

UL v CA

Expert Report

General 12/1983

on Mount Laurel II Issues
prepared by Alan Malach.

pgs. 93

~~includes 5 handwritten pages~~

~~pgs. 98~~

CA 002268E

EXPERT REPORT

on

MOUNT LAUREL II ISSUES

in

URBAN LEAGUE OF GREATER NEW BRUNSWICK

v.

BOROUGH OF CARERET, et al.

Prepared by
Alan Mallach
Roosevelt, New Jersey
December, 1983

Expert for Urban League plaintiffs

TABLE OF CONTENTS

Introduction..... 1

I. Fair Share Housing Allocation..... 2

 A. Proposed Housing Allocation Plan..... 2

 B. Discussion of Fair Share Allocation
 Report Submitted to the Court.....26

II. Standards for the Provision of Low and
Moderate Income Housing Pursuant to the
New Jersey Supreme Court Mt. Laurel II
Decision.....35

 A. Mt. Laurel II Holdings.....35

 B. General Development Standards, and
 Standards for Specific Housing
 Types, Under a Mount Laurel II
 Zoning Ordinance.....41

Appendix A - Affordability Standards for Low
and Moderate Income Housing Under
Mount Laurel II.....A-1

Appendix B - Review of Township Ordinances.....B-1

INDEX OF TABLES

Low and Moderate Income Region Renter
Households Spending More than 25%
of Gross Income for Rent 1980..... 9

Low and Moderate Income County Renter
Households Spending More than 25% of
Gross Income for Rent 1980.....10

Projection of Household Increase by
County to 1990.....13

Allocation Factors for Middlesex County
Municipalities.....17

Distribution of Indigenous Housing Needs
by County and Re-allocation of Indigenous.....22
Needs

Fair Share Housing Allocations for Middlesex
County Municipalities.....25

REPORT ON MT. LAUREL II ISSUES ON BEHALF OF URBAN LEAGUE
PLAINTIFFS IN URBAN LEAGUE OF GREATER NEW BRUNSWICK V.
BOROUGH OF CARTERET ET AL.

ALAN MALLACH
DECEMBER 1983

INTRODUCTION

The purpose of this report is to present our position in the Urban League litigation with regard first, to the issues of region and fair share; and second, to the issue of ordinance compliance with the standards set forth by the New Jersey Supreme Court in the Mt. Laurel II decision. With regard to the area of region and fair share, the report is in two parts. The first presents the region and the fair share allocation plan we propose, and the second provides a review and comment on the fair share housing allocation plan prepared by Carla Lerman, the expert appointed by the court. With regard to ordinance compliance, the report sets forth standards or guidelines for the development of an ordinance in keeping with the Mt. Laurel II standards. These guidelines include both general standards for development, specific provisions to govern specific development types, and areas in which a municipality can act affirmatively in support of low and moderate income housing development.

An appendix in which the ordinance provisions of individual municipalities are discussed is added to the report. With regard to this appendix, note that Monroe and South Plainfield have not been included, since they have not

presented any ordinance revisions or proposed compliance activities to the plaintiffs. Neither the fair share analysis nor appendix contain information regarding North Brunswick or Old Bridge, the two townships which did not appeal the judgments of unconstitutionality or obtain a judgment of compliance. A supplemental report concerning these two townships will be forthcoming shortly. A further appendix deals with the issue of affordability, as it affects low and moderate income housing development consistent with Mount Laurel II.

I. FAIR SHARE HOUSING ALLOCATION

A. PROPOSED HOUSING ALLOCATION PLAN

A fair share housing allocation plan consists of four general elements: delineation of a region, determination of lower income housing need within that region, identification of allocation factors, and application of a method of using those factors to allocate that need across the municipalities having fair share housing responsibilities within the region. Each of these is discussed in turn below.

(1) Delineation of a Region

The appropriate region for fair share housing allocation to Middlesex County municipalities is the eight county region which largely represents the New Jersey portion of the larger New York metropolitan area. This is a region made up of Bergen, Essex, Hudson, Middlesex, Morris,

Passaic, Somerset and Union Counties. Below is a summary of the reasons why this region is considered appropriate: ^{1/}

a. Consistency: A clearly stated objective in Mt. Laurel II is to arrive at a consistent regional pattern for each section of the state, and, ultimately, for the state as a whole, in order to obviate the need to define region and regional need separately in each case (at 254-255). While the particular region we propose may not be the only region meeting this test, the standard clearly excludes any region that has been tailored to the circumstances of a particular municipality, rather than on the basis of broad regional planning criteria. A region based on a 'journey to work' radius around a particular municipality would be intrinsically in violation of this standard, and would result in 567 separate, unique, mutually exclusive, regions around the state.

b. Scale: A region must be large enough, and diverse enough to provide both that the full extent of lower income housing need is identified, and can be satisfied

^{1/} Also see the discussion on region in Clarke & Caton, Mahwah Township Fair Share Housing Report, July 1983 (prepared for the court in the Mahwah litigation), and Abeles Schwartz & Associates, A Fair Share Housing Allocation for Ten Municipalities in Morris County, October, 1983 (prepared for the New Jersey Department of the Public Advocate). Both of these studies arrived at the same conclusion with regard to region as is presented here.

within the region. Such a standard requires a region in which there is a balance of counties in which needs exceed resources (Essex, Hudson, Passaic, and possibly Union), and in which resources exceed needs (Middlesex, Somerset, Morris, and Bergen). It represents an area in which the housing needs of northeastern New Jersey can potentially be solved.

c. Housing Market Area: As the court stated in Mt. Laurel II, accepting a position initially set forth in Madison, the region is the area "from which the prospective population of the municipality would substantially be drawn, in the absence of exclusionary zoning". The prospective population at issue is, in essence, the population of the core - the area in which need for lower income housing exceeds the means of providing it. All of the counties in the eight-county region relate to a common core area, or a common area generating lower income housing need. Although it is true that Mahwah and Cranbury may otherwise have little relationship to each other, they share a common relationship to the common core.

d. Regional Planning: For similar reasons, these counties have been treated as a region by regional planning agencies, and by the state. They make up the region, less its 'outer ring' defined by the Regional Plan Association; they are treated as a common Labor Market Area by the New Jersey Department of Labor; and, with the

addition of Monmouth County, ^{2/} are treated as a region by the former Tri-State Regional Planning Commission. All of these definitions are a reflection of a common pattern of regional relationships, which is reflected in the close inter-relationships between housing, employment, and transportation throughout the region, a region characterized by growth corridors radiating outward from a central core. It is interesting to note that the only significant

2/ The status of Monmouth County is ambiguous. Clearly, part of the County is within the northeastern New Jersey region, and affected by the same factors that we have noted. That part, however, is arguably a modest part of the county, in contrast to the eight counties which are clearly metropolitan in full or in large part. The northwestern New Jersey regional sector of Monmouth County, under the SDGP, is limited to two corridors, along Route 9 and the Garden State Parkway. Substantial parts of the county are in an agricultural area (Western Monmouth), a limited growth area, and the shore region, which is subject to other than strictly regional pressures. These 'non-regional' elements may add up to 2/3 of the county or more. It is possible as well that small parts of Hunterdon and Warren counties are also linked to the region. In this case, however, the overwhelming majority of the land area in both counties is outside the growth area, and therefore of little or no effect on the fair share question. Finally, Mercer County, although linked in part to the region (particularly the Princeton area), is as strongly linked to the southern part of the state and to Philadelphia; when major interstate regions were delineated in the 1960's, Mercer County was placed in the Delaware Valley, rather than the Tristate region. Because clarity dictates that a region be defined by counties, rather than by municipalities or other fine-grain measures, it seems preferable to exclude rather than include these counties, as was done by the Department of Community Affairs in their Housing Allocation Report.

departure from this radial pattern, which is the development of I-287 as a major employment center since the end of the 1960's, has had the effect of linking Middlesex, Morris, and Somerset Counties into a single whole, with Bergen County likely to be added at such time as the last link of I-287 is completed.

The above is but a short summary, but is, in our judgment, compelling. It is our opinion that the proposed eight-county region is clearly the most readily supportable region for fair share housing allocation, both from the specific standpoint of Mt. Laurel II as well as on the basis of general planning and housing development criteria.

(2) Determination of Housing Needs

The proposed allocation process distinguishes between two categories of need. Present Need is that need which is present today; i.e., lower income households living in housing that is inadequate, for any of a number of reasons. This is, at least initially, the same as indigenous need, as defined in Mt. Laurel II. The terms will be distinguished in the allocation procedure, however, since at least some indigenous need in certain core communities will be reallocated to other communities. Prospective Need is that need which is triggered by the ongoing process of household formation or loss of existing housing and will come into being in the future.

Both need categories are divided in turn between low and moderate income households, as defined in the Mt. Laurel II decision. Low income households are, then, those earning between 0 and 50% of the region's median household income; and moderate income households are those earning between 50% and 80% of the region's median income. While the actual income figures vary over time, the percentage of low and moderate income households of the total population, in the absence of major economic upheaval, varies little, if at all.

a. Present Need: Present housing need represents low and moderate income households living in severely substandard housing conditions. In lieu of a single indicator of such conditions, present need has been derived from the sum of three categories measured and reported in the 1980 Census of Housing:

- . Plumbing: Units lacking complete facilities for the exclusive use of the household;
- . Heating: Units heated only by room heaters without flue (space heaters), or completely without heat; and
- . Overcrowded: Units with more than 1.1 persons per room

A study by the Tri-state Regional Planning Commission established that 82% of the households experiencing such living conditions are low and moderate income households. ^{3/} With

^{3/} Tristate Regional Commission, People, Dwellings, and Neighborhoods, May 1978, P. 15

little analysis, it is possible effectively to eliminate overlap from the above categories. ^{4/} Based on that analysis, total present housing need for the eight county region is as follows:

Deficient Plumbing	30,135
Deficient Heating	32,922
<u>Overcrowded</u>	<u>56,626</u>
ALL DEFICIENT UNITS	119,683
<u>Low and moderate income percentage</u>	x .82
PRESENT HOUSING NEED	<u>98,140</u>

It should be stressed that by defining present need as above, we are not reflecting the full scope of lower income housing needs. First, not all categories of substandard housing are included. Structural deficiencies serious enough to prevent rehabilitation may occur in buildings with complete plumbing and heating systems; unfortunately, no reliable data on such conditions are available (it is rare that units are found without plumbing or heating that do not have additional deficiencies). Thus, this is a very conservative estimate.

^{4/} The plumbing and overcrowding categories are presented in the Census tabulations exclusive of overlap with each other. With regard to heating, the Census provides a tabulation for the number of units lacking central heating that eliminates overlap between that category and units overcrowded or lacking plumbing (STF-3, Table XII, No. 35). This category includes room units with flues; e.g., wood or coal stoves, which may be considered adequate. A separate breakdown of heating equipment in detail (STF-3, Table X, No. 17) is provided, from which the heating-deficient units as a percentage of all units lacking central heating, can be determined. This percentage is then applied to the total from Table XII No. 35, thus providing a reliable estimate of heating-deficient units from which overlap with other deficiency categories has been eliminated.

Second, for every lower income household living in inadequate housing as defined above, roughly two are living in housing that is adequate, but for which they are spending more than 25% of their gross income. This is a need as real as the needs of households living in units with inadequate plumbing or heating. A table illustrating the extent of financial housing need is given below. It was determined, however, that this need could arguably be considered less appropriately met through construction of new units than was the case with physical housing needs; i.e., the units

TABLE I

 LOW AND MODERATE INCOME REGION RENTER HOUSEHOLDS SPENDING MORE THAN 25% OF GROSS INCOME FOR RENT 1980

	LOW	MODERATE
Bergen	23,770	11,498
Essex	63,476	14,501
Hudson	49,038	8,448
Middlesex	16,173	7,641
Morris	6,200	4,628
Passaic	25,320	6,456
Somerset	3,473	2,089
Union	19,309	7,325
REGION	206,759	62,586

269,345

SOURCE: U.S. Census of Housing (STF-3, Table IX, No. 30). Since the income information in this table was presented in ranges (\$0 to \$4,999, \$5,000 to \$9,999, etc., etc.) the range of \$0 to \$9,999 was used as a equivalent of low income, and the range of \$10,000 to \$14,999 as the equivalent of moderate income. These closely approximate 0 to 50%, and 50% to 80% of median income in the region, as of 1980. Note also that these numbers include some overlap with housing deficiency categories discussed previously.

associated with financial need do not need replacement, but the families living in them need either increased income or less expensive housing accommodations. Since our intent is to provide for a conservative fair share allocation, and since there is at least some possibility that programs such as housing allowances will be available to meet some of the financial housing need in place, we did not include this need in calculations for allocation within the region. It does represent, however, a significant component of indigenous need.

As an indigenous need category, the number of households living in financial need, although in otherwise sound housing, should be addressed by each of the seven Middlesex County defendant municipalities. If adequate

TABLE II

 LOW AND MODERATE INCOME COUNTY RENTER HOUSEHOLDS SPENDING MORE THAN 25% OF GROSS INCOME FOR RENT 1980

	LOW	MODERATE	TOTAL	TOTAL LESS POTENTIAL OVERLAP *
Cranbury	33	18	51	31
East Brunswick	255	245	500	290
Monroe	40	19	59	-0-
Piscataway	877	513	1,400	1,048
Plainsboro	246	389	635	587
South Brunswick	172	126	298	133
South Plainfield	95	82	177	33

* Potential overlap assumes all substandard units are included within total of units in which lower income households spend in excess of 25% of income for shelter.

SOURCE: See preceding table.

subsidies, from Section 8 existing housing programs, welfare programs, future housing allowance programs, etc., are available, this need may be potentially met without new construction. If, however, such subsidies are not available, this need may have to be met by development of lower income housing. However it may be met, it is a part of each municipality's responsibility to its citizens to address this problem as directly as it must address those problems for which new housing units are clearly dictated. Table II presents the relevant data for each of the seven communities.

b. Prospective Need: Prospective need is the number of units needed to provide for the increment in lower income households projected to 1990. This period was specified in Judge Serpentelli's letter of July 25, 1983. 1990 is appropriate since it is consistent with the 6 year period of 'repose' provided for by Mt. Laurel II, as well as the 6 year period for re-evaluation of municipal planning under the Municipal Land Use Law. It also represents, from a general housing perspective, a reasonable period for development to be planned and come to fruition. In order to determine prospective need, three elements must be identified, and combined:

1. The number of added households: We have applied, with regard to population projections, the average of the two 'preferred' projections issued in July 1983 by

the New Jersey Office of Demographic and Economic Analysis (ODEA). This projection indicates a pattern of substantial population decline in Essex and Hudson counties, modest decline in Bergen, Passaic and Union counties, and population growth in Middlesex, Morris and Somerset counties. Based on that projection, household increase was derived based on the assumptions that (1) the rate of decline in household size from 1980 to 1990 would be 60% of the 1970-1980 rate; i.e., a substantial levelling-off in the household size decline curve; ^{5/} and (2) the percentage of population in group quarters (college dormitories, military barracks, mental institutions, etc.) would remain the same from 1980 to 1990.

A table presenting the household projection by county is provided on the following page.

2. Units lost from the housing stock: Based on a comparison of 1970 and 1980 Census of Housing data, between 1970 and 1980, 3.2% of the pre-1970 housing stock was lost as a result of attrition - demolition, fires,

^{5/} Based on annual data gathered under the Current Population Survey, the rate of household size decline began to slow down in 1978-1979, becoming roughly 75% of the 1970-1978 rate. We anticipate, as do most demographers, that this slowdown is a continuing pattern, and on that basis have estimated the 1980-1990 rate of change at 60% of the 1970-1980 rate.

TABLE III

PROJECTION OF HOUSEHOLD INCREASE BY COUNTY TO 1990

COUNTY	1990 POPULATION (1)	POP. IN HOUSEHOLDS (2)	HOUSEHOLD SIZE (3)	1990 HOUSEHOLDS (4)	1980 HOUSEHOLDS (5)	1980-1990 HOUSEHOLD CHANGE (6)
BERGEN	841,350	833,778	2.58	323,170	299,880	+ 23,290
ESSEX	787,400	775,589	2.66	291,575	300,782	(9,207)
HUDSON	527,450	521,648	2.56	207,003	208,062	(1,059)
MIDDLESEX	645,800	625,134	2.69	232,392	196,969	+ 35,423
MORRIS	442,950	433,205	2.83	153,076	131,777	+ 21,299
PASSAIC	442,900	436,257	2.75	158,639	153,587	+ 5,052
SOMERSET	224,250	219,317	2.72	80,631	67,383	+ 13,248
UNION	497,150	492,179	2.63	187,140	177,808	+ 9,332
						+ 88,378

- (1) Average of Demographic Cohort and Demographic/Economic projections, N.J. Office of Demographic & Economic Analysis, July 1983
- (2) Total population times percentage in households as given in 1980 Census of Population (total population less population in group quarters)
- (3) Based on assumption that rate of decline in household size during 1980's will be 60% of measured rate during 1970's
- (4) Col. 2 divided by Col. 3
- (5) Data from 1980 Census of Population
- (6) Col. 4 less Col. 5

conversions to nonresidential use, etc. We assumed that between 1980 and 1990 the same ratio of attrition to housing stock would prevail; i.e., that 3.2% of the pre-1980 housing stock would be lost between 1980 and 1990, and would have to be replaced.

3. Vacancy rate: A production level capable of maintaining a vacancy rate, across the entire housing stock, of 5% for rental units and 1.5% for sales units, was assumed. In order to determine the number of units needed, we assumed that 1980-1990 production would have the same owner/renter breakdown as the existing housing stock, and that the number of units needed for the vacancy rate factor was the target amount (5%/1.5%) less the actual number of 1980 vacancies. 6/

The sum of these three categories was then multiplied by .394, a figure derived from 1980 Census of Population income data which represents the percentage of low and moderate income households in the population. The actual numbers are as shown below:

Household formation to 1990	88,378
Replacement of lost units	51,040
Provision of vacancy rate	15,677
	<u>155,095</u>
Percentage low and moderate income	x .394
	<u>61,107</u>

This represents the prospective regional housing need for lower income households to 1990 to be allocated to municipalities in the region.

6/ This is a generally accepted standard, also used in the housing allocation report by Carla Lerman.

(3) Identification of Allocation Factors

Based on the discussion in Mt. Laurel II of what constituted appropriate fair share housing allocation factors, we have identified and utilized three separate factors as the basis for determining the allocation percentages for municipalities in the region:

- Vacant Developable Land: This factor is an essential control factor; i.e., it determines the realistic feasibility of developing the units called for by the fair share allocation process. The data utilized is that assembled by the Department of Community Affairs in 1978 for the DCA housing allocation study. It excludes wetlands, steep slope lands, agricultural lands, etc., as defined in the DCA study. Although less current than one might hope, it represents the most recent internally consistent source of information available.

- Total Employment: This factor reflects the base of employment in the community, and its share in the total job base of the region. The 1981 covered employment statistics, from the New Jersey Department of Labor, as published in New Jersey Covered Employment Trends 1981, the most recent available, were utilized.

- Employment Growth: This factor reflects recent trends in employment growth, and the generation of additional ratables, in each community. The increase in covered employment from 1972 to 1981, as reported in the above Department of Labor publication, was utilized.

The municipal percentage for each category was determined by establishing the regional total for that category, and dividing by the municipal total. The regional total was determined by taking the gross amount for the eight-county region, and subtracting land, employment, and employment growth associated with (a) municipalities in the region which are completely outside the 'growth area' as defined in the State Development Guide Plan, inasmuch as these municipalities are to be given no regional allocation according to Mt. Laurel II; (b) Urbanaid municipalities, in view of their disproportionately high percentage of lower income households; and (c) municipalities with less than 10 acres of vacant developable land. This last group was deleted because the absence of vacant land would make it realistically infeasible for them to produce housing to meet prospective housing needs on the timetable dictated by those needs.

The municipal allocation percentage is the sum of its percentages for each factor, divided by three. The factors for each of the seven Middlesex County municipalities is given in the table on the following page. An illustration

TABLE IV

ALLOCATION FACTORS FOR MIDDLESEX COUNTY MUNICIPALITIES

	VACANT LAND		1981 EMPLOYMENT		1972-1981 EMP. CHANGE	
	n	%	n	%	n	%
Cranbury	2,626	1.14	3,477	0.30	703	0.24
East Brunswick	2,904	1.26	14,618	1.25	4,382	1.48
Monroe	10,667	4.62	1,117	0.10	947	0.32
Piscataway	2,412	1.05	24,949	2.13	15,635	5.28
Plainsboro	2,150	0.93	2,092	0.18	1,426	0.48
South Brunswick	14,055	6.09	8,465	0.72	4,465	1.51
South Plainfield	1,534	0.66	14,728	1.25	6,666	2.25

NOTES:

Numbers are derived (a) vacant land from DCA housing allocation study; (b) employment and employment change from N.J. Department of Labor, Covered Employment statistics

Percentages are the municipal percentage of the regional total (exclusive of municipalities outside 'growth area' and with less than 10 acres of vacant land) of each category.

is given below, for East Brunswick Township:

Percentage of Vacant Developable Land	1.26%
Percentage of 1981 Employment	+ 1.25
Percentage of 1972-1981 Employment Growth	1.48
SUM OF FACTOR PERCENTAGES	<u>3.99</u>
	- 3
FAIR SHARE ALLOCATION PERCENTAGE	<u>1.33</u>

Although various arguments can be made for weighing one or another factor more or less heavily than others, there is no clear logic to support doing so. Each factor measures a different consideration relevant to the allocation procedure. We have, therefore, given each factor equal weight.

(4) Allocation Procedure

A somewhat different procedure was followed with regard to the allocation of prospective need, and the allocation of present housing need.

a. Prospective Housing Need: The allocation of prospective housing need is carried out in a series of steps:

(1) Each municipality included in the allocation process is allocated an amount of prospective need based on its allocation percentage x 61,107.

(2) Any municipality in which the allocation derived according to this formula is more than twice its total vacant acreage, has the excess re-allocated. ^{7/}

It is appropriate here to make a point with regard to the relationship of vacant land availability to the fair share allocation. It is clear that, if an allocation clearly cannot be accommodated within the available land area of a community, it should be adjusted. That is the purpose of the above re-allocation procedure. Based on the data sources I have utilized, all of the seven Middlesex County municipalities have adequate amounts of vacant land to accommodate their fair share allocations.

There may be communities, however, where a limit on land availability may not be apparent from the statistics, but may turn out to be the case upon detailed investigation. These municipalities have the burden of establishing that

^{7/} The 'development limit' of two times vacant acreage was adopted on the basis of a series of assumptions: (a) all or most of each municipality's fair share would be met through inclusionary programs; (b) the average percentage of lower income housing units in developments would be 20%; and (c) the gross density of development would not exceed 10 units per acre. Thus, if all the remaining vacant land in a community were developed at 10 units per acre, with 20% of the units as lower income housing, then the resulting number of lower income housing units would be 2 times the vacant acreage. This is considered a realistic maximum assumption, in the absence of redevelopment of already built-up land.

circumstances have changed. Any downward adjustment, therefore, of any municipality's fair share housing allocation should only take place, on the basis of an explicit finding, grounded in reliable current data, of the present land availability in these communities, at trial, or after trial under supervision of the master. ^{8/}

(3) The total prospective need subject to re-allocation is then allocated to the remaining included municipalities within the region. The sum of the two allocations is the municipality's allocation of prospective need.

b. Present Housing Need: Present housing need is the sum of two separate categories; first, the indigenous housing need within each community, and second, any indigenous need of other communities which is re-allocated. Within the region, 6.4% of the occupied housing stock is inadequate, as defined above. In view of the clear language in Mt. Laurel II that municipalities should not be penalized for their past hospitality to the poor, I take the position

^{8/} I believe that this approach is consistent in spirit with the approach recommended by the Supreme Court to deal with the growth area boundary questions affecting both Clinton and Mahwah in Mt. Laurel II. Any amount reduced from any municipality's allocation, however, must be re-allocated, either to adjacent municipalities, or across the region, among communities with ample vacant land available. It cannot simply be wiped out.

that no municipality should be made to take responsibility for indigenous housing needs in excess of 6.4% of its occupied housing stock. The balance should be reallocated to those communities with more modest indigenous housing needs.

Since the re-allocation of present housing needs is, in essence, a process of redistributing lower income households within the region, it is arguably subject to considerations other than simply region-wide re-allocation on the basis of the allocation formula, or the percentage of housing units, or the like. We propose the following scheme for allocating present needs:

- (1) As noted above, each municipality is responsible for its own indigenous housing need up to 6.4% of its occupied housing stock;
- (2) The indigenous need in excess of that amount, in those counties in which the countywide percentage is in excess of 6.4%, is redistributed across the entire region, on the basis of the allocation percentages;

This results in a re-allocation of 21,476 units of lower income housing need, from Essex, Hudson, and Passaic Counties. The basis for this is given in the table on the following page.

- (3) Within any other county (where the countywide percentage is below 6.4%), the excess from those municipalities whose indigenous need is above the average is redistributed within that county.

This results in a re-allocation within Middlesex County of 1,023 units; from New Brunswick (489), Perth Amboy (529), and Helmetta (5).

TABLE V

DISTRIBUTION OF INDIGENOUS HOUSING NEEDS BY COUNTY AND RE-ALLOCATION OF INDIGENOUS NEEDS

COUNTY	OCCUPIED DWELLING UNITS	UNITS LACKING PLUMBING	UNITS LACKING ADEQUATE HEATING	OVER-CROWDED UNITS	TOTAL	TOTAL X 82%	% OF COUNTY HOUSING STOCK	EXCESS OVER REGIONAL AVERAGE (TO RE-ALLOCATE)
BERGEN	300,410	3,462	3,191	5,274	11,927	9,780	3.3%	-0-
ESSEX	300,303	8,292	8,589	16,018	32,899	26,977	9.0	7,758
HUDSON	207,857	7,985	8,539	12,600	29,124	23,382	11.2	10,579
MIDDLESEX	196,708	2,631	1,984	5,009	9,624	7,892	4.0	-0-
MORRIS	131,820	930	1,787	4,931	7,648	6,271	4.8	-0-
PASSAIC	153,463	3,562	5,582	6,662	15,806	12,961	8.4	3,139
SOMERSET	67,368	581	658	1,033	2,272	1,863	2.8	-0-
UNION	177,973	2,692	2,592	5,099	10,383	8,514	4.8	-0-
<hr/>								
	1,535,902	30,135	32,922	56,626	119,683	98,140	6.4	21,476

Data from 1980 Census of Housing

The households who make up the re-allocated present need already live in a community within the region, unlike those making up prospective need, who are migrating to the region, or being created by new household formation. Thus, the former already have, to some degree, ties to specific geographic areas. This allocation procedure, therefore, is designed to result in a re-allocation that will place these households somewhat closer to their present community of residence, on the average, than would be the case if the re-allocation were done purely on the basis of regional allocation factors. ^{9/}

The present need allocation, therefore, for each municipality is the sum of the municipality's own indigenous need, to which is added that share of other municipalities' indigenous need, which is re-allocated through the two steps given above. The total fair share allocation for each municipality is the sum of the present need allocation and the prospective need allocation, as previously described.

The fair share housing allocation presented here is for a period from 1980 through 1990, since it is grounded in 1980 Census data on present housing need, and population projections over the 1980-1990 period. It is, therefore, possible that housing activities have taken place in some municipalities prior to promulgation of a fair share goal

^{9/} Note that there is no arbitrary cap on the number of present need units that can be re-allocated to any municipality. It is our position that this is inappropriate (see discussion on p. 30 of this report).

that legitimately can be counted toward achievement of that goal. While it is clearly the burden of a municipality to demonstrate that a particular housing development should be counted toward the fair share goal, it is appropriate here to indicate the standards that must be met by any development, or group of housing units, in order to be credited to the fair share goal.

- . The units must have been placed in occupancy after April 1, 1980;
- . The units must not only be affordable to low or moderate income households, as the case may be, but sold or rented to low or moderate income households under formal selection criteria ensuring lower income occupancy;
- . The units must be subject to controls on future sale or rental adequate to ensure that the units will continue as lower income housing for an extended period. Such controls must be explicit and enforceable.
- . The units must represent either net increments to the housing stock (new construction, or rehabilitation of formerly vacant or non-residential property), or if not, must represent the upgrading of severely substandard units occupied by low or moderate income households, and continued to be occupied by such households after rehabilitation.

Any unit that does not meet all four criteria is not, in our judgment, appropriate to be counted toward achievement of the municipality's fair share goal.

A table summarizing the fair share allocations for each municipality is given on the following page. We have divided the allocation of low and moderate income households separately for present and for prospective need. Based on an analysis in the Clarke & Caton report, we have divided

TABLE VI

FAIR SHARE HOUSING ALLOCATIONS FOR MIDDLESEX COUNTY MUNICIPALITIES

		INDIGENOUS	PRESENT	PROSPECTIVE	TOTAL
CRANBURY	LOW	14	124	231	369
	MOD	6	48	154	208
	TOTAL	20	172	385	577
EAST BRUNSWICK	LOW	151	294	549	994
	MOD	59	114	366	539
	TOTAL	210	408	915	1533
MONROE	LOW	83	372	694	1149
	MOD	32	144	462	638
	TOTAL	115	516	1156	1787
PISCATAWAY	LOW	253	623	1163	2039
	MOD	99	242	776	1117
	TOTAL	352	865	1939	3156
PLAINSBORO	LOW	35	117	219	371
	MOD	13	45	146	204
	TOTAL	48	162	365	575
SOUTH BRUNSWICK	LOW	119	613	1144	1876
	MOD	46	238	762	1046
	TOTAL	165	851	1906	2922
SOUTH PLAINFIELD	LOW	104	306	572	982
	MOD	40	119	382	541
	TOTAL	144	425	954	1523

present need on the basis of 72% being low income, and 28% moderate income. The prospective need, based on the total household distribution given in the 1980 Census of Population is divided between 60% low income and 40% moderate income. This distinction is consistent with common sense judgment, since all available data indicate that the lower the income, the more disproportionate the share of substandard living conditions.

B. DISCUSSION OF FAIR SHARE ALLOCATION REPORT SUBMITTED TO THE COURT

Having presented our proposed fair share allocation plan, it is now appropriate to review the plan presented by Carla Lerman, the expert appointed by the court to prepare such an analysis. It is clear that there are many differences between our plan and that submitted by Ms. Lerman. It should be noted, however, that differences that occur in this subject fall into two categories; one, where we would argue that an incorrect assumption or procedure has been applied, and a second, where differences in judgment have resulted in two different, but both legitimate, approaches. An example would be with regard to the delineation of region. It is our position that a journey to work or 'commutershed' region oriented around a specific municipality is incorrect, in that it is patently inconsistent with the approach dictated by the Mt. Laurel II decision. There can be, however, more than one arguably legitimate region that does meet the requirements of Mt. Laurel II. We consider the eight-county region preferable, but that does not necessarily make certain alternative regions invalid.

Bearing this in mind, it is our view that, over all, the Lerman fair share allocation report is a reasonable one, with regard to the region, the over-all methodology, and the specific choices made with regard to the various elements leading to a fair share allocation. As will be noted, despite the reservations that are expressed in this report, the outcome of the two studies is not so drastically different as to suggest that there are fundamental errors in data or methodology present in the Lerman report. There are flawed assumptions on procedure, however, which are noted here, and which should be addressed, perhaps in modifications that can be made to the report as it presently stands. Each of the areas in the report is discussed in turn below.

(1) Delineation of a Region

Although the choice of a region in the Lerman report may appear somewhat unusual, it represents a legitimate means of reflecting both the necessary scale of the larger region in which broad regional interactions take place, and the more limited area in which the journey-to-work patterns and direct housing market interactions are concentrated. I would argue that it may not be necessary, in a Mt. Laurel II context, to deal with the latter issues, but it would appear that as long as the overall concern of balancing the housing needs with the resources to meet those needs has been addressed, there is no bar to doing so.

Within the regional approach, however, one point should be noted. The definition of the 'core', in our judgment, is

too limited. Within the immediate core of the region, in addition to Newark and Hudson County, are to be found the communities of East Orange, Orange, and Elizabeth. These communities are contiguous to Newark/Hudson, and share the same disproportionate concentrations of poverty and poor housing that are the basis for designating Newark/Hudson the 'core' in the report. At a minimum, the core area should be expanded to include these communities. A second issue, which bears on allocation of present need more than on region, is the treatment of inner-city municipalities that are not part of this contiguous 'core' area; e.g., Paterson, Passaic, Perth Amboy or New Brunswick.

(2) Determination of Housing Needs

While the determination of housing needs in the Lerman report generally follows accepted methodology, there are certain omissions which should be noted. It is not possible, however, without a major undertaking, to compare the need figures in her report with that presented previously, in view of the difference in approach to region. It is our position, however, that certain modifications should be given serious consideration.

a. Present Need: The failure to include a category reflective of inadequate heating results in an understatement of the extent of present need. It is recognized that all of these indices, such as lack of plumbing, heating, kitchens, etc., are efforts to approximate a general definition of severely substandard

housing which is unfortunately unavailable. It is, therefore, important to use a broad group of categories. Census data provide usable information on units with deficient heating conditions, with a margin of error more than small enough to allow it to be used with considerable confidence. The concern with overlapping categories, where it is possible to make highly reliable estimates, should not prevent one's using such an important measure of housing quality.

Furthermore, we note the absence of any reference to the category of financial housing need. With the qualifications that we have noted in our discussion of this measure of housing need, we believe that it is important to incorporate this measure of need, in some fashion, into the analysis, if not into the actual regional allocation process.

b. Prospective Need: A similar omission is noted with regard to prospective need; namely, the replacement of units lost through demolition, conversion, arson, etc. A comparison of 1970 and 1980 Census data indicates that such losses are considerable. If newly created households are to be decently housed, and there is to be no attrition in the housing conditions of the existing population, a factor for replacement of lost units should be included. As noted in the first part of this report, within the eight-county region, this is estimated to require in excess of 50,000 additional units to 1990.

With regard to other aspects of prospective need, such as the choice of population projections, the assessment of trends in household size, and the like, these differences clearly fall into the category of differences in judgment. The choices made are responsible and sound. It would appear that the differences in this regard tend, nonetheless, to result in roughly similar outcomes.

(3) Identification of Allocation Factors

In both reports, three factors are used, of which two are basically the same (vacant land and employment growth). I would argue, however, that to use the growth in non-residential ratables as the third factor is less desirable, inasmuch as it is largely measuring the same thing as the employment growth factor. Indeed, a review of the data on page 35 of the report shows considerable parallelism between the two factors. While such weight is not necessarily inconsistent with the relevant Mt. Laurel II language, it is preferable in our judgment to incorporate some factor that recognizes the size of the current base of employment and/or ratables. This was the approach as well in the Clarke & Caton report, in which total non-residential ratables were used as an allocation factor. ^{10/}

^{10/} We note as well that on Table 10 there appears to be an arithmetical error in calculating East Brunswick's percentage of regional growth in non-residential ratables. It appears that East Brunswick's percentage should be 2% and not 2/10 of 1% as given.

(4) Allocation Procedure

Although the differences in choice of allocation factors can be seen as another 'judgment call', it is my position that there are a number of problems associated with the manner in which the allocation takes place, particularly with regard to allocation of present need. Each of a number of issues is discussed below.

a. Inadequate re-allocation of present need: As was noted briefly above, there are a substantial number of communities in which the disproportionate concentration of poverty and poor housing is at least as serious as it is in the 'core' area. The following municipalities all fall into that category: East Orange, Orange, and Irvington (Essex); Passaic and Paterson (Passaic); New Brunswick and Perth Amboy (Middlesex); Elizabeth and Plainfield (Union). Trenton, also in this category, is within the South Metro area, although outside the eight-county region. If the same procedure were followed with regard to these municipalities, the total present need to be re-allocated would increase substantially; there do not appear to be any grounds not to do so.

b. Inappropriate re-allocation of present need: Although the fair share allocation factors are used to distribute present need between Metro North and Metro South, the only factor used to allocate re-allocated present need at the municipal level is that of the municipal 'cap'; i.e.,

the proposition that no municipality should receive an allocation in excess of the regional average of 5.7%. It is our position that this is not appropriate. Each of these municipalities is not only growing steadily, ^{11/} but typically has substantially lower percentage of lower income households than the regional average. There appears, therefore, no compelling justification for such a 'cap' on present need allocation. Allocating present need on the basis of the same allocation factors as used to allocate prospective need, perhaps with some adjustment such as that proposed earlier, would be preferable.

c. Burden on urban areas: Compounding the lack of reallocation from urban core cities other than Newark/Hudson, is the apparent outcome of the prospective need allocation process; namely, that these communities, such as New Brunswick or Elizabeth, also receive allocations of prospective need if they show growth on either of the two growth factors, or have any vacant developable land. Since inflation alone more or less guarantees that even core cities will show an increase in commercial and industrial ratables from 1970 to 1980 (see Table 5 in the report for Newark), they will receive a prospective need allocation

^{11/} Since these municipalities are growing rapidly, their percentage of substandard housing will inevitably decline steadily in any event, in contrast to the situation in the core cities.

even if they have no employment growth or vacant land.

d. Failure to deal with limit on land

availability: While the potential effect of limited land availability is addressed in the report, with regard to the implications of the fair share allocation for Piscataway and South Plainfield, it is not integrated into the allocation procedure. As a result, within the region large allocations are being made to communities with little or no vacant land, which allocations should be re-allocated to those communities with ample land resources. Although the arithmetical effort in performing a 'second round' of allocations throughout such a large region is considerable, there is no alternative; otherwise, the outcome is likely to be that a substantial part of the need will be allocated into locations where it is extremely unlikely that it can be met, therefore frustrating the objectives of the fair share plan in particular, and Mt. Laurel II generally.

We suggest that, as was the case with regard to the determination of need, consideration be given to modifications in the allocation procedure, and the report, in line with the above comments.

In conclusion, it is nonetheless the case that the Lerman report represents a responsible approach to determining a fair share housing allocation for the seven Middlesex County municipalities under consideration. In

that context, it should be noted that the proposed allocations, those we have made and those in the report under discussion, are congruent in five of the seven cases, as shown below:

	MALLACH PROPOSAL	LERMAN PROPOSAL	DIFFERENCE M/LERMAN
Cranbury	577	587	(- 1.7%)
East Brunswick <u>12/</u>	1,533	1,323	+ 15.9%
East Brunswick <u>13/</u>	1,533	1,660	(- 7.7%)
Monroe	1,787	769	+132.4%
Piscataway	3,156	3,613	(- 12.6%)
Plainsboro	575	488	+ 17.8%
South Brunswick	2,922	1,680	+ 73.9%
South Plainfield	1,523	1,782	(- 14.5%)

There is little question that most of the modifications proposed in the above discussion would increase the size of the allocations in the Lerman report, at least for those municipalities with ample vacant land. One reason for the apparent consistency between the two reports in the table results from the fact that the absence of these modifications is largely offset by a generally higher population projection base used, as well as the inclusion of counties such as Monmouth and Hunterdon, both of which are

12/ As presented in Lerman report

13/ As adjusted for apparent arithmetical error in Lerman report

projected to experience considerable population growth. 14/

II. STANDARDS FOR THE PROVISION OF LOW AND MODERATE INCOME HOUSING PURSUANT TO THE NEW JERSEY SUPREME COURT MT. LAUREL II DECISION

After a statement of the basic Mt. Laurel II holdings, this section of the report discusses the standards for development in general, and for each of a number of different housing types, which should be followed in order to make lower income housing possible, and in the absence of which a municipal zoning ordinance cannot be considered to be in conformity with the Mt. Laurel II decision.

A. THE MT. LAUREL II HOLDINGS

Before beginning the detailed technical discussion, it is appropriate to summarize the key holdings of the Supreme Court in Mt. Laurel II which dictate the approach followed in this report. Other holdings, directly germane to specific parts of this report, will be discussed at the appropriate place.

14/ It can reasonably be expected in an analysis of this nature, with such a large number of variables, that when the analysis is done with reasonable objectivity (rather than with a deliberate intent to arrive at a high or a low number) which is the case with both our report and the Lerman report, the 'judgment calls' tends to balance out. An example is the distribution of low vs. moderate income households; the Lerman report uses a lower percentage of low income households in the present need, but a higher percentage for the prospective need. Thus, the final breakdown is roughly comparable, despite the differences in underlying approach.

The Court held that each municipality must provide a realistic opportunity for its fair share of low and moderate income housing to be constructed; in determining what was to be considered 'realistic,' the Court noted:

Satisfaction of the Mt. Laurel obligation shall be determined solely on an objective basis: if the municipality has in fact provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the Mt. Laurel obligation to satisfy the constitutional requirement; if it has not, then it has failed to satisfy it. (slip opinion at 36)

In order to do so, the Court sets down a series of steps by which a municipality must meet its Mt. Laurel obligation. These steps, it should be stressed, are not alternatives, or mutually exclusive. They are cumulative, in the sense that a municipality must adopt all of them, or as many as necessary clearly to establish that it has provided the opportunity called for.

(1) A municipality must remove, to the extent necessary to meet its fair share obligations, "zoning and subdivision restrictions and exactions that are not necessary to protect health and safety" (at 97);

(2) A municipality must act affirmatively to "make the opportunity real"; i.e., to provide conditions under which builders and developers will actually construct the needed low and moderate income housing. The Court identifies two types of affirmative measures:

- a. Encouraging or requiring the use of available Federal or state housing subsidies; and
- b. Providing incentives for or requiring private developers to set aside a portion of their developments for lower income housing (at 102).

To the degree that subsidies are available, municipalities are obligated to seek them, or facilitate developers' efforts to do so. The Court recognizes, however, that at present subsidies are in limited supply, and turns to the subject of inclusionary zoning devices, both voluntary and mandatory.

Since this is the core of the decision, it is important to establish clearly the implications of the requirement that a municipality act affirmatively, and the underlying rationale for such a position.

A municipality cannot comply with Mt. Laurel II simply by zoning for higher densities, and eliminating exclusionary standards

The Court has recognized that the elimination of cost-generating provisions in and of itself merely makes the provision of lower income housing theoretically possible. In the absence of affirmative provisions, incentives, etc., there is no reason why a developer will not build housing as expensively as the market will permit. While there is little doubt that most housing built under non-exclusionary standards will be somewhat less expensive than most housing built under exclusionary standards, this is not the concern of the Court. The concern of the Court is to provide

housing for lower income households; in the words used frequently in the decision, housing for the poor.

Even if subsidies were widely available, which they are not, it is still unlikely that simply eliminating cost-generating provisions would enable developers and sponsors fully to take advantage of housing subsidy programs. In suburban communities, particularly those in which market housing demand is greatest, it is likely that parcels of land zoned for higher density development will be bid out of the price range of subsidized housing programs by market demand, again leading to construction only of more expensive units.

Voluntary inclusionary housing programs, referred to as 'incentive zoning' are unlikely to generate lower income housing

The Court takes notice of the existence of voluntary inclusionary programs, referred to as "incentive zoning", and notes experience that "those municipalities that relied exclusively on such programs were not very successful in actually providing lower income housing" (at 109, citing study by Fox & Davis, 3 Hastings Const. L.Q. (1015)). The Court then notes, with regard to this point, that

a more effective inclusionary device that municipalities must use if they cannot otherwise meet their fair share obligations is the mandatory set-aside (at 110).

The evidence is nearly incontrovertible that New Jersey suburban municipalities will not be able to meet their fair share obligations otherwise, and will therefore be required

to adopt mandatory set-aside ordinances. There is an extensive literature that documents the limited reach of voluntary inclusionary ordinances, such as the Fox & Davis article cited by the Court, and the more recent major examination of the California experience by Schwartz, Johnston & Burtraw, Local Government Initiatives for Affordable Housing (Davis, CA, 1981). The New Jersey experience is fully consistent with this literature. East Brunswick, despite admirable affirmative efforts, was able only to create 168 units of Federally-assisted moderate income units over 7 years. Developers without access to Federal or other subsidies have been unwilling to utilize these voluntary density bonus programs.

It is, therefore, my conclusion that, under all but the most extraordinary circumstances, a municipal zoning ordinance must include a mandatory set-aside program in order to meet its fair share obligation under Mt. Laurel II. It is for this reason that the greater part of this report is devoted to setting forth the basic conditions and standards that must be met by such an inclusionary housing program.

(3) A municipality, unless it can show that it can meet its fair share obligations otherwise, must "provide zoning for low-cost mobile homes as an affirmative device in their zoning ordinance (at 122).

Finally, the Court deals with 'least-cost' housing. This, however, is different from the least cost housing approach, as initially pursued in the Madison decision. In essence, the position that the Mt. Laurel II court takes in this regard is that if it is demonstrated to be impossible, despite every affirmative effort, to provide housing for low and moderate income households, housing must be provided for the lowest income population for whom it is feasible to provide new housing. This point is stressed, since it should be clearly understood that 'least cost' housing, in this context is not a substitute for affirmative measures, and mandatory set-asides, but an adjustment of such measures in the light of economic realities, only upon conclusive evidence that it is not possible to provide bona fide low and moderate income units. It is my position, however, that in the great majority of cases it will be possible to produce at least some percentage of low and moderate income housing, so that the 'least cost' issue need not be addressed directly at this time.

Thus, both the scope of affirmative actions - inclusionary ordinances and other supportive municipal actions - as well as the elimination of cost-generating provisions must be addressed by a municipality seeking to comply with Mt. Laurel II. Furthermore, as the Court makes clear, the scope of the ordinance is not limited to the physical characteristics of the units that are permitted. The low and moderate income units thus provided are to be

affordable to, and occupied over an extended period by, lower income households. The ordinance, either in itself or through regulations or guidelines separately adopted, must deal with these issues as well as the classical physical issues of zoning and land use control.

B. GENERAL DEVELOPMENT STANDARDS, AND STANDARDS FOR SPECIFIC HOUSING TYPES, UNDER A MT. LAUREL II ZONING ORDINANCE

Given the principles set forth in the Mt. Laurel II decision, which have been summarized above, the next step is to translate those principles into specific development standards. These standards provide, first, a basis for evaluating existing zoning ordinances; and second, a basis for modifying ordinances to correspond to the objectives of the decision. An ordinance, therefore, that meets these standards, i.e., that contains appropriate affirmative provisions and incentives, and regulates development according to the criteria set forth herein is likely to be consistent with the Mt. Laurel II objectives. An ordinance which fails in either regard, will not be. That point is important, since the possibility that a municipality will enact a so-called inclusionary ordinance; i.e., one containing a mandatory set-aside provision, and proceed to make it unworkable by virtue of exclusionary and cost-generating standards, cannot be ignored.

Within this section, the first two subsections concern development of inclusionary housing generally: first, standards governing developments in which there is a

mandatory set-aside; and, second, a discussion of the non-zoning incentives which should be coupled with the zoning ordinance in order to further the objective of lower income housing production. The third subsection concerns appropriate development standards for specific housing types. No attempt has been made to be exhaustive; it is anticipated, however, that the thrust of the standards is clear enough so that any additional technical standard can be established without difficulty, based on the principles set forth herein.

(1) Standards for Developments subject to a Mandatory Set-Aside of Low and Moderate Income Units

The basic principle guiding the setting of standards for developments in which a mandatory set-aside is included (as distinct from the standards for the low and moderate income units themselves) is that no standard or regulation should, within the limits imposed by reasonable health and safety considerations, impede the developer's ability to provide the most cost-efficient development realistically feasible. Providing low and moderate income housing, particularly low income housing, places an inevitable strain on the economics of housing development. Imposing cost-generating requirements and other burdens on top of that constitutionally-mandated obligation cannot be justified.

It is likely that in many, if not most, cases municipalities will seek to achieve Mt. Laurel objectives within the context of a planned unit development ordinance,

however it may be characterized. On that basis, the following standards should be followed (many of these apply equally to single-housing-type zones):

a. Mandatory set-aside: The developer must be required to market a proportion of the units at prices affordable to lower income persons. Ordinarily the proportion should be 20 percent. This is the proportion endorsed by the Supreme Court (slip opinion at 129). A larger percentage ordinarily will make development economically infeasible. A smaller percentage ordinarily means that the developer is doing less than it could to meet the housing needs of lower income households.

One point must be emphasized in this context. Mt. Laurel II does not, of course, require that all housing permitted in a municipality must contribute toward meeting the municipality's fair share obligation. A municipality may have large lot zones, agricultural zones, and the like. If, however, a municipality is seeking to meet its fair share obligation through an inclusionary zoning ordinance, that municipality may not zone other parts of the community for development at standards or densities comparable to those of the inclusionary districts, but without an inclusionary requirement. To do so would clearly place anyone seeking to develop under the inclusionary provisions at a disadvantage, thereby hindering achievement of the fair share objectives of the municipality.

b. Resale Price Controls and Affirmative Marketing:

There must be a workable mechanism to ensure that the unit continues to be affordable over an extended period to low or moderate income families as the unit is resold or re-rented. There must also be a workable procedure to ensure that all of the initial purchasers of sales units and all tenants of rental units are eligible as low or moderate income households.

c. Flexibility in Residential Mix: The ordinance should provide the developer with maximum flexibility to determine the mix of different housing types, sizes, and the like. Arbitrary percentages of different housing types should be avoided. Minimum percentages of detached single family units must be avoided.

d. Flexibility in Modification: Particularly in developments to be built in phases over a number of years, the developer should be allowed flexibility to modify the development mix in response to changing market conditions and requirements. Ordinances which require extensive submissions, hearings, and approvals for modifications which do not fundamentally change the character and the community impact of a development must be avoided. See N.J.S.A. 40:550-50.

e. No Non-Residential Development Requirements:

There may be no requirements that any minimum percentage of any non-residential (office, retail, industrial) uses be provided within the development.

f. No Unreasonable Minimum Tract Size Requirements:

Any minimum tract size requirement must not be such as to interfere with the availability of land for development. A minimum tract size that cannot be achieved without assembly of parcels from more than one owner must be avoided. Note that the Municipal Land Use Law permits residential PUD developments on as little as five acres. N.J.S.A. 40: 550-6.

g. Reasonable Development Densities: Net densities for each housing type should be consistent with least-cost standards as given below. Gross development densities, if included in the ordinance, should be such that they do not interfere with achievement of the net densities provided. ^{15/}

h. Reasonable Open Space Requirements: A planned development should not include excessive open space requirements, thereby unreasonably limiting the number of units that can be provided. 20% of the tract area, in all but the most unusual circumstances, is as large an open space requirement as can reasonably be justified.

^{15/} Within a large-scale planned development, gross density is the density of residential development as a whole within the perimeter of the entire development; i.e., the number of units divided by total acreage. Net density is the density of development on the residentially-used portion of the site; i.e., total site less common open space, collection streets, public facilities (if any) and non-residential uses (if any). In a small single-housing-type development, built on existing street frontage, there is, as a rule, no significant difference between gross and net density.

i. Reasonable Improvement Standards: Ordinances may not require excessive improvements and facilities within the development. Interior road widths should be modest, in keeping with the level of traffic reasonably anticipated; recreational facilities should be modest, and any additional facilities should be at the discretion of the developer. Developers, and by extension the residents of the development, should not be required to pay through Homeowners' Association fees for services which the other residents of the municipality obtain through their tax dollars.

j. Reasonable Off-Site Improvement Requirements: Sites for development incorporating mandatory set-aside provisions should be located, wherever possible, in close enough proximity to major infrastructure and services so that developers are not required to underwrite major improvements to the community infrastructure. If that is not feasible, the municipality should seek to reduce the cost impact to the developer to the degree feasible, including bonding for the cost of the necessary off-site improvements.

k. Phasing: Provisions must be included to ensure that the required low and moderate income units are phased simultaneously with the market rate units in the same development, with issuance of permits for the market rate units conditioned on proportionate production of lower income units, in order to prevent a developer from

constructing the market rate units, and then renegeing on his/her commitment to build lower income housing.

(2) Zoning Land to Make Possible Inclusionary Objectives

The amount of land zoned to meet the inclusionary goals, based on application of the mandatory set-aside approach, must meet certain criteria, of which two are most significant:

a. It must be remembered that the only units that count toward the fair share goal are the low and moderate income units, and not the balance of the units in the PUD or other multifamily development. Thus, the zoning envelope for the district or districts subject to a mandatory set-aside must contain far more potential units than the fair share number. The number it must contain is a function of the set-aside percentage that has been adopted. If, for example, the community adopts an ordinance with a mandatory set-aside of 20% lower income housing, the capacity of the district must be at a minimum five times the fair share. Thus, if the fair share is 1,000 units, one must zone for 5,000 units ($5,000 \times .20 = 1,000$).

b. Simply to zone as above, however, would require perfect efficiency of development throughout the zone to achieve the fair share goal. Since perfect efficiency is unlikely, both common sense and the language of the court in Madison and Mt. Laurel II dictate that overzoning be applied; i.e., that more land be zoned for the

inclusionary program than is theoretically necessary to accommodate the fair share goal. The extent of the overzoning turns on factual proofs and may vary from community to community; it is a function of land ownership patterns, infrastructure, etc. In all cases, it must be structured to ensure that the lower income housing opportunity being created is a realistic one.

Beyond questions of quantity, a point must be made with regard to quality. The land zoned to provide for the fair share goal must be attractive land, suitable for medium and high density development, and realistically likely to accommodate units that will appeal to buyers in the middle and upper income markets. If this is not the case, it is unlikely that the fair share goal will be achieved, in that it is dependent on the existence of a market for conventional housing in the same development. 16/

16/ On a related point, it should be noted that a fair share goal can be furthered by multisite development; e.g., a developer of market rate housing can build his mandatory set-aside on a separate site from that of his market housing. If that is to be allowed, however, it must be limited to lower income housing sites which are (a) of comparable quality to the market rate housing site; and (b) do not present any risk of creating concentrations of lower income population within the community.

(3) Incentives in Support of Development with Mandatory Set-Asides

Mt. Laurel II makes clear that the municipality is obligated to provide substantial support to those developers seeking to build low and moderate income housing, stressing that "satisfaction of the Mt. Laurel obligation imposes many financial obligations on municipalities, some of which are potentially substantial" (at 107). The extent of some potential obligations has been suggested above. Among the obligations that municipalities should be ready to assume, as they may be needed to facilitate production of low and moderate income housing, the following should be noted. This is not necessarily an exhaustive list, as particular circumstances will undoubtedly suggest additional actions and incentives in the future.

a. Facilitate Application for Housing Subsidies:

This may range from actions as modest as adoption of a Resolution of Need, as required by the NJHFA statute, to providing technical support, front money, and the like for development proposals.

b. Provide Tax Abatement: While New Jersey law does not appear to provide any means by which tax abatement can be provided to sales housing, provisions exist for abatement of taxes on rental developments. In view of the demonstrably great difficulty in making a rental development affordable to low and moderate income households

(particularly low income), tax abatement should be provided as a matter of course to any developer undertaking such a project.

c. Utilize Community Development Block Grant

Funds: Financial support of low and moderate income housing development under Mt. Laurel II should be the highest priority for use of those CDBG funds available to each municipality through the Urban County program. There are a number of means by which this can be done, including land acquisition, infrastructure provision, down payment assistance or mortgage reduction to buyers, etc.

d. Make Municipally-Owned Land Available: To

the degree that municipalities have land available in their ownership which is (a) suitable for housing, and (b) not actively in any other use or urgently required for other use, it should be made available at little or no cost to developers to provide low and moderate income housing.

e. Provide Infrastructure: Growing suburban

municipalities should have, and in many cases do have, ongoing programs to extend infrastructure and facilities supported by the general fund or the capital budget. Such activities should be coordinated with the development of housing under an inclusionary zoning ordinance, so that the burden on the developer is minimized.

f. Waive fees: Many municipalities impose

substantial fees for approval, sewer and water hookups, engineering inspection, etc. Consideration should be given

to waiving these fees, at least with regard to the (\pm 20%) low and moderate income units within a larger development.

The above are all general approaches, which are likely to be applicable in a variety of circumstances. There are likely to be a variety of specific steps that will emerge out of particular needs. For example, under the County Improvement Authorities Law (N.J.S.A. 40:37A-44 et seq.) municipalities are empowered to guarantee bond issues by such a county authority, which can issue bonds to finance housing and redevelopment projects. This could be a useful source of below-market financing in some cases. In other circumstances, a municipality could make funds available to support the nonprofit corporation which is to administer the occupancy controls required for this housing. The crux of the matter is that Mt. Laurel II obligates each municipality to do what it can, within reasonable but broad parameters, to facilitate meeting its fair share obligation. Anything less is clearly inconsistent with the explicit intent of the New Jersey Supreme Court.

(4) Standards for Specific Housing Types Under A Mt. Laurel II Zoning Ordinance

The above sections have presented overall development standards and incentives appropriate for an inclusionary zoning ordinance. This section will deal, in greater detail, with standards appropriate for specific housing types that may be used by a municipality to meet its fair

share obligation. Before discussing the specific housing types, some standards should be noted which apply generally to all housing types that may be under consideration.

Cost generating provisions, as noted, that are not clearly related to health and safety requirements, have no place in an inclusionary ordinance. While some such features may be considered desirable, for reasons of community taste or preference, such considerations clearly do not supersede the constitutional mandate at issue. Such requirements tend to fall into a number of broad categories:

- a. Requirements designed to enhance house value, such as:
 - requiring basements rather than slabs;
 - requiring excessive parking spaces, or covered parking areas and garages;
 - requiring more open space dedication than bears a reasonable relationship to the needs of the occupants;
 - requiring facades of certain materials, such as brick or stone;
- b. Requirements designed to achieve visual or aesthetic goals, such as:
 - 'zigzag' standards, requiring that setbacks of multifamily buildings vary at regular intervals;
 - 'no look alike' standards, requiring that houses or townhouses show significant variation from one another in facade, elevation, roofline, etc.;
 - excessive open space dedication requirements;
 - excessive setback, buffer, perimeter landscaping, and similar requirements.

c. Requirements designed to displace costs onto developers, and by extension, residents of new housing, such as:

- requirements that developer provide major infrastructure, or facility improvements at his expense; ^{17/}
- requirements that developers or residents of multifamily developments on PUDS bear the cost of services (snow removal, trash removal, etc.) borne by the municipality in the balance of the community.

Third, floor area requirements unrelated either to occupancy or to minimum health and safety requirements still appear in many ordinances, despite the Supreme Court decision Home Builders League of South Jersey vs. Township of Berlin, et.al. It should be noted that such provisions are banned as a general proposition, not only in areas zoned for least cost or affordable housing.

Although there is no absolute standard of crowding to determine the smallest possible unit that is consistent with health and safety, the existence of, and the extensive experience with HUD Minimum Property Standards (MPS) makes it unnecessary. These standards have resulted in the

^{17/} Although most municipalities are in conformity with the rule of pro rata sharing of improvement costs set by the Municipal Land Use Law, there are still problems. One such problem is where a municipality requires a developer to bear the entire cost of an improvement, subject to future reimbursement from other developers or landowners. Another is where sites zoned for development are located remote from existing infrastructure, a practice criticized by the Court in the Madison decision.

construction of thousands of livable housing units over the past more than 40 years. They are performance standards; i.e., rather than establish a flat square footage figure for a dwelling unit, they establish requirements for specific rooms, for storage space, hallway clearances, etc., from which an architect can construct a conforming floor plan. The following floor areas are representative of successful units constructed in accordance with the MPS conditions:

1 bedroom	540 to 600 SF
2 bedroom	660 to 720 SF
3 bedroom	850 to 900 SF

In similar vein, the standards used by the Department of Housing & Urban Development as de facto maximum standards for the Section 8 program are:

1 bedroom	540 SF
2 bedroom	800 SF
3 bedroom	1050 SF

In summary, to avoid unreasonable cost-generating effects, floor area standards, if included in an ordinance, should:

- . Be no greater than the MPS requirements, and be preferably related to performance standards, rather than flat area requirements;
- . Be occupancy related; i.e., vary with number of bedrooms, rather than a single requirement for a zone;
- . Be consistent across zones; i.e., the same standard for a unit of a given number of bedrooms should apply in all zones;
- . Eliminate any requirement not clearly related to health and safety, such as differential requirements for 1 story, 1½ story, and 2 story single family dwellings.

Given the above, the discussion can now turn to the standards that are specific to each housing type.

a. Standards for Detached Single Family Houses^{18/}

Lot size, frontage, and front yard setback, requirements must be kept to the absolute minimum, since they relate directly to the cost of the unit. The lot must be big enough to place a modest house upon, to place a driveway for the owner's car(s), and provide some minimum flexibility of layout for privacy. Careful site planning, including utilization of techniques such as zero lot line development or housing types such as patio houses, can make possible attractive development on very small lots. Minimum standards should not exceed:

- (1) Lot size no greater than 5,000 SF per unit;
- (2) Frontage no greater than 50 feet at the setback line;
- (3) Front yard setback no more than 25 feet.

Lot size can be further reduced where clustering is proposed, or where creative site planning and design make it feasible. Side and rear yard setbacks are less significant than front setbacks from a cost standpoint, but should in any event be modest enough so that the feasibility of

18/ In the interest of completeness, these standards are included. Under current circumstances, it is considered unlikely that any municipality can arrive at a legitimate means of meeting Mt. Laurel II objectives in which development of single family detached housing is a major part of the program.

placing a conventional house on a 5,000 SF lot is not impaired.

b. Standards for Townhouses

The following standards should govern townhouse development:

- (1) Gross residential density of at least 10 units per acre (this, and similar standards, would be used to define net density in the context of a large-scale PUD);
- (2) Front yard setback no more than 20 feet;
- (3) No minimum number of units or minimum tract size for townhouse development;
- (4) No minimum width requirement or minimum individual lot size requirement for townhouse development; 19/
- (5) No 'aesthetic' requirements such as setback variations, facade variations, etc.;
- (6) If a maximum number of units per structure is considered important, it should be no smaller than 16 units;
- (7) Open space dedication, if any, should not exceed 20% of the tract area. There should be no requirements for specific recreation facilities except for playgrounds and/or tot lots. There should be no minimum open space requirement for developments of less than 25 units.
- 8) Parking requirements should not exceed the following: 20/

19/ Many ordinances require a minimum width for individual townhouses, typically 20 or 22 feet. These are totally unnecessary. Individual townhouses can be built, meeting all reasonable standards, to widths as narrow as 12 or 14 feet.

20/ Based on a recent in-depth study of parking requirements of affordable housing developments in Southern California, an overall standard of no more than 1.55 spaces per unit (where no spaces were assigned) was recommended.

- for each 3 or more bedroom unit, 2.0 spaces
- for each 2 bedroom unit, 1.75 spaces
- for each 1 bedroom unit 1.25 spaces

In developments where the total number of spaces is 100 or more, provision should be made for 1/4 to 1/3 of the spaces to be sized for compact cars. No covered parking spaces should be required.

In the event that the development fronts on a major arterial road, or exceptionally busy and heavily trafficked street, the setback can be increased, but not in excess of 50 feet. Berms, buffers, and other similar features should be required only where it is necessary to protect the townhouse development from an adjacent noxious use, and not to protect others from townhouses.

c. Standards for Garden Apartments

The following standards should govern garden apartment developments. These standards apply equally to buildings built for rental or for condominium occupancy.

- (1) Gross residential density of at least 16 units per acre if two story, 25 units per acre if three story. Three story garden apartments should be permitted except where a compelling reason exists to limit height by virtue of impact on immediate surroundings.
- (2) Front yard setback no more than 25 feet, except where development fronts on major arterial or exceptionally heavily trafficked street, in which case it may be increased, but not in excess of 50 feet.