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The Politics of Exclusionary Zoning & the Pathology That Led to the Collapse of New Jersey's Mount Laurel Mandate

By Kristin Rempusheski

Part I: Introduction

On March 10, 2015, the New Jersey Supreme Court disbanded the Council on Affordable Housing (COAH)¹ in *In re Adoption of N.J.A.C. 5:96 and 5.97 by the New Jersey Council on Affordable Housing*, what is now being deemed *Mount Laurel IV*.² As a consequence, specially assigned judges now have jurisdiction over all affordable housing litigation.³ In 1975, the *Mount Laurel* sequence of cases began when the New Jersey Supreme Court invalidated “exclusionary zoning,” which meant that municipalities could no longer use local zoning ordinances to effectively exclude people of low to moderate incomes from communities.⁴ In doing so, the remarkable decision expressly mandated municipalities to provide a “realistic opportunity” of affordable housing to all people.⁵ However, when the *Mount Laurel* mandate was widely ignored by municipalities, the court again heard the issue in what was coined *Mount Laurel II*.⁶ There, the court established a procedure by which three specially selected judges would hear all *Mount Laurel* litigation, and established strict enforcement mechanisms to ensure compliance.⁷ This revolutionary decision opened the floodgates to litigation, and the New Jersey legislature responded by enacting the Fair Housing Act (FHA) to keep the courts out of the business of enforcing housing obligations.⁸

¹ COAH was created in 1985 by the Fair Housing Act.

² 221 N.J. 1 (2015) [hereinafter *Mount Laurel IV*].

³ *See id.*

⁴ *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter *Mount Laurel I*].

⁵ *Mount Laurel I*, 67 N.J. at 173-75.

⁶ *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158 (1983) [hereinafter *Mount Laurel II*].

⁷ *Id.* at 253-54; 85-86.

⁸ N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 2013).

As an alternative for supervision, the Act created COAH, an agency that was granted broad authority to oversee all affordable housing obligations.⁹ While this angered housing advocates who foresaw future noncompliance as a result of defects in the new system, the Court upheld the FHA and its companion agency in what was termed *Mount Laurel III*, and jurisdiction over all *Mount Laurel* litigation was transferred to the Council.¹⁰ However, in the years to follow, COAH's own flaws became apparent, and a lack of political consensus regarding the *Mount Laurel* mandate enabled abrogation of the constitutional mandate at the local level. The lack of unanimity amongst the branches of government essentially allowed municipalities to escape their fair share housing obligations, through delays and other devices. Thus, just like in *Mount Laurel II*, this ultimately led the court to re-enter the scene and assume jurisdiction over all affordable housing litigation. Once again, an opening of the floodgates has ensued.

This Note will argue that until the other branches of government can devise an effective system to enforce the *Mount Laurel* mandate, it is necessary for the judicial branch to compel compliance with affordable housing obligations. In doing so, it proceeds in four parts. Part II provides a synopsis of the reasoning and background behind the *Mount Laurel* doctrine, as well as the enactment of the FHA and COAH. Part III then explains how COAH's own shortcomings, in conjunction with a lack of political consensus regarding the *Mount Laurel* mandate, ultimately allowed for inconsistencies amongst the three branches of state government. It will illustrate how these inconsistencies ultimately led to judicial intervention, resulting in the recent *Mount Laurel IV* decision. Finally, Part IV provides an explanation of why the *Mount Laurel IV* decision was necessary. In doing so, it describes how the feeble administrative process and lack of political

⁹ *Id.* § 52:27D-329.2(a).

¹⁰ *Hills Development Co. v. Township of Bernards*, 103 N.J. 1, 43 (1986) [hereinafter *Mount Laurel III*].

consensus regarding the *Mount Laurel* mandate enabled municipalities to ignore the *Mount Laurel* mandate through delays and other tactics in the absence of court orders requiring compliance. Furthermore, it describes how allowing the judiciary to have jurisdiction over affordable housing issues in the first instance has already expedited reform for affordable housing accommodations.

Part II: Background

Historically, the law has made exclusionary conduct in the housing context possible.¹¹ Until the 1940s, private exclusion was legally accepted to allow for patterns of segregation and housing discrimination.¹² Even mortgages guaranteed by the Federal Housing Administration contained racial restrictions.¹³ Discernibly, these outright restrictions were eventually ruled unconstitutional.¹⁴ However, localities have the “sovereign power to regulate land use as they see fit,” which enables institutional discrimination to endure through less ostensible means.¹⁵ For example, municipalities effectively exclude others by offering little dwelling units for affordable to low-income people.¹⁶ They also do so “by using local land-use regulatory ordinances that raise the cost of other housing beyond their [low income people’s] reach.”¹⁷ Laws can be a proxy for substantial barriers, for example, through “minimum lot and room sizes, setback rules, and discretionary procedures for multifamily developments.”¹⁸

¹¹ CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES*, 8 (1996).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; Noelle Van Baaren, *The Persistence of Exclusionary Zoning*, RUTGERS CTR. FOR LAW IN METROPOLITAN EQUITY (Sept. 20, 2013), <http://www.clime.newark.rutgers.edu/publications/article/persistence-exclusionary-zoning>.

¹⁷ HAAR, *supra* note 11, at 8.

¹⁸ *Id.*; *see also* Van Baaren, *supra* note 16 (explaining how local zoning ordinance limit the supply of housing to increase the municipality’s desirability and raise the price of residential accesses to the area. Van Baaren explains local governments’ objectives as follows: “Through this practice, municipal governments are able to accomplish two distinct but interrelated objectives: (1) they can take advantage of the benefits of regional development without having to bear the burdens of such development; and (2) they can maintain themselves as enclaves of affluence.”).

Nevertheless, markedly, in 1975, the New Jersey Supreme Court struck down the practice of exclusionary zoning in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*.¹⁹ The revolutionary decision declared that every “developing municipality” has a state constitutional obligation under both substantive due process and equal protection, in addition to the state’s inherent police powers, to provide a realistic opportunity to afford housing for all people.²⁰ Accordingly, it set the precedent that developing municipalities have an affirmative duty to provide for their “fair share of the regional need for low and moderate income housing.”²¹

Though innovative, *Mount Laurel I* did not develop remedies or guidelines to implement its mandate. Rather, it relied on voluntary municipal compliance, reasoning that, “[t]he municipality should first have full opportunity to itself act without judicial supervision.”²² Yet, it notably encouraged the state legislature to aid in preventing exclusionary zoning at the local level by authorizing regional zoning, or at least regulation of those land use ordinances with a substantial impact by an agency beyond the local municipality.²³

Despite the court’s groundbreaking decision, local municipalities largely ignored the mandate.²⁴ Its lack of enforcement procedures led to little change.²⁵ Thus, the New Jersey

¹⁹ *Mount Laurel I*, 67 N.J. at 173-75. The decision resulted from a lawsuit brought by the Southern Burlington County NAACP on behalf of low-income African-American residents of Mount Laurel Township, who were not afforded the opportunity to build decent housing to replace the run-down homes in which they lived.

²⁰ *Id.*

²¹ *Id.* at 192.

²² *Id.*

²³ *Id.* at 189 & n.22.

²⁴ Henry L. Kent-Smith, *The Council on Affordable Housing and the Mount Laurel Doctrine: Will the Council Succeed?* 18 RUTGERS L.J. 929, 933 (1987). (“Overall, the supreme court’s reliance on goodwill efforts and voluntary compliance meant no low cost housing.”).

²⁵ *See id.* at 953 (“Prior to the Mount Laurel II decision, little legislative action was taken towards effectuating the constitutional obligation set forth in the original *Mount Laurel* decision. In fact, some of the earliest legislative actions were proposed constitutional amendments to overrule this decision. These amendments redefined the Article I guarantees making them inapplicable to land use ordinances which may have indirect economic effects on low and moderate income housing opportunities.”); Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court’s Judicious Retreat*, 18 SETON HALL L. REV. 30, 32 (1988) (“While hailed as a case which could transform land-use

Supreme Court consolidated six cases concerning the issues surrounding the *Mount Laurel* Doctrine into a trial that resulted in what has been coined *Mount Laurel II*.²⁶ In *Mount Laurel II*, aggravated by “widespread non-compliance,” the court expressly reaffirmed *Mount Laurel I* and authorized substantial remedies to “put some steel into [the *Mount Laurel*] doctrine.”²⁷ Particularly, instead of applying the doctrine to “developing” municipalities as it did in *Mount Laurel I*, the Court adopted the State Development Guide Plan as a method of discerning “growth areas” where the *Mount Laurel* mandate would apply.²⁸ Furthermore, in an effort to promote a consistent and expedited system, it established a procedure by which three specially selected judges would hear all future *Mount Laurel* litigation.²⁹ The judges would assess “fair share” for their regions, oversee challenges and development, and have the authority to invoke enforcement measures for noncompliant municipalities.³⁰ Significantly, the court also approved a “builder’s remedy,” in which developers could receive direct approval from the court to build developments that included a reasonable share of affordable housing, if they successfully sued the municipalities with exclusionary zoning ordinances that rejected the developments.³¹

In adopting these extensive remedial measures, the court noted that while it prefers legislative to judicial action in the field, the inaction of the legislative and executive branches essentially left it no choice but to “give meaning to the constitutional doctrine” through its “own devices.”³² In other words, if the legislative body would not take action to enforce constitutional

law, eight years later little had changed.”); Alan Mallach, *From Mount Laurel to Molehill: Blueprint for Delay*, 15 N.J. REP. 21 (Oct. 1985) (“Looking back in 1983, eight years after the original [*Mount Laurel*] decision, it seemed clear that little lower-income housing had actually been built as a result of the *Mount Laurel* ruling, and not a single unit in Mount Laurel Township itself.”).

²⁶ *Mount Laurel II*, 92 N.J. at 158.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Mount Laurel II*, 92 N.J. at 158.

rights, the judiciary would. The fact that the legislature could not reach accord to devise an effective enforcement mechanism was no longer an excuse.³³

The court's controversial decision mustered up both praise and resistance, generated over one hundred lawsuits, and most significantly, prompted the executive and legislative branches to act.³⁴ In 1985, in order to preserve municipal home rule and to keep the judiciary away from implementing the *Mount Laurel* mandate, the legislature enacted the Fair Housing Act.³⁵ The FHA created a state agency, known as the Council on Affordable Housing (COAH), which was granted broad authority to assess and determine affordable housing obligations.³⁶ Its purpose was to serve as "an optional administrative alternative to litigating constitutional compliance through civil exclusionary zoning actions."³⁷

COAH would be required to: (1) enact regulations that establish and update statewide affordable housing need; (2) assign each municipality an affordable housing obligation for its

³³ *Id.* (explaining that the court's intervention was attributable in part to "the enormous difficulty of achieving a political consensus that might lead to significant legislation enforcing the constitutional mandate better than [the court] can, legislation that might completely remove [the court] from those controversies."); see also Paula A. Franzese, *Mount Laurel and the Fair Housing Act: Success or Failure?* 19 FORDHAM URB. L.J. 59, 67-68 (1991) ("Recognizing that the sore absence of political consensus posed a formidable obstacle to the passage of responsive legislation, the court concluded that enforcement of the constitutional rights at stake could not await a supporting popular concordance.").

³⁴ Corey Klein, *Re-Examining the Mount Laurel Doctrine After the Demise of the Council on Affordable Housing: A Critique of the Builder's Remedy and Voluntary Municipal Compliance*, SETON HALL L. STUDENT SCHOLARSHIP PAPER, 1, 7 (2012), http://erepository.law.shu.edu/student_scholarship/123; see also Thomas Daniel McCloskey, *Animal House Re-Lived: A Depiction of New Jersey's Current Affordable Housing Landscape*, IN THE ZONE (Feb. 2009), http://www.foxrothschild.com/content/uploads/2015/05/inthezone_feb09_animalhouse.pdf. ("A rash of such suits were brought in the wake of Mt. Laurel II, prompting fears by municipalities that the courts would be dictating to them how and where residential developments (with and without affordable housing) would be implemented.")

³⁵ N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 2013); Kent-Smith, *supra* note 24, at 937 & n.62 ("The concept of municipal Home Rule directly opposes the regional fair share allocation of low and moderate income housing. The term Home Rule originates from the *Home Rule Act of 1917* . . . This act gave municipalities broad powers 'over the internal affairs of such municipalities for local government.'"); McCloskey, *supra* note 34 ("Tensions immediately fomented and reached a feverish pitch between and among the judicial, legislative, and executive branches of government over who was the more responsible, and equipped, agency of government to socially engineer housing policy and implement construction state-wide.")

³⁶ N.J. STAT. ANN. §§ 52:27D-307, -308; see also *Mount Laurel IV*, 221 N.J. at 4.

³⁷ *Mount Laurel IV*, 221 N.J. at 4.

designated region; and (3) identify the delivery techniques available to municipalities in addressing the assigned obligation.³⁸ Of critical importance was COAH's ability to assess a municipality's fair share plan and housing element, and accordingly, grant or deny "substantive certification."³⁹ In order to reward municipal compliance, the FHA protected towns that received substantive certification by granting a period during which the municipality's implementing ordinances would enjoy a presumption of validity in any ensuing exclusionary zoning litigation.⁴⁰ Furthermore, it generated the "exhaustion-of-administrative-remedies requirement," which provided a period of immunity from lawsuits to towns participating in the administrative process for demonstrating constitutional compliance.⁴¹

Despite criticism that the new Act institutionalized delay and did not provide enough recourse, in *Mount Laurel III*, the New Jersey Supreme Court upheld the constitutionality of the Fair Housing Act.⁴² While recognizing that the attack on the statute was substantial, the court dismissed it as pure speculation, and conveyed its preference for legislative action.⁴³ It afforded the Legislature great deference, reasoning, "that a law is presumed to be constitutional" and found that any inadequacy with respect to the Council "must be close to a certainty" to be deemed unconstitutional.⁴⁴ Moreover, the court clarified that in the earlier *Mount Laurel* cases, it was not sheer delays alone that necessitated judicial intervention, but rather, "the total disregard by municipalities of the judiciary's attempts to enforce the obligation, and the interminable delay where litigation was in process."⁴⁵ The unanimous decision thus transferred jurisdiction of all

³⁸ N.J. STAT. ANN. § 52:27D-307 to -308; 313 to -317; *see also Mount Laurel IV*, 221 N.J. at 7-8.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Mount Laurel III*, 103 N.J. at 21; Kent-Smith, *supra* note 24, at 945; *see also Franzese, supra* note 25, at 40.

⁴³ *Mount Laurel III*, 103 N.J. at 43; Kent-Smith, *supra* note 24, at 945; *see also Franzese, supra* note 25, at 40.

⁴⁴ *Mount Laurel III*, 103 N.J. at 43-45.

⁴⁵ *Mount Laurel III*, 103 N.J. at 41. The Court also rejected the argument that the freeze on builder's remedies was part of the constitutional obligation. *Id.* at 42.

pending litigation to the Council.⁴⁶ However, the court warned that if the legislature failed to accomplish its constitutional obligation, the judiciary would have no choice but to re-enter the scene and assure constitutional compliance.⁴⁷

The system established worked somewhat well through the year 2000.⁴⁸ About half of New Jersey's local governments had submitted plans for COAH by the year 2001, and those, along with an additional sixty-eight, had completed or were beginning construction of about 29,000 low and moderate income housing units.⁴⁹ Moreover, about 11,000 units were bought and occupied by low and moderate income households at this time.⁵⁰ However, COAH's shortcomings quickly proved the system ineffective, and a lack of political consensus regarding the mandate allowed, if not enabled, local noncompliance.⁵¹ Inaction on the part of the legislative and executive branches thus allowed history to repeat itself, and on March 10, 2015, the New Jersey Supreme Court fulfilled its promise of *Mount Laurel II* and re-entered the affordable housing scene in what is now deemed "*Mount Laurel IV*."⁵² The unanimous decision rendered COAH "moribund," and just like in *Mount Laurel II*, transferred jurisdiction over *Mount Laurel* affordable housing issues to specially selected judges as the first forum for redress.⁵³ This has prompted the floodgates to open with litigation.

⁴⁶ *Id.* at 26.

⁴⁷ *Id.* at 23 (noting, "If . . . the Act . . . achieves nothing but delay, the judiciary will be forced to resume its appropriate role." "[n]o one should assume that our exercise of comity today signals a weakening of our resolve to enforce the constitutional rights of New Jersey's lower income citizens.").

⁴⁸ Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 851 (2011); see also Eamonn K. Bakewell, *Foreclosure of a Dream: The Impact of the Council on Affordable Housing's New Regulations on the Constitutional Duty to Provide Affordable Housing in New Jersey*, 2 RUTGERS J.L. & PUB. POL'Y 310, 313-14 & n.30 (2005).

⁴⁹ Mallach, *supra* note 48, at 851.

⁵⁰ *Id.*

⁵¹ *Id.*; Bakewell, *supra* note 48 at 316 ("Unfortunately, the regulations are rife with loopholes that would allow smart municipalities to completely avoid their Mount Laurel obligations."); Klein, *supra* note 34, at 17-18.

⁵² *Mount Laurel IV*, 221 N.J. at 1.

⁵³ *Id.* at 5.

Part III: Inaction and Lack of Political Consensus Leads to Judicial Intervention

In 2015, the judiciary was ultimately forced to re-enter the fray and render COAH “moribund” as a direct result of not only COAH’s own flaws, but a lack of political accord that ultimately facilitated abrogation of the *Mount Laurel* mandate at the local level.⁵⁴ Despite COAH’s initial successes, embedded within the agency were loopholes that allowed townships to avoid their affordable housing obligations.⁵⁵ The legislative and executive branches of the State’s government, however, simply did not address these shortcomings.⁵⁶ Rather, clashing opinions concerning the *Mount Laurel* Mandate at its very core funneled conflicting decisions made by these branches.⁵⁷ Ultimately, the same tensions amongst the executive, legislative, and judicial branches that led to COAH’s creation also led to its demise, necessitating intense judicial intervention all over again, thirty years later.

A. COAH’s Faults

The system set up by COAH ultimately had its own faults that necessitated judicial intervention. In 1987, the Council first adopted specific rules for determining a municipality’s affordable housing obligation known as the First Round Rules.⁵⁸ In 1993, the Second Round Rules were adopted, which were similar to the first, but took into account changes in census data.⁵⁹ The rules “applied a complex formula that took into account vacant land area, employment growth, and income distribution to come up with a firm, and sometimes seemingly highly arbitrary number for each municipality.”⁶⁰ While the criteria set out by COAH was inherently designed to address

⁵⁴ *Id.*

⁵⁵ *Id.*; see also Bakewell, *supra* note 48, at 321-22; see also Klein, *supra* note 34, at 17-18.

⁵⁶ See generally Mallach, *supra* note 48.

⁵⁷ *Id.*

⁵⁸ See *In re Adoption of N.J.A.C. 5:94 & 5:95*, 390 N.J. Super. 1, 11 (App. Div. 2007); see also Klein, *supra* note 34, at 8.

⁵⁹ *In re Adoption of N.J.A.C. 5:94 & 5:95*, 390 N.J. Super. at 25.; see also Klein, *supra* note 34, at 8.

⁶⁰ Mallach, *supra* note 48 at 850-51. See also *In re Adoption of N.J.A.C. 5:94 & 5:95*, 390 N.J. Super. at 25.

a municipality's need for affordable housing, the rules had various "loopholes" that prevented inclusion.⁶¹

Particularly, under the rules, municipalities could reduce the number of affordable housing units they were required to provide through the use of "credits."⁶² In addition, up to twenty-five percent of a municipality's required affordable housing could be satisfied through age-restrictive affordable housing.⁶³ Moreover, communities could make use of a "Regional Contribution Agreement" (RCA) in which they could transfer up to fifty percent of their fair share to another community within the region through an agreement.⁶⁴ Essentially, with an RCA, municipalities were "sending communities and receiving communities."⁶⁵ Cash typically changed hands between the sender and the receiver, with the sender being a suburban community and the receiver usually an urban center.⁶⁶

As time went on, as a result of these leniencies, many felt as though COAH became increasingly bureaucratic and not as concerned about the housing needs of low-income people.⁶⁷ Its amenability combined with inaction led to a downward spiral.⁶⁸ The promulgation of Third Round Rules was due in 1999—however, when the Second Round Rules expired, COAH had not proposed new regulations.⁶⁹ By 2004, the Appellate Division stated that COAH's delay frustrated

⁶¹ Bakewell, *supra* note 48, at 321-22; *see also* Klein, *supra* note 34, at 17-18.

⁶² N.J.A.C. 9:93-2.14, -3.2; *see also In re Adoption of N.J.A.C. 5:94 & 5:95*, 390 N.J. Super. at 25. (Explaining that in particular, COAH permitted credits and adjustments to reduce a municipalities fair share for affordable housing constructed between 1980 and 1986, for substantial compliance, and "for municipalities that lacked sufficient vacant land or did not have access to water and sewer.")

⁶³ N.J.A.C. 5:93-5.15. In other words, by providing senior housing units could satisfy affordable housing obligations. *See also In re Adoption of N.J.A.C. 5:94 & 5:95*, 390 N.J. Super. at 25.

⁶⁴ N.J.S.A. § 52:27D-312. *See also In re Adoption of N.J.A.C. 5:94 & 5:95*, 390 N.J. Super. at 23.

⁶⁵ Franzese, *supra* note 33, at 72.

⁶⁶ *Id.*

⁶⁷ Mallach, *supra* note 48, at 851; *see also* Klein, *supra* note 34, at 17.

⁶⁸ *Id.*

⁶⁹ *See* 31 N.J.R. 1480 (June 7, 1999) (noting that second-round obligations expired on June 6, 1999); *see also Mount Laurel IV*, 221 N.J. at 8.

the public policies embodied by the *Mount Laurel* cases.⁷⁰ COAH finally adopted a set of Third Round Rules on December 20, 2004, five years after the end of the previous round.⁷¹ In contrast to the prior rules, the new rules relied upon a municipality's "growth share," as opposed to a fixed obligation.⁷² This meant that municipalities had to provide affordable units "only to the extent that market rate housing and non-residential growth took place."⁷³ The new methodology was highly criticized for deterring municipalities from expanding, since under the new regulations, housing obligations were determined by the amount of homes and jobs created.⁷⁴ Moreover, the new rules were scrutinized because they allowed one half of the affordable housing obligations to be satisfied through RCAs and the other half through age-restrictive zoning.⁷⁵

The flaws in COAH's own rules were simply not addressed by the Council until the judiciary was forced to enter the scene in 2007. Opposition from both developers and housing advocates, along with the New Jersey Builders Association, brought suit to invalidate the Third Round Rules.⁷⁶ On January 25, 2007, the Appellate Division affirmed portions of COAH's proposed methodology, but invalidated other aspects of the Third Round Rules.⁷⁷ These invalidated aspects included the "growth share" principle and others methods by which COAH reduced municipal housing obligations, on constitutional and other grounds.⁷⁸

⁷⁰ *In re Six Month Extension of N.J.A.C. 5:91*, 372 N.J. Super. 61, 95-96, 855 A.2d 582 (App. Div. 2004), *cert. denied*, 182 N.J. 630 (2005); *see also Mount Laurel IV*, 221 N.J. at 8.

⁷¹ *Mount Laurel IV*, 221 N.J. at 8.

⁷² *Id.* at 23. *E.g.*, Bakewell, *supra* note 48 at 320-29 (providing a detailed description of the Third Round Rules).

⁷³ Mallach, *supra* note 48 at 851.

⁷⁴ Bakewell, *supra* note 48 at 320-21 ("There are both strong advocates and harsh critics of the New Third Round Numbers. The criticisms focus on the fact that there are so many loopholes in the new third round numbers that enable clever municipalities to effectively avoid the Mount Laurel obligation.").

⁷⁵ *Id.* One major criticism of allowing age restrictive zoning to satisfy affordable housing obligations is that it discriminates against low-income families with children. *Id.* at 323.

⁷⁶ *Id.*

⁷⁷ *In re Adoption of N.J.A.C. 5:94 & 5:95*, 390 N.J. Super. at 86-87.

⁷⁸ *Id.* at 88. *See also* McCloskey, *supra* note 34 (stating that judicial intervention in the process invalidated COAH's third rounds "as having been, in material part, defective and trumped-up in such a way that, the Appellate Division concluded, recklessly if not deliberately underestimated the affordable housing need state-wide and over-stated the successes of municipal compliance with affordable housing obligations.")

Yet, the problematic rules remained for quite some time thereafter. Thus, efforts to truly enforce the *Mount Laurel* mandate moved at a glacial pace. It was not until after the Appellate Division granted COAH two extensions, that COAH promulgated revised rules in 2008.⁷⁹ These rules maintained a form of the “growth share” methodology, but removed many of the credits and other concerns of the prior rules, and more than doubled the total local fair share obligation.⁸⁰ However, the delay in their creation simply worsened the public’s perception of the *Mount Laurel’s* mandate. Specifically, it frustrated those municipalities that already spent time and money to meet the requirements of the *prior* rules in good faith, but now fell out of compliance.⁸¹

B. State Government Inaction & Lack of Political Consensus

Following the adoption of the revised Third Round Rules a slew of contradictory decisions concerning the *Mount Laurel* mandate by both the executive and legislative branches followed. Independent from COAH’s promulgation of its revised Third Round Rules that became effective on June 2, 2008, and while COAH’s further amendments had been proposed, on July 17, 2008, Governor Corzine enacted new COAH-reform legislation, P.L. 2008, c. 46, which updated the prior Act.⁸² It was driven by Assembly Speaker Joe Roberts, who was newly elected at the time.⁸³

The legislation amended the New Jersey Fair Housing Act.⁸⁴ It added a new section to the FHA known as the “State-wide Non-Residential Development Fee Act” and took effect immediately upon its enactment by Governor Corzine on July 17, 2008.⁸⁵ The Amendment also

⁷⁹ N.J.R. 237(a) (Jan. 22, 2008); 40 N.J.R. 515(a) (Jan. 22, 2008); *see also Mount Laurel IV*, 221 N.J. at 8.

⁸⁰ *See* Mallach, *supra* note 48, at 853.

⁸¹ *Id.*

⁸² N.J. STAT. ANN. §§ 52:27D-329.2; McCloskey, *supra* note 34 (describing the new Act, P.L. 2008, c. 46, which “took the form of Assembly Bill 500/Senate Bill 1783 – more commonly known and referred to as the ‘Roberts’ Bill’ that had been passed by the State Assembly on June 16, 2008, and State Senate on June 23, 2008.”)

⁸³ Mallach, *supra* note 48, at 854.

⁸⁴ *Id.*

⁸⁵ *Id.*

abolished RCAs and made other changes to law concerning affordable housing.⁸⁶ Particularly, it provided that COAH may authorize a municipality to impose and collect development fees from developers of residential property, but provided that the municipality may not spend or commit to spend any of the fees without first obtaining COAH’s approval of the expenditure.⁸⁷ Moreover, it mandated COAH to promulgate regulations regarding the establishment, administration, and enforcement of the expenditure of affordable housing development fees by municipalities.⁸⁸

Of critical significance, the Amendment also added that any developer fees collected, but not committed for expenditure within four years from the date of the collection, would be required by the council to revert the remaining unspent balance at the end of the four-year period to the state’s “New Jersey Affordable Housing Trust Fund,” to be used in the housing region of the transferring municipality for the authorized purposes of that fund.⁸⁹ Shortly thereafter, in 2008, COAH’s then-Executive Director wrote to all New Jersey mayors explaining the provisions and noting that COAH was authorized to promulgate regulations regarding the expenditure of development fees in the municipal trust funds.⁹⁰ However, this never transpired, despite the

⁸⁶ *Id.*

⁸⁷ N.J. STAT. ANN. §§ 52:27D-329.2(a) (stating first that COAH “may authorize a municipality that has petitioned for substantive certification . . . to impose and collect development fees from developers of residential property” and second, that “[a] municipality may not spend or commit to spend any affordable housing development fees . . . without first obtaining [COAH’s] approval of the expenditure”); *see also* *In re Failure of COAH to Adopt Trust Fund Regulations*, 440 N.J. Super. 220, 223 (App. Div. 2015) [hereinafter *In re Failure of COAH*].

⁸⁸ N.J. STAT. ANN. §§ 52:27D-329.2(d) (requiring COAH to “promulgate regulations regarding the establishment, administration and enforcement of the expenditure of affordable housing development fees by municipalities”); *see also In re Failure of COAH*, 440 N.J. Super at 223.

⁸⁹ N.J. STAT. ANN. §§ 52:27D-329.2(d) (providing that “[a] municipality that fails to commit to expend the balance required in the development fee trust fund by the time set forth in this section shall be required by the council to transfer the remaining unspent balance at the end of the four-year period to the ‘New Jersey Affordable Housing Trust Fund,’ . . . to be used in the housing region of the transferring municipality for the authorized purposes of that fund.”); N.J. STAT. ANN. §§ 52:27D-329.2(b) (declaring, in part “[a] municipality that fails to commit to expend the amounts collected pursuant to this section within the timeframes established shall be required to transfer any unexpended revenue collected pursuant to subsection a. of this section to the ‘New Jersey Affordable Housing Trust Fund,’ . . . to be used within the same housing region for authorized purposes of that fund, in accordance with regulations promulgated by the council”); *see also In re Failure of COAH*, 440 N.J. Super at 224.

⁹⁰ *In re Failure of COAH*, 440 N.J. Super at 224.

Amendment's mandate that COAH do so.⁹¹ The inaction thus added to the uncertainty concerning affordable housing obligations. Consequently, by this point, COAH's credibility had begun to decrease, as delays on the part of COAH continued to aggravate local governments.⁹²

Moreover, in 2008, confusion further spiraled when Governor Corzine altered the constitutional requirements of *Mount Laurel*, ignoring distinctions drawn by the Legislature in the Highlands Act.⁹³ Specifically, the Governor ratified the Highlands Regional Master Plan and issued "Executive Order 114," aimed at issues relating to the eighty-eight northern New Jersey municipalities located in the Highlands region.⁹⁴ Executive Order 114 "directed that COAH's calculations of affordable housing obligations of municipalities be adjusted downwards as necessary to ensure consistency with the Highlands Regional Master Plan" even though the Highlands Region, by statute, was already divided in to two distinct areas: the "Preservation Area" and the "Planning Area."⁹⁵ The Governor's mandate was officially implemented on November 4, 2008 and allowed conforming Highlands Region municipalities to have their "COAH Third Round affordable housing regulations adjusted to ensure that the Regions' water and other resources were protected."⁹⁶

⁹¹ *Id.*

⁹² Mallach, *supra* note 48, at 854-55.

⁹³ McCloskey, *supra* note 34; *see also Memorandum of Understanding Among the Highlands Water Protection And Planning Council, The New Jersey State Planning Commission, and the Office of Smart Growth, NEW JERSEY HIGHLANDS COUNCIL*, http://www.nj.gov/state/planning/docs/highlands_mou_2007.pdf (last visited Feb. 1, 2016) [hereinafter *Memorandum of Understanding*]. In 2001, the state plan designated the New Jersey Highlands Region a Special Resource Area in New Jersey based upon its unique characteristics and resources. Accordingly, it enacted the Highlands Act in 2004, which recognized the Highlands Region as an essential of exceptional natural resources, and created a bifurcated system for municipal and county conformance with the Regional Master Plan (RMP) that consists of a "preservation area" and a "planning area." *Id.* at 1-2.

⁹⁴ *Id.*

⁹⁵ McCloskey, *supra* note 34.

⁹⁶ *Id.* Executive Order 114 was ultimately implemented by a Memorandum of Understanding between the Highlands Council and COAH. Each conforming municipality's obligation would be determined by a local build-out analysis to be performed in accordance with the Highland Regional Master Plan and "up to 50 percent of a municipality's affordable housing obligation could be shared with other willing municipalities in the Highlands Region in order to conserve environmentally sensitive lands or to take advantage of transportation hubs or existing infrastructure." *Id.* *See also Memorandum of Understanding, supra* note 93.

While Governor Corzine’s Executive Order enabled protection of the Highlands Region’s resources, it triggered the issuance of a “scare resource restraint” (“the restraint”) by COAH merely one week later, which further rattled political accord with respect to affordable housing obligations.⁹⁷ The restraint effectively stopped all construction that did not include affordable units in all Highlands towns under its control.⁹⁸ It was deemed to apply even to those towns in the Highlands Region “Planning Area,” where compliance with the Regional Master Plan is voluntary.⁹⁹ Therefore, the restraint had a significant effect on development efforts. Director of the Sierra Club of the New Jersey, Jeff TiFittel, attempted to justify the wide sweeping restraint, and stated that his organization supported the order, saying, “[w]e felt it would be the one way to make sure the affordable housing got built, and the towns couldn't play games. . . . Without the order, we worried that towns would approve luxury housing or box stores and say they had no room left for affordable housing, leading developers to sue and threaten the environmental protections of the Highlands Act.”¹⁰⁰ In other words, the restraint was an attempt to prevent towns from quickly constructing in areas with scarce room for development, to exploit Executive Order 114 and avert affordable housing obligations. However, the decision ultimately aggravated political unanimity and led to greater delay in affordable housing efforts, since COAH arguably did not provide proper legal notice nor comply with its own rules or procedures.¹⁰¹ The sentiment was that COAH was essentially “shutting down the planning and zoning boards of the 72 affected

⁹⁷ McCloskey, *supra* note 34.

⁹⁸ *Id.* (The towns affected included “72 of the 88 municipalities in the Highlands Region, including 24 of Morris County’s 32 municipalities.”).

⁹⁹ *Id.*

¹⁰⁰ Paula Saha, *State Approves Affordable Housing Rules for 72 Highlands Towns*, NJ.COM (Nov. 12, 2008), http://www.nj.com/news/index.ssf/2008/11/state_approves_affordable_hous.html.

¹⁰¹ McCloskey, *supra* note 34.

Highlands Region towns for the next 4-5 years.”¹⁰² It was thus viewed as an unjustified means of achieving nothing but deferral, and local governments’ aggravation with COAH intensified.¹⁰³

As this controversy took place, municipalities continued to wait on COAH to provide a framework for the expenditure of housing development fees. However, during the wait, legislation to abolish COAH was introduced by the Republican minority in the New Jersey Legislature in early 2009.¹⁰⁴ By January 19, 2010, Senate Bill 1 was introduced to abolish COAH.¹⁰⁵ The bill was amended a number of times over the months to come.¹⁰⁶ Around this time, at the executive level, in February 2010, newly elected Governor Christie issued Executive Order No. 12, which created the Housing Opportunity Task Force.¹⁰⁷ He directed the task force to review existing affordable housing laws and regulations, assess “the continued existence of COAH,” and issue a report in 90 days, staying any pending COAH proceedings until the task force submitted its report.¹⁰⁸ In its report issued March 19, 2010, the task force concluded that in “the 25 years since its creation, COAH has failed to recognize the significant changes in New Jersey environmental awareness, transportation, population trends, and the economic climate.”¹⁰⁹ The Task Force determined that COAH was “irrevocably broken” and proposed a new model for affordable

¹⁰² *Id.*

¹⁰³ *Id.* (McCloskey explains, “One highly respected, prominent land use lawyer noted that ‘This was a very irregular way to proceed . . . I have a bunch of hearings scheduled in the next few weeks, and I’m not sure if the planning boards are going to let them go forward . . . We might be talking about a couple of years of delay if the courts don’t step in and say this was not required, this was not justified.’”).

¹⁰⁴ *Id.* Although this legislation was unsuccessful, around the same time, soon to be Governor Chris Christie announced, “If I am governor, I will gut COAH and I will put an end to it.” Mallach, *supra* note 48, at 855.

¹⁰⁵ See S. 1., 214th Leg. (N.J. Jan. 19, 2010); see also *In re Abolition of Council on Affordable Housing*, 424 N.J. Super. 410, 438 (App. Div. 2012), *aff’d as modified*, 214 N.J. 444, 452 (2013) [hereinafter *In re Abolition*]; see also Mallach, *supra* note 48, at 856 (Mallach describes, S-1, stating, “While the bill would have given the State Planning Commission some of COAH’s ministerial responsibilities, the Commission would neither set fair share numbers nor approve municipal plans. Under S-1, municipalities could choose between adopting a housing plan embodying a self-determined fair share goal or imposing a twenty percent affordable housing set-aside on all new development”).

¹⁰⁶ *In re Abolition*, 214 N.J. at 452; see, e.g., S. Comm. Substitute for S. Comm. Substitute for S. 1, 214th Leg. (N.J. June, 3, 2010); S. Comm. Substitute for S. Comm. Substitute for S. 1 [First Reprint], 214th Leg. (N.J. Dec. 10, 2010).

¹⁰⁷ See 42 N.J.R. 659(a) (Mar. 15, 2010); see also *In re Abolition*, 214 N.J. at 451.

¹⁰⁸ *In re Abolition*, 214 N.J. at 451.

¹⁰⁹ *Id.* at 452.

housing policy.¹¹⁰ Thereafter, although COAH’s statutory responsibilities remained unchanged, the council was carefully monitored by the Governor’s office.¹¹¹ As a result, it effectively remained latent. This ultimately had a devastating effect on the implementation of affordable housing throughout the state, because COAH took few, if any, significant actions.¹¹²

The lack of unity amongst the legislature became further apparent by June 2010, when one version of the Senate 1 Bill passed the Senate, but did not reach enough support in the Assembly.¹¹³ However, during the summer and fall of 2010, “the Assembly leadership worked to craft an alternative bill that would occupy a middle ground among the many different advocates and interest groups.”¹¹⁴ A-3447, introduced in October 2010, attempted to provide a new method of carrying out the *Mount Laurel* mandate.¹¹⁵ Also, during this time, the Appellate Division concluded that COAH’s revised regulations suffered from “many of the same deficiencies as the original third round rules,” and invalidated considerable parts of the second set of COAH’s Third Round Rules.¹¹⁶ *Again*, the court remanded to COAH for the adoption of new Third Round Rules and “specifically directed COAH to use a methodology for determining prospective need similar to the methodologies used in the prior rounds.”¹¹⁷ Moreover, the court ordered COAH to complete the task within five months.¹¹⁸ However, this was ignored by Governor Christie’s administration.¹¹⁹

¹¹⁰ *Id.*

¹¹¹ Mallach, *supra* note 48, at 856.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 857.

¹¹⁵ *Id.*

¹¹⁶ *In re Adoption of N.J.A.C. 5:96 & 5:97*, 416 N.J. Super. 462, 471 (App. Div. 2010), *aff’d*, 221 N.J. 1,9 (2015).

¹¹⁷ *Mount Laurel IV*, 221 N.J. at 9 (citing *N.J.A.C. 5:96 & 5:97*, 416 N.J. Super at 487-511).

¹¹⁸ *Id.*

¹¹⁹ Mallach, *supra* note 48, at 856.

Within three months, in January 2011, after some negotiations between the leadership of the two houses, with minor modifications, A-3447 was substituted for S-1, and the bill passed both houses on a party-line vote in January.¹²⁰ Given COAH's lack of successes, "it was now seen as politically impossible to give any state agency the authority to impose or enforce fair share obligations."¹²¹ Nonetheless, A-3447 embraced a variation of the Massachusetts 40B model.¹²²

Although the legislature finally achieved accord concerning affordable housing reform at this point in time, the State still failed to achieve consensus at the executive level. Despite the senate and assembly's collaboration to achieve an agreement between the two houses, the Governor conditionally vetoed the bill on January 25, 2011.¹²³ His veto delineated particular objections to the final bill and requested that it be amended to go back to the version that was passed in the Senate on June 10, 2010.¹²⁴ However, since the legislature was not willing to adopt the changes demanded by the Governor, the bill died.¹²⁵

By February 7, 2011, the bill was withdrawn from consideration in the Legislature.¹²⁶ It became evident that despite close attempts, the branches of state government could not agree on a new affordable housing policy, and as a result, the FHA and COAH remained intact.¹²⁷ Since the Bill under consideration died, COAH remained the sole *Mount Laurel* enforcement mechanism. While the Appellate Division was willing to hold COAH accountable for its responsibilities, the

¹²⁰ *Id.* at 858.

¹²¹ *Id.* at 857 (Mallach explains that the task of forming the bill was difficult, as it was apparent that municipalities needed firm quantifiable targets to establish fair share obligations, but it was evident that no standard would be effective without higher-level enforcement.)

¹²² *Id.* ("In order to provide a means of verifying the legitimacy of the municipal plan, without giving that responsibility to a state agency, the bill created a new category of 'licensed housing compliance professional' authorized to review and certify municipal housing plans."); see A.B. 3447, 214 Leg., 1st Sess. (NJ 2010).

¹²³ *In re Abolition*, 214 N.J. at 452.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 452-53.

executive branch treated it as a non-existent agency.¹²⁸ In the meantime, the New Jersey Supreme Court had agreed to take the appeals from the appellate division ruling overturning the COAH rules.¹²⁹

Roughly four months later, on June 29, 2011, the Governor issued Reorganization Plan No. 001-2011 (“The Plan”).¹³⁰ The Governor’s Plan sought to abolish COAH and transfer its powers, functions, and duties to Department of Community Affairs (DCA).¹³¹ Accordingly, it would replace the twelve-member Council with the DCA Commissioner.¹³² Around this time, in 2012, the DCA Commissioner, Richard E. Constable, prepared amendments that purported to define when funds were considered as expended or committed for expenditure, pursuant to the FHA’s 2008 Amendment, after not being defined for four years.¹³³ Such regulations were critical, since the 2008 Amendment had provided that the municipality could not “spend or commit to spend” any of the fees without first obtaining COAH’s approval of the expenditure, and added that any developer fees collected, but not committed, for expenditure within four years from the date of the collection would revert to the State’s “New Jersey Affordable Housing Trust Fund,” to be used in the housing region of the transferring municipality for the authorized purposes of that fund.¹³⁴ However, Commissioner Constable’s amendments were never adopted.¹³⁵ Thus, in their absence, municipalities were left to their own devices to attempt to resolve the issue, but had little success.¹³⁶

¹²⁸ Mallach, *supra* note 48, at 856.

¹²⁹ See *Mount Laurel IV*, 221 N.J. at 1.

¹³⁰ *In re Abolition*, 214 N.J. at 453; see 43 N.J.R. 1621(a) (Aug. 1, 2011).

¹³¹ *In re Abolition*, 214 N.J. at 453.

¹³² *Id.*

¹³³ *In re Failure of COAH*, 440 N.J. Super. at 224.

¹³⁴ N.J. STAT. ANN. §§ 52:27D-329.2(a), *supra* note 87.

¹³⁵ *In re Failure of COAH*, 440 N.J. Super. at 224-25.

¹³⁶ *Id.* Among these methods included an entreaty by one group of municipalities to the Governor regarding the uncertainty presented by the status quo. The municipalities argued that, without having a clear meaning of what exactly “commit to expend,” meant under the amendment, they would be forced to commit funds while remaining liable to compensate from their own funds if stricter guidelines were later devised by COAH. *Id.* at 225.

Subsequently, on March 8, 2012, the Appellate Division invalidated Governor Christie's Plan to abolish COAH after the Fair Share Housing Center challenged the Reorganization Plan in court.¹³⁷ Shortly thereafter, despite the fact that legislation was passed that would have defined what funds were "committed," and therefore ineligible for transfer to the State, on June 29, 2012, Christie vetoed the legislation and passed to extend the four-year deadline for two years.¹³⁸ Moreover, Christie line-item vetoed language in the 2012-2013 budget which would have defined what funds were "committed" and therefore ineligible for transfer to the State.¹³⁹ With that proposed definitional language removed, the 2012 budget bill as signed into law provided that "an amount not to exceed \$200,000,000 from the municipal affordable housing trust funds and transferred to the New Jersey Affordable Housing Trust Fund as funds that have not been committed "shall be deposited in the General Fund as state revenue."¹⁴⁰ By July of 2012, the Christie administration attempted to usurp nearly \$200 million in trust funds set aside for affordable housing, and place them into the State's general fund.¹⁴¹ Hence, the millions of dollars in fees accumulated over years, specifically devoted to affordable housing efforts, could essentially be used for anything, but that for which they were intended. However, ultimately, that effort failed because it was ruled unlawful by the Appellate Division.¹⁴²

C. The Judiciary Re-Enters the Fray

In 2013, higher courts finally addressed issues relating to the lack of political consensus that enabled delays for affordable housing.¹⁴³ Specifically, in July 10, 2013, the New Jersey

¹³⁷ *In re Abolition*, 214 N.J. at 453-54.

¹³⁸ *In re Failure of COAH*, 440 N.J. Super. at 225-26. The language of the legislation vetoed was adopted as L. 2012, c. 18). *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 225.

¹⁴¹ Kevin Walsh, *Court Rules Trust Fund Raid Illegal*, FAIR SHARE HOUSING CENTER (Apr. 9, 2015), <http://fairsharehousing.org/blog/entry/court-rules-trust-fund-raid-illegal/>.

¹⁴² *See infra* note 159 and accompanying text.

¹⁴³ *See In re Abolition*, 214 N.J. at 444.

Supreme Court affirmed that the governor could not unilaterally abolish COAH.¹⁴⁴ Furthermore, two months later, the New Jersey Supreme Court affirmed the Appellate Division's decision invalidating the Third Round rules, and directed COAH to adopt new rules.¹⁴⁵ Incorporating the Appellate Division's five-month compliance period, the new rules were to be created by February 26, 2014.¹⁴⁶ However, the court granted COAH one last motion for an extension, subject to specific conditions and this date was pushed back even further.¹⁴⁷ COAH was to adopt the Third Round Rules by October 22, and publish the notice in the November 17 edition of the New Jersey Register.¹⁴⁸

Ultimately, it became apparent that COAH did not approach this deadline. Although the Board met and voted to propose COAH's new Third Round Rules on April 30, 2014, the rules had not been provided to the Board until roughly twenty-four hours before the meeting.¹⁴⁹ Furthermore, its second meeting to vote on the proposed new Third Round Rules did not take place until October 20, 2014, merely two days before the court's extended deadline. At that meeting, the COAH members split 3-3 on the vote, and the Third Round Rules were thus never adopted by October 22 in accordance with the court's order.¹⁵⁰

As a result of COAH's studied inaction, in March 2015, the New Jersey Supreme Court unanimously ruled that there was no longer a legitimate basis to block access to the courts with respect to issues regarding the *Mount Laurel* mandate.¹⁵¹ Specifically, the court held that, "[t]he FHA's exhaustion-of-administrative remedies requirement, which states off civil actions, is

¹⁴⁴ *Id.* at 479.

¹⁴⁵ *In re Adoption of N.J.A.C. 5:96 & 5:97*, 215 N.J. 578 (2013).

¹⁴⁶ *See Mount Laurel IV*, 221 N.J. at 9.

¹⁴⁷ *Id.* at 9-10.

¹⁴⁸ *Id.* at 10.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 5.

premised on the existence of a functioning agency, not a moribund one.”¹⁵² The court recognized that by failing to promulgate Third Round Rules after years of inaction, COAH was essentially dilapidated. Jurisdiction over *Mount Laurel* affordable housing issues, therefore, would return the courts as the first forum for redress. Particularly, the court held, “[p]arties concerned about municipal compliance with constitutional affordable housing obligations are entitled to such access, and municipalities that believe they are constitutionally compliant or that are ready and willing to demonstrate such compliance should be able to secure declarations that their housing plans and implementing ordinances are presumptively valid in the event they later must defend against exclusionary zoning litigation.”¹⁵³ Hence in an impartial fashion, the court was willing to accommodate both municipalities and affordable housing advocates alike.

In order to establish an orderly method by which proceedings could commence and to allow parties to prepare, the court delayed its order 120 days and established a transitional process.¹⁵⁴ Under the process, after the first 90 days, municipalities would have 30 days to file declaratory judgment actions before judges assigned in each vicinage.¹⁵⁵ These declaratory judgment actions would allow the municipalities to request immunity from lawsuits if they had already achieved substantive certification, or already had “participating status” from COAH under the Third Round Rules before they were invalidated.¹⁵⁶ The judges’ evaluation of a town’s plan could then result in what it referred to as “the town’s receipt of the judicial equivalent of substantive certification and accompanying protection as provided under the FHA.”¹⁵⁷ On the other hand, if towns chose

¹⁵² See *Mount Laurel IV*, 221 N.J. at 5.

¹⁵³ *Id.* at 21-29.

¹⁵⁴ *Id.* There are approximately twenty-nine specially designated civil-division *Mount Laurel* judges, including backup Judges, serving the fifteen Vicinages in New Jersey. No Vicinage has more than three assigned judges. See *Designated Mount Laurel Judges by Vicinage*, NEW JERSEY JUDICIARY (Oct. 2015), https://www.judiciary.state.nj.us/civil/Designated_Mount_Laurel_Judges_Roster.pdf

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 5-6.

¹⁵⁷ *Id.* at 6.

not to file such actions within the time frame set by the New Jersey Supreme Court, an action could be brought by a party against that municipality to determine whether its housing plan satisfied the *Mount Laurel* mandate.¹⁵⁸ The court thus made clear that any municipalities noncompliant with the deadlines set forth would have clear consequences. Respectively, the following month, the Appellate Division further clarified that the Christie administration could not take housing trust funds and place them in the State's general fund.¹⁵⁹

Part IV: Why the *Mount Laurel IV* Decision Was Necessary

Ultimately, the *Mount Laurel IV* decision terminating any requirement to exhaust administrative remedies before COAH for *Mount Laurel* compliance issues was necessary to serve as an impetus for reform and to put an end to delays in the provision of affordable housing opportunities throughout the State. It is evident that without political consensus and reform legislation, affordable housing obligations are simply ignored absent court orders pushing the process along. Inconsistencies at the State government level enable municipalities to employ pre-textual methods to disregard the mandate. This is because the absence of clear governing standards leaves local and county officials, respective in-house and outside professional staffs, litigators, developers, builders, planners, local government attorneys, zoning, land use, and planning attorneys, engineers, affordable housing advocates, and environmentalists with insufficient guidance concerning how best to comply with the *Mount Laurel* mandate.¹⁶⁰ Such lack of guidance for all involved enables municipalities to exploit irregularities, rely on loopholes, and foster delay. Specifically, absent political consensus and strict enforcement mechanisms, localities can be creative in finding ways to avoid compliance, whether by routinely routinely requesting deadline

¹⁵⁸ See *Mount Laurel IV*, 221 N.J. at 6.

¹⁵⁹ *In re Failure of COAH*, 440 N.J. Super at 220; see also Walsh, *supra* note 141.

¹⁶⁰ See McCloskey, *supra* note 34 (explaining the “whole host of representatives” that are “intimately involved in the affordable housing matrix”).

extensions, hiring attorneys and experts skilled in avoidance tactics, and using environmental preservation as a pre-text to skirt the *Mount Laurel* duty. Now that the judiciary has established jurisdiction over *Mount Laurel* litigation in the first instance, those delay tactics are less likely to succeed.

The present posture of allowing the judiciary to serve as the first forum for redress until reform legislation is developed makes good sense. Otherwise, municipalities can too easily skirt their affordable housing obligations by requesting extensions and adjournments. The Township of Marlboro, for example, failed to act in good faith in the completion of its second-round obligations and in its submissions for third-round certification by fashioning deferrals for years on end.¹⁶¹ Particularly, the township fulfilled only about one-fifth of its 1019-unit second-round obligation by obtaining numerous postponements throughout COAH's review process.¹⁶² Moreover, during this time, Marlboro frequently shifted project sites to defer the process of erecting affordable housing.¹⁶³ Although COAH attempted to resolve this issue, its enforcement was simply not effective. For example, COAH confronted the municipality by demanding further information regarding its changes in affordable housing plans.¹⁶⁴ However, the township was ultimately able to escape these demands by simply requesting further postponements through the

¹⁶¹ See *In Re Marlboro Township, Monmouth County, Motion Seeking Accelerated Denial of Marlboro's Third Round Housing Element and Fair Share Plan, A-0243-10T4*, at *4 (N.J. Super. App. Div. Aug. 7, 2015) [hereinafter *In Re Marlboro*].

¹⁶² *Id.* at *5. The township had been creating delays since December of 1985, when Marlboro was granted a period of repose until 1991, which was later extended at its request to 1995. Although the town included certain sites to address its second-round obligations, Marlboro later proposed to eliminate the sites and “[b]y the time it began to engage in COAH-moderated mediation of its third-round obligations, it was including proposals which would simultaneously satisfy its second-round obligations.” *Id.* at *4-5. The Appellate Division ultimately held, “[n]ot only were the township's third-round substantive proposals significantly flawed, but it also fell woefully short of fulfilling its second-round commitments.” *Id.* at *10-11.

¹⁶³ *Id.* at *5.

¹⁶⁴ *Id.*

administrative process.¹⁶⁵ These extensions thus allowed Marlboro to perpetually postpone its *Mount Laurel* obligations.

In addition, the frequent changes and inconsistencies at the state governmental level allow municipalities to avoid their obligations, because townships' attorneys are able to use the lack of political consensus as a defense when townships are challenged for engaging in dilatory behavior. For example, when various developers filed a motion to dismiss Marlboro from COAH's jurisdiction after years of noncompliance, the township not only opposed the application and requested additional extensions, but also attributed its delay to "factors beyond its control, such as the Governor's executive order suspending COAH's operations, appeals challenging the third-round regulations, and the introduction of legislative proposals designed to alter the affordable housing laws."¹⁶⁶ While it was apparent that the municipality had no intention or drive to satisfy its affordable housing obligations, it was able to mask its failure to do so and gain more time by using the state government's inaction to its advantage.¹⁶⁷

Moreover, the *Mount Laurel IV* decision was necessary, because without judicial intervention, municipalities can too easily create the illusion of compliance. For example, a township could enact a set of ordinances that do make provision for affordable units, but never act upon those ordinances. For instance, in 2011, the Fair Share Housing Center sued the Hoboken Zoning Board and four developers for failing to enforce a local housing ordinance with provisions that require residential developers to devote a certain percentage of new units for "working

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at *15. It was apparent that the township had no drive to comply with affordable housing obligations despite factors beyond its control since the township "did nothing to advance the completion of additional housing units." The township never supplied COAH with supporting information that the Council requested regarding plans for which the township sought approval of. Marlboro's failure to supply COAH with this necessary supporting information was never justified nor explained, despite COAH's repeated requests for the information.

families, seniors and those with disabilities.”¹⁶⁸ The Appellate Division ultimately agreed with the Fair Share Housing Center and upheld the ordinance, which compelled developers in the city to make ten percent of new units affordable to lower-income families. However, the decision was not rendered until July of 2015, roughly twenty-seven years after the ordinance was signed into law in 1988.¹⁶⁹

Furthermore, it is imperative to allow the judiciary to serve as the first forum for redress, because in the midst of the political confusion surrounding the *Mount Laurel* doctrine, and absent reform legislation, municipalities can abuse proposals for environmental preservation efforts as a pretext to continue exclusionary practices.¹⁷⁰ In *Mount Laurel II*, the court specifically held that “the Mount Laurel Doctrine will not restrict other measures, including large-lot and open area zoning, that would maintain its beauty and communal character.”¹⁷¹ The court thus implemented affordable housing obligations while accounting for environmental conservation proposals. However, one study revealed, “municipalities are targeting land able to accommodate higher-density development in their preservation efforts, and that municipalities that preserve open space are also active in transferring away their affordable housing obligations.”¹⁷² This indicates that

¹⁶⁸ Laura Denker, *Appellate Court Upholds Hoboken Housing Ordinance: Ruling Means at Least 55 New Affordable Rentals*, FAIR SHARE HOUSING CENTER (Apr. 2015), <http://fairsharehousing.org/blog/entry/appellate-court-upholds-hoboken-housing-ordinance-ruling-means-at-least-55->. (Explaining, “[t]he ordinance was meant to ensure that longtime Hoboken residents could continue to live in the city even as it developed and became a more expensive place to live.”); see *Fair Share Housing Center, Inc. v. Zoning Bd. of City of Hoboken*, 441 N.J. Super. 483 (App.Div. 2015) [hereinafter *City of Hoboken*].

¹⁶⁹ *City of Hoboken*, 441 N.J. at 491. (This decision overturned a lower court ruling that struck down the housing ordinance, holding that it violated New Jersey’s housing policies); see also Denker, *supra* note 168. (Fair Share Housing Center Executive Director Kevin Walsh declared, “[t]his unanimous decision [*City of Hoboken*] is a victory for working families – not only in Hoboken but also in fast-growing urban communities across New Jersey.” He added, “[a]s expensive new luxury high-rises go up across New Jersey, the court today gave our cities crucial tools to ensure that no one is left behind by this continuing growth and everyone can enjoy the benefits of living in these thriving communities.”).

¹⁷⁰ See *infra* notes 170-77 and accompanying text.

¹⁷¹ *Mount Laurel II*, 92 N.J. at 220.

¹⁷² See Stephan Schmidt and Kurt Paulsen, *Is Open Space Preservation a Form of Exclusionary Zoning? The Evolution of Municipal Open-Space Politics in New Jersey*, 45 URB. AFF. REV. 92 (2009).

without strict oversight, and under relaxed “enforcement” regimes like COAH, towns can employ environmental preservation plans as a way to curtail affordable housing obligations. In *Toll Bros. v. Twp. Of W. Windsor*, for example, the New Jersey Supreme Court affirmed the lower court’s decision granting a builder’s remedy when a township established ordinances to set aside an excessive amount of common open and recreational space and the sites zoned for affordable housing had severe environmental constraints including “freshwater wetlands, freshwater wetlands buffers, and floodplain plain areas.”¹⁷³ The township also set unduly expensive sewerage requirements that made development unlikely.¹⁷⁴ Moreover, it did not authorize the building of modest one-family detached dwellings, or the building of modest one-family detached dwellings.¹⁷⁵ The court found that the township failed to provide a reasonable opportunity for the development of affordable housing and did not built the units of affordable housing to which it committed.¹⁷⁶

Similarly, in *Tomu Dev. Co. v. Borough of Carlstadt*, zoning boards did not satisfy their affordable housing obligations arguing that the land had no realistic development potential.¹⁷⁷ However, the Appellate Division ultimately affirmed that the municipality could not even meet its burden of proving that the site for development was environmentally constrained or that construction would represent bad planning.¹⁷⁸ It found that East Rutherford made no good faith

¹⁷³ *Toll Bros. v. Twp. of W. Windsor*, 173 N.J. 502, 529 (2002); *see also* 1-9 A Practical Guide To Winning Land Use Approvals and Permits § 9.05 (LexisNexis 2015) [hereinafter *A Practical Guide*].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Tomu Dev. Co. v. Borough of Carlstadt*, 2008 N.J. Super. Unpub. LEXIS 1996 (App.Div. Aug. 29, 2008)..The case involved three back-to-back appeals that arose from two consolidated “builder’s remedy” suits, alleging that the Borough of Carlstadt and the Borough of East Rutherford, and their zoning boards, engaged in exclusionary zoning and failed to meet their affordable housing obligations.

¹⁷⁸ *Id.* at *3. After the developer asserted that the land and infrastructure needed for affordable housing was scarce in the municipalities, the lower court had issued a “scare resources” order that restrained the municipalities from approving any new use of or access to scare resources without court approval, in order to assure that affordable housing might actually be built. The land upon which the developer proposed to build affordable housing laid within the statutorily created Meadowlands District. *Id.* at *8.

effort to submit a compliant housing element, as the site appeared to be one of the few remaining developable housing sites in the two municipalities.¹⁷⁹ The Appellate Court also notably upheld the trial judge's decision to, for the first time ever, create an additional new mechanism to ensure compliance by the defendant towns as an aide to its award of a "builder's remedy."¹⁸⁰ Specifically, a new "'Mt. Laurel Implementation Monitor' was appointed by the court to perform pertinent zoning functions of the towns such as making land use development decisions for them, preparing housing elements and fair share plans and appearing before the NJMC on affordable housing applications."¹⁸¹ All zoning ordinances in both Carlstadt and East Rutherford were suspended pending their compliance with the remedy.¹⁸²

While the court ultimately held in favor of the implementation of affordable housing in both *Toll Bros.* and *Tomu Dev. Co.*, it is important to allow the judiciary to serve as the initial forum for redress until effective reform legislation can be passed. Otherwise, attempts at securing compliance with the affordable housing mandate would be needlessly protracted. For example, previously aggrieved developers had to comply with COAH's own procedures before being granted judicial review. Those procedures presented multiple opportunities for delay and obfuscation. For instance, in *In Re Marlboro*, the court held, "COAH gave Marlboro years of opportunities to perfect its plans. That Marlboro chose not to do so triggered the consequences it

¹⁷⁹ *Id.* at *18. The lower court's opinion thus stated that the land use regulations of the municipalities remained invalid and unconstitutional insofar as they continued past exclusionary practices and the Meadowlands Commission "implicitly fostered" those municipalities' failures through its "benign neglect of the housing needs of the poor." *Id.* at *3.

¹⁸⁰ *Id.* at *18.

¹⁸¹ McCloskey, *supra* note 34; *Tomu*, 2008 N.J. Super. Unpub. at *10-11, 18. The Appellate division rejected a challenge the the imposition of the "Mt. Laurel Implementation Monitor" and instead lauded the lower court's innovation as "an inspired and appropriate exercise of the court's judicial powers" that was "creative and insightful" and "intended to avoid collaboration between the municipalities and Meadowlands Commission that would continue the pattern of non-compliance." *Id.* at *21-22.

¹⁸² *See Tomu*, 2008 N.J. Super. Unpub. LEXIS at *10-11.

now faces.”¹⁸³ Although the court held that “Mount Laurel issues were best addressed before a judge, as Marlboro simply failed to engage in the alternative process in good faith,” it was not until many years later that the Court actually got to address the issue.¹⁸⁴ These were years that could have been spent erecting affordable housing units for people in need.

Moreover, this lengthy process deters people from pursuing litigation because the amount of time and money expended on such can be rendered worthless if the litigation is unsuccessful. For example, in *Mount Olive Complex v. Township of Mount Olive*, although *Mount Laurel* issues were finally dealt with before the judiciary, the court ultimately affirmed the denial of a builder’s remedy.¹⁸⁵ The Appellate Division concluded that it did not appear that completion of the proposed project would significantly impact the availability of affordable housing in the township.¹⁸⁶ Specifically, it affirmed that the developer was not a “major player” in an earlier settlement and could not demonstrate that Mount Olive’s land-use regulations failed to provide a realistic opportunity to satisfy its obligation at the time the developer brought its litigation.¹⁸⁷ Although the developer exhausted significant time and money to pursue litigation, its efforts were fruitless. As a result, many of the aggrieved simply do not litigate. John Mangin, an attorney who worked for the Fair Share Housing Development, explained that, “[s]uburban municipalities will baldly reject conforming applications for multifamily affordable development, knowing that applicants will most likely not be able to carry a property through a drawn-out legal battle.”¹⁸⁸ Furthermore, he states, “[a]nd while the remedy in a successful NIMBY suit is a blocked development, the remedy in a successful developer suit is typically the privilege of starting the

¹⁸³ *In Re Marlboro*, A-0243-10T4, at *11-12.

¹⁸⁴ *Id.* at *12. The Appellate Division noted that for years, “Marlboro engaged in dilatory tactics throughout the application process.” *Id.* at *10.

¹⁸⁵ *Mount Olive Complex v. Township of Mount Olive*, 356 N.J. Super 500 (App. Div. 2003).

¹⁸⁶ *Mount Olive Complex*, 356 N.J. Super at 507; *see also A Practical Guide*, *supra* note 173.

¹⁸⁷ *Mount Olive Complex*, 356 N.J. Super. at 507-10.

¹⁸⁸ John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 101 n.53 (2014).

costly approvals process all over again. Delay can kill projects outright if carry costs become too burdensome. The developer loses the property or simply gives up.”¹⁸⁹ Thus, from the perspective of developers, the costs of delay can simply outweigh any benefits of building affordable housing.

Conversely, by terminating any requirement to first exhaust administrative remedies before COAH, the problem of delays in affordable housing can be averted. The *Mount Laurel IV* decision serves not as a punishment, but rather, a means by which towns can demonstrate their constitutional compliance.¹⁹⁰ Moreover, it acts as an impetus for reform in affordable housing legislation. While the judiciary took control of *Mount Laurel* compliance issues, the court held, “nothing herein should be understood to prevent COAH from fulfilling its statutory mission to adopt constitutional rules to govern municipalities’ Third Round obligations in compliance with the FHA.”¹⁹¹ Nevertheless, until constitutional rules or more effective legislation is developed, the *Mount Laurel IV* decision has acted to end delays in the implementation of affordable housing.

By allowing the judiciary to serve as a forum of initial redress, clearer guidelines regarding the *Mount Laurel* mandate have already emerged to avert postponement on the part of municipalities. For example, within a few short months of the decision, in July of 2015, Superior Court Judge Douglas K. Wolfson clarified the steps that need to be taken by municipalities in order to comply with *Mount Laurel*.¹⁹² The decision provided a roadmap for compliance and illustrated

¹⁸⁹ *Id.* at 101. The term NIMBY, which stands for “Not In My Backyard” is a characterization referring to people who oppose proposals for new developments because they perceive that the development will bring about something potentially dangerous, unpleasant, or unsightly in their neighborhood.

¹⁹⁰ See *Mount Laurel IV*, 221 N.J. at 23 (explaining that “it bears emphasizing that the process established is not intended to punish the towns represented before this Court, or those that are not represented but which are also in a position of unfortunate uncertainty due to COAH’s failure to maintain the viability of the administrative remedy. Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes, where appropriate, that are similar to those which would have been available through COAH for the achievement of substantive certification.”).

¹⁹¹ *Id.* at 6 (Furthermore, the court held, “[n]or should the action taken by this Court, in the face of COAH’s failure to fulfill its statutory mission, be regarded as impeding the Legislature from considering alternative statutory remedies to the present FHA.”).

¹⁹² In the Matter of the Adoption of the Monroe Township Housing Element and Fair Share Plan and Implementing Ordinances, MID-L-3365-15, at *6 (Law Div. July 9, 2015) [hereinafter *Monroe Township*]; see also Kevin Walsh,

that the judiciary acts as an impartial referee when addressing affordable housing issues. It allotted the municipality, Monroe Township, ample time to file a fair share plan while also setting a firm deadline of November 9, 2015.¹⁹³ Moreover, it stressed that all interested parties would have the opportunity to be heard. Accordingly, the Judge permitted a developer and the Fair Share Housing Center to participate in the lawsuit.¹⁹⁴

Furthermore, by giving specially assigned judges jurisdiction over all affordable housing litigation in the first instance, municipalities can no longer snub their affordable housing obligations by requesting extensions and adjournments. The judicial branch has made clear that such attempts will no longer be tolerated. For instance, even though Judge Wolfson's decision clearly set out a roadmap for municipalities for filing a fair share plan, the Borough of Roselle Park nevertheless filed a motion to request that the five-month period begin on an undecided future date.¹⁹⁵ However, this delay tactic was quickly eliminated. When the FSHC opposed the request, it was able to quickly and efficiently obtain an order granting immunity and declaring that the five months would begin when the municipality filed in court.¹⁹⁶

Decision Provides Roadmap to Municipalities, Requires Fair Share Plans in 5 Months, FAIR SHARE HOUSING CENTER (July 9, 2015), <http://fairsharehousing.org/blog/entry/decision-provides-roadmap-to-municipalities-requires-fair-share-plans-in-5-/>.

¹⁹³ *Monroe Township*, MID-L-3365 at *6 (Judge Wolfson held, "I am satisfied that Monroe has made a good faith attempt to satisfy its affordable housing obligations, and hence, deserves immunity from exclusionary zoning actions, on the condition that it prepares and files its housing element and fair share plan within five months").

¹⁹⁴ *Id.* at *9 (holding "while I am mindful of the Supreme Court's clear mandate to adjudicate such actions as quickly as prudence and justice will allow, it is amply clear that the Court specifically contemplated, and in the case of FSHC, for example, directly encouraged, interested parties to weigh in on the extent and methods by which a given municipality proposed to fulfill its affordable housing obligations").

¹⁹⁵ See Kevin Walsh, *Another Court Rules Five Months Starts from Filing of DJ Complaint*, FAIR SHARE HOUSING CENTER (July 24, 2015), <http://fairsharehousing.org/blog/entry/another-court-rules-five-months-starts-from-filing-of-dj-complaint/>.

¹⁹⁶ See Walsh, *supra* note 195 (explaining "[t]he municipality sought to delay when the five-month period started, arguing that nine months was not enough time to prepare a fair share plan and that other proceedings had to happen first, all while declining to provide even a proposed timeframe for when those proceedings would happen"); see also *In the Matter of the Application of the Borough of Roselle Park, County of Union, Order Maintaining and Reaffirming the Borough's Immunity From Mount Laurel Lawsuits*, UNN-L-2061-15, (Law. Div. July 24, 2015).

Moreover, by allowing the judiciary to serve as the first forum for redress, Judges have been able to quickly make innovative decisions to promote the building of affordable housing. Particularly, in Middlesex County, Judge Wolfson continues to rapidly address *Mount Laurel* issues. In September of 2015, for example, he held that municipalities “proceeding in good faith” to accomplish judicial consent of their affordable housing plans will have their housing trust funds safeguarded from state seizure.¹⁹⁷ Since Monroe Township, collected over ten million dollars in its housing trust fund, the decision is likely to have a significant impact on future housing development projects.¹⁹⁸

In October of 2015, Judge Wolfson issued another noteworthy decision that accounted for the sixteen-year delay in the adoption of fair housing rules.¹⁹⁹ The decision is binding on Middlesex County and follows an approach that divides the State’s housing need into two segments.²⁰⁰ Specifically, from 1999 to 2015, excess Prior Round credits can be applied so that affordable housing need from the 16-year gap is addressed first.²⁰¹ The resulting need will then be phased in three ten-year cycles, over thirty years.²⁰² Although, under the FHA, a municipality may be eligible for a one thousand unit cap limiting fair housing obligations, this determination would be made separately for the 2015-2025 segment, after any remaining excess Prior Round credits are applied.²⁰³ Thus, the longwinded sixteen-year delay in affordable housing is accounted

¹⁹⁷ In the Matter of the Adoption of the Monroe Township Housing Element and Fair Share Plan and Implementing Ordinances, MID-L-3365-15, (Law. Div. Aug. 26, 2015); Laura Denker, *Ruling by Judge Wolfson protects Monroe housing trust funds, sets process to build homes*, FAIR SHARE HOUSING CENTER (Sept. 1, 2015), <http://fairsharehousing.org/blog/entry/ruling-by-judge-wolfson-protects-monroe-housing-trust-funds-sets-process-to/>.

¹⁹⁸ Denker, *supra* note 197.

¹⁹⁹ Laura Denker, *Middlesex County decision addresses municipal cap issue*, FAIR SHARE HOUSING CENTER (Oct. 15, 2015), <http://fairsharehousing.org/blog/entry/middlesex-county-decision-addresses-municipal-cap-issue/>.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Denker, *supra* note 199.

for.²⁰⁴ The decision, which is the first to address this issue, proves that the judiciary is committed to holding municipalities accountable for their *Mount Laurel* obligations.²⁰⁵

Part V: Conclusion

Ultimately, despite the challenges it has faced, the *Mount Laurel* mandate remains a most hopeful mechanism by which to make real the promise of decent housing for all.²⁰⁶ It is evident, however, that the judiciary has its work cut out for it in arriving at stricter and more cohesive enforcement mechanisms than those set out by COAH. Indeed, COAH and the coordinating branches object failure yielded inescapable the conclusion that the judiciary had to enter the fray. It will remain there until the legislative and executive branches can develop legislation that effectively addresses the affordable housing crisis. Until then, however, the judicial branch is needed to compel relief that will unquestionably have a meaningful impact on affordable housing reform in New Jersey. Today, New Jersey remains one of the most economically and racially segregated states in America notwithstanding the *Mount Laurel* mandate.²⁰⁷ The judiciary can spur meaningful change by implementing the spirit and letter of the affordable housing mandate.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *See Mount Laurel II*, 92 N.J. at 209-216.

²⁰⁷ Van Baaren, *supra* note 16.