its original master plan on January 1, 1977, updated its master plan on January 1, 1983, and obtained a compliance judgment in Mount Laurel II litigation on December 1, 1988, the municipality would risk triggering the "substantial transformation" test by any revision of its master plan on January 1, 1989, as scheduled. Thus, instead of having a six-year period of repose from the date of the compliance judgment (December 1, 1988), the municipality would face the prospect of having only a few months repose before another litigant could challenge its master plan.
75. These effects might be termed third-order consequences. For purposes of discussion, however, this Article labels all of the unforeseen consequences as second-order consequences.
So analyzed, a partial working inventory of potential second-order consequences of the *Mount Laurel II* decision is provided below. The listing is not exhaustive, detailed or even accurately predictive. It is presented for heuristic purposes only. Indeed, even if only a small percentage of the possible second-order consequences of *Mount Laurel II* come to pass, significant social costs will be incurred. After a brief sketch of land use and zoning changes effected by *Mount Laurel II*, this Article will consider a more focused study of one particular second-order consequence: the impact of the *Mount Laurel II* decision on future solar energy development in the state. Other potential political, economic and social second-order consequences of the decision follow in Part IV.

**B. Zoning and Land Use Consequences**

1. The Judiciary's Role as a Super-Zoning Board will Vastly Increase.

The New Jersey Supreme Court has effectively judicialized zoning decisions on a statewide basis. The court's elaborate and forceful remedial holdings create a standard of judicial review analogous to the "hard look" doctrine in federal environmental litigation. Courts are admonished not to defer to local land use decisions or consider a zoning challenge in isolation, but must scrutinize the municipality's entire zoning ordinance, its regional effects and any affirmative measures taken to construct lower-income housing. The "hard look" doctrine is applicable to both trial and appellate courts.

The three *Mount Laurel* judges selected to implement the mandate enjoy extraordinary judicial powers, akin to independent agency commissioners with wide responsibilities to implement a specific piece of legislation. Simultaneously, the supreme court encouraged these judges to impose freely precise zoning

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76. See infra notes 191-200 and accompanying text.
77. Judge Bazelon of the United States Court of Appeals for the District of Columbia originated the "hard look" doctrine in Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971). Reviewing the Secretary of Agriculture's refusal to suspend or commence proceedings to suspend the registration of the pesticide DDT, the court of appeals determined that a stricter standard of review was required in environmental litigation. Judge Bazelon observed that matters which touch on "fundamental personal interest in life, health and liberty... have always had a special claim to judicial protection" and remanded the matter for further proceedings. Id. at 598. The court of appeals' expression was reiterated by the United States Supreme Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), where the Court addressed the Secretary of Transportation's scope of authority under the Federal Aid Highway Act of 1966, 23 U.S.C. §§ 101-141 (Supp. V 1984). The Court indicated that its review was to be "thorough, probing and in-depth." 401 U.S. at 415. Both courts emphasized the special nature of environmental matters as reasons for expanding the scope of courts' review. Apparently, the special need for low-income housing in this state also justified the state supreme court's stricter standard of review.
79. See id. at 218, 290, 456 A.2d at 420, 458-59.
ordinances, to solicit vigorously the involvement of hybrid masters and other experts, and to become involved generally with the details of local land use planning.\textsuperscript{80}

That judges’ decisions regarding pertinent regions and regional need are binding on non-party municipalities within that region\textsuperscript{81} closely resembles the rulemaking powers of an administrative agency. Indeed, this judicial power goes beyond the model of agency rulemaking since the Mount Laurel judges are not expressly required to provide notice or an opportunity for comment to affected municipalities.\textsuperscript{82} Trial courts may alter the SDGP determination through which municipalities are subject to a regional fair share obligation by allowing the Mount Laurel courts to reclassify a municipality if it encourages or allows growth.\textsuperscript{83} If the SDGP is not revised after January 1, 1985, the special courts will have “considerable discretion” to vary the contours of the SDGP.\textsuperscript{84} Thus, given strict scrutiny of municipal zoning ordinances and greatly increased judicial power to enforce compliance and alter SDGP planning determinations, the judiciary will be setting important details of land use ordinances in the state.

2. Land Use Decisionmaking Has Been Forcibly Shifted from Decentralized to Centralized Control.

In Mount Laurel II the supreme court elevated the importance of centrally promulgated regional and statewide master plans despite the absence of persuasive legislative and administrative authority to justify this action.\textsuperscript{85} In the process the court debased the value of municipal master plans, which, according to the court’s reasoning, are now subject to preemptive override by conflicting centrally developed state planning documents. Moreover, the SDGP has apparently been given primacy over other conflicting state-developed or regionally-developed plans.

The supreme court’s interpretation of the legislature’s intent in passing the statute\textsuperscript{86} establishing the role of the Division of State and Regional Planning in the Department of Community Affairs can be accurately described as

\textsuperscript{80} See id. at 245-46, 253-55, 456 A.2d at 434-35, 439-40.
\textsuperscript{81} Id. at 254, 456 A.2d at 439. While the court indicates that non-party municipalities may attempt to intervene or the court may require their joinder, it seems that the language of the supreme court’s opinion discourages such joinder or intervention because it may complicate the litigation. Id. Moreover, the supreme court leaves it to the discretion of the trial court to determine whether a non-party municipality will be allowed to intervene. Fundamental rules of res judicata and collateral estoppel dictate that if a non-party municipality will be bound by a determination of region and regional housing needs, it must have the right to intervene.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 241-42, 248 n.21, 456 A.2d at 432-33, 435 n.21.
\textsuperscript{84} Id. at 242, 456 A.2d at 432-33.
\textsuperscript{85} See infra notes 86-101 and accompanying text.
\textsuperscript{86} N.J. STAT. ANN. § 13:1B-15.52 (West 1979).
a double extrapolation. The court extended the legislature's purposes in enacting the Department's enabling statute and extended the purposes of the Division of State and Regional Planning in writing the SDGP. In reviewing the enabling act in juxtaposition with the SDGP, the court created new common law by analogous reasoning from non-judicial sources. 87

Contrary to the supreme court's expansive and far-ranging interpretation, the legislature did not mandate or intend a "statewide blueprint for future development" 88 when it charged the Division of State and Regional Planning with "preparing and maintaining a comprehensive guide plan and long term development and capital improvement program for the future improvement and development of the State." 89 Nor did the legislature mandate or intend the SDGP as a document that must be used for the purpose of deciding where growth should be encouraged, discouraged, permitted and prohibited in New Jersey. 90 A more reasonable interpretation of the 1961 enabling statute would have viewed it as a legislative request for administrative development of information to be used by local, state and federal officials to coordinate planning efforts and promote sensible and efficient land use policies. The court overstates the agency interpretation given by the Division of State and Regional Planning to the enabling act as requiring "a plan that would guide and influence the location of future development, including residential development." 91 The SDGP recommends where future development and conservation efforts in New Jersey should be concentrated. The SDGP did recognize that while it might have some indirect impact on social, economic and psychological goals, it is essentially an advocacy plan for the preservation and efficient use of the State's physical resources. However, "it functions by recommending where growth-inducing investments should and should not be made so that these resources are used efficiently to achieve fundamental statewide goals." 92 Thus, the SDGP

87. There is a tradition of utilizing non-judicial sources, particularly statutes, as material for growth and development of the common law. See generally Landis, Statutes and the Sources of Law, in HARVARD LEGAL ESSAYS 213 (1934); Stone, The Common Law in the United States, 50 HARV. L. REV. 4, 11-14 (1936); Traynor, Statutes Revolving in Common Law Orbits, 17 CATH. U.L. REV. 401, 405-26 (1968). See also R. LEFLAR, APPELLATE JUDICIAL OPINIONS 121-26 (1974).
91. Id. at 227, 456 A.2d at 425.
92. DIVISION OF STATE & REGIONAL PLANNING, NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, STATE DEVELOPMENT GUIDE PLAN ii-iv (May 1980) [hereinafter cited as STATE DEVELOPMENT GUIDE PLAN]. The Guide Plan states that it provides a long-range, statewide perspective which transcends functional and departmental lines. It is designed to assist the Governor's Office of Policy and Planning and the various Cabinet Committees it serves, as well as other agencies of government. In the final analysis implementation of the Guide Plan will depend upon its utility to those agencies and the extent to which
is, at best, equivocal about whether it was to be a binding regional blueprint for determining the appropriateness of publicly funded, growth-inducing developments such as highways and sewers. The SDGP states that the intention of the Division of Planning was that the Guide Plan be used in functional planning by State agencies, that county, regional and federal agencies take into account the plans' concept, and that some progress be made toward establishing a unified statewide land use and investment policy.\textsuperscript{93}

The legislature did not view the SDGP as a top-to-bottom legislative mandate of where future growth and development should or should not take place.\textsuperscript{94} It is reasonable to conclude that both the legislative and executive branches envisioned that primary prescriptive land use decisionmaking would continue on a local, decentralized basis, albeit with municipal consideration of the relationship of the proposed development of the municipality, as articulated in its master plan, to the master plans of contiguous municipalities, the master

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its recommendations are expressed in the programs and policies of the State government.
\end{flushright}

\textit{Id.} at iv.

\textsuperscript{93} \textit{Id.} at iii. While housing and residential development is discussed in the \textit{State Development Guide Plan}, the analysis is theoretical and general rather than prescriptive and detailed. Indeed, the problem of lower-income housing was presented in extremely vague terms:

\begin{quote}
Suburbanization and the shift of employment locations to areas outside the central cities have led to problems of restricted housing opportunities for some income groups. Many New Jersey residents, particularly low- and moderate-income families, have difficulty in finding affordable housing near their jobs. Recognizing this problem, the New Jersey Supreme Court in the 1975 Mount Laurel decision held that all "developing" municipalities should provide opportunities for a "fair share" of regional housing needs within their borders. However, the impact of this and subsequent decisions, at least at the present time and in view of the economic constraints, has been minimal. A major challenge in the coming years will be to provide a variety of housing opportunities in appropriate locations for New Jersey's expanding population. Single persons and young couples, families with growing children, and the elderly all have different housing needs and tastes. The economics of the housing market requires efforts by both the State and the Nation. Solutions to the problems of the cost, variety and location of new housing will have to be found if present and future residents are to enjoy decent homes in good residential environments.
\end{quote}


\textsuperscript{94} A single exception to this statement would be with regard to environmentally critical areas, to wit, the Pinelands and the coastal zone. In these areas the State clearly did indicate a top-to-bottom legislative mandate of where and how development should take place. This had already been done in other statutes. See Pinelands Protection Act, N.J. STAT. ANN. §§ 13:18A-1 to -29 (West Cum. Supp. 1983); Hackensack Meadowlands Reclamation and Development Act, N.J. STAT. ANN. §§ 13:17-1 to -86 (West 1979); Coastal Area Facility Review Act, N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979).
plan of the county in which the municipality is located and any comprehen-
sive guide plan formulated under the statute.\textsuperscript{95}

In making the SDGP the centerpiece of its reconstituted constitutional
doctrine, the supreme court converted a voluntary informational and
coordinating guide for state, county, and local officials into an involuntary
blueprint for municipal development mandated by the state. While the court
noted that the SDGP may become "inappropriate" for continued use as a
standard for determining constitutional obligation,\textsuperscript{96} the pragmatic reality is
that municipalities who spurn the SDGP after \textit{Mount Laurel II} will do so
at their own peril. Regardless of whether the SDGP was a voluntary guide
for municipal consideration \textit{before} the supreme court's ruling, it is now a binding
mandate caught up in the very fabric of the court's constitutional remedy
in \textit{Mount Laurel II}.

Repercussions of the decision go beyond usurpation of municipal autonomy
and derogation of legislative intent. \textit{Mount Laurel II} will also have a tendency
to interfere with intra-executive policymaking by virtue of the planning primacy
the decision accords to the SDGP developed by the Department of Community
Affairs. Indeed, that Department might interpret the court's far-ranging \textit{dicta}
to justify a decision to overrule a planning decision by a sister agency of state
government such as the Departments of Energy, Transportation or Agriculture.
\textit{Mount Laurel II} also undermines some policy assumptions made by the pro-
fessional planners who wrote the SDGP. The SDGP planners did not know
that their designation of growth areas would trigger affirmative municipal
obligations to provide thousands of units of lower-income housing on a
statewide basis.\textsuperscript{97} The mapping of growth areas by the Department might have
been different had this requirement been an explicit part of the planning
process. Population projections for the state,\textsuperscript{98} urban strategy,\textsuperscript{99} and assump-

\textsuperscript{95} N.J. \textsc{Stat. Ann.} § 40:55D-28(d) (West 1979). This statute was partially quoted
by the \textit{Mount Laurel II} court. 92 N.J. at 228, 456 A.2d at 425. Indeed, in a paradoxical admission at the end of its review and amplification of the \textsc{State Development Guide Plan}, the \textit{Mount Laurel} court notes the essentially non-binding, voluntary nature of the \textsc{State Development Guide Plan}:

\begin{quote}
Except for protective legislation (such as that pertaining to the Pinelands and
certain coastal areas) limited to particular ecologically sensitive areas, \textit{the state has imposed no prescriptions against development}. While conformity of the
constitutional obligation to the design of the Plan unquestionably advances
the state's purposes, \textit{the absence of such prescription against development}
may, in the long run, undermine the regional planning objectives of the SDGP,
whether we limit the Mount Laurel obligation to growth areas or not.
\end{quote}

\textsuperscript{96} See \textit{infra} notes 247-50 and accompanying text.

\textsuperscript{97} See \textsc{State Development Guide Plan}, supra note 92, at 6.

\textsuperscript{98} Id. at 2-5.

\textsuperscript{99} Id. at 15-16.
tions about infrastructure development might also have been fundamentally different. While the court left open the opportunity for the Department to modify the SDGP in the future, such court-sanctioned modification, linked as it is to municipal constitutional obligation, destabilizes long-range municipal fiscal planning and municipal assessment of legal responsibilities to zone for lower-income housing.

3. Important Purposes of Zoning Outside of “Health and Safety” Considerations will be Eclipsed.

The bedrock constitutional responsibility of growing municipalities in taking steps to comply with Mount Laurel II is the removal of zoning and subdivision restrictions and exactions that are not necessary to protect health and safety. While the court indicates that once compliance with Mount Laurel II is assured, a municipality may undertake other “restrictive provisions incompatible with lower income housing,” the court creates doubt about the continued validity and scope of other “general welfare” purposes of zoning such as energy, aesthetics and historical preservation.

In discussing municipal zoning responsibilities regarding mobile homes, for example, the court ambiguously states that it recognizes the propriety of aesthetic considerations in zoning, but that “the ‘subjective sensibilities’ of present residents are not a sufficient basis for the exclusion of the poor.” Taken together with its admonition for municipalities to eliminate all restrictive and cost generating exactions not necessary for health and safety, it would seem that the court has eliminated aesthetic zoning as well as other “general welfare” objectives such as energy conservation and historical preservation from zones set aside for lower-income housing. Because municipal compliance with Mount Laurel II will often involve overzoning for low- and moderate-income housing, it is apparent that the court has relegated “general welfare” zoning purposes to an inferior status. Moreover, since a municipality will not know whether it is in compliance with Mount Laurel II until it is

100. Id. at 16-17.
102. See id. at 259, 456 A.2d at 441.
103. Id. at 259-60, 456 A.2d at 442.
106. Id. at 259, 456 A.2d at 441.
107. Id. at 262 n.26, 456 A.2d at 453 n.26 (citing Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 519, 371 A.2d 1192, 1210-11 (1977)).
challenged in court, and is subject to future suit notwithstanding an existing judgment for compliance, prudent zoning policy would dictate the eschewal of "general welfare" zoning purposes such as aesthetics, energy, and historical preservation, since these might be considered to be exclusionary zoning devices by a court. 108


The supreme court's absolute insistence on municipal elimination of cost-generating building standards and exactions, unnecessary for health and safety, ignores the fundamental economic reality that some building improvements, while initially cheaper, are more costly over the life of the building than other improvements. This concept is particularly true with regard to a building's energy system, 109 but is also applicable to exterior improvements that may have to be replaced prematurely because of shoddiness in original construction. 110

5. Increased Density Will Cause Substantial Ripple Effects in Many Areas.

Increased density in housing development is a central concept in the court's mandate that municipalities undertake affirmative measures to assure the construction of their fair share of lower-income regional housing. Widespread municipal use of density bonuses, leading to too-intensive development could, however, have several unintended negative effects. First, too high densities can have an adverse impact on the psychological well-being of residents. 111 Second, over-intensive development can cause accelerated deterioration of physical facilities and supporting infrastructure. 112 Third, too dense development can result in an ugly, aesthetically unappealing appearance. Finally, as discussed in greater detail in Part III, modern and efficient alternative energy designs for homes require reasonable access to sunlight and minimization of

108. The court's statement that it did not intend the opinion to result in environmentally harmful consequences, and that its concern for protection of the environment is a strong one, is inextricably linked to health and safety concerns. 92 N.J. at 331 n.68, 456 A.2d at 479-80 n.68 (citing Mount Laurel I, 67 N.J. at 186-87, 336 A.2d at 173). Indeed, the court implied as much in stating that "[w]here a particular proposed lower income development will result in substantial environmental degradation, such a development should not be required or encouraged." Id.


111. Id.

112. Id.
northern exposures. Over-intensive development could stifle and discourage such energy planning.

III. IMPLICATIONS OF *Mount Laurel II* ON FUTURE SOLAR ENERGY DEVELOPMENT IN NEW JERSEY

A. National and Statewide Importance of Solar Energy Development

With lower short-term oil prices and better supply, policymakers may forget the American imperative to take intelligent steps toward a more balanced system of energy sources instead of continuing to rely on imported oil. Yet rational energy development is still the "moral equivalent of war," and there is wide consensus that energy independence is one of our nation's most important long-range priorities.

Of all the potential options in managing this necessary national transition from energy dependence to energy autonomy, solar energy and conservation are the most promising. According to experts at the Harvard Business School's Energy Project, domestic oil, natural gas, coal and nuclear energy cannot deliver vastly increased supplies in future years, although these traditional energy sources cannot be ignored. The Harvard report concludes that America has only two major alternatives for the rest of this century — "to import more oil or to accelerate the development of conservation and solar energy."

This Article will focus on residential solar space and hot water heating.


114. 1 PUB. PAPERS 656 (Apr. 18, 1977) (President Carter).


116. Id. at 216.

117. Id. Solar energy is not a single homogenous energy source, but a generic term that covers a variety of renewable energy technologies, some modern and some ancient. According to the U.S. Department of Energy, these are: (1) thermal, including heating and cooling of buildings and hot water and agricultural and industrial process heating; (2) fuels from biomass, including wood and waste; and (3) solar electricity, including photovoltaic (solar cell), wind, hydro-power and solar and ocean thermal applications. See *Energy Future*, supra note 113, at 184.

For general background information on the unique opportunities as well as obstacles for increased solar energy development in the United States, see L. COTT, *WIND ENERGY: LEGAL ISSUES AND INSTITUTIONAL BARRIERS* (Solar Energy Research Institute, 1979); G. HAYES, *SOLAR ACCESS LAW: PROTECTING ACCESS TO SUNLIGHT FOR SOLAR ENERGY SYSTEMS* (1979); S. JOHNSON, *A SURVEY OF STATE APPROACHES TO SOLAR ENERGY INCENTIVES* (Solar Energy Research Institute, 1979); J. LAITOS, *ECONOMIC AND REGULATORY ISSUES RAISED BY UTILITY INVOLVEMENT IN CENTRAL AND DECENTRALIZED SOLAR APPLICATIONS* (Solar Energy Research Institute, 1981); J. LAITOS & R. FEVERSTEIN, *REGULATED UTILITIES AND SOLAR ENERGY: A LEGAL-ECONOMIC ANALYSIS OF THE MAJOR ISSUES AFFECTING THE SOLAR COMMERCIALIZATION EFFORT* (Solar Energy Research Institute, 1980); J. OVERDORF, *LEGAL ISSUES ARISING FROM PASSIVE SOLAR ENERGY
Solar space heating is the most mature form of solar technology.\textsuperscript{118} It is largely an "on site" technology: the heating system is designed for a given structure or small group of structures. In contrast, other solar technologies are more centralized and capable of delivering energy to a larger number of buildings. Examples of the latter type include solar thermal electric, ocean thermal electric and hydropower dams.

Solar heating can be further subdivided into "passive" and "active" technologies. Passive solar energy relies on energy conscious architecture and design, rather than on an actual heat storage and distribution system. Thus, a passive solar home has no moving parts; its heating "system" consists of a massive south-facing wall with large double-paned windows combined with improved conservation technologies. The massive wall absorbs sunlight throughout the day and releases heat at night to provide a continuously warm air temperature in the home. Active solar heating, on the other hand, involves mechanical moving parts such as solar collectors that heat air or water which moves through pipes. The air or water is then fanned or pumped through a heat exchanger in a water-filled storage tank. This hot water can be used to heat the house directly or can heat the house by pumping it through a radiator.

Energy experts agree that solar heating could significantly decrease the United States' consumption of other sources of energy during this decade,\textsuperscript{119} and by the end of the twentieth century.\textsuperscript{120} For most of this decade, solar heating is expected to have its principal effect in the form of active systems, especially for heating water.\textsuperscript{121} More importantly, its major impact, if allowed to develop fully, would be on new structures. Passive solar technology is most efficient and is easily incorporated in new construction at little or no extra cost. Retrofits onto existing buildings, on the other hand, are more expensive.\textsuperscript{122} The same is true of active solar systems, although they do add to the price of a new home.

Solar and energy conserving new construction is especially important for New Jersey for several reasons. First, the ramifications of the increases in the price of oil and petroleum products are felt more severely in New Jersey than elsewhere because the state is exceptionally dependent on petroleum.\textsuperscript{123} New Jersey is also more dependent on foreign-produced oil than the nation

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\textsuperscript{118} See Energy Future, supra note 113, at 186.
\textsuperscript{119} Id.
\textsuperscript{120} See S. Kraemer, Solar Law 1 (Supp. 1983) [hereinafter cited as Solar Law].
\textsuperscript{121} See Energy Future, supra note 113, at 187.
\textsuperscript{122} New Jersey Dep't of Energy, The New Jersey Energy Master Plan 6 (Oct. 1978) [hereinafter cited as Energy Master Plan].
\textsuperscript{123} Id.
as a whole. The New Jersey Department of Energy, about twenty-eight percent of the petroleum used in New Jersey in 1980 was used by the residential and commercial sectors for heating and another five percent by the industrial sector for heating. The Department of Energy estimates that by the year 2000 solar energy could produce twenty-five million British thermal units (Btus) annually, and that figure could be substantially increased by, among other things, governmental policies to encourage the use of solar energy. Further, the Department pointed out that the solar energy industry is relatively inflation-proof and generates jobs while keeping consumers' energy dollars in the local economy.

According to pre-Mount Laurel II estimates by the New Jersey Department of Energy, at least seventy-five percent of the approximately 400,000 new single family homes that will be built in New Jersey between 1985 and 2000 could have solar hot water systems; fifty percent of those homes could integrate passive solar heating techniques; an additional ten percent could have active solar heating systems. Finally, state energy officials estimate that at least ten percent of the industrial and commercial establishments in existence in the year 2000 could use solar energy. If these projections are accurate, twenty-five million Btus of energy would be produced in New Jersey annually.

B. The New Jersey Energy Master Plan

In 1977, the New Jersey Legislature, finding that the state was threatened by the prospect of both short- and long-term energy shortages, statutorily created a cabinet-level Department of Energy to ensure the wise and efficient production, distribution, use and conservation of energy. In passing this statute, the legislature expressly delegated to the Department broad powers to conduct and implement emergency and long-range planning. These administrative responsibilities included the development of a ten-year Energy Master Plan to be periodically updated. The legislature required the newly-formed Department of Energy to promulgate this Master Plan within a year of the passage of the enabling act. To this end, the Department was given

124. Id. at 7.
126. Id.
127. Id. Currently, about 98% of a New Jerseyan's dollar spent on energy goes out of state, and some portion of that out of the country. This is a severe drain on our local economy. See id. at C-24.
128. Id. at B-19.
129. Id.
130. Id.
132. See id. § 52:27F-4.
133. Id. § 52:27F-14. See generally ENERGY MASTER PLAN, supra note 122.
power to collect a wide range of energy information necessary to carry out its responsibilities.\textsuperscript{134} The legislature also granted standing to the Department to intervene in any proceeding involving the control, production, transmission, use, or storage of any form of energy.\textsuperscript{135} Other state regulatory agencies were required to give the Department notice of any proceeding which might affect the goals or implementation of the Energy Master Plan; the legislative scheme placed the burden on New Jersey regulatory agencies to bring state government plans, projects, and regulations into conformance with this Plan.\textsuperscript{136}

In 1978, the Department, after several public hearings, issued the Energy Master Plan. The Plan detailed the past major energy transitions: from the use of wood, water wheels and windmills to coal, and from coal to petroleum and natural gas. According to the Plan, what might have been the third transition — to nuclear power — appears to have been largely interrupted by environmental and safety regulatory delays, greatly increased costs, and slowed consumption of energy.\textsuperscript{137} The third necessary transition, then, was thought to be from petroleum to a mix of fuels. The Plan specifically called for a diversification of the state’s energy resources to include conservation and renewable energy sources such as solar energy.\textsuperscript{138}

New Jersey’s Energy Master Plan outlined three major goals: to assure uninterrupted energy supply to all users; to promote economic growth while safeguarding environmental quality; and to encourage the lowest possible energy cost consistent with the conversation and efficient use of energy.\textsuperscript{139} The Department of Energy wrote several policy papers to detail how it intended to meet these goals. The conservation policies focused on six critical areas where conservation could substantially reduce energy use: residential, commercial and industrial conservation programs, electric and gas prices, and transportation patterns.\textsuperscript{140} The Department also called for energy impact information to be included in existing state permit applications, and ruled that it play a direct role in the approvals of large developments and projects, by requiring large developers to file a statement for departmental review indicating the type and extent of fuel usage proposed.\textsuperscript{141} The Plan advised that local planning boards retain the responsibility of determining the energy impact of purely local construction.\textsuperscript{142}

As for New Jersey’s indigenous sources of energy, the Department focused on solar energy and solid waste as the two most promising and significant

\textsuperscript{134} Energy Master Plan, supra note 122, at 1.
\textsuperscript{136} The Department also has co-equal jurisdiction to site energy facilities and authority to set energy prices and conduct research and development projects. Id.
\textsuperscript{137} See Energy Master Plan, supra note 122, at 3-6.
\textsuperscript{138} Id. at 11.
\textsuperscript{139} Id. at 13.
\textsuperscript{140} See id. at 20-30.
\textsuperscript{141} Id. at 23.
\textsuperscript{142} Id.
renewable resources. The Plan determined that both solar energy and solid waste energy were technologically and economically feasible and have great continuing potential as alternatives to existing sources of energy.\textsuperscript{143} The Department of Energy, therefore, recommended a state solar policy with a three-fold purpose: to provide incentives to a growing solar industry while allowing the market system to prove the cost-effectiveness of solar technology; to ensure the reliability of solar systems; and to incorporate consideration of solar energy systems in building and land use and development throughout New Jersey.\textsuperscript{144}

The Master Plan emphasized that the Department would undertake a planning assistance program to work with municipal and zoning boards in drafting solar elements in the municipal master plans required by the Municipal Land Use Law, to review and formulate changes in the Uniform Construction Code,\textsuperscript{145} to promote solar systems, to consider legislation guaranteeing sunlight access for solar users, and to encourage financial incentives to promote the use of solar systems.\textsuperscript{146} Among the regulations adopted pursuant to this Plan was a joint regulation by the New Jersey Departments of Energy and Environmental Protection requiring all applicants for permits to build in the state’s coastal area to demonstrate why passive and active solar designs were not applicable for the proposed project.\textsuperscript{147}

In proposed amendments to the Energy Master Plan released for public hearings in 1981, the Department proposed that municipalities and county governments play much stronger roles in conserving energy and promoting solar energy through the land use planning process and municipal master plans.\textsuperscript{148} In 1980, the legislature had already required that municipalities and county governments enact ordinances concerning site plans or subdivisions that would require that streets be oriented to permit buildings to maximize solar gain.\textsuperscript{149} The Department outlined what a municipal energy master plan should include beyond street and building orientation and also called for increasing densities near urban areas, employment centers, and transit lines to reduce trip lengths, wasteful infrastructure development and unnecessary energy transmission costs. Further suggested local planning considerations included the following: solar envelope zoning; rezoning multi-family and attached housing; cluster development with mixed uses (residential, commercial and industrial); and discouragement of strip development, infill, non-contiguous development and wide streets.\textsuperscript{150} The Master Plan amendments expressly call

\textsuperscript{143} Id. at 32-38.
\textsuperscript{144} Id. at 35-36.
\textsuperscript{146} ENERGY MASTER PLAN, supra note 122, at 36.
\textsuperscript{147} Id. at 42.
\textsuperscript{148} See 1981 AMENDMENTS, supra note 125, at C-24 to C-32.
\textsuperscript{150} See 1981 PROPOSED AMENDMENTS, supra note 125, at C-25 to C-31. Multi-
for municipalities to locate new residential, industrial and commercial development in older, developed areas. This makes use of the existing infrastructure and mass transit to reduce energy consumption in the transportation sector, which uses about forty-five percent of the petroleum consumed in the state.\footnote{151}

New Jersey’s municipalities face a legal dilemma. Given the express intent of the legislature that other agencies — including municipalities in their zoning — adhere to the state Energy Master Plan\footnote{152} and further legislation calling for zoning regulations and subdivision site plan ordinances to implement a solar and conservation construction strategy,\footnote{153} local governments should begin to reject builders’ plans which do not at least call for street and house orientation to maximize solar utilization. Yet, in carrying out this responsibility, and in exercising legislatively delegated powers to actively encourage solar energy use, after Mount Laurel II municipalities will subject themselves to suit for having added to the cost of housing, as though zoning for a solar future were an exclusionary device.

To avoid this regressive result, the SDGP must be revised to fully incorporate the Energy Master Plan. Municipalities attempting to fulfill their Mount Laurel II obligation would then clearly have to consider the long-term cost effectiveness of solar energy. The Energy Master Plan could be incorporated into the SDGP when it is revised as part of its triennial update. Finally, Mount Laurel judges and the state supreme court must become aware of the great need and potential for energy conservation and solar energy in new construction, the ease with which this goal could be accomplished or upset, and the need to retrofit our urban and developed suburban houses with solar systems, to the extent possible, to move toward an energy self-sufficient New Jersey. If the bench, bar and builders are educated about solar energy this goal will be realized in a way that includes the poor, who are currently excluded from the solar future because of the relatively high initial cost of solar systems.\footnote{154} As seen in the next part of this Article, these high costs have been the result of unnecessary obstacles to solar energy use.

C. Solar Energy Development: A Legacy of Barriers

Unlike traditional sources of energy, some of which have received exten-
sive federal government aid to stimulate growth, solar energy development in the United States has been stymied as a result of a variety of imposing barriers. These barriers fall into three major categories: economic, institutional and legal.

1. Economic Barriers

The critical economic barrier to the development of solar energy is the perception by possible buyers of active solar heating, especially in retrofit situations, that the dollars spent on installing a system will not be recouped in future fuel savings. This is a false perception: potential consumers fail to appreciate that their initially high solar investment will not only be recouped in future fuel savings, but the solar system will actually start earning money for its owners. That is, an active solar system’s life cycle cost, consisting of installation and fuel expenses over the system’s lifetime, is much less expensive than the life cycle costs of traditionally fueled heating systems.

The cost of borrowing money to pay for solar heating technology is another economic barrier. An individual will have to pay interest rates up to twenty percent higher to save a kilowatt through solar energy than to add a kilowatt of capacity through utilities. The installation of solar heating may also increase the value of a building with the consequence of increasing property taxes.

2. Institutional Barriers

Some problems are the result of misperceptions. Also, the lack of technical skills in installing and maintaining solar systems has created reliability problems in system performance. This, in turn, may dissuade otherwise interested customers from installing solar equipment. A substantial portion of the potential market for solar heating technology lacks basic understanding of the effectiveness and operation of solar equipment. Moreover, many potential consumers still perceive the use of solar technology as an elitist phenomenon due to its high price.

Other problems are more institutional in nature. For instance, since solar heating systems usually require back-up heating systems, fueled by traditional fuels, cooperation with utilities is essential. Many utilities have seen solar

156. Solar Law, supra note 120, at 3.
158. Id.
heating as competing with their own role as producers and converters of energy. Other utilities view solar energy as a threat to their self-defined growth programs. The utility rate structure may also deter solar use since it is usually based on average cost category use or on volume of usage, rewarding energy waste rather than conservation.

Solar research has traditionally been given a small research and development budget by both government and industry. Total federal funding for solar programs was less than $100,000 per year before 1972. While federal solar funding increased in the late 1970's under President Carter, the Reagan Administration has reduced the already small solar and wind portion of the federal energy budget by sixty percent. Yet for many years, traditional forms of energy have been substantially supported by direct and indirect subsidies such as the oil depletion allowance and massive government investment in nuclear energy research and development. If the federal government withdrew from these other traditional sectors of the energy business, or if solar energy were subsidized to the same degree as the traditionally subsidized sources of energy, solar energy could compete on a true cost basis in the energy marketplace.

3. Legal Obstacles

A variety of legal impediments have plagued the widespread use of solar heating technology in existing and new buildings. The most significant barriers are municipal zoning laws and procedures which place limits on the location and use of solar collectors, the materials of which they can be made, and the physical dimensions of the equipment. State and local building codes which create arbitrary engineering requirements regarding structural elements of solar equipment, inappropriate plumbing and heating performance standards, and capricious limitations on the integration of solar collectors into structures also impede the use of solar systems. Other barriers include private covenants and easements which seek to limit the use of solar collectors in new or existing structures, denial of injunctive relief in support of continued uninterrupted access to sunlight for landowners with in-place solar collectors on their buildings, arbitrary state and federal tax regulations which tax solar systems as property improvements, tax the purchase of solar systems, and allow no income tax deduction or credit for purchase, and the uncertain legal status regarding the ability to convey solar air space rights by neighboring property owners.

163. Id. at 195.
165. See id. at G-3.
166. Solar Law, supra note 120, at 3.
167. See id.
168. See id. at 237.
169. See id.
D. Incentives for Solar Energy Development in New Jersey: Before Mount Laurel II

1. General Financial and Use Incentives

During the 1970’s, federal legislation was passed to remove some of the previously discussed financial barriers which inhibit solar energy development in the United States. In three separate acts, Congress provided modest financial support for solar energy research and development, and modest tax breaks for individuals who installed solar heating equipment on their principal residences. These were the Solar Heating and Cooling Demonstration Act of 1974 \(^{170}\) (providing limited funds for solar research and development), the National Energy Conservation Policy Act of 1978 \(^{171}\) (designed to set standards and provide loans, audits and grants for energy conservation and buildings), and solar tax provisions of the Energy Tax Act of 1978 \(^{172}\) (allowing a qualified renewable energy source expenditure credit and qualified energy conservation expenditure credit for an individual’s principal residence).

The New Jersey Legislature followed the federal lead by removing some of the financial barriers to the use of solar heating equipment on individual residences in the state. State tax legislation exempted active and passive solar systems from inclusion in the assessed value of real property for real estate taxation purposes, \(^ {173}\) and another statute stipulated that qualified solar energy equipment is exempt from the state sales tax. \(^ {174}\) The state Solar Easement Act, \(^ {175}\) passed in 1978, allows for the making and recording of solar airspace easements over another’s land by describing vertical and horizontal angles from a solar collector or wall. \(^ {176}\)

While these state laws provided a promising start for incentives to support solar energy on a par with traditional energy sources, New Jersey has lagged behind other states’ efforts to financially encourage the growth and expansion of solar energy. \(^ {177}\) The State Uniform Construction Code Act, \(^ {178}\)

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176. At least one commentator has criticized the general format of New Jersey’s solar easement law, which is patterned after Colorado’s law, as being too restrictive in requiring precise vertical and horizontal angles. See SOLAR LAW, supra note 120, at 41.
177. Other states have taken innovative actions to encourage solar energy use and development. See SOLAR ENERGY RESEARCH INSTITUTE, U.S. DEPT. OF ENERGY, A SURVEY OF STATE APPROACHES TO SOLAR ENERGY INCENTIVES (1979).
statutory and case law that allows utility rate discrimination against users of solar energy systems needing traditional energy backup, and the lack of statutory life cycle cost approaches to public construction investment decisions still financially impede reasonable solar energy use in New Jersey.

2. Land Use Incentives

The Municipal Land Use Law of 1975 theoretically provided a regulatory framework adaptable to the joint state-local implementation of solar energy. The legislation did not expressly encourage the use of solar energy and other alternative energy technology through land use planning techniques, however, and substantial questions exist about the legality of local solar land use policies. With the passage of the 1979 energy amendments to the Municipal Land Use Law, the legislature expressly delegated power to local planning and zoning boards in New Jersey to implement land use policies to encourage solar energy and energy conservation. The legislature authorized local planning boards to “promote the conservation of energy through the use of planning practices designed to reduce energy consumption and to provide for maximum utilization of renewable energy sources.”

The legislature also authorized other local planning and zoning tools, such as energy conservation elements in master plans subdivision and site plan review ordinances which maximize solar gain to buildings by proper street orientation and requirements which serve to conserve non-renewable energy and use renewable energy sources, and zoning ordinances which allow the regulation of the bulk, height, orientation, and size of buildings and require that buildings and structures use renewable energy sources, within limits of practicability and feasibility in certain places. Moreover, the governing bodies of New Jersey municipalities were admonished by the 1979 amendments to

179. A rate structure that adversely impacts solar energy users may be difficult to challenge under current case law. Several cases arising under New Jersey public utility law have upheld the legality of rate structures that subsidize all-electric customers, despite antidiscrimination laws, see, e.g., N.J. Stat. Ann. §§ 48:3-1, -2, -4 (West 1969 & Supp. 1984-1985). For example, in Rossi v. Garton, 88 N.J. Super. 233, 211 A.2d 806 (App. Div. 1965), a New Jersey court held that an allowance of $150 to anyone installing electric home heating did not violate the state’s antidiscrimination statute. The court interpreted the statute to bar only “unjust” discriminations and concluded that only arbitrary discriminations are unjust. Id. at 236, 211 A.2d at 808.

180. See ENERGY MASTER PLAN, supra note 122, at G-9.


182. See ENERGY MASTER PLAN, supra note 122, at G-3.


184. Id. § 40:55D-2(n).

185. Id. § 40:55D-28(b)(9).

186. Id. § 40:55D-38(b)(2); 40:55D-41(e).

187. Id. § 40:55D-65(b).
periodically examine and prepare written reports with recommendations for improvement on the extent to which there had been significant changes in the assumptions, policies and objectives forming the basis for land use laws with particular regard to energy conservation.\textsuperscript{188}

The 1979 energy amendments constituted a strong legislative policy statement authorizing and encouraging bold and innovative local solar energy planning approaches which could reduce New Jersey's unwholesome dependence on petroleum fuels.\textsuperscript{189} Thus, prior to the supreme court's decision in \textit{Mount Laurel II}, New Jersey municipalities had a wide variety of land use planning options to promote alternative energy within their borders.\textsuperscript{190} These local solar land use options included traditional zoning tools to expand solar access and energy conservation such as low density zoning, new height, grade and setback rules, down zoning and overlays. A municipality could also write its own solar comprehensive plans that would make vigorous use of legislatively-mandated energy conservation elements by providing such components as energy conservation provisions, required orientation of streets to take maximum advantage of direct rays of the sun, prevention of structures and vegetation from blocking sunlight to approved solar collectors, and mapping out

\begin{table}
\centering
\begin{tabular}{|l|c|c|c|}
\hline
Fuel Type & 1960 & 1970 & 1974 \\
\hline
\textbf{New Jersey} & & & \\
Oil & 69.8\% & 71.8\% & 76.5\% \\
Natural Gas & 12.8\% & 18.7\% & 16.7\% \\
Coal & 17.1\% & 7.7\% & 4.6\% \\
Nuclear & .0\% & 2.8\% & 2.3\% \\
\hline
\textbf{Northeast} & & & \\
Oil & 54.8\% & 60.0\% & 61.1\% \\
Natural Gas & 14.0\% & 16.4\% & 15.4\% \\
Coal & 28.9\% & 19.9\% & 17.4\% \\
Nuclear & .0\% & 0.9\% & 1.2\% \\
\hline
\textbf{United States} & & & \\
Oil & 42.0\% & 41.8\% & 43.7\% \\
Natural Gas & 31.4\% & 34.3\% & 32.0\% \\
Coal & 22.6\% & 19.4\% & 17.9\% \\
Nuclear & .0\% & .3\% & 1.7\% \\
\hline
\end{tabular}
\caption{TOTAL ENERGY CONSUMPTION BY FUEL TYPE}
\end{table}

\textsuperscript{188} Id. § 40:55D-89(c).

\textsuperscript{189} According to the Energy Master Plan, supra note 122, New Jersey's total energy consumption by fuel type compares unfavorably to the Northeast region and the United States in general, as shown by the following table:


Local government officials could pick and choose from an assortment of solar energy land use tools which are appropriate for the unique demography and developmental characteristics of the community. Moreover, different planning approaches could be taken for varying neighborhoods within a single municipality. \textit{Id.}
areas of the municipality for special planned unit solar development polices. A municipality could pass subdivision regulations and site plan review ordinances which would provide for regulation of solar use and solar access.

Another option was to enforce solar envelopes and bulk plane zoning that would provide a simple "rectangular box envelope" that could protect solar access on nearby lots by outlining the three dimensional areas in which building construction could take place on a particular lot. Zoning incentives for solar use are especially useful in particular building projects or planned unit developments where density bonuses could be awarded and transferrable solar development rights given to developers for buildings laid out for solar access. Under this latter technique, land ownership is severed into two categories permitting transfer of the affirmative right to solar access of a specific piece of property to another site.

Yet another option was to enforce ordinances that declare vegetation or structures that shade qualified solar collectors as constituting public nuisances. A municipality might also have mandated local energy impact statements which require analysis of the energy demand of a suggested development project and the local and regional sources of energy available to meet the demand, requiring that solar energy and conservation be utilized whenever practical. Finally, the municipality could provide a method for vesting solar collector rights through local recording. After the Mount Laurel II decision, however, the future of these practical and innovative solar energy planning techniques has been considerably darkened.

E. New Jersey's Solar Energy Future: Possible Consequences of Mount Laurel II

Mount Laurel II has threatened the future of solar energy development in New Jersey. Yet, because there are a number of policy actors that may react in different ways to the court's judicial mandates — including the New Jersey Supreme Court itself — the actual turn of events in the coming years is uncertain.

First, due in large part to increased fiscal pressures, it is considerably doubtful that New Jersey municipalities will undertake comprehensive solar planning and zoning after Mount Laurel II. The supreme court's decision adds yet another local governmental responsibility to a host of existing demands for scarce local tax dollars. Moreover, unlike other theoretically or truly discretionary municipal government services such as garbage collection, recreational programs and solar planning efforts, the Mount Laurel II mandate is a matter not of choice but of necessity. Indeed, it is a matter of first order priority. Any effective local effort at solar planning will entail extra transaction costs to the municipality to pay for land use experts, attorneys and engineers to develop the plans and local officials to administer the plans once developed. The municipality will also bear opportunity costs as local dollars spent on solar development are dollars unavailable for other worthy purposes such as schools, libraries, road improvements and sewage treatment plants. Moreover,
land dedicated to solar energy construction is land unavailable for overzoned "least cost" housing. Thus, Mount Laurel II creates a strong local disincentive against meaningful solar planning. Solar energy development was not a top local priority before Mount Laurel II; after the decision it is likely to be a luxury or worse, a dangerous oddity which might be viewed as an exclusionary zoning device by potential litigants.

Second, while sensible solar planning, building design, and site orientation do not necessarily add to new development costs, it is likely that continued uninformed opinion on the subject of solar construction and the pressures created by Mount Laurel II's least cost approach will lead local officials to eschew required solar building standards in lower-income housing construction. Life-cycle approaches to construction costs reveal that use of solar energy results in significant net savings over traditional energy systems. Likewise, reasonably high housing densities can be achieved in many areas without sacrificing solar access, provided the housing is carefully sited and oriented. Without special local efforts to understand and incorporate these technical needs and the willingness to pay for expertise in addressing them and educating developers, it is probable that local officials will avoid even the appearance of adding to the cost of a building intended for low- and moderate-income housing.

Third, even if a municipality were interested in undertaking the additional costs and uncertainty of comprehensive solar planning after Mount Laurel II, restrictive judicial interpretation of local powers under the Municipal Land Use Law has reduced that municipality's ability to use flexible and innovative planning techniques to encourage solar heating use. For example, the New Jersey Superior Court undermined the prospect for utilizing solar transferable development rights recently in Centrex Homes of New Jersey, Inc. v. Mayor & Council of Township of East Windsor. There the trial court held that New Jersey municipalities lack authority to adopt transferable development right (TDR) programs under the Municipal Land Use Law. Thus, an act of the legislature is apparently necessary to expressly delegate such authority, as well as to spell out in detail precisely how TDRs are to be recorded, conveyed, taxed and treated generally. While it is arguable that this interpretation would be inappropriate in the case of solar transferable development rights promulgated pursuant to the specific energy and solar planning powers

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delegated by the legislature to municipalities, a municipality would face considerable legal uncertainty if it attempted to implement such a solar planning technique in the face of the *Centrex Homes* decision. Finally, it would certainly be rational for New Jersey's municipalities to totally abdicate responsibility for energy policy in general, and solar energy policy in particular, in the face of the mandate for centralized statewide regional planning enunciated by the *Mount Laurel II* court. There is, after all, no requirement that municipalities actively encourage solar energy on the local level, only that they consider the energy impact of their master plans. Indeed, the legislative history of the energy amendments to the Municipal Land Use Law provides that municipalities, "facilitat[e] the issuance of variances if they can be reasonably justified on energy efficiency grounds, and promot[e] the exploitation of solar energy by providing for the appropriate orientation of streets, within the limits of practicability and feasibility." The Assembly Energy and Natural Resources Committee viewed the amendments as flexible. The Committee noted that local planning boards should incorporate energy conservation considerations into their master plans (1) only upon the periodic revision of such plans, that is, at least every six years, rather than immediately, and (2) only if such energy conservation criteria are found to be practicable and feasible. If municipalities perceive *Mount Laurel II* as a policy signal that energy planning is now a responsibility of the state, we can expect to witness a continuation of the trend in centralized energy decision making with a bias toward traditional energy sources at the state level.

Furthermore, the *Mount Laurel II* decision contains no recognition of the Energy Master Plan and allows little room for the solar and conservation goals of the Plan to be implemented with respect to *Mount Laurel*-induced new housing construction. The goals of the Energy Master Plan may have been superseded by the supreme court's interpretation of the SDGP as controlling where two or more master plans conflict. These perceptions will significantly retard attempts by the legislative and executive branches and municipalities to pursue an energy efficient and solar future.

196. See *supra* notes 181-90 and accompanying text.
197. See *supra* notes 85-101 and accompanying text.
200. The supreme court's complete analysis of the central importance of the SDGP is contained *Mount Laurel II*, 92 N.J. at 223-48, 456 A.2d at 427-35. While the court did not expressly indicate in its opinion that the SDGP would control over another state master plan, such as the Energy Master Plan, this conclusion is justified by reasonable inferences drawn from the opinion. First, the court has indicated that the comprehensive plans for management and control of environmentally sensitive areas prepared by the Division of Coastal Resources, Bureau of Coastal Planning & Development Department of Environmental Protection, and the Pinelands Commission would govern the fair share obligation "to the extent that these plans permit or encourage
IV. Socio-Economic and Political Second-Order Consequences of Mount Laurel II

One of the express purposes of Mount Laurel II is to foster social and racial egalitarianism and to help alleviate the "self-destructive division between affluent suburban areas and depressed inner cities." Toward that end, the New Jersey Supreme Court sought to zone poor people into substantial areas of the state to reflect fundamental fairness and decency in the exercise of governmental police power, since the state cannot favor the rich over the poor in controlling the use of land.

Despite these goals, segregation along racial and economic grounds is likely to continue. Rather than being on an exclusively regional basis, however, racial and social segregation will resurface on an intra-municipal level within the various municipalities subject to the Mount Laurel obligation. Although the court expressly acknowledged that intra-municipal segregation will be acceptable along economic lines, and implicitly along racial lines, it ignored growth."

201. Mount Laurel II, 92 N.J. at 210 n.5, 456 A.2d at 416 n.5.
202. Id. at 209, 456 A.2d at 415.
203. Id.
204. Id. at 259-60, 456 A.2d at 442. The court stated:

[W]here fully developed municipalities are involved . . . [t]he Mount Laurel doctrine should ordinarily be able to be accommodated, for example, without placing lower income housing projects in the middle of long-settled middle or upper income sections of a town.

The proportion between [low- and moderate-income housing within a municipality will be] inevitably, a matter for expert testimony. It will depend as does the fair share [obligation] itself, on a complex mix of factors.


Black Americans are three times as likely to be poor as whites, and Hispanics more than twice as likely. In the introduction to the National Urban League's Annual Assessment, The State of Black America 1980, Vernon Jordan, the
the potential social costs of continued segregation. Without an assimilation of middle- and upper-income residents and lower-income residents in a particular municipality and housing interaction between the races, the prospect exists for discrimination in the provision of municipal services between different portions of a town, the creation of ethnic and class ghettos and exacerbation of a “rich versus poor” mentality. Intra-school tensions between groups of children who may perceive themselves as different from one another in light of their obviously different housing patterns may not improve.\(^\text{206}\)

*Mount Laurel II* also inequitably redistributes wealth from residents of growth areas, builders and upwardly-mobile homeowners to low-income households. Implementation of the court’s decision will force redistribution of wealth from a few categories of individuals to lower-income households. Mandatory “set asides” by builders amount to an internal subsidy\(^\text{207}\) by developers of the regional poor. According to one critic, if a developer erected ten units, eight would rent or sell at a premium in order to subsidize the two units which would be rented or sold to low- and moderate-income individuals. To preclude a windfall profit, a set aside unit would not be freely transferable. It could only be sold to a similarly situated individual at a limited increment over the purchase price, such as the increase in the Consumer Price Index for the period during which the unit was owned. The fairness of this procedure is questionable. Builders and purchasers of new homes should not be responsible for subsidizing low-income housing. Society should pay for these costs as a general, rather than a special, obligation.\(^\text{208}\) Small builders, in particular, will be unfairly penalized since mandatory set asides are not suitable for small projects. Moreover, disallowing an upwardly-mobile low- or moderate-income family from realizing the reasonable increase in market value of their home when it is sold violates a basic aspect of owning property — realizing a profit from appreciation of that property. Notwithstanding the initial subsidization, *Mount Laurel II* will inhibit a family from moving to a larger, better home by realizing equity appreciation unless that new home is also subsidized. Finally, property owners in municipalities containing growth areas

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league's president, wrote “Black income, which was over 60 percent of white income in 1969, fell to only 57 percent by the end of the decade. More blacks were poor at the end of the seventies than at the beginning. The black middle class, described as rapidly expanding by some so-called experts, actually declined from 12 percent to 9 percent of all black families during this period. . . . On balance . . . the seventies were not a time of progress within Black America.” According to the National Puerto Rican Forum, the family income of Puerto Ricans dropped from 71 percent of the national average in 1959 to 47 percent in 1979.

*Id.* at 255.

208. *Id.*
on the SDGP will be unfairly burdened by the *Mount Laurel* decision. They will have to absorb the substantial costs of subsidizing lower-income housing while homeowners in towns with little or no growth areas will not have to bear any burdens of the supreme court's decision to transfer wealth to lower-income individuals and are likely to enjoy a windfall profit of appreciated property values. Beyond the aforementioned inequities and substantial disincentives for actual construction, *Mount Laurel II* may threaten fair and efficient local control of housing prices\(^{209}\) and the availability of sufficient municipal operating funds to maintain the subsidized units in good repair.

*Mount Laurel II* will result in inefficient planning decisions while discouraging new jobs and industry. To force compliance with its doctrine and actually to induce the construction of lower-income housing, the court created some economically inefficient legal principles. The court's suggestion that municipalities help assure compliance through "overzoning"\(^{210}\) for lower-income housing until such housing is actually built is the most blatant inefficiency. While overzoning may well achieve compliance, other important social and economic goals will be sacrificed or undermined in the process. Overzoning, of course, implies displacement of other potential uses: schools, health facilities, industrial sites, parks, and other public and private uses. It is true that the bigger communities with relatively large tracts of undeveloped land, such as Mount Laurel Township, will bear less of an opportunity cost than geographically smaller communities, but both large and small communities will be denied the opportunity of making the most efficient use of their available land while they wait for ultimate compliance decisions from the courts.

*Mount Laurel II* will also act as a disincentive for municipalities to undertake aggressive campaigns to attract industry and business. This pernicious effect will, in turn, have a detrimental impact on employment opportunities for New Jersey residents. Municipalities' governing bodies will be unsure about what their obligations are under *Mount Laurel II* because an important criterion for a municipality's fair share is its present and future employment opportunities.\(^{211}\) While the court probably defined fair share in this way to preclude overzoning for industry, its effect is to reduce industrial and office/research zoning, even where it is desirable. It would not be surprising if communities in non-growth areas were reducing or deleting their non-residential zoning in order to preserve their status under the SDGP and to

\(^{209}\) Municipalities have consistently had problems with administering analogous rent control ordinances. This has led to inequitable rentals placed on housing units by local rent control boards and, therefore, discouragement of housing opportunities within a locale. See generally C. Baird, *Rent Control: The Housing Crisis U.S.A.* 35-39 (1971); D. Mandelker, *Housing Subsidies in the United States and England* 19-20 (1973).

\(^{210}\) See *Mount Laurel II*, 92 N.J. at 262 n.26, 456 A.2d at 453 n.26 (citing Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 519, 371 A.2d 1192, 1210-11 (1977)).

\(^{211}\) Id. at 256, 456 A.2d at 440.
keep out of the growth category, while municipalities in the growth areas were restricting commercial and industrial zoning in order to limit their fair share obligation. This result will not be beneficial because businesses will not move from the suburbs to the cities, such as Newark, Trenton, or Camden, but will continue to decide between the Piscataways and Parsippany Troy-Hills of the state — attractive suburban communities on major highways.²¹²

Inefficiency in land use planning is institutionalized by Mount Laurel II. Despite the court’s indication that a compliance order will have res judicata effect for six years,²¹³ the court created a wide and uncertain exception to this rule in a seemingly innocuous footnote. Indeed, the court warned that “a substantial transformation of the municipality may trigger a valid Mount Laurel claim before the six years have expired.”²¹⁴ This warning leaves the bench and bar wondering what “substantial transformation” means. This issue will only be settled by further litigation which, itself, creates substantial additional transactional and opportunity costs for municipal governments.

In addition to the new Mount Laurel II responsibility imposed on growth area municipalities by the court, local governments must shoulder a considerable number of existing legal obligations imposed by the legislature and certain state administrative agencies. This is no more apparent than in the area of education, where local school districts are forced to provide a number of programs centrally mandated by the State Department of Education without adequate funding to carry out their responsibilities.²¹⁵ The court ignores the marginal effect of continued centrally prescribed municipal obligations without provision for adequate state funding to meet them.

There is a notable lack of analysis by the court of the potential interstate effects of its decision. The court overlooked the palpable incentive that Mount Laurel II will give to poor families and individuals residing in other states to move into New Jersey’s new lower-income housing,²¹⁶ and the concomitant, though regrettable, prospect of middle- and higher-income families fleeing the state. New Jersey is already recognized as an entry point for a substantial number of poor immigrants.²¹⁷

²¹². See Bernstein, supra note 110, at 5.
²¹⁴. Id. at 292 n.44, 456 A.2d 459 n.44.
²¹⁵. For example, New Jersey boards are continually required to carry out programs for which no funds are provided. See NJSBA 1983 LEGISLATIVE GOALS at 8.
²¹⁶. Mount Laurel II, 92 N.J. at 222 n.8, 456 A.2d 422 n.8. But see STATE DEVELOPMENT GUIDE PLAN, supra note 92, at 2-4, 6 (Department of Community Affairs’ planners viewed the impact of the 1975 Mount Laurel I decision as minimal and did not incorporate lower-income housing projections into its future population projections).
²¹⁷. New Jersey, while being ninth in overall population nationwide, was sixth in the population of aliens reporting under the Alien Address Program in 1979, having 269,000 or 5.3% of resident aliens nationwide. STATISTICAL ABSTRACT OF THE UNITED STATES 1980 99 (Dec. 1980). See generally Ruebens, Aliens, Jobs and Immigration Policy, 51 PUB. INTER. 113 (1978) (discussing the detrimental impact on our labor market of legal resident aliens as well as illegal aliens). The national shortage
The supreme court notes that in non-growth areas such as limited growth, conservation, and agricultural areas, no municipality will have to provide for more than the present need generated within the municipality, for to require more would be to induce growth in that municipality in conflict with the SDGP.\textsuperscript{218} The proviso to this rule, however, is that if a municipality containing non-growth areas is found to have encouraged or allowed development, the SDGP "non-growth characterization" may be inappropriate.\textsuperscript{219} The court apparently expects the numerous patchwork municipalities containing growth and agricultural or conservation areas to provide for an appropriate fair share of the region's low-income housing need.\textsuperscript{220}

Application of the standard to some patchwork municipalities containing growth areas that are already fully developed,\textsuperscript{221} but which consist substantially of upper-income housing, will create a windfall fiscal benefit for the local governments relying on that tax base. In these municipalities, the proximity of relatively expensive and exclusive housing to environmental amenities such as open space, farmland, and preserved natural areas will have a tendency to make the existing housing stock very valuable to prospective buyers in the middle and upper income levels. Accordingly, property values, assessed valuations, and tax revenues will tend to rise because of the fortuitous operation of \textit{Mount Laurel II}. Examples of such communities in Burlington County would include Evesham Township and Medford Township.

Conversely, application of this standard to other patchwork municipalities containing growth areas that are substantially undeveloped will unfairly penalize these municipalities for undertaking reasonable and necessary encouragement of tax ratables such as industrial facilities and single family housing. While the supreme court has partially anticipated this problem by positing some vague hypothetical examples,\textsuperscript{222} a municipality in this situation would face con-

\textsuperscript{218} Mount Laurel II, 92 N.J. at 244, 456 A.2d at 433-34.
\textsuperscript{219} Id. at 242, 456 A.2d at 432-33.
\textsuperscript{220} Id. at 243, 456 A.2d at 433.
\textsuperscript{221} Id. at 240 n.15, 456 A.2d at 431 n.15.
\textsuperscript{222} The court gave the following hypothetical:

If a municipality that is substantially rural changes only to the extent of an added industrial use and fairly large residential subdivision, that might or might not constitute a substantial change, depending on all of the circumstances; if in addition there was further development of its infrastructure.
siderable uncertainty in formulating future zoning and tax plans. This uncertainty is an inequitable fiscal burden since it involves extra municipal transactional costs such as the need to hire more professional assistance in attempting to interpret the law, as well as incurring opportunity costs by being inhibited from vigorously seeking new industry and development needed to support the existing population. The burden falls randomly on some municipalities and not on others.

The court's acknowledged buckpassing of difficult problems stemming from its decision in Mount Laurel II undermines its own judicial legitimacy. Critics of judicial activism accuse some courts of assuming an elitist posture that violates sovereignty and reaches deep into the lives of people against their will. These critics contend that judicial activism in a democratic society tends to atrophy the sense of responsibility of both citizens and elected representatives in making fundamental political decisions. In addition, since the judicial branch has a limited supply of political "capital" to draw upon, each time it tampers with policy supported by political majorities through interventionism, the judiciary jeopardizes its own institutional power base.

While the New Jersey Supreme Court enjoyed a relatively large balance of political capital when it decided Mount Laurel I, it has substantially depleted that capital over the ensuing years. In 1975, the Mount Laurel doctrine was new and promising. In spite of public opinion favoring zoning for fiscal goals, popular opposition to racial segregation and public support for equal housing opportunities by New Jersey citizens gave the court considerable leeway in judicial policymaking in this area. The progeny of Mount Laurel I served to confuse and obfuscate municipal fair share obligations under the state constitution, however, and realistically limited the political acceptability of the court's continued experimentation in exclusionary zoning cases.

Mount Laurel II is dangerous because it seeks to borrow political capital and several new substantial places of work and residential subdivisions, that municipality's SDGP classification should probably be changed.

Id. at 241-42, 456 A.2d at 432 (emphasis in original).


224. Id.


226. STATE SUPREME COURTS, supra note 3, at 67.

by passing off some of the most troublesome problems presented by the ruling onto other state officials and, ultimately, to the electorate. To illustrate, the court presents a fiscal fait accompli to the legislature, not unlike Robinson v. Cahill, which has "all but rewritten the state tax code" for the second time in less than a decade. The court notes that inequitable tax and other burdens caused by the location of lower-income housing are the result of the state having made its decision on where development should occur. If location in accordance with that state plan has adverse economic consequences, the court found that it would be appropriate for the legislature rather than the court to correct them.

This express avoidance of responsibility is especially dangerous because the court's premise that the legislative and executive branches mandated development according to the SDGP is questionable, and the court has confronted the legislature in a time of long-term state fiscal austerity. The New Jersey Supreme Court has also abdicated responsibility for implementing several of the details of its decision. The court noted that "the application of the Mount Laurel doctrine to fully developed municipalities will undoubtedly pose difficult problems," but that a satisfactory resolution of the occasionally conflicting interests at times requires creativity and cooperation.

The Mount Laurel ruling creates false hope for certainty and simplicity and will result in continued protracted litigation. The supreme court believes that its decision in Mount Laurel II will clarify the Mount Laurel doctrine and make it easier for public officials, including judges, to apply it, while simplifying litigation in this area. The court's view is unrealistic. The new Mount Laurel doctrine will continue to be enormously complex to administer and to interpret. Municipal officials attempting to understand the doctrine and trying in good faith to apply it to their towns, as well as judges who will be forced to grapple with its numerous principles, subtleties and exceptions, will face great uncertainty in dealing with future exclusionary zoning cases.

Rather than employing one simple test for the determination of a municipality's obligation to provide low- and moderate-income housing, Mount Laurel II actually involves nine anticipatory standards. In turn, many of these standards are pregnant with alternative sub-standards and unresolved sub-issues.

229. STATE SUPREME COURTS, supra note 3, at 8.
231. Despite a short-term budget surplus in 1984, the State has been faced with periodic reports of revenue shrinkage and concomitant proposals for spending cuts. See, e.g., Task Force Recommends $500,000,000 Cut in School Aid, VII School Board Notes (New Jersey School Boards Association), Oct. 13, 1983, at 1, col. 2.
232. Mount Laurel II, 92 N.J. at 240 n.15, 456 A.2d at 431 n.15.
233. Id.
234. See id. at 199, 456 A.2d at 410.
235. Id. at 214, 456 A.2d at 418.
A. Indigenous Poor Obligation Standard

All municipalities in the state, no matter what their planning designation on the SDGP, “must provide a realistic opportunity for decent housing for its indigenous poor except where they represent a disproportionately large segment of the population as compared with the rest of the region.” Questions exist about what will constitute “decent housing” in the court’s view, what would constitute “a disproportionately large segment of the population” sufficient to absolve the obligation, and how these factors should be balanced.

B. Total Growth District/Full Fair Share Standard

In those municipalities of the state entirely made up of growth area designations, which are not “fully developed” communities, and where no special proofs are proffered to show cause for deviation from the SDGP, Mount Laurel II requires an unequivocal obligation to provide what can be termed a “full fair share” of the regional need for low- and moderate-income housing. In other words, these municipalities’ fair share calculations would be based on consideration of the total land area and total existing population of the municipality.

C. Partial Growth District Standard

By virtue of the SDGP’s creation of several patchwork municipalities where growth areas are combined with other non-growth classifications, such as limited growth, conservation and agriculture, a “partial fair share” obligation will exist in some locales. In computing the Mount Laurel II quan-

236. Id. at 214-15, 456 A.2d at 418.
237. Id. at 240 n.15, 456 A.2d at 431 n.15.
238. As noted by the court:

The existence of a municipal obligation to provide a realistic opportunity for a fair share of the region’s present and prospective low and moderate income housing need will no longer be determined by whether or not a municipality is “developing.” The obligation extends, instead, to every municipality, any portion of which is designated by the State, through the SDGP, as a “growth area.” This obligation, imposed as a remedial measure, does not extend to those areas where the SDGP discourages growth — namely, open spaces, rural areas, prime farmland, conservation areas, limited growth areas, parts of the Pinelands and certain Coastal Zone areas. . . . Moreover, the fact that a municipality is fully developed does not eliminate this [the Mount Laurel II] obligation although, obviously, it may affect the extent of the obligation and the timing of its satisfaction. The remedial obligation of municipalities that consist of both “growth areas” and other areas may be reduced, based on many factors, as compared to a municipality completely within a “growth area.”

Id. at 215, 456 A.2d at 418. See generally id. at 354-74, 456 A.2d at 491-50 (the Appendix
titative housing obligation in these communities, only land area and population that is within a growth area on the SDGP will likely be considered. In these patchwork municipalities, the deviation from what would otherwise be a "full fair share" obligation, that is, assuming the municipality was made up entirely of growth areas on the SDGP, will vary depending upon the ratio of growth area land to non-growth area land.

D. Total Growth District/Fully Developed Community Standard

Municipalities subject to this standard will have their entire land area designated as a growth area on the SDGP, but will be fully developed. The court makes an exception from both the total growth district standard and the partial growth district standard for fully developed municipalities.\textsuperscript{239} The language establishing this exception is ambiguous since it is not clear what is quantitatively involved in exercising "great care . . . to assure that the benefit of \textit{Mount Laurel II} is not offset by damage to legitimate zoning and planning objectives"\textsuperscript{240} or resolving "occasionally conflicting interests [with] creativity and cooperation."\textsuperscript{241} This test is further confused by the court's rejection of the former \textit{Mount Laurel I} developing/non-developing distinction\textsuperscript{242} for determining a municipality's regional fair share lower-income housing obligation on the one hand, followed by substantially the same standard when considering the quantitative numbers and locations of lower-income housing within a particular municipality.

E. Partial Growth District/Fully Developed Community Standard

Municipalities subject to this standard will be fully developed patchwork municipalities which are made up of varying combinations of growth areas and non-growth areas.\textsuperscript{243}

F. Rebutted SDGP Standard

While subject to a heavy burden of proof, any party to a future \textit{Mount Laurel} lawsuit can theoretically challenge the SDGP's classification for a defendant municipality by providing expert testimony on why the SDGP designation was inappropriate or has become inappropriate.\textsuperscript{244} Considerable further litigation will no doubt be required to determine what kind of expert testimony would be relevant or persuasive.

\begin{footnotesize}
\begin{itemize}
\item contains the SDGP "concept maps," which show numerous municipalities that are in the nature of "patchwork" areas containing both growth and non-growth areas.
\item 239. \textit{Mount Laurel II}, 92 N.J. at 240, 240 n.15, 456 A.2d at 431, 431 n.15.
\item 240. \textit{Id.} at 240 n.15, 456 A.2d at 431 n.15.
\item 241. \textit{Id.}
\item 242. \textit{Id.} at 223-25, 456 A.2d at 422-23.
\item 243. See supra note 238.
\item 244. \textit{Mount Laurel II}, 92 N.J. at 239-40, 456 A.2d at 431.
\end{itemize}
\end{footnotesize}
G. Pinelands/Coastal Zone Standards

The supreme court noted that trial judges in Mount Laurel cases involving municipalities regulated by either the Pinelands Commission or the Division of Coastal Resources of the state Department of Environmental Protection must consider in detail the classification system involved to determine whether imposition of the Mount Laurel doctrine would be consistent with the regional planning goals of the agencies, and whether the constitutional obligation will under any circumstances override those goals. The pertinent Mount Laurel obligation of a municipality located in the Pinelands or the coastal zone will be subject to a case-by-case determination. The factors to be considered by the trial courts, however, are not specified. The court also appeared to mandate a more complex analysis in these environmentally sensitive cases by virtue of the more detailed and ambiguous regional types of land specified in the coastal zone (high growth, moderate growth, low growth, barrier island) and the Pinelands (protection and preservation areas). By virtue of the supreme court’s follow-up decision in In re Egg Harbor Associates, environmentally sensitive areas of the state are also subject to an agency’s imposition of an independently determined Mount Laurel obligation, subject to judicial override.

H. Judicial Wildcard Standard

The court left open the possibility that its elaborate Mount Laurel II standards will be subject to outright change or further revision or refinement. In this regard, the court specifically noted that flexibility is needed since the court’s work is partially legislative in character. The possible meaning of this caveat is limited only by the imagination of counsel. Almost any socio-economic argument would seem to be pertinent.

I. SDGP Wildcard Standard

In a footnote to its opinion, the court set forth a fallback position in the event that the State takes action rendering the use of the SDGP inappropriate for Mount Laurel purposes. This could entail a failure by the Department of Community Affairs to update periodically the SDGP, legislative

245. Id. at 245-46, 456 A.2d at 434-35.
248. Id.
249. Id. at 248 n.21, 456 A.2d at 435-36 n.21.
action overruling the court’s use of the SDGP for *Mount Laurel* purposes or continued unenforceable regional development standards. In the event that the SDGP becomes inappropriate, a modified developing municipality *Mount Laurel I* test will be imposed. This test is confusing at best.\(^{250}\)

V. SOME LESSONS: MINIMIZING SECOND-ORDER CONSEQUENCES OF INNOVATIVE JUDICIAL POLICYMAKING

Innovative policymaking by state and federal courts is no longer new or shocking. Despite continued debate by those who would limit the power of courts to hear certain types of controversial cases,\(^{251}\) the two decade-long trend of active judicial involvement in a wide assortment of public law\(^ {252}\) policy matters, including education, mental health, prison systems, land use regulation, environmental protection and energy promotion, will probably continue unabated. As society becomes more complex, continued public law/institutional litigation will be the norm rather than the exception.

Indeed, for several decades, state supreme courts have had significant effects within the states and on the nation as a whole\(^ {253}\) in the areas of elaborative policymaking (extension of precedent enunciated by the United States Supreme Court),\(^ {254}\) restrictive policymaking (limitations or evasion of policy developed by the United States Supreme Court),\(^ {255}\) institutional policymaking (judicial activity directed toward preserving the autonomy and

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250. *Id.* The court held that:

[D]eveloped municipalities shall be subject to the *Mount Laurel* obligation — that includes the central cities and the built-up suburbs. The most significant question in such cases will ordinarily be whether there is any land available for development, and, if not, what kind of remedy is appropriate to assure that as land becomes available, a realistic opportunity exists for the construction of lower-income housing, assuming it is otherwise suitable for that purpose.

In addition to urban areas and the built-up suburbs, “developing” municipalities will be subject to *Mount Laurel*. To the extent that prior decisions imply that the so-called “six criteria” must be satisfied to characterize a municipality as “developing”, ... we disavow that implication. Any combination of factors demonstrating that the municipality is in the process of significant commercial, industrial or residential growth or is encouraging such growth, or is in the path of inevitable future commercial, industrial or residential growth will suffice.

*Id.* (emphasis in original).


252. This paradigm was largely developed by Professor Abram Chayes in his article *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).


254. *Id.* at xviii.

255. *Id.*
integrity of the judicial process), and complementary policymaking (rulings that aid state legislative goals). In light of the noticeable trend of retrenchment of federal court involvement in matters of arguable concern to the states, occasioned by the Supreme Court’s “new federalism,” and the active encouragement by some members of the United States Supreme Court of state supreme courts’ expansion of their policymaking roles, opportunities for state supreme court policymaking in general, and innovative policymaking in particular, will increase in the remaining years of this century.

The central issue, then, is not a question of judicial legitimacy, that is, whether state supreme court innovative policymaking in public law/institutional litigation is in keeping with the judiciary’s proper role in the American political system, although poor innovative policymaking can contribute to public dissatisfaction with judicial power. Rather, as exemplified by the New Jersey Supreme Court’s decision in Mount Laurel II, the critical issue is one of judicial capacity: legitimacy aside, can the judiciary capably handle the new responsibilities it has assumed?

When embarking on innovative policy decisions in the future, state supreme courts should be more concerned about crafting effective and targeted rulings, rather than justifying their power to make the rulings. In particular, since innovative policy decisions have far-ranging second-order consequences that are not readily detected or understood, state supreme courts should concentrate on minimizing these unintended consequences. In short, state supreme courts must strive to become first rate anticipatory and prophylactic governmental institutions. They cannot be contented with merely emulating equalizing legislative oversight committees, for instance, or executive agency planning staffs. Because of the modern scope and importance of their decisions, state supreme courts must become preeminent social planners.

Supreme courts should canvass diverse policy perspectives prior to making remedial innovative decisions. This could be achieved by liberalizing standing requirements at the remedy phase of trial, active court solicitation of amicus briefs from representative interest groups, and appointment of absentee advocates for interests not before the court. Before handing down an innovative policy decision, state supreme courts should formulate, with the assistance of court appointed experts and staff experts, judicial impact statements to avoid unintentional consequences of the decision in chief. The burden should be on the winning party in institutional litigation to put for-

256. Id.
257. Id. at xvii.
258. See supra notes 3-4 and accompanying text.
259. STATE SUPREME COURTS, supra note 3, at xii.
ward every plausible alternative remedy that might be consistent with the state supreme court's decision on the legal issues together with assessments of projected consequences and costs. The losing party's adversary presentation could then assume a more useful form, and the court could more easily weigh alternatives and probable costs against probable benefits.\textsuperscript{262}

The issue of remedy should be considered a mixed factual and legal question, not just a purely legal question. This has presented problems in the past where the evidence closes before the court's decision on the rights of the parties, and usually does not reopen thereafter. Since the decision on the remedy entails a forecast of behavior, it presents factual as well as legal questions, though, to be sure, these are questions about the future rather than about the past. That the remedy presents questions about the future is all the more reason to regard the facts as problematic rather than settled.\textsuperscript{263} Supreme courts should engage in a two-step decisional process: one, a substantive law decision preceded with full briefing and oral argument by the parties; the second, a remedial decision preceded by written and oral input by the parties as well as by court appointed experts, staff, and those groups or institutions that will likely be affected by the decision.

State supreme courts should also retain special confidential experts to assist them in gauging second-order consequences on an ongoing basis. These experts would be trained in policy science, future studies, operations research and systems analysis. Their reports would be confidential, subject to discretionary release by the court to certain individuals and institutions for feedback and input.

State supreme courts should set a separate oversight calendar of their major innovative policy decisions, with a committee of two or three justices assigned to review, on a periodic basis, the remedial progress in particular cases as well as the evolving second-order consequences in a particular area. On recommendation by the supreme court's oversight committee, the supreme court en banc could, on its own motion, bring a previously decided case back for review and adjustment, with a particular eye directed at clarifying and eliminating unintended second-order consequences of the decision. Supreme courts might even find it advisable to issue periodic policy progress reports which could be circulated among interested individuals and be subjected to regular feedback.

State inter-branch policy review committees consisting of state supreme court justices, legislators, executive cabinet representatives, gubernatorial aides, and supporting staff could be established within states. These committees would meet on an annual or semi-annual basis and review second-order consequences of judicial decisions, as well as second-order consequences of legislation and administrative regulations and policy. From the perspective of state supreme

\textsuperscript{262} \textit{Courts and Social Policy, supra} note 6, at 288.
\textsuperscript{263} \textit{Id.} at 288-89.
courts, this type of cross-fertilization would assist the courts in understanding the full range of impact of their decisions.

VI. Conclusion

The New Jersey Supreme Court’s *Mount Laurel II* decision is a classic example of innovative policymaking by a state supreme court. The decision, while admirable in its goals and social purposes, presents the prospect for troublesome second-order consequences in a number of policy areas, including discouraging local land use measures designed to encourage solar energy planning and construction, especially in new homes.

Since innovative judicial policymaking by state supreme courts is likely to continue in scope and frequency in the future, state supreme courts should focus greater attention on anticipating and preventing unintended second-order consequences of their decisions. A number of options are available; however, all options suggest reformulation of the remedial stage of institutional litigation to allow a wider variety of input by non-parties, expert assistance in gauging potential impacts, and periodic follow-up by state supreme courts of their major policy decisions.