Mt. Laurel II, generally

Analysis of "the Builder's Remedy Problem"
Circa 1984/85

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THE BUILDER'S REMEDY PROBLEM

The Fair Housing Act pays scant attention to the builder's remedy, and such attention as it does give permits more negative inferences than positive ones. Since the builder's remedy is an absolutely central aspect of the Mount Laurel II opinion, however, one necessary approach to assessing the facial constitutionality of the Act is to inquire whether the Act sufficiently incorporates or substitutes for the builder's remedy to pass constitutional muster. The Urban League respondents submit that the Act is constitutionally deficient in this regard unless substantial clarification is added through a combination of judicial construction and administrative implementation.

1. The Act. The Fair Housing Act contains only three references to the builder's remedy, two of which are negative. Section 3a provides that "it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing." "Builder's remedy" is not included in the definition section of the act, section 4, but it is defined in section 28, which provides for a moratorium on awards of the builder's remedy until late 1986 or early 1987.[1] The section 28 definition is:

[1] The constitutionality of the section 28 moratorium, including more detailed discussion of the statutory time period, will be considered separately infra at p. .

> For the purpose of this section "builder's remedy" shall mean a court imposed remedy for a litigant who is an individual or a profit-making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set asides or density bonues which provide for the economic viability of a residential development by including housing which is not for low and moderate income households.

The only positive reference to the builder's remedy, although not specifically called such, is in section 11a, which requires a municipality to "consider" in preparing its housing element for submission to the Affordable Housing Council "[r]ezoning for densities necessary to assure the economic viability of any inclusionary developments, either through mandatory set asides or denisty bonuses, as may be necessary to meet all or part of the municipality's fair share."

A matter of terminology is important here. The term "builder's remedy" has come to acquire two distinct meanings in Mount Laurel litigation. As used by politicians, newspaper reporters and angry citizens in municipalities faced with a Mount Laurel obligation, builder's remedy generally describes the mandatory set aside technique which this court approved for use in Mount Laurel II.[2] This is the section 28 definition and in essence the section 11 defintion as well. It is of course hostility to the overbuilding that results from the 4:1 ratio of a 20% setaside that generated much of the pressure for passage of the Fair Housing Act and, specifically, the section 28 moratorium provision. Nevertheless, it is a fair reading of the Act that it permits (although it does not

[2] Strictly speaking, the court did not require use of mandatory set asides. But it found, 92 N.J. at ***, that in the absence of significant public subsidies, a "realisitc opportunity" for low and moderate income housing would be difficult to provide otherwise. The possibility of alternatives to the mandatory set aside will be discussed further at pp.******.

require) use of the mandatory set aside technique to achieve compliance and in this respect the act is facially constitutional.[3]

There is, however, a different, more technical use of the term "builder's remedy," one which the Supreme Court explicitly used in Mount Laurel II and which is crucial to the analysis of the constitutionality of the act. Mount Laurel II recognized that the ability of public interest plaintiffs to vindicate the constitution was limited by numbers and resources. It therefore sought to provide sufficient incentive to private parties -- builders -- to insure that the necessary constitutional litigation would be brought, or else the teaching of Mount Laurel I would remain a hollow abstraction.

The incentive provided was not the mandatory set aside as such, because such a mandatory rule applies with equal force to builders who have had nothing to do with Mount Laurel litigation (although the possibility of a mandatory setaside undoubtedly encourages builders to come forward voluntarily). The true incentive was that a successful builder-plaintiff, one who offered to provide a

[3] It may be argued that the act, unlike the Mount Laurel II opinion, seeks to de-emphasize the use of the mandatory set aside and thus reduces the likelihood that housing elements submitted to the Affordable Housing Council will provide the constitutionally required "realistic opportunity." The significant appropriation of housing subsidies also contained in the act somehwat mitigates this objection, although the money appropriated to date is clearly insufficient to fully meet the housing need covered by the Mount Laurel doctrine.
Housing elements that do not contain a mandatory set aside can be realistic if carefully crafted, however. The The Urban League respondents achieved a model settlement with Plainsboro Township, which like many of the appellants here sought to avoid excessive growth. The settlement will provide 525 units of low and moderate income housing with only sixty units of related market-rate housing, by placing primary emphasis on tax sheltered financing and use of a housing trust fund. Since a "realistic opportunity" standard can be satisified without a mandatory set aside, and since the Fair Housing Act does not prohibit use of the set asides generally (deferring for the moment the moratorium question), any constitutional problems in this area will arise on an as-applied basis.

significant amount of lower income housing on a site that satisfied environmental and other general planning suitability criteria, would be entitled to the necessary municipal permits to go forward on that site, even if the municipality might prefer compliance on a different site and even if some alternative sites might be regarded as "more suitable." See 92 N.J. at ***.

The builder's remedy is the builder's right to a personal remedy; absent this specific entitlement, of course, the defendant municipality could easily rely on the inherint interchangeability of many developable sites to come up with a compliance plan that excludes (spitefully, or on more legitimate grounds of preference) the winning builder-plaintiff. No economically motivated party will undertake expensive and complex litigation such as that which has been involved to date in the Mount Laurel cases without assurance that "winning" will include tangible reward as well as the nobler satisfaction of having done the right thing.

Acceptance of the builder's remedy was a crucial element in this Court's attempt in the Mount Laurel II opinion to "put some steel," 92 N.J. at ***, in the constitutional obligation enunciated by Mount Laurel I. As a technique to encourage litigation that would vindicate the constitution, there can be no doubt but that the builder's remedy technique has succeeded spectacularly well in achieving this objective. Since January 20, 1983, at least *** Mount Laurel challenges have been filed against *** municipalities; all but one of these suits has been filed by a builder-plaintiff seeking to claim a builder's remedy.[4]

[4] These data are compiled from time to time by the Administrative Office of the Courts. The numbers cited are from the AOJ's docket summary dated ****.

Nowhere in the act is there an explicit authorization for the award of a builder's remedy as described here -- as an incentive to a builder-plaintiff to bring a municipality to constitutional compliance. There is, however, in section 10f, a requirement that the municipality's housing element include "a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing." This provision, we believe, is sufficiently broad that it can be construed to permit a builder's remedy. If it cannot be so construed, we believe that the act contains a facial constitutional flaw that requires correction before it can be sustained.

The central concept of the act is voluntary compliance. Municipalities initiate the process by filing a notice of participation and thereafter a housing element, section 9a. In support of its housing element, the municipality makes its own fair share study, which is then reviewed by the Council against council-promulgated criteria that may be quite non-specific. Finally, "at any time during a six year period following the filing of the housing element," section 13, the municipality may (but need not) move for substantive certification which, if granted, will immunize it from further litigation in the courts unless a heavy presumption of validity can be overcome by "clear and convincing" evidence to the contrary. Section 17a. A municipality denied substantive certification has sixty days to refile in a satisfactory manner. Section 14b.

On the face of the act, the inducement to voluntary compliance is effective immunity from Mount Laurel litigation in the courts

that is achieved through substantive certification. This facial inducement is illusory, however, because of the way the key sequence of statutory events just outlined intersects with the act's provision for exhaustion of administrative remedies. Once a housing element has been filed pursuant to section 9b, no matter how inadequate it may be, a private litigant is required to exhaust review and mediation before the Affordable Housing Council and an Administrative Law Judge before it can bring an exclusionary zoning suit in the Superior Court. Section 16.

Although the municipality has six years to seek substantive certification, section 13, it will have an incentive to do so once the mediation process has been invoked by the filing of private builder litigation since substantive certification will gain it protection against the court suit that can proceed once the obligation of exhaustion has been completed. The obligation to exhaust continues through the period of seeking substantive certification, section 18, and section 14b even gives the municipality sixty days to refile its petition for substantive certification should it initially be rejected by the council. It will be a rare municipality indeed (Monroe and South Plainfield are perhaps stupid enough to be the exceptions) that cannot come up with a substantive certification for its housing element after the second try, and thus gain effective immunity from the litigation which has been foreclosed while this administrative process has been unfurling.

The apparent result of this process -- housing elements that afford a "realistic opportunity" for the construction of lower

income housing -- would hardly be unsatisfactory (assuming, as the Urban League respondents do at this stage, that the Council will develop constitutionally adequate standards for passing on substantive certification) but for one catch. Since the outcome of the process will almost certainly be substantive certification for all but the dullest of municipalities, effectively barring litigation, there is in fact very little incentive for a private, profit-motivated builder to trigger the process by bringing or threatening suit in the first place. And if the builder suit is not brought, then there is neither statutory nor real-world incentive for the municipality to seek the protection that substantive certification will confer. The legislation, in other words, is circular, and the inducement that it offers to constitutional compliance is illusory.[5]

[5] There is one technical loophole in this analysis. Section 18 provides that the obligation to exhaust ceases "if the council rejects the municipality's request for substantive certification or conditions its certification upon changes which are not made within the period established in this act or within an extension of that period agreed to by the council and all litigants." Read in comparison to section 14b, which flatly permits refiling even if there is outright rejection by the council rather than a conditional rejection, section 18 seems to mean that exhaustion would cease immediately upon flat rejection, and that litigation in the Superior Court could thereafter proceed, even if the municipality decided to refile under section 14b. If this construction is correct, then there is some slight incentive to the builder to trigger the process by bringing the initial action, the possibility that the council will issue an outright rejection. It stretches belief, however, to think that the council will do so very often, given that the whole statutory purpose is to encourage voluntary compliance, such as by rewriting non-compliant plans. -- fix this up --