

Is Growth Share Working for New Jersey?

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INTRODUCTION

The principle that people are free to choose where they want to live undergirds New Jersey's *Mount Laurel* doctrine. The New Jersey Supreme Court's landmark 1975 *Mount Laurel* decision¹ arose out of a community group's challenge to a local government's zoning regulation on state constitutional grounds. By holding that the local government, Mount Laurel Township, had violated the State Constitution, the New Jersey Supreme Court began the struggle for an intelligent affordable housing scheme in the state. The current administrative iteration of the *Mount Laurel* doctrine presents a familiar problem of local government law: when should the state defer to its constituent municipalities' zoning choices, and when should the state tell those municipalities what to build?

The *Mount Laurel* doctrine has both modified and been modified by the political and geographical landscape of New Jersey. The doctrine morphed from a judge-made constitutional command,² to a litigation remedy,³ to a legislative edict,⁴ to an administrative matrix.⁵ To many who initiated and inspired the *Mount Laurel* movement in New Jersey, the present form of the law barely resembles the civil-rights-inspired rulings of the New Jersey Supreme Court in the 1970's. What was a command that towns shall not use exclusionary zoning, and then that towns must provide inclusionary zoning, has become an administrative miasma to those on all sides of the issue.

Despite this controversy, *Mount Laurel* has not been a failure. Since 1983, the doctrine has generated 40,000 new low and moderate income housing units in New Jersey, provided for

¹ Southern Burlington County NAACP v. Mount Laurel Township, 336 A.2d 713 (N.J. 1975).

² See *id.*

³ See Southern Burlington County NAACP v. Mount Laurel Township, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*).

⁴ See N.J.S.A. § 52:27 D-301, *et seq.*, available at <http://www.state.nj.us/dca/coah/fha.shtml>.

⁵ See, e.g., N.J.A.C. 5:97.

the refurbishing of 15,000 substandard units, and generated over \$200 million to refurbish urban housing.⁶ Nonetheless, the Council on Affordable Housing (“COAH”) and the State Planning Commission, the two agencies charged by the legislature with overseeing implementation of *Mount Laurel*, are the targets of sharp criticism by builders, municipalities, and housing advocates. Part I of this Note examines how *Mount Laurel* arrived at its current iteration. Part II provides the perspectives of those on all sides of the affordable housing debate in New Jersey—advocates who seek to remedy a history of racial injustice throughout the state, municipalities burdened by seemingly arbitrary affordable housing requirements unrelated to harms committed in recent collective memory, and builders compelled by business concerns to create sprawl in America’s most densely populated state.⁷ Part III evaluates the relative success or failure of “Growth Share,: the current implementation of *Mount Laurel* doctrine. This survey will reveal that the goals of *Mount Laurel* vary depending upon one’s place in the political landscape. To make the evaluation more palpable, this Note examines the current affordable housing situations, both positive and problematic, in several New Jersey municipalities.

I - Background

LAND DEVELOPMENT IN NEW JERSEY

New Jersey ranks as the nation’s second wealthiest state,⁸ but also contains some of its poorest cities. Newark, Camden, Paterson, and Trenton were among the first to suffer from urban decay in the mid- and late-twentieth century, but while cities elsewhere in America are enjoying a renaissance, New Jersey’s urban areas persist in blight and often top annual lists in

⁶ Richard Keevey, *Still in Search of a Remedy*, NORTHJERSEY.COM (Feb. 20, 2008).

⁷ Census 2000, Population, Housing Units, Area, and Density, *available at* <http://www.census.gov/population/www/censusdata/density.html>

⁸ Bureau of Economic Analysis, *State Personal Income 2006* (Mar. 27, 2007), *available at* <http://www.bea.gov/newsreleases/regional/spi/2007/spi0307.htm>.

the category of “Most Dangerous City.”⁹

New Jersey, the fourth smallest state by geographic area, contains 566 municipalities. Unlike many states where municipalities sit as islands within large, unincorporated counties, New Jersey municipalities often abut one another with little unincorporated land remaining in many counties. All New Jersey municipalities have local control over zoning.¹⁰

The suburban boom of the late twentieth century is well documented. Most of the New Jersey population resides in the metropolitan area of either Philadelphia or New York City, a result of the mass exodus to suburban tracts after World War II. This suburban population further bulged from the movement of residents out of New Jersey’s own cities like Newark and Camden to places like Edison, Middletown, and Mount Laurel, the community that generated the current controversy.¹¹ It is also well documented that most of those who left the cities from 1950 through the 1980’s were white, and most of those who remained behind were black.¹²

B. THE MOUNT LAUREL CASES

Historically, the township of Mount Laurel was rural and diverse. Older residents

⁹ Some suggest this phenomenon is directly related to the now outlawed practice of creating Regional Contribution Agreements, discussed *infra* Part II.D. See Joseph J. Roberts, Jr., *Can We Afford Affordable Housing?*, RECORD, BERGEN COUNTY, July 27, 2008 at O1. The oft-cited Morgan Quitno Rankings of the 25 “most dangerous” cities in the United States lists Camden as the fifth most dangerous city followed by Trenton (#14) and Newark (#22). City Crime Rankings by Population Group, <http://www.statestats.com/cit07pop.htm#25>. Note that Camden and Philadelphia are in as close proximity as, say, Brooklyn and Manhattan, but because of the arguably arbitrary drawing of municipal lines, these small, statistically isolated jurisdictions appear more dangerous in rankings like Morgan Quitno. Rather than being purely the product of public policy, the “dangerousness” of a place like Camden is largely due to the limits on the methodology chosen for data collection.

¹⁰ The New Jersey municipalities’ zoning power is derived from the state Constitution which provides:

The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

N.J. CONST. art. IV, § 6, ¶ 2.

¹¹ See, e.g., DAVID L. KIRP, JOHN P. DWYER, and LARRY A. ROSENTHAL, *OUR TOWN* (1995).

¹² See, e.g., KEVIN MUMFORD, *NEWARK: A HISTORY OF RACE, RIGHTS, AND RIOTS IN AMERICA* (2007).

described the population as “poor Jews, Cubans, poor whites, black”; but, with respect to their housing, it was said, “[t]he chicken coops they lived in were like places where you cage an animal.”¹³ As the 1960’s and 70’s progressed, Mount Laurel transformed from this rural past into a growing suburb, a result of flight from Philadelphia and Camden and the expansion of the Turnpike and Interstate 295.¹⁴ Farmers began selling off their plots for subdivisions.¹⁵ To help the poorer residents of Mount Laurel continue to afford living in their rapidly developing town, community organizers applied and received a state grant with hope of eventually receiving federal money to develop garden apartments. But before any could be built, Mount Laurel would have to change its zoning laws to permit multifamily units.¹⁶

Prior to the *Mount Laurel* decisions, the New Jersey Supreme Court¹⁷ held that the state’s municipalities had broad power to exercise discretion over local land use.¹⁸ The Court’s anti-urban bias was clear: “[P]eople who move into the country rightly expect more land, more living room, indoors and out, and more freedom in their scale of living than is generally possible in the city. City standards of housing are not adaptable to suburban areas and especially to the upbringing of children.”¹⁹ To the mid-century Court, cities were rife with iniquity and people who could escape had the right to exclude factors they believed caused such iniquity.²⁰ In *Vickers v. Township Committee of Gloucester County*, the court defined “general welfare”

¹³ *Id.* at 45. People literally lived in chicken coops, abandoned by Mount Laurel’s chicken farmers. *Id.* at 3.

¹⁴ *Id.* at 48.

¹⁵ *Id.*

¹⁶ *Id.* at 46.

¹⁷ References hereinafter to “the Court” refer to the New Jersey Supreme Court.

¹⁸ For example, in *Lionshead Lake, Inc. v. Wayne Township*, the court held that Wayne had the right to impose minimum floor area requirements on new units being developed in a once-rural township. 89 A.2d 693, 697 (N.J. 1952).

¹⁹ *Id.*

²⁰ See, e.g., Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 95 (1998-99); see also Jon Shure, *Don’t Separate Workers from their Jobs*, NJBIZ (Jul. 28, 2003), available at <http://www.allbusiness.com/north-america/united-states-new-jersey/1077284-1.html>.

narrowly to include only the welfare of the municipality enacting a zoning ordinance.²¹ This standard served to fragment the state in the name of “rustic character.”²² Such euphemisms contributed to the boundaries between New Jersey cities and suburbs being drawn along racial lines.²³

The Court overruled these cases in *Southern Burlington County NAACP v. Mount Laurel Township*,²⁴ known as *Mount Laurel I*, and expanded the once-narrow view of general welfare with respect to the zoning power: “Frequently the decisions in this state . . . spoke[] only in terms of the interest of the enacting municipality”²⁵ But because the zoning power is a police power of the state delegated to municipalities, when exercise of the police power has a “substantial external impact,” a municipality is constitutionally bound to serve the welfare of state citizens beyond its border.²⁶ Municipalities could no longer base their zoning decisions solely on the “desires of local residents.”²⁷ *Mount Laurel I* established that a municipality could not use zoning to exclude the poor, and that each municipality in the state must take affirmative steps to make housing available to low and moderate income persons “to the extent of the municipality’s fair share of the present and prospective regional need therefor.”²⁸ Putting this firm declaration into effect by defining terms like “fair share” and “regional need” proved challenging for the courts.

The requirements mandated by *Mount Laurel I* are widely praised. Even those who oppose current implementation of the *Mount Laurel* doctrine, like the New Jersey League of Municipalities, applaud the first *Mount Laurel* decision as a fair and correct reading of the

²¹ 181 A.2d 129, 137 (N.J. 1962).

²² See KIRP, *supra* note 11, at 66.

²³ *Id.*

²⁴ 336 A.2d 713 (N.J. 1975).

²⁵ *Id.* at 726.

²⁶ *Id.* at 726–28.

²⁷ See GERALD FRUG, CITY MAKING, 78-79 (1999).

²⁸ *Mount Laurel I*, 336 A.2d at 724.

Constitution.²⁹ *Mount Laurel* stands for the idea that municipalities should have to care for those outside their borders when they cause direct negative externalities. Gerald Frug explains that a city's zoning law "affects not only its own identity but also the identity of other cities within the region. Suburban exclusiveness is dependent on the neighboring cities' refusal to exclude; some places have to be open for others to be closed."³⁰ *Mount Laurel I* calls into question this idea of suburban exclusiveness and forces suburban municipalities to house their fair share out of those who would otherwise be forced to live in places that refuse to exclude.³¹ Though the Court provided specific requirements in *Mount Laurel I*, it left undefined terms like "municipality's fair share" and "present and prospective regional need." Defining those terms would prove far more controversial than the constitutional pronouncements of 1975.

In its first eight years of life, the *Mount Laurel* doctrine achieved tepid success. The Court was unwilling to give real teeth to the doctrine, and in several decisions, seemed to draw back from specific mandates for municipalities. In *Oakwood at Madison, Inc. v. Madison Township*, the court balked at defining municipalities' "fair share" and refused to demarcate regional boundaries within which Municipalities bore some housing responsibility.³² *Madison Township* rubber stamped any definition of a "region" that expanded a municipality's zone of care beyond the political borders of that municipality, missing a chance to give the doctrine real definition and effectiveness.³³ In *Pascack Associates Ltd. v. Mayor of Washington Township* the Court limited the number of municipalities required to provide their fair share of housing,

²⁹ Interview with Michael Jedziniak, Senior Associate at Jeffrey R. Surenian and Associates, attorneys for the New Jersey League of Municipalities, conducted on October 7, 2008. Hereinafter "Michael Jedziniak, Oct. 7, 2008 Interview."

³⁰ FRUG, *supra* note 27, at 79.

³¹ See GREGORY WEIHER, THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION 188 (1991). Weiher equates suburbs to theme parks where, for an admission price, one is greeted with a planned, isolated caricature of culture.

³² 371 A.2d 1192 (N.J. 1977); see also CHARLES M. HAAR, SUBURBS UNDER SIEGE, 34 (1996).

³³ HAAR, *supra* note 32.

reasoning that the requirements of *Mount Laurel I* only extended to growing municipalities.³⁴

But in 1983, the New Jersey Supreme Court thoroughly reaffirmed and strengthened the *Mount Laurel* doctrine in what became known as “*Mount Laurel II*.”³⁵ Not only did the Court, through Chief Justice Wilentz, reaffirm the doctrine espoused in *Mount Laurel I*, but, in a 123-page opinion, it created a procedure—the “Builder’s Remedy”—for courts to determine and enforce municipalities’ obligation to provide low and moderate income housing.³⁶ The *Mount Laurel II* decision repudiated *Oakwood* and *Pascack*, holding: “[T]he general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare—in this case the housing needs—of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality.”³⁷ The Court installed three trial judges to manage *Mount Laurel* cases, replacing the patchwork of litigation that preceded *Mount Laurel II*.³⁸

The Builder’s Remedy capitalized on the incentives builders already had—namely to build as much as possible—to incentivize municipalities to zone for affordable housing. A builder who successfully demonstrated that a noncompliant municipality’s zoning was exclusionary would be granted permission to build additional market-priced units over and above the number permitted by the zoning ordinances of that municipality.³⁹ Just as Growth Share, years later, would utilize market forces to measure municipalities’ fair share, the Builder’s Remedy, in 1983, gave profit-driven parties the incentive to litigate over affordable housing,

³⁴ 379 A.2d 6, 11 (N.J. 1977); *see also* HAAR, *supra* note 32.

³⁵ *Southern Burlington County NAACP v. Mount Laurel Township*, 456 A.2d 390 (N.J. 1983).

³⁶ *Id.*; *see also In re Adoption of N.J.A.C. 5:94 and 5:95*, 914 A.2d 348, 356 (N.J. Super. 2007).

³⁷ *Mount Laurel II*, 456 A.2d at 415.

³⁸ *Id.* at 490.

³⁹ HAAR, *supra* note 32, at 44. “A developer is entitled to a builder’s remedy if: (1) it succeeds in *Mount Laurel* litigation; (2) it proposes a project with a substantial amount of affordable housing; and (3) the site is suitable, that is, the municipality fails to meet its burden of proving that the site is environmentally constrained or construction of the project would represent bad planning.” *Mount Olive Complex v. Township of Mount Olive*, 774 A.2d 704 (N.J. Super. A.D. 2001).

marrying the interests of builders and civil rights advocates. The Builder’s Remedy spurred on towns that otherwise would not act under their own volition, and incentivized municipalities to provide their fair share.⁴⁰

In the three years after *Mount Laurel II* was decided, more than 100 lawsuits were filed against some seventy New Jersey municipalities.⁴¹ The *Mount Laurel II* court was aware that giving builders such an incentive could backfire, and urged courts to be vigilant for gaming behavior.⁴² The decision could backfire in two ways: first, the Builder’s Remedy could lead to sprawl—court orders that a municipality, because of past misbehavior, must alter the character of its housing stock and build *more*. But second, it could, and did, create a mess of litigation that ultimately led to the enactment of the state’s Fair Housing Act, creating a “more friendly forum” for adjudicating land-use disputes.⁴³ While courts have taken steps to curtail this latter risk,⁴⁴ the immediate increase in litigation after *Mount Laurel II*, drew the attention of the state legislature.⁴⁵

To end what many saw as judicial activism by the Court in *Mount Laurel I* and *II*, the New Jersey Legislature enacted the state’s Fair Housing Act of 1985 (“FHA”).⁴⁶ The FHA codified many of the court-created provisions of the *Mount Laurel* doctrine, but added innovations, including Regional Contribution Agreements (“RCAs”), which permitted

⁴⁰ Michael Jedziniak, Oct. 7, 2008 interview.

⁴¹ John M. Payne, *The Unfinished Business of Mount Laurel II*, 6, in *Mount Laurel II at 25: The Unfinished Agenda of Fair Share Housing* (Timothy N. Castano and Dale Sattin, eds.), Policy Research Institute for the Region (2008) (citing A. Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the Berenson Decision*, 4 PACE ENVTL. L. REV. 37, 119 (1986)).

⁴² *Mount Laurel II*, 456 A.2d at 452 (“Care must be taken to make certain that Mount Laurel is not used as an unintended bargaining chip in a builder’s negotiations with the municipality . . .”).

⁴³ See Payne, *supra* note 41, at 6.

⁴⁴ See, e.g., *K.T.K. Trust v. Borough of Rumson*, Docket. No. MON-L-885-03 (N.J. Super. Jul. 15, 2004), holding that builders must make a good faith effort to present development plans to municipalities before bringing a Builder’s Remedy. See also Chanan French, *New Jersey Court Requires Good Faith Negotiations Prior to Bringing Mt. Laurel Litigation*, PRACTICING PLANNER, (Winter 2004), available at <http://myapa.planning.org/affordablereader/pracplanner/MtLaurelvol2no4.htm>.

⁴⁵ Michael Jedziniak, Oct. 7, 2008 interview.

⁴⁶ N.J.S.A. § 52:27 D-301, *et seq.*, available at <http://www.state.nj.us/dca/coah/fha.shtml>.

municipalities to transfer their affordable housing obligations to other municipalities by paying a fee to receiving municipalities.⁴⁷ The FHA also created the Council on Affordable Housing, known as “COAH,” a division of the state’s Department of Community Affairs.⁴⁸ COAH was the state agency charged with setting fair share guidelines for municipalities and certifying *Mount Laurel* compliance. Primary enforcement was thus taken out of the courts’ hands.⁴⁹

COAH established a fair share calculation, providing every New Jersey municipality with a number of affordable units to build.⁵⁰ This calculation, originally devised by Professor Robert Burchell at Rutgers University, has been widely panned by housing advocates and municipalities. Susan Kraham, who argued successfully against the Council on Affordable Housing’s (“COAH’s”) recent Third Round Rules,⁵¹ described Burchell’s original fair share calculations as a “black box,” lacking transparency. Michael Jedziniak, who represents the New Jersey League of Municipalities, challenges “anyone on Earth, other than Burchell, to understand how the calculations were made.”⁵² Burchell’s methodology was used through 2004, and in that time, it proved difficult for any municipality to challenge the numbers – courts simply gave deference to COAH.⁵³

Finally, in 2004, COAH replaced Burchell’s Fair Share methodology with the Growth Share methodology, described more fully below. Growth Share simplified the fair share

⁴⁷ RCAs were the second market-based innovation introduced to promote *Mount Laurel* compliance.

⁴⁸ N.J.S.A. § 52:27 D-305.

⁴⁹ Cf. John M. Payne, *The Mount Laurel Matrix*, 22 W. NEW ENGL. L. REV. 365, 369 (2001). “Judicial involvement . . . accounts for the degree of success that the *Mount Laurel* doctrine has enjoyed, for there can be no doubt that the legislature would have abandoned the fair share process altogether had it been constitutionally permissible to do so.”

⁵⁰ N.J.A.C. 5:93-2.1, *et seq.* provides the formerly-used method for calculating “fair share.”

⁵¹ See *infra* Part II.C (discussing *In re Adoption of N.J.A.C. 5:94 and 5:95* by the New Jersey Council on Affordable Housing, 914 A.2d 348 (N.J. Super. 2007)).

⁵² Michael Jedziniak, Oct. 7, 2008 Interview.

⁵³ *Id.* Courts generally afford great deference to administrative decisions by COAH. See, e.g., *Hills Development Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986); *In re Township of Ocean*, COAH 04-1608, 2006 WL304134 (N.J. Super. Ct. App. Div. Oct. 27, 2006); *Sod Farm Assocs. v. Township of Springfield*, 840 A.2d 885 (N.J. Super. Ct. App. Div. 2004).

calculation for affordable housing, pegging a township's *Mount Laurel* obligations to the number of actual building permits issued. Thus, towns were required to build affordable housing in proportion to market rate housing that they were already building.⁵⁴

II. Perspectives on *Mount Laurel*

A. OPINIONS ON THE PURPOSE OF *MOUNT LAUREL*

While the narrow purpose of the *Mount Laurel* decisions was to cure a constitutional deficiency in the state's housing allocation, a number of underlying purposes become evident through conversations with a number of practitioners in the field, whether to remedy racial segregation, to limit local power, or to create housing equality. By exploring the possible purposes of *Mount Laurel*, one can best evaluate which purpose COAH is best institutionally positioned to promote.

1. *The Racial Perspective*

The NAACP brought suit in *Mount Laurel I* to force Mount Laurel to permit affordable housing construction for the poorer residents of that municipality. While the group of original plaintiffs were mostly rural blacks, all long-time Mount Laurel residents,⁵⁵ courts have deemphasized the racial element of the *Mount Laurel* decisions from the start. In *Mount Laurel I*, the Court framed its decision not in terms of racial classification, but economic classification, holding that economic classification in New Jersey invokes the strict scrutiny standard (contrary to the position of the United States Supreme Court).⁵⁶ Nonetheless, most commentators agree that race plays an important, if below-the-surface, role in the Mount Laurel doctrine. Naomi Wish argues that one of the core goals of *Mount Laurel* has always been to ameliorate

⁵⁴ See N.J.A.C. 5:94 Appendix A and *infra*.

⁵⁵ KEVIN MICHAEL KRUSE AND THOMAS J. SUGRUE, *THE NEW SUBURBAN HISTORY*, 175 (2006).

⁵⁶ HAAR, *supra* note 32, at 23; *see generally* Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) (holding economic classifications receive only rational basis review in Federal court).

segregation.⁵⁷

Adam Gordon, one of the leading attorneys at the Cherry Hill-based Fair Share Housing Center (“FSHC”), the public interest organization founded by the plaintiffs in the original *Mount Laurel* case, thinks that integration is not the primary goal of *Mount Laurel*.⁵⁸ Gordon reads the original decision narrowly as an attempt to remedy exclusionary use of municipalities’ zoning power.⁵⁹ The racial element of *Mount Laurel*, according to Gordon, is an effect of the history of segregation between New Jersey’s cities and suburbs. Similarly, Richard Hoff, who has represented various New Jersey builders associations, argues that the purpose of *Mount Laurel* is to give those who want to leave cities the means to do so through affordable housing.⁶⁰ The Court and the FHA do not legally distinguish between cities and suburbs. If *Mount Laurel* obligations are falling most heavily on suburbs, it is solely a result of their fast growth. Whether that growth was (and is) caused by economic opportunity or white flight is unrelated to the remedies the Court, and later COAH, fashions.

2. The “Housing Equality” Perspective

The *Mount Laurel I* court defined economic exclusion broadly, explaining that a person was excluded when he was forced to pay too large a portion of his income on housing.⁶¹ Builders advocacy groups like the New Jersey Homebuilders Association have been strong supporters of *Mount Laurel* from the start, because the builders’ interests in avoiding land use

⁵⁷ Naomi Bailin Wish, 27 SETON HALL L. REV. 1268 (1997). Wish identifies three core goals of *Mount Laurel*. In addition to ameliorating segregation, *Mount Laurel* was meant to increase opportunities for low and moderate income housing, and provide housing in the suburbs for currently poor urban residents. Wish adds that there are also a number of fluctuating goals of the *Mount Laurel* Doctrine. For instance, should the purpose be to stabilize or revitalize urban neighborhoods or focus only on creating inclusive suburbs, and should the doctrine focus only on middle income residents, or extend to the poorest residents of New Jersey’s inner cities? *Id.*

⁵⁸ Interview with Adam Gordon, staff attorney and Equal Justice Works Fellow at Fair Share Housing Center, conducted on September 18, 2008. Hereinafter “Adam Gordon, Sept. 18, 2008 Interview.”

⁵⁹ *Id.*

⁶⁰ Interview with Richard J. Hoff, Flaster Greenberg, conducted on October 9, 2008. Hereinafter “Richard Hoff, Oct. 9, 2008 Interview.”

⁶¹ HAAR, *supra* note 32, at 23.

restrictions align with the interests of those with low to moderate incomes seeking to live in suburbs instead of cities.⁶²

Adam Gordon believes that *Mount Laurel* does not yet go far enough— that *Mount Laurel* itself becomes an obstacle to true inclusion because once a municipality meets its fair share as defined by COAH, it no longer has to do *anything* to provide for affordable housing and can avoid further scrutiny of its zoning laws.⁶³ He thinks Growth Share⁶⁴ is fundamentally wrong because towns can still choose not to grow, they can choose stasis to avoid the obligation to provide additional affordable housing. He cites a recent Princeton study finding that most migration out of New Jersey was by low-income individuals, while those coming into New Jersey are wealthy,⁶⁵ and urges that a homogenous “all-wealthy” New Jersey is an undesirable outcome. Reduction of inequality could be one of the goals of *Mount Laurel*. Inequality in this sense could better be described as ‘diversity’: the absence of community boundaries drawn along the lines of wealth; every city or region should have both poor and rich. However, evidence exists that a states or commuter-sheds with *less* inequality, i.e., one with either all-wealthy or all-poor residents, enjoy faster growth in population and income, less crime, and report less unhappiness among residents.⁶⁶ The proposition that the all-wealthy region is a *bad* thing will be discussed further *infra*.

3. The “Limit Local Power” Perspective

⁶² Richard Hoff, Oct. 9, 2008 Interview; *see also Affordable Housing Illusive*, June 29, 2007, available at <http://www.njba.org/coahwebsiteposting7revs%20180.pdf> (“The State’s affordable housing policy continues to be one of delay.”).

⁶³ Adam Gordon, September 18, 2008, Interview.

⁶⁴ *See infra* Part II.A.

⁶⁵ CRISTOBAL YOUNG, CHARLES VARNER, AND DOUGLAS MASSEY, TRENDS IN NEW JERSEY MIGRATION: HOUSING, EMPLOYMENT, AND TAXATION 2 (Sept. 2008).

⁶⁶ Edward L. Glaeser, Matt Resseger, and Kristina Tobio, *Urban Inequality*, 26–27 (Harvard Institute of Economic Research, Discussion Paper Number 2168, Nov. 2008), available at <http://www.economics.harvard.edu/journals/hier2008>.

The purpose that *Mount Laurel*, and COAH, exist to limit municipalities’ power over local zoning decisions is likely the most important, and most controversial, conclusion to be drawn about the doctrine. In the first *Mount Laurel* opinion, Justice Hall expanded the meaning of the term “general welfare” from parochial political boundaries of the enacting city to the welfare of the entire, interrelated region in which the municipality sits.⁶⁷ Such parochialism has been somewhat remedied by COAH, but the New Jersey Fair Housing Act, which created COAH, left the implementation of *Mount Laurel* with localities—it is still the responsibility of the municipalities to plan for growth, which ultimately determines their fair share numbers.⁶⁸ Thus the limitation in the New Jersey Constitution⁶⁹ that required the first *Mount Laurel* decision to “treat[] every city as an individual decision-maker required to confront regional needs by itself as a matter of thought,”⁷⁰ continues to linger under COAH’s management. Despite these limitations, the New Jersey Constitution grants the state legislature the power to repeal or alter local ordinances.⁷¹ This could provide further room for COAH to limit local power. From the start, the *Mount Laurel* doctrine has held the potential to turn the attention of municipalities outward, requiring them to play a part in the welfare of the entire region in which they are located.

B. MOUNT LAUREL TODAY AND GROWTH SHARE

⁶⁷ *Mount Laurel I*, 336 A.2d 713, 727-28 (N.J. 1975); see HAAR, *supra* note 32, at 25.

⁶⁸ Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 54 (1990).

⁶⁹ The State Constitution provides:

“[M]unicipalities . . . may adopt zoning ordinances limiting and restricting . . . buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State.”

N.J. CONST. art. IV, § 6, ¶ 2. But note, it goes on to provide: “Such laws shall be subject to repeal or alteration by the Legislature.” *Id.*

⁷⁰ FRUG, *supra* note 27, at 80.

⁷¹ N.J. CONST. art. IV, § 6, ¶ 2.

“Growth Share” is the central feature of the modern *Mount Laurel* doctrine.⁷² Introduced in 2004 as a simplification to the Fair Share calculation, Growth Share pins affordable housing obligations to actual residential and commercial construction in a municipality. Growth Share requires a municipality to use growth projections, provided by COAH,⁷³ based on New Jersey Department of Labor and Workforce Development county projections, and allocated to the municipal level based on historical trends for each municipality.⁷⁴ The current rules require one affordable unit to be built for every four market-rate residential units built, and one affordable unit for every sixteen new jobs created.⁷⁵ Actual growth is measured bi-annually in the municipality based on building certificates issued, and the municipality’s actual growth share is determined.⁷⁶ If the municipality fails to build more than 10% of its share, COAH can order the municipality to modify its plans to meet requirements.⁷⁷ If actual growth is *less* than the projections, the regulations provide “the municipality shall continue to provide a realistic opportunity for affordable housing to address the projected growth share”⁷⁸

COAH’s third round rules implementing Growth Share were challenged by the New Jersey Builders Association, Fair Share Housing Center, and the Coalition for Affordable Housing and the Environment, among others, in *In re Adoption of N.J.A.C. 5:94 and 5:95*

⁷² See N.J.A.C. 5:97-2.1–2.5.

⁷³ See N.J.A.C. 5:97-2.4. Municipalities may use their own projections if they exceed COAH’s projections. N.J.A.C. 5:97-2.2(d), 2.3(d). COAH has also stated that if, using local data, municipalities come up with projections believed to be more accurate, municipalities can appeal to COAH to change their projections. See Daniel Howley, *Agency Responds to Criticisms about COAH*, ATLANTICVILLE (Oct. 9, 2008).

⁷⁴ N.J.A.C. 5:97-2.2(d).

⁷⁵ *Id.* Job creation is “measured based upon the square footage of non-residential development converted to jobs based on the use group ratios provided in chapter Appendix D.” N.J.A.C. 5:97-2.5(b). Appendix D provides, for example, that in an office building, 1000 square feet creates 2.8 jobs, so a municipality must produce one affordable unit for every 5,714 square feet of office space it builds (16 jobs = 5,714 sq. ft.). N.J.A.C. 5:97 Appendix D.

⁷⁶ N.J.A.C. 5:97-2.5(a)(2). See N.J.A.C. 5:96-10.1 for description of the review process.

⁷⁷ N.J.A.C. 5:96-10.4(a).

⁷⁸ N.J.A.C. 5:97-2.5(e).

(“*Third Round*”).⁷⁹ All parties, COAH included, had different visions of what Growth Share ought to mean. Adam Gordon, who filed FSHC’s brief in *Third Round*, argued that Growth Share permitted towns to choose not to grow and thereby avoid any fair share obligation.⁸⁰ He cited Mantua Township, whose original fair share plan zoned for 600 new units, but later rezoned for only 100 units. Gordon believes that, to avoid having to build affordable housing units, the township decided to build fewer units overall, though municipalities often argue that such decisions are not made to avoid obligations but to maintain the density and character of the community.⁸¹ CAHE addressed the “choose not to grow” criticism in its brief in *Third Round*, pointing out that between 1999 and 2003, only eight of 566 municipalities in New Jersey had no growth at all.⁸² These eight should be compared to the twenty-five municipalities that had no affordable housing obligations under the Fair Share methodology.⁸³ Nonetheless, CAHE lodged its own complaints about Third Round Growth Share. Before those complaints are explored, a more detailed explanation of COAH’s original Third Round Growth Share rules is necessary.

C. THIRD ROUND RULES – STRUCK DOWN AND REVISED

The New Jersey Superior Court struck down COAH’s Third Round Rules, primarily because those rules were premised on flimsy data.⁸⁴ The Third Round Rules calculated municipalities’ affordable housing obligation by combining rehabilitation share (the measure of a municipality’s old or run-down housing occupied by low and mid-income residents),⁸⁵

⁷⁹ In re Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing, 914 A.2d 348 (N.J. Super. 2007).

⁸⁰ Adam Gordon, September 18, 2008 Interview.

⁸¹ *Id.*

⁸² CAHE Brief at 32. Those eight municipalities were East Newark, Hi-nella, Millstone, Shrewsbury, Tavistock, Victory Gardens, Walpack, and Woodlynne. *Id.*

⁸³ CAHE Brief at 33.

⁸⁴ *Third Round*, 914 A.2d at 373 (holding that, for example, COAH’s determination that filtering was occurring in New Jersey was based on “flawed data”).

⁸⁵ *Id.* at 364.

unsatisfied prior round obligation, and Growth Share.⁸⁶ In the Third Round, COAH drastically reduced some municipalities' prior-round obligations by finding that "filtering" would reduce prospective need in the state from approximately 140,000 to 52,725 units.⁸⁷ According to the consultant's report used by COAH,⁸⁸ filtering is the

process by which units decline in value and therefore become affordable to lower-income households. This process begins when higher end housing is built by private developers. When higher-income consumers move into these new units, the demand for their prior units declines, causing values or rents to drop; the units then become affordable to consumers at a lower income level. In this way, the construction of new, market-rate housing may reduce affordable housing needs by freeing up additional existing units for purchase or rent by moderate-income households. Filtering is most likely to take place in housing markets containing sound housing undergoing significant turnover and in close proximity to substantial new development.⁸⁹

Filtering is controversial.⁹⁰ NJ Builders Association, CAHE, and FSHC argued that COAH's Third Round filtering calculation did not even pass the rational basis review that the court used to evaluate agency decisions.⁹¹ The court agreed, faulting the studies used by COAH.⁹² One such study found that while seventeen percent of middle and upper income housing filtered down in New Jersey between 1989 and 1999, fifteen percent actually *filtered up*⁹³ in the same period, confounding the claim that nearly ninety thousand units were no longer required because of

⁸⁶ *Id.* at 363-64.

⁸⁷ *Id.*

⁸⁸ N.J.A.C. 5:97 Appendix A.

⁸⁹ *Id.* at Appendix A, 89.

⁹⁰ Filtering theory is blamed for the decline of inner cities, Keith Aoki, *Race, Space and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 799 (1993), gentrification, Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988), and the perpetuation of racial segregation. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993). *See also*, Andrew Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23 (1996).

⁹¹ *Third Round*, 914 A.2d at 373. The court declined to adopt a heightened scrutiny standard of review. *Id.* at 366.

⁹² *Id.* at 373.

⁹³ Note that even in the revised rules promulgated after the *Third Round* decision, COAH still does not account for the possibility of filtering *up*.

filtering.⁹⁴ COAH offered no evidence that housing was becoming more affordable in New Jersey between 1999 and 2004, and evidence existed showing that housing was becoming more expensive.⁹⁵ Because of a lack of good data suggesting that filtering was actually occurring, the court invalidated COAH's adjustment of statewide housing requirements.

The court also found fault with COAH's Third Round rendition of Growth Share, explaining that under Third Round Growth Share, "each municipality controls its destiny."⁹⁶ First, the court held that for Growth Share to be viable there must be some showing that there is sufficient vacant, developable land within areas of growth to allow the ratios to generate enough housing to meet need.⁹⁷ Second, the court found that Growth Share encouraged municipalities to adopt master plans that retarded growth in order to minimize their fair share obligation.⁹⁸ The court concluded that "[a]ny growth share approach must place some check on municipal discretion,"⁹⁹ and sent COAH back to the drawing board.

COAH has since revised its Third Round Growth Share rules.¹⁰⁰ The revised Third Round rules (the "Revised Rules") reflect a response to the court's concern that the prior rules (the "Prior Rules") permitted too much discretion to the individual municipalities. Section 2.4 of the Prior Rules provided: "Municipalities shall project the residential component of growth share obligations . . . based on the data and analysis of growth projections pursuant to N.J.A.C. 5:94-2.2."¹⁰¹ Section 2.2, in turn, required each municipality to develop Plan Projections through

⁹⁴ *Id.* at 373 (citing N.J.A.C. 5:94, Appendix A at 94-42).

⁹⁵ *Id.*

⁹⁶ *Id.* at 377.

⁹⁷ *Id.* at 380.

⁹⁸ *Id.*

⁹⁹ *Id.* at 381.

¹⁰⁰ Compare N.J.A.C. 5:94, 5:95, *et seq.* with N.J.A.C. 5:97, *et seq.*

¹⁰¹ N.J.A.C. 5:94-2.4(a). 5:94 also provided for a higher ratio of market-rate housing and nonresidential development to affordable development (8:1 residential, 25:1 job creation). See N.J.A.C. 5:94-2.4(a)-(b).

2015 to be submitted to the State Planning Commission for approval.¹⁰² The *Third Round* court found this minimal check, approval by the State Planning Commission, insufficient to ensure the construction of affordable housing. So COAH promulgated the Revised Rules with the relevant revision providing: “A municipality shall determine the residential component of its growth share obligation . . . based on the household projections provided in chapter Appendix F, unless municipal projections are utilized pursuant to N.J.A.C. 5:97-2.2(d).”¹⁰³ Rather than have each municipality calculate its own projection for future growth, COAH provided projections for the entire state in Appendix F.¹⁰⁴

In Appendix F, consultant Econsult reported to COAH that by 2018,¹⁰⁵ New Jersey’s population would be 9,411,670 (up from 8,675,880 in 2004).¹⁰⁶ The report further concludes that New Jersey would build 269,448 new housing units in the Third Round period, with the fastest growth in the central and southwestern counties.¹⁰⁷ Generally, Econsult predicted slower growth for the northern, more urban counties, and faster growth for the central coastal, and western rural counties.¹⁰⁸ Ocean County, with its vast shoreline, is projected to have the highest growth in the state with construction of over 38,000 units in the Third Round period.¹⁰⁹ Appendix F also contains projections for every municipality in the state. For example,

¹⁰² N.J.A.C. 5:94-2.2(b)(4).

¹⁰³ N.J.A.C. 5:97-2.4(a).

¹⁰⁴ Appendix F to N.J.A.C. 5:97 is a 372-page report prepared by a number of consultants for COAH, directly responding to the *Third Round* decision. Its contents include ANALYSIS OF VACANCY LAND IN NEW JERSEY AND ITS CAPACITY TO SUPPORT FUTURE GROWTH, by the National Center for Neighborhood & Brownfields Rehabilitation; INCLUSIONARY HOUSING: LESSONS FROM THE NATIONAL EXPERIENCE, by Applegate & Thorne-Thomsen; and ALLOCATING GROWTH SHARE TO MUNICIPALITIES, ESTIMATING THE DEGREE TO WHICH FILTERING IS A SECONDARY SOURCE OF AFFORDABLE HOUSING, COMPENSATORY BENEFITS TO DEVELOPERS FOR PROVISION OF AFFORDABLE HOUSING, AND COUNTING JOBS AT THE LOCAL LEVEL, all by Econsult.

¹⁰⁵ The Third Round Period runs from 2004 to 2018.

¹⁰⁶ ALLOCATING GROWTH SHARE TO MUNICIPALITIES, *supra* note 104, at 15.

¹⁰⁷ COAH has divided the state into six regions comprised of three of four whole counties. Region 3, comprised of Middlesex, Hunterdon, and Somerset counties, is predicted to have the highest rate of growth, followed by Region 4 (Monmouth, Ocean, and Mercer) and then by Region 5 (Burlington, Camden, Gloucester). *Id.* at 16.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Middletown Township, a large suburban township in northern Monmouth county, is projected to grow by 1,149 units between 2004 and 2018.¹¹⁰ Thus, following the revised Growth Share ratio (1:4), Middletown will have to create approximately 287 affordable units based on its residential growth.

D. A NOTE ON THE 2008 FHA AMENDMENT

In July, 2008, the New Jersey Legislature passed, and the Governor signed, major revisions to the state's Fair Housing Act.¹¹¹ The most significant change brought about by this new legislation is the elimination of Regional Contribution Agreements as a way for municipalities to address their affordable housing obligations. RCAs were a device by which one municipality would give cash to another to be relieved of a portion of its affordable housing obligation.¹¹² On one level, RCAs were an ingenious device that permitted zoning policies to "be worked out not centrally or by each municipality alone but through regional negotiations."¹¹³ But RCAs were criticized by affordable housing advocates for allowing wealthier towns to buy their way out of their *Mount Laurel* obligations.¹¹⁴ Richard Hoff argues that RCAs were "atrocious" because they diluted the purpose of *Mount Laurel* which he views as giving those who want to leave struggling cities the ability to do so.¹¹⁵ Hughes and McGuire argue that RCAs created a new type of property right in New Jersey: the right to exclude for a price.¹¹⁶ Though RCAs worked like a tax intended to influence behavior, they also depended on the skill of the

¹¹⁰ *Id.* at 40.

¹¹¹ See COAH website at <http://www.state.nj.us/dca/coah/legislation.shtml>; and see http://www.njleg.state.nj.us/2008/Bills/PL08/46_.PDF (containing the full text of A500).

¹¹² N.J.S.A. 52:27D-312 ("[A] municipality may propose the transfer of up to 50% of its fair share to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter.") (superseded by N.J.S.A. 52:27D-302(f)). See Mark Alan Hughes and Therese J. McGuire, *A Market for Exclusion: Trading Low-Income Housing Obligations under Mount Laurel III*, 29 J. URBAN ECON. 207 (1990).

¹¹³ See FRUG, *supra* note 27, at 80.

¹¹⁴ Adam Gordon, Sept. 18, 2008 Interview.

¹¹⁵ Richard Hoff, Oct. 9, 2008 Interview.

¹¹⁶ Hughes and McGuire, *supra* note 112, at 216.

negotiators,¹¹⁷ and often resulted in wildly different sums being paid by different municipalities.¹¹⁸ Such differing sums reflect the prisoner’s dilemma faced by most “recipient” (poor) towns; because rich towns potentially have their pick of which poor towns to “donate” housing share to, poor towns were motivated to drop their prices to “compete” with one another for cash.¹¹⁹ Hughes and McGuire argued that rich towns should have been restricted on which poor towns’ housing share to purchase.¹²⁰ But the 2008 Amendments go further, reflecting the legislature’s greater distaste for RCAs:

Because the legislature has determined . . . that it is no longer appropriate or in harmony with the Mount Laurel doctrine to permit the transfer of the fair share obligations among municipalities within a housing region, it is necessary and appropriate to create a new program to create new affordable housing and to foster the rehabilitation of existing, but substandard, housing.¹²¹

Assemblyman Joseph Roberts, the architect of the 2008 FHA Amendment, has argued that RCAs were the reason why the “renaissance,” enjoyed by other mid-sized American cities in the past decade, passed New Jersey’s cities by, reasoning that poorer cities cannot attract market-rate development so long as they are solely responsible for housing the state’s poorest residents.¹²²

III. Evaluation of Growth Share

A. GROWTH SHARE INHIBITS PREDICTABILITY

New Jersey’s current fair share allocation system is not pure growth share. In its *Third*

¹¹⁷

Id.

¹¹⁸ Towns paid anywhere from \$15,000 per unit to \$100,000 per unit. It is hard to imagine how \$15,000 could produce a unit of affordable housing, though one should remember that towns do not build, builders build, and the \$15,000 may have helped a town to cover the cost difference between a market-rate unit and an affordable unit.

¹¹⁹ See WILLIAM THOMAS BOGART, *THE ECONOMICS OF CITIES AND SUBURBS*, 243 (1998).

¹²⁰

Id.

¹²¹ N.J.S.A. 52:27D-302(f).

¹²² Joseph J. Roberts, Jr., *Can We Afford Affordable Housing?*, RECORD, BERGEN COUNTY, July 27, 2008 at O1.

Round brief, CAHE proposed the adoption of a pure system of growth share.¹²³ Such a system would operate in real time, using monthly data published by the state for each New Jersey municipality.¹²⁴ The frequent monitoring and adjusting of a municipality's obligations was one essential difference between CAHE's proposal and the prior Third Round Rules.¹²⁵ By using actual growth instead of projections, CAHE argued, pure growth share eliminates the need for a rehabilitation share formula, thus eliminating the other, complicating elements of current affordable housing plans.¹²⁶ Such formula was part of the reason the Fair Share methodology had become so complex, and is presently the reason why municipalities are still confused about their obligations.¹²⁷

But adoption of a pure growth share system highlights the problem with the modified Growth Share system currently in use— that is, Growth Share inhibits predictability. Pure growth share, without projections, would make planning difficult. Even if Fair Share numbers were arbitrary, as critics have alleged, they were at least solid numbers around which city planners could intelligently plan for municipalities' future housing needs.¹²⁸ Richard Hoff, who has represented the Builders League of South Jersey in numerous *Mount Laurel* cases,¹²⁹ agrees that the current fair share system is not pure growth share because it still makes use of projections, but adds that the revised Third Round rules mean that a municipality might never end up meeting its goal.¹³⁰ Municipalities can never be certain they will be in compliance with COAH.¹³¹

¹²³ Brief of CAHE, *Third Round*.

¹²⁴ See NJ Dept. of Community Affairs at <http://www.state.nj.us/dca/codes/cr/monthly2008.shtml>.

¹²⁵ CAHE Brief at 17.

¹²⁶ *Id.* at 36.

¹²⁷ CAHE Brief at 37.

¹²⁸ Richard Hoff, Oct. 9, 2008 Interview.

¹²⁹ See, e.g., *In re Adoption of N.J.A.C. 19:3 – 19:6*, 922 A.2d 852 (N.J. Super. A.D. 2007).

¹³⁰ Richard Hoff, Oct. 9, 2008 Interview.

¹³¹ This also assumes that affordable housing numbers are something that could ever be met. The very nature

B. GROWTH SHARE CONFUSES SUPPLY FOR DEMAND

Suburban communities in New Jersey are presently experiencing the most rapid growth in the state. The Growth Share formula tags those boom-towns with an affordable housing obligation in proportion to the growth they are enjoying. As the *Third Round* court put it: “The growth share methodology is based on the premise that municipalities that add jobs and housing . . . should also accommodate their fair share of the statewide and regional need for affordable housing.”¹³² But this reveals a disjoint in the rationale for Growth Share. Growth Share operates on the assumption that new, market-rate development will bring new residents—new construction is used as a proxy for demand, and affordable housing then acts as a tax on that demand.¹³³ But new construction is actually the response to demand, an effect of that demand, and not a proper measure of it. Builders are not likely to expend massive resources building units to attract people into a town, rather they are likely to build only after there is an indication that new residents will move into the locality for other reasons.

C. GROWTH SHARE IS PREMISED ON SPRAWL

If Growth Share is not meant to be a proxy for demand, but is meant to provide a vehicle for filtering, there is evidence that filtering, when it does occur, leads to suburban sprawl.¹³⁴ Increased housing construction leads to increased supply, which may inadvertently affect all housing prices (by lowering them), and also requires space to build. Take the example of Montgomery County, Maryland, a community that boasts one of the nation’s most

of providing fair share suggests that any fair share number will constantly change (and likely change upward) as a municipality and its region grow.

¹³² *Third Round*, 914 A.2d at 384

¹³³ See Robert C. Ellickson, *The Irony of ‘Inclusionary’ Zoning*, 54 S. CAL. L. REV. 1167 (1980-81).

¹³⁴ See, e.g., Richard A. Oppel, Jr., *Efforts to Restrict Sprawl Find New Resistance From Advocates for Affordable Housing*, N.Y. TIMES (Dec. 26, 2000); see also Planners Web “Sprawl Guide,” citing filtering theory in affordable housing as one of ten traits associated with sprawl, available at <http://www.plannersweb.com/sprawl/define.html>.

comprehensive inclusionary housing programs.¹³⁵ Montgomery County has succeeded with a program that, in the 1970's, was a precursor to New Jersey's Growth Share method. Montgomery County required builders to build fifteen percent affordable units for developments of more than 50 market-rate units.¹³⁶ In exchange, builders would receive a density bonus, allowing them to build more units per lot than would normally be allowed under zoning laws.¹³⁷ The Maryland program differed from *Mount Laurel* because it was not derived from a state constitutional mandate, and did not require complex planning projections to be approved by a state agency. It was much closer to the "Pure" Growth Share proposed by CAHE. Most importantly, the Montgomery County program put responsibility for provision of affordable housing squarely on the party with the capacity to create that housing—the builders. Municipalities played no role. As a result, Montgomery County's program has succeeded in creating 10,000 units in a county with under one million people.¹³⁸ But despite its successes, Montgomery County's experiment of dotting market-rate neighborhoods with affordable units is built on sprawl.¹³⁹

The Court, in *Hills Development Co.*, acknowledged criticism that the Builder's Remedy, if not the *Mount Laurel* doctrine at that time, was based upon continuing growth and sprawl to justify its existence. When a builder sued a municipality for the right to construct housing (including affordable units), it was typically awarded the right to build four units of market-rate

¹³⁵ See Christopher Swope, *Little House in the Suburbs*, GOVERNING MAGAZINE (April 2000).

¹³⁶ *Id.* at 3; see also Karen Destorel Brown, *Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area* 29–30 (Brookings Inst. Ctr. On Urban and Metropolitan Policy, Oct. 2001), available at <http://www.brookings.edu/es/urban/publications/inclusionary.pdf>.

¹³⁷ *Id.*

¹³⁸ *Id.* Compare that number to the approximately 40,000 units created in New Jersey, a state of nearly nine million.

¹³⁹ *Id.* at 2. One advantage, however, of Montgomery County's program was that, in times of economic recession, the county kept construction crews working on affordable units after construction of market-rate units slowed. *Id.*

housing for every unit of affordable housing constructed.¹⁴⁰ “By that analysis a *Mount Laurel* fair share of a certain number of lower income units is viewed as requiring the municipality to build, in the aggregate, five times that number.”¹⁴¹ The same conclusion holds true under the current Growth Share ratio. To support such sprawl, there must be adequate space. COAH has asserted that there is ample vacant land in the state to accommodate sprawl, concluding that there are 1.03 million acres of developable land in the state¹⁴² and noting that in the past 240 years, only 1.42 million acres have been developed.¹⁴³

But COAH’s land analysis doesn’t consider that most of the vacant land in the state is outside the range of sewage treatment facilities, thus limiting realistic growth.¹⁴⁴ This puts the realistic possibility of development on towns in the already-developed regions of the state; old communities with dense, weathered housing, and lacking obvious tracts to grow. Driving through towns like the Amboys, Harrison, or Hazlet, one has trouble imagining areas for further growth that do not require the bulldozing of the last few clumps of foliage in sight.

IV. The Effects of Growth Share

Growth Share has aroused the ire of many New Jersey municipalities.¹⁴⁵ Beach Haven, a small seaside borough in Ocean County, has had an affordable housing obligation of 70 units since 1994, and a Growth Share obligation of nine additional units as of October, 2008.¹⁴⁶

¹⁴⁰ *Hills Development Co.*, 520 A.2d at 30 n.4.

¹⁴¹ *Id.*

¹⁴² See Henry J. Mayer, ANALYSIS OF VACANT LAND IN NEW JERSEY AND ITS CAPACITY TO SUPPORT FUTURE GROWTH, 27 (Dec. 31, 2007). In response to *Third Round*, COAH undertook to study available vacant land in New Jersey. *Third Round*, 914 A.2d at 400. COAH had previously calculated two million acres of vacant land in New Jersey, but that most of that vacant land was in areas of the state designated as protected. *Id.* at 380.

¹⁴³ Mayer, *supra* note 142.

¹⁴⁴ Mayer, *supra* note 142, at 27-28. “38 percent of the State’s vacant lands are located in State Planning Areas 1 or 2, a Designated Center or other areas having access to centralized wastewater treatment systems (collectively referred to as growth areas).”

¹⁴⁵ See, e.g., Press Release, Americans for Prosperity of New Jersey, Americans for Prosperity Battles COAH Mandates in New Jersey (Feb. 26, 2009), available at <http://www.americansforprosperity.org/030309-americans-prosperity-battles-coah-mandates-new-jersey>.

¹⁴⁶ COAH 2008 Obligations.

Despite this requirement, Beach Haven officials have built no units, explaining: “We don’t have a fast and steady number, especially with what is going on at the state level.”¹⁴⁷ This suggests that despite the promise held out by Growth Share to streamline and localize affordable housing planning, a combination of recalcitrance and honest hesitation while litigation settles continues to stymie construction of affordable units. Beach Haven has presently sought temporary immunity from *Mount Laurel* suits until it can develop a new Fair Share Plan.¹⁴⁸ This is despite eager developers who *want* to build in Beach Haven, but whose plans to include affordable units have been thwarted since 1994. Developer Linda Burris has proposed to build a total of 35 units, including 7 affordable units (20% affordable).¹⁴⁹ Michael Jedziniak, whose firm represents a number of municipalities, including Beach Haven, believes that most municipalities in New Jersey will not be able to satisfy their *Mount Laurel* obligations under Growth Share, citing urgent objections from Middletown, Egg Harbor, and Oldmans Townships, among others.¹⁵⁰

Similarly, Egg Harbor, the fastest growing community in Atlantic County, is currently embroiled in two lawsuits— one, in mediation, involves the town’s alleged frustration of a developer’s goal to build 138 single family homes along with affordable housing in the form of trailer homes.¹⁵¹ The other suit, filed by FSHC against the developer and the planning board, seeks to overturn approval of 657 new homes in the Farmington community within Egg Harbor without any affordable housing element.¹⁵² Egg Harbor Township (population 40,000)¹⁵³

¹⁴⁷ Donna Weaver, *Beach Haven Faces Affordable Housing Suit*, PRESS OF ATLANTIC CITY, (Sept. 2, 2008).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Michael Jedziniak, Oct. 7, 2008 Interview.

¹⁵¹ Michele Lee, *Egg Harbor Township Faces Multiple Fronts in Affordable Housing Fight*, PRESS OF ATLANTIC CITY (Aug. 28, 2008).

¹⁵² *Id.*; see also Michelle Lee, *End of Year is Key Deadline in Egg Harbor Township Affordable Housing Suits*, PRESS OF ATLANTIC CITY (Oct. 18, 2008).

¹⁵³ 39,493, U.S. Census Bureau, 2007 Population Estimates.

currently has no affordable housing,¹⁵⁴ and its combined Growth Share, Rehabilitation Share, and Prior Round obligations total 2,033 units.¹⁵⁵ Such statistics belie statements by local officials like Freeholder Tom Ballistreri who said, “[t]he Trenton politicians are forcing towns to cram more low and moderate income housing into areas which cannot sustain any more growth.”¹⁵⁶ Egg Harbor Township, for one, clearly can, and has been able to support more growth, suggesting the opposition’s motives are less earnest than concern for “cramming.”

Evesham Township, in Burlington County, complains that it had to abandon development of a shopping center¹⁵⁷ because it would have required construction of 37 affordable housing units and cost taxpayers \$6 million.¹⁵⁸ It is not clear where this \$6 million would come from. *Mount Laurel* housing is not required to be built with taxpayers’ money, but, as COAH acknowledges, municipal officials often cry “high taxes!” as a scare tactic to rally opposition to affordable development.¹⁵⁹ Alternatives to raising taxes include collecting local development fees, access to the new statewide pool of funding for affordable housing,¹⁶⁰ access to federal funds, and inclusionary development by private developers mixing affordable and market-rate units.¹⁶¹

Oldmans Township, similarly affected, is a farming community in northern Salem County that is largely undevelopable because of farmland preservation¹⁶² and Department of

¹⁵⁴ Lee, *End of Year*.

¹⁵⁵ COAH 2008 Obligations.

¹⁵⁶ 7:7 GALLOWAY TWP REPUBLICAN LEAGUE 3.

¹⁵⁷ In addition to requiring affordable housing construction in proportion to residential construction, Growth Share also requires affordable housing construction in proportion to job growth. N.J.A.C. 5:97-2.4(b). Job growth is measured based on square-footage and use-type. N.J.A.C. 5:97 Appendix D. So, for example, Appendix D provides that a “Business” like a bank, or law office, produces 2.8 jobs per 1000 feet of space constructed. *Id.*

¹⁵⁸ Maya Rao, *Officials Decry New Housing Mandate*, PHIL. INQUIRER B1 (Sept. 19, 2008).

¹⁵⁹ NJ Dept. of Cmty Affairs, COAH Fact Sheet, <http://www.state.nj.us/dca/affiliates/coah/reports/factsheet.html>.

¹⁶⁰ See N.J.S.A. 52:27D-320. This funding is expected to provide up to \$160 million each year,

¹⁶¹ See COAH Fact Sheet, *supra* note 159.

¹⁶² Salem County Cross-Acceptance III Public Hearing, Minutes of the Meeting Held Apr. 17, 2007, State Planning Commission, Department of Community Affairs, available at <http://www.nj.gov/dca/divisions/osg/docs/>

Environmental Protection regulations.¹⁶³ Prior to the adoption of Growth Share, Oldmans negotiated a deal for a 3.14 million square foot business park to serve regional business needs. After the implementation of Growth Share, Oldmans was saddled with a 300 unit growth share linked to a project that was planned before implementation of Growth Share in 2004.

These examples display anecdotal resistance to the imposition of the COAH regulations. One may criticize the towns for resisting their constitutional obligations in bad faith, but perhaps criticism is more properly directed at COAH, whose responsibility it is to properly motivate municipalities to build *some* affordable housing (again, Egg Harbor has built none).

There is some evidence that Growth Share fundamentally fails to distinguish between towns that do not provide for affordable housing and those that do. Eatontown may be the best example in support of this critique.¹⁶⁴ Eatontown has a projected Growth Share of 490 units, and a prior round obligation of 504 units.¹⁶⁵ But Eatontown's Mayor, Gerald Tarantolo, stated that "[m]ore than 50 percent of our residents live in apartments, which [are] affordable housing, yet we get no credit for that."¹⁶⁶ Tarantolo was referring to a provision of the FHA that prohibits housing built before 1980 from counting toward a municipality's affordable housing quota.¹⁶⁷ He adds that Eatontown's growth projections are impossible given that the borough is "97 percent developed."¹⁶⁸ According to the NJLM, COAH used an aerial survey of Eatontown to determine developable area, and took into account protected or otherwise undevelopable area in

sailemcamminutes041707.pdf (89% of the land in Salem County has been set aside for preservation, 11% for growth).

¹⁶³ Michael Jedziniak, Oct. 7, 2008 Interview.

¹⁶⁴ *Id.*

¹⁶⁵ COAH Fact Sheet, *supra* note 159.

¹⁶⁶ Daniel Howley, *Mayors Seek Change to Affordable Housing Law*, ATLANTICVILLE, (Sept. 18, 2008).

¹⁶⁷ *Id.* N.J.S.A. 52:27D-307(c)(1) provides: "[A] municipality shall be entitled to a [credit against its affordable housing quota] for a unit if it demonstrates that the municipality issued a certificate of occupancy for the unit, which was either newly constructed or rehabilitated between April 1, 1980 and December 15, 1986." The Court has held such provisions "enjoy a presumption of validity" for administrative ease. *Third Round*, 914 A.2d at 365.

¹⁶⁸ Howley, *Mayors Seek Change*.

compiling its growth projections including cemeteries, schoolyards, and private homes' front-and backyards.¹⁶⁹ COAH responded that it “would never require or permit affordable housing development to be placed in homeowners' backyards, parks or in the median of a highway. . . . These ludicrous claims are being used by people trying to keep affordable housing out of their community.”¹⁷⁰ COAH explained that it used data available state-wide and acknowledged that localities often have more precise data about vacant land— “Any municipality may submit actual local data to COAH and we will work with the municipalities and adjust the projections accordingly.”¹⁷¹ These examples serve to demonstrate that the fight between COAH and the municipalities is often political, not legal. If municipalities can succeed in depicting COAH as incompetent or sloppy, they can undermine its administrative credibility. Yet COAH rightfully acknowledges that local data will often be more accurate than its own data.

According to Michael Jedziniak, in 1975, Eatontown was the poster child of inclusionary development. It has never used its zoning power to exclude the poor; nonetheless, COAH requires 30-year deed restrictions that units will remain affordable.¹⁷² Jedziniak's main criticism of Growth Share is that it is a layer on top of prior round obligations which remain unadjusted. Growth Share does not take demographics into account. Thus a town could have 100% affordable units but, under Growth Share, would be treated the same as a town that has never provided affordable units.¹⁷³ From the municipalities' point of view, then, Growth Share, while administratively simple, brushes too broadly and does not take into account towns' previous behavior.

From the municipalities' perspective, the questions are (1) what is the need for housing

¹⁶⁹ Daniel Howley, *Agency Responds to Criticisms about COAH*, ATLANTICVILLE (Oct. 9, 2008).

¹⁷⁰ Howley, *Agency Responds* (quoting DCA Commissioner Joseph Doria).

¹⁷¹ *Id.*

¹⁷² Michael Jedziniak, Oct. 7, 2008 Interview.

¹⁷³ *Id.*

(2) and how much land is available to meet that need?¹⁷⁴ As for need, Jedziniak emphasized that confusion inhibits affordable housing from being built. Near-continuous appeals have left the current rules and projections in limbo, though the municipalities (along with housing advocates) have contributed heavily to those appeals.¹⁷⁵ Jedziniak also calls into question the feasibility of meeting Governor Corzine’s campaign promise to provide 100,000 affordable housing units in his first term.¹⁷⁶ The municipalities’ biggest fear, according to Jedziniak, is not that minorities or the poor will move in; it is that housing will be built but not be maintained. Municipalities are not concerned with who will live in their town, but rather how development will change the towns’ layout in five or ten years.¹⁷⁷

The builders, for their part, would remind municipalities that the ultimate constitutional burden rests *with the municipalities*. The doctrine, the courts, the legislature, and COAH are all supposed to create incentives for builders. This puts the towns on the hook for behavior not completely within their control.¹⁷⁸ The towns have also tied the hands of builders through their zoning power—Richard Hoff explains that it is not possible for builders to fit units into the small spaces left over through towns’ exercise of zoning power.¹⁷⁹ One possible solution to this problem would be strengthening of COAH, or some other regional governmental organization, to have veto power over municipal zoning choices.¹⁸⁰ Hoff agrees that *Mount Laurel* was once about racism, but no longer. In South Jersey, he says, racism was one of the chief motivators for the initial litigation, but it is not the grounds for the doctrine. Chiefly, *Mount Laurel* exists to bring to life the theory that inclusionary zoning creates the most sustainable communities—if

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Id.

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Id.

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Tom Hester, *Corzine Signs Overhaul of NJ’s Affordable Housing Law*, STAR-LEDGER (Jul. 17, 2008).

¹⁷⁷

Michael Jedziniak, Oct. 7, 2008 Interview.

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Richard Hoff, Oct. 9, 2008 Interview.

¹⁷⁹

Id.

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Susan Kraham, Sept. 30, 2008 Interview.

some cities are rich and others poor, those poor cities' citizens will have limited access to good schools and jobs.¹⁸¹ The real opposition from municipalities, according to Hoff, is their desire to avoid high density, and families with children. If a town zones for senior living centers, it does not have to use tax dollars to build as many schools. It is also easier to build schools with high property taxes. One may rightfully say that New Jersey's municipalities are self-interestedly, trying to minimize expenditures, but on this analysis, they are not trying to exclude outsiders for more invidious purposes. Such self-interest may prove short-sighted if one agrees that equal access to good schools and jobs will ultimately improve life for everyone. But, less controversially, the Constitution and the Court prohibit such self-interest, even where it reflects the majoritarian will of a municipality because it violates the same spirit of *Mount Laurel* that Regional Contribution Agreements violated, and which *Mount Laurel* has stood against for its entire life—the spirit that municipalities must care for those who live outside of them, and who cannot vocalize their zoning desires

V. CONCLUSION

Mount Laurel has morphed into a complex regulatory scheme. The courts have primarily found fault with COAH for not doing what it exists to do: take authority away from municipalities and manage their affordable housing obligations for them. But the burden to build affordable housing remains with municipalities. One should question whether such a scheme, founded in state constitutional law, is the most direct way of building affordable housing. If incentives were transferred directly to builders, as was done in Maryland and partially implemented in New Jersey through the Builder's Remedy, municipalities would be largely removed from the equation. So long as COAH retained zoning oversight to insure that municipalities were not acting to prevent construction of affordable units where demand for

¹⁸¹ Adam Gordon, Sept. 18, 2008 Interview; see BOGART, *supra* note 119, at 241;

those units exists, there would be no danger of reversion to the pre-*Mount Laurel* polarization of the state between rich suburbs and poor cities.¹⁸²

Municipalities' opposition to COAH will likely remain—if a municipality is only required to care for those already there, it will do everything in its power to maintain the status quo for its own citizens. This self-interest justifies the need for a regional government like COAH to pop the balloon of localism. COAH has largely done this in the revised Third Round Rules by providing municipalities with their obligations, rather than allowing them to calculate those obligations on their own. This has satisfied the Superior Court's concern that "each municipality controls its destiny."¹⁸³ But does such a gesture go far enough to combat the parochialism that prevents municipalities from broadening their definition of the "general welfare"? Growth Share has not caused municipalities to become more altruistic, or even more compliant; some might say it has only given municipalities more numbers to argue against. The litigation and abuse spawned by the Builder's Remedy has been traded, under Growth Share, for endless administrative review. COAH has the unenviable job of requiring municipalities to cooperate, while not demanding so much of them that its numbers become a joke, a statist goal never to be achieved in this lifetime, or a target for free-marketeers to complain about getting government "off their backs." COAH is likely a more competent steward of affordable housing policy than the courts (bound only to cases chosen to be litigated), or the lumbering, partisan legislature. COAH may be the most able to give deference to municipalities to define the land within their boundaries, and to make opportunities for all New Jersey residents to live in the town of their choice.

¹⁸² This is not to say that such polarization no longer exists, but most agree that the situation has improved since 1975.

¹⁸³ *Third Round*, 914 A.2d at 377.