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**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**

Corey Klein

I. INTRODUCTION

In its landmark 1975 decision in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*, 67 N.J. 151 (1975), the New Jersey Supreme Court ruled that municipalities must use their zoning powers in such a way to provide low- and moderate- income residents with a realistic opportunity to afford housing within their borders.¹ The court found that Mount Laurel Township had used its zoning powers to effectively exclude lower income residents.²

In 1983, the court reaffirmed the basic premise of *Mount Laurel I* in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*, 92 N.J. 158 (1983), and made the doctrine enforceable by giving developers an incentive to initiate exclusionary zoning suits.³ This incentive came to be known as the “builder’s remedy.”⁴ 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 on the grounds that the municipality has not complied with the *Mount Laurel* doctrine.⁵ If a court determines that the municipality had not complied with the *Mount Laurel* doctrine, 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.⁶

¹ S. Burlington County NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 67 N.J. 151, 180, 209 (1975).

² *Id.* at 209.

³ S. Burlington County NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 92 N.J. 158, 214, 236-37 (1983).

⁴ *Id.* at 214, 279-81.

⁵ *Id.*

⁶ *Id.*

The flood of litigation that followed *Mount Laurel II* caused the New Jersey State Legislature to pass the Fair Housing Act of 1985.⁷ The Fair Housing Act created the Council on Affordable Housing (COAH), an administrative agency tasked with determining the amount of affordable housing each New Jersey municipality was required to provide to comply with the *Mount Laurel* doctrine.⁸ In *Hills Dev. Co. v. Twp. of Bernards*, 103 N.J. 1 (1986), numerous municipalities challenged the Act's constitutionality under the *Mount Laurel* doctrine; however, the court upheld it, supporting the Legislature's intent to move affordable housing issues away from the judiciary.⁹

The Fair Housing Act created a system that permitted municipalities to seek certification from COAH to show that they had substantially complied with the *Mount Laurel* doctrine.¹⁰ Municipalities could choose whether to participate by filing a Fair Share Housing Plan with COAH seeking COAH certification. By doing so, a municipality was insulated from builders' remedy suits.¹¹ The COAH process had been under judicial review, and the Supreme Court and Appellate Courts invalidated COAH's methodology for calculating municipal affordable housing obligations on several occasions.¹² These judicial challenges eventually led the Legislature to propose an end to COAH.¹³ Although this proposed legislation was never enacted, Governor Christie abolished the agency by executive order in June, 2011.¹⁴

⁷ Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to -329.19 (West 2011). 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.").

⁸ § 52:27D-302. See *Hills Dev. Co. v. Twp. of Bernards*, 103 N.J. 1, 31-40 (1986).

⁹ *Hills Dev. Co.*, 103 N.J. 1, 63-64 (1986).

¹⁰ § 52:27D-313.

¹¹ §§ 52:27D-309(b), 316(b).

¹² See *infra* Part II.A-B.

¹³ S. 1, 214th Leg. (N.J. 2010).

¹⁴ STATE OF N.J., EXEC. DEP'T, REORGANIZATION PLAN NO. 001-2011, A PLAN FOR THE ABOLITION OF THE COUNCIL ON AFFORDABLE HOUSING AND PROVIDING FOR THE TRANSFER OF THE FUNCTIONS, POWERS, AND DUTIES OF THE COUNCIL ON AFFORDABLE HOUSING TO THE DEPARTMENT OF COMMUNITY AFFAIRS (2011), available at <http://www.nj.gov/dca/services/lps/hss/transinfo/001-2011.pdf>.

Municipalities have strong incentives to resist the construction of affordable housing in their jurisdictions. By saddling the responsibility of paving the way for affordable housing on municipalities, the *Mount Laurel* doctrine is viewed by critics as an affront to sound planning principals, a catalyst for urban sprawl, an attack on the environment, and a financial burden that local budgets are ill-equipped to handle.¹⁵ These criticisms were echoed by Governor Christie, who made public statements about allowing municipalities more say in their planning decisions.¹⁶ Ultimately, Governor Christie abolished the agency based on these criticisms.¹⁷ The appellate division invalidated Christie's move to abolish COAH and the Governor has vowed to appeal that decision.¹⁸

This Note discusses two aspects of the *Mount Laurel* decisions and their progeny: the voluntary compliance mechanism, which allows municipalities to decide how and where to permit construction of affordable housing within their boundaries subject to state approval, and the builder's remedy, which allows developers to decide how and where affordable housing will be built within a municipality subject to state approval.

An analysis of the recent history of COAH, and affordable housing in New Jersey generally, will show that COAH accomplished some good during its existence, but ultimately was destined to fail. By permitting municipalities and developers to decide how and where to

¹⁵ See Daniel Carlson & Shashir Mathur, *Does Growth Management Aid or Thwart the Provision of Affordable Housing?*, in 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"); Kaitlyn Anness, *Gov. Christie orders COAH reorganization*, MARLBOROPATCH, Aug. 29, 2011, <http://marlboro.patch.com/articles/gov-christie-orders-the-reorganization-of-coah> (noting the financial burdens of rapid development); Mallach, *supra* note 7, at 864 (pointing to pressures on municipal officials to preserve open space while keeping taxes down).

¹⁶ Megan DeMarco, *Gov. Christie Abolishes N.J. Council on Affordable Housing*, THE STAR-LEDGER, June 29, 2011, http://www.nj.com/news/index.ssf/2011/06/gov_christie_abolishes_nj_coun.html (quoting Christie as stating, "I've always believed that municipalities should be able to make their own decisions on affordable housing without being micromanaged and second guessed from Trenton.").

¹⁷ STATE OF N.J., DEP'T OF CMTY. AFFAIRS, FAIR HOUSING ACT ADMINISTRATION, <http://www.nj.gov/dca/services/lps/hss> (last visited Apr. 22, 2012).

¹⁸ Matt Friedman, *NJ. Appeals court overturns Christie's decision to abolish Council on Affordable Housing*, THE STAR-LEDGER, March 8, 2012, http://www.nj.com/news/index.ssf/2012/03/nj_appeals_court_overturns_chr.html.

build affordable housing, the goals of *Mount Laurel* are less likely to be reached. This is particularly true in a time of economic uncertainty that harms the bottom line of developers and municipal tax bases alike. Municipalities have an incentive to do as little as possible to avoid the “builder’s remedy” and developers have an incentive to build affordable housing only when it is accompanied by four times as much higher-end housing.

Part II of this note takes a detailed look at the history of the *Mount Laurel* decisions and COAH, recent developments regarding legislative and executive action against COAH, and the remedies the judiciary provided to enforce the *Mount Laurel* doctrine. Part III discusses the wisdom of permitting private developers and local municipalities to determine the fate of affordable housing in New Jersey in light of criticism from affordable housing advocates and state officials who believe the system is not working. Ultimately, the problems with affordable housing in New Jersey rest not with COAH, but with the *Mount Laurel* decisions themselves. Rather than a town-by-town approach to affordable housing, the Courts should adopt a top-down approach to affordable housing that will determine where housing is built by looking at the state in regions. However, care must be taken to ensure that this is done in a way that still promotes *Mount Laurel*’s goals: affordable housing for low- and moderate-income residents and racial, economic, and social integration.

II. BACKGROUND

A. The *Mount Laurel* Decisions

In 1975, the New Jersey Supreme Court ruled that every developing municipality in the state must use its zoning power in a way to ensure that lower-income residents of the state have a realistic opportunity to afford housing within its borders.¹⁹ The *Mount Laurel I* decision arose from a lawsuit brought by the Southern Burlington County NAACP on behalf of African-American

¹⁹ S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 67 N.J. 151, 174, 180 (1975).

residents of Mount Laurel Township. Those residents claimed they were denied an opportunity to construct decent housing within the municipality as a result of its exclusionary zoning ordinances.²⁰

The municipality zoned sixty-five percent of its land as “vacant” or for agricultural use, twenty-nine percent of its land for industrial use, and the remainder for residential use.²¹ The residential zone only permitted single-family detached homes.²² Attached townhouses, most apartments, and mobile homes were not allowed anywhere in the township.²³ The court invalidated the ordinance on the grounds that the municipality had used its zoning power contrary to the general welfare clause of the New Jersey State Constitution.²⁴

The Court interpreted the general welfare clause of the New Jersey Constitution²⁵ to mean that a zoning regulation “must promote public health, safety, morals or the general welfare.”²⁶ In arriving at this conclusion, the Court noted that the state’s police power must conform to substantive due process and equal protection of the laws.²⁷ Therefore, as with any police power enactment, “a zoning enactment which is contrary to the general welfare is invalid.”²⁸ Furthermore, the Court held that because shelter is one of the most basic human needs, adequate housing is “essential in promotion of the general welfare required in all local land use regulation.”²⁹ Clearly, the Court adopted a broad view of “general welfare” and held

²⁰ *Id.* at 180.

²¹ *Id.* at 161-62.

²² *Id.*

²³ *Id.* at 163-70.

²⁴ *Id.* at 180.

²⁵ “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” N.J. CONST. ART. 1, PAR. 1.

²⁶ *Mount Laurel I*, 67 N.J. at 175.

²⁷ *Mount Laurel I*, 67 N.J. at 174.

²⁸ *Mount Laurel I*, 67 N.J. at 175.

²⁹ *Mount Laurel I*, 67 N.J. at 178-79.

that every developing municipality must at least give an opportunity for appropriate housing for all through land use regulations.³⁰

The decision, although far-reaching, lacked an enforcement mechanism.³¹ It was widely ignored by local governments and lower court holdings interpreting it were inconsistent or contradictory.³² The first New Jersey Supreme Court case to fashion an enforcement mechanism for the *Mount Laurel* doctrine was *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481 (1977). In that case, the New Jersey Supreme Court determined that a municipality's zoning ordinance was unconstitutional per *Mount Laurel I*.³³ Developer-plaintiffs, who sought to build multi-family housing in the municipality, argued that the court should order the township to not only invalidate the ordinance, but grant them a zoning variance to build their project.³⁴ The court reasoned that plaintiffs bore “the stress and expense of this public-interest litigation, albeit for private purposes”³⁵ and that merely invalidating the ordinance could still leave them unable to build the project.³⁶ Therefore, the court held that the trial court should direct defendant municipality to permit the development of the property.³⁷ In so holding, the court pointed out that the property was “environmentally suited to the degree of density and type of development” proposed by developer-plaintiffs.³⁸

Eight years later in *Mount Laurel II*, the court extended the obligation to “provide a realistic opportunity for affordable housing for lower income households” to all municipalities in

³⁰ *Mount Laurel I*, 67 N.J. at 180.

³¹ *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 92 N.J. 158, 260 (1983) (stating that despite the affirmative nature of *Mount Laurel I*, it afforded “no more than a theoretical, rather than realistic” opportunity for the construction of affordable housing. *See also* Mallach, *supra* note 7, at 850 (stating that the later decision, *Mount Laurel II*, “put teeth in the doctrine”).

³² Mallach, *supra* note 7, at 850.

³³ *Oakwood at Madison, Inc. v. Twp. of Madison*, 72 N.J. 481, 548 (1977).

³⁴ *Id.* at 548-50.

³⁵ *Id.* at 550.

³⁶ *Id.*

³⁷ *Id.* at 551.

³⁸ *Id.*

the state.³⁹ The doctrine had previously only applied to “developing” municipalities.⁴⁰ The decision also upheld the use of a “builder’s remedy” similar to the one used in *Oakwood*.⁴¹ The ruling acknowledged that the passive remedies in *Mount Laurel I* were insufficient and could not produce much affordable housing.⁴² Over 100 lawsuits arose in response to the decision.⁴³ This spurred the New Jersey legislature to take action.⁴⁴

In 1985, the State Legislature enacted the Fair Housing Act⁴⁵ to assign the task of enforcing the *Mount Laurel* doctrine to an administrative agency.⁴⁶ The Legislature gave COAH the responsibility of determining municipal affordable housing obligations and the development of compliance mechanisms.⁴⁷ The Fair Housing Act allows a municipality with a Fair Share Housing plan to petition COAH for certification to show that it has complied with its affordable housing obligations.⁴⁸ Participation with the program is voluntary.⁴⁹ However, if COAH grants certification, the municipality is protected from exclusionary zoning litigation (the “builder’s remedy”) for 10 years.⁵⁰ In order to ascertain whether a municipality complied with the *Mount Laurel* doctrine, COAH would “adopt criteria and guidelines for municipal determination of its present and prospective fair share of the housing need in a given region.”⁵¹ The New Jersey

³⁹ S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 92 N.J. 158, 214, 236-37, 243-44 (1983).

⁴⁰ *Id.* at 240 (stating that, “The developing/non-developing distinction is therefore no longer relevant and the conclusion that fully developed municipalities have no Mount Laurel obligation is no longer valid”).

⁴¹ *Id.* at 218.

⁴² John M. Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 Wash. U. J.L. & Pol’y 555, 559 (2000).

⁴³ Mallach, *supra* note 7, at 850. Before the FHA, affordable housing obligations were determined on a case-by-case basis and the suits arose as a result of the absence of a comprehensive plan. *Hills Dev. Co. v. Twp. of Bernards*, 103 N.J. 1, 21 (1986).

⁴⁴ Mallach, *supra* note 7, at 850.

⁴⁵ Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to -329.19 (West 2011).

⁴⁶ *Hills Dev. Co.*, 103 N.J. at 31-40.

⁴⁷ *Id.* at 31-47.

⁴⁸ § 52:27D-313.

⁴⁹ § 52:27D-313(a).

⁵⁰ *Id.*

⁵¹ § 52:27D-307.

Supreme Court upheld the Fair Housing Act in *Hills Development Co. v. Township of Bernards*, 103 N.J. 1 (1986 (sometimes referred to as *Mount Laurel III*)). The decision gave the courts a way out of the housing business, allowing the legislature to take on the task.⁵² In so deciding, the court recognized that an agency created by the Legislature is in a better position than the courts to enforce the *Mount Laurel* doctrine.⁵³

COAH promulgated specific criteria for determining a municipality's affordable housing obligation, referred to as the First and Second Round Rules, adopted in 1987 and 1993 respectively. These rules dealt with a municipality's inherent need for affordable housing.⁵⁴ The need was calculated using a complicated formula, taking into account a municipality's amount of vacant land, employment growth, and income distribution.⁵⁵

COAH's methodology for the first two rounds involved number-crunching of massive amounts of relevant data, including:

Journey-to-work patterns, existing housing quality (year built, persons per room, plumbing facilities, kitchen facilities, heating fuel, sewer, and water), housing rehabilitation, household income, population projections, headship rates, household formation projections, housing price filtering, residential conversions, housing demolitions, equalized nonresidential property valuation (ratables), and undeveloped land.⁵⁶

As a result, municipalities were obligated to provide anywhere from zero to 1,000 units, the then-statutory cap.⁵⁷ The second round was similar to the first in terms of methodology, but

⁵² *Hills Dev. Co.*, 103 N.J. at 49-52.

⁵³ *Id.* at 24-25. See also *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 92 N.J. 158, 212-14 (1983) (stating that the court was compelled to act, despite the fact that the legislature is better suited to address the problem of affordable housing in New Jersey, and that the court cannot wait for a "political consensus" to address the problem).

⁵⁴ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. 1, 23-27 (App. Div. 2007), *cert. denied* in 192 N.J. 72 (2007).

⁵⁵ Mallach, *supra* note , at 850-51.

⁵⁶ David N. Kinsey, *The Growth Share Approach to Mount Laurel Housing Obligations: Origins, Hijacking, and Future*, 63 Rutgers L. Rev. 867, 869 (2011).

⁵⁷ *Id.*

also took note of changes in census data.⁵⁸ Furthermore, the rules allowed municipalities to reduce their fair share obligations through the use of “credits,”⁵⁹ meaning reductions in the number of affordable housing units a municipality is required to provide. For example, COAH awarded credits for affordable housing constructed between 1980 and 1986, credits for “substantial compliance,” and a two-for-one credit was awarded for municipalities that permitted the construction of rental housing. COAH also awarded adjustments for municipalities without adequate infrastructure and permitted municipalities to satisfy 25 percent of their affordable housing obligations through age-restricted affordable housing.⁶⁰

In order to address concerns that COAH’s methodology was unfair and complex and the reality that significant development had taken place in New Jersey during the tenure of the first two rounds of housing obligations without a commensurate increase in affordable housing, advocates worked with COAH to create a different model for COAH’s Third Round.⁶¹

COAH issued its Third Round Rules in 2004.⁶² The Third Round Methodology departed from the Second Round calculations in that it depended on a municipalities “growth share.”⁶³ The growth share tied affordable housing obligations to the net increase in the number of jobs

⁵⁸ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. at 25.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Kinsey, *supra* note 56, at 870-71 (detailing the origins of the growth share approach and stating, “As COAH’s Second Round drew to a close in 1999, without even a public proposal from COAH for a Third Round fair share methodology or allocations for the next six year cycle, CAHE [the Council for Affordable Housing and the Environment] developed, refined and discussed on several occasions during 2000-2001 with COAH leadership a detailed growth share proposal. CAHE’s goal was a simpler, fairer, more effective system of achieving constitutional housing obligations throughout New Jersey.”). CAHE is “a statewide group of planning, environmental and housing organizations and advocates” that seeks to increase affordable housing opportunities, to preserve New Jersey’s natural resources, and to rebuild cities throughout the state.” *About Us*, COAL. FOR AFFORDABLE HOUS. & THE ENV., <http://www.cahenj.org/aboutus/aboutus.html> (last visited on Apr. 22, 2012).

⁶² *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. at 27-30.

⁶³ *Id.* at 47.

and housing units a municipality would experience between 2004 and 2014.⁶⁴ “Growth share” meant

the affordable housing obligations generated in each municipality by both residential and non-residential development from 2004 through 2018⁶⁵ represented by a ratio of one affordable housing unit among five units constructed plus one affordable housing unit for every 16 newly created jobs as measured by new or expanded non-residential construction within the municipality.⁶⁶

COAH reasoned that the growth share approach would be more in line with the *Mount Laurel* doctrine.⁶⁷ COAH also asserted that the method would meet *Mount Laurel*’s “realistic opportunity” prong by ensuring that housing for low- and moderate-income residents is actually built.⁶⁸ In addition to growth share, the rules addressed a municipality’s rehabilitation share⁶⁹ and its unsatisfied prior round obligations.⁷⁰

The FHA permitted any compliance mechanisms to satisfy affordable housing obligations.⁷¹ These included requiring developers to pay for affordable housing, restricting unit ownership by age, allowing municipalities to gain additional “credits”⁷² for providing rental housing, allowing municipalities to send their affordable housing obligation to another municipality through Regional Contribution Agreements (RCAs),⁷³ and allowing municipalities to gain credits for existing affordability controls.⁷⁴

B. Recent Developments

⁶⁴ *Id.* at 10.

⁶⁵ N.J. ADMIN. CODE § 5:96-10.1 (2008) (current version extends growth share period to 2018).

⁶⁶ § 5:97-1.4.

⁶⁷ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. at 30.

⁶⁸ *Id.*

⁶⁹ “Rehabilitation” means “the renovation of a deficient housing unit, which is occupied by a low or moderate income household, to meet municipal or other applicable housing code standards” § 5:94-1.4.

⁷⁰ Prior round obligations were defined as unmet obligations left over from the First and Second Rounds. *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. at 27.

⁷¹ Fair Housing Act, N.J. STAT. ANN. § 52:27D-311(a) (West 2011).

⁷² A “credit” is the equivalent of one affordable housing unit. N.J. ADMIN. CODE § 5:92-6.1 (2007).

⁷³ RCAs are contractual agreements voluntarily entered into by two municipalities wherein one municipality transfers up to 50 percent of its fair share housing obligation to another in exchange for monetary compensation. Fair Housing Act, N.J. STAT. ANN. § 52:27D-312(a) (West 2012).

⁷⁴ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. at 67-68.

In January, 2007, the Appellate Division rejected the Third Round rules.⁷⁵ Specifically, the Appellate court rejected COAH's allowance of "filtering"⁷⁶ and the notable absence of job growth and housing growth resulting from rehabilitation and redevelopment from the methodology.⁷⁷ The decision criticized the growth share approach for potentially permitting municipalities to shirk their obligations by restricting growth.⁷⁸ The appellate court affirmed COAH's methodology for calculating a municipality's rehabilitation share, decision to no longer "reallocate present need,"⁷⁹ the use of RCAs, and regulations awarding credits, bonus credits and vacant land adjustments.⁸⁰ The decision was appealed to the New Jersey Supreme Court, which denied certification.⁸¹ Thereafter, COAH revised its third round rules again.⁸² The revised rules modified the growth share approach, ensuring that calculations as to projected growth were calculated by COAH itself, rather than the municipalities, in response to concerns that municipalities were underestimating future growth, or limiting growth, in order to avoid their fair share housing obligations.⁸³

In October 2010, the Appellate Division partially invalidated COAH's revised Third Round Rules, particularly with respect to the growth share, to calculate projected affordable

⁷⁵ *Id.* at 87-88.

⁷⁶ Filtering rests on the assumption that, as new housing is constructed for higher-income families, the overall increase in supply provides more housing opportunities for low- and moderate-income families. N.J. ADMIN. CODE § 5:92 App. A (2006).

⁷⁷ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. at 87-88.

⁷⁸ "Any growth share approach must place some check on municipal discretion. The rules, as they currently exist, permit municipalities with substantial amounts of vacant developable land and access to job opportunities in nearby municipalities to adopt master plans and zoning ordinances that allow for little growth, and thereby a small fair share obligation." *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. at 56.

⁷⁹ "Present need consists of the indigenous need of a municipality and the fair share of the reallocated excess need of the municipality's present need region. Indigenous need is defined as substandard housing currently existing in any municipality." *AMG Realty Co. v. Warren Twp.*, 207 N.J.Super. 388, 401 (Law. Div., 1984).

⁸⁰ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. at 86.

⁸¹ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 192 N.J. 72 (2007).

⁸² Mallach, *supra* note 7, at 855.

⁸³ N.J. ADMIN. CODE § 5:97-1.1 (2008).

housing needs.⁸⁴ The ruling invalidated the “growth share,”⁸⁵ reasoning that the “growth share” would permit municipalities to limit growth to decrease their fair share obligation.⁸⁶ The ruling asked COAH to adopt rules that resembling the First and Second Round rules⁸⁷ and held that land use ordinances cannot require developers to provide affordable housing without incentives, such as increased densities and reduced costs.⁸⁸ The ruling upheld “Smart Growth”⁸⁹ and “Redevelopment” bonuses⁹⁰ and rejected arguments that a lack of vacant land, sewer, and water capacity for development will result in municipal expenditures to create affordable housing, holding that municipalities in this position can petition the court for relief.⁹¹

The New Jersey State League of Municipalities has appealed this ruling to the New Jersey Supreme Court.⁹² The case still has not been decided.⁹³ The League is arguing that the growth share approach in the revised Third Round rules is flawed even though the growth share itself it still valid.⁹⁴

In January 2010, New Jersey State Senator Raymond Lesniak introduced S-1, a bill calling for an end to COAH.⁹⁵ In June 2010, the bill passed the Senate by a margin of 28-3.⁹⁶ The bill criticized COAH for increasing the judiciary’s role in affordable housing and creating

⁸⁴ *In re Adoption of N.J.A.C. 5:96 and 5:97*, 416 N.J.Super. 462, 501 (App. Div. 2010).

⁸⁵ *Id.* at 478-79.

⁸⁶ *Id.* at 483.

⁸⁷ *Id.* at 483-84.

⁸⁸ *Id.* at 488-89 (citing *Toll Bros. v. Twp. of West Windsor*, 173 N.J. 502 (2002)).

⁸⁹ “Smart growth” is defined as development in specified planning areas of the state. N.J. ADMIN. CODE § 5:97-3.18 (2008).

⁹⁰ *In re Adoption of N.J.A.C. 5:96 and 5:97*, 416 N.J.Super. at 495-96.

⁹¹ *Id.* at 504-505.

⁹² Letter from N.J. State League of Municipalities Executive Director William G. Dressler to N.J. State League of Municipalities members (Sept. 16, 2011), *available at* <http://www.njslom.org/letters/2011-0916-COAH-reorg.html>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ S. 1, 214th Leg. (N.J. 2010).

⁹⁶ Peggy Ackermann & Claire Heininger, *N.J. Senate Votes to Abolish Affordable Housing Council, move Control from State to Towns*, STAR-LEDGER, Jan. 11, 2011, http://www.nj.com/news/index.ssf/2010/06/nj_senate_disbands_coah_moves.html.

needless bureaucratic processes at the state and local level.⁹⁷ The bill would give municipalities discretion in determining their affordable housing need⁹⁸ and do away with state-imposed calculations of affordable housing need.⁹⁹ The bill would decrease mandatory set-asides¹⁰⁰ and amend N.J.S.A. § 40:55D-1 to make a housing element a mandatory part of a municipal master plan.¹⁰¹ The bill would also amend the Fair Housing Act “to prevent the State from calculating prospective need, in line with the original Mt. Laurel decision, which held that projected affordable housing ‘need’ numbers were not specifically required.”¹⁰²

In October 2010, the New Jersey State Assembly introduced its version of the bill, A-3447.¹⁰³ In January 2011, both houses approved an amended version of S-1/A-3447.¹⁰⁴ The new bill required that at least 10% of the total housing units in most municipalities be dedicated to affordable housing, creating obligations in excess of what was required under COAH’s Round Three Rules for many municipalities.¹⁰⁵

Weeks later, Governor Christie issued a conditional veto of the bill.¹⁰⁶ The veto stated that because twenty-five percent of the ten percent set aside must be met by “inclusionary development,” the approach “legislates sprawl.”¹⁰⁷ It also criticized the legislation because it

⁹⁷ N.J. S. 1 § 6(b).

⁹⁸ N.J. S. 1 § 1(d).

⁹⁹ N.J. S. 1 (“Statement”).

¹⁰⁰ N.J. S. 1 § 1(d). *See also* N.J. ADMIN. CODE § 5:92-1.3 (2006). “Mandatory set-asides require a developer to sell or rent a certain percentage of housing units at below their full value so that the units are affordable to lower-income households.” *Bi-County Dev. of Clinton, Inc. v. Borough of High Bridge*, 174 N.J. 301, 329 (2002).

¹⁰¹ N.J. S. 1 (“Statement”).

¹⁰² *Id.*

¹⁰³ Assemb. 3447, 214th Leg. (N.J. 2010).

¹⁰⁴ N.J. S. 1.

¹⁰⁵ N.J. S. 1 (“Conditional Veto”).

¹⁰⁶ *Id.* In New Jersey, a conditional veto allows the Governor to return a bill passed by both houses and brought before his desk with his objections. The Legislature may then approve of a revised version of the bill, reflecting the Governor’s objections, and bring it to his desk. It then becomes law once the Governor signs it. N.J. CONST. art. V, § 1, para. 14(f).

¹⁰⁷ N.J. S. 1 (“Conditional Veto”).

would “fundamentally change the character” of municipalities.¹⁰⁸ Finally, the veto stated that the legislation would push for burdensome new construction in environmentally sensitive areas.¹⁰⁹ In order to address these concerns, Christie recommended that the Legislature pass a bill that more closely resembled the S-1 bill originally proposed by Senator Lesniak, which would have eliminated COAH. The bill required that one in ten housing units be designated as affordable, afforded municipal protection against builder’s remedy suits, eliminated commercial development fees, and allowed municipalities to avoid their affordable housing obligations by not developing.¹¹⁰

On June 29, 2011, Governor Christie’s issued an Executive Order to abolish COAH.¹¹¹ The order consolidates COAH’s power with the Department of Community Affairs (DCA).¹¹² According to Governor Christie, consolidating the authority for housing in the DCA will reduce bureaucracy and foster predictability and consistency for developers and housing advocates.¹¹³ It would also curb procedural inefficiencies that result in unreasonable delays and costs to municipalities and the private sector. Finally, the Governor said the order would “appropriately” increase the availability of affordable housing throughout the State.¹¹⁴ As recently as September 2011, Governor Christie also stated that the state’s commitment to creating affordable housing would continue.¹¹⁵ However, the Governor still does not have a choice in this matter as the New Jersey Supreme Court’s *Mount Laurel* decisions are still binding law. Soon after, DCA

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ STATE OF N.J., DEP’T OF CMTY. AFFAIRS, FAIR HOUSING ACT ADMINISTRATION, *supra* note 17.

¹¹² STATE OF N.J., EXEC. DEP’T, *supra* note 14.

¹¹³ STATE OF N.J., DEP’T OF CMTY. AFFAIRS, FAIR HOUSING ACT ADMINISTRATION, *supra* note 17; *See also* STATE OF N.J., EXEC. DEP’T, *supra* note 14.

¹¹⁴ *Id.*

¹¹⁵ Bob Jordan, *COAH Abolished, NJ Affordable Housing Duties in New Hands*, THE ASBURY PARK PRESS, June 29, 2011, <http://blogs.app.com/capitolquickies/2011/09/15/coah-abolished-nj-affordable-housing-duties-in-new-hands/>.

implemented interim rules.¹¹⁶ The Appellate Division quickly upheld both the interim rules and Christie's reorganization plan.¹¹⁷ However, the Appellate Division later overturned Christie's abolishment of COAH. Christie said he would take that decision to the New Jersey Supreme Court.¹¹⁸

C. Criticism of COAH

Critics have insisted that COAH and the *Mount Laurel* doctrine encourage the spread of urban sprawl and overdevelopment of environmentally sensitive areas. The validity of these arguments has been questioned.¹¹⁹ Nonetheless, COAH united local governments charged with regulating zoning in their jurisdictions more than any other issue.¹²⁰ While affordable housing planned in accordance with COAH regulations has often been built in accordance with "smart growth" principals,¹²¹ the builder's remedy also facilitates "large developments built in greenfields."¹²² This leads the public to believe New Jersey's affordable housing policy contributes to urban sprawl.¹²³ Still, the New Jersey Supreme Court insists that affordable housing be created in accordance with sound zoning principals¹²⁴ and high density development can mitigate sprawl.¹²⁵

¹¹⁶ Lori Grifa, *New Jersey After COAH*, NEW JERSEY STATE LEAGUE OF MUNICIPALITIES (Sept. 26, 2011), <http://www.njslom.org/notices/092611-after-COAH.html>.

¹¹⁷ Letter from N.J. State League of Municipalities Executive Director William G. Dressler to N.J. State League of Municipalities members (Oct. 20, 2011), *available at* <http://www.njslom.org/letters/2011-1020-COAH.html>.

¹¹⁸ Friedman, *supra* note 18.

¹¹⁹ See Mallach, *supra* note 7, at 851-52 (stating that local officials and anti-growth activists' view of COAH and *Mount Laurel* and its process as a threat to open space may have been perceived).

¹²⁰ *Id.* at 855 (quoting the Executive Director of the New Jersey State League of Municipalities).

¹²¹ Smart growth principals usually include, "limiting outward expansion; encouraging higher density development; encouraging mixed-use zoning instead of fully segregating land uses; reducing travel by private automobiles; revitalizing older areas; and preserving open space. Anthony Downs, *Introduction, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT?* 1, 3 (Anthony Downs ed., 2004).

¹²² Carlson & Mathur, *supra* note 15, at 45.

¹²³ *Id.* at 45-46.

¹²⁴ S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 92 N.J. 158, 243-244 (1983).

¹²⁵ See *Generally* GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? (Anthony Downs ed., 2004).

The courts have also required that environmental concerns be taken into account when permitting the construction of affordable housing.¹²⁶ However, in some cases, courts have given merely lip service to environmental concerns where it appeared that defendant municipalities were effectively using such concerns as a pretext to exclude lower-income residents.¹²⁷ Some commentators have similarly characterized opponents of affordable housing who point to environmental concerns as “segregationist wolves concealed under the hides of environmental lambs.”¹²⁸

Nonetheless, the fear that New Jersey’s affordable housing regime may have adverse effects on the environment is not simply political rhetoric. For example, as a result of a successful builder’s remedy lawsuit, developers may construct a 360-unit, high density housing development in the Borough of Cranford next to a flood plain in order to facilitate affordable housing.¹²⁹ This development could exacerbate flooding in an already flood-prone area that was ravaged by Hurricane Irene in 2011.¹³⁰ Examples are anecdotal, but give some credibility to those who criticize the *Mount Laurel* doctrine from an environmentalist’s standpoint.

Other critics point out that “rapid development of affordable housing strains the town’s infrastructure, and causes a surge in population, causing overcrowding in schools and potential traffic problems.”¹³¹ The court has stated that it is willing to waive housing obligations in the

¹²⁶ *Mount Laurel II*, 92 N.J. at 218 (noting that sound planning and environmental impacts should be taken into account when awarding builder’s remedies).

¹²⁷ For example, in *AMG Realty Co. v. Twp. of Warren*, 207 N.J. Super. 388, 449 (Law Div. 1984), the court criticized defendant municipalities claims that the high density housing that a builder’s remedy would permit would injure the water quality of a nearby river. The court responded that “To permit [defendant] to hide behind a state policy which incorporates exclusionary zoning is to permit [defendant] to do indirectly what it cannot do directly.” *Id.*

¹²⁸ CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES* 170 (1996). *See also id.* at 199 (1996) (on environmental harms).

¹²⁹ Paul Mulshine, *State Wants to Flood Cranford with High-Density Housing*, THE STAR-LEDGER, September 7, 2011, http://blog.nj.com/njv_paul_mulshine/2011/09/state_wants_to_flood_cranford.html.

¹³⁰ *Id.*

¹³¹ Anness, *supra* note 15 (detailing the Mayor of Marlboro Township’s fight against COAH, which the municipality eventually won).

face of real problems with strains on municipal infrastructure.¹³² Still, New Jersey's affordable housing policy, like similar social programs,¹³³ helped breed "middle-class resentment" against the burden of high state and local property taxes in New Jersey.¹³⁴

Local officials unwilling to take on the burden of added growth of any kind are often simply responding to pressures to balance the local budget.¹³⁵ So called "fiscal zoning" seeks to

"...create and maintain amenities...; to ensure that adequate infrastructure is available; to safeguard against natural hazards; to smooth the rate of change; to support productivity of agricultural and forest land; and to create positive externalities (for instance, by encouraging complimentary land uses to locate close to one another)."¹³⁶

In New Jersey particularly, local officials are under pressure to "keep taxes down, preserve open space and deliver quality public services."¹³⁷ Because a municipality is only answerable to its own residents, "it will do everything in its power to maintain the status quo."¹³⁸ In curtailing growth, municipalities may not be purposely excluding lower-income or minority residents at all or it may not be their primary concern.¹³⁹

Affordable housing advocates were not sold on COAH either.¹⁴⁰ To them, it appeared that COAH had become increasing bureaucratic and less concerned with the needs of the poor.¹⁴¹

¹³² S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 92 N.J. 158, 224 (1983).

¹³³ See Mallach, *supra* note 7, at 862-63 (linking the *Mount Laurel* decisions to the decision in *Abbott v. Burke*, 100 N.J. 269 (1985), which ordered the state to correct the economic disparity between urban and suburban school districts).

¹³⁴ *Id.* at 862-63 (citing a New York Times article that pointed to the role of high property taxes in the 2009 gubernatorial election and to the recurring theme of high taxes in municipal objections to the 2008 COAH rules).

¹³⁵ Arthur C. Nelson et. al., *The Link Between Growth Management and Housing Affordability: The Academic Evidence*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 117, 150 (Anthony Downs ed., 2004).

¹³⁶ *Id.*

¹³⁷ Mallach, *supra* note 7, at 864.

¹³⁸ Daniel Meyler, *Is Growth Share Working for New Jersey?*, 13 N.Y.U J. Legis. & Pub. Pol'y 219, 252 (2010).

¹³⁹ Nelson et. al., *supra* note 135, at 150.

¹⁴⁰ Mallach, *supra* note 7, at 851-52 (noting that affordable housing advocates were equally dismayed with COAH and citing the results of a 1997 study which demonstrated that the goals of *Mount Laurel* and the Fair Housing Act were not met and that they failed to provide affordable housing to families earning less than 40 percent of the area median income or low-income residents who were not white suburbanites).

¹⁴¹ *Id.*

In particular, COAH allowed municipalities to downsize their affordable housing obligations for “seemingly trivial reasons” and did little to alleviate concerns that COAH housing was not reaching poorer residents.¹⁴² Later, COAH’s revisions to its third round rules even allowed credits for housing units planned but never built.¹⁴³ In light of these shortcomings, even housing advocates did not argue against COAH’s abolition.¹⁴⁴ In *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, Mallach cites “political legitimacy” as the major flaw that has kept the *Mount Laurel* doctrine from reaching its goals.¹⁴⁵ However, political legitimacy is only a small part of the larger problem with implementing a lasting, working affordable housing plan in New Jersey: a strong public commitment for providing for the state’s neediest residents.

COAH’s legacy will not be entirely negative. As of March, 2011, municipalities had completed or started construction on 169,799 low- and moderate-income homes and brought another 39,888 existing homes occupied by low- and moderate-income families up to code.¹⁴⁶ This puts New Jersey far ahead of states with similar programs.¹⁴⁷ Anecdotally, suburban municipalities such as Mahwah, South Brunswick, and Franklin have produced more than 500 affordable housing units each.¹⁴⁸ Bedminster and Lawrence Township in Mercer County each produced over 1,000 such units.¹⁴⁹

D. The Builder’s Remedy

¹⁴² *Id.*

¹⁴³ *Id.* at 852.

¹⁴⁴ *Id.* at 857 (pointing out that, after the introduction of A-3447, “not even the advocacy community wanted to argue that COAH should be reformed, not abolished.”).

¹⁴⁵ *Id.* at 866.

¹⁴⁶ STATE OF N.J. DEP’T OF CMTY. AFFAIRS, PROPOSED AND COMPLETED AFFORDABLE UNITS 11 (2011), available at <http://www.state.nj.us/dca/affiliates/coah/reports/units.pdf>.

¹⁴⁷ See GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT?, *supra* note 125 (supplying data that indicates that New Jersey’s program resulted in the creation of more units than similar programs in Massachusetts and Connecticut, and nearly as many units as California).

¹⁴⁸ STATE OF N.J. DEP’T OF CMTY. AFFAIRS, *supra* note 146, at 7, 59, 84.

¹⁴⁹ *Id.* at 47-48, 86-87.

Mount Laurel II upheld the Builder's Remedy.¹⁵⁰ In that case, plaintiff-developers argued that such remedies were:

(1) [E]ssential to maintain a significant level of Mount Laurel litigation, and the only effective method to date of enforcing compliance; (2) required by principles of fairness to compensate developers who have invested substantial time and resources in pursuing such litigation; and (3) the most likely means of ensuring that lower income housing is actually built.¹⁵¹

Defendant-municipalities, on the other hand, argued that builders' remedies would allow developers to determine how and where a municipality would meet its fair share obligation.¹⁵²

The court rejected the statement in *Oakwood at Madison, Inc. v. Twp. of Madison* that "such relief will ordinarily be rare."¹⁵³ Experience since *Madison*, the court reasoned, "has demonstrated to us that builder's remedies must be made more readily available to achieve compliance with *Mount Laurel*."¹⁵⁴ The court went on to hold that a builder's remedy should be granted where a developer-initiated *Mount Laurel* suit proposes "a project providing a substantial amount of lower income housing."¹⁵⁵ The court decided that a multi-unit development where twenty percent of units were designated as affordable had a substantial amount of lower income housing.¹⁵⁶ The remaining units may be at a market rate, presumably middle- and upper-income housing.¹⁵⁷ This market-rate housing "may be necessary to render the project profitable,"¹⁵⁸ the court stated, adding that, "[i]f builder's remedies cannot be profitable, the incentive for builders

¹⁵⁰ S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 92 N.J. 158, 218 (1983).

¹⁵¹ *Id.* at 279.

¹⁵² *Id.*

¹⁵³ *Id.* (quoting *Oakwood at Madison, Inc. v. Twp. of Madison*, 72 N.J. 481 (1977)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 280.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

to enforce *Mount Laurel* is lost.”¹⁵⁹ Therefore, a reasonable developer may inflate the price of the market-rate units in order to subsidize the affordable ones.

Once a trial court determines that a municipality’s zoning ordinance is exclusionary, the trial court may appoint a “special master” to work with the municipality in revising the ordinance to bring it into compliance with *Mount Laurel*.¹⁶⁰ The court envisioned that the trial court and special master would work closely with a municipality in making the project suitable for it, so long as the municipality does not “delay or hinder the project” or “reduce the amount of lower income housing required.”¹⁶¹

The New Jersey Legislature responded to *Mount Laurel II* by enacting the Fair Housing Act,¹⁶² and, in *Hills Dev. Co. v. Twp. of Bernards*, the New Jersey Supreme Court upheld its constitutionality.¹⁶³ In upholding a provision of the act that imposes a moratorium on builder’s remedy suits until five months after the newly created Council on Affordable Housing adopted criteria and guidelines for compliance,¹⁶⁴ the court pointed out that the builder’s remedy is not a part of the State Constitution, but is “simply a method for achieving the ‘constitutionally mandated goal’ of providing a realistic opportunity for lower income housing needed by the citizens of this state.”¹⁶⁵

The Fair Housing Act provides that once a municipality has a COAH-approved fair share housing plan, it generally will not be subject to a builder’s remedy suit for a 10-year period following the approval.¹⁶⁶ As one trial court decision read, “the remedy is the carrot,”¹⁶⁷ and

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Mallach, *supra* note 7, at 850.

¹⁶³ *Hills Dev. Co. v. Twp. of Bernards*, 103 N.J. 1, 63-65 (1986).

¹⁶⁴ Fair Housing Act, N.J. STAT. ANN. § 52:27D-328 (West 2011).

¹⁶⁵ *Hills Dev. Co.*, 103 N.J. at 42 (1986) (quoting *Mount Laurel II*, 92 N.J. at 237).

¹⁶⁶ See § 52:27D-316(b); § 52:27D-309(b). See also *Elon Associates, L.L.C. v. Twp. of Howell*, 370 N.J. Super. 475, 481-82 (App. Div., 2004), *cert. denied*, 182 N.J. 149 (2004) (quoting *In re* Petition for Substantive Certification,

because participation with COAH is voluntary, it would be difficult to entice municipalities to zone for affordable housing without the builder's remedy.¹⁶⁸ While some commentators claim that few builders' remedies were ever actually awarded by the court and that panic over the remedy was unjustified,¹⁶⁹ many affordable unit were built as a result of settlements in lawsuits in process.¹⁷⁰

New Jersey's system has succeeded at creating a great deal of affordable housing.¹⁷¹ Some commentators have also noted that by using the builder's remedy as an incentive to zone for affordable housing, with the actual placement of units to be decided by local officials, haphazard zoning without regard to sound planning is avoided.¹⁷² However, because the court allowed developers to build four units of market-rate housing for every unit of affordable housing,¹⁷³ the builder's remedy meant that a municipality that loses a builder's remedy suit would be required to absorb the market rate units as well.¹⁷⁴ This led to major increases in

Twp. of Southampton, 338 N.J.Super. 103, 113 (App.Div. 2001), *cert. denied*, 169 N.J. 610, (2001), and stating that "the grant of substantive certification effectively insulates a municipality from exclusionary zoning lawsuits for six years," later amended to ten years).

¹⁶⁷ *Orgo Farms & Greenhouses, Inc. v. Colts Neck Twp.*, 192 N.J.Super. 599, 605 (Law Div., 1983).

¹⁶⁸ HAAR, *supra* note 128, at 112 ("Should the judiciary fail to afford builders this remedy, then the process of voluntary compliance and mediation inevitably will slacken, because there will be little incentive for the municipality to bend.").

¹⁶⁹ Mallach, *supra* note 7, at 851; *But see* Ellen Lovejoy, *Mount Laurel Scorecard*, PLANNING, May 1992, at 10 (pointing out that, between 1983 and 1985, 23,000 affordable housing units were ordered by the courts). Notably, housing developments were built in Bedminster Township and Mount Laurel. Doreen Carvajal, *Nearly 140 Suits Filed to Enforce Mt. Laurel II*, THE PHILADELPHIA INQUIRER, Mar. 5, 1985, at B1.

¹⁷⁰ HAAR, *supra* note 128, at 90. *See, i.e.*, Tomoeh Murakami, *Going to Court over Housing "Builder's Remedy" Suits Force the Issue with Towns that Won't Plan for Affordable Homes*, THE PHILADELPHIA INQUIRER, May 14, 2000, at BR1.

¹⁷¹ *See supra* Part II.C. *See also* Douglas Porter, *The Promise and Practice of Inclusionary Zoning*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 212, 239 (Anthony Downs ed., 2004) (pointing out that New Jersey's affordable housing policy has created more affordable units than other similarly situated states).

¹⁷² Julie M. Solinski, *Affordable Housing Law in New York, New Jersey, and Connecticut: Lessons for Other States*, 8-FALL J. Affordable Housing & Community Dev. L. 36 (1998).

¹⁷³ *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 92 N.J. 158, 279 (1983).

¹⁷⁴ HAAR, *supra* note 128, at 111 (noting that, prior to the adoption of the Fair Housing Act, 2,800 housing units were built on 1,600 acres in Bernards and Bedminster Townships, of which 560 were designated as affordable).

development in rural municipalities¹⁷⁵ and, inevitably, the passage of the Fair Housing Act.¹⁷⁶ As of April, 2011, 314 of New Jersey's 566 municipalities had submitted plans for COAH to certify.¹⁷⁷ However, as noted above, COAH's methods have been the subject of scrutiny and criticism and the courts continue to grapple with what constitutes compliance with the *Mount Laurel* doctrine.¹⁷⁸

E. Voluntary Municipal Compliance

In order to avoid a builder's remedy suit and to exercise its zoning power "independently and voluntarily as compared to...court-ordered rezoning,"¹⁷⁹ a municipality may file a fair share housing plan.¹⁸⁰ However, municipal compliance with COAH has always been voluntary.¹⁸¹ The Court in *Hills* presumed the constitutionality of the Fair Housing Act despite concerns from developers that voluntary municipal cooperation would deter affordable housing.¹⁸² Absent certainty that this claim was true, the court dismissed this part of plaintiffs' claim, particularly focusing on the fact that the legislation is presumed constitutionally valid and that the Legislature, through the Fair Housing Act, had given political credibility to the *Mount Laurel* doctrine.¹⁸³

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ STATE OF N.J. DEP'T OF CMTY. AFFAIRS, TOWNS CERTIFIED UNDER THE REVISED THIRD ROUND RULES, 7 (2011), available at <http://www.nj.gov/dca/services/lps/hss/transinfo/reports/certified.xls>.

¹⁷⁸ Letter from N.J. State League of Municipalities Executive Director William G. Dressler to N.J. State League of Municipalities members, *supra* note 92 (noting that a challenge to the most recent set of rules is pending before the New Jersey Supreme Court).

¹⁷⁹ *Hills Dev. Co. v. Twp. of Bernards*, 103 N.J. 1, 22 (1986).

¹⁸⁰ *Id.* at 33-34.

¹⁸¹ *Id.* at 22.

¹⁸² *Id.* at 42-44.

¹⁸³ *Id.* at 43-44 (stating that, "The Fair Housing Act has many things that the judicial remedy did not have: it requires, in every municipality's master plan, as a condition to the power to zone, a housing element that provides a realistic opportunity for the fair share; it has funding; it has the kind of legitimacy that may generate popular support, the legitimacy that comes from enactment by the people's elected representatives; it may result in voluntary compliance, largely unachieved in a decade by the rule of law fashioned by the courts; it incorporates what will be a comprehensive rational plan for the development of this state, authorized by the Legislature and the Governor for this purpose; and it has all of the advantages of implementation by an administrative agency instead of by the courts,

Later, in *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. 1 (App. Div., 2007), cert. denied, 192 N.J. 72 (2007), the New Jersey Supreme Court noted that “prior experience ‘has documented that if permitted to do so, municipalities are likely to utilize methodologies that are self-serving and calculated to minimize municipal housing obligations.’”¹⁸⁴ For example, in rejecting a “pure growth share” approach that would only require municipalities to provide for affordable housing where they choose to grow, the court noted that this would permit discouragement of development to avoid affordable housing obligations.¹⁸⁵ In other words, municipalities could avoid growth altogether to avoid providing for the construction of affordable housing. Or, as one commentator put it, “[w]hile local governments can learn, up to a point, to “live with” such laws, they are never fully reconciled to them, and are quick to seize on opportunities to weaken them, or eliminate them altogether.”¹⁸⁶ In *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, author Alan Mallach argues that the entire concept of affordable housing is at risk.¹⁸⁷

In arguing for a new remedy, commentators have argued that COAH’s voluntary compliance mechanism is a structural deficiency, as it put COAH in the “‘unseemly position’ of having to sell the idea of compliance by sweetening deals for municipalities.”¹⁸⁸ The courts, displeased with COAH’s role in this, have struck down COAH’s rules.¹⁸⁹ With COAH out of the

advantages that we recognized in our Mount Laurel opinions. In many respects the Act promises results beyond those achieved by the doctrine as administered by the courts.”).

¹⁸⁴ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. 1, 55 (App. Div., 2007), cert. denied, 192 N.J. 72 (2007) (quoting 36 N.J.R. 5761 (Dec. 20, 2004)).

¹⁸⁵ *Id.* at 56.

¹⁸⁶ Mallach, *supra* note 7, at 860.

¹⁸⁷ *Id.* at 849.

¹⁸⁸ Susan J. Kraham, *Right for a Remedy: Observations on the State Constitutional Underpinnings of the Mount Laurel Doctrine*, 63 Rutgers L. Rev. 835, 846-47 (2011) (quoting John M. Payne, *The Unfinished Business of Mount Laurel II*, in MOUNT LAUREL II AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING 10 (Timothy N. Castano & Dale Sattin eds., 2008)).

¹⁸⁹ *See, i.e., In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. 1 (invalidating COAH’s Third Round rules); *In re Adoption of N.J.A.C. 5:96 and 5:97*, 416 N.J.Super. 462, 470 (N.J. App. Div. 2010) (invalidating COAH’s revised Third Round rules).

picture, it remains to be seen what the legislature's role will be in enforcing compliance with the *Mount Laurel* doctrine.

III. CRITIQUE OF A SYSTEM THAT GIVES DEVELOPERS AND MUNICIPALITIES CONTROL OVER DECISIONS REGARDING AFFORDABLE HOUSING

A. A developer-driven model as a hindrance to affordable housing production

Since at least 1983, the New Jersey courts have been well aware of the fact that the development community plays an essential role in ensuring the construction of affordable housing.¹⁹⁰ The privatization of affordable housing construction has obvious benefits. First, it solves the problem without direct subsidies from the taxpaying public. Second, it does not further burden developers because, with a four-to-one ratio of market-rate to affordable units, developers may subsidize the cost of constructing the housing.¹⁹¹

However, by allowing developers to decide how and where to construct affordable housing and affording them with such a large density bonus, the *Mount Laurel* doctrine may result in the creation of housing in places other than where they are needed, such as in rural areas away from jobs, transportation or social services. Additionally, by effectively giving court-sanctioned zoning powers to developers, the doctrine further breeds resentment from local politicians and their constituents.¹⁹² Also, opponents of urban sprawl and environmental advocates resent that builder's remedies have been awarded on pristine land.¹⁹³ Some have called for limits on sprawl and incentives to invest in redeveloping urbanized areas.¹⁹⁴ Even the courts

¹⁹⁰ S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 92 N.J. 158, 279-80 (1983) (emphasizing the likelihood of successful affordable housing construction with a developer-driven model).

¹⁹¹ *Id.* (noting the fairness in rewarding developers for bringing litigation on behalf of lower-income residents and for foregoing additional profits realized by construction of market-rate housing).

¹⁹² See *supra* Part II.C.

¹⁹³ *Id.*

¹⁹⁴ Richard H. Chused, *Mount Laurel: Hindsight is 20-20*, 63 Rutgers L. Rev. 813, 832 (2011) (stating that, "More than any other feature of contemporary land use practice, the ability of developers to purchase and build on cheaper land on the outskirts of suburbia significantly reduces the incentives to invest in more urbanized neighborhoods,

have embraced constructing affordable housing in redevelopment areas.¹⁹⁵ While this sounds like a simple fix, it does not address the broader goals of *Mount Laurel*, which include desegregating the state along racial and economic lines.¹⁹⁶

In *Hills*, the New Jersey Supreme Court upheld the constitutionality of Regional Contribution Agreements.¹⁹⁷ The legislature abolished the use of RCAs in 2008, finding that it had “proven to not be a viable method of ensuring that an adequate supply and variety of housing choices are provided in municipalities experiencing growth.”¹⁹⁸ In *Trading Affordable Housing Obligations: Selling a Civic Duty or Buying Efficient Development?*, author Joel Norwood argued that RCAs “fail to achieve their ultimate goal of reducing racial and economic segregation.”¹⁹⁹ Norwood noted that RCAs allow municipalities to steer typically high-density affordable housing to municipalities with the infrastructure to handle such developments.²⁰⁰ Further, funds are shifted to places that are in greater need of funding for affordable housing.²⁰¹ However, RCAs might not reduce segregation, a key component of the *Mount Laurel* decisions.²⁰² Norwood’s solution would be for New Jersey to set higher goals for affordable housing. This way, shifting affordable housing obligations through RCAs would not affect the

increases sprawl, and limits the availability of housing for middle- and upper-class people in more densely populated urban areas. The overall goal should be to force infill development to occur before new areas are opened for urbanization.”)

¹⁹⁵ *In re Adoption of N.J.A.C. 5:96 and 5:97*, 416 N.J. Super. 462, 496 (App. Div. 2010) (upholding provisions of the FHA that afford a “credit” to municipalities for placing their affordable units in redevelopment areas).

¹⁹⁶ Although the *Mount Laurel* doctrine itself does not distinguish between races in its ruling, *Mount Laurel I* suggests that racial desegregation was a factor in the decision. *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 67 N.J. 151, 220-21 (1975) (stating that “. . . communities, too, need racial, cultural, social and economic diversity to cope with our rapidly changing times” and “The consequences of such economic, social, and racial segregation are too familiar to need recital here. Justice must be blind to both race and income.” (citation omitted)).

¹⁹⁷ *Hills Dev. Co. v. Twp. of Bernards*, 103 N.J. 1, 37-38 (1986). See *supra* Part II.A.

¹⁹⁸ Fair Housing Act, N.J. STAT. ANN. § 52:27D-329.6(a) (West 2008).

¹⁹⁹ Joel Norwood, *Trading Affordable Housing Obligations: Selling a Civic Duty or Buying Efficient Development?*, 39 Conn. L. Rev. 347, 347 (2006).

²⁰⁰ *Id.* at 376.

²⁰¹ *Id.* at 366.

²⁰² *Id.* at 376-77.

number of units actually built in wealthier suburbs.²⁰³ Although RCAs could deter some of the problems with implementing the *Mount Laurel* decisions, such as the construction of high-density housing in environmentally sensitive areas and areas where infrastructure cannot accommodate large populations, they would ultimately fail at bringing about the dream of *Mount Laurel*: social, racial, and economic integration.²⁰⁴

S-1 is an example of a proposed alternative to New Jersey's model for facilitating public housing, but it was struck down by the State Assembly.²⁰⁵ This alternative, sometimes referred to as the "pure growth share approach" has been adopted in Massachusetts and in Montgomery County in Maryland.²⁰⁶ The Montgomery County approach has been touted as the fix that will solve New Jersey's affordable housing issues.²⁰⁷ Various conflicting groups have supported such a system. Municipal Amici in *In re Adoption of N.J.A.C. 5:96 and 5:97* supported the growth share rules²⁰⁸ and housing advocates have supported such a system as well.²⁰⁹ However, this plan also encourages municipalities to adopt master plans and zoning ordinances that retard growth.²¹⁰ The "mandatory 10% model" of Massachusetts's 40B legislation was the inspiration for New

²⁰³ *Id.* at 377.

²⁰⁴ See *supra* note 194.

²⁰⁵ See *supra* Part II.B.

²⁰⁶ A-3447 was modeled after the Massachusetts 40B Model and would require that 10 percent of housing stock be affordable. The bill was vetoed by Governor Christie. See *supra* Part IIB. See also, Mallach, *supra* note 7, at 857. Montgomery County, Maryland requires that "12.5 to 15 percent of all units in a development of 20 or more residences be made available to residents earning 65 percent or less of the median income in the county. In return, developers gain a 22 percent increase in normally available density levels." Chused, *supra* note 194, at 829.

²⁰⁷ Meyler, *supra* note 138, at 249-50 (calling Montgomery County's approach successful at creating affordable units and devoid of many of the problems experienced in New Jersey); Mallach, *supra* note 7, at 829-30 (stating that "The entire state of New Jersey should be operating under a similar plan" to Montgomery County's plan).

²⁰⁸ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. 1, 15, 49 (noting that the New Jersey State League of Municipalities argued in favor of the growth share model).

²⁰⁹ Kinsey, *supra* note 56, at 870-71 (pointing to support from the Council for Affordable Housing and the Environment (CAHE)).

²¹⁰ *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J.Super. at 56 (stating that a growth share approach may "permit municipalities with substantial amounts of vacant developable land and access to job opportunities in nearby municipalities to adopt master plans and zoning ordinances that allow for little growth, and thereby a small fair share obligation.").

Jersey's A-3447 legislation, which was introduced in October 2010.²¹¹ Like the Maryland plan, it has the potential for inhibiting growth, as evidenced by the fact that the number of affordable units created in Massachusetts under the program has been small.²¹² Especially today, in a time where the housing industry (and the economy in general) is moving slowly, all growth is necessarily slowed. A growth share model like those adopted in Massachusetts and Montgomery County, Maryland would not likely address New Jersey's affordable housing concerns.

B. Voluntary municipal compliance as a hindrance to affordable housing production

The voluntary compliance mechanism fashioned by the *Mount Laurel* decisions has not delivered on its promise to make affordable housing obligations more palatable for municipalities.²¹³ While *Mount Laurel* has delivered in terms of actual numbers of affordable housing units built,²¹⁴ all sides agree that the implementation of it has been fraught with needless bureaucracy. For example, The Asbury Park Press referred to COAH as "cumbersome, even at times contradictory" while defending its mission of requiring municipalities to provide their fair share of affordable housing.²¹⁵ Governor Christie's administration called COAH "hopelessly complex" and claimed that a "bureaucratic logjam...chilled housing development."²¹⁶ Moreover, politicians on both sides of the aisle have called COAH "bureaucratically cumbersome and

²¹¹ Mallach, *supra* note 7, at 857-58 (stating that "A-3447 embraced a variation on the Massachusetts 40B model.").

²¹² Brian R. Lerman, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. Envtl. Aff. L. Rev. 383, 402 (2006) (stating that the number of units created under Massachusetts 40B has been small, only 1,000 units between 1990 and 1997).

²¹³ *Supra*. Part II.E.

²¹⁴ *Supra*. Part II.C.

²¹⁵ Editorial, *Specifics Needed on Housing Plan*, ASBURY PARK PRESS, July 1, 2011, available at <http://fairsharehousing.org/blog/entry/asbury-park-press-editorial-specifics-needed-on-housing-plan/>.

²¹⁶ Matt Katz, *Fight Brews Over New Jersey Council on Affordable Housing Overhaul by Christie*, THE PHILADELPHIA INQUIRER, Sept. 16, 2011, http://articles.philly.com/2011-09-16/news/30183237_1_affordable-housing-affordable-housing-housing-costs.

outdated”²¹⁷ Recently, both the legislative and executive branches of New Jersey government have responded to COAH’s clumsiness.²¹⁸

Governor Christie has said that “[m]unicipalities should be able to make their own decisions on affordable housing without being micromanaged and second guessed from Trenton.”²¹⁹ However, if given the choice, developing municipalities would prefer not to facilitate the construction of affordable housing for the reasons stated in Part II.²²⁰ The modified growth share model espoused in COAH’s Third Round rules, far from bringing municipalities on board, only gave them “new numbers to argue against.”²²¹

Since the first *Mount Laurel* decision, the courts have required that every developing municipality zone for affordable housing.²²² New Jersey, unlike many other states, is devoid of unincorporated areas and contains 566 municipalities, each with its own zoning power.²²³ Also unlike many other states, New Jersey is reaching “build-out,” that is, the state is running out of open space that is not environmentally protected.²²⁴ Rather than looking at affordable housing on a town-by-town basis, perhaps New Jersey should consider affordable housing regionally. Because local zoning boards will likely attempt to shift the burden of providing affordable housing onto neighboring municipalities, regional zoning boards would be more effective in addressing the state’s affordable housing needs. Aside from preserving open space, this can put affordable housing where lower income residents can actually use it, near infrastructure and

²¹⁷ DeMarco, *supra* note 16.

²¹⁸ *Supra*. Part II.B.

²¹⁹ *Governor Christie Takes Action to Streamline State Government Through Common Sense Reorganization Plans*, STATE OF N.J., GOVERNOR CHRIS CHRISTIE (June 29, 2011).

<http://www.nj.gov/governor/news/news/552011/approved/20110629d.html>.

²²⁰ *See supra* Part II.E.

²²¹ Meyler, *supra* note 138, at 252.

²²² *See supra* Part II.A.

²²³ STATE OF N.J., DEP’T OF CMTY. AFFAIRS, DIV. OF LOCAL GOV’T SERVICES, ANNUAL REPORT GLOSSARY, *available at* http://nj.gov/dca/lgs/annualrpt/ar_glossary.shtml.

²²⁴ Laura Mansnerius, *New Jersey is Running Out of Open Land it Can Build On*, N.Y. TIMES, May 24, 2003, <http://www.nytimes.com/2003/05/24/nyregion/new-jersey-is-running-out-of-open-land-it-can-build-on.html>.

employment opportunities. Of course, this may run afoul of the goal of desegregating the state. By providing affordable housing near jobs, transportation, and infrastructure, this sort of model could create conditions where high concentrations of poor and minority residents live in certain designated areas. This would ensure that the social makeup of New Jersey remains the same as it has been since the first *Mount Laurel* decision.

Nonetheless, the *Mount Laurel* line of cases must be reworked to eliminate the requirement that “each municipality” must affirmatively provide for affordable housing. However, this must be done without eliminating New Jersey’s commitment to affordable housing outside of traditionally poor urban cities. In order to do so, New Jersey should adopt a top-down approach where zoning for affordable housing comes from the state. This could be done by using the State’s Master Plan. Perhaps one small town has inadequate infrastructure or particular environmental sensitivities that make high-density housing illogical. In this case, a nearby town without those restrictions should offer affordable housing options. This is not to say that RCAs would be a good idea. The state should take care to ensure that certain municipalities are not the designated places for affordable housing simply because they are in need of funding for their own affordable housing projects. Certainly, these needs should not be ignored. However, rather than all of Essex County dumping its affordable housing in Newark, for example, regional approaches to affordable housing should take into consideration one of the main goals of the *Mount Laurel* cases, which is to desegregate the state. However, affordable housing should be constructed where it is most useful—near jobs and infrastructure, such as public transportation. Perhaps high rises would not make the most sense in a rural area, where jobs and public transportation are scarce, despite the fact that it has a less than desirable level of racial integration.

Furthermore, the builder's remedy should not be used as an incentive for towns to provide for affordable housing and an incentive for developers to build it. Developers should not be in control of how and where affordable housing units are built any more than individual municipalities should be. Instead, the state should determine how and where affordable housing should be constructed. Oregon implemented such a top-down system, where local municipalities were required to adhere to statewide land use goals.²²⁵ The Oregon Land Conservation & Development Commission, the agency in charge of approving municipal land use plans, rejected 52 of 53 plans for not complying with Goal 10, which dealt with affordable housing.²²⁶ This system shares many similarities with COAH. Both share the benefits of allowing local municipalities to create plans and leaving it up to the state to accept or reject those plans. However, in New Jersey, COAH only has the power to strip municipalities of their protection from builders' remedy suits. In Oregon, the agency has the power to reject land use plans outright. New Jersey should adopt a similar approach.

Inclusionary zoning should remain as a way to incentivize developers to build affordable housing. Where appropriate, the state should allow developers to increase densities in order to make inclusionary housing projects affordable. The benefits of inclusionary zoning are twofold. First, inclusionary zoning has the benefit of desegregating communities by allowing low- and moderate-income residents to live as neighbors with higher income residents. As Justice Frederick Hall pointed out in *Mount Laurel I*, desegregation is one of the goals of the doctrine²²⁷ and what better way to achieve it by literally allowing poorer residents to live alongside wealthier ones. Secondly, density bonuses and inclusionary developments significantly increase

²²⁵ ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 785 (3rd ed. 2005).

²²⁶ *Id.*

²²⁷ *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 67 N.J. 151, 220-21 (1975).

the overall supply of housing. If the overall supply of housing is increased, the rules of supply and demand would indicate that the cost of housing will decrease.

A potential setback for a top-down approach where the state decides where to place affordable housing would be the unfairness to the municipalities who would be shouldered with the burden of absorbing the housing, and the increased costs of municipal services that come with it. This could be addressed through a tax sharing arrangement.²²⁸ For example, Minnesota has allowed pooling of tax revenues from commercial and industrial property in the Twin Cities area²²⁹ and even New Jersey has implemented a property tax-sharing scheme.²³⁰ The sense that each community can be thought of in an isolated manner is absurd, so if one community cannot handle increased development without severe planning concerns, then it should not be able to abandon its affirmative duties.

IV. CONCLUSION

In a state where voters are committed to preserving what little open space they have left and where parochialism runs rampant in each of its 566 fiefdoms, any attempts by state government to restrict local zoning powers will be met with resistance. This is particularly true where distinctions between rich town and poor town are sharp.²³¹ As many commentators have lamented, the real challenge to providing affordable housing in New Jersey “may not be a legal one, but a political one.”²³² The entire discussion about reworking judge-made law may be for naught, as Governor Christie has expressed his intentions to politicize the state Supreme

²²⁸ MINN. STAT. § 473F.01 (2004).

²²⁹ *Village of Burnsville v. Onischuk*, 222 N.W.2d 523 (Minn. 1974) (upholding a law that would redistribute taxes on commercial and industrial property among needier communities in the region).

²³⁰ *Meadowlands Regional Redevelopment Agency v. State*, 63 N.J. 35 (1973).

²³¹ Perhaps due, in part, to past exclusionary zoning. *See* Mallach, *supra* note 7, at 860 (noting that, in New Jersey, “both economic and racial disparities between urban and suburban areas are pronounced”).

²³² Meyler, *supra* note 138, at 252.

Court.²³³ The immediate political challenge would be to convince the legislative and executive branches to push for affordable housing in the wake of COAH's failure. The broader political challenge is to convince voters in a time when less taxes and smaller government are gaining favor that governmental control over the housing market will benefit the state. Broader still would be the challenge of reinvigorating voter interest in safety nets for the poor, interest that has been on the decline for 30 years.

Although it may be a pipe dream in light of political resistance to state-ordered zoning mandates, New Jersey should take a top-down approach to zoning for affordable housing. By putting power in the hands of developers and municipalities, the dream of affordable housing in New Jersey may well be lost. Considering the political climate, however, a state-run approach is likely to be met with even more resistance than COAH was. Still, the basic premise of *Mount Laurel I*, that towns cannot use their zoning power to exclude, cannot be lost.

²³³ Alan Steinberg, *The New Jersey Supreme Court: Christie Has Options*, POLITICKERNJ, April 26, 2009, <http://www.politickernj.com/alan-steinberg/38626/new-jersey-supreme-court-christie-has-options>.