

**THE FATE OF AFFORDABLE HOUSING
LEGISLATION IN NEW JERSEY: HOW
GOVERNOR CHRISTIE’S PROPOSED S-1
LEGISLATION THREATENS TO UNDO THE NEW
JERSEY SUPREME COURT DECISIONS IN
MOUNT LAUREL I AND *MOUNT LAUREL II***

Kirah Addes*

I. INTRODUCTION.....	82
II. BACKGROUND	85
A. Zoning	85
B. New Jersey’s Courts Responses to Exclusionary Zoning.....	87
C. COAH.....	92
D. S-1 and A-3447	97
III. THE FATE OF AFFORDABLE HOUSING LEGISLATION IN NEW JERSEY	100
A. Constitutionality of S-1: S-1 vs. The Mount Laurel Doctrine.....	100
B. Governor Christie Should Sign S-1(2).....	103
IV. CONCLUSION	105

I. INTRODUCTION

The nineteenth century Industrial Revolution brought overcrowding and pollution to cities across the United States.¹ In response to these problems, municipalities began implementing zoning ordinances, which allowed cities and towns to control land-planning

* J.D. Candidate, 2012, Seton Hall University School of Law; B.A. in Sociology, *cum laude*, New York University, 2008. The author would like to thank Professor Marc Poirier, Professor Paula Franzese and Adam Gordon, Esq. for their help and guidance in writing this Note. She would also like to thank her parents, Ethan and Talma Addes, for always inspiring her to go forth and learn great things.

¹ JESSE DUKEMINIER, JAMES E. KRIER, GREGORY D. ALEXANDER & MICHAEL H. SCHILL, PROPERTY 821 (6th ed. 2006).

development.² In 1926 the United States Supreme Court, in *Village of Euclid v. Ambler Realty* (hereinafter “*Village of Euclid*”),³ ruled that the power to implement zoning ordinances was inherent in a local government’s police power as long as the ordinances promoted public health, safety, morals or general welfare.⁴ Eventually, however, some municipalities began using zoning regulations to explicitly prevent particular socioeconomic groups from living within their boundaries.⁵ City officials speculated that people in similarly situated socioeconomic classes would choose to live in certain types of neighborhoods.⁶ For example, occupants of single-family houses on one-acre lots are likely to be wealthier than occupants of mobile homes. It follows that, if a municipality wanted to appeal to wealthier people it could influence the socioeconomic class of its residents by enacting a zoning ordinance banning mobile homes.⁷

In 1975, the New Jersey Supreme Court addressed the issue of exclusionary zoning in *Southern Burlington County NAACP v. Township of Mount Laurel* (hereinafter “*Mount Laurel I*”).⁸ In *Mount Laurel I*, the plaintiffs alleged that the land use regulations in the Township of Mount Laurel prevented low- and moderate-income families from living there.⁹ The Court invalidated the zoning regulations, finding that they excluded certain people based on the limited extent of their income and resources from living in the township.¹⁰

Despite the court’s decision in *Mount Laurel I*, eight years later the town of Mount Laurel remained afflicted with blatantly exclusionary

² Zoning ordinances essentially allow local governments to “control (a) building bulks, (b) the size and shape of lots, (c) the placement of buildings on lots, and (d) the uses to which the land and buildings may be put.” ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 74 (3d ed. 2005); see also *DUKEMINIER ET AL.*, *supra* note 1, at 821.

³ 272 U.S. 365 (1926).

⁴ See Brian Lerman, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 385 (2006).

⁵ This type of zoning became known as “exclusionary zoning.” ELLICKSON & BEEN, *supra* note 2, at 709 (explaining that city officials could “use land use regulations as an effective – if indirect – mechanism for excluding certain groups from the city’s resident population.”).

⁶ *Id.*

⁷ See generally *id.*

⁸ 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*].

⁹ *Id.* at 717.

¹⁰ See generally *id.* at 716.

zoning ordinances, forcing the New Jersey Supreme Court to revisit the issues in *Southern Burlington County NAACP v. Township of Mount Laurel* (hereinafter “*Mount Laurel I*”).¹¹ The Court in *Mount Laurel I* resolved to carry out the *Mount Laurel* doctrine.¹² New Jersey municipalities remained free, in many respects, to control the development of their communities through zoning laws, but not if it meant excluding lower income groups.¹³ In response to the decision in *Mount Laurel I*, the New Jersey Legislature enacted the Fair Housing Act (“FHA”) in 1985.¹⁴ The FHA established the Council On Affordable Housing (“COAH”),¹⁵ an agency in charge of the State’s affordable housing plans and responsible for ensuring that towns complied with the *Mount Laurel* doctrine.¹⁶

In January 2010, New Jersey State Senator Raymond Lesniak introduced the S-1 bill, which proposed major changes to the regulation of affordable housing.¹⁷ On June 10, 2010, the state Senate voted 28-3 to pass S-1.¹⁸ On October 18, 2010, New Jersey Assemblyman Jerry Green introduced his own version of a bill that proposed changes to the regulation of affordable housing, A-3447.¹⁹ On January 10, 2011, both houses approved an amended version of A-3447/S-1 (hereinafter “S-1(2)”).²⁰ On January 24, 2011 New Jersey Governor Chris Christie issued a conditional veto of S-1(2), calling for the Legislature to pass the earlier version of the bill, S-1.²¹ This Note discusses the

¹¹ 456 A.2d 390, 410 (N.J. 1983) [hereinafter *Mount Laurel I*].

¹² “*Mount Laurel* doctrine” refers to the court’s holdings in *Mount Laurel I*, which focused on preventing state and local governments from using their land use powers to discriminate against the poor. *Id.* at 410.

¹³ See generally *DUKEMINIER ET. AL.*, *supra* note 1, at 918.

¹⁴ N.J. STAT. ANN. § 52:27D-305 (West 2008).

¹⁵ The FHA “assigned [COAH] the responsibility for defining housing regions within the state, determining the regional need for low- and moderate-income housing, and specifying the criteria by which that need should be allocated among municipalities within each region.” *ELICKSON & BEEN*, *supra* note 2, at 776.

¹⁶ N.J. STAT. ANN. § 52:27D-305 (West 2008).

¹⁷ S. 1, 214th Leg. (N.J. 2010).

¹⁸ Peggy Ackermann & Claire Heining, *N.J. Senate Votes to Abolish Affordable-Housing Council, move Control from State to Towns*, NJ.COM, June 10, 2010, http://www.nj.com/news/index.ssf/2010/06/nj_senate_disbands_coah_moves.html.

¹⁹ H.R. 3447, 214th Gen. Assemb. (N.J. 2010).

²⁰ S. 1, 214th Leg. (N.J. 2011); see also Beth DeFalco, *State Legislature Overhauls Affordable-Housing Laws*, PRESSOFATLANTICCITY.COM, Jan. 11, 2011, http://www.pressofatlanticcity.com/news/press/new_jersey/article_1d7745ce-1d44-11e0-b58e-001cc4c03286.html.

²¹ Damika Webb, *Tell Your Legislators to Reject the Conditional Veto*, FAIR SHARE

constitutionality of S-1 and how Governor Christie's plan conflicts with the Judiciary's decisions in both *Mount Laurel I* and *II* and threatens to undo over thirty years of work towards improving the availability of affordable housing in New Jersey. An analysis of S-1 and S-1(2) will show that Governor Christie should have signed S-1(2), because S-1(2) does not suffer from the same constitutional issues as S-1 and complies with the *Mount Laurel* doctrine.

Part II of this Note takes a detailed look at the history of zoning, the New Jersey Supreme Court decisions in *Mount Laurel I* and *II*, the Appellate Court decisions on COAH's third round rules, and the proposed S-1 and S-1(2) affordable housing legislation. Part III discusses the constitutionality of S-1 and S-1(2) and the possible impact each bill would have on the regulation of affordable housing if enacted.

II. BACKGROUND

A. Zoning

When municipalities began enacting zoning ordinances, they sought to minimize or eliminate unwanted externalities.²² Zoning provided "rational planning . . . and an optimistic belief that planning bodies could control the shortsighted and uncoordinated decisions of individual landowners, which had resulted in ugly and chaotic cities."²³ Three important events precipitated the spread of the use of zoning ordinances across the United States.²⁴ First, in 1916 New York City approved a widely publicized zoning ordinance to remedy two problems: pollution due to traffic and factories, and the blockage of light and air as a result of proliferating skyscrapers.²⁵ Second, in 1921 Herbert Hoover, then United States Secretary of Commerce, introduced the Standard State Zoning Enabling Act, which sanctioned local "governments to regulate and restrict the height, number of stories, and size of buildings, . . . the density of population, and the location and use of buildings, structures and land for trade, industry, residence, or other

HOUSING CENTER BLOG (Jan. 28, 2011), <http://fairsharehousing.org/blog/entry/tell-your-legislators-to-reject-the-conditional-veto/>.

²² See generally *DUKEMINIER ET AL.*, *supra* note 1, at 828.

²³ *Id.* at 825.

²⁴ *ELLICKSON & BEEN*, *supra* note 2, at 74.

²⁵ *Id.* at 74-75.

purposes.”²⁶ Third, in 1926 the United States Supreme Court, in *Village of Euclid*, held that the power to enact zoning ordinances was a valid exercise of a municipality’s police power and was constitutional as long as the ordinances had a substantial relation to the health, safety, morals, or general welfare of the population.²⁷

Until 1927, New Jersey courts invalidated zoning schemes as unconstitutional and beyond a municipality’s police power.²⁸ In 1927, however, the New Jersey Legislature ratified an amendment to the New Jersey Constitution that gave the Legislature the power to authorize municipalities to enact zoning regulations.²⁹ In 1955 the New Jersey Supreme Court in *Pierro v. Baxendale*³⁰ reversed the New Jersey Law Division’s decision to grant the plaintiffs a building permit to construct a motel, despite a zoning ordinance prohibiting the construction of motels.³¹ The Court held that the city’s policy makers had the power to enact zoning ordinances as long as their decisions promoted the public interest.³² The court followed the same reasoning in its 1962 decision in *Vickers v. Township Committee of Gloucester Township* (hereinafter “*Vickers*”).³³ In *Vickers*, the Court held that it would not interfere with a municipal ordinance banning all mobile homes because the municipal officials believed the ordinance was in the best interest of the community.³⁴

By 1973, however, large metropolitan areas of New Jersey were

²⁶ *Id.*

²⁷ *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 397 (1926).

²⁸ Frederick W. Hall, *Prelude to Mount Laurel*, in *AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING* 4 (Jerome G. Rose & Robert E. Rothman eds., 1977); *see, e.g.*, *Robert Realty Co. v. City of Orange*, 135 A. 60, 61 (N.J. 1926) (finding that the City did not present sufficient evidence to show a zoning ordinance prohibiting the construction of apartments was necessary to protect the public health, safety, or general welfare) and *Stein v. City of Long Branch*, 2 N.J. Misc. 121, 123 (N.J. 1924) (holding a zoning ordinance that barred construction of multi-home developments unconstitutional).

²⁹ The amendment later became part of article 4 of the 1947 New Jersey Constitution. *See* N.J. CONST. art. IV, § 6, para. 2.

³⁰ 118 A.2d 401 (N.J. 1955).

³¹ *Id.* at 402, 408.

³² *Id.* at 408; *see also* Hall, *supra* note 28, at 6. (The court “in rather striking language . . . indicated its satisfaction with the thought that conscientious municipal officials had finally been sufficiently empowered to adopt zoning measures designed to preserve the ‘wholesome and attractive characteristics of their communities and the values of taxpayers’ property.”) (quoting *Pierro v. Baxendale*, 118 A.2d 401, 408 (N.J. 1955)).

³³ 181 A.2d 129 (N.J. 1962).

³⁴ *Id.* at 138.

changing rapidly. One commentator described the changes as follows:

Business and industry for one reason or another had moved out of the central cities and people had moved from the central cities to new houses in the suburbs. As cities were being worn out, the housing worsened and the people having to occupy that housing were at a disadvantage. Meanwhile, the suburban municipality was indulging in fiscal zoning; that is, to keep taxes low it was encouraging good ratables—industrial and commercial uses—and discouraging school children. To discourage the presence of school children, these developing municipalities were imposing all kinds of restrictions—limiting new construction to single-family housing on large lots, with large minimum floor area—while trying to attract industry. But this left the central cities and their residents in a terribly bad state, because the poor of all kinds were largely congregated in the cities.³⁵

Many communities, especially affluent ones, began implementing zoning ordinances that prohibited mobile homes and limited the construction of multi-family dwellings.³⁶ Over time, municipal governments became increasingly parochial, and it became clear that the motivation behind these zoning regulations was to “preserve community character.”³⁷ The regulations excluded lower income individuals from living in certain municipalities because those individuals could not afford to build or live in housing that met the zoning requirements.³⁸ These municipal zoning schemes resulted in numerous court challenges to exclusionary zoning and, ultimately, the New Jersey Supreme Court’s decision in *Mount Laurel I*.

B. New Jersey’s Courts Responses to Exclusionary Zoning

In 1975 the New Jersey Supreme Court, in *Mount Laurel I*, upheld a trial court decision that invalidated a system of land use regulations in the Township of Mount Laurel.³⁹ The Court based its decision on the notion that low- and moderate-income families were being unlawfully excluded from living in the municipality.⁴⁰ The legal question before the Court centered on whether it was lawful for a municipality to use zoning ordinances as a means of preventing people from living within

³⁵ Hall, *supra* note 28, at 9-10.

³⁶ Lerman, *supra* note 4, at 386.

³⁷ *Id.* at 387.

³⁸ *Id.* at 386-87.

³⁹ *Mount Laurel I*, 336 A.2d 713, 723 (N.J. 1975).

⁴⁰ *Id.*

that municipality based on the limited extent of their income.⁴¹

Plaintiffs⁴² in *Mount Laurel I* challenged two principal regulations of Mount Laurel's zoning scheme.⁴³ The first was an ordinance that permitted only single-family detached dwellings with large minimum lot-size requirements to be built in residential areas of the town.⁴⁴ The Court found that these requirements "[a]llow only homes within the financial reach of persons of at least middle income."⁴⁵ The second regulation plaintiffs challenged zoned approximately thirty percent of the town's land for industrial use, even though less than one percent of this area was actually used by industry.⁴⁶ This regulation effectively prevented developers from building on the land and kept the land vacant.

Low- to moderate-income earning individuals could not afford to live in the areas zoned for residential use because the housing was too expensive and they were not allowed to build more affordable housing on the land zoned for industrial purposes even though most of it was not being used. The Court agreed with the trial court's finding that the Township of Mount Laurel had engaged in economic discrimination by depriving the poor of adequate housing.⁴⁷ The Court held that every municipality's zoning scheme must provide "a variety and choice of housing" so as to afford low- and moderate-income persons a realistic opportunity to reside in each municipality.⁴⁸ The Court also explained that Mount Laurel could not use government tax money and other resources solely for the benefit of middle- and upper-income persons.⁴⁹ The Court summarized its holding as follows:

As a developing municipality Mount Laurel must, by its land use

⁴¹ *Id.* at 724.

⁴² The plaintiffs included current residents of Mount Laurel who resided in dilapidated housing, former residents who were unable to find suitable housing and thus had been forced to move, nonresidents living in rundown housing in the area who wished to acquire more suitable housing, and three organizations representing the interests of racial minorities, Southern Burlington County's National Association for the Advancement of Colored People (NAACP), Camden County's Congress of Racial Equality (CORE), and Camden County's NAACP. *Id.* at 717.

⁴³ *Id.* at 719.

⁴⁴ *Id.*; see also *DUKEMINIER ET AL.*, *supra* note 1, at 922.

⁴⁵ *Mount Laurel I*, 336 A.2d at 719.

⁴⁶ *Id.*; see also *DUKEMINIER ET AL.*, *supra* note 1, at 922.

⁴⁷ *Mount Laurel I*, 336 A.2d at 723.

⁴⁸ *Id.* at 724.

⁴⁹ *Id.* at 723.

regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply of these needs.⁵⁰

The Court granted the Township of Mount Laurel ninety days to amend its zoning regulations consistent with the court's findings and correct the deficiencies specified in the Court's opinion.⁵¹ Although the Court outlined a remedy pertaining specifically to the Township of Mount Laurel, the court also explained that the problem of exclusionary zoning existed in numerous other municipalities.⁵² Therefore, the Court broadened its holding by requiring each New Jersey municipality to enable developers, through land use ordinances, to have a realistic opportunity to provide a fair share of low- and moderate-income housing.⁵³

Unfortunately, the court's holdings in *Mount Laurel I* proved difficult to apply.⁵⁴ In two cases following *Mount Laurel I*, *Oakwood at Madison, Inc. v. Township of Madison* (hereinafter "*Oakwood*")⁵⁵ and *Pascack Association v. Mayor & Council of Township of Washington* (hereinafter "*Pascack Association*"),⁵⁶ the New Jersey Supreme Court

⁵⁰ *Id.* at 731-32; see also *DUKEMINIER ET AL.*, *supra* note 1, at 930 (explaining that in *Mount Laurel I* the court found that a municipality may not foreclose opportunities for low- and moderate-income housing, and must offer an opportunity for such housing "at least to the extent of the municipality's fair share of the present and prospective regional need therefore.").

⁵¹ *Mount Laurel I*, 336 A.2d at 734.

⁵² *Id.* at 717.

⁵³ *Id.* at 724. "Low-income housing" refers to housing "occupied or reserved for occupancy by households with a gross household income equal to 50% or less of the median gross household income for households of the same size within the housing region in which the housing is located." N.J. STAT. ANN. § 52:27D-304(c) (West 2008). "Moderate-income housing" refers to housing "occupied or reserved for occupancy by households with a gross household income equal to more than 50% but less than 80% of the median gross household income for households of the same size within the housing region in which the housing is located." N.J. STAT. ANN. § 52:27D-304(d) (West 2008).

⁵⁴ Rutgers University, *History*, THE N.J. DIGITAL LEGAL LIBRARY (2010), <http://njlegallib.rutgers.edu/mtlaurel/aboutmtlaurel.php>.

⁵⁵ 371 A.2d 1192 (N.J. 1977).

⁵⁶ 379 A.2d 6 (N.J. 1977).

interpreted the *Mount Laurel* doctrine as only applicable to “developing municipalities.”⁵⁷ The Court held that *Mount Laurel I* did not require municipalities to provide a specific number of low-cost housing units.⁵⁸ The holdings in these cases gave towns very little incentive to provide affordable housing, and eight years later the New Jersey Supreme Court revisited the issues raised in *Mount Laurel I* in *Mount Laurel II*.⁵⁹

The Court in *Mount Laurel II* stated that it was determined to make the *Mount Laurel* doctrine work.⁶⁰ The Court explained, “unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in . . . trials and appeals. We intend by this decision to . . . clarify it and make it easier for public officials . . . to apply it.”⁶¹ The court heard and decided five cases in addition to the *Mount Laurel* case.⁶² In its *Mount Laurel II* opinion, the Court outlined various requirements and obligations every municipality must follow in order to comply with the *Mount Laurel* doctrine.⁶³ First, the Court held that every municipality must provide its fair share of the region’s present and prospective need for affordable housing as designated by the state.⁶⁴ Next the Court ruled that all municipalities should provide a realistic opportunity for the construction of decent housing for residents currently living in decrepit housing.⁶⁵ The Court overruled the holdings in *Oakwood* and *Pascack Association*, stating that a municipality must express its affordable

⁵⁷ The court described “developing municipalities” as municipalities with sizeable land area that have “undergone great population increase[s] since World War II . . . but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth.” *Mount Laurel I*, 336 A.2d at 717-18; *see also* ELLICKSON & BEEN, *supra* note 2, at 773.

⁵⁸ *Pascack Association*, 379 A.2d at 11; *see also* ELLICKSON & BEEN, *supra* note 2, at 773.

⁵⁹ *See* ELLICKSON & BEEN, *supra* note 2, at 773.

⁶⁰ *Mount Laurel II*, 456 A.2d 390, 410 (N.J. 1983).

⁶¹ *Id.*

⁶² The five other cases are: *Urban League of Essex Co. v. Twp. of Mahwah*, No. L-17112-71 (N.J. Super. Ct. Law Div. Mar. 8, 1979) (cited in *Mount Laurel II*, 456 A.2d at 411); *Glenview Dev. Co. v. Franklin Twp.*, 397 A.2d 384 (N.J. Super. Ct. Law Div. 1978); *Caputo v. Twp. of Chester*, No. L-42857-74 (N.J. Super. Ct. Law Div. Oct. 4, 1978) (cited in *Mount Laurel II*, 456 A.2d at 411); *Urban League of Greater New Brunswick v. Borough of Carteret*, 406 A.2d 1322 (N.J. Super. Ct. Ch. Div. 1979); *Round Valley, Inc. v. Twp. of Clinton*, 413 A.2d 356 (N.J. Super. Ct. App. Div. 1980). *Mount Laurel II*, 456 A.2d at 410-11.

⁶³ *Mount Laurel II*, 456 A.2d at 418-20.

⁶⁴ *Id.* at 418.

⁶⁵ *Id.* (stating that “the zoning power is no more abused by keeping out the region’s poor than by forcing out the resident poor.”).

housing obligation using specific numbers.⁶⁶ The Court also explained that the *Mount Laurel* obligation could only be satisfied “if the municipality has *in fact* provided a realistic opportunity for the construction of its fair share of low and moderate income housing.”⁶⁷ Furthermore, the Court stressed that a community will not meet its fair share obligation merely by removing exclusionary provisions from its zoning code; it will be “required” to provide a realistic opportunity for affordable housing.⁶⁸

Additionally, the Court implemented a builders’ remedy, which allows developers to obtain court approval for a project to build low- or moderate-income housing even if the town has not approved the plan.⁶⁹ This creates an incentive for developers to take municipalities to court in the hopes that by providing affordable housing in their developments they can override municipal zoning restrictions. The builders’ remedy also safeguards against municipalities that make a conscious effort to delay the approval of projects to construct affordable housing.

In 1985, in response to the decision in *Mount Laurel II* and growing pressure from municipalities to create a plan for towns to follow in order to meet their *Mount Laurel* obligations outside of the court system, the New Jersey Legislature enacted the FHA.⁷⁰ The FHA established COAH, an agency responsible for developing the state’s affordable housing plans and ensuring that towns comply with the *Mount Laurel* doctrine.⁷¹

⁶⁶ *Id.* at 418-19 (holding that “[n]umberless resolution of the issue based upon a conclusion that the ordinance provides a realistic opportunity for [affordable] housing” would no longer be sufficient).

⁶⁷ *Id.* at 421 (emphasis in original).

⁶⁸ *Id.* at 419; see also *DUKEMINIER ET AL.*, *supra* note 1, at 935.

⁶⁹ *Mount Laurel II*, 456 A.2d at 419; see also *DUKEMINIER ET AL.*, *supra* note 1, at 935 (explaining that a court will impose a builder’s remedy after it determines that the municipality has not otherwise met its affordable housing obligation).

⁷⁰ N.J. STAT. ANN. § 52:27D (West 2008); The FHA also created Regional Contribution Agreements (RCAs), which allowed wealthy towns to meet half of their affordable housing obligation by providing funds to rehabilitate housing in poorer towns. In 2008, however, the Legislature repealed the RCA provision. *The Mount Laurel Doctrine*, FAIR SHARE HOUSING CENTER, <http://fairsharehousing.org/mount-laurel-doctrine/> (last visited Nov. 22, 2011).

⁷¹ *The Mount Laurel Doctrine*, FAIR SHARE HOUSING CENTER, <http://fairsharehousing.org/mount-laurel-doctrine/> (last visited Nov. 22, 2011).

C. COAH

COAH's duties, enumerated in the FHA, include estimating the present and prospective need for affordable housing and establishing criteria and guidelines for computing every municipality's fair share number.⁷² COAH has carried out these duties by adopting sets of rules, known as "first round rules,"⁷³ "second round rules,"⁷⁴ and "third round rules."⁷⁵ In the first round rules, COAH determined that 147,707 units targeted towards low- and moderate-income families must be built statewide between 1987 and 1993.⁷⁶ In its second round rules, using the same methodology as in the first round rules, COAH determined that the total statewide affordable housing need for the period from 1992 to 1999 was 86,000 units.⁷⁷ COAH's method for calculating the present and prospective need for affordable housing included adjustments due to filtering,⁷⁸ residential conversions,⁷⁹ and spontaneous rehabilitation,⁸⁰

⁷² N.J. STAT. ANN. § 52:27D-307(c)(1)-(2) (West 2008).

⁷³ N.J. ADMIN. CODE § 5:92 (1986).

⁷⁴ N.J. ADMIN. CODE § 5:93 (1994).

⁷⁵ N.J. ADMIN. CODE § 5:94 (2004).

⁷⁶ N.J. ADMIN. CODE § 5:92 (1986); *see also* N.J. ADMIN. CODE § 5:92-5.1(a) (explaining that municipal "present and prospective need shall be calculated by summing municipal indigenous need and the municipal share of the appropriate housing region's reallocated present need and prospective need. The resulting total shall be modified for secondary sources of supply/demand as described in this subchapter." Section 5:92-1.3 defines "indigenous need" as "deficient housing units occupied by low and moderate income households within a municipality and is a component of present need.").

⁷⁷ N.J. ADMIN. CODE § 5:93 (1994); *see also* *In re Adoption of N.J.A.C. 5:94 and 5:95* by the New Jersey Council on Affordable Housing, 914 A.2d 348, 362 (N.J. Super. Ct. App. Div. 2007) [hereinafter "*In re Adoption of N.J.A.C. 5:94 and 5:95*"] and *COAH, FAIR SHARE HOUSING CENTER*, <http://fairsharehousing.org/mount-laurel-doctrine/> (last visited Nov. 22, 2011).

⁷⁸ "Filtering is a downward adjustment of housing which recognizes that the housing requirements of lower-income groups can be served by supply additions to the higher-income sectors of the housing market . . . [and] is predicated on the existence of housing surpluses which cause [] prices to drop because of the excess of [] supply over demand." N.J. ADMIN. CODE § 5:92, App. A (1986); *see also In re Adoption of N.J.A.C. 5:94 and 5:95*, 914 A.2d at 362 (explaining the concept of filtering: "as newer, more desirable housing options became available in the housing market, middle-and upper-income households would move out of the existing housing, making it available to become the home for a lower-income household.").

⁷⁹ Residential conversion occurs when there is demand in the market for smaller housing units, and existing larger housing units are broken into smaller housing units, creating additional units. N.J. ADMIN. CODE § 5:92, App. A.

⁸⁰ Spontaneous rehabilitation arises when the private market rehabilitates deficient

2011 *FATE OF AFFORDABLE HOUSING LEGISLATION* 93

which reduce the overall need for affordable housing.⁸¹ Affordable housing advocates⁸² challenged numerous aspects of the methodology COAH used in its first and second round rules in court.⁸³ These court challenges, however, were generally unsuccessful.⁸⁴ COAH's third round rules, on the other hand, have been struck down twice by the Appellate Division of the New Jersey Superior Court due to COAH's inability to produce supporting data for its methodology.⁸⁵

COAH released its third round rules in 2004.⁸⁶ The third round rules decreased the affordable housing obligations to only 52,726 units statewide from 2004 to 2014.⁸⁷ COAH's methodology to determine affordable housing need in the third round rules differed from its methodology in rounds one and two.⁸⁸ In the first and second round rules, COAH assigned a specific fair share number to every municipality.⁸⁹ By contrast, the third round rules depended "on the net increase in the number of jobs and . . . housing units a municipality experiences between 2004 and 2014."⁹⁰ Various public interest organizations challenged the constitutionality of COAH's third round rules.⁹¹ Even three of COAH's twelve board members agreed the rules

housing units. It "lessens housing demand as a deficient unit is replaced by a sound unit . . . [and] affects only a small proportion of the low-and moderate-income housing stock." *Id.*

⁸¹ *Id.*; see also *In re Adoption of N.J.A.C. 5:94 and 5:95*, 914 A.2d at 362.

⁸² The advocates included: Coalition for Affordable Housing and the Environment, New Jersey Builders' Association, Fair Share Housing Center and ISP Management Company. *In re Adoption of N.J.A.C. 5:94 and 5:95*, 914 A.2d at 349.

⁸³ *Id.* at 362.

⁸⁴ *Id.*; see also *Van Dalen v. Washington Twp.*, 576 A.2d 819, 825 (N.J. 1990) (upholding COAH's use of the State Development Guide Plan (SDGP) to determine a municipality's Mount Laurel obligation.); *Non-Profit Affordable Hous. Network of N.J. v. Twp. of Brick*, 627 A.2d 1153, 1156 (N.J. Super. Ct. App. Div. 1993) (holding that COAH's legislative enactments being challenged were not ultra vires and remanding the "issue to COAH for exhaustion of administrative remedies.") and *Twp. of Bernards v. State of N.J. Council on Affordable Housing*, 558 A.2d 1, 14 (N.J. Super. Ct. App. Div. 1989) (finding that COAH's rules were valid and enforceable).

⁸⁵ See *In re Adoption of N.J.A.C. 5:94 and 5:95*, 914 A.2d at 362; see also *In re Adoption of N.J.A.C. 5:96 and 5:97* by the New Jersey Council on Affordable Housing, 416 N.J. Super. 462, 471 (N.J. Super. Ct. App. Div. 2010) [hereinafter "*In re Adoption of N.J.A.C. 5:96 and 5:97*"]; COAH, FAIR SHARE HOUSING CENTER, <http://fairsharehousing.org/mount-laurel-doctrine/> (last visited Nov. 22, 2011).

⁸⁶ N.J. ADMIN. CODE § 5:94 (2003).

⁸⁷ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 914 A.2d at 354, 365.

⁸⁸ *Id.* at 353-54.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 348; see also Telephone Interview with Adam Gordon, Staff Attorney, Fair

were unconstitutional because they did not comply with the *Mount Laurel* doctrine.⁹²

In 2005, the Fair Share Housing Center, the New Jersey Builders Association, the Coalition on Affordable Housing and the Environment, and ISP Management Company, Inc. filed an appeal against COAH claiming that the third round rules were unconstitutional.⁹³ The New Jersey Appellate Division identified four main problems with COAH's third round rules: COAH's adjustments to the need for affordable housing based on filtering; COAH's use of growth share⁹⁴ to calculate the need for affordable housing; COAH's rules allowing municipalities to compel developers to build affordable housing without giving the developers any compensation; and COAH's rules allowing towns to meet their growth share obligation by restricting fifty percent of their affordable housing units to residents age fifty-five or older.⁹⁵

The first issue the Court addressed was COAH's use of filtering in calculating a town's fair share obligation.⁹⁶ The Court found that COAH's reliance on filtering to decrease municipalities' fair share number lacked supporting data.⁹⁷ The Court did not prohibit COAH from incorporating filtering in calculating affordable housing needs, but rather explained that COAH must base its calculations on recent and reliable data in order to use filtering.⁹⁸

The Appellate Division also found that COAH's growth share methodology lacked adequate supporting data.⁹⁹ The Court invalidated

Share Housing Center (Oct. 25, 2010) (stating that there were many problems with COAH's third round rules. For example, "numerous municipalities that were supposed to have increased obligations miraculously received lower obligations. Another flaw included a provision that permitted municipalities to restrict half of their units to seniors and transfer half of their obligation to a poor municipality, thus entirely excluding families with children.").

⁹² Telephone interview with Adam Gordon, Staff Attorney, Fair Share Housing Center (Oct. 25, 2010).

⁹³ *In re Adoption of N.J.A.C 5:94 and 5:95*, 914 A.2d at 348.

⁹⁴ Growth share is "the affordable housing obligation generated in each municipality by both residential and non-residential development from 2004 through 2014 and represented by a ratio of one affordable housing unit for every 8 market-rate housing units constructed plus one affordable housing unit for every 25 newly created jobs . . ." N.J. ADMIN. CODE § 5:94-1.4 (2003).

⁹⁵ *In re Adoption of N.J.A.C 5:94 and 5:95*, 914 A.2d at 375, 381, 388, 396.

⁹⁶ *Id.* at 372.

⁹⁷ *Id.* at 373.

⁹⁸ *Id.* at 375.

⁹⁹ *Id.* at 377.

COAH's use of growth share because it was inconsistent with both the New Jersey Supreme Court's decision in *Mount Laurel II* and the legislature's regulations laid out in the FHA.¹⁰⁰ The growth share "methodology permits each municipality to determine its capacity and desire for growth."¹⁰¹ This method allows municipalities to decide how much affordable housing they should provide.¹⁰² The Court found that COAH's method of calculating growth share would give a municipality the power to implement zoning ordinances that slow growth and thereby minimize that municipality's fair share obligation.¹⁰³ Additionally, growth share calculates a municipality's affordable housing obligation based on the total number of homes built.¹⁰⁴ Thus, middle-class towns with more, but smaller sized, homes would have to build more affordable housing units than more affluent towns with fewer, but larger, homes.¹⁰⁵

Next, the Court addressed the validity of a provision in COAH's third round rules that allowed a municipality to require developers to bear the cost of building affordable housing without providing the developers any incentives, such as density bonuses,¹⁰⁶ to actually build.¹⁰⁷ Under the third round rules, municipalities could satisfy their affordable housing requirements by implementing land use ordinances that compel a builder to construct one low- or moderate-income housing unit for either every eight market-rate units or every twenty-five jobs created in a non-residential development.¹⁰⁸ The ordinances could also give developers the option to make a payment to the municipality in lieu of

¹⁰⁰ *Id.* at 377, 379-80; *see also* N.J. STAT. ANN. § 52:27D-307 (West 2008).

¹⁰¹ *In re Adoption of N.J.A.C 5:94 and 5:95*, 914 A.2d at 376.

¹⁰² *Id.*

¹⁰³ *See id.* at 380 (finding that "the growth share approach encourages municipalities to adopt master plans and zoning ordinances that retard growth, in order to minimize the municipality's fair share allocation.").

¹⁰⁴ Telephone Interview with Adam Gordon, Staff Attorney, Fair Share Housing Center (Oct. 25, 2010).

¹⁰⁵ *Id.*

¹⁰⁶ Density Bonuses allow a developer "to construct more units than would otherwise be allowed in a specified residential zone in exchange for the provision of affordable housing units." The concept of density bonuses relies on the assumption that when a developer increases the number (density) of units, the costs per unit tend to be lower because "land prices, soft costs, and foundation costs can be amortized over more units." N.J. ADMIN. CODE § 5:97, App. F, § 2.2 (2008).

¹⁰⁷ *In re Adoption of N.J.A.C 5:94 and 5:95*, 914 A.2d at 388.

¹⁰⁸ N.J. ADMIN. CODE § 5:94-4.1(a) (2003); *see also In re Adoption of N.J.A.C 5:94 and 5:95*, 914 A.2d at 388.

constructing the required number of affordable housing units.¹⁰⁹ The Court held that any rule allowing a municipality to require a developer either to build affordable housing units or to make payments in lieu thereof violates the fundamental principle of the *Mount Laurel* doctrine that “ordinances create a realistic opportunity for the construction of the region’s need for affordable housing.”¹¹⁰ The Court opined that giving developers the option to pay deters rather than encourages developers to construct affordable housing.¹¹¹

Finally, the Court addressed COAH’s third round rule allowing municipalities to restrict fifty percent of their housing to residents age fifty-five or older.¹¹² The Court held that COAH could not allow towns to do this because providing affordable housing based on a person’s age would limit the amount of affordable housing available to low- and moderate-income families with children.¹¹³ Excluding families with children is appealing for municipalities because “[t]he cost of primary and secondary education generates a significant burden which can be lowered by limiting housing opportunities for families with children.”¹¹⁴ The Court noted that COAH’s own data predicted that only one-third of the population in need of affordable housing from 1999 to 2014 would be over age fifty-five.¹¹⁵

On October 8, 2010, the Appellate Division of the New Jersey Superior Court, in *In re Adoption of N.J.A.C 5:96 and 5:97*, addressed twenty-two appeals that challenged the validity of COAH’s revised third round rules.¹¹⁶ The Court concluded that most of COAH’s revisions “suffer from many of the same deficiencies as the original third round rules.”¹¹⁷ The Court invalidated the sections of the rules that used growth

¹⁰⁹ N.J. ADMIN. CODE § 5:94-4.1(b) (2003); see also *In re Adoption of N.J.A.C. 5:94 and 5:95*, 914 A.2d at 388.

¹¹⁰ *In re Adoption of N.J.A.C 5:94 and 5:95*, 914 A.2d at 389.

¹¹¹ *Id.* at 390.

¹¹² *Id.* at 393-94.

¹¹³ *Id.* at 396.

¹¹⁴ *Id.* at 393.

¹¹⁵ *Id.* at 396.

¹¹⁶ *In re Adoption of N.J.A.C 5:96 and 5:97*, 416 N.J. Super. at 462.

¹¹⁷ *Id.* at 471; see also Kevin D. Walsh, *Court Invalidates Discriminatory COAH Regulations Ensures that Municipalities Cannot Ban Starter Homes Through Regulations*, FAIRSHAREHOUSING.ORG, Oct. 8, 2010, http://fairsharehousing.org/pdf/FSHC_press_release_-_10_8_101.pdf (stating that COAH had not done enough to “remove regulatory barriers to housing affordable to low- and moderate-income people.”).

2011 *FATE OF AFFORDABLE HOUSING LEGISLATION* 97

share to calculate the need for affordable housing.¹¹⁸ The Court remanded to COAH to adopt new rules and directed COAH to use a methodology similar to the methodology used in the first and second round rules so that the adoption of valid third round rules would not be delayed any longer.¹¹⁹

D. S-1 and A-3447

In January 2010, New Jersey State Senator Raymond Lesniak introduced a proposal, S-1, that would overhaul New Jersey's current affordable housing legislation.¹²⁰ The Senate approved S-1 in June 2010, but the General Assembly rejected it.¹²¹ On October 18, 2010, Assemblyman Jerry Green introduced a proposal similar to S-1, A-3447.¹²² In early December 2010, the Assembly released an amended version of A-3447, S-1(2).¹²³ The New Jersey Legislature passed S-1(2) on January 11, 2011.¹²⁴ Governor Christie issued a conditional veto of S-1(2) on January 24, 2011, calling for the Legislature to pass S-1 in its original form.¹²⁵

S-1 criticizes the FHA, as administered by COAH, stating that COAH's rules have increased the judiciary's role in affordable housing issues, resulting in additional "expense[s] of bureaucratic paper and process at both the State and local level."¹²⁶ The bill proposes a new system for ensuring that municipalities provide low- and moderate-income housing.¹²⁷ If passed, S-1 would allow municipalities to develop their own plan for meeting their fair share as required by the *Mount*

¹¹⁸ *In re Adoption of N.J.A.C. 5:96 and 5:97*, 416 N.J. Super. at 511.

¹¹⁹ *Id.* (noting that more than ten years have elapsed since the second round rules expired); *see also* Walsh, *supra* note 117 (summarizing the court's holdings as follows: the Court remanded the case to COAH for promulgation of regulations in conformance with the *Mount Laurel* doctrine and the FHA within five months).

¹²⁰ *See* S. 1, 214th Leg. (N.J. 2010); *see also* Kevin D. Walsh, *Assembly refuses to rush S-1*, FAIR SHARE HOUSING CENTER BLOG (June 30, 2010), <http://fairsharehousing.org/blog/entry/assembly-refuses-to-rush-s-1-an-interim-victory/>.

¹²¹ S. 1, 214th Leg. (N.J. 2010).

¹²² *See* H.R. 3447 § 22, 214th Gen. Assemb. (N.J. 2010) (as passed by N.J. Gen. Assemb., Dec. 13, 2010).

¹²³ *Proposed Amendments to H.R. 3447*, 214th Gen. Assemb. (N.J. 2010).

¹²⁴ S.1, 214th Leg. (N.J. 2011).

¹²⁵ Matt Friedman, *Gov. Christie Rejects N.J. Bill's Affordable Housing Minimum Requirement*, NJ.COM, Jan. 25, 2011, http://www.nj.com/news/index.ssf/2011/01/gov_christie_rejects_nj_afford.html.

¹²⁶ S. 1 § 6(b), 214th Leg. (N.J. 2010).

¹²⁷ *Id.* § 6(e).

Laurel doctrine.¹²⁸ S-1 would abolish COAH and transfer COAH's responsibilities to the Department of Community Affairs ("DCA").¹²⁹ S-1 would also decrease set-aside¹³⁰ requirements.¹³¹ A municipality could meet its affordable housing obligation by showing that at least 7.5 percent of its housing units are price restricted, that thirty-three percent or more of its housing units are single-family attached dwellings or mobile homes, or by adopting a zoning ordinance that requires ten percent of newly-constructed residential housing units to be reserved for low- and moderate-income families.¹³² S-1 also lists alternative means for complying with affordable housing regulations.¹³³ Municipalities could meet their obligation by rehabilitating existing substandard housing.¹³⁴ Developers could meet their affordable housing obligation by paying a fee to a municipal trust fund in place of constructing low- and moderate-income housing units.¹³⁵ The bill also prohibits litigation against a municipality's zoning regulations for one year.¹³⁶

Assemblyman Green's affordable housing bill, A-3447, shares many similarities with S-1.¹³⁷ Like S-1, if enacted, A-3447 would abolish COAH and transfer COAH's duties to the DCA.¹³⁸ A-3447 would allow municipalities to meet their affordable housing obligations

¹²⁸ *Id.* § 1(d) (resolving that "[a] simple, rather than complex, system that maximizes the ability of the free market to produce a variety and choice of housing will most effectively provide housing opportunities for the low- and moderate-income residents of New Jersey.>").

¹²⁹ *Id.* § 2; see also New Jersey League of Municipalities, *Summary of the Senate Committee Substitute for S-1*, June 3, 2010, <http://www.njslom.org/letters/SCS-s1-summary060710.pdf>.

¹³⁰ Set-asides refer to the number of housing units designated for low- and moderate-income households within a development. N.J. ADMIN. CODE § 5:92-1.3 (2006).

¹³¹ New Jersey League of Municipalities, *Summary of the Senate Committee Substitute for S-1*, June 3, 2010, <http://www.njslom.org/letters/SCS-s1-summary060710.pdf>.

¹³² S. 1 § 20, 214th Leg. (N.J. 2010).

¹³³ *Id.* § 22.

¹³⁴ *Id.*

¹³⁵ *Id.* §§ 22(2)-(3); see also New Jersey League of Municipalities, *Summary of the Senate Committee Substitute for S-1*, <http://www.njslom.org/letters/SCS-s1-summary060710.pdf>.

¹³⁶ S. 1 § 30(a), 214th Leg. (N.J. 2010); see also New Jersey League of Municipalities, *Summary of the Senate Committee Substitute for S-1*, <http://www.njslom.org/letters/SCS-s1-summary060710.pdf>.

¹³⁷ H.R. 3447, 214th Gen. Assemb. (N.J. 2010); see also Michael Symons, *Assembly Passes Housing Overhaul Legislation*, COURIER POST, Dec. 14, 2010, <http://www.courierpostonline.com/article/20101214/NEWS01/12140326/Assembly-passes-housing-overhaul-legislation>.

¹³⁸ H.R. 3447 § 2, 214th Gen. Assemb. (N.J. 2010).

by demonstrating that ten percent of their housing stock is affordable or by adopting a zoning ordinance “that set[s] aside one-fifth of the developable land within the municipality as housing affordable to families making 150 percent of the area median income or less.”¹³⁹ If a municipality does not meet the ten percent requirement, the municipality can still comply with the provisions of A-3447 by showing that twenty-five percent of children enrolled in the municipality’s schools receive free- or reduced-price lunch under the federal School Lunch Program.¹⁴⁰

S-1(2) is a combination of some provisions from S-1 and A-3447, as well as amendments the General Assembly made to certain provisions in S-1 and A-3447.¹⁴¹ The New Jersey Legislature passed S-1(2) on January 10, 2011.¹⁴² Under S-1(2), all municipalities would be obligated to provide a certain number of affordable housing units equivalent to ten percent of their current housing stock.¹⁴³ At least fifty percent of a municipality’s affordable housing units would be reserved for families and a maximum of twenty-five percent of the homes could be limited to persons aged 55 or older.¹⁴⁴ In addition, new residential development plans would be required to devote a minimum of ten percent of the plan’s housing units to low- and moderate-income housing.¹⁴⁵ Municipalities would also have to provide density bonuses to developers who construct mixed-income developments.¹⁴⁶ Furthermore, S-1(2) contemplates two alternative means for a municipality to meet its

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Proposed Amendments to H.R. 3447*, 214th Gen. Assemb. (N.J. 2010) (The changes included deleting section 22 of the bill that would have allowed certain towns to deem houses costing as much as \$600,000 “affordable.”) *Id.* § 1(b); see generally Adam M. Gordon & Kevin D. Walsh, *The \$600,000 Home Mandate: Understanding the Zoning Provisions of A-3447/S-1*, FAIR SHARE HOUSING CENTER, Nov. 2010, http://fairsharehousing.org/images/uploads/Expensive_Housing_Report_-_11_2010.pdf (stating that affordable housing advocates were particularly disturbed by section 22 of A-3447 and section 24(c) of S-1, which “allow municipalities to rezone 20 percent of a municipality’s developable land for housing affordable to up to 150% of median income (or for families earning as much as \$150,000)” This would mean that in certain towns, houses costing as much as \$600,000 could be considered “affordable.” Chairman Jerry Green removed the provision from A-3447 in December 2010).

¹⁴² S.1, 214th Leg. (N.J. 2011); see also DeFalco, *supra* note 20.

¹⁴³ *Id.* § 21.

¹⁴⁴ *Id.* § 23.

¹⁴⁵ *Id.* § 24.

¹⁴⁶ *Id.*

affordable housing requirements.¹⁴⁷ A municipality could meet its affordable housing obligation if it shows that fifty percent or more of its public school children qualify for free- or reduced-price lunch under the federal School Lunch Program.¹⁴⁸ A municipality may also be deemed compliant if it passes a zoning ordinance requiring twenty percent of its developable property be reserved for affordable housing.¹⁴⁹

The Legislature passed S-1(2) despite Governor Christie's statements that he would veto it because he does not believe the bill gives municipalities enough control over the development of affordable housing in their own areas.¹⁵⁰ On January 24, 2011, Governor Christie conditionally vetoed S-1(2), stating he would only sign the original version of the bill.¹⁵¹ In March, the New Jersey Supreme Court decided to review the Appellate Court's decision in *In re Adoption of N.J.A.C. 5:96 and 5:97*.¹⁵² The Court has not yet ruled on the case.

III. THE FATE OF AFFORDABLE HOUSING LEGISLATION IN NEW JERSEY

A. Constitutionality of S-1: S-1 vs. The Mount Laurel Doctrine

Before the New Jersey Supreme Court decisions in *Mount Laurel I* and *II*, municipalities controlled land-use planning.¹⁵³ Over time, however, city officials began using this power to enact exclusionary zoning ordinances to prevent the poor from having access to housing in their municipalities.¹⁵⁴ A pattern of exclusionary zoning regulations began to emerge in New Jersey's wealthier municipalities, which

¹⁴⁷ *Id.* § 23.

¹⁴⁸ S.1 § 23(2), 214th Leg. (N.J. 2011).

¹⁴⁹ *Id.* § 23(1).

¹⁵⁰ See David Levinsky, *Christie Likely to Veto Housing Bill*, BURLINGTON COUNTY TIMES (Dec. 14, 2010), http://fairsharehousing.org/pdf/121410_-_Christie_likely_to_veto_housing_bill.pdf (explaining that Republican lawmakers do not believe Governor Christie will sign a bill that includes affordable housing quotas because he wants towns to be able to set their own affordable housing goals).

¹⁵¹ Webb, *supra* note 21.

¹⁵² Tom Hester Sr., *N.J. Supreme Court to Hear Appeal Against COAH Zoning Regulations*, NEWJERSEYNEWSROOM.COM (March 31, 2011), <http://www.newjerseynewsroom.com/state/nj-supreme-court-to-hear-appeal-against-coah-zoning-regulations>.

¹⁵³ See discussion *supra* Part II(A).

¹⁵⁴ See discussion *supra* Part II(A).

prompted the Court's decision in *Mount Laurel I*.¹⁵⁵ Governor Christie's proposal would essentially give municipalities the same zoning powers they had prior to the Court's rulings in *Mount Laurel I* and *II*. Affordable housing advocates fear that if S-1 is enacted, municipalities will revert back to implementing exclusionary zoning regulations, which will undo over thirty years of work towards improving low- and moderate-income individuals' accessibility to housing they can afford.¹⁵⁶

Governor Christie believes S-1 is the solution to New Jersey's affordable housing issues.¹⁵⁷ The Fair Share Housing Center ("FSHC")¹⁵⁸ contends that various provisions of S-1 are unconstitutional.¹⁵⁹ One of the goals Governor Christie wishes to accomplish by enacting S-1 is to give municipalities the power to develop their own plans for providing affordable housing.¹⁶⁰ This provision is in direct conflict with the Court's holdings in *Mount Laurel I* and *II* because it does not require municipalities to actually provide a certain number of affordable housing units.¹⁶¹

Supporters of S-1 argue that S-1 does require municipalities to provide affordable housing because S-1 calls for a ten percent set-aside of all new construction residential housing.¹⁶² This provision seems promising on its face; however, it is misleading because a municipality would only be required to "set-aside" affordable housing if it decided to build new residential developments. The bill does not require municipalities to set aside a percentage of affordable housing in existing

¹⁵⁵ See discussion *supra* Part II(A).

¹⁵⁶ Telephone Interview with Adam Gordon, Staff Attorney, Fair Share Housing Center (Oct. 25, 2010).

¹⁵⁷ Lisa Fleisher, *Governor Christie Proposes Eliminating Affordable Housing Quotas, Fees*, THE STAR-LEDGER (May 13, 2010), http://fairsharehousing.org/pdf/Ledger_5_13_2010.pdf.

¹⁵⁸ The FSHC is a public interest organization "devoted to defending the housing rights of New Jersey's poor through enforcement of the *Mount Laurel* doctrine." *Our Mission*, FAIR SHARE HOUSING CENTER, <http://fairsharehousing.org/about/> (last visited Nov. 22, 2011).

¹⁵⁹ Telephone Interview with Adam Gordon, Staff Attorney, Fair Share Housing Center (Oct. 25, 2010).

¹⁶⁰ Fleisher, *supra* note 157.

¹⁶¹ See discussion *supra* note 67; see also Adam Gordon, *Making a Bad Bill Even Worse*, FAIR SHARE HOUSING CENTER BLOG (March 18, 2010), <http://fairsharehousing.org/blog/entry/making-a-bad-bill-even-worse/> (discussing the changes to the bill lack requirements for developers to build low and moderate income homes).

¹⁶² See S. 1 § 16, 214th Leg. (N.J. 2010).

residential buildings in lieu of building new residential units. It follows that, if a municipality chose not to construct new residential units, it would be exempt from any obligation to provide affordable housing.

Another concern with S-1 is that it contains a provision that allows builders to opt-out of providing affordable housing units if they pay a fee of \$10,000 per unit to a municipal trust fund.¹⁶³ The Court in *In re Adoption of N.J.A.C 5:94 and 5:95* explicitly held that allowing builders to pay a fee in lieu of actually building affordable housing units violates the fundamental principle of the *Mount Laurel* doctrine that municipalities provide a realistic opportunity for the construction of affordable housing.¹⁶⁴ The reasoning behind this is that most developers will choose to pay the fee “because it is cheaper than providing actual units for lower-income families” and therefore will not build any affordable housing units.¹⁶⁵

In May 2010, the New Jersey Office of Legislative Services (“OLS”)¹⁶⁶ released a letter to FSHC analyzing the constitutionality of two particular provisions of S-1.¹⁶⁷ One of the provisions would abolish COAH.¹⁶⁸ The other provision would allow municipalities to meet their affordable housing obligation by adopting inclusionary zoning¹⁶⁹

¹⁶³ *In re Adoption of N.J.A.C 5:94 and 5:95*, 914 A.2d 348, 389 (N.J. Super. Ct. App. Div. 2007).

¹⁶⁴ *Id.*

¹⁶⁵ Adam M. Gordon & Kevin D. Walsh, *Proposed Assembly Housing Legislation as Bad as S-1*, FAIR SHARE HOUSING CENTER, (Oct. 18, 2010), http://fairsharehousing.org/pdf/FSHC_press_release_-_10_18_2010_-_re_assembly_bill_introduction.pdf.

¹⁶⁶ The Office of Legislative Services is a sixteen-member bipartisan agency established by law and provides, among other things, general, legal and fiscal research and analysis. *Office of Legislative Services: An Overview*, NEW JERSEY LEGISLATURE, <http://www.njleg.state.nj.us/legislativepub/oview.asp> (last visited Sept. 6, 2011).

¹⁶⁷ Letter from the N.J. State Legislature Office of Legislative Services to Fair Share Housing Center (April 13, 2010), https://1530940035611580461-a-fairsharehousing-org-sites.googlegroups.com/a/fairsharehousing.org/fair-share-housing-center/miscellaneous/OLSletter-42010.pdf?attachauth=ANoY7cqrRbH56_sfcnLWi01xsvDaPAVhD9kiUz-vWCEHdHO2J2bi0I2rjn2p1obxE6KaZLLKdRjomieC21meBgTPbjdHvZX6xrNTgiuUt5wCNMbx0hwBzZj_b8kSAGIq_zGXsJusCIE7_dTM8K3biHQcBAfV1VpovA7bcVcBIWNM8nJaH87_Uf6OZ-uC6NgIStkbDr7-S_8iX0alvNF8bSuqN3ebzHw9HV3yBUzoVmVexfA1yo3fgC22_Bq9A7o6qeh93TFpUJ&attredirects=0.

¹⁶⁸ See S. 1 § 2, 214th Leg. (N.J. 2010).

¹⁶⁹ “‘Inclusionary zoning’ is a land use practice that encourages or requires real estate developers to set aside a percentage of the units in a market-rate residential development as housing that is affordable to households having low or moderate incomes.” Letter from the

2011 *FATE OF AFFORDABLE HOUSING LEGISLATION* 103

ordinances without having to consider the municipality's allocated regional need.¹⁷⁰

OLS stated that the bill's provision that would abolish COAH is constitutional because the legislature has the power to amend legislation.¹⁷¹ With regard to the second provision, however, OLS asserted that the provision might fail to comply with the *Mount Laurel* doctrine.¹⁷² OLS based its conclusion on the fact that the bill does not compel municipalities to include, in addition to the mandatory set-aside requirement, another mechanism to assure that the State's affordable housing needs will be met.¹⁷³ Additionally, in *Mount Laurel II*, the Court explicitly stated that municipalities must demonstrate that they have met their affordable housing requirements in terms of specific numbers.¹⁷⁴ S-1's set-aside system fails to provide specific numbers, which are necessary to assure that towns are meeting the regional need for affordable housing.¹⁷⁵

B. Governor Christie Should Sign S-1(2)

Before the Court's decision in *Mount Laurel I*, numerous New Jersey municipalities were doing everything in their power to "preserve community character" by preventing middle and lower class people from being able to afford to live within their borders. Governor Christie claims S-1 proposes a new system for ensuring that municipalities provide affordable housing to low- and moderate-income individuals. The system outlined in S-1, however, is not new. S-1 is simply a variation on the system that existed before the judiciary's decisions in *Mount Laurel I* and *II*. History is bound to repeat itself. S-1 would put

N.J. State Legislature Office of Legislative Services to Fair Share Housing Center, *supra* note 167 (citing Brian Lerman, *Mandatory Inclusionary Zoning – The Answer to the Affordable Housing Problem*, 33 B.C. ENV'T L. REV. 383, 385 (2006)).

¹⁷⁰ Letter from the N.J. State Legislature Office of Legislative Services, *supra* note 167.

¹⁷¹ N.J. CONST. art. IV, § 1, para. 1.

¹⁷² Letter from the N.J. State Legislature Office of Legislative Services, *supra* note 167.

¹⁷³ *Id.*

¹⁷⁴ *Mount Laurel II*, 456 A.2d 390, 418-19 (N.J. 1983).

¹⁷⁵ Letter from the N.J. State Legislature Office of Legislative Services, *supra* note 167 ("We believe that the absence of a nexus between the mandatory inclusionary zoning proposed by the bill and satisfaction of regional and Statewide affordable housing needs would permit a challenge to the sufficiency of the bill under the *Mount Laurel* doctrine."); see also Rick Remington, *Assembly Takes up Bill to 'Blow Up' COAH*, NJ SPOTLIGHT (June 17, 2010), http://fairsharehousing.org/pdf/061710_-_Assembly_Takes_Up_Bill_to_Blow_Up_COAH.pdf.

municipalities in control of land-planning development, which is likely to result in economic discrimination against the poor.

Governor Christie asserts that COAH's rules have only resulted in increased litigation and that S-1 would solve this problem. However, S-1 would only delay future lawsuits because of the provision that prohibits litigation against a municipality's zoning regulations for one year. If this legislation is passed, the same problems that prompted the Court to intervene in 1975 are likely to emerge. Municipalities will fail to meet their fair share as required under the *Mount Laurel* doctrine, and affordable housing advocates will turn to the courts to challenge the municipalities' practices.

S-1(2) provides a compromise between S-1 and the FHA as administered by COAH. S-1(2) does not suffer from the same constitutional concerns as S-1. Unlike S-1, S-1(2) places a check on municipal discretion by requiring all municipalities to provide a specific number of affordable housing units.¹⁷⁶ This requirement not only complies with the *Mount Laurel* doctrine, but it would also reduce the influx of housing litigation suits in New Jersey's courts that has occurred as a result of COAH's third round rules because the provision sets a standard that every municipality must follow.

Additionally, S-1(2) would ensure that towns provide a realistic opportunity for low- and moderate-income housing by requiring towns to have at least ten percent of their housing units be considered affordable, regardless of whether the units are part of new residential construction projects or already existing residential units.¹⁷⁷ S-1, on the other hand, would only require ten percent of new construction projects be set aside as affordable,¹⁷⁸ thus only compelling towns that choose to build new housing units to provide affordable housing.

FSHC maintains that S-1(2) is a major improvement from S-1, and believes S-1(2) "provide[s] a workable and predictable framework to get homes built."¹⁷⁹ Even though the New Jersey courts have consistently held that land use regulations cannot be left to individual municipalities because the municipalities will attempt to prevent certain socioeconomic groups from being able to afford to live within their boundaries, Governor Christie does not appear to be willing to come to

¹⁷⁶ S.1 § 22, 214th Leg. (N.J. 2011).

¹⁷⁷ *See id.* §21.

¹⁷⁸ Friedman, *supra* note 125.

¹⁷⁹ Webb, *supra* note 21.

2011 *FATE OF AFFORDABLE HOUSING LEGISLATION* 105

an agreement, as evidenced by his veto of S-1(2). By not being open to compromising, the Governor is only prolonging reform further. Governor Christie should sign S-1(2) because it presents a reasonable compromise between the current affordable housing legislation that the Governor wishes to overhaul and the Governor's proposed plan for affordable housing legislation, while leaving over thirty years of work towards making affordable housing available in New Jersey undisturbed.

IV. CONCLUSION

The Supreme Court decisions in *Mount Laurel I and II* have provided affordable housing for more than 100,000 people.¹⁸⁰ Unfortunately, COAH's delay in providing suitable third round rules has led to almost ten years of litigation. The recent Appellate Division's ruling striking down COAH's third round rules for the second time reveals that the current affordable housing regulations must be revised. Governor Christie would choose S-1, but the Legislature will not. The Legislature has chosen S-1(2), but Governor Christie vetoed it. In the meantime, although the judiciary has tried to pressure COAH to adopt a constitutionally valid set of third round rules since 2004, nothing has been done. S-1 puts affordable housing needs back in the hands of municipalities without ensuring that the municipalities will promote the public health, safety, morals and general welfare of the community. S-1(2) provides a solution that will address the ongoing problems. Governor Christie should sign S-1(2), thus implementing a compromise to the current debate over the fate of affordable housing legislation in New Jersey.

¹⁸⁰ Telephone Interview with Adam Gordon, Staff Attorney, Fair Share Housing Center (Oct. 25, 2010).