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The History of the Mount Laurel Doctrine as a Story of Struggle for Social Justice

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I. INTRODUCTION

Zoning is an integral part of nearly every American community. The main purpose of zoning regulation is to promote orderly community development. Zoning accomplishes this purpose by imposing a variety of restrictions on location, size, and types of land use. Continued population growth and urban development have made zoning essential to balance public and private property interests.[1] Communities adopt growth limits from a variety of motives. Such incentives may include conservationists genuinely interested to preserve general or specific environments, social exclusionism, racial exclusion, racial discrimination, income segregation, fiscal protection, or just fear of any future change; each of these are purposes well served by growth prevention. Whatever the motivation, total exclusion of people from a community is both immoral and illegal. [2]

The Fair Housing Act of 1968 (also commonly known as Title VIII of the Civil Rights Act of 1968, hereinafter the "Act") had aimed to remediate race-based housing exclusion.[3] However, it did not address economic discrimination in housing.[4] Because people of color are disproportionately low-income, economic segregation achieves many of the same outcomes as explicit race-based exclusion.[5] Such *de facto* segregation is no better for its targets than purposeful

[1] 24 AM. JUR. 3D *Proof of Facts* 543 (Originally published in 1994).
[2] Associated Home Builders etc., Inc. v. City of Livermore, 557 P.2d 473 (Cal. 1976).
[3] THE FAIR HOUSING ACT, 42 U.S.C. §§ 3601-31 (1968); *See also* Paula A. Franzese & Stephanie J. Beach, *Promises Still to Keep: The Fair Housing Act Fifty Years Later*, 40 CARDOZO L. REV. 1207 (2019) (noting that the Fair Housing Act "aimed to undo the shameful legacy of de jure and de facto race-based housing discrimination").
[4] Elizabeth Winkler, *'Snob Zoning' is Racial Housing Segregation by Another Name*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/25/snobzoning-is-racial-housing-segregation-by-another-name/?utm_term=.4174ba73b19f ("There is no class-based version of the Fair Housing Act—that is, no federal legislation that says economic exclusion is improper.").
[5] Richard D. Kahlenberg, *Opinion, The Walls We Won't Tear Down*, N.Y. TIMES (Aug. 3, 2017), https://www.nytimes.com/2017/08/03/opinion/sunday/zoning-laws-segregation-income.html.

de jure segregation.[6] The impact has been devastating for generations of minorities who were denied the right to live where they wanted to live, and raise and school their children where they could flourish most successfully —leading to the powder keg that has defined Ferguson, Baltimore, Charleston, and Chicago.

In response to the Act, in the early 1970s the courts were moving rapidly towards a major reversal in the law on exclusionary zoning directed against lower-income groups, and the promotion of affordable housing.[7] The three big Middle Atlantic states—New York, New Jersey, and Pennsylvania, took the lead on this. Their approach culminated in the *Mount Laurel* doctrine, while other areas of the country have implemented alternative solutions.

The *Mount Laurel* doctrine[8], a legal principle set forth in a series of New Jersey Supreme Court rulings, is among the most significant contributions ever made to the advancement of affordable housing. In these rulings, the New Jersey Supreme Court implicitly declared housing to be a fundamental right[9] and imposed an affirmative obligation on municipalities to provide a

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[6] Paula A. Franzese & Stephanie J. Beach, *Promises Still to Keep: The Fair Housing Act Fifty Years Later*, 40 CARDOZO L. REV. 1207, 1208 (2019)

[7] *Introduction*, 3 American Land Planning Law § 68:1 (Rev. Ed.).

[8] The Mount Laurel doctrine emanates from a series of cases: *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 336 A.2d 713 (N.J. 1975) [hereinafter "*Mount Laurel I*"]; *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 456 A.2d 390 (N.J. 1983) [hereinafter "*Mount Laurel II*"]; *Hills Dev. Co. v. Bernards Twp. in Somerset Cnty.*, 510 A.2d 621 (N.J. 1986) [hereinafter "*Mount Laurel III*"]; and *In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Housing*, 110 A.3d 31 (N.J. 2015), [hereinafter "*Mount Laurel IV*"] (collectively "*Mount Laurel*").

[9] *See generally* John M. Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 WASH. U. J.L. & POL'Y 555 (2000) (*Mount Laurel II* court effectively declares a constitutional right to shelter under the New Jersey Constitution). However, the *Mount Laurel* court could not point to any specific provision in the state constitution to support a finding that there is a constitutional right to affordable housing. *Id.* at 564–65. In notable contrast, however, in the same year, the same justices concluded a specific provision within the New Jersey Constitution supported a finding of a constitutionally protected right to a "thorough and efficient" education. *See* Robinson v. Cahill, 351 A.2d 713, 720 (N.J. 1975).

"realistic opportunity" [10] for a fair share of the state's need for affordable housing.[11] In doing so, the court recognized poverty as a factor in the constitutional inquiry.[12] In effect, the court went beyond what any state or federal court had done prior to 1975 or has done since in this area of the law.

Nevertheless, municipalities have strong incentives to resist the construction of affordable housing in their jurisdictions. Critics view the *Mount Laurel* doctrine as contradictory to sound planning principals, a catalyst for urban sprawl, environmentally precarious, and financially burdensome to ill-equipped local budgets.[13] Thus, for years, powerful forces within the state kept New Jersey from making progress in the fight to address the affordable-housing crisis, claiming that expanding opportunities for low-income families and breaking down barriers of racial exclusion would somehow hurt middle-class families.[14] Instead, we are learning that our communities thrive when we redevelop blighted office parks and empty strip malls into spirited

[10] *Mount Laurel I*, 336 A.2d at 724–25. By use of the phrase "realistic opportunity," the court did not impose on municipalities an obligation to provide a fair share of housing, but to create the opportunity to do so. Payne's article emphasizes that the effect of these words is to make the doctrine less strict or harsh, and other scholars have written on the subject as well. The language is also supported by its repeated use in *Mount Laurel II*. *See, e.g.*, *Mount Laurel II*, 456 A.2d at 442 ("Once a municipality has revised its land use regulations and taken other steps affirmatively to provide a realistic opportunity for the construction of its fair share of lower income housing, the *Mount Laurel* doctrine requires it to do no more.").

[11] *Id*. However, the Court makes it clear that it does not intend to prescribe remedies to effectuate its bold ruling, and that the mandate would not affirmatively require suburban municipalities to produce affordable housing. *See*, *e.g.*, *Mount Laurel II*, 456 A.2d at 442 ("Once a municipality has revised its land use regulations and taken other steps affirmatively to provide a realistic opportunity for the construction of its fair share of lower income housing, the Mount Laurel doctrine requires it to do no more.").

[12] Robert C. Holmes, *The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues*, 12 CONN. PUB. INT. L.J. 325, 326 (2013) (Recognition of poverty as a relevant consideration in the inquiry regarding Mount Laurel compliance does not necessarily raise poverty to a protected class, but only to a relevant consideration in determining whether the realistic opportunity test has been met).

[13] *See* DANIEL CARLSON & SHASHIR MATHUR, *Does Growth Management Aid or Thwart the Provision of Affordable Housing?* GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 20, 45-46 (Anthony Downs ed., 2004) (stating that, "There is a widespread public perception that the state's affordable housing policy is a cause of urban sprawl").

[14] George T. Vallone, *Affordable Housing: Familiar Problem, New Challenges*, MULTI-HOUSING NEWS (July 30, 2020), https://www.multihousingnews.com/post/affordable-housing-the-same-problems-only-worse/

mixed-use communities that reduce sprawl and increase affordability with diverse housing options that include apartments and starter homes.[15]

Part I of this paper will discuss the systematic segregation in housing that led to the Fair Housing Act and *Mount Laurel* doctrine. Part II will lay out the development and execution of the *Mount Laurel* doctrine, beginning with *Mount Laurel I* viewed through the lens that economic exclusion is racial exclusion. Part III will then examine the benefits and burdens of two separate approaches to compliance. On one hand, a legislative scheme that sets up an executive agency which allows municipalities to decide how and where to permit construction of affordable housing within their boundaries, versus a judicial scheme that for all intents and purposes allows courts to decide how and where affordable housing will be built within a municipality.

II. PART ONE

In New Jersey, the exclusionary zoning tradition developed in the 1950s and early 1960s relied upon several propositions. First, that the statutory power to zone for the "general welfare" grants municipalities with broad powers to control land use to achieve a variety of objectives; and this power should be interpreted as referring to the welfare of each municipality as a separate unit.[16] It was also established that "fiscal zoning," to improve a municipality's position on tax ratables, is an appropriate goal under this police-power action.[17] Further, that "the vague phrases deriving from the end of Section 3 of the Standard Zoning Enabling Act—conservation of property

[15] Douglas Massey, *Learning from Mount Laurel*, SHELTERFORCE (Oct. 10, 2012), shelterforce.org/2012/10/10/learning_from_mount_laurel/ (finding that Mount Laurel's Ethel Lawrence homes were an "unequivocal success").
[16] *An affirmative (and negative) municipal duty on access to housing—In New Jersey—The exclusionary tradition*, 3 AMERICAN LAND PLANNING LAW § 68:4 (Rev. Ed.).
[17] *Id*.

values, taking into consideration the character of the district and its peculiar suitability for particular uses, and encouraging the most appropriate use of land—represent a separate and additional grant of municipal power, and serve to justify exclusionary zoning."[18] Finally, the traditional zoning also relied upon a concept of "balanced zoning"—which, in practice, turns out to eliminate multiple dwellings.[19]

As zoning laws first developed, New Jersey courts upheld a broad range of potentially exclusionary techniques and ordinances. These decisions include prohibitions against any apartment buildings in practically an entire community,[20] against increasing the number of dwelling units in apartments above about 10% of the total,[21] against any small houses,[22] against homes on less than five-acre lots in most of a township,[23] and even against any mobile homes.[24] These opinions upheld backward-looking principles under the traditional concept of "balanced zoning."

However, in the last of these cases (involving mobile homes) Justice Frederick Hall wrote a dissent focused upon the development of the prohibitive tradition that had become suburban exclusionary zoning.[25] His dissent is widely regarded as the best of modern zoning opinions.[26] In it, Justice Hall noted that the court's holding gave almost boundless freedom to developing

[18] *Id*.
[19] *Id*.
[20] Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 405 (App. Div. 1951).
[21] Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320 (1958).
[22] Lionshead Lake v. Wayne Twp., Passaic County, 10 N.J. 165 (1952).
[23] Fischer v. Bedminster Twp., 11 N.J. 194 (1952).
[24] Vickers v. Township Committee of Gloucester Twp., 181 A.2d 129 (N.J. 1962) (overruled by, *Mount Laurel II*) (the Southern Burlington court rendered absolute bans of mobile homes no longer permissible on grounds of adverse effect on real estate values).
[25] *See id*.; *An affirmative (and negative) municipal duty on access to housing—In New Jersey—The Vickers dissent*, 3 AMERICAN LAND PLANNING LAW § 68:5 (Rev. Ed.).
[26] *Id*.

municipalities and opened the door for the municipalities to use their zoning powers for aims beyond its legitimate purposes.[27] He reasoned that

> [L]egitimate use of the zoning power by such municipalities does not encompass the right to erect barricades on their boundaries through exclusion or too tight restriction of uses where the real purpose is to prevent feared disruption with a so-called chosen way of life…[n]or does it encompass provisions designed to let in as new residents only certain kinds of people, or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners.[28]

Justice Hall further cautioned "[t]he majority's view could as well support exclusion of modernistic dwelling architecture, split level homes, or even whole developments of identical houses if a bare majority of the township committee does not like their looks."[29]

Shortly thereafter, the winds began to shift. In 1973 a Rhode Island court noted that the test used to determine whether an ordinance is a legitimate exercise of the police power is whether there exists a reasonable relationship between the ordinance and protecting the public health, safety, morals and welfare - and held that restrictions intended to protect the community's tax base were improper.[30] Then, in 1975, in *Berenson v. Town of New Castle*, the New York Court of Appeals announced a two-part test for municipal zoning ordinances challenged as being exclusionary.[31] The court held that a proper ordinance should: (1) provide for a "balanced [and] cohesive community;" and (2) take into consideration regional, as well as local, housing needs.[32]

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[27] *Vickers*, 181 A.2d at 140-41.
[28] *Id.*
[29] *Id.*
[30] Town of Glocester v. Olivo's Mobile Home Court, Inc., 300 A.2d 465 (R.I. 1973).
[31] Berenson v. Town of New Castle, 341 N.E.2d 236, 241-42 (N.Y. 1975).
[32] *Id.*

Nevertheless, the court qualified the latter requirement by holding that a municipality need not meet a "fair share" standard when the regional need for low and moderate-income housing is satisfied elsewhere.[33]

Other major states, including California, joined New York in endorsing this "regional general welfare" approach.[34] States like Pennsylvania, Michigan, and Illinois, no longer permitted municipalities to exclude multifamily housing completely and required that they provide for their "fair share" of various housing types.[35] Meanwhile, Massachusetts continued to implement (and support) its "antisnob-zoning" law.[36] While courts in Connecticut and Maine suggested the exclusionary problem may have to be addressed, though not going so far as to overturn any ordinances.[37] Surely, the Justices sitting on the Supreme Court of New Jersey were aware of this turning tide when they sat to hear and decide *Mount Laurel* at this kairotic moment in our history.

The development of public policy in other critical areas also cast considerable light on the implications of the exclusionary suburban pattern.[38] Indeed, "the *Mount Laurel* saga resembles, at least in form, a more prominent line of constitutional decisions."[39] In *Brown v. Board of Education* (hereinafter "*Brown I*"), the United States Supreme Court held that racial segregation deprived

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[33] *Id.* at 242-43.
[34] *Associated Home Builders*, 557 P.2d at 473.
[35] Twp. of Willistown v. Chesterdale Farms, Inc., 341 A.2d 466, 468 (Pa. 1975); Robinson Twp. v. Knoll, 302 N.W.2d 146 (Mich. 1981); Oak Park Tr. & Sav. Bank v. Vill. of Palos Park, Cook Cty., 435 N.E.2d 1265 (Ill. App. 1982).
[36] MASS. GEN. LAWS CH. 40B (West 2020); 760 MASS. CODE REGS. 56.01 (West 2020). Chapter 40B permits a city or town to plan jointly with other cities or towns to promote development and prosperity within their area. §§ 20 through 23 of Chapter 40B specifically deal with affordable housing, while 760 CMR 56.00 has further advanced the statutory purposes of M.G.L. c. 40B, §§ 20 through 23 by clarifying the procedures of the expedited review process, and by otherwise addressing recurring questions of interpretation
[37] Zelvin v. Zoning Bd. of Appeals of Town of Windsor, 306 A.2d 151 (C.P. 1973); Barnard v. Zoning Bd. of Appeals of Town of Yarmouth, 313 A.2d 741 (Me. 1974).
[38] *Introduction*, 3 American Land Planning Law § 68:1.
[39] Joseph Marsico, *A Forty-Year Failure: Why the New Jersey Supreme Court Should Take Control of Mount Laurel Enforcement*, 41 SETON HALL LEGIS. J. 149, 167 (2016).

schoolchildren of their constitutional equal protection rights.[40] A subsequent *Brown v. Board of Education* case (hereinafter "*Brown II*") remanded each of the consolidated *Brown I* cases to their respective District Courts and directed the courts "to take such [action] as [is] necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[41] As the arduous process of school desegregation progressed, it became increasingly obvious that in many areas the primary cause for school segregation is simply the pattern of segregated occupancy of housing. After all, a segregated residential area, whether no matter the demographic, is likely to have a segregated school, unless major efforts are made to prevent this.[42]

Certainly, the *Brown* decisions were a recent example of the judiciary recognizing an acute injustice and constructing a remedy where the political branches had failed; they were groundbreaking and the aftereffects were still newsworthy and relevant. For the veteran jurists tasked to decide *Mount Laurel I, Brown* could not have been far from mind.[43] The same justices were also in that same year hearing *Robinson v. Cahill,* a case which mingled the state tax uniformity clause and the federal equal protection clause, ultimately declaring the system of financing public schools to be unconstitutional.[44]

In both *Brown* and *Mount Laurel,* the courts heard complaints by minority groups alleging that government actors had violated their rights. The courts broke ground by recognizing "fundamental rights" that had not been previously observed. Yet both decisions were politically

[40] Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[41] Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).
[42] *Introduction*, 3 American Land Planning Law § 68:1.
[43] *See* Holmes, *supra*, note 12 at 347 ("A case likely in the minds of the *Mount Laurel* court is *Brown v. Bd. of Education*. The court also likely considered familiar adages associated with social change: that rules are not self-executing and that a rule change is no good without a political base to support it." (citations omitted)).
[44] *Robinson*, 351 A.2d 713.

unpopular in most sectors, and enforcement was neither straightforward nor effortless and took time to achieve.[45] Finally, in both cases, the respective legislatures eventually lent their support by passing statutes to foster compliance: Congress with its Civil Rights Act [46] to, *inter alia*, promote integration, and the New Jersey Legislature with its Fair Housing Act[47] to streamline and formalize the affordable housing mission. Thus, it is reasonable to note that there is a parallel between the *Brown* cases and the *Mount Laurel* cases.

III. PART II

During the 1960s, a social movement to end institutionalized racial discrimination, disenfranchisement and racial segregation was growing throughout the United States. Moderates in the movement worked with the United States Congress to achieve the passage of several significant pieces of federal legislation that overturned discriminatory laws and practices, authorizing oversight and enforcement by the federal government. As a result, the separate but equal policy, which aided the enforcement of Jim Crow laws, was substantially weakened and eventually dismantled. At the same time, two major development strategies were taking place in the Mount Laurel region, one in the City of Camden, and the other in its developing suburbs, including Mount Laurel Township in Burlington County.

In Camden, the policy-makers were trying to utilize urban renewal and highway construction to rebuild the city. The result was just the opposite: the city's middle-class residents,

[45] Arguably, the actualization of both efforts is intertwined, and the aims of neither decision have been realized to date, but that is beyond the scope of this note.
[46] CIVIL RIGHTS ACT, 42 U.S.C. § 2000 *et seq*. (1964).
[47] Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to -329.19 (West 2020).

mostly white, left the city for the suburbs, and the poor, financially unable to move out, were displaced by the government action, "relocated" from one slum to the next and sentenced to reside in substandard, overpriced housing which became the worst urban ghetto in America.[48] Their goal was to escape Camden to the decent housing, safe neighborhoods, good schools and employment in the developing suburbs.[49]

In Mount Laurel Township, development plans were underway. Three "Planned Unit Developments" (hereinafter "PUDs"), were intended to develop more than 10,000 homes, industrial parks and commercial centers.[50] The result would transform Mount Laurel from farmland to an affluent suburb. Not even one unit of affordable housing was part of these planned developments.[51] Mount Laurel's plans were fiscal zoning at its best, aimed at attracting the highest tax ratables.[52] Zoning regulations such as the ones in place create barriers to inclusion by imposing minimum lot size requirements, requiring aesthetic uniformity, and forbidding builders from developing apartment buildings or townhouses in certain areas, thereby assuring access only to those of certain financial means, which translates to excluding the poor.[53]

Contrasted with this massive development scheme was Mount Laurel's historic black community, which had resided in the Township since the Revolutionary War. These families worked the farms and were of modest means, incomes much below what would be needed to

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[48] *E.g.* Top 100 Most Dangerous Cities in the U.S., NEIGHBORHOODSCOUT, https://www.neighborhoodscout.com/blog/top100dangerous (last visited January 3, 2021) (Camden has appeared in the top ten on this list every year since the lists inception); *10 Most Dangerous U.S. Cities*, AMERICAN CITY AND COUNTY, https://www.americancityandcounty.com/galleries/2020s-10-most-dangerous-u-s-cities/ (last visited January 3, 2021).

[49] Fair Share Housing Center, *What is the Mount Laurel Doctrine?*, WWW.FAIRSHAREHOUSING.COM, https://fairsharehousing.org/mount-laurel-doctrine/ (last visited January 7, 2021 6:33 p.m.).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] Richard D. Kahlenberg, AN ECONOMIC FAIR HOUSING ACT, REPORT RACE & INEQUALITY at 3-4 (2017), https://tcf.org/content/report/economic-fair-housing-act (last visited January 8, 2021).

purchase one of the new single-family homes planned for Mount Laurel's three PUDs.[54] This is how entrenched race-based class differences allow economic exclusion to continue "racial segregation's ugly work."[55] Because people of color remain of disproportionately lower income than whites, the absence of affordable housing in more expensive cities and towns achieves many of the same results as explicit racial zoning.[56]

While the PUD plans were undergoing the municipal approval process, Mount Laurel Township stepped up its code enforcement efforts in order to remove its black residents who were often residing in substandard, dilapidated housing, some of which were "living" in converted chicken coops.[57] As these properties were condemned, the Township ordered the occupants to vacate. No relocation, as required by state law, was offered to these families.[58] The goal was to get them out of the Township in order to enhance the PUD marketing plan to "attract predominantly upper middle-class families and first-class commercial and industrial rateables."[59] Unfortunately, this type of economic exclusion assures that whole swaths of the working poor and middle class are unable even to live in convenient proximity to their places of work. [60]

Mount Laurel's longtime black community, facing the prospect of being forced out of the only community they had ever known, began to organize.[61] Ethel R. Lawrence, a daycare teacher,

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[54] Fair Share Housing Center, *supra* note 49.
[55] *See* Kimberly Quick, *Exclusionary Zoning Continues Racial Segregation's Ugly Work*, CENTURY FOUND (last visited December 4, 2020), https://tcf.org/content/commentary/exclusionary-zoningcontinues-racial-segregations-ugly-work/?agreed=1.
[56] Kahlenberg, *supra* note 102, at 6.
[57] *Mount Laurel I*, 336 A.2d at 714.
[58] *Id*.
[59] *Id*.
[60] *See* Alana Semuels, *The Barriers Stopping Poor People from Moving to Better Jobs*, ATLANTIC, https://www.theatlantic.com/business/archive/2017/10/geographicmobility-and-housing/542439 (last visited January 7, 2021); *see also* Emily Dreyfuss, *The Year in Housing: The Middle Class Can't Afford to Live in Cities Anymore*, WIRED (Dec. 31, 2020, https://www.wired.com/2016/12/year-housing-middle-class-cant-afford-livecities-anymore/.
[61] *Mount Laurel I*, 336 A.2d at 716.

wife, mother of nine, church leader and member of the Burlington County Community Action program ("B.C.C.A.P.", the anti-poverty program), organized an effort in November 1969 to petition Mount Laurel Township's zoning board to permit the development of thirty affordable garden apartments by a non-profit group.[62] This proposal would create relocation housing within the Township for displaced families. Mount Laurel Township officials doggedly opposed the proposal, and resulted in *Southern Burlington County NAACP v. Township of Mount Laurel* (*Mount Laurel I*).[63]

In *Mount Laurel I*, the justices determined that Mount Laurel Township's zoning ordinance was invalid because it unlawfully excluded low and moderate-income families from the municipality.[64] The justices reasoned that the state could only exercise its police power [65] (for example, the power to regulate land use through zoning ordinances) to promote public health, safety, morals, or the general welfare.[66] The justices also stated that all police power enactments, whether state or local enactments, must conform to the basic state constitutional requirements of substantive due process and equal protection.[67] Accordingly, the *Mount Laurel I* court determined that because all local power to zone comes from the State Enabling Act, and the state delegates the power to municipalities, the police power must reflect the general welfare of the state as a whole, and is thus not limited to the municipality itself.[68] Thus, the definition of "general welfare" *must*

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[62] Fair Share Housing Center, *supra* note 49.
[63] *Mount Laurel I*, 336 A.2d at 713.
[64] *Mount Laurel I*, 336 A.2d at 731.
[65] *See generally Mount Laurel I*, 336 A. 2d 713. The police power as used herein does not refer to law enforcement, but to the fundamental power vested in states to govern, including making and enforcing laws. Controlled by state constitutions and other limitations, such as due process, this power must be exercised for the protection and preservation of public health, justice, morals, order, safety, and the general welfare of the state's inhabitants. Police power can be delegated to local units of government. (quotations omitted).
[66] *Mount Laurel I*, 336 A.2d at 725.
[67] *Id*.
[68] *Id*.

include the welfare of those outside the municipal borders as well as those inside.[69] Furthermore, the court determined that the provision of adequate housing for low and moderate-income citizens is an "absolute essential in promotion of the general welfare required in all local land use regulation."[70] Thereafter, having invalidated Mount Laurel Township's exclusionary zoning ordinance, the court went on to make the *Mount Laurel* doctrine applicable to all of the state's municipalities.[71] However, while *Mount Laurel I* sought to resolve the problems of exclusion by requiring that each developing community make possible the development of its fair share of the regional need for affordable housing –through its land use controls– it actually complicated them through the failure to specify the remedial obligation and the definitions established.

Thus, the decision was essentially impotent.[72] Many towns openly refused to enforce it, and even Mount Laurel itself refused to implement the doctrine bearing its name, and so the matter reappeared before the Supreme Court of New Jersey almost ten years later.[73] At that time, the court observed:

> After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that

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[69] *Id.*
[70] *Id.* at 727.
[71] *See, e.g.*, *Id.* at 728 ("It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries."); *See also* Holmes, *supra*, note 12 at 360.
[72] *See, e.g.*, 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) (arguing that *Mount Laurel I* failed to produce low cost housing); Paula A. Franzese, *Mount Laurel III*: *The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 32 (1988) (arguing that little had changed in the eight years between *Mount Laurel I* and *Mount Laurel II*); Alan Mallach, *From Mount Laurel to Molehill: Blueprint for Delay*, 15 N.J. REP. 4, 21 (1985) (noting that eight years after *Mount Laurel I* no affordable housing had yet been built in Mount Laurel Township).
[73] *Mount Laurel II,* 510 A.2d at 410.

> there is widespread non-compliance with the constitutional mandate of our original opinion in this case.[74]

With *Mount Laurel II*, the Supreme Court of New Jersey resolved that "[t]o the best of our ability, we shall not allow [this delay] to continue."[75] The court was "more firmly committed to the original *Mount Laurel I* doctrine than ever, and [it was] determined, within appropriate judicial bounds, to make it work."[76] This time, the court increased the obligation to actually make affordable housing available either through use of mobile homes, subsidies, development incentives such as density bonuses, tax incentives, and conceivably rent skewing, where the subsidy for affordable units of housing was supplied by raising the price of unsubsidized units within a development, or by the mandatory set-aside of a percentage of units in new developments for affordable housing.[77]

Further, *Mount Laurel II* made the doctrine enforceable by giving developers an incentive to initiate exclusionary zoning suits.[78] This incentive came to be known as the "builder's remedy."[79] When a builder proposes a development that includes affordable housing and a municipality denies the proposal for violating local zoning codes, the developer may challenge the denial in court, asserting that the municipality has not complied with the *Mount Laurel* doctrine.[80] The court designated *Mount Laurel* specialty judges to hear disputes[81], and ordered that the state

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 419.
[78] *Id.* at 418, 429-30.
[79] *Id.* at 418, 452-53.
[80] *Id.*
[81] *New Jersey—Mount Laurel doctrine*, 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 22:17 (4th ed.) (Determination of a municipality's fair share of regional lower income housing needs will be made by one of three trial judges selected by the chief justice and approved by the full court. It is expected that the use of specially designated judges will help to ensure consistency and predictability of rules, and will allow the selected judges to develop the special expertise and knowledge called for by future *Mount Laurel* litigation.).

planning agency's definition of region and "fair share" (the amount of affordable housing each New Jersey municipality was required to provide to comply with the *Mount Laurel* doctrine) be utilized.[82] If a court determines that the municipality has not complied, the court may permit the developer to construct the project despite violations to the local zoning code and invalidate the offending zoning provision for excluding affordable housing.[83]

After *Mount Laurel I*, constitutional compliance was at the discretion of each town. Now, the courts themselves became an effective enforcement instrument, supplying a "special litigation track for exclusionary zoning cases and . . . a 'builder's remedy' by which builders could file suit for the opportunity to construct housing at higher densities than a municipality otherwise would allow."[84] The court had "learned from experience . . . that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals."[85]

Nonetheless, the flood of "builder's remedy" litigation that followed *Mount Laurel II* triggered a movement to get the courts out of the practice of land use planning and eventually caused the New Jersey State Legislature to pass the Fair Housing Act of 1985.[86] The main purpose of the Act was to reassess the fair share allocations assigned to the affected communities, to get these communities out of court, and to provide a funding mechanism so that low- and moderate-income housing could be viable without the "builder's remedy."[87] If a trial court found that a

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[82] *Id.*
[83] *Id.*
[84] *Mount Laurel IV*, 110 A.3d at 36.
[85] *Mount Laurel II*, 456 A.2d at 410.
[86] *Fair Housing Act*, N.J. STAT. ANN. §§ 52:27D-301 to -329.19. *See* Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 850 (2011) (stating that, "The decision spawned well over 100 lawsuits, prompting the New Jersey legislature to enact the New Jersey Fair Housing Act in 1985.").
[87] *Mt. Laurel II*, at 458. ("The remedies authorized today are intended to achieve compliance with the Constitution and the Mount Laurel obligations without interminable trials and appeals. Municipalities will not be able to appeal a trial court's determination that its ordinance is invalid, wait several years for adjudication of that appeal, and then, if unsuccessful, adopt another inadequate ordinance followed by more litigation and subsequent appeals.")

municipality has failed to meet its *Mount Laurel* obligation, the court would order the town to revise its ordinance in 90 days. [88]

New Jersey's Fair Housing Act in turn created a state agency to promulgate guidelines and oversee administration, the Council on Affordable Housing (hereinafter "COAH").[89] COAH was now responsible for determining the municipalities' "fair share."[90] 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 designated region; and (3) identify the delivery techniques available to municipalities in addressing the assigned obligation.[91] Further, the Fair Housing Act permitted municipalities to seek certification from COAH to show that they had substantially complied with the *Mount Laurel* doctrine.[92] Participating municipalities would file a Fair Share Housing Plan with COAH, and this process insulated the municipality from builders' remedy suits.[93]

The "builder's remedy" available under the *Mount Laurel* doctrine was initially available in limited circumstances after the creation of COAH, but was later eliminated under COAH's regulations if a municipality's fair share plan remained in effect.[94] The Fair Housing Act also permitted communities to transfer their cases to a nine-member Council on Affordable Housing.[95] Trial courts hearing *Mount Laurel* cases not transferred to the Council on Affordable Housing

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[88] *Id*.
[89] N.J. STAT. ANN. §§ 52:27D-307, -308 (West 2020); *see also Mount Laurel IV*, 110 A.3d at 33.
[90] N.J. STAT. ANN. § 52:27D-302 (West 2020); *See Mount Laurel III*, 510 A.2d 621 at 637-42.
[91] N.J. STAT. ANN. § 52:27D-307 to -308; 313 to -317 (West 2020); *see also Mount Laurel IV*, 110 A.3d at 35-36.
[92] § 52:27D-313.
[93] §§ 52:27D-309(b), 316(b).
[94] N.J. Admin. Code § 5:91-3.6. However, when a municipalities plan lapsed, a municipality may be sued and the builder's remedy could be imposed. Toll Bros., Inc. v. Township of West Windsor, 173 N.J. 502, 803 A.2d 53 (2002).
[95] 17 N.J. Stat. Ann. § 52:27D-305 (West 2020).

must nevertheless use the fair share methodology employed by the Council unless found arbitrary and capricious; and only the Appellate Division had the power to invalidate the regulations.[96]

In *Mount Laurel III*, numerous municipalities challenged the Act's constitutionality under the *Mount Laurel* mandate. Despite criticism that the new Act institutionalized delay and did not provide enough recourse, the New Jersey Supreme Court upheld the constitutionality of the Act.[97] While recognizing that the attack on the statute was substantial, the court dismissed it as pure speculation, and conveyed its preference for legislative action.[98] The court supported the Legislature's intent to move affordable housing issues away from the judiciary, however, the court cautioned that it remained firmly committed to the original *Mount Laurel I* doctrine, and would not hesitate to intervene should it become clear that the legislature could not deliver.[99]

The new enforcements of the doctrine had some success.[100] Reports indicate that 95% of participants that moved ended up in a community with higher median income than where they lived prior to moving to their current housing but that moves to COAH-generated housing tended to concentrate participating households, with 41% of all movers concentrated in just five municipalities.[101] Surveys of those who moved indicated that respondents were far more likely to report being better off financially in their new community than where they lived previously, but "given that access to employment has been a consistent focal point of debates around COAH and

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[96] Bi-County Development Corp. v. Mayor and Council of Borough of Oakland, 224 N.J. Super. 455, 540 A.2d 927 (Law Div. 1988). *See also* Kent-Smith, *supra*, note 57.
[97] *Mount Laurel III*, 510 A.2d 621 at 632; Henry L. Kent-Smith, *supra*, note 57, at 945; *see also* Paula A. Franzese, *supra* note 76 at 40.
[98] *Mount Laurel III*, 510 A.2d at 643; Kent-Smith, *supra*, note 76; *see also* Franzese, *supra*, note 76.
[99] *Mount Laurel III*, 510 A.2d at 633, 654-55. "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."
[100] Peter Buchsbaum, *Mount Laurel II: A Ten Year Retrospective*, ST. & LOC. L. NEWS, at 7, 17 (Winter 1994) (noting that without judicial pressure in *Mount Laurel*, the New Jersey legislature would not have enacted the Fair Housing Act, and 13,830 units of affordable housing were generated from litigation and legislation between 1987 – 1993).
[101] Bush-Baskette, Robinson and Simmons, *Residential and Social Outcomes for Residents Living in Housing Certified by the New Jersey Council on Affordable Housing*, 63 RUTGERS L. REV. 879 (2011).

the *Mount Laurel* doctrine, it was unexpected to learn that most residents surveyed did not include access to employment as a motive for participation."[102] A large majority of respondents reported feeling very safe in their current residence, with approximately half of the residents reported feeling safer than in their prior location and only a very small percentage feeling less safe than previously.[103]

Almost half of surveyed households that had children at home listed access to schools (or better schools) as one of their reasons for moving.[104] A very large majority (85%) of these households with children reported that access to schools was "very good," and while most of these households with children reported that access to schools did not change when they moved, more than one-third (35%) of these households reported that access to schools improved and this was approximately four times the number of households that reported a decline in access (8%).[105] Additionally, by and large the residents surveyed reported having been able to maintain and extend their social networks, with 31% of households having more friends in their new community than in their prior one –a figure that tended to increase as residents lived in their new community for a longer period– and a large majority of residents surveyed reported that they were able to maintain contact with friends from their prior location [106]This is despite the fact that more than one-third of residents report declining access to public transportation associated with their move to COAH housing.[107] Overall there were very high levels of satisfaction among participants that moved:

[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id*.
[106] *Id*.
[107] *Id*.

> A substantial majority of affordable housing residents surveyed tell us that: they like where they live; they like their housing units better than where they lived before; and, they like their new communities better than their old ones. Given the opportunity to move, a majority of respondents said they would prefer to stay where they are.[108]

In 1987, the Council first adopted specific rules for determining a municipality's affordable housing obligation, known as the First Round Rules.[109] In 1993, the Second Round Rules were adopted, which were similar to the first, but took into account changes in census data. [110] 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."[111]

When the time came to issue Third Round Rules, COAH changed the method of calculation to one which relied on a given municipalities "growth share," a rehabilitation share, and any unsatisfied prior round obligations.[112] The growth share tied affordable housing obligations to the net increase in the number of jobs and housing units a municipality would experience between 2004 and 2014.[113] This new methodology was highly criticized for deterring municipalities from expanding, since under the new regulations, housing obligations were determined by the amount

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[108] Bush-Baskette, Robinson and Simmons, *Residential and Social Outcomes for Residents Living in Housing Certified by the New Jersey Council on Affordable Housing*, 63 RUTGERS L. REV. 879 (2011).
[109] *See* In re Adoption of N.J.A.C. 5:94 & 5:95, 914 A.2d 348, 354 (N.J. App. Div. 2007); *see also* 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, 8 (2012), http://erepository.law.shu.edu/student_scholarship/123.
[110] *In re Adoption of N.J.A.C. 5:94 & 5:95*, 914 A.2d at 362.; *see also* Klein, *supra*, note 88.
[111] *In re Adoption of N.J.A.C. 5:94 & 5:95*, 914 A.2d at 362; *see also* Mallach, *supra*, note 72 at 851.
[112] *In re Adoption of N.J.A.C. 5:94 & 5:95*, 914 A.2d at 363-66, 375.
[113] *Id.* at 353-54.

of homes and jobs created.[114] Furthermore, while the criteria set out by COAH was inherently designed to address a municipality's need for affordable housing; the rules had various "loopholes" that prevented inclusion.[115]

Specifically, under the rules, municipalities could reduce the number of affordable housing units they were required to provide through the use of "credits."[116] In addition, up to twenty-five percent of a municipality's required affordable housing could be satisfied through age-restrictive affordable housing.[117] In other words, senior housing units could satisfy affordable housing, a circumstance that discriminates against low-income families with children[118] Still, perhaps most devastatingly, "the FHA gave COAH discretion to approve townships' efforts to buy their way out of their *Mount Laurel* duty by transferring up to fifty percent of the given municipality's affordable housing obligation to a designated receiving municipality to use to build affordable housing within their borders."[119] These Regional Contribution Agreements (hereafter "RCA's") frustrated the primary intention of economic integration and the creation of affordable housing opportunities in municipalities otherwise closed to whole segments of the population.[120] Most often the receiving municipalities were found in older urban areas achieved the very opposite of the intended effect

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[114] 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, 320-21 (2005). ("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.").

[115] Klein, *supra*, note 88, at 17-18.

[116] 62 N.J.A.C. 9:93-2.14, -3.2 (West 2020); *see also In re Adoption of N.J.A.C. 5:94 & 5:95*, 914 A.2d at 362 (Explaining that in particular, COAH permitted credits and adjustments to reduce a municipalities fa ir share for affordable housing constructed between 1980 and 1986, for substantial compliance, and "for municipalities that lacked sufficient vacant land or did not ha ve access to water and sewer.")

[117] 63 N.J.A.C. 5:93-5.15 (West 2020).

[118] Bakewell, *supra* note 114 at 323.

[119] Paula A. Franzese, *An Inflection Point for Affordable Housing: The Promise of Inclusionary Mixed-Use Redevelopment*, 52 UIC J. MARSHALL L. REV. 581, 591 (2019); N.J. STAT. ANN. § 52:27D-307(e) (West 2020).

[120] Kriston Capps, *Putting a Price on NIMBYism*, BLOOMBERG CITYLAB (December 19, 2018) https://www.bloomberg.com/news/articles/2018-12-19/a-vexed-fix-for-housing-segregation-cap-and-trade/. (Concentrating low-income housing in neighborhoods with little opportunity was the last thing that the framers of the Mount Laurel Doctrine hoped to accomplish.).

of the *Mount Laurel doctrine*.[121] Thus, the RCA's enabled New Jersey to maintain existing segregation, utterly defeating the intent of the law.

Finally, in 2007 developers and housing advocates, along with the New Jersey Builders Association, brought suit to invalidate the Third Round Rules.[122] In *In re Adoption of N.J.A.C. 5:94 & 5:95*, the Appellate Division affirmed portions of COAH's proposed methodology, but invalidated other aspects of the Third Round Rules.[123] These invalidated aspects included the "growth share" principle, the RCA's and other methods by which COAH reduced municipal housing obligations, on constitutional and other grounds.[124]

Underscoring the political unpopularity of the doctrine, Gov. Chris Christie made abolishing COAH a central plank of his gubernatorial campaign in 2009.[125] In 2011 Christie did just that, and abolished COAH by issuing a reorganization plan (hereinafter the "Plan") that the Legislature could have blocked, but didn't.[126] Subsequently, on March 8, 2012, the Appellate Division invalidated the Plan after the Fair Share Housing Center challenged it in court.[127]

Nonetheless, because COAH failed to successfully amend the Third Round Rules COAH remained unequipped to process municipalities' petitions for substantive certifications.[128]

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[121] *Id.* (Cities and towns that sent housing (120 municipalities in total) gained more than 133,000 jobs between 1990 and 2003, while the places that received housing (53 cities and towns) lost 3,600 jobs.).
[122] *In re Adoption of N.J.A.C. 5:94 & 5:95*, 914 A.2d 348.
[123] *Id.* at 400-401.
[124] *Id.* at 402.
[125] Lisa Fleisher, *N.J. Gov. Chris Christie Creates Task Force to Review Affordable Housing*, NJ.COM (Feb. 9, 2010), http://www.nj.com/news/index.ssf/2010/02/ nj_gov_chris_christie_creates_1.html (last visited January 9, 2021) (New Jersey Governor Chris Christie pushed in 2010 to end the "COAH nightmare" and to "[place housing development] back into the hands of local municipalities.")
[126] Michael Aron, *NJ Supreme Court Rules Gov. Christie Didn't Have Authority to Abolish COAH*, NJ TODAY (July 10, 2013) https://www.njspotlight.com/news/video/nj-supreme-court-rules-gov-christie-didnt-have-authority-to-abolish-coah/ (last visited January 9, 2021).
[127] *In re Plan for the Abolition of the Council on Affordable Hous.*, 70 A.3d 559 (N.J. 2013).
[128] *Mount Laurel IV*, 110 A.3d 31.

Consequently, on March 10, 2015, the New Jersey Supreme Court declared COAH "moribund," and once again transferred jurisdiction over *Mount Laurel* affordable housing issues to specially selected trial court judges in each vicinage.[129]

In *Mount Laurel IV*, confronted by COAH's prolonged and ultimately unfruitful efforts to promulgate rules for assessing and identifying municipal compliance with housing obligations, the Supreme Court of New Jersey (1) recognized COAH to be a nonfunctioning agency; (2) eliminated the FHA's exhaustion-of-administrative-remedies requirement and reopened the courts to *Mount Laurel* litigants; and (3) provided a process by which a town might obtain the equivalent of substantive certification for its fair share housing plan and avoid exclusionary zoning actions, after a court assessed the town's fair share responsibility.[130] Two years later the court re-affirmed the *Mount Laurel IV* takeover of enforcement in *In re Declaratory Judgment Actions Filed By Various Municipalities*.[131]

IV. PART III

Over the years the Mount Laurel doctrine has been enforced both through a legislative scheme that sets up an executive agency which allows municipalities to decide how and where to permit construction of affordable housing within their boundaries, and a judicial scheme that for all intents and purposes allows courts to decide how and where affordable housing will be built within a municipality. The difference between the two options is glaring. In the former, municipalities retain their autonomy and are allowed to plan best for the land uses that occur within

[129] *Mount Laurel IV*, 110 A.3d at 31.
[130] *Mount Laurel IV*, 110 A.3d at 34-35, 42; In re Declaratory Judgment Actions Filed By Various Municipalities, 152 A.3d at 917. *The Fair Housing Act of 1985*, 3 AMERICAN LAND PLANNING LAW § 68:61 (Rev. Ed.).
[131] In re Declaratory Judgment Actions Filed By Various Municipalities, 152 A.3d 915 (2017).

their borders. In the latter, planning is nonexistent; the state's end goal trumps the mechanics of achieving it.

Unfortunately, forty years had passed and the underlying issues that led to *Mount Laurel I* remained.[132] Yet, in the five years since *Mount Laurel IV* nearly three hundred and fifty towns have now reached settlements with fair-housing advocates, paving the way for thousands of new residences.[133] Obviously, the judicial "builder's remedy" has been more effective. But this was really an emergency remedy, and the need for a holistic solution remains. Indeed, the courts originally withdrew from the affordable-housing issue when the legislature stepped in, believing judicial leadership was no longer necessary, but political pressures stalled movement for nearly fifteen years, forcing the courts to take control once again.

Massachusetts has taken an alternative approach, placing remediation of the affordable housing problem squarely in the hands of developers with their "Anti-Snob" Zoning Law, Chapter 40B Sec. 21-23.[134] Like *Mount Laurel*, Chapter 40B was also enacted in response to economic discrimination in housing.[135] Chapter 40B allows developers to ignore local zoning in Massachusetts communities where less than 10 percent of housing is "affordable."[136] It allows

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[132] The Fund for New Jersey, *COMMUNITIES OF OPPORTUNITY: New Jerseyans Need More Affordable, Convenient, and Safe Places to Call Home*, CROSSROADS N.J. (2017), www.fundfornj.org/sites/default/files/crossroadsnj/Cross_HOUSINGt_1.3%20JS.pdf (estimating that an additional 155,000 low and moderate-income units are needed throughout the State); *See also* Joseph Atmonavage, *New Jersey Needs to Build 155,000 Affordable Housing Units. No One Can Agree on How or Where*, NJ.COM (July 25, 2018).

[133] Christian Estevez, *Victory Seen In Fight Over Affordable Housing In NJ*, NJ SPOTLIGHT NEWS (February 26, 2020) https://www.njspotlight.com/2020/02/op-ed-victory-seen-in-fight-over-affordable-housing-in-nj/ (last visited December 23, 2020).

[134] See MASS. GEN. LAWS CH. 40B (2006).

[135] *See e.g.* Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 548-550 (1992)(chronicling the history of the statute and acknowledging it as one of "retribution" and "vengeance" against the suburbs).

[136] *Id.*

developers in those towns to construct large-scale multifamily projects wherever they wish, provided that they dedicate twenty-five percent of the new units as affordable housing.[137]

Much has been written regarding the history of the statute and the curious timing of the adoption by the Legislature in the wake of Boston's "forced busing" and the racial crises that followed.[138] Some have hailed the one-size-fits-all statute as an innovative success. [139] However, it makes no distinction among the state's unique geologic or topographic regions or among the state's cities, suburbs, or relatively rural towns, and that stands in contradiction to sound planning principles.[140] That each and every community—both Boston and Lee, for instance—must attain the same standard fails to recognize that Boston (population approximately 685,094 in 2017) is different from Lee (population approximately 2051 in 2010).[141] Furthermore, in practice, the statute "provides a developer with a blank check to build an unlimited number of dwelling units on a parcel of land zoned for a different use or for a density far different from that proposed." [142] Surely, 40B is market-driven, and most developers want to build where housing demand is high, and so while 40B has led the creation of significant affordable housing within the state, it will not likely be constructed in Massachusetts in any meaningful way.

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[137] *Id*.
[138] 760 MASS. CODE REGS. 56.01 (West 2020).
[139] Eric Reenstierna, *One Reason to Like Anti-Snob Zoning*, BOSTON GLOBE, Aug. 13, 2007, at A11 ("With 40B, the state found a more creative solution. It changed the rules. The change left developers free to do what developers do—make a profit—and, in the process, solve the housing problem. The state accomplished that without spending a cent.").
[140] *Cf.* 83 AM. JUR. 2D ZONING AND PLANNING § 19 (A town planning commission's duty is to prepare and adopt a plan of development for the town based on studies of physical, social, economic, and governmental conditions and trends, and the plan should be designed to promote the coordinated development of the town and the general welfare and prosperity of its people.)
[141] *See* Boston, Massachusetts (MA) Detailed Profile, http://www.city-data.com/city/Boston-Massachusetts.html (last visited January 8, 2021); Lee, Massachusetts (MA) Detailed Profile, http://www.city-data.com/city/Lee-Massachusetts.html (last visited January 8, 2021).
[142] Jonathan Witten, *Adult Supervision Required: The Commonwealth of Massachusetts's Reckless Adventures with Affordable Housing and the Anti-Snob Zoning Act*, 35 B.C. ENVTL. AFF. L. REV. 217, 223 (2008).

Mount Laurel I made clear that the New Jersey Constitution requires each municipality to bear a reasonable portion of the state's collective affordable housing burden. The record has shown that a task as controversial as affordable housing in New Jersey "cannot be handled effectively by a body subject to political pressures."[143] Massachusetts Anti-Snob Zoning Act provides a good, if not sad, example of a statute that has simply gone too far in asserting compliance with a state mandate.[144] Until we live in a world of true equality, the judicial solution of *Mount Laurel II* and *Mount Laurel IV* remains the most effective response to economic discrimination in housing and therefore the best means to eradicate the remnants of *de jure* racial segregation in our New Jersey cities and suburbs.

V. CONCLUSION

At heart, New Jersey's fair-housing laws are not just about building homes. They are also about expanding ladders of opportunity to the middle class for the many thousands of families priced out of our state's many thriving communities. The 45-year history of New Jersey's *Mount Laurel* doctrine illustrates the difficulty faced in addressing remediating past wrongs such as exclusionary zoning. When little had been accomplished in the eight years following the Supreme Court of New Jersey's landmark ruling in *Mount Laurel I*, the Court's *Mount Laurel II* ruling, by allowing a "builder's remedy" and assigning exclusionary zoning challenges to a hand-picked group of judges, effectively forced the legislature to act. The resulting Fair Housing Act, while controversial from its inception due to its allowing for Regional Contribution Agreements, established a workable administrative system for ensuring that local governments met their "fair share" affordable housing obligations. Over time, however, the Council on Affordable Housing

[143] Marsico, *supra* note 39 at 173.
[144] *Id.* at 257.

(COAH), unable to surmount technical problems and facing political and public opposition, proved incapable of meeting its obligations under the Fair Housing Act. Finally, in 2015, thirty years after the legislature had replaced court supervision of municipal "fair share" obligations with the COAH, the Court found it had no choice but to return the responsibility for overseeing compliance with the Fair Housing Act to the judiciary. Today, this economic segregation, further aggravated by gentrification and rising housing costs, has exacerbated the economic class divide.[145] "We are today faced with a second form of *hypersegregatio*n, one based on income rather than race."[146] Fair and aggressive enforcement of our fair-housing laws provides real opportunities for tens of thousands of families. As far as we've come, there is still more we can do to ensure we take full advantage of this historic opportunity. Housing remains the major unfinished business of the civil rights movement.[147]

[145] ALISSA QUART, SQUEEZED: WHY OUR FAMILIES CAN'T AFFORD AMERICA (2018) (chronicling the financial struggles of the teetering middle class).
[146] Alan C. Weinstein, *Reflections on the Persistence of Racial Segregation in Housing*, 45 CAP. U. L. REV. 59 (2017).
[147] *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).