Toothless: An Analysis of the Efficacy of New Jersey's Affordable Housing Policy

By: Sarah Fletcher

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As the first state to pass a comprehensive anti-discrimination statute after the Reconstruction Era, New Jersey has a demonstrated commitment to civil rights. This commitment, coupled with several characteristics unique to the "Garden State," has laid the groundwork for, what is arguably, the most contentious affordable housing debate in the country. New Jersey is the only state in which there is a judicially recognized constitutional mandate that all municipalities provide for a "realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing,"[1]however, enforcement of this mandate has proven to be nearly impossible.

This paper will take a broad approach to analyzing the specific issues currently plaguing the state of affordable housing in New Jersey. Part I provides historical context for the affordable housing debate, explaining how racially discriminatory federal government policies led to racial and economic segregation in New Jersey and across America today. Part II describes the legal framework which has developed over the last forty years to address the resulting affordable housing need in New Jersey, collectively known as the Mount Laurel Doctrine. Part III details the obstacles which have hindered the full implementation of the Mount Laurel Doctrine, including the current controversy over the promulgation of regulations to enforce the Doctrine. Taking a step back, Part IV explores how other states have approached the affordable housing issue, and considers which policies should be imported to New Jersey. Finally, in Part V, specific recommendations will be made for implementing the essence of the Mount Laurel Doctrine, while acknowledging the concerns of the Doctrine's many vocal opponents.

I. An Introduction to New Jersey and the Affordable Housing Problem

New Jersey is positioned between two of the biggest cities in the country – New York City and Philadelphia – so it is hardly surprising that New Jersey is also the most densely populated state in America.[2] At one time, a majority of the land in New Jersey was used for farming. Today, some farmland remains, but much of it has been replaced with residential and commercial development. Having been located between two big cities, New Jersey was primed for the boom of suburbanization that began in the earlier half of the twentieth century.

To address the national housing crisis resulting from the Great Depression, several programs administered by the newly created Federal Housing Administration were implemented to insure and refinance mortgages and encourage homeownership in suburban America.[3] Loans were generally granted to white applicants, and they were

to be used to purchase homes in white neighborhoods.[4] This practice, known as "red-lining," led to the onset of "white-flight" from the nation's cities.[5] During this time, sixty percent of the homes purchased in the United States were financed by these types of discriminatory loans.[6] The "success" of these and other discriminatory programs[7] came at the expense of the minority community. When white city-dwellers took advantage of government sponsored opportunities to move to the suburbs, they took with them a substantial portion of the cities' economic resources, leaving behind a racially segregated and economically disadvantaged population.[8]

Not until the passage of the Federal Fair Housing Act of 1968 were racially discriminatory housing practices officially prohibited and subject to punishment.[9] In the meantime, however, many cities were in desperate need of repair, prompting the next blow to poor urban minority populations: urban renewal. In Camden, New Jersey, the closest large city to Mount Laurel, talks of urban renewal began in the early 1960s. These plans included the demolition of dilapidated homes to be replaced by more expensive homes and industrial buildings.[10] This resulted in the displacement of many families – over one thousand in 1967 alone.[11] Having lost their homes, and unable to afford those newly constructed, many displaced families turned to local suburbs for housing, where exclusionary zoning laws became their next obstacle.[12]

II. New Jersey's Mount Laurel Doctrine and the Legislative Response

Southern Burlington County NAACP v. Township of Mount Laurel, or Mt. Laurel I as it came to be known, was brought as a challenge to the exclusionary zoning practices of the Township of Mount Laurel, New Jersey.[13] Under Mount Laurel's zoning laws, housing options for those with low and moderate income, a majority of which were racial minorities, were very limited.[14] For the residents of Mount Laurel's Springfield section, living conditions were very poor, and basic public services were severely lacking.[15] In an attempt to remedy the situation, a local action committee asked that the town's zoning laws be amended to allow for the construction of a new apartment complex but the town refused. So began the litigation of Mt. Laurel I.[16]

The decision in Mt. Laurel I was a win for affordable housing advocates, but it was a small one. The court invalidated the practice of exclusionary zoning in developing communities, and announced that the New Jersey Constitution compelled developing municipalities to make a variety of housing available to persons of all income levels in accordance with the current and predicted need in the region.[17] While it was fairly clear what the end result was to be, that municipalities would each contribute their fair share of new and rehabilitated affordable housing to their region, the court did not outline how that end result would be achieved.[18] Furthermore, the ruling did not impose, or even suggest, any penalties for lack of compliance.[19] As a result, the opinion was largely aspirational and little progress was made.[20]

Out of the impotence of the Mt. Laurel I, Mt. Laurel II[21] was born. In this second opinion, the court reaffirmed the constitutional mandate pronounced in Mt. Laurel I, that a municipality must meet their "fair share" of the affordable housing need in their region, by making "realistically possible an appropriate variety and choice of housing."[22] This time, however, the court found that each municipality's fair share, as well as the standard for what would be considered "realistically possible," must be

quantified using a definitive formula in order to clarify the specific obligation imposed.[23] Furthermore, the court found that all municipalities were subject to the obligation, not just those considered to be "developing."[24] Most importantly, the court provided guidance for how the obligation could be enforced and created a special litigation track to handle exclusionary zoning challenges.[25]

To enable the construction of affordable housing units, municipalities were directed to remove all impediments to the inclusion of affordable housing in their communities and to seek out methods of making the construction of affordable housing financially feasible, such as applying for federal subsidies and granting tax abatements for developers as an incentive to build affordable housing units.[26] The court also suggested using inclusive zoning practices like incentive zoning and mandatory set-asides.[27] Another suggestion was that municipalities zone certain areas specifically for mobile homes, which tend to be fairly affordable.[28] Finally, in the event that a municipality was unable to realistically provide the type of housing the court required, so long as the municipality provided the most inexpensive housing it reasonably could, it would be deemed compliant.[29]

To combat the lack of municipal compliance with Mt. Laurel I, the court created judicial remedies to compel compliance.[30] As punishment for non-compliance, the municipality in violation would be subject to a builder's remedy.[31] The builder's remedy is still the main tool used today to encourage municipal compliance.[32] If a developer seeks municipal approval to build affordable housing and is denied, they can challenge the refusal in court.[33] Once the case is brought before the court, the defending municipality can be compelled to grant the developer permission to build the proposed units.[34] The court can also order the non-compliant municipality to eliminate or rewrite their zoning ordinances, require the adoption of specific policies dictated by the court, and halt all active projects until the municipality's affordable housing obligation is met.[35] However, the court has no opportunity to intervene unless the developer invokes the builder's remedy.[36]

If they had so desired, perhaps the Mt. Laurel II court could have taken a more aggressive approach to enforcing the municipal obligation, however, the cries condemning judicial activism would have been much louder than they already were. Instead the court called on the state legislature to take action, believing that the type of lawmaking required was typically not for the courts to be engaged in.[37] It was only begrudgingly that the court's approach was as aggressive as it was. Finding that little action had been taken to enforce the municipal obligation in the years since Mt. Laurel I, the court determined that judicial intervention was necessary, at least until the legislature adopted its own rules.[38] The legislative response was the Fair Housing Act of 1985 (FHA), which adapted the principles of Mt. Laurel I and II into statutory law and created the Council on Affordable Housing (COAH) to handle administration of the law.[39]

Section 307 of the FHA delineates the duties COAH is to perform, which include, 1) identifying state housing regions; 2) estimating the future state and regional

affordable housing need; 3) promulgating rules which will guide municipalities in determining both their present and future affordable housing need, as well as their capacity for new development; 4) estimating future state and regional population and household composition; and 5) if they so choose, placing a limit on the number of units a municipality is allocated as its fair share of the regional need.[40] The regulations COAH promulgates must be in furtherance of these duties, and within the limits of their authority as granted by the FHA.[41] To date, COAH has released three "rounds" of rules, each with a specified date of expiration in order to facilitate reevaluation of the formula used to calculate municipal obligations in light of new data.[42] As will be described below, this periodic review has tended to be more problematic than useful.[43] Each municipality can be insulted from the builder's remedy by receiving certification from COAH that the municipality is in compliance with the current regulations.[44] To petition for certification, a municipality must adopt and submit a Fair Share Plan, demonstrating that the municipality has a proper and realistic plan in place to meet their affordable housing obligation.[45] If granted certification, the municipality is insulated from the builder's remedy for up to ten years.[46] To alleviate the congestion caused in the courts by an abundance of affordable housing litigation, the FHA also granted COAH jurisdiction over all builder's remedy cases, although litigants are permitted to appeal COAH's decisions to the state appellate court.[47]

In upholding the constitutionality of the FHA and its creation of COAH, the court found that both were a "valid method of creating a realistic opportunity" to meet affordable housing needs.[48] Writing for the majority, Justice Wilentz optimistically proclaimed in 1986, that,

> [i]nstead of depending on chance -- the chance that a builder will sue – the location and extent of lower income housing will depend on sound, comprehensive statewide planning, developed by the Council and aided by the State Development and Redevelopment Plan . . . to be prepared by the newly formed State Planning Commission.[49]

While this has proven to be true in some respects, the efficacy of the FHA and COAH has been severely reduced by an endless slew of litigation, as well as generally poor decision-making by each branch of government in New Jersey, especially in the last decade.

III. Obstacles to COAH's Effective Enforcement of the Mount Laurel Doctrine

The first and second round rules promulgated by COAH were very similar to the plan outlined in Mt. Laurel II.[50] The methodology used to calculate the fair share obligation assigned to each municipality included three factors: 1) present need; 2) prospective need; and 3) allocated need.[51] Present need was a calculation of the "total number of deficient housing units occupied by low or moderate income households."[52] To determine whether a unit was deficient, COAH considered the age of the home and available amenities as well as the number of people occupying

it.[53] The calculation of prospective need was based on the expected growth of the municipality as laid out in municipal development plans, real estate sales and economic projections.[54] In addition to the present and prospective need of the municipality, the final municipal obligation also included allocated need, which was the municipality's fair share of the excess regional need.[55] Cities tended to have large numbers of deficient housing, so a portion of the present and prospective need of these overburdened cities would be allocated to other municipalities within the region.[56] The number of units allocated to a municipality depended on factors like the municipality's current and projected employment figures, wealth and the percentage of the municipality that fell within a growth area, as well as "secondary sources" of need like demolitions, and other market forces.[57]

The second round methodology was very similar to the first round but with some notable change. The second round promulgation included the implementation of a credit system in which municipalities would receive credits for the construction of affordable housing, for meeting municipal obligations, and for building rental units.[58] The second round also introduced adjustments of municipal obligations for certain challenges such as lack of access to water and sewage.[59] Additionally, the Second Round Rules declared that affordable housing with age restrictions could satisfy up to one quarter of a municipality's obligation.[60] These changes appear to have been aimed more towards reducing the burden on municipalities of fair share obligations, than increasing the state's affordable housing stock.

The second round rules expired in 2004, the same year that the first version of the third round rules was promulgated.[61] The first third round promulgation was intended to be in effect until 2014, and COAH has so far failed to promulgate rules which have been able to survive litigation.[62] This first promulgation proposed a new calculation formula.[63] The new formula consisted of three factors: 1) the rehabilitation share; 2) the unanswered previous obligation; and 3) the growth share.[64] The rehabilitation share was similar to the present need factor of the first and second round rules.[65] The unanswered obligation was the number of units from 1987-1999 that the municipality was obligated to provide, but failed to.[66] The third factor, growth share, was the cause of the eventual invalidation of the entirety of the third round promulgation.[67] Under the growth share methodology, statewide employment figures and the growth of the particular municipality are considered, as opposed to the regional figures from the first and second round rules.[68] Following the invalidation of several provisions of the third round rules, COAH was given six months for revision to conform the rules to the FHA.[69] After two extensions, new rules were proposed in 2008 and later amended in response to numerous complaints.[70] However, even with these new amendments, litigation continued.[71] In 2010, an appellate panel invalidated several provisions of the new rules, giving COAH another five months to promulgate new rules consistent with the First and Second Round Rules.[72] Intending to appeal the decision to the New Jersey Supreme Court, COAH unsuccessfully applied for a stay from the Appellate Division, and then requested leave from the Supreme Court to apply for a stay, arguing that the Supreme Court may reverse the Appellate decision, so there was no sense in wasting time and money to repromulgate the rules before knowing how the

Supreme Court was going to rule.[73] While the request was pending, Fair Share Housing Center persuaded the Appellate Court to compel COAH to comply with their ruling, and implemented a reporting requirement so they could monitor COAH's compliance.[74] The very next day, however, the Supreme Court granted the stay and accepted the case for review.[75] After ten years without permissible rules for calculating municipal fair share obligations, the New Jersey Supreme Court once again invalidated the third round rules, in their entirety, specifically taking issue with the growth share calculation, finding it to be inseverable from the remainder of the rules.[76]

Under the growth share approach, COAH attempted to allocate affordable housing obligations based on the actual growth of the municipality, as opposed to the previous methods which based allocations on predicted growth.[77] The growth share methodology required that one unit of affordable housing be constructed for every eight market-rate residential units constructed, and one unit of affordable housing for every twenty five jobs created.[78] This approach is generally favored by municipalities because it assigns obligation based on actual growth in the municipality, as opposed to projected growth, which is not always accurately calculated and may result in a larger fair share obligation than a municipality can realistically meet. In practice, however, growth share can work to discourage development and make it impossible for a municipality to plan for future construction because there is no way to accurately predict what the future obligation will be.[79] Affordable housing advocates oppose growth share, as does the New Jersey Supreme Court, because a municipality that wishes to avoid incurring affordable housing obligations can do so simply by avoiding development.[80] The court also found that the growth share factor was inconsistent with Mount Laurel II because it considered statewide need, not regional need as required by Mount Laurel I, and also because it did not provide for a way to calculate a firm obligation in relation to future need since the obligation number was to be periodically adjusted based on actual development.[81] The court emphasized that the legislature is free to develop new techniques to determine municipal obligation but those techniques must comply with the Mt. Laurel holdings, and COAH especially does not have the authority to rewrite the FHA by changing the methodology for calculating need.[82] The court invalidated the third round rules, and gave COAH five months for repromulgation.[83]

As COAH continued to battle in court, Governor Chris Christie took office in 2011, and immediately attempted to abolish COAH through Executive Order, intending to pass administration of the FHA to an existing state agency.[84] Christi's negative stance on affordable housing policy is largely based on his preference for local autonomy, or home rule. Many home rule proponents feel that the Mount Laurel Doctrine forces municipalities to change the character of their communities against their wishes. To this argument an affordable housing advocate may respond that such communities are often the product of immoral government policies which led to the creation of an artificial environment whose continued existence has perpetuated unnecessary inequality in the State.

Since Christie's announcement, the Council members have rarely convened, resulting in statewide delays in construction projects, particularly detrimental in the wake of Hurricane Sandy which severely impacted affordable housing stock along the coast of Southern New Jersey.[85] Before signing the Order, Christie vetoed a plan passed by the legislature to abolish COAH because he felt it was too burdensome on local power.[86] In the summer of 2013, the New Jersey Supreme Court found that Christie did not have the power to abolish COAH without the approval of the state legislature.[87] Both the legislative and executive branches have made clear that they are not satisfied with the current system for enforcing affordable housing obligations. For now, COAH still exists, despite its reduced activity, but its days may be numbered.[88] So long as the current text of the FHA remains in effect, the obligation to make affordable housing available in each municipality must be adhered to, however it is unclear how that will be done in the future.

COAH released a proposal for what would be the third promulgation of the third round rules in April 2014. Under this proposal, growth share would be replaced with "fair share of prospective need."[89] Fair share of prospective need is a "projection of low and moderate housing needs in a municipality based on development and growth that is reasonably likely to occur in the region or municipality . . . and includes the reductions and limits set forth . . ." in the proposed accompanying procedural rules, and also includes "reductions for caps and Buildable limits."[90] This new formula seems to address the Supreme Court's concerns regarding the unpredictable nature of the growth share calculation, as well as the potential for discouraging municipal growth. However, the rules proposed raised some other concerns. As the court made clear in each of the prior decisions invalidating third round rules, COAH cannot act beyond the authority it has been granted by the FHA. The recently proposed rules resolved some of the issues of overreaching of authority, but not all.

The recently proposed third round rules include a one thousand unit cap on municipal obligation. This reduction is take nearly word-for-word from the FHA which reads,

> No municipality shall be required to address a fair share *of housing units affordable to households with a gross household income of less than 80% of the median gross household income* beyond 1,000 units within ten years from the grant of substantive certification, unless it is demonstrated, following objection by an interested party and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within that ten-year period.[91]

The language in the proposed third round rules is identical, except it excludes the phrase "of housing units affordable to households with a gross household income of less than 80% of the median gross household income."[92] This simple omission changes a 1,000 unit cap on low-income housing obligation, to a 1,000 unit cap on low and moderate income housing, substantially reducing the number of affordable units

each municipality is responsible for. This omission is especially problematic in light of the *Calton Homes* decision in 1990.[93] *Calton Homes* challenged, in part, the 1,000 unit cap on municipal obligation.[94] At the time *Calton* was decided, the text of the FHA, like the recently proposed rules, did not include, "of housing units affordable to households with a gross household income of less than 80% of the median gross household income."[95] The court ultimately held that the 1,000 unit cap was "arbitrary and unreasonable."[96] In reaction to the *Calton* ruling, the legislature amended the FHA to apply the 1,000 unit limit to only low-income housing.[97] By excluding this language in the proposed Rules, COAH is exceeding their authority as granted by the FHA because they are returning to a policy that the FHA specifically rejected, and the court invalidated. The amended language of the FHA does not permit a limit on the aggregate affordable housing unit obligation, but rather it addresses the inclusion of housing specifically for low, not moderate, income households. The language COAH chose places a limit on the aggregate obligation amount, and is not authorized by the FHA. This is just one reason COAH wound have wound up right back in court if they had chosen to adopt the proposed rules as drafted. It appears that the clause could be considered severable from the remainder of the rules, however, these rules were ultimately rejected so the point is moot, unless the same language appears in the fourth attempt at promulgation.

Another potential issue with the now-rescinded proposed third round rules was the compliance credits provision. Compliance credits are a reduction of a municipal obligation based on the municipality's compliance with their prior round obligation.[98] While invalidating the previous promulgation of third round rules, the Appellate Court found the compliance credits provision to be problematic because it offered credits for units which were planned but not constructed, and it failed to further public policy or assist municipalities in complying with their constitutional obligation.[99] To this point, the Supreme Court announced that they will "reserve judgment on what COAH may choose to do in its revamped rules and will review those judgments on the record then presented if the agency's choice is challenged. For now, [the court] express[es] no opinion on the Appellate Division's assessment of that issue."[100] The recently proposed requirements for compliance credits are a vast improvement from the previous version. Under the proposed system, municipalities are required to have "substantially complied with the terms of any prior round substantive certification and . . . actually created a substantial percentage of the new units that were part of the municipal 1987-1999 housing obligation and its 1999-2014 prior obligation."[101] COAH appears to be attempting to balance the need to facilitate compliance with the constitutional obligation as defined by the Mt. Laurel Doctrine, and limiting the burden on municipalities. Inclusion of the "substantial" requirement prevents the situation the Appellate Court feared – "COAH providing credits to municipalities for rental units yet to be constructed more than one decade after the prior round."[102] This change, in theory, should work to encourage construction of affordable housing, while lessening the burden on municipalities that have made a meaningful effort to comply with their obligation. However, if history is any indication, it is quite likely that this provision would be challenged if adopted by COAH, despite the benefits of its inclusion, and the likelihood that the challenge will fail.[103]

After a contentious public hearing and what was probably just as hostile of a public comment period, COAH has decided to reject their third proposal for third round rules, taking them into year eleven of no clear or current affordable housing regulations. As a result, COAH has failed to meet yet another unenforceable Supreme Court deadline. In the interim, developers have looked to the regulations used by the New Jersey Housing and Mortgage Finance Agency (HMFA) for guidance. This has filled in some of the gap left by the inefficient enforcement of COAH obligations by setting forth rules about affordable housing development that developers must follow in order to receive state assistance. This does not address the problem of municipal compliance, however. The HMFA can encourage developers to build affordable housing units, but generally cannot compel municipalities to comply with affordable housing obligations, which can easily result in a disproportionate distribution of affordable housing throughout the state. Furthermore, for municipalities who would actually like to comply with affordable housing obligations it is difficult to determine exactly what is required of them in order to be able to take advantage of the builder's remedy incentive.

IV. A Look at Inclusionary Zoning Policies Outside of New Jersey.

According to the latest data reported by COAH, released on April 13, 2011, 314 out of New Jersey's 565 municipalities have petitioned for certification under the now-invalidated third round rules.[104] This is an improvement from the 292 petitioning municipalities under the second round rules.[105] It is unclear how many municipalities petitioned for certification under the first round rules, but 161 were ultimately certified.[106] This is evidence that the Mount Laurel Doctrine and the legislative response to the Doctrine have not been entirely ineffective. That being said, there are clear areas where the New Jersey affordable housing laws can be improved.

The practice of inclusionary zoning is not unique to New Jersey. In fact, several states have developed affordable housing laws which require the inclusion of affordable housing. The first states to experiment with inclusionary zoning were Virginia and Maryland.[107] In Virginia, the program was initially adopted at the county level but in 1973, the Virginia Supreme Court found the program to be in violation of State law.[108] However, inclusionary zoning practices were later adopted by the State, and are still in effect today.[109] Massachusetts also has a significant inclusionary zoning program which offers an affirmative remedy for developers which is similar to the builder's remedy in New Jersey.[110] California, however, is the only state that uses inclusionary zoning as a "significant element in the provision of affordable housing on a statewide level."[111]

The most significant difference between inclusionary zoning policies in California and New Jersey is the deference given to local governments. In New Jersey, COAH sets the standards and policies that are to be implemented statewide, as mandated by the state legislature and judiciary.[112] In California, municipal obligations are determined by a regional council of governments instead of by a statewide agency like New Jersey's COAH.[113] This regional approach, coupled with the absence of the

judicial and legislative mandate found in New Jersey, has allowed for much greater flexibility in policy choices.[114] This flexibility has allowed California to adjust its affordable housing policies as new circumstances arise and new knowledge is obtained.[115] COAH, on the other hand, has continuously attempted, and failed, to promulgate acceptable rules to address changing circumstances and knowledge.[116] The New Jersey Supreme Court has continually emphasized that COAH is free to adopt remedies which were not outlined in Mt. Laurel I or II, and has even gone so far as to suggest that changes are necessary in light of newly available information.[117] However, each change COAH has attempted to make has been invalidated by the judiciary.[118] It seems that the only way COAH will be able to make any meaningful adjustments in the municipal obligation formula is by amending the FHA to give COAH greater flexibility.

V. Conclusion and Recommendation

The specificity with which the FHA describes COAH's duties and authority severely hinders the effectiveness of the agency. Even without the extensive political turmoil, COAH would still be unable to promulgate rules which would satisfy the requirements of the FHA and Mount Laurel I and II. The handling of growth share is a perfect example of this. Growth share is a program advocated for by many affordable housing scholars, especially the late Professor John M. Payne.[119] Under the growth share approach, municipalities are responsible for building affordable housing based on their actual growth, instead of their projected growth.[120] As discussed above, this methodology would lower the burden on municipalities. One can reasonably conclude that if municipalities feel that they are being treated fairly, they will be more likely to voluntarily comply with the constitutional mandate to provide affordable housing. However, because the State Supreme Court has decided that growth share does not comply with the FHA, this is a moot point.[121]

Another problem with the FHA is the lack of either an enforceable compliance provision, or incentives sufficient to compel voluntary municipal compliance. The current policies are both under and overly restrictive on municipalities. In order to accomplish Mount Laurel's lofty goals, municipal compliance must be either forced or properly encouraged. Clearly, compliance is not mandated by the FHA, and the authoritative nature of the Doctrine often works to turn municipalities against the inclusion of affordable housing. While this is a problem that can be explained fairly simply, solving it is not as clear cut. One approach is to include more appealing incentive programs. The builder's remedy is a good starting point, but it does not appear to have gone far enough to incentivize the creation of affordable housing. Another approach, perhaps to be used in addition to incentive programs, is to implement a system of municipal ownership of affordable housing policy, like that used in California.[122] Such a system could lead to great improvement in compliance because municipalities themselves could have great influence over the rules and could more easily have their specific needs and concerns addressed. Furthermore, municipal government officials are much more accessible to their constituents, and therefore may be more heavily influenced by calls for better housing options. Surely, this is a bit of a

double edged sword, since it is not difficult to imagine that municipally divined regulations, particularly those where the idea of home rule is most cherished, would be far less demanding resulting in the creating of fewer affordable units than could theoretically be created under the current system. However, because of all the political jockeying, the Doctrine has not been realized so new approaches should at least be considered. Again, the FHA must first be amended before any of these changes can happen.

There is no shortage of creative solutions to the affordable housing problem. That is simply not where the problem lies. Ultimately, nothing will change for the better until the heavily politicized nature of affordable housing policy in New Jersey is substantially reigned in. Every branch of New Jersey government has openly recognized the dire state of the Mount Laurel Doctrine. While each branch, and indeed each political party, has their own list of criticisms, there is a common view that something must be done. The judiciary took matters into their own hands in Mount Laurel I, and unintentionally created an unworkable situation. They have somewhat relinquished control over policy making on this issue, but because of the standards they have established, it has been nearly impossible for the legislature and the executive branch to pick up where the judiciary left off. Furthermore, the court compelled the legislature to legislate on an issue they did not view with the same urgency as at the court did, evidenced by legislative inaction up until there was no other choice. Both the legislature and the governor agree that COAH cannot do the job it was created to do, although neither acknowledges the role they have had in this failure. Compounding all of these challenges is the impression of impropriety given by COAH and the governor's office. One of the major controversies to come out of COAH latest proposed rules, was the fact that the text of the rules voted upon by Council members differed from that of the rules subsequently published in the New Jersey Register.[123] This became a flash point at the public hearing on these proposed rules when the Counsel refused to explain the reasoning behind the changes, and the official whom authorized them. Giving people a reason to suspect political corruption in involved, is not the way to win support for a controversial policy. Unfortunately, the only way to solve this aspect of the affordable housing problem is to elect political leaders that will understand the importance of placing the efficacy of affordable housing policy above the political gains or losses to be had by implementing effective policy. One can dream.

Many great minds have put years of work into divining a successful solution to the affordable housing problem in New Jersey, however a complete solution has yet to be found. So long as political concerns continue to have an undue influence over the creation and implementation of affordable housing policy it is likely that litigation over these policies will continue. The latest promulgation of the third round rules is an improvement over the prior round three promulgations, but since it has been rejected by COAH, no measurable progress has really been made. New Jersey's municipalities have been without reliable guidance and protection for many years now, and as a result, the constitutional obligation that municipalities afford a "realistic opportunity for the construction . . . [of] low and moderate income housing," has been made needlessly more burdensome. If there is to be meaningful reform, the Supreme Court has made

clear that it must come from the legislature. It took two groundbreaking opinions to get the legislature to respond by creating the FHA, and it looks like it will take much more to convince the legislature to amend the FHA to provide COAH, or some other administrative body, with a real opportunity to create intelligent and efficient affordable housing policy that all New Jerseyans can benefit from.

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[1] S. Burlington County NAACP v. Mt. Laurel, 456 A.2d 390, 413 (N.J. 1983) [hereinafter Mt. Laurel II]).

[2] Population Density Ranking by U.S. State (2010), City-Data.com, http://www.city-data.com/forum/general-u-s/1417982-u-s-states-ranked-population-density.html (last visited July 29, 2014).

[3] Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 219 (Oxford U. ed., 1985).

[4] *Id.*

[5] *Id.* at 70.

[6] *Id.*

[7] Florence W. Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IA. L. REV. 479, 492 (1995).

[8] 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 (1998).

[9] *Id.* at 107.

[10] David L. Kirp, et al. Our Town: Race, Housing, and the Soul of Suburbia 28-29 (Rutgers U. Press ed. 1995).

[11] *See id*.

[12] *See id.*

[13] 336 A.2d 713 (N.J. 1975) [hereinafter Mt. Laurel I].

[14] See Kirp, supra note 11. Interestingly, many of the African American residents of Mount Laurel affected by the exclusionary zoning laws, were also descendants of freed

and escaped slaves who settled in Mount Laurel when it was one of New Jersey's Underground Railroad Communities. New Jersey Historical Commission, New Jersey's Underground Railroad Heritage: "Steal Away, Steal Away…," A Guide to the Underground Railroad in New Jersey
3, http://slic.njstatelib.org/slic_files/digidocs/h673/h6732002.pdf.

[15] *See* Kirp, *supra* note 10, at 48.

[16] *See* Kirp, *supra* note 10, at 57

[17] Mt. Laurel I, 336 A.2d at 713

[18] *Id.*

[19] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d 893, 898 (N.J. 2013) (discussing the need for a judicially imposed remedy in the Mt. Laurel II opinion).

[20] *Id.*

[21] Mt. Laurel II, 456 A.2d at 390.

[22] Mt. Laurel I, 336 A.2d at 724.

[23] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 898.

[24] *Id.* at 899.

[25] *Id.*

[26] Mt. Laurel II, 456 A.2d at 442

[27] Id. at 445. Incentive zoning provides developers with rewards such as permission to build more units on a piece of property than it is zoned for. Id. For the purposes of this paper, a mandatory set-aside is a predetermined number of units to be used specifically for affordable housing. Id. at 446.

[28] *Id.* at 450

[29] *Id.* at 451

[30] Mt. Laurel II, 456 A.2d at 452-59.

[31] *Id.* at 411.

[32] In re Plan for the Abolition of the Council on Affordable Housing, 70 A.3d 559 (N.J. 2013).

[33] Mt. Laurel II, 456 A.2d at 411.

[34] N.J.S.A. 52:27D-313.

[35] Mt. Laurel II, 456 A.2d at 453-55.

[36] *Id.* at 452-53.

[37] *Id.* at 390

[38] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 899

[39] N.J.S.A. § 52:27D-301 to 329.19.

[40] N.J. S.A. § 52:27D-307.7(a)-(e).

[41] N.J.S.A. § 52:27D-302.

[42] In re Adoption of N.J.A.C. 5:94 & 5:95 By New Jersey Council On Affordable Housing, 914

[43] *See infra* Part III.

[44] N.J.A.C. § 52:27D-313.

[45] *Id.*

[46] *Id.*

[47] N.J.S.A. § 52:27D-316(b).

[48] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 899.

[49] Hills Dev. Co. v. Bernards, 510 A.2d 621, 632 (N.J. 1986).

[50] *See generally*, In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 899-900.

[51] *See* N.J.A.C. § 5:92 (first round rules), *and* N.J.A.C. § 5:93 (second round rules).

[52] N.J.A.C. § 5:92-1.3.

[53] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 899-900.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] In re Adoption of N.J.A.C. 5:94 & 5:95 By New Jersey Council On Affordable Housing, 914 A.2d. at 361-62.

[58] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 900-01.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 901.

[63] *Id.*

[64] N.J.A.C. § 5:97.

[65] *Id.*

[66] *Id.*

[67] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 904 (Finding growth share inconsistent with the Mount Laurel Doctrine, the court invalidated all third round rules, "[b]ecause growth share is the backbone of the regulatory scheme adopted by COAH, [so] the regulations' validity rises or falls on whether the growth share approach adopted in the revised Third Round Rules is permissible.").

[68] *Id.* at 901.

[69] *Id.* at 902.

[70] *Id.* at 902-03.

[71] *Id.*

[72] *Id.*

[73] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 904.

[74] *Id.*

[75] *Id*.

[76] *See id.*

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

[78] N.J.A.C. § 5:94-1.1(d).

[79] *Id.*

[80] *Id.*

[81] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 893.

[82] *Id.*

[83] *Id.*

[84] In re Plan for the Abolition of the Council on Affordable Housing, 70 A.3d at 559 (discussing Christie's plan to reorganize COAH so that it was a division of the Department of Community Affairs (DCA), as opposed to its current status as "in not of" the DCA).

[85] Anthony Campisi, *Christie Blasts Judge After New Jersey Supreme Court Says He Can't Eliminate Housing Agency*, The Record, July 10, 2013.

[86] *Id*.

[87] *Id*.

[88] A.B. A-467, 216th Leg., Reg. Sess. (NJ 2014) (a bill currently before the NJ General Assembly which will abolish COAH if passed).

[89] N.J.A.C. § 5:99-2.4 (proposed Apr. 30, 2014).

[90] *Id*.

[91] N.J.S.A. § 52:27D-307e (emphasis added).

[92] *Id*.

[93] Calton Homes, Inc. v. Council on Affordable Housing, 582 A.2d 1024 (N.J. App. Div. 1990).

[94] *Id*. at 1030-31.

[95] In re Adoption of N.J.A.C. 5:94 & 5:95, 914 A.2d at 363.

[96] *Id*. at 1030.

[97] *Id*.

[98] N.J.A.C. § 5:97-3.17; N.J.A.C. § 5:99-3.5 (proposed on Apr. 30, 2014).

[99] In re Adoption of N.J.A.C. 5:96 & 5:97, 6 A.3d. at 467.

[100] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 917.

[101] N.J.A.C. § 5:99-3.5 (proposed on Apr. 30, 2014).

[102] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 903.

[103] The first promulgation of the Third Round Rules was met with the following unsuccessful challenges:

> that the "rehabilitation share" of a municipality's affordable housing obligation, sometimes also referred to as present need, should include "cost burdened" low- and moderate-income households that reside in standard housing and households that lack permanent housing or live in overcrowded housing; that COAH's methodology for identifying substandard housing was "arbitrary and unreasonable;" that the third round rules improperly eliminated the part of the first and second round methodologies that required reallocation of excess present need in poor urban municipalities to other municipalities in the region; that the use of regional contribution agreements to satisfy part of a municipality's affordable housing obligations violates the *Mount Laurel* doctrine and federal and state statutory provisions; that the allowance of bonus credits towards satisfaction of a municipality's affordable housing obligations unconstitutionally dilutes those obligations; and that the rule relating to vacant land adjustments violates the *Mount Laurel* doctrine and the FHA.

In re Adoption of N.J.A.C. 5:96 & 5:97, 6 A.3d. at 452-53.

[104] COAH Status and Information, Municipal Participation in the Third Round, *available at* http://www.nj.gov/dca/services/lps/hss/archive.html.

[105] COAH Status and Information, Municipal Participation in the Second Round, *available at* http://www.nj.gov/dca/services/lps/hss/archive.html.

[106] COAH Status and Information, Towns Certified in the First Round, *available* at http://www.nj.gov/dca/services/lps/hss/archive.html

[107] Nico Calavita et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 Housing Pol'y Debate 109, 111 (1997).

[108] Board of Supervisors v. De Groff Enterprises, Inc., 198 S.E.2d 600 (Va. 1973) (holding that inclusionary zoning laws were preempted by several other state laws).

[109] Office of Policy Development and Research, HUD, Expanding Housing Opportunities Through Inclusionary Zoning: Lessons From Two Counties 82 (2012).

[110] Peter Dreier, John Mollenkopf & Todd Swanstrom, Place Matters: Metropolitics for the Twenty-First Century 317 n. 45 (U. Press of KS ed. 2001).

[111] *See* Calavita, *supra* note 107, at 111.

[112] *See supra* part II.

[113] *See* Calavita, *supra* note 107, at 117.

[114] *See* Calavita, *supra* note 107, at 117.

[115] *See* Calavita, *supra* note 107, at 117.

[116] *See supra* part II.

[117] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 893.

[118] *See supra* part II.

[119] *See e.g.,* John Payne, *The Unfinished Business of Mount Laurel II*, Mount Laurel II at 25: The Unfinished Agenda of Fair Share Housing 5 (Timothy N. Castano & Dale Sattin eds., 2008).

[120] *Id.*

[121] In re Adoption of N.J.A.C. 5:96 & 5:97, 74 A.3d at 893; *See also supra* notes 70-72 and accompanying text.

[122] *See infra* note 112-17 and accompanying text.

[123] Brent Johnson, *Critics Blast Christie Administration's New NJ Affordable Housing Plan*, NJ.com (July 2, 2014, 6:31 PM), http://www.nj.com/politics/index.ssf/2014/07/critics_blast_christie_admi....