Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases

Lawrence Berger
University of Nebraska College of Law, lawrence.berger@unl.edu
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I. INTRODUCTION

One of this country's most intractable problems has been the physical separation of the places of residence of the various economic classes in our society. A convincing case can be made that our present system of class separation poses some serious dangers for the future of the country. I rest this on well known facts concerning the plight of the underclass in the United States. Among that group, there has been a particularly severe deterioration in the state of the family, marked by an increase in the absolute number of and proportion of illegitimate births, and like increases in the number of families headed by single females. The causes of these phenomena are undoubtedly numerous, but the precipitous flight of the middle classes from central...
city areas no doubt is a contributing factor. The absence of middle class role models makes it very difficult for persons growing up in areas that are dominated by members of the economic underclass to assimilate the traditional values of family, education, and the work ethic. The morés of some inhabitants of the inner city are characterized by the absence of traditional job-holding, the presence of promiscuous sexual liaisons with a concomitant increase in illegitimacy, and the use of and trade in illicit drugs. Among many of the young, these morés tend to predominate over the more conventional ones and thus to be perpetuated. Whether the insertion of the persons with these destructive characteristics into every urban and suburban residential neighborhood in the United States would over time "solve" the problem and break the chain of cultural values among their offspring is, of course, questionable. However, it is certainly arguable that this is the only possible way it could be done in any reasonable period of time.¹

The New Jersey Supreme Court recently tried to attack this great social problem in the famous Mount Laurel cases.² In those cases, the court ordered that the municipalities of the state undertake a series of affirmative activities designed to remedy the problem. A court presented with great social problems can sometimes rise to the occasion and within the acknowledged limits of its judicial power come up with solutions that will command, over time, the almost universal respect of the polity. Such was the U.S. Supreme Court’s decision in Brown v. Board of Education of Topeka.³ Sometimes, however, courts use poor judgment and faulty analysis in an attempt to solve difficult social problems and thereby make a bad situation worse. It can be convincingly argued that that was what happened in the Mount Laurel cases.

No one can question the motives of the members of the New Jersey Supreme Court in their attempt to end economic segregation in the state. If there are difficulties with the decisions, they lie not in the judges’ motives or good will, nor even in determining whether they had the power to do what they did, for later events have made it clear that their decisions have had the effect of something quite different.¹

¹. For a strong argument on this point see A. Downes, Opening Up the Suburbs 50 (1973). There are, of course, a few who do not regard class separation as a problem at all. It has been argued, for example, that the market’s allocation of where people live may be the most “efficient” one and that it probably is the allocation desired by most of our citizenry. See Ellickson, The Irony of “Inclusionary” Zoning, 54 S. Cal. L. Rev. 1167, 1198-1202 (1981). Ellickson argues that “upper-income groups disvalue the proximity of lower-income groups more than lower-income groups value the proximity of upper-income groups.” Id. at 1199.


that they had the raw power. But in a democratic society it is not always good judgment for governmental institutions to use their power to its fullest extent. This is especially true of the courts, which, commanding neither armies nor purse, completely depend, in the final analysis, upon the support of the people for the reach of their writ. There is no doubt that this support can be eroded or even lost when the public perceives that the courts are trying to make policy in areas where they feel their elected representatives should be dominant.4 The court has received much criticism, both from the inside5 and the outside6 for the wide ranging, "legislative" nature of its Mount Laurel opinions. Just as importantly, there is a serious question as to whether the remedies, mandated by those cases, which the New Jersey court held are required by the state constitution to be imposed on the landowners, housing consumers and developers of the state, may not actually be unconstitutional under the latest takings cases decided under the U.S. Constitution by the U.S. Supreme Court.7 Further, there is a serious question of their constitutionality under traditional takings principles well established by state courts under the law of subdivision exactions.

This Article is an attempt to carefully explore the Mount Laurel cases, as representing an archetype of the judicial overreaching that occurs when an activist court decides that a serious social problem must be addressed by government, but a recalcitrant legislature, reflecting overwhelming public sentiment, refuses to do so. In the course of this exploration, the Article will review in some detail the holdings of these cases and what has occurred in the real world as a result of them. Finally, the Article will examine whether these decisions really can stand up to rigorous constitutional analysis under the takings clause.

II. MOUNT LAUREL I

In Mount Laurel I, the first decision in the series, plaintiffs sued the defendant township of Mount Laurel to void its zoning ordinance as violative of their rights to substantive due process and equal protection guaranteed by the New Jersey and United States constitutions. The plaintiffs fell into four categories: (1) poor residents of Mount

Mount Laurel was a developing town of twenty-two square miles with a population of over 11,000 persons. At the time of the case, about sixty-five percent of the land was vacant or in agricultural use. According to the terms of the ordinance under attack, twenty-nine percent of the land was zoned exclusively for industrial use. Most of the remainder was zoned for single family detached dwellings with minimum lot sizes of 9300 square feet and up, and minimum house sizes of 900 to 1100 square feet and up. Recently, the town had permitted a limited number of cluster zoned single family dwellings and had provided for and approved several planned unit developments having some variety of housing and some retail. The trial court held that low and moderate income families were unlawfully excluded from the town and declared its zoning ordinance completely invalid as a denial of equal protection.8 The court further ordered that the town make studies of the housing needs of its present and former low and moderate income persons, and prepare a plan to meet those needs. The town appealed and the plaintiffs cross-appealed, arguing that the relief should include a provision for persons who had no connection with the town.

The Supreme Court of New Jersey, in an opinion by Justice Hall, agreed that the town had not provided for the housing needs of lower income persons and indeed had set up a system that effectively excluded them from new construction in the town. It was argued to the court that the real purpose for excluding lower income persons was to keep out minorities, a goal which, of course, would be vulnerable to constitutional attack. However, the court accepted town counsel's assertion that the purpose animating those passing the zoning ordinance was not to exclude minorities but to keep Mount Laurel a low property tax town. This could be done by: (1) keeping out low income families, who tend to have more children and thus to require higher educational appropriations; (2) attracting middle and upper income families, who have fewer children and pay higher taxes; and (3) bringing in light industries, which also pay high taxes and require little in the way of municipal services. The court then noted that Mount Laurel's regulatory patterns were characteristic of virtually all developing communities in the state. Since such municipalities act in the perceived interest of those seeking to keep property taxes low, the effect is that the housing needs of the lower and moderate income people in the entire region are left unmet.

Reasoning from the above findings, the court reached these conclusions: Since housing was a basic necessity, proper provision for it in New Jersey zoning ordinances was essential to meet the requirement, imposed by both the state constitution and the zoning enabling act, that zoning ordinances must promote the general welfare. Zoning ordinances have an effect outside the boundaries of the municipality enacting them, and therefore to promote the general welfare, the welfare of persons living outside the town as well as the citizens living within it must be recognized and served. The state legislature has in numerous laws found a great need for decent low and moderate income housing. Mount Laurel's ordinance, preferring as it did higher income classes over the low and moderate income groups, was not enacted for the general welfare and therefore was in violation of the basic constitutional requirements of substantive due process and equal protection of the laws in the New Jersey Constitution.

It is interesting that the court used state rather than federal constitutional law as the basis for its decision; no doubt it wanted to avoid the possibility of a review and reversal of its decision by the U.S. Supreme Court. It is also noteworthy that the New Jersey Constitution does not have due process and equal protection clauses as such. Instead, the New Jersey courts deduced those protections from the general language of article 1, paragraph 1 of that document.\(^9\)

After stating its constitutional arguments, the court articulated in some detail the rules, with which a municipality must comply, for its zoning ordinance to be deemed so promotive of the general welfare as to be a valid exercise of the police power.

1. "[A] developing municipality . . . must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there . . . including those of low and moderate income."\(^10\)
2. "It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like . . . ."\(^11\)
3. "The amount of land removed from residential use by allocation to industrial and commercial purposes must be reasonably related

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9. N.J.S.A. Const. art. I, par. 1: "All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."


11. Id. at 187, 336 A.2d at 732.
to the present and future potential for such purposes."\(^{12}\)

4. The developing municipality's obligation is "to afford the opportunity for decent and adequate low and moderate income housing at least to" the extent of "the municipality's fair share of the present and prospective regional need therefor."\(^{13}\)

The court gave relatively little guidance to the lower courts as to how to define the relevant "region" and the municipality's "fair share" for the purpose of the above rules. No doubt it thought that the principles to determine those questions would be worked out in later cases over a period of time. In the meantime, it concluded that Mount Laurel's zoning ordinance had to be modified in accordance with the above standards in order to make it a valid exercise of the police power. It gave the town ninety days (or more if the trial court so ordered) to adopt the necessary amendments to its ordinances. If it failed to do so, further judicial action could be sought by supplemental pleading in the case.

Noteworthy is the fact that the supreme court refused to affirm the trial court's holding that the defendant town had to devise a plan for municipal affirmative action to satisfy the indicated housing needs. In dealing with the problem of exclusionary zoning, the court could have chosen to mandate, as a matter of state constitutional law, that the municipalities use the inclusionary remedies that had been tried elsewhere. There had been a short history of the use of inclusionary devices (most notably the mandatory set-aside) by certain municipalities scattered around the United States in the early 1970s.\(^ {14}\) Essentially, these were ordinances in which the city required that a small percentage (ten to twenty percent) of units in new developments be priced below market for the benefit of low and moderate income persons. Some cities relied on federal subsidy money, which was often not forthcoming, to get the developers to build, and, as a result, the programs most often did not get off the ground. Other ordinances provided for "density bonuses." These allowed the builders to construct units at greater densities than ordinarily allowed in the zone and served as incentive to, and compensation for, the construction of the desired below market price units. Only a few hundred of these units had actually been constructed across the United States at the time of

\(^{12}\) Id.

\(^{13}\) Id. at 188, 336 A.2d at 732.

\(^{14}\) For the details of this history, see Fox & Davis, Density Bonus Zoning to Provide Low and Moderate Cost Housing, 3 Hastings Const. L.Q. 1015, 1036-67 (1976). The authors relate the history of these devices in the early 1970s in such cities as Boulder, CO, Los Angeles, CA, Berkeley, CA, Montgomery County, MD, Fairfax County, VA, Palo Alto, CA, and Lewisboro, NY. See also Kleven, Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing, 21 UCLA L. Rev. 1432 (1974).
Perhaps the court's hesitancy to use these devices stemmed from the fact that they had been imposed by municipal ordinance rather than by judicial fiat. In that connection, it stated that "[c]ourts do not build housing nor do municipalities" and that that function is properly performed by private builders, various kinds of associations, and government agencies created for the purpose. Eight years later in Mount Laurel II, the court found itself taking a quite different position, when it in fact imposed certain affirmative duties on the towns and cities of New Jersey.

In the interim period between the two cases, however, some on the court must have felt that they had created a sort of Frankenstein monster in the holdings of Mount Laurel I, because it was just three years after that case that the court seemed to be in full retreat from them in Oakwood at Madison, Inc. v. Township of Madison. No doubt this was due, at least in part, to the political firestorm that arose after Mount Laurel I.

III. OAKWOOD AT MADISON

In Oakwood at Madison, the court laid down some important limitations upon the original Mount Laurel decision. First, it reiterated that "[m]unicipalities do not themselves have the duty to build or subsidize housing," a concession that the court was later to at least partially retract in Mount Laurel II. More importantly it modified the municipal duty to provide for low and moderate income housing. In recognition of the criticism that without subsidy, it was impossible to build such housing, it substituted a requirement that the cities provide for "least-cost housing." At the same time it expressed some doubt as to the validity of so called "density bonus" provisions in zoning ordinances that would allow developers a greater density in construction of sale or rental housing in exchange for the developers' giving special concessions in the sale price or monthly rent. The court felt that legislative authorization was probably necessary for such measures to be valid. This is particularly ironic in view of its later holding in Mount Laurel II that the use of such devices might be constitutionally required.

15. Fox & Davis, supra note 14, at 1089.
18. Id. at 499, 371 A.2d at 1200.
19. Id. at 512, 371 A.2d at 1207-08. By least-cost housing the court meant the lowest priced housing "consistent with minimum standards of health and safety, which private industry [would] undertake, . . . in amounts sufficient to satisfy the deficit in the hypothesized fair share." Id.
20. Id. at 513, 371 A.2d at 1210.
The court decided it should not try to articulate specific rules to determine the relevant region and fair share for municipalities. Likewise towns would not be required to "devise specific formulae for estimating their precise fair share of the lower income housing needs of a specifically demarcated region."21 The court also refused a request that it order the defendant town to take affirmative action to bring in low income housing by making tax concessions or by sponsoring public housing projects saying that they had "no lawful basis for imposing such action as obligatory."22

In one area, the court extended the reach of the Mount Laurel doctrine, creating what has become known as the builder's remedy. Noting that the corporate plaintiff had prevailed in two trials and on appeal, it said that if all the relief plaintiff got after six years of litigation were a determination that the zoning ordinance was invalid, it would be a pyrrhic victory indeed. It then proceeded to order the issuance of a building permit for the development sought by the plaintiff in the first place. Included in the order was a requirement that plaintiff's permit be granted on the condition that at least twenty percent of the dwellings be allocated to low and moderate income persons, presumably at a reduced price.23 Plaintiff's original application for a building permit contained that allocation as an element, and that undoubtedly was the reason that the court felt that plaintiff was attempting to vindicate its Mount Laurel policies in the lawsuit.

The court used the builder's remedy for obvious reasons. It felt (although it did not in so many words say so) that unless a plaintiff, which had spent many years in litigating the right to build some low and moderate income housing, were finally permitted to get the relief it sought, there would be no one willing to undertake such a lawsuit in the future. It is clear that such is the case, for if the only relief courts were to grant in exclusionary zoning cases were a judgment voiding the town's ordinance, all the town would have to do would be to pass another ordinance forbidding plaintiff's development but permitting low and moderate income housing where it was unsuitable or where the owner had no intention to build such housing.

In addition to ordering the trial court to grant a builder's remedy on remand, the court ordered the court below to require the municipality to rezone to create the opportunity for a fair and reasonable share of the least cost housing needs of Madison's region . . . . The revision shall as minima: (a) allocate substantial areas for single-family dwellings on very small lots; (b) substantially enlarge the areas for dwellings on moderate sized lots; (c) substantially enlarge the [multi-family] district or create other enlarged multi-family zones; (d) reduce the [two and one acre minimum lot size] zones to the extent neces-

21. Id. at 498-99, 371 A.2d at 1200.
22. Id. at 546, 371 A.2d at 1224.
23. Id. at 551, 371 A.2d at 1227.
sary to effect the foregoing . . . ; (e) modify the restrictions in the [multi-family] zones and PUD areas . . . which discourage the construction of apartments of more than two bedrooms; (f) modify the PUD regulations to eliminate . . . undue cost generating requirements . . . ; and (g) generally eliminate and reduce undue cost-generating restrictions in the zones allocated to the achievement of lower income housing in accordance with the principles of least cost zoning . . . . 24

Though it was clear that the majority opinion signaled a retreat from the strictures of Mount Laurel I, it was also clear that it represented a compromise by the “moderates” between two other groups having polar opposite positions on the major issues. On the one side was Justice Pashman who argued in his concurring and dissenting opinion for a more aggressive and even radical approach. Pashman expressed impatience with the pace of change in the housing situation for the poor in the developing towns. In Mount Laurel I, over Pashman’s opposition, the court had held that the governments in the various developing municipalities should have an opportunity to improve the situation without court supervision. Pashman believed that that approach had been proven dead wrong and that it was time for the courts to take a more active role in the process.25

Pashman advocated a draconian series of remedies because he felt the support for exclusionary zoning was strong and the result of “long-standing social and racial fears and prejudices.”26 Pashman’s suggested judicial remedies included: (1) the setting of a fair share of low and moderate income housing for the various towns in the state;27 (2) ordering the towns to formulate a plan which would include proposed changes in the zoning ordinance as well as affirmative action on the part of the town such as “establishment of a local housing authority, creation of a mobile home park district, imposition of inclusionary conditions upon subdivision, PUD and cluster zone developments, or provision of density bonuses and other inclusionary devices”28; (3) ordering rezoning and granting of a building permit to developer litigants seeking to build housing for low and moderate income persons;29 (4) ordering specific changes in offending municipal ordinances rather than just invalidating them;30 (5) enjoining municipal approval of any other development until it had “taken steps to provide for its fair share of the regional housing need”;31 (6) ordering towns to provide density bonuses and other incentives for building the desired hous-

24. Id. at 553, 371 A.2d at 1228.
25. Id. at 560, 371 A.2d at 1231-32.
26. Id. at 562, 371 A.2d at 1232.
27. Id. at 588-95, 371 A.2d at 1246-49.
28. Id. at 584, 371 A.2d at 1244.
29. Id. at 596-601, 371 A.2d at 1250-53.
30. Id. at 609-10, 371 A.2d at 1256-57.
31. Id. at 610-11, 371 A.2d at 1257.
Nothing could have been further from Pashman's approach to the judicial function than that exhibited in Justice Clifford's concurring opinion. Drawing from an article by Judge Simon Rifkind, Clifford posited that there are two kinds of exercises of the judicial power: adversarial dispute resolution and problem solving. He quoted with approval various passages in the Rifkind article:

"The American public today perceives courts as jacks-of-all-trades, available to furnish the answer to whatever may trouble us: Shall we build nuclear power plants, and if so, where? Shall the Concorde fly to our shores? How do we tailor dismissal and lay-off programs during the depression, without undoing all of the progress achieved during prosperity by anti-discrimination statutes? All these are now the continuous grist of the judicial mills.

"Thus, it is not surprising to learn that a lawsuit was recently filed in the Southern District of New York seeking to prevent the United States Postal Service from issuing a commemorative stamp honoring Alexander Graham Bell — on the grounds that someone else invented the telephone. . . . . . . 'Problem solving is . . . a chancy business requiring, in a democracy, not only wisdom and inventiveness but a keen perception of the political implications. Moreover, it imposes a duty upon the problem-solver to hear all those who have a significant interest in the problem. Very frequently the problem-solver tends to become a champion of a cause and not a neutral decider. His reward comes from popular acclaim, not from law review commendation. Despite this chasm which divides the problem-solver from the dispute resolver there is a growing tendency to confuse the two.

'On the campuses, voices are heard which look benignly upon those areas of our jurisprudence wherein courts have become problem-solvers. It is projected as the wave of the future. Indeed, new words have been coined to describe the judicial role. Courts have become mini-legislatures. Judges now preside at proceedings in which there is no clear alignment of parties but at which all who have so-called significant interest may have their say, and indeed they should since the decree will directly affect them by judgment and not by precedent. Judges, being human, are not averse to their enlarged role and expanded responsibility. It is exhilarating to administer relief to a universe of victims, and if some are unknown and unknowable, then to distribute largesse to the deserving by application of the cy-pres doctrine in the fashion of Haroun Al-Rashid.'

In the end Justice Clifford threw up his hands in trying to recon-

32. Id. at 611-12, 371 A.2d at 1257-58.
33. Id. at 612-14, 371 A.2d at 1258-59. This, as we shall see, became the predominant method used in attempts to fulfill the Mount Laurel mandate.
34. Id. at 615-16, 371 A.2d at 1259-60.
36. Id. at 44.
cile his conflicting views about the case—on the one hand, his conviction that the governmental zoning power was being improperly used by the middle class to exclude the poor from certain towns, and, on the other hand, his uneasiness about the proper limits of judicial power—and voted for the middle ground of the majority opinion. Justice Clifford was in effect saying to his colleagues, "What we are doing here is probably morally correct but we are dangerously near to overextending the reach of the courts."

Perhaps even more dubious about judicial activism in this area was Justice Mountain. In a strong concurring and dissenting opinion, he expressed his many doubts about the course the court was embarking upon. Basically, Mountain argued that the court was beginning to carry on what was essentially a legislative function. If a court goes beyond merely declaring a zoning ordinance unconstitutional "it invites the fairly certain prospect of being required itself to undertake the task of rezoning." Justice Mountain made it clear that he did not think courts were competent to do that kind of work even with the help of court-appointed masters who were experts in the area, because there are simply no standards by which a court could proceed.

A principal weakness inherent in this approach is that no authoritative guidelines exist at the present time to aid the trial judge and the planning experts he has appointed, and to which the law would require that they adhere. Therefore a land use plan so devised will reflect rather the informed judgment of the chosen expert than a judicial application of settled principle to particular facts. Full realization of this is likely further to diminish the probability of community acceptance.

And later he noted that judicial zoning "not only exceed[s] the boundaries of judicial skill but also those of 'political tolerance.' . . . Such activity 'cuts too closely to the political core of our society.'"

No one questions that zoning is a legislative function. When the judiciary—for whatever reason—undertakes to move in this field, it immediately places in issue its power of legitimacy. I suggest that such intrusion may be especially resented, and hence more likely to be denied acceptance, where the subject matter is as controversial and potentially inflammatory as are many questions of zoning. How much better were the Legislature to take steps that would obviate this problem altogether!

There is no real likelihood that any of the problems to which I have adverted will yield to unaided judicial ingenuity. There is, on the other hand, very legitimate hope that our zoning difficulties and land use problems—centered as they are today around the injustice of exclusionary zoning, but by no means limited to that—can be ameliorated and eventually solved by careful and imaginative legislative action. The Legislature can recruit the expertise, hear all sides of each strand of the tangled web, view the State regionally or as a whole, experiment if need be, and develop a land use program responsive to

38. Id. at 626, 371 A.2d at 1265.
39. Id.
40. Id. at 628, 371 A.2d at 1266.
41. Id. at 628-29, 371 A.2d at 1266.
the needs of all its citizens. I am satisfied this a feat of which the courts are incapable.42

In the end, Justice Mountain was so troubled with the course of the law, that his only agreement with the majority was that the case should be remanded. Sharply disagreeing with essentially all the terms of that remand, he argued that since the court was setting new standards for the resolution of these exclusionary zoning cases, the municipality should be given not only the right to further argument in the court below but a chance to present additional evidence. In addition, Mountain disagreed with all the remedies prescribed by the majority opinion including the builder’s remedy and the order to rezone.

IV. MOUNT LAUREL II

A climax to the first phase of the New Jersey’s consideration of the exclusionary zoning problem was reached in 1983 in Mount Laurel II.43 That case was an appeal by plaintiffs and defendant from the decision of the trial court reached on remand of Mount Laurel I, in which it was held that: (1) the rezoning done by the town in response to the supreme court’s original mandate was a bona fide attempt to comply with its requirements; and (2) that a developer-intervenor was entitled to a builder’s remedy for a mobile home court. The town had rezoned twenty out of 14,700 acres for lower income housing, most of which was arguably unsuitable for housing at all.

It had been apparent to the New Jersey Supreme Court, in considering the entire matter, that the mandates of Mount Laurel I, directing the towns of the state to solve the exclusionary zoning problem, were being met by universal municipal inaction and fierce political opposition. In Mount Laurel II the court had an opportunity to beat a strategic retreat from its earlier positions, but it chose instead to forge ahead in one of the most aggressive exercises in judicial law making ever attempted by a state court. In a 155 page opinion by Chief Justice Wilentz, the court strongly affirmed the constitutional rights invented in the earlier case and put new, sharp teeth into the remedies prescribed to enforce them. The emotional flavor of the opinion will be best appreciated by reading of some of its most indignant and strident language:

This is the return, eight years later, of Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, (Mount Laurel I). We set forth in that case, for the first time, the doctrine requiring that municipalities’ land use regulations provide a realistic opportunity for low and moderate income housing. The doctrine has become famous. The Mount Laurel case itself threatens to become infamous. After all this time, ten years after the trial

42. Id. at 630, 371 A.2d at 1267.
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.

To the best of our ability, we shall not allow it to continue. This Court is more firmly committed to the original Mount Laurel doctrine than ever, and we are determined, within appropriate judicial bounds, to make it work. The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals. We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.

This case is accompanied by five others, heard together and decided in this opinion. All involve questions arising from the Mount Laurel doctrine. They demonstrate the need to put some steel into that doctrine. The deficiencies in its application range from uncertainty and inconsistency at the trial level to inflexible review criteria at the appellate level. The waste of judicial energy involved at every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts. The length and complexity of trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue.44

Thus, rather than drawing the conclusion that the complained of inefficacy of and opposition to Mount Laurel I was the fault of a judiciary that had tried to extend its power too far, the court, frustrated with the pace of the reforms it had ordered, concluded that even harsher measures were required. It thereupon proceeded to promulgate a comprehensive system of substantive and procedural rules to govern the disposition of all Mount Laurel disputes. A summary of the more important holdings of the case will indicate the tremendous sweep of the opinion:

(1) "Every municipality's land use regulations should provide a realistic opportunity for decent housing for at least some part of its resident poor who now occupy dilapidated housing . . . except where they represent a disproportionately large segment of the population as compared with the rest of the region."45 The exception would pertain to many of the urban areas of the state.

(2) The municipal obligation will no longer extend only to "developing communities" but will apply to every town in the state designated as a "growth area" in the State Development Guide Plan, a plan prepared by the Division of State and Regional Planning in the executive branch of state government.46

(3) The municipality must provide opportunity for its defined fair

44. Id. at 198-200, 456 A.2d at 409-11 (citations omitted).
45. Id. at 214-15, 456 A.2d at 418.
46. Id. at 215, 456 A.2d at 418.
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share of low and moderate income housing.\textsuperscript{47}

(4) To get fairly uniform results, future Mount Laurel litigation will be assigned to three judges, each to a region of the state.\textsuperscript{48}

(5) "The municipal obligation to provide a realistic opportunity for the construction of its fair share of low and moderate income housing may require more than the elimination of unnecessary cost-producing requirements and restrictions. Affirmative governmental devices should be used to make the opportunity realistic, including lower-income density bonuses and mandatory set-asides. Furthermore the municipality should cooperate with the developer's attempts to obtain federal subsidies."\textsuperscript{49}

(6) "The lower income regional housing need is comprised of both low and moderate income housing. A municipality's fair share should include both in such proportion as reflects consideration of all relevant factors, including the proportion of low and moderate income housing that make up the regional need."\textsuperscript{50}

(7) "Least cost housing" is not an adequate substitute for low and moderate income housing and should be used when all the other above remedies have been considered and tried.\textsuperscript{51}

(8) Ordinarily a builder's remedy will be granted to a successful plaintiff in Mount Laurel litigation "provided that the proposed project includes an appropriate portion of low and moderate income housing, and provided further that it is located and designed in accordance with sound zoning and planning concepts, including its environmental impact."\textsuperscript{52}

(9) To avoid the problem of multiple trials, appeals, and remands, cases should ordinarily be handled with one trial and one appeal. This means that a town whose zoning ordinance has been declared unconstitutional might be required to rezone before it even has the chance to appeal.\textsuperscript{53}

(10) Courts have the power (to be used sparingly) to phase in relief gradually to avoid too radical a change in the nature of the municipality.\textsuperscript{54}

In reviewing the entire Mount Laurel II opinion, one is struck by the hubris of its tone as well as the overarching comprehensiveness of its coverage. It was almost as if the court was saying that if the legislature doesn't want to solve this problem with a comprehensive legisla-

\textsuperscript{47} Id. at 215-16, 456 A.2d at 418-19.
\textsuperscript{48} Id. at 216, 456 A.2d at 419.
\textsuperscript{49} Id. at 217, 456 A.2d at 419.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 217-18, 456 A.2d at 419-20.
\textsuperscript{52} Id. at 218, 456 A.2d at 420.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 218-19, 456 A.2d at 420.
tive program using the normal statutory tools at its command, the court will legislate for it, promulgating a complete and comprehensive statute-like program for reform of the system using the tools at its command, judicial ipse dixit.

V. POLITICAL AND LEGISLATIVE REACTION TO MOUNT LAUREL II

A. The Fair Housing Act of 1985

The political reaction to Mount Laurel II was predictably hostile. As one commentator described it:

It is difficult to convey adequately the intensity of the public reaction to the Mount Laurel process since 1983. Where Mount Laurel I could be ignored because it was ineffective, Mount Laurel II worked and it stirred up a firestorm. Perhaps the best-known political contribution was by the Governor of New Jersey, who equated Mount Laurel with communism; a local mayor flamboyantly promised to go to jail rather than obey a Mount Laurel judgment. Politicians in suburban communities simply had to oppose Mount Laurel as a political matter, and it was a rare local official who could be induced to discuss settlement of litigation. Ironically, the effect was to drive the process ever more firmly into the courts and the litigation process, frustrating the 'voluntary' compliance the state supreme court hoped for.55

Though the initial reaction in the New Jersey Senate to Mount Laurel II was the introduction of an angry resolution to overturn the Mount Laurel decisions by constitutional amendment, this never passed and cooler heads prevailed a few years later with the passage of the Fair Housing Act of 1985.56 It is testimony to America's long and deeply-engrained reverence for judicial rulings on constitutional questions that the compromise statute passed at all, because there was very widespread sentiment in the state that the decisions of the court had gone much too far in extending judicial power beyond its historic limits and that the decisions therefore should be unconditionally opposed.

A brief summary of the Act will be sufficient to indicate its scope and effect. The statute created a new state administrative agency called the Council on Affordable Housing (COAH) to administer the Act. COAH was charged with the determination of: (1) the boundaries of the various housing regions in the state; (2) the need for housing in each of the regions; (3) the fair share of those needs assigned to each municipality in the state; and (4) estimated future population and household size for the regions.57

Municipalities might but were not required to submit to COAH their own fair share plan and "housing element."58 The housing ele-

57. Id. at § 52:27D-307 (West 1986).
58. Id. at § 52:27D-309 (West 1986).
ment had to contain at least the following matters concerning the town in question: (1) a detailed inventory of existing housing; (2) a future projection of the town's housing stock for the next six years; (3) a detailed demographic analysis; (4) an analysis of present and future employment; (5) a determination of the town's present and future fair share of lower income housing; and (6) an analysis of suitable land for lower income housing.59

COAH could grant a town, upon its application, "substantive certification" of its housing element and zoning ordinances upon a finding that its fair share plan was acceptable and that there were no "unnecessary housing cost-generating" features in its land use ordinances and that "affirmative measures in the housing element . . . make the achievement of the municipality's fair share of low and moderate income housing realistically possible . . . ."60 If a town received the substantive certification, it had the benefit of a "presumption of validity attaching to the housing element and ordinances implementing" it.61 A person thereafter challenging them had "the burden of proof to demonstrate by clear and convincing evidence that [said element and ordinances] . . . do not provide a realistic opportunity for the provision of the municipality's fair share" of lower income housing.62

The statute contained a provision authorizing "regional contribution agreements" wherein a town in the same region as a central city could meet up to one half of its fair share by agreeing with that city to finance lower income housing therein.63 Once approved by COAH such an agreement was given a presumption of validity.64 The statute further provided: "To rebut the presumption of validity, the complainant shall have the burden of proof to demonstrate by clear and convincing evidence that the agreement does not provide for a realistic opportunity for the provision of low and moderate income housing within the housing region."65

The Act contained a provision allowing the courts to order, under statutorily defined timetables, a slow phase-in of municipal action to meet the fair share obligation.66 In addition, the Act empowered the state Housing and Mortgage Finance Agency to administer rent controls, resale price controls, and eligibility lists for purchasers and renters in connection with various kinds of inclusionary developments.67 Under the statute: "Any municipality which . . . reached a settlement

59. Id. at § 52:27D-310 (West 1986).
60. Id. at § 52:27D-314b (West 1986).
61. Id. at § 52:27D-317a (West 1986).
62. Id.
63. Id. at § 52:27D-312 (West 1986).
64. Id. at § 52:27D-317b (West 1986).
65. Id.
66. Id. at § 52:27D-323 (West 1986).
67. Id. at § 52:27D-324 (West 1986).
of any exclusionary zoning litigation prior to the effective date of [the] act, [would] not be subject to any exclusionary zoning suit for a six year period . . . ."68 Further, a municipality might seek a six year period of repose in a declaratory judgment action filed in superior court after it filed its housing element.69

Perhaps the most important effect of the Act was to get the supervision of land use law out of the courts and into the Council on Affordable Housing. Under the statute:

For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation.70

And for those cases begun after, or within 60 days before, the effective date of the Act, there was a provision for mediation by the Council, which if unsuccessful, would be followed by a determination by an administrative law judge.71 The New Jersey Supreme Court in Hills Development Co. v. Township of Bernards72 interpreted these provisions as requiring COAH to initiate proceedings for "substantive certification," and held that the courts "would have nothing more to do with the determination and satisfaction of the Mount Laurel obligation unless and until either a challenge was subsequently made to that substantive certification, or such certification was denied."73 Thus as the court interpreted the statute, it foresaw that, essentially, Mount Laurel disputes would be taken from the courts and handled by an administrative agency.

The court also considered the constitutionality of the Fair Housing Act in the same case.74 Suit had been brought by various developers and public interest groups who were dissatisfied with the decision by the legislature to shift basic control of exclusionary zoning disputes from the judiciary to an administrative agency. In a brief opinion, the court upheld the constitutionality of the Act against challenges that it: (1) would improperly delay implementation of the solution to the Mount Laurel problem; (2) unconstitutionally limited judicial power by curtailing the right to review ordinances by certiorari and by imposing a temporary moratorium on the builder's remedy; and (3) would not result in construction of low income housing. As to the last point the court simply said: "... before this Act may be declared unconstitutional on these grounds, the contention that it will not work

68. Id. at § 52:27D-322 (West 1986).
69. Id. at § 52:27D-313 (West 1986).
70. Id. at § 52:27D-316 (West 1986).
71. Id. at § 52:27D-315 (West 1986).
72. 103 N.J. 1, 510 A.2d 621 (1986).
73. Id. at 38, 510 A.2d at 641.
74. Id.
must be close to a certainty."\textsuperscript{75}

\textbf{B. Preliminary Results Under the Fair Housing Act}

In 1986, COAH, which had been established by the Fair Housing Act, promulgated guidelines: (1) defining the six housing regions in the state; (2) setting allocation formulas for determining the lower-income housing needs in each region; (3) stating the housing obligations of each region and municipality; and (4) establishing a procedure for certification of a municipal housing element. In 1987 and 1988, a survey of some eighty municipalities was made by Martha Lamar and Associates for the Fund for New Jersey and the Alliance for Affordable Housing, to find out how the Fair Housing Act was functioning in practice.\textsuperscript{76} The fifty-four municipalities which responded were among the most active "in planning and producing low- and moderate-income housing in the State."\textsuperscript{77}

The details of survey findings will not be fully rehearsed here, but there are some important trends that should be mentioned. First, it is not surprising to note that with the decrease in funds appropriated by Congress to federal housing programs in the 1980s, only a small proportion of affordable housing construction was of the subsidized housing variety. Thus, of the 2830 affordable units completed at the time of the survey, 2101, or 74\%, were in mandatory set-aside developments while the balance were constructed through "other methods."\textsuperscript{78} By "other methods" is meant rehabilitation of existing units and construction of new, federally and municipally subsidized, housing projects.\textsuperscript{79} And, interestingly, of the 2257 affordable units under construction at the time of the survey, 2123, or 94\%, were in mandatory set-aside developments while only 6\% were through "other methods."\textsuperscript{80} Set-asides were also 92\% of the units with preliminary municipal approval\textsuperscript{81} and 80\% of those proposed but not yet approved.\textsuperscript{82} In set-asides 86\% of the units were for sale and 14\% were for rent, while in "other methods" 47\% of the units were for sale and 53\% were for rent.\textsuperscript{83}

Thus, COAH has used the mandatory set-aside as the predominant

\textsuperscript{75} Id. at 43, 510 A.2d at 643.
\textsuperscript{76} M. LAMAR AND ASSOCIATES, AFFORDABLE HOUSING IN NEW JERSEY: THE RESULTS OF MOUNT LAUREL II AND THE FAIR HOUSING ACT (1988) [hereinafter AFFORDABLE HOUSING].
\textsuperscript{77} It was estimated that these towns had 93\% of the total number of affordable housing units completed in compliance with the Mount Laurel doctrine. Id. at 9.
\textsuperscript{78} Id. at 15.
\textsuperscript{79} Id. at 12.
\textsuperscript{80} Id. at 26.
\textsuperscript{81} Id. at 27.
\textsuperscript{82} Id. at 29.
\textsuperscript{83} Id. at 19.
means of carrying out the mandate of *Mount Laurel II*. As noted above, under the mandatory set-aside, a developer seeking approval to build profit-making housing must earmark some percentage (conventionally twenty percent) of his projected units to lower income housing. These units must then be sold or rented at below market prices. In exchange for his undertaking to construct the lower income housing, the city typically gives the developer a "density bonus" which is intended to compensate the builder for at least some of the losses he necessarily incurs by selling or renting the units at below market prices. The density bonus allows the builder to build more units per acre than he ordinarily would be allowed to under the relevant zoning ordinance. Also necessarily accompanying these devices are resale price controls which have two purposes: to prevent the first occupant of the affordable housing from getting a windfall in a quick resale, and to maintain the housing for lower income persons.

VI. ANALYSIS OF THE MANDATORY SET-ASIDE AND DENSITY BONUS

The use of the mandatory set-aside rather than some of the other possible devices is partially explainable by the obvious fact that the former does not cost municipalities one red cent of tax money. When a town is pressured by state authorities to do something in the way of a lower income housing program, there is often political support by existing town residents for use of the set-aside and corresponding political opposition to the use of other devices that cost local tax money, such as municipal housing subsidy programs.

That is not to say that there may not be political opposition to public housing projects where the money comes from the federal government. Thus in the famous Yonkers, New York case, when, because of a past history of municipally encouraged racial segregation, the U.S. District Court ordered the city to build scatter-site public housing outside the traditionally minority areas using federal funds, there was still tremendous opposition from residents of the affected areas.

84. The affordable units built for sale have been predominantly in townhouse and multiplex (up to 24-plex) developments. Id. at 58-59. The *Mount Laurel* units typically are smaller than the market rate units. Id. at 60. They are priced not on the basis of what they cost to construct, but rather on what lower and moderate income persons can afford to pay per month in the way of mortgage, taxes, and insurance. Id. at 39-53.

The *Mount Laurel* requirement is expected to change the mix of new housing construction in the state from around 30% multifamily (including townhouses) and 70% single family, to around 40% multifamily and 60% single family. N.Y. Times, Apr. 2, 1989, § 10, at 9.

One could infer that this opposition was based at least partly upon racial and/or class prejudice.

Obviously, there are substantial costs involved in using the mandatory set-aside. After all, the units are marketed at less than their fair market value and indeed at less than the total expenses incurred in their production. The density bonuses offered to compensate the builder for these costs are often not adequate to cover them totally, and the difference between the two amounts must be borne by someone. The likely loss-bearers, absent government subsidy, are the builder, the consumer of the regularly priced housing offered by the builder, and the landowners whose properties are being developed.

Professor Ellickson has argued that the inclusionary costs are borne by the owners of the undeveloped land in towns where the demand for the housing is elastic. That occurs when there are perfect substitutes for housing in other neighboring towns not having those costs. The argument is that to keep prospective buyers from going to those other lower cost towns, the builder would have to price the new profit-making units to meet the competition. He would then seek to make up the difference by offering to pay less for developable land.

On the other hand, where demand for housing in the municipality is inelastic, that is, where the town has unique advantages in facility or location that other neighboring towns do not offer, the losses inflicted by the set-aside would be borne both by owners of undeveloped land and consumers of the new regularly priced housing. This is so because some consumers would be willing to pay more than they would for similar housing in neighboring towns. But these consumers would not bear the entire loss, because the price increase they paid would be less than the total cost of the inclusionary measure, and some of the costs would be passed back to the owners of developable land.

Speaking still of the town that has unique attributes, at the same time as the consumers and landowners would bear the costs of the new lower income housing, other economic groups would be receiving fortuitous gains. Obviously a few lower income families receiving the subsidized housing would reap the largest benefits. However, owners of existing housing in the community would also benefit, because

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86. Ellickson, supra note 1, at 1181. There is evidence that some density bonuses offer the builder sufficient compensation so that the incentive to build is not destroyed. Of course, all this might mean is that the builder is able to pass the increased costs on to someone else. See infra discussion accompanying notes 155-63.


88. Ellickson, supra note 1, at 1190-91.
fewer new housing units would be produced as the price of new housing rose, and therefore the used housing would face less competition and its price would also rise. On the other hand, the larger number of the lower income families would not receive the subsidy and they would be harmed by having to pay higher prices for housing than they ordinarily would; they, therefore, would end up as net losers often unable to buy housing in the town at all. Overall, then, it appears that inclusionary devices such as the mandatory set-aside really have exclusionary effects on the vast majority of those sought to be helped, at least in those towns where the demand for the housing is inelastic.

Other arguments can be made against the mandatory set-aside as well. If dwellings were sold to individuals at below-market prices in such a way that they were free to resell the unit at market, they would get an undeserved windfall gain and the unit would no longer be available to lower income families. Thus the set-aside has of necessity always been accompanied by resale controls. The typical resale control allows the owner to recoup the original cost, plus cost of improvements, plus an increase represented by the percentage which the Consumer Price Index or other inflation measure has grown since purchase. Any time the law attempts to frustrate the allocations that would be made by trading at market price, distortions and inefficiencies can arise, and that is certainly the case here. As William Tucker has pointed out about housing with resale controls:

'[T]he new housing will not circulate. The new owners, after all, are subsidized and cannot move without giving up their subsidy. They are usually not even allowed to sell their unit without giving up a significant portion of the capital appreciation, either to the municipality or the next owner. Thus, they will stay in their units long after the units have ceased to suit them and long after they have ceased to be 'low income.' By attaching subsidies to housing units, rather than the people who live in them, governments effectively take these units off the market.'

Other inefficiencies and inequities are introduced as well. The owner of the property, faced with a price cap, does not have the normal incentives to maintain the premises properly. And since distr-

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89. See, e.g., the resale controls (called affordability controls) described in AFFORDABLE HOUSING, supra note 76, at 35.1, A.3.
91. See Ellickson, supra note 1, at 1179 n.62 quoting William A. Fischel as follows: [R]esale controls discourage everyday maintenance such as painting and cleaning. At first I thought that this would be [deterred] by the price index, but let me give an example to show why it is not so. If the market price of a unit is $100,000, and the controlled price is $60,000, assume that all housing prices rise in five years by 50%. The controlled house now can be sold for $90,000, for a tidy tax free gain of $30,000. But why should the lucky 'moderate income' family settle for only a $30,000 gain? Suppose that ordinary maintenance in the five year period would have cost $50,000. Poregoing the maintenance causes the house to depreciate by
bution of a very limited resource is made at an artificially low price, allocation to the “wrong” (i.e., non lower income) persons through corruption, prejudice, or favoritism is an ever-present threat.

What follows from all this legally? Assuming that the above analysis is correct and that the attempt to supply new housing for lower income persons through mandatory set-asides is often self-defeating or does more harm than good, is the device subject to constitutional attack as a violation of substantive due process or as a taking? As a practical matter asking the question as a matter of state law in a state like New Jersey would seem to be rather quixotic, because the court in that state has not only held that the device is not unconstitutional, but indeed its use may actually be required by the state constitution. However, that still does not answer the question as a matter of federal constitutional law.

A. Takings Analysis—Nollan and the Means-Ends Review

To analyze the validity of the mandatory set-aside, one must start with the U.S. Supreme Court case of Nollan v. California Coastal Commission,92 in which the Court in an opinion by Justice Scalia established as a bedrock takings principle what had not until very recently been a takings principle at all—a constitutional requirement of a nexus between means and ends. In that case, the Nollans sought a permit to tear down their small beachfront dwelling and replace it with a modern larger home. The Nollan property lay between two public beaches. The California Coastal Commission agreed to grant a permit, if the Nollans gave the public an easement to pass across their beach from one abutting public beach to the other. The easement was to be along the shoreline between the mean high tide line and the seawall protecting the Nollan’s property. The justification for the condition advanced by the Commission was that the new house would increase blockage of the public’s view of the ocean. The Court held that the easement requirement constituted a taking of the Nollan’s property. In support of that ruling it said that a “land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his

$10,000. But what does the controlled price owner care? All that happens to him is that the ‘true’ value of the house is now only $140,000 ($150,000 minus $10,000). But since he cannot get more than $90,000, he has no incentive to maintain the house. In fact, in this situation he has some incentive to cannibalize the house, selling some good features and replacing them with cheap (or no) features.

92. In a recent case, the New Jersey Supreme Court has implied that it will hold, when presented with the issue, that mandatory set-asides are not takings even if not accompanied by compensation. Holmdel Builders Ass’n v. Township of Holmdel, 121 N.J. 550, 583 A.2d 277 (1990).

land." And conversely "[a] use restriction may constitute a "taking" if not reasonably necessary to the effectuation of a substantial government purpose." The Court felt that the condition did not advance the Commission's objective of protecting the public's view of the ocean since it is "quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." Therefore, since there was no nexus between the condition attempted to be imposed and the end advanced as justification for it, the condition was an unconstitutional taking.

The Nollan test—requiring the linkage of the exaction with the objective advanced in justification of it—serves the important function of demanding that governmental impingements on private property not be used as a subterfuge to extract from the individual some valuable right which the government could not ordinarily take without paying compensation for it, just because the individual happens to be seeking some permission from the government at the time. To avoid a taking by subterfuge, there must be a relation between the government's condition and that particular objective which it advances to justify the condition. If the regulation does not meet that threshold test, it is improper. Why should the government harm a person in the exercise of his property rights when its purported justification for doing so is a sham designed to take his property without paying for it?

The Nollan opinion was a departure from established prior law in at least two respects. First, it established with finality that a means-ends judicial review was an appropriate test to be used to determine whether a particular regulation was a taking, although it conceded such a review was also appropriate under the due process clause. Second, and more importantly, it differentiated between those two kinds of means-ends reviews in seemingly attaching a standard of heightened judicial scrutiny to one under the takings clause.

Since the time of the New Deal, the Court had evolved a three-tiered structure for review of legislation under the equal protection clause and the substantive component of the due process clause. With

94. Id. at 834.
95. Id.
96. Id. at 838.
97. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "substantial advancing" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

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respect to economic and social legislation, the Court used a rational basis test, which in effect gave almost untrammeled power to the various legislatures to regulate as they saw fit. Under that approach, as a matter of due process, the challenged law merely had to rationally relate to some legitimate government objective to be upheld by the Court.\(^9\) Furthermore, in the absence of some articulated purpose for the law, the Court made clear that, in order to uphold a law, it would hypothesize any possible legitimate purpose the legislature might have had as a justification for it.\(^10\) And, in \(Ferguson v. Skrupa,\)\(^1\) the Court seemingly went even further in abandoning substantive due process review of economic legislation when it said: "[W]e refuse to sit as a 'superlegislature to weigh the wisdom of legislation' . . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."\(^2\)

On the other hand, in reviewing the wisdom of laws affecting "fundamental" civil rights and civil liberties, the Court leaned in the other direction, developing a formula requiring "strict scrutiny" of the legislation. "Where the government seeks to deprive persons of fundamental rights, it must prove to the Court that the law is necessary to promote a compelling or overriding [state] interest."\(^3\) A listing of those rights the Court came to view as "fundamental", and, therefore, deserving of protection by strict scrutiny included most guarantees of the Bill of Rights, the right to fairness in the criminal process, the right to privacy (including some freedom of choice in matters of marriage, sexual relations and child bearing), the right to travel, the right to vote, the freedom of association and some aspects of fairness in the adjudication of individual claims against the government (procedural due process rights).\(^4\)

Since the 1930s, as a practical matter, when the Court has used the rational basis form of judicial review, it has become extremely difficult to induce it to set aside a government regulation. On the other hand, when the Court has used the strict scrutiny-compelling interest review, it has become very difficult to get it to uphold the regulation.

In yet a third group of the cases, (involving the equal protection clause), the Court developed an intermediate standard of heightened scrutiny in which it seemed independently to examine the classification for its rationality. Thus, in sex discrimination cases, the Court required that the classification be "substantially related" to an "important governmental objective."\(^5\)

\(^{10}\) Id. at 490.
\(^{11}\) 372 U.S. 726 (1963).
\(^{12}\) Id. at 731-32.
\(^{13}\) J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 448 (2d ed. 1983).
\(^{14}\) Id.
It was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with a takings analysis (rather than in connection with equal protection where it originated), that marks the importance of the *Nollan* case.

Contrary to Justice Brennan's claim ..., our opinions do not establish that these [takings] standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, [the takings formulation], not that 'the State "could rationally have decided" the measure adopted might achieve the State's objective' [the due process formulation] .... [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.106

In support of the above takings–due process distinction, Justice Scalia cited two earlier cases, *Agins v. Tiburon*107 and *Penn Central Transportation Co. v. New York City*.108 *Agins* in turn relied upon *Nectow v. Cambridge*109 for its assertion that it is a taking if the challenged land use law does not substantially advance legitimate state interests. But that is not quite what the latter case held. The *Nectow* court did not rest the rule upon the takings clause but rather upon the due process clause of the Constitution. That is hardly surprising because the means-to-a-lawful-end inquiry was at the time of *Nectow* the standard formulation of the traditional substantive due process review. One would have to assume that Justice Scalia was being quite disingenuous in implying that the rule he established in *Nollan* was not a departure from prior law, for the means-end review was certainly not a traditional part of the takings jurisprudence of the last century.110 As mentioned above, if one takes literally and gives full


Also noteworthy on the nexus issue is the New York Court of Appeals opinion in *Seawall Assoc. v. City of New York*, 74 N.Y.2d 92, 554 N.Y.S.2d 542, 542 N.E.2d 1059 (1989). In that case the court held, unconstitutional as a taking, a municipal law that (1) established a five year moratorium on the conversion, alteration, and demolition of single-room occupancy housing; (2) required owners to restore the units to habitable condition; and (3) required the owners to rent the dwellings at rent controlled rents. One of the grounds that the court gave was that, following the rule of the *Nollan* case, there was not a sufficient nexus between the regulation and the aim of housing the homeless.


110. Takings law had previously emphasized whether the governmental activity involved a physical invasion (taking), or was the regulation of a noxious use (not taking), or whether it resulted in too great a diminution in value (taking). See
scope to what the justice says, the *Nollan* case makes a remarkable change in the law. With his use of the words "substantially advance a legitimate state interest" he is announcing for land use regulations a takings rule of heightened means-end scrutiny similar to that applied to sex\(^1\) and illegitimacy\(^2\) discrimination under the equal protection clause.

In dissenting, Justice Brennan challenged Justice Scalia's use of a takings formulation to justify making a heightened-scrutiny, means-ends review of land use control regulations. Brennan argued that the judicial determination of the rationality of a regulation was a substantive due process and not a takings question at all. He pooh-poohed Scalia's careful distinction between the various verbal formulations that had been used in the past to describe exactly what the rationality review was to be.

Our phraseology may differ slightly from case to case—e.g., regulation must 'substantially advance,' or be 'reasonably necessary to' the government's end. These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.

Of course, government action may be a valid exercise of the police power and still violate specific provisions of the Constitution. Justice Scalia is certainly correct in observing that challenges founded upon these provisions are reviewed under different standards . . . . Our consideration of factors such as those identified in *Penn Central*, supra, for instance, provides an analytical framework for protecting the values underlying the Takings Clause, and other distinctive approaches are utilized to give effect to other constitutional provisions. This is far different, however, from the use of different standards of review to address the threshold issue of the rationality of government action.\(^1\)

For Justice Brennan, then, the proper means-end review of land use regulations was under the doctrines of substantive due process and equal protection, using the most forgiving rational basis formula as the standard of review. The quarrel between the majority's and the dissent's view of whether the takings or due process clause is the appropriate one to use is not terribly important. What is important, however, is their differences with respect to what the standard of review should be. *Nollan* established that a meaningful, heightened, nexus scrutiny of governmental regulation of property rights is, henceforth the governing norm.

What would result from the application of Justice Scalia's nexus doctrine in the *Nollan* case to the mandatory set-aside device ordered by the *Mount Laurel* cases? It is clear that the desired objective of the regulation is to get more housing built for the poor in locations

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where they are not already concentrated. The question then would be whether requiring that builders set aside loss-priced housing for sale to lower income persons, as a condition for obtaining a permit to build profit-making housing, "substantially advances the legitimate state interest" in reaching that objective. If the requirement does not get the poor so dispersed, then it would certainly violate the policy against taking by subterfuge, which is the bedrock principle underlying the Nollan case, for it is absolutely clear that the government would have no right to pass a law requiring builders to build housing for the poor at a loss, if at the same time the builder were not seeking a permit to build profitable housing.

If one were to accord some presumption of validity to the legislative, judicial, or administrative decision to use the device, there is at least a surface plausibility to the argument that the means are calculated to reach the end. The above economic analysis, however, suggests that the attempt may be self-defeating and counterproductive, as it might actually have substantially exclusionary effects. Should the federal courts use economic analysis to reach the conclusion that the state administrators are wrong in saying that the means are calculated to achieve the end? This is a close question, the answer to which probably depends upon who has the burden of proof to show nexus or lack of nexus. The Nollan opinion is not clear on that point, but the notion of heightened scrutiny contained in the requirement that the regulation "substantially advance legitimate state interests" certainly would appear to cast the burden on the person asserting that the regulation is not a taking. For that reason, one could argue that an uncompensated mandate that builders sell some of their property at a loss to lower income persons with the objective of providing more affordable housing for them constitutes a taking. On the other side, it could be argued that for almost every analysis by a qualified economist on a particular issue, one can find an analysis on the other side by an economist just as qualified, and that economics as a discipline simply does not have the degree of certitude that should be required to serve as a basis for substituting the judgment of the courts for that of state governmental authorities. The answer to the issue really depends upon whether the courts begin to review deprivations of property with as critical an eye as they have reviewed allegations of deprivations of civil rights.

A clue to the answer to that question may come from the New York Court of Appeals. In a recent case, Seawall Associates v. City of New York, the court held unconstitutional as a taking, a municipal law that (1) established a five year moratorium on the conversion, al-

114. See supra text accompanying notes 87-91.
115. See Kleven, supra note 14, at 1473-90.
teration, and demolition of single-room occupancy (SRO) housing; (2) required owners to restore the units to habitable condition; and (3) required the owners to rent the dwellings at rent controlled rents. The city advanced as the objective of the law, the housing of the homeless. One of the grounds that the court gave for its holding that it was a taking, among others, was that, following the rule of the Nollan case, there was not a sufficient nexus between the regulation and the aim of housing the homeless. In reviewing this question the court rejected the city's contention that by increasing the availability of SRO housing, this would help to achieve that end. Using the city's own study that indicated a ban on destroying these units would not do much to help the homeless, the court also made its own evaluation of this question and said "there is simply no assurance that units will be rented to members of either [homeless] group . . . . While, of course, any increase in the supply of low-cost housing would benefit some prospective tenants, it is by no means clear that it would actually benefit the homeless." In Seawall Associates, the New York court certainly gave the heightened scrutiny called for by the Nollan case in its review of the supposed nexus between means and ends.

A federal court with a similarly critical eye could well reach the same result in reviewing mandatory set-asides under Mount Laurel and for a much more convincing reason. In Seawall Associates, the court was talking about theory—what was likely to happen if the SRO law were enforced. But in the case of mandatory set-asides, we have more than theory—we have actual results to examine. It has been observed for quite some time that the "wrong persons"—that is people who are neither poor nor minority—are getting the benefit of affordable housing built under mandatory set-aside programs. Under the Mount Laurel programs already constructed, the tendency is to give priority to persons who have some connection with the town such as residents of the town, persons employed in the town or by the town, and relatives of town residents. Lotteries are also used in some of the subdivisions usually after the persons having a priority have been taken care of. As William Tucker in his recent book The Excluded Americans notes concerning these Mount Laurel units:

Much to the consternation of housing advocates (and the quiet relief of suburban officials), these units have not fallen into the hands of the urban

117. Id. at 111-12, 554 N.Y.S.2d at 551, 542 N.E.2d.
118. See Ellickson, supra note 1, at 1178, where the author noted that "[t]he beneficiaries of inclusionary programs apparently include disproportionate numbers of both upwardly mobile young families and divorced women with children," and that "there can be no doubt that the great majority of the California families who have received inclusionary units have had income in the middle third of the state's income distribution." Id. at 1193.
119. AFFORDABLE HOUSING, supra note 76, at 38.
120. Id. at 37.1 and 37.2.
poor. Instead they have attracted what might be called 'subsidy hunters'—young couples, divorced single mothers, the elderly, and other middle-class people who are knowledgeable enough to take advantage of the system. In 1988, The New York Times reported: 'The first trickle of affordable homes built [under Mount Laurel] has not gone to the inner-city poor, even though the court held in 1975... that the poor in cities were entitled under the State constitution to the same housing opportunities in the suburbs as other economic classes.... With their meager incomes and weak credit ratings, [the poor] either cannot qualify for or afford a down-payment or closing costs, experts on the Mt. Laurel doctrine say.

'Instead, the homes, generally priced between $30,000 and 70,000, have been snapped up by others who qualify as low- and moderate-income buyers, most notably young professional families and divorced, single, and retired people.'

It should also be noted that the specially prepared empirical study of the results of the Mount Laurel cases indicates that minority occupancy of these units has been negligible. Therefore, opponents of mandatory set-asides can not only point to economic theory but to actual results to show that without compensation, there is a taking because there is no nexus between the means—the set-aside—and the ends—dispersion of the urban poor into various communities around the state. Mandatory set-asides of affordable housing in middle income developments should not survive such a means-ends scrutiny.

B. Subdivision Exactions—Nexus Between the Proposed Activity and the Public Need

In its opinion in Nollan, the Court also dealt with but dismissed the government's argument that the regulation passed another nexus test, the one traditionally used by state courts to determine the validity of subdivision exactions. Under various versions of that test, more fully described below, an exaction, required by local government of a subdividing developer, is invalid as a taking unless it can be shown that the developer's proposed new use in some way created a public need that the exaction is serving to fulfill. In the context of the Nollan case, one would have to show that the larger house sought by the Nollans would create an additional burden upon or need for public view that in turn justified the proposed easement condition.

The above rules as to subdivision exactions have direct relevance to the issue we are considering in this Article, for the reason that the predominant remedy under Mount Laurel has become the mandatory


122. The report says: "Many developments have very small minority populations and, within that minority population, even smaller numbers of black residents. At least three Mount Laurel developments appear to have no black residents; in some other developments the percentage of black homebuyers varies from 1% to 3%." Affordable Housing, supra note 76, at 69.
set-aside, itself a form of subdivision exaction. As noted earlier, the mandatory set-aside is designed to bring lower income persons into market-priced developments by exacting from the developer a requirement that he sell some units below cost to qualified lower income buyers (generally in return for allowing the developer some increased density in the subdivision.) It therefore would be useful to trace in some detail the history of subdivision exactions and how the courts have dealt with the issue of their constitutionality.

In colonial times, it became customary to take land for road building through property owned by individuals, without paying compensation if it was undeveloped property, but with compensation if it was already developed. The theory was that construction of roads, where there were none at all, was not a detriment but a benefit to the owner affected. But if the owner's land was developed with roads already in the area, and his valuable land was being taken for widening or extending roads into the lands of others, he ought to be compensated as he was suffering an overall loss from the new construction.

In the nineteenth century, subdividers began voluntarily to dedicate land to local government for roads and other public utilities such as sewer and water lines. Their purpose, of course, was not altruistic but rather to make the subdivision attractive to potential buyers, who ordinarily would not be interested in land without such facilities. The developers got other advantages as well, because when the city accepted the dedicated land, it became responsible for the future operation and maintenance of the facilities.

Since the 1920s and perhaps earlier, municipalities began to require the subdivider to dedicate land for streets and to surface them as well, in exchange for a permit to subdivide. In addition, the towns often required that the developer pay for on-site water and sewer systems. With the cities having the power under modern subdivision enabling statutes to either permit a desired subdivision or to forbid it, it was inevitable that some of them would exercise the power unfairly or even in an extortionate manner. In the early cases, the courts generally allowed the cities great latitude in deciding what exactions should be required, using the argument that subdivision was a mere privilege that could be withheld unless certain conditions were met.

123. F. Bosslman & N. Stroud, Legal Aspects of Development Exactions in Development Exactions 70 (J. Frank and R. Rhodes eds. 1987) [hereinafter Legal Aspects].
125. On the privilege theory, see, e.g., Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928). The court said: "In theory, at least, the owner of a subdivision voluntarily dedicates sufficient land for streets in return for the advantage and privilege of having his plat recorded. Unless he does so, the law gives him no right to have it recorded." Id. at 472, 217 N.W. at 59.

Occasionally, especially in the later cases, a court has, in egregious circum-
It should be noted that the subdivision exaction—requiring the developer to construct various capital improvements in exchange for the right to subdivide—was not a great departure from what had been done before to accomplish the construction of such facilities. Since colonial times, cities had been using as a financing device, the special assessment, in which abutting landowners were taxed to provide the wherewithal to build improvements that specially benefited them. Street paving and sewer construction were the most common improvements financed by this mechanism. If one thinks about the matter for just a moment, the relation between the special assessment and the subdivision exaction is obvious. Both require in the end that someone other than municipal government pay for capital improvements. In the case of the special assessment the owner of the land assessed bears the burden initially; and if that person happens to be the developer, he will try to pass the expense on to the ultimate consumer in the form of higher land costs. In the case of the subdivision exaction, the developer ordinarily bears its initial cost, and he will likewise try to pass that cost on to the consumer.

Financing construction of improvements through the use of the special assessment has fallen into comparative desuetude since the 1930s. That period was one of extreme financial difficulty for the general economy and for municipalities as well. Property taxes and special assessments for such improvements as streets and sewers became difficult to collect. After World War II, with the history of municipal insolvency of the 1930s behind them, many states turned to subdivision exactions to finance construction of improvements formerly handled by use of the special assessment. In addition to the traditional kinds of improvements such as streets and sewer lines, cities started to demand that the developers dedicate land for parks and schools and to contribute funds (called in lieu fees and impact fees) for the construction of on-site as well as off-site improvements.

stances, required the repayment to the developer of an exaction that it thought was unfairly extorted from him. See, e.g., West Park Ave., Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966). In that case, the city forbade the developer to use a billboard to advertise his development and threatened to withhold building permits unless he paid $300 per house toward a school building fund. The court held that the legislature had not authorized the charge and that the payment was not “voluntary” but rather extracted under the duress of official authority.

126. LEGAL ASPECTS, supra note 123, at 72.
128. R. ELICKSON & A. TARLOCK, supra note 124, at 738.
129. See Juergensmeyer & Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 FLA. ST. U.L. REV. 415 (1981). In the above article the authors discuss the difference between “in lieu fees” and “impact fees”. In the former, the fee is in lieu of a required dedication of land when such is not feasible,
The courts have responded to the growth of these subdivision exactions with a requirement that there be some relationship or nexus between the exaction and the needs caused by and benefits accruing to the subdivision from it. Three different approaches to this requirement have appeared in the cases since the 1940s. They are: (1) the reasonable relationship test; (2) the specifically and uniquely attributable test; and (3) the rational nexus test. Simply stated, the purpose of all three of these tests is to avoid putting a disproportionate burden of infrastructure construction on a land supplier, developer, or housing consumer, unless he has himself created the need sought to be solved by the exaction. In other words, the policy is to prevent discrimination against the newer residents of a town and owners of undeveloped land by government acting to assist its older residents, who are obviously in the political position of being able to mold its decisions and decision-making processes unfairly in their favor. Thus, in a sense, the subdivision exaction rule has equal protection as well as

for example, where there is not enough land in the subdivision to dedicate for a school. In that case, the subdivider is required to pay a fee instead of dedicating some land. The impact fee is similar but is used where dedication of land for the project is not appropriate because land is not really needed for it. As examples they cite sewer and water facilities which can service an entire municipality. In lieu fees are collected at the time subdivision approval is given by the town. Impact fees are collected at the time of issuance of building permits and are therefore usable where subdivision approval was given at a much earlier time, development was delayed, and new needs caused by the construction are now perceived.

In a dissenting opinion in Pennell v. City of San Jose, 485 U.S. 1 (1988), Justice Scalia took a similar position with respect to a rent control ordinance, under which a rent increase could be denied a landlord when the tenant would suffer economic hardship as a result. Arguing that the landlord had not caused the poverty of the tenant, he could not justify a program to help tenants "privately funded by those landlords who happen to have 'hardship' tenants."

Not every authority looks at these tests in the same way; some divide the cases differently. Thus, Professors Juergensmeyer and Blake see two lines of authority rather than three—the specifically and uniquely attributable test and the rational nexus test. In their taxonomy the reasonable relationship and rational nexus cases are lumped together in one category. They just regard some of the cases as requiring more exactitude in calculating needs and benefits than others. See Juergensmeyer & Blake, supra note 129, at 430-33. For a similar analysis, see Legal Aspects, supra note 123 at 73-81.

It is not the purpose of this Article to examine in detail the equal protection ramifications of the mandatory set-aside device. The main reason for this is that since the distinction between new and older residents is not a "suspect classification" calling for heightened scrutiny under the equal protection clause, any such review of the classification would be less stringent than under the takings heightened scrutiny standard of the Nollan case. But it is interesting that the New Jersey Supreme Court's Mount Laurel decisions, holding that inclusionary zon-
The loose reasonable relationship test was first applied in California in the leading case of *Ayres v. City of Los Angeles*, but more clearly articulated later in *Associated Home Builders v. City of Walnut Creek*. In the latter case, in answer to a developer challenge of exactions requiring dedication of lands or payment of fees in lieu thereof for park and recreational purposes, the California Supreme Court said that such "can be justified on the basis of a general public need for recreational facilities caused by present and future subdivisions." Under this relatively relaxed standard of review, it is very difficult to get a court to overturn an ordinance on nexus grounds, the tendency being to hold there is no taking where the court finds the proposed development is a contributing factor to the problem sought to be alleviated. On the other hand, in Illinois and a few other states, courts have on occasion followed the most rigid and demanding test. Under it, the need for the new facilities met by the exaction must be "specifically and uniquely attributable" to the subdivision. In addition, funds collected as an exaction must be used solely for the benefit is required by the equal protection clause because exclusionary zoning discriminates against low income groups, are themselves subject to equal protection attack because the judicially mandated inclusionary devices irrationally discriminate against new residents of the town.

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133. 34 Cal. 2d 31, 207 P.2d 1 (1949).
134. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. (1971).
135. *Id.* at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634 (1971).
137. *See also* in this connection, the famous Wisconsin case of *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) where the court held it was sufficient if there was a "reasonable connection" between the need for the new facilities sought and the growth pressures created by the subdivision. According to the court:

> In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or a school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, the municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of the subdividers be utilized for school, park and recreational purposes for the benefit of such influx. In the absence of contravening evidence this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider.

*Id.* at 447. Thus did the court reject the earlier, strict, "specifically and uniquely attributable" test of the Illinois court.

Also following this approach was *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1965).

fit of the subdivision charged. It seems quite clear that this approach has not garnered widespread support, and is probably not strictly applied even in Illinois itself.

The third approach to this problem has become known as the rational nexus test. In the leading case of *Longridge Builders, Inc. v. Planning Board of Princeton*, the New Jersey court set a standard somewhere between the laxity of the reasonable relationship test and stringency of the specifically and uniquely attributable test. In that case the court said: "It is clear to us that . . . the subdivider [can] be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision" [emphasis added]. The distinction between the reasonable relationship and rational nexus approaches lies in the latter's requirement of a reasonably precise accounting of both the city's additional needs attributable to the new subdivision as well as the benefits accruing to it from the exaction. If as a result of this calculation, the court finds that the subdivision is bearing more than its fair share of the costs of the new facilities—either because the exaction is out of proportion to the additional burden caused by, or benefits accruing to, the subdivision—then it will strike the exaction down as an unconstitutional taking.

The courts of Utah and New Jersey in particular have stated

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142. *Id.* at 350, 245 A.2d at 337.

143. The New Jersey Supreme Court has recently described the rational nexus test as requiring a "strong, almost but-for, causal nexus" between the development and the creation of the need, while the reasonable relationship test requires only an "indirect and general impact" on the need. *Holmdel Builders Ass'n v. Township of Holmdel, 121 N.J. 550, 583 A.2d 277 (1990).* In that case, the court, without stating any reason, announced that it would apply the reasonable relationship test to inclusionary zoning problems instead of the rational nexus test it has traditionally applied to other subdivision exactions.

144. Lafferty v. Payson City, 642 P.2d 376 (Utah 1982); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981). In *Banberry* the court said:

Therefore, where the fee charged a new subdivision or a new property hookup exceeds the direct costs incident thereto (as a means of sharing the costs of common facilities), the excess must survive measure against the standard that the total costs fall equitably upon those who are similarly situated and in a just proportion to benefits conferred. Stated otherwise, to comply with the standard of reasonableness, a municipal fee related to services like water and sewer must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred.

To determine the equitable share of the capital costs to be borne by
in some detail the factors that must be considered by the courts to determine whether the burden is being unconstitutionally applied. Those jurisdictions have not been as detailed in their requirements of calculations concerning benefit, but it is clear that they will insist upon a reasonable benefit considering the amount of the exaction.\footnote{146}

Among the most important factors the municipality should consider in determining the relative burden already borne and yet to be borne by newly developed properties and other properties are the following, suggested by the well-reasoned authorities cited below: (1) the cost of existing capital facilities; (2) the manner of financing existing capital facilities (such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants); (3) the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities (by such means as user charges, special assessments, or payment from the proceeds of general taxes); (4) the relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future; (5) the extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or owners (by contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed development) that have been provided by the municipality and financed through general taxation or other means (apart from user charges) in other parts of the municipality; (6) extraordinary costs, if any, in servicing the newly developed properties; and (7) the time-price differential inherent in fair comparisons of amounts paid at different times. [citing cases]

\textit{Id.} at 903-04. In an earlier case, the Utah court seemed to follow the less demanding reasonable relationship approach. Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980).


\footnote{146} \textit{See, e.g.,} Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 905 (Utah 1981) (citations omitted):

\textit{[The amount of such exactions or fees should be such that the burden of providing these municipal services 'falls equitably upon those who are similarly situated and in a just proportion to benefits conferred.' The measurement of 'benefits conferred' may have a more significant impact on the reasonableness of park fees than on water connection fees. The central facilities that support water and sewer service would generally confer the same benefits in every part of the municipality, but the benefits conferred by recreational, flood control, or other dispersed resources may be measurably different in different parts of the municipality. Park improvement fees should therefore be fixed so as to be equitable in light of the relative benefits conferred on, as well as the relative burdens previously borne and yet to be borne by the newly developed properties in comparison with the other properties in the municipality as a whole. The fees in question should not exceed the amount sufficient to equalize the relative benefits and burdens of newly developed and other properties.}
The insistence upon a reasonable benefit in return for an exaction\(^\text{147}\) is fully justified, for there is no point in requiring that the subdivision increase the need for new facilities, if the exaction is not used to serve that need. Where the exaction is in the form of facilities to be constructed by the developer in the subdivision, it is usually clear that the benefit requirement is met. But where the city is requiring the dedication of land to be "banked" for streets that might never be constructed, it has been held that this is an unconstitutional taking rather than a valid exercise of the police power.\(^\text{148}\) And where the exaction is in the form of money payments—as many of them are—a detailed examination of how the funds are utilized is obviously called for. Some courts have required the earmarking of the funds for the purported purpose of the exaction,\(^\text{149}\) while others have required that there be a definite plan to build the projected facilities.\(^\text{150}\)

Let us look at mandatory set-aside from the standpoint of the above cases on subdivision exactions, that require a nexus between the exaction and the needs created by and benefits accruing to the subdivision. Under any of the three formulations, to sustain the constitutionality of the set-aside, one would have to show that construction of new housing in a subdivision itself creates the need for more housing for poor and moderate income persons.\(^\text{151}\) In my view it is well-nigh im-

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A city may not, under the guise of the police power, require a property owner to dedicate private property for some future public purpose as a condition of obtaining a building permit without paying the property owner just compensation, when the requested dedicated property is to be placed in a land bank for future use by the city and such future use is not directly occasioned by the construction sought to be permitted.

Id. at 248, 292 N.W.2d at 302. See also Hart Realty Co. v. Wright Township Bd. of Supervisors, 73 Pa. Commw. 117, 457 A.2d 240, where the court held it was an "abuse of discretion" to require the construction on premises of a capped sewer system to be connected to a municipal sewer system where there were no plans to extend the latter to the area of the subdivision involved.

149. See, e.g., Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976); Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983).

150. See, e.g., J.E.D. Assocs. v. Town of Atkinson, 121 N.H. 551, 432 A.2d 12 (1981). See also City of Fayetteville v. IBI, Inc, 280 Ark. 484, 659 S.W.2d 505 (1983), where the lower court reached the result as a matter of constitutional law but the supreme court reached it as a matter of statutory interpretation.

151. In Holmdel Builders Ass'n v. Township of Holmdel, 121 N.J. 550, 583 A.2d 277 (1990), the New Jersey Supreme Court recently announced that it would apply the reasonable relationship test to inclusionary zoning problems instead of the rational nexus test it has traditionally applied to other subdivision exactions. In
possible to do that. Of course one could argue that a new subdivision of middle income housing creates the need for dwellings for those lower income persons who will be needed to service the subdivision.\textsuperscript{152} But that clearly overlooks the fact that the persons who are moving into the new subdivision will be vacating other housing which will then "filter down" to the lower income families\textsuperscript{153}. Certainly, the fact that one can posit an absurd economic argument to support the validity of a regulation should not be sufficient to sustain it; it should have at least some surface plausibility. Otherwise there would be no point in courts conducting nexus reviews of legislation at all.

Much of the discussion of the affordable housing problem overlooks this filtering down process. It seems as if advocates of affordable housing believe that the only way to provide more housing for the poor is to build it. Historically, that just has not been the case. As Messrs. Lansing, Clifton and Morgan stated in their empirical study of housing markets in the United States:

\begin{quote}
The working of the market for housing is such that the poor will benefit from any actions which increase the supply in the total market. There is a natural tendency for someone who is concerned with the provision of housing for the poor to take a direct approach. To provide housing for people, hand them the key to the door of a home! The evidence in this research is that the direct approach is not the only approach which will be effective. The housing market (for whites) operates as a single market. Any policy which shifts either the demand curve or the supply curve in the market will affect the price in the total market.\textsuperscript{154}
\end{quote}

This country has always housed its poor citizens through the construction of housing for more affluent families, whose old housing filters down to the poor. Thus it is clear that the construction of new middle income housing does not create the need for low income housing but rather contributes to meeting that need. In addition, most em-

\begin{footnotesize}
\textsuperscript{152} See Kleven, \textit{supra} note 14, at 1495.
\textsuperscript{153} For a discussion of the filtering down process, see W. TUCKER, \textit{supra} note 90, at 83-89; Ellickson, \textit{supra} note 1, at 1184-86. The classic empirical study on the subject of filtering down is J. LANSING, C. CLIFTON, & J. MORGAN, \textit{NEW HOMES AND POOR PEOPLE} (1969).
\textsuperscript{154} \textit{NEW HOMES AND POOR PEOPLE}, \textit{supra} note 153, at 68. The authors found one flaw in the operation of the market, viz., that blacks were underrepresented in the sequence of moves resulting from construction of new housing as compared to their white counterparts of the same income, \textit{id.} at 49-56, and that "measures which increase the supply of housing in the market as a whole influence the market for housing for Negroes only in an attenuated form." \textit{id.} at 68. Thus at the time of the study, poor blacks benefited from construction of new middle income housing but not as much as poor whites did. Even assuming that this situation continues today in spite of fair housing legislation, still one could not argue that construction of new middle income housing actually creates a need for more housing for any group.
\end{footnotesize}
employees in this country are willing to and do commute to work.\(^{155}\) Construction of housing built expressly for persons who service a new subdivision is no more necessary than would be construction of proximitous places of employment for the subdivision’s commuting residents.\(^{156}\)

In summary, it can therefore be said that, since under any of the three formulations of the tests for the constitutionality of subdivision exactions, one must show that the new development exacerbates the problem of housing for the poor—something that cannot fairly be shown—it should be held that the mandatory set-aside is unconstitutional as a taking, unless compensation is paid to the developer.\(^{157}\)


\(^{156}\) A somewhat closer question is presented when a fee is assessed upon nonresidential developers to fund support for low cost housing, a so-called linkage ordinance. It has been argued that construction of commercial buildings creates the need for affordable housing, because additional workers are necessarily brought into the region to staff the new facilities. See, e.g., Kayden & Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 *Law & Contemp. Probs.* 127 (1987). It is not clear, however, why private enterprise will not supply the needed additional housing at reasonable cost, as long as city authorities do not artificially limit the amount of land available for residential purposes by anti-growth zoning ordinances. The same filtering down process to lower income persons would then occur. In the usual subdivision exaction case, the need created by the subdivision (e.g., for parks and schools) cannot be satisfied by the private market and there is greater justification to impose the obligation on the builders and consumers of the housing.

In addition to the need requirement, there is also the requisite under the rational nexus test that the exaction benefit the nonresidential facility burdened with the exaction. It seems quite tenuous to argue that construction of affordable housing so directly benefits that facility.

\(^{157}\) In a recent case the Appellate Division of the New Jersey Superior Court held that mandatory set-asides “must be accompanied by density bonuses in order to compensate the developer for the cost of constructing the *Mount Laurel* housing. Without such benefits, developers have no economic incentive to build such housing, and thus no ‘realistic opportunity’ is offered by the ordinance to satisfy the municipalities’ *Mount Laurel* obligation.” Holmdel Builders Ass’n v. Township of Holmdel, 232 N.J. Super. 182, 196-97, 556 A.2d 1236, 1243 (App. Div. 1989). The court did not specifically hold that an uncompensated mandatory set-aside would be a taking but the thrust of the argument requiring compensation probably should be read to make that case.

However, on appeal, the New Jersey Supreme Court, while not reaching the question, implied that when presented therewith, it would hold that such was not a taking.

Since initial authority for promulgating development-fee regulations lies with COAH, we do not reach the question of when, if ever, compensatory benefits might have to accompany mandatory development fees. As long as the measures promulgated are not confiscatory and do not result in an inadequate return on investment, there would be no constitutional injury. We leave it to COAH to determine initially the level at which fees might become confiscatory.
Density Bonuses as Compensation

If, as we have argued here, under either the Nollan approach or the subdivision exaction approach, mandatory set-asides would be invalid as takings unless compensation is paid, there still is the question of whether the density bonuses that often accompany set-asides can and do provide adequate compensation to the builders and their customers.

Consider first the matter of adequacy of compensation. Presumably one would measure that by comparing the total net revenues the developer would have had without the set-aside with those he actually received with it. A study indicates that even where there is a density bonus of one additional unit for every affordable unit, a developer would lose more on the inclusionary units than he would gain from the density bonus and therefore there would be a loss in net revenues as a result.158 However, there is also evidence that many builders deem density bonuses adequate compensation.159 Perhaps this is because they are adequate, or perhaps it is because the builders feel that in a tight housing market they can pass the increased costs on to the consumers of regularly priced housing and/or to the landowners who supply the land.

Of course, if the density bonus does actually fully compensate the builder for any losses he incurs in selling units below cost, then neither he nor his customers for regularly priced housing would be directly paying for the subsidy and there would be no taking. It

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159. It seems that builders are desirous of building with density bonuses as compensation for a mandatory set-aside. See N.Y. Times, Jan. 6, 1989, § B, at 1:

New Jersey’s Mount Laurel housing plan is probably the most painless way to build low- and moderate-income housing in suburban America. Developed after 12 years of court battles, the state plan sets a quota of subsidized units for each suburb. But it doesn’t cost the suburbs one cent. The builder pays for it. And builders love it. They make more profit.

How? They get zoning variances to build more units per acre. For example, Mahwah used to allow six condominiums per acre. To meet its subsidized goal it now allows builders 14 units per acre. Eleven selling at market rate (typically $150,000) and three subsidized (about $50,000). And the builders have a financial incentive to make the units nice: otherwise the regular units won’t sell.

See also N.Y. Times, Apr. 2, 1989, § 10, at 9 which describes a builder who paid Warren Township $3 million to have its 365 acres rezoned from acre and a half to one acre zoning. That works out to an additional 122 lots at a cost of approximately $24,600 per lot. The money was used to fund a regional contribution agreement to enable the building of affordable housing in New Brunswick. And in Scotch Plains a builder paid the city $35,000 per additional lot to get the city to rezone a 75 acre parcel from one acre to one-third acre zoning.
should be noted, however, that the reason this is true is that restrictive low density zoning reduces the value per acre of land zoned for single family housing. First the government adversely affects the value of land suitable for development by its restrictive zoning; then it says that it will increase the value of that land by lifting those restrictions somewhat if the builder-landowner sells some of the housing he constructs at an artificially low price. It is clear that if the city does this all in one fell swoop in order to force the builder to subsidize the poor, the courts will strike the measures down as a sham.160 But should the result be any different just because the regulations were enacted over a period of years? If the low density zoning was necessary to protect the health, welfare, and safety of the people at the time it was enacted, (and, after all, that is the purported justification for restrictive zoning) why is low density zoning no longer necessary to achieve those ends, now that government has decided that affordable housing at higher densities is the new desideratum? The real problem is that low density zoning itself is on very shaky constitutional ground, though the courts have long accepted the pretexts offered in justification of it.161

As long as courts continue to do that, however, there is little reason to believe that mandatory set-asides accompanied by adequate density bonuses will be invalidated.

Now suppose that the density bonus offered by the city does not fairly compensate the builder for the losses he incurs in the sale of affordable housing. As mentioned above,162 if he cannot pass the increased costs on to the consumers of regularly priced housing because the town in question has no unique characteristics, he will try to pass them on to the owners of undeveloped land in the area. In such case, it is those owners who would have the takings claim. And if the town has unique characteristics, the developer will try to pass the increased costs on to the consumer as well as the landowner. There both such groups would have a legitimate takings argument. And these results make eminently good sense. It should be remembered that the purpose of the rules requiring a nexus between the exaction and the needs created by and benefits accruing to a subdivision, is to avoid putting an unfairly disproportionate burden of infrastructure construction on the parties not responsible for creating the need for it. Imposing the costs of lower income subsidies upon the suppliers of land or upon the new residents of the town would seem to violate the


162. See supra text accompanying notes 87-91.
fundamental principle that a few persons, who have not caused a societal problem, but who are fortuitously in a position to bear the cost of ameliorating it, should not be forced to do so, where those costs should fairly be borne by the citizens of the town in general. In the words of the U.S. Supreme Court, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Thus, both because the developer's proposed new use in no way creates a public need that the mandatory set-aside is serving to fulfill, and because the set-aside does not achieve its supposed purpose of dispersal of the poor, a mandatory set-aside ordinance not providing adequate compensation should be voided as a taking.

VII. AN OVERALL VIEW

The courts of this country have been presented with a terrible dilemma, and not of their own making. The legislatures, state and municipal, have (albeit with court approval) saddled the system of housing distribution with a regulatory structure so complex, onerous, and costly that the result is housing that is too expensive for most Americans who have not already gotten on the escalator. Residential rent control, enacted in many cities along both coasts, has the ostensible purpose of protecting the public from rent gouging by "monopolistic landlords" , though no one has satisfactorily explained how hundreds of landlords in a city could possibly have monopoly power. Rather, for obvious reasons, rent control has had a terribly inhibiting effect upon the construction of new rental housing, benefiting those, almost invariably in the middle class, who happen to be in a rental when the regulations are instituted, and in the process harming everyone else in society. Housing shortages, in the form of a low vacancy rate, are almost universally used as a justification for rent control, but the fact is that the shortages do not precede rent control but rather follow almost inexorably from its introduction. The fact that

164. The following is typical: "Rent control begins with the premise that rents are being unfairly inflated as a result of failure in the free operation of the rental housing market—e.g., housing shortages, monopoly power, etc." Troy Hills Village v. Township Council, 68 N.J. 604, 623, 350 A.2d 34, 44 (1975).
165. William Tucker studied the relationship between rent control and vacancy rates in his recent book. He found that the nine cities that had rent control out of the fifty major cities studied indeed had the lowest vacancy rates. He also found that no rent control city had a vacancy rate over 3% and all but one non-rent control city had vacancy rates over 4% and ranging as high as 18%. W. TUCKER, supra note 90, at 63. But more importantly he found that the cities that imposed rent control in the 1970s had a normal vacancy rate in the 1970 census and that "[i]n
rent control exists in almost every New Jersey community has no doubt contributed to the shortage of housing for the poor in that state.

Zoning, whose supposed purpose is to protect the health, welfare, safety, and morals of society\textsuperscript{166} has very little to do with all that. The Law of Unintended Consequences has operated here as well. Zoning's effects (and indeed the real goals of its strongest advocates in each community) have been two: first, the protection of the community's politically entrenched middle class from incursions by other "less desirable" persons, or, for that matter, by "too many" of the same class; and, second, the protection of the community's politically entrenched business people from too much competition. The result of the first above mentioned factors is that in the highly populated parts of the country, where exclusionary zoning is the norm, the amount of land available for construction is sharply limited, in turn causing rapidly escalating prices for land and, therefore, new housing.\textsuperscript{167} With higher prices for new housing, there is less demand, less is built, shortages

\begin{quote}
\textit{every city where rent control has been adopted, the regulatory action has preceded low vacancy rates.}" \textit{Id.} at 71.
\end{quote}

\begin{flushleft}
166. The statutory provisions purporting to state the purposes of zoning were borrowed by most of the state legislatures from a United States Department of Commerce model zoning enabling act. It provided as follows:

\begin{quote}
Sec. 1. Grant of Power. For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of a lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.
\end{quote}

\begin{quote}
Sec. 3. Purposes in View. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.
\end{quote}

\textbf{UNITED STATES DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (1926).}

167. The severity of the problem is fully explored in \textit{W. Tucker, supra} note 90. He describes a \textit{Newark Star-Ledger} study as follows:

\begin{quote}
In a nine-part study of housing costs undertaken in 1989 by the \textit{Newark Star-Ledger}, the newspaper concluded that 'it is not the value of labor or building materials that are pushing the average price of homes beyond many, but rather the uncontrolled growth of a massive and costly system of regulation and bureaucracy, much of which has been found to be wasteful.' The \textit{Star-Ledger} estimated that as much as 35 percent of the cost of a new house in New Jersey is now due to regulation.

East Coast developer Ara K. Hovnanian told \textit{The Star-Ledger} he can build a four-bedroom house in any major North Carolina market for $95,000, getting through regulatory approval in three months. In New Jersey, the same house will cost $230,000 and take three years of regula-
ensue, and prices for existing housing inexorably go up under the pressure of increasing population.\textsuperscript{168} The political support for zoning is explainable by the fact that more than half the population owns their own homes and rising prices are more than palatable to those persons.

The courts in the more populated parts of the country are thus faced with a housing "shortage" that has been created in great part by market-frustrating regulation. Perhaps, if it were back in 1926 and the U.S. Supreme Court had it to do all over again, the Court, blessed with the knowledge that we have today, would strike \textit{all} zoning down as a taking instead of upholding it as it did;\textsuperscript{169} but it is probably way too late for that. The courts today are seized with the problem of dealing with the ensuing mess. It is unfortunate that the New Jersey Supreme Court and many of the towns in the country have adopted self-defeating \textit{inclusionary} zoning measures to solve the problems created in great part by \textit{exclusionary} zoning measures. Maybe the best that we can hope for is that the federal courts will, under the evolving rules concerning takings, strike these latest measures down, as making a bad situation worse. In the meantime, the \textit{Mount Laurel} cases serve to teach us all, once again, the lesson that excessive arrogation of power to the judiciary, under the guise of constitutional interpretation, is itself a dangerous tendency in a representative democracy.

\textsuperscript{168} Marin County, across the Golden Gate Bridge from San Francisco, is the perfect example of what exclusionary regulation can "accomplish." In 1970, the median home in the county cost \$33,000, within a few thousand dollars of the national median. The residents of the county used the following devices over the ensuing years to block further home construction: (1) induced the federal government to purchase a large portion of the seashore area for use as a national seashore; (2) blocked freeway access to the new national seashore making the area as a practical matter accessible only to county residents using local roads; (3) passed a law forbidding farmers from selling off parcels of less than 60 acres for home construction purposes; (4) blocked acquisition of new sources of water to prevent additional development; (5) some municipalities of the county passed ordinances requiring a minimum 20 acre lot to build a home. The result of all this is that Marin County has the highest housing prices in the country, the median price of a home in 1990 being \$224,000.

\textsuperscript{169} City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).