

Fair Share in Practice:
The Council on Affordable Housing and
the *Mount Laurel* Doctrine

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Every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.

--*Southern Burlington County NAACP v. Township of Mount Laurel (I)*, 336 A.2d 713 (1975), 174.

...[E]very municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families.

--*New Jersey Fair Housing Act*, N.J.S.A. 52:27D-302a (1985).

Table of Contents

INTRODUCTION	1
<i>MOUNT LAUREL I</i> AND THE CREATION OF THE DOCTRINE	2
REACTION TO THE DOCTRINE AND <i>MOUNT LAUREL II</i>.....	6
REACTION TO <i>MOUNT LAUREL II</i> AND THE LEGISLATIVE RESPONSE	8
REACTION TO THE FAIR HOUSING ACT AND <i>MOUNT LAUREL III</i>	13
THE COUNCIL ON AFFORDABLE HOUSING IN ACTION	16
CONCLUSION	24
CASES AND LEGISLATION.....	27
BIBLIOGRAPHY	29

Introduction

On March 24, 1975, after two trials and more than five years of legal proceedings, the Supreme Court of the State of New Jersey issued a landmark ruling that redefined the regulation of land use throughout the state. As a heavily suburbanized state with a strong tradition of home rule, many New Jersey municipalities had developed zoning ordinances that favored revenue-generating uses for the locality and discouraged or excluded affordable, multi-family housing—actions justified by the municipalities as promoting the general welfare of the township. In sweeping terms, the Court in *Southern Burlington County NAACP v. Township of Mount Laurel (I)*, 336 A.2d 713 (1975),¹ found these actions to violate state constitutional protections of substantive due process and equal protection, defining housing as a “basic human need” to which municipalities must affirmatively provide access for the betterment of the *public* general welfare through the police power of zoning. Because the power to zone was granted through state-enabling legislation, the Court also redefined municipal land use as an issue of *regional* concern, in which localities were required to provide for a “fair share” of the region’s housing needs within their borders.² Together, the directives embodied in this decision became known as the *Mount Laurel* Doctrine.

Thirty-five years later, the basic principles of the *Mount Laurel* Doctrine remain in force: New Jersey municipalities have a constitutional obligation to ensure fair-share access to affordable housing through their land-use regulations. As a bold and controversial issue, however, there has been vigorous debate over the methods by which this obligation should be enforced as well as varying interpretations of what this obligation truly means. The initial *Mount Laurel* decision did not quantify fair share and relied primarily on voluntary compliance, an arrangement that resulted in little

¹ This case is hereafter referred to as *Mount Laurel I*.

² *Mount Laurel I*, 178-180.

affordable housing actually being built.³ In 1983, the New Jersey Supreme Court returned to the issue in *Southern Burlington County NAACP v. Township of Mount Laurel (II)*, 456 A.2d 390, expressing frustration at municipal inaction and creating a detailed judicial enforcement system that would “put some steel into that doctrine.”⁴ After this ruling, the New Jersey Legislature was driven to create a legislative alternative to judicial remedies by passing the New Jersey Fair Housing Act in 1985, which transferred responsibility for the *Mount Laurel* Doctrine to the newly created Council on Affordable Housing (COAH).⁵

It is this administrative framework—which has survived to the present day—that is the subject of this paper. As a creation of the Legislature, it is an inherently political solution to a politically volatile issue, with leadership that is directly accountable to elected officials. At the same time, it is also a legislative acknowledgement of a unique constitutional obligation, and the Courts that began this process have monitored and at times corrected its operation. This paper will explore the practical application of the *Mount Laurel* Doctrine through COAH: how it came to be, how it has worked, how it is shaped by outside forces, and what its future holds. It will discuss the evolution of the *Mount Laurel* Doctrine over time and how COAH’s implementation efforts relate to the goals articulated in the original landmark decision.

***Mount Laurel I* and the Creation of the Doctrine**

The original *Mount Laurel* case was one of several brought against New Jersey municipalities in the early 1970s that alleged municipal zoning ordinances to be exclusionary. In this specific case, the suit was initiated by a community organization known as the Springville Action

³ David Kirp, John P. Dwyer, and Larry A. Rosenthal, *Our Town: Race, Housing, and the Soul of Suburbia* (New Brunswick: Rutgers University Press, 1995), pp. 87.

⁴ *Southern Burlington County NAACP v. Township of Mount Laurel (II)* 456 A.2d 390 (1983), 2000. This case is hereafter referred to as *Mount Laurel II*.

⁵ N.J.S.A. 52:27D-301.

Council that was denied permission to build a 36-unit affordable housing development in Mount Laurel Township, mostly for long-term African-American residents who were living in substandard housing. The Mount Laurel zoning ordinance and municipal approval process included a variety of restrictions that made the development of affordable multi-family housing nearly impossible—in addition to residential zones that exclusively permitted single-family housing, these included features such as minimum lot sizes, amenity requirements, and large developer impact fees that significantly increased the cost of housing. The Township defended these ordinances as legitimate uses of the police power to promote the general welfare of the municipal budget, as this zoning ensured the development of uses that brought higher yields of tax revenue. For the plaintiffs, however, these ordinances were seen as discriminatory—a use of the police power to limit access to Township residency on the basis of economic class, and indirectly on the basis of race. The evidence of this discrimination was augmented by the fact that Mount Laurel was a *developing* township, in which high-yield population and industrial growth were encouraged while that of low- and moderate-income residents was not.⁶

While there was clear Court precedent to strike down exclusion on the basis of race,⁷ a series of previous cases in New Jersey had shown deference to the Legislature in land-use decisions and upheld zoning features that were potentially exclusionary: *Fisher v. Bedminster*, 93 A.2d 378 (1952) [upheld minimum lot size requirements]; *Lionshead Lake, Inc. v. Wayne*, 89 A.2d 693 (1953) [upheld minimum house sizes]; and *Vickers v. Gloucester Township*, 181 A.2d 129 (1962) [upheld a prohibition on mobile home parks].⁸ On the federal level, the Supreme Court had issued several key rulings upholding similar restrictions, including a requirement that public housing developments be approved by referendum in *James v. Valtierra*, 402 U.S. 137 (1971), and regulations that limited the

⁶ *Mount Laurel I*.

⁷ See the “Willingboro Case,” as cited by Kirp et. al. (1995), pp. 51.

⁸ Naomi Bailin Wish and Stephen Eisdorfer, “The Impact of *Mount Laurel* Initiatives: An Analysis of the Characteristics of Applicants and Occupants,” 27 Seton Hall L. Rev. 1268 (1996-1997) at p. 1268-1269.

number of unrelated residents in “single-family” homes in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).⁹ In fact, concurrent federal Supreme Court decisions significantly limited federal support for exclusionary zoning claims, particularly *Lindsey v. Normet*, 405 U.S. 56 (1972) [housing is not a fundamental right]; and *Warth v. Selden*, 422 U.S. 490 (1975) [exclusionary zoning plaintiffs lack federal standing].¹⁰ In neighboring Pennsylvania, however, the state Supreme Court followed a different trend, striking down a large minimum lot size requirement in *National Land & Investment Co., Inc. v. Kohn*, 215 A.2d 597 (Pa. 1965), and requiring municipalities to rezone for multi-family dwellings in *Appeal of Girsh*, 263 A.2d 395 (Pa. 1970).¹¹

In this context, advocates in *Mount Laurel I* and other cases brought suit on both federal and state constitutional grounds, claiming that access to affordable housing was an extension of fair housing guarantees granted under Title VIII of the 1968 Civil Rights Act and extended to the states by the 14th Amendment.¹² Because of exclusionary zoning techniques, these plaintiffs claimed that poor and minority residents were unfairly denied access to housing in these communities even when they had a long history of living there. Additionally, there was precedent in New Jersey to read state constitutional guarantees of equal protection and substantive due process as *more demanding* than those from the federal government, as well as precedent for the state Judiciary to impose directives on legislative and administrative bodies.¹³

The evidence presented in *Mount Laurel I* made apparent that the Township was openly hostile to both the construction of multi-family housing and the condition of the Township’s poor minority residents living in substandard housing.¹⁴ Drawing on the “general welfare” obligation of

⁹ Kirp et. al. (1995), pp. 80, 62.

¹⁰ Daniel R. Mandelker, John M. Payne, Peter W. Salsich, Jr., and Nancy E. Stroud, *Planning and Control of Land Development: Cases and Materials* (Newark, N.J.: Matthew Bender & Co., 7th ed. 2008), pp. 440.

¹¹ Mandelker et. al. (2008), pp. 459-460.

¹² 42 U.S.C. §§ 3601-3619 (1968). See John M. Payne, "Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?" *Yale Law & Policy Review*, Vol. 6, No. 2 (1988), at p. 361.

¹³ *Mount Laurel I*, 175, citing *Robinson v. Cahill*, 303 A.2d 273 (1973), 482, 490-492.

¹⁴ Kirp et. al. (1995), pp. 75.

zoning as a police power, the New Jersey Supreme Court found this arrangement to be an illegitimate exercise of this power, providing affirmative action for the benefit of some and to the detriment of others. While zoning for the purpose of generating municipal revenue can be legitimate, the Court held that it is not legitimate to do so when this limits housing opportunity.¹⁵ Next, citing *Robinson v. Cahill*, a landmark state education case, the Court defined housing as a “basic human need” that was inhibited by Mount Laurel’s zoning ordinance; in contrast, the Court argued that municipalities had an obligation to accommodate this need through zoning under a broader view of the general welfare. Further, since the power to zone is derived from state enabling legislation, and since housing needs often extend beyond municipal borders, the Court extended general welfare considerations to those *outside* the municipality to consider *regional* housing needs when crafting municipal zoning ordinances.¹⁶ Justice Hall summarized this new view of the general welfare, which he acknowledged to be a significant departure from the Court’s own precedent, when he wrote, “Municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate.”¹⁷

On these grounds, the *Mount Laurel* Doctrine was born, in which developing New Jersey municipalities were now obliged to provide for the regional general welfare through the use of their zoning powers, thereby providing a realistic opportunity for a fair share of the region’s housing needs to be built within their borders. If a municipality were to grow, the Doctrine proclaimed that it must be open for all in doing so. It is interesting to note that the Court did not confine the Doctrine’s focus to affordable housing alone—the location of that housing mattered also. The Court also chose not to specifically address the issue of racial discrimination, positioning the decision instead as an answer to economic discrimination. Perhaps most important, the Court based its decision entirely on state

¹⁵ *Mount Laurel I*, 185-6, citing *Gruber v. Mayor and Township Committee of Raritan Township*, 186 A.2d 489 (1962), 9-11.

¹⁶ *Mount Laurel I*, 177.

¹⁷ *Mount Laurel I*, 188.

constitutional grounds, which ultimately insulated the decision from review by the more conservative federal Supreme Court.¹⁸

Reaction to the Doctrine and *Mount Laurel II*

While the principles established in the *Mount Laurel* Doctrine may have been strong, the state Supreme Court did not include a strong enforcement mechanism in its decision to ensure these principles were realized. Additionally, the doctrine failed to establish clear standards or targets that municipalities should follow (such as quantifying a region’s “fair share,” defining a “developing municipality,” or identifying the appropriate boundaries of each region).¹⁹ Instead, municipalities were expected to voluntarily comply with the ruling, a decision that resulted in only token rezonings that yielded little if any affordable housing construction. Many commentators have described this as a politically wise move by the Court; since the Doctrine was already a significant departure from precedent, a more active approach might have over-extended the Court and exposed it to potent criticism.²⁰ Nevertheless, the Court was strongly criticized by municipalities, and it may be for this reason that the Court chose to step back from the *Mount Laurel* Doctrine in 1977 when it decided *Oakwood at Madison*, 371 A.2d 1192 (1977). In this case, the court declared that quantifying an appropriate “fair share” would be too difficult, too political, and ultimately inappropriate for the judiciary; it would instead be adequate for municipalities to act in “good faith” to allow affordable housing to be built.²¹

In an effort to compel enforcement of the *Mount Laurel* Doctrine, housing advocates and builders filed a series of cases in the state court system, which were ultimately bundled and heard by the state Supreme Court as *Mount Laurel II*. Under a new Chief Justice, Robert Wilentz, the Court

¹⁸ Payne (1988), at p. 362.

¹⁹ *Mount Laurel I*, 177-179.

²⁰ Kirp et. al. (1995), pp. 81.

²¹ *Oakwood at Madison*, 371 A.2d 1192 (1977), 1245.

issued a strongly-worded decision in this case that criticized municipalities for their inaction and created a detailed implementation and enforcement system for the Doctrine. Here, the Court cleared up an ambiguity of the *Mount Laurel* Doctrine by focusing it specifically on low- and moderate-income housing, ensuring that its effect would not be diluted by efforts to promote exclusively market-rate developments.²² It also extended the obligation to all municipalities within a state-designated growth area, thereby linking the Doctrine to a system of long-range land-use planning on the state level.²³ For implementation, the Court divided the state into regions and created a special three-judge panel that would quantify regional allocations of fair share housing need for each municipality, thereby invalidating the Court’s earlier decision in *Madison* that a numberless “good faith attempt” was adequate.²⁴ To incentivize the private market to build affordable housing, the “affirmative” nature of the Doctrine was defined as offering development bonuses, mandatory set-asides, and zoning to permit mobile homes. If a municipality cooperated by incorporating these features into its zoning codes, it would receive six years of amnesty from litigation. If municipalities were slow to enact these changes, however, the three-judge panel was authorized to hear and settle “builder’s remedy” lawsuits, through which developers or property owners would be granted zoning relief and project approval if they met a series of basic criteria.²⁵ In addition to these individual remedies, the consequences of overall noncompliance were quick and significant: 1.) A judicial order to rezone and include development incentives such as density bonuses; and 2.) An injunction of all development until the municipality rezones or affordable housing is built.²⁶

²² *Mount Laurel II*, 211.

²³ *Mount Laurel II*, 215.

²⁴ *Mount Laurel II*, 216-217.

²⁵ *Mount Laurel II*, 218. The criteria for receiving a builder’s remedy are as follows: 1.) Plaintiff has attempted, in good faith, to obtain relief without litigation; 2.) The proposed project includes an appropriate portion of low- and moderate-income housing; and 3.) The proposal conforms to sound zoning and planning concepts.

²⁶ *Mount Laurel II*, 278-279.

While the strong wording and extensive implementation system described above received the most attention from *Mount Laurel II*, particularly from opponents of the decision, perhaps more important was the Court's statement about its role in drafting this framework:

...[W]e agree, that the matter is better left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them...So while we have always preferred legislative to judicial action in this field, we shall continue -- until the Legislature acts -- to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine.²⁷

Here, the Supreme Court rightly anticipated the controversy that its decision would receive for performing functions under the Judiciary (policy development and implementation) that are normally performed by the legislative and executive branches. It also, however, included a direct entreaty to the Legislature to finally address the *Mount Laurel* Doctrine and create a legitimate implementation and enforcement system. This would in fact occur in direct response to *Mount Laurel II*, although the legislators doing so would rarely credit the Court for the impact of its decision.

Reaction to *Mount Laurel II* and the Legislative Response

The vigorous compliance and enforcement system created by the Court in *Mount Laurel II* was viewed with alarm by both municipalities and the Legislature, as builders quickly filed plans to build in townships that had previously limited development; more than 100 developers and landowners filed builder's remedy suits within two years of *Mount Laurel II*. While few of these cases resulted in actual remedies being awarded, they did induce many townships to settle with developers rather than risk a less favorable outcome in court.²⁸ Thus, as a direct result of *Mount Laurel II*, developers and townships entered into agreements to build housing. In some cases, this system is said to have achieved innovative compromise solutions that balanced affordable housing construction with the desire to limit overdevelopment, while in others it led to exploitation by

²⁷ *Mount Laurel II*, 212-213.

²⁸ Alan Mallach, "From Mount Laurel to Molehill, Blueprint for Delay," 15 N.J. Rptr. 21 (Oct. 1985), at p. 21-22.

builders.²⁹ While by definition these development schemes included affordable housing, it is useful to note that the affordable component was often moderate-income housing—there was no explicit requirement that low-income housing be constructed, and moderate-income housing was naturally less costly for private developers.³⁰ The three-judge panel created under *Mount Laurel II* used a diverse team of professional planners to develop projections of housing need and determine each municipality's fair share; the resulting allocations were considerable for many municipalities that were accustomed to restricting development, and this helped to raise further concern and opposition to the system.³¹

It is easy to understand how many elected officials representing suburban constituencies saw these developments as a threat to the status quo of their district as well as an unlawful encroachment on their traditional rights of home rule. The system established by *Mount Laurel II* enabled developers to potentially bypass development restrictions that municipalities had successfully wielded since *Mount Laurel I* and beforehand. Opposition to development, whether based on concern over ratables, community character, or prejudice against affordable housing, had a clear constituency for local politicians, while the beneficiaries of development were merely *potential* residents with little political support in a locality.³² The result of these factors was a strong political reaction against the *Mount Laurel* system to which both practical and drastic alternatives were proposed. On one side, the Legislature worked to craft an administrative solution that could implement the constitutional obligations of the *Mount Laurel* Doctrine in a way that suburban politicians and local governments would find more palatable. On the other, a dramatic push was made by suburban mayors and Republican state legislators to raise a federal constitutional claim against the *Mount Laurel* Doctrine and to pass a constitutional amendment repealing the *Mount Laurel* Decisions. In nearly all cases,

²⁹ Mallach (1985), at p. 22; Kirp et. al. (1995), pp. 103-107.

³⁰ Kirp et. al. (1995), pp. 105.

³¹ Kirp et. al. (1995), pp. 106-7.

³² Kirp et. al. (1995), pp. 114-115.

legislators, mayors, and the Governor openly and sometimes harshly criticized the Court for overstepping its bounds and framed their solution as a necessary check on judicial activism.³³

Considering the Court's clearly-articulated desire for a legislative solution to the Doctrine, it is disappointing but unsurprising that this rhetoric was so negative.

The primary legislative answer to *Mount Laurel II* was the New Jersey Fair Housing Act, which was introduced in committee on June 28, 1984, a year and a half after *Mount Laurel II* was decided. Concurrent to this legislative effort, which was primarily driven by Democrats, was an outspoken campaign by Republican mayors and legislators to challenge the *Mount Laurel* decisions in the federal court system or repeal them through an amendment to the state Constitution. While these efforts ultimately received little traction, they did have a strong effect on the tone of the debate and led to a series of legislative concessions that ultimately favored municipalities.³⁴ The Fair Housing Act called for the creation of an administrative agency known as the "Council on Affordable Housing" (COAH) to implement and enforce the *Mount Laurel* Doctrine. In the original bill, COAH assumed direct responsibility for calculating municipal fair-share requirements and monitoring for compliance, which would be judged through a housing plan submitted by the locality. Once the locality were deemed to be compliant, its housing plans were given significant protection from builder's remedy lawsuits by gaining a "presumption of validity," thus making them difficult to challenge in court. This provision would be further strengthened as the bill developed, whereby any challenge to an approved housing plan would have to demonstrate noncompliance with "clear and convincing evidence." The original bill also provided for a common means of funding affordable housing development, something that was absent in the developer-driven *Mount Laurel* system, through the establishment of an Affordable Housing Trust Fund. In an account of the evolution of the Fair Housing Act, housing advocate Alan Mallach describes this original bill as an attempt to strike a

³³ Kirp et. al. (1995), pp. 110-133; Mallach (1985), at p. 22-25.

³⁴ Kirp et. al. (1995), pp. 110-133; Mallach (1985), at p. 22-25.

balance between protecting municipal interests and creating a workable system to implement the *Mount Laurel* Doctrine.³⁵

Several months into the legislative process, a separate bill was proposed that would ultimately be integrated into the first. The primary feature of this bill was the establishment of Regional Contribution Agreements (RCAs); these would allow municipalities to buy-out a portion of their fair-share obligation by funding affordable housing construction in a nearby municipality.³⁶ Over time, RCAs would become a source of repeated controversy for COAH—one of the original goals of *Mount Laurel I* was the economic integration of suburban townships, and RCAs provided a means for townships to circumvent this goal by funding housing elsewhere. Indeed, the recipients of RCAs were often cash-strapped cities in which the poor and minorities were disproportionately represented.³⁷ Throughout the legislative process, RCAs gained considerable support from suburban lawmakers and the Republican governor, who used them to emphasize inner-city housing rehabilitation as an affordable housing strategy over new construction in the suburbs.³⁸ An additional feature of this second bill was an expanded timeframe for implementation, which allowed municipalities to phase in their affordable housing construction over 20 years.³⁹ This feature was a significant change from the *Mount Laurel II* court system, in which negotiated settlements with builders could lead to relatively quick building schedules.⁴⁰

In subsequent negotiations, the combined Fair Housing Act granted municipalities further concessions, directing COAH to set general guidelines for fair-share obligations while allowing mayors to determine their locality's ultimate housing requirement. Another modification allowed

³⁵ The initial bill was S. 2046 201st Sess. (N.J. 1985). For a detailed account, see Mallach (1985), at p. 23-26.

³⁶ S. 2334 201st Sess. (N.J. 1985); Mallach (1985), at p. 23.

³⁷ Payne (1988), at p. 373.

³⁸ Kirp et. al. (1995), pp. 123.

³⁹ Mallach (1985), at p. 24.

⁴⁰ The Court's decision in *Mount Laurel II* did allow for municipalities to meet their obligations over a phased schedule, although the intended timeframe was likely less than 20 years. "Trial courts shall have the discretion, under those circumstances, to moderate the impact of such housing by allowing even the present need to be phased in over a period of years. Such power, however, should be exercised sparingly." See *Mount Laurel II*, 219.

localities to further decrease their fair-share requirement by gaining credit for existing affordable housing within their borders. Finally, a 12-month moratorium on builder's remedy lawsuits was added to the bill before it was sent to the Governor for signature. While contemporary commentators had assumed this bill would receive the Governor's support, it was in fact returned to the Legislature by conditional veto with changes to strengthen the builder's remedy moratorium and provide additional means for municipalities to reduce their fair-share obligations. The final bill, which became law on July 2, 1985, included fair share reduction allowances for a variety of factors (such as historic sites, environmental conditions, and a lack of infrastructure) and also gave COAH the authority to institute a "fair-share cap" on municipalities at its discretion.⁴¹ Perhaps most notable of all, the final version of the bill made compliance with COAH voluntary—townships were offered the carrot of immunity from builder's lawsuits in exchange for compliance, while the lawsuit moratorium provided them with a year-long grace period before they could be prodded by any stick.⁴² The Council on Affordable Housing would consist of nine members appointed by the Governor and approved by the Senate, and it would be housed within the New Jersey Department of Consumer Affairs. If necessary, COAH's decisions could be overturned by the Legislature.⁴³

From nearly any vantage point, the ultimate structure of the New Jersey Fair Housing Act and COAH was considerably less demanding on municipalities than the system devised under *Mount Laurel II*. For many contemporary housing advocates, COAH represented a significant dilution of the *Mount Laurel* Doctrine, while for others it presented relief from a system that had overwhelmed many townships and was seen as an overextension of judicial authority. For a variety of reasons, the development directives included in the *Mount Laurel* Doctrine touched a particularly sensitive nerve for suburban constituencies, and the process that shaped the Fair Housing Act and COAH is

⁴¹ Mallach (1985), at p. 25.

⁴² Kirp et. al. (1995), pp. 127.

⁴³ Kirp et. al. (1995), pp. 155-161.

reflective of the influence of these constituencies in the legislative system. The Court in *Mount Laurel II* took pains to emphasize that the Legislature would be better suited to address the issue of fair-housing access while acknowledging “the enormous difficulty of achieving a political consensus.”⁴⁴ If one accepts the perspective of housing advocates that the Fair Housing Act strongly diluted the Doctrine, it would appear that the Legislature was in fact *less* well-suited to deal with controversial issues effectively. At the same time, the Fair Housing Act is a codification of the *Mount Laurel* Doctrine in some form, stating in its first full paragraph that all growing municipalities have a *constitutional obligation* to use their land use controls to provide a fair share of the region’s housing needs.⁴⁵ Over time, housing advocates would use this language to challenge COAH’s performance in the courts, arguing that its particular actions were not focused on meeting this standard. Just as the process that shaped COAH’s formation was political, its operation would ultimately be the same as well, with the nature of its directives closely following the goals of the New Jersey executive and legislative branches.

Reaction to the Fair Housing Act and *Mount Laurel III*

When the Fair Housing Act was passed, many municipalities were still in the process of negotiating settlements in the *Mount Laurel* court system. The passage of the Act effectively halted these negotiations, and many localities petitioned the courts to transfer their cases to COAH. When the courts refused, citing “manifest injustice,” the townships initiated a legal battle that would challenge the legitimacy of the Act in the New Jersey Supreme Court.⁴⁶ These township claims were bundled and decided collectively in *Hills Development Company v. Township of Bernards*, 510 A.2d 621 (1986), which strongly affirmed the Act’s constitutionality and ordered that pending *Mount*

⁴⁴ *Mount Laurel II*, 212.

⁴⁵ New Jersey Fair Housing Act, N.J.S.A. 52:27D-302,2a (1985).

⁴⁶ Kirp et. al. (1995), pp. 136.

Laurel cases be transferred to COAH. Referencing the Court’s stated desire for a legislative solution in *Mount Laurel II*, the Court described the Act as a framework with the potential to “assure a realistic opportunity for lower-income housing” if it “works in accordance with its expressed intent.”⁴⁷ In arguments presented to the Court, housing advocates challenged the constitutionality of the Act on the grounds that it would delay the provision of affordable housing, that the builder’s remedy moratorium was contrary to the decision in *Mount Laurel II*, and that COAH would not perform according to its stated intent. In response to this, the Court countered that the Act and COAH should be given a presumption of validity and constitutionality as per established precedent: “we must assume that the Council will pursue the vindication of the *Mount Laurel* obligation with determination and skill”; “particularly strong deference [is] owed to the Legislature relative to this extraordinary legislation...”⁴⁸ The Court argued that no set timetable was required for the *Mount Laurel* Doctrine to be implemented, and that the builder’s remedy was merely a proposed method for achieving an objective, not a requirement.⁴⁹ It also listed several features of the Fair Housing Act that were preferable to the *Mount Laurel II* judicial system: 1.) An administrative framework for implementation; 2.) Legitimacy in the form of approval by the legislative and executive branches; 3.) A dedicated funding source for affordable housing construction; 4.) The Act’s emphasis on voluntary compliance; and 5.) Incorporation of comprehensive planning with the State Development Guide Plan.⁵⁰ The Court concluded its opinion defending itself against criticisms of “activism,” arguing that its landmark decisions in *Mount Laurel I* and *Mount Laurel II* had incentivized the other branches of government into action, resulting in the legislative solution that the Court had always desired.⁵¹

⁴⁷ *Hills v. Township of Bernards*, 9-10.

⁴⁸ *Hills v. Township of Bernards*, 10, 24.

⁴⁹ *Hills v. Township of Bernards*, 41-42.

⁵⁰ *Hills v. Township of Bernards*, 48-50.

⁵¹ *Hills v. Township of Bernards*, 63-64.

In some ways, the Court’s decision in *Hills* is clearly consistent with its statements in *Mount Laurel II*. That opinion included “the strongest possible entreaty to the Legislature” to codify the *Mount Laurel* Doctrine and create an administrative framework for its implementation—when the Legislature did so, the Court approved accordingly.⁵² At the same time, the Fair Housing Act represents a distinct shift from a compulsory system (one with “steel,” in the form of builder’s remedy lawsuits) to a voluntary one with few means of compulsion. This shift is somewhat inconsistent with the decision in *Mount Laurel II*, and the Court’s support of it is questionable. Some critics have attributed *Hills* to a political retreat by the state Supreme Court, noting that political pressure may have specifically influenced Chief Justice Wilentz, who was due to face reappointment hearings soon after the *Hills* decision.⁵³

Overall, however, the Court’s assumption of validity for the Fair Housing Act appears reasonable; the Act as structured had the potential to implement the goals of the *Mount Laurel* Doctrine, and the test would be whether or not this potential were realized. The Court left open the possibility to challenge the Act and COAH in the future, and this would in fact be done.⁵⁴ In 1993, for example, the Court with *In Re Warren*, 622 A.2d 1257 (1993), struck down COAH regulations supporting large occupancy preferences, which allowed municipalities to set aside 50% of their affordable housing supply for existing residents.⁵⁵ In a recent landmark case, *In the Matter of the Adoption*, 914 A.2d 348 (2007), the Court struck down part of the methodology used by COAH to determine its fair-share guidelines while also affirming the constitutionality of Regional Contribution Agreements.⁵⁶ These cases demonstrate a resumption of the state Court’s more traditional role as a monitor rather than implementer of policy. While some advocates lamented the Court’s withdrawal

⁵² *Mount Laurel II*, 212-214.

⁵³ Kirp et. al. (1995), pp. 142-144.

⁵⁴ *Hills v. Township of Bernards*, 65.

⁵⁵ *In Re Petition for Substantive Certification Filed by the Township of Warren*, 622 A.2d 1257 (1993).

⁵⁶ *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing*, 914 A.2d 348 (2007).

from active enforcement of the *Mount Laurel* Doctrine, these cases also demonstrate that the Court's deference to COAH and the Legislature would not be absolute.

The Council on Affordable Housing in Action

Since 1985, the Council on Affordable Housing has provided local governments with an administrative framework through which to fulfill their *Mount Laurel* obligations. The Council's nine members include four elected officials, three representatives of the "public interest" (such as corporate officials and prominent residents), the state housing officer, and one representative of "builders' interests" (a developer).⁵⁷ COAH's members are appointed by the Governor and are subject to the approval of the Legislature, which creates the potential for elected officials to strongly shape the Council's direction. Initially, for example, the Council showed a bias for reducing municipal fair-share obligations, which reflected the prevailing goal of elected officials at the time. This can be seen in the statement of COAH's initial chairman, Arthur Kondrup, who urged localities to "Kick and scream. Fight for every adjustment you feel is appropriate."⁵⁸ In calculating fair-share obligations and certifying municipal plans, the Council has pursued strategies resulting in notable participation rates among municipalities and some achievements in housing production. Because the Council's membership includes no clear advocate for the interests of the poor, however, some have observed a bias in COAH's approved housing plans for moderate- over low-income housing.⁵⁹ David Kirp notes that this bias was enhanced by the long-term presence of Ara Hovnanian, a developer specializing in moderate-income affordable developments, as the builder's representative on the Council.⁶⁰ Alan Mallach, who spoke critically of the Fair Housing Act when it was first passed,

⁵⁷ Kirp et. al. (1995), pp. 155. Since the passage of the Fair Housing Act, the Council's eligible membership has been expanded to twelve, although several of those spots are currently unfilled due to the Council's uncertain future. See the Council on Affordable Housing website, <http://www.state.nj.us/dca/affiliates/coah/about/members.html>.

⁵⁸ Kirp et. al. (1995), pp. 154.

⁵⁹ Kirp et. al. (1995), pp. 155-159; Wish and Eisdorfer (1996-1997).

⁶⁰ Kirp et. al. (1995), pp. 155-159.

wrote approvingly in a 2004 article that COAH had received housing plans from 271 municipalities and produced or begun 29,000 units of affordable housing through the Year 2000. Additionally, Mallach also noted that 7,400 affordable units had been constructed or rehabilitated through RCAs and an additional 11,000 existing low-income units had been improved to code.⁶¹

Notable in this assessment is the variety of programs mentioned—the system established by *Mount Laurel II* was focused primarily on building new housing in the suburbs, while the Council has approached meeting *Mount Laurel* obligations through a mixture of new construction and rehabilitation efforts in both suburbs and urban areas. This reflects in part the strong desire of suburban localities and state elected officials to slow or limit development where possible, while also reflecting a policy shift away from the initial goal of economic suburban integration. Indeed, one study published in 1996 found that urban-suburban moves accounted for only 7% of all suburban residents in COAH-induced housing. Additionally, this study found that COAH-induced developments were not successful at promoting racial integration, a goal that was expressed by the original plaintiffs in *Mount Laurel I* but not officially adopted by the Court.⁶² The lack of resulting city-suburb movement and minority integration from COAH developments is attributed to a variety of factors: an acute need for affordable housing among existing residents, inadequate social and physical infrastructure to accommodate new residents, and the influence of RCAs.⁶³ As a counter-example to these trends, Fair Share Housing Development, Inc., a company run by one of the former plaintiff attorneys from the *Mount Laurel I* case, has developed a successful low-income suburban

⁶¹ Alan Mallach, "The Betrayal of Mount Laurel: Will New Jersey Get Away with Gutting its Landmark Fair Housing Legislation?" *Shelterforce Online* I. 134 (March-April 2004), <http://www.nhi.org/online/issues/134/mtlaurel.html>.

⁶² Wish and Eisdorfer (1996-1997), at p. 1302-1304.

⁶³ Payne (1988); Wish and Eisdorfer (1996-1997); Fair Share Housing Center, *Separate is Never Equal* (2008), <http://fairsharehousing.org/advocacy/bill-a-500/>.

housing development in Mount Laurel Township that includes comprehensive support services and a wait list of several years, proving that such a model is possible and a strong demand for it exists.⁶⁴

The most controversial aspect of COAH's operations has been its process for determining fair-share obligations. Under the Fair Housing Act, COAH is required to calculate regional housing needs every six years and provide guidelines to municipalities on how to calculate their fair-share obligation of this need. The agency performed this task for the first time in 1987, and the values it calculated were significantly lower than those calculated under the *Mount Laurel* judicial system. According to David Kirp, COAH estimated a total statewide need of 145,000 affordable units in 1987, in contrast to an estimated need of 240,000 units made by the *Mount Laurel* judges in 1984. For one specific municipality, this had the effect of reducing its fair-share obligation from 800 affordable units to 187.⁶⁵ Consultant planners who had represented both plaintiffs and defendants in *Mount Laurel II* determined the *Mount Laurel* figures, while the COAH figures were determined by an agency whose leaders publicly stated their desire to reduce fair-share obligations.⁶⁶ The quantitative difference between these projections is quite significant, and in light of these factors, it seems appropriate to view COAH's numbers critically.

If COAH's estimates undercount regional housing need, it may also be appropriate to re-evaluate its production numbers. Many evaluations of COAH's performance count housing units that have been "started" or are "in progress" as well as those constructed—as such, it is possible that both the Council and municipalities are crediting units that never reach completion. This theory is supported by a recent study of Regional Contribution Agreements, which found that receiving municipalities have not spent a significant proportion of their RCA funds, even though these funds

⁶⁴ Fair Share (2008).

⁶⁵ Kirp et. al. (1995), pp. 157-158.

⁶⁶ Kirp et. al. (1995), pp. 106-107, 154.

have been credited toward municipal housing obligations.⁶⁷ There is also evidence to show that COAH's reduction of fair-share obligations has underestimated actual need, resulting in an undersupply of affordable units. Wish and Eisdorfer have found this undersupply to be particularly pronounced in regions containing the state's largest urban areas, which also feature greater concentrations of poverty.⁶⁸ The lack of urban-suburban movement in COAH-induced housing may also be an indication of undersupply—COAH-induced suburban housing is largely consumed by local demand, leaving little room to accommodate greater regional demand. If this assumption were accurate, it would indicate that the COAH system is deficient in meeting the *Mount Laurel* obligation to accommodate regional housing needs. One analysis performed by John Payne estimates that COAH-induced housing production from 1985 – 2000 was roughly comparable to public housing production before 1985—a period in which there was a well-documented affordable housing shortage. Because government production in public housing decreased greatly after 1985 due to shifts in government policy, COAH essentially maintained the status quo of affordable housing supply in New Jersey, albeit with relatively more construction in suburban locations.⁶⁹

Many assessments of COAH's production numbers stop in the Year 2000. This is a result of disruptions to COAH's certification process that stemmed from its creation of a new methodology to calculate regional need, known as the Third Round calculations. In this case, it has been suggested that political pressures encouraged the Council to further reduce municipal obligations—both the Governor and the appointed Chair of COAH opposed affordable housing developments as mayors of suburban municipalities.⁷⁰ Because of the appointment of Governor Christine Todd Whitman to the Environmental Protection Agency in the Year 2001, official Third Round calculations were not

⁶⁷ Adam Gordon, "New Analysis of RCAs Shows Homes Not Built; Over \$50 Million Unspent," *Fair Share Housing Center Blog* (March 12, 2010), <http://fairsharehousing.org/blog/entry/analysis-of-rcas-oral-argument-in-league-of-municipalities-and-eo-appeals-o/>.

⁶⁸ Wish and Eisdorfer (1996-1997), at p. 1287.

⁶⁹ John M. Payne, "Fairly Sharing Affordable Housing Obligations: The *Mount Laurel* Matrix," 22 W. New Eng. L. Rev. 365 (2000-2001), at p. 367.

⁷⁰ Mallach (2004).

established. In 2001, Jim McGreevy was elected Governor and a new chair of COAH was appointed, but it was not until 2003 that new rules were proposed. Under this new calculation system, significantly lower levels of housing need were determined under the assumption that affordable housing had actually been widely available through filtering, the process by which homes become available to lower-income households as the housing stock ages.⁷¹ Based on this new methodology, localities were then given credit for the affordable housing they apparently overproduced from 1987-1999, which in some cases completely eliminated municipal fair-share obligations. This new system also increased the amount of age-restricted affordable housing that municipalities could allow to meet their fair-share obligations and increased incentives for suburban municipalities to use RCAs.⁷² Builders and housing advocates challenged these standards in the state court system, which culminated in a state Supreme Court decision in 2007 that invalidated COAH's use of filtering to determine housing need.⁷³ The Supreme Court also found COAH's increased allocation for age-restricted housing to be discriminatory to low- and moderate-income households with children.⁷⁴ The result of this decision was to increase the state's projected affordable housing need from 52,000 units to 115,000 units when the standards were finally recalculated in January 2008, as well as to reduce the permitted allocation for age-restricted units to the previous level of 25%.⁷⁵

As this reform effort played out in the courts, a parallel reform effort was taking place in the state Legislature. Led by Assembly Speaker Joseph Roberts, Democrats in the Assembly proposed a series of amendments to the Fair Housing Act, the most notable of which was the elimination of Regional Contribution Agreements.⁷⁶ Citing the argument that RCAs concentrate economic inequality in urban areas—a rewording of the economic integration argument—the amendments

⁷¹ Mallach (2004).

⁷² Mallach (2004).

⁷³ *In the Matter of Adoption*, 41-46.

⁷⁴ *In the Matter of Adoption*, 76.

⁷⁵ "COAH Proposes New Third Round Rules," *Council on Affordable Housing e-news* (January 2008).

⁷⁶ John Appezzato, "Corzine Signs Overhaul of NJ's Affordable Housing Law," *NJ.com* (July 17, 2008), http://www.nj.com/news/index.ssf/2008/07/gov_jon_corzine_signed_legisla.html.

stated 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.”⁷⁷ This bill also required that 13% of all affordable housing units created under COAH be accessible to very low-income individuals (at 30% of the area median income), that state-financed transit-villages contain 20% affordable housing, and that all *commercial* developments include a 2.5% development fee that would be put into the Affordable Housing Trust Fund.⁷⁸

Housing advocates heralded the passing of this legislation on July 17, 2008; it addressed the economic segregation issue by eliminating RCAs and explicitly extended COAH’s focus to both low-income households and transit-oriented development. At the same time, one observer characterized these reforms as “overextending,” stretching political and market limits and providing substance for opponents of COAH to seize upon.⁷⁹ Indeed, the addition of new cost burdens on development could not have come at a worse moment; in the wake of a global recession in 2008, the building industry collapsed, leading to drastic reductions in construction activity. The state economy slowed, and the political will to exact fees from commercial development for affordable housing disappeared. Politicians from both political parties seized on COAH’s new regulations as barriers to economic development, and this criticism somehow translated to calls for the agency’s dissolution.⁸⁰ This push became more pronounced with the election of Republican governor Chris Christie in 2009, who faced pressure from suburban mayors within his party to limit COAH’s influence on their local land-use authority.⁸¹ On February 9, 2010, Governor Christie issued an executive order halting all administrative review under COAH and commissioned a task force to evaluate COAH’s performance

⁷⁷ A. 500 ACS, 213th Sess. (N.J. 2008), 4f.

⁷⁸ A. 500 ACS, 213th Sess. (N.J. 2008), 7, 8, 18b.

⁷⁹ Interview with Alan Mallach, Urban Planner, in conversation with the Author (April 15, 2010).

⁸⁰ Raymond Lesniak, "COAH Reform: Life or Death for our Economy," *NJ.com* (January 12, 2009), http://blog.nj.com/njv_raymond_lesniak/2009/01/senator_raymond_j_lesniak.html; Lisa Fleisher, "N.J. Gov. Chris Christie Creates Task Force to Review Affordable Housing," *NJ.com* (February 9, 2010), http://www.nj.com/news/index.ssf/2010/02/nj_gov_chris_christie_creates_1.html.

⁸¹ Interview with Alan Mallach (2010).

and develop a new method for the State to implement the *Mount Laurel* Doctrine.⁸² A month later, the Governor’s task force recommended that COAH be abolished and replaced by a new system under the State Planning Commission; this system would provide more flexibility to municipalities and result in significantly lower housing obligations that resemble those estimated under the Third Round methodology (which was invalidated by *In the Matter of Adoption*). In practice, however, this system would function in a similar manner to COAH—municipalities would prepare plans under these (more generous) guidelines and be certified and protected from builder’s remedy lawsuits if they were found to comply.⁸³

A more detailed reform proposal is currently advancing through the state Legislature, sponsored by Democratic Senator Raymond Lesniak. This proposal would also essentially replace COAH with the State Planning Commission and would focus on the concept of “inclusionary municipalities” to meet *Mount Laurel* obligations. Municipalities with an existing affordable housing supply would be certified as inclusionary and gain the same benefits municipalities receive from substantive certification under COAH. A municipality could meet either of the following criteria to qualify as having an adequate affordable housing supply: 1.) 7.5% of its existing housing stock is price-restricted; or 2.) 33% of its existing housing stock is non-luxury single-family attached housing and/or mobile homes. If a municipality does not meet the above criteria, it can either rezone 20% of its vacant but developable and sewer-serviced land for inclusionary residential development, or it can wait for a developer to propose a housing project with a 20% affordable component.⁸⁴ In the first case, it is notable that the sewer-service requirement provides a disincentive for townships to build

⁸² *Executive Order No. 12*, N.J. Exec. Ord. No. 12 (Feb. 9, 2010), www.state.nj.us/infobank/circular/eocc12.pdf. This executive order was challenged by housing advocates in state court as an unconstitutional suspension of the *Mount Laurel* Doctrine. The courts issued an injunction against the order, allowing COAH to resume operations, and the Governor ultimately rescinded the order before arguments were heard. See Lisa Fleisher, “Christie Rescinds Executive Order Halting State COAH’s Work,” www.NorthJersey.com (March 19, 2010).

⁸³ Marcia A. Karrow, Wilda Diaz, Frank Druetzler, James Hughes, and Ira Oskowski, *Housing Opportunity Task Force: Findings and Recommendations* (March 19, 2010), www.nj.gov/governor/news/reports/pdf/20100323_COAH.pdf. Ironically, the report describes COAH’s handling of the Third Round adoption process as “most egregious.”

⁸⁴ S.1 SCS 1R, 214th Sess. (N.J. 2010), 20-21.

public infrastructure, since they could avoid their housing obligation if their vacant land is not serviced. In the second case, such a project would be deemed to have an “inherently beneficial use” and would face a lower burden to receive any required variances or permits.⁸⁵ This second case is a weaker form of the builder’s remedy method from the *Mount Laurel II* system, providing less certainty that builders will succeed in an administrative setting (as opposed to a judicial one) while also lacking the means to compel municipalities to rezone this 20% of their vacant land.

An additional feature of the proposed Senate reforms would mandate that new large-scale residential developments⁸⁶ include 20% affordable units, while new small-scale developments would have to contribute 2.5% of total development costs to the state’s Affordable Housing Trust Fund.⁸⁷ There are, however, many variations to these requirements: the affordable units can be constructed on-site, off-site, include off-site rehabilitated units, or be substituted with a contribution to the Affordable Housing Trust Fund.⁸⁸ A developer can also be excused from affordability requirements if he or she can conclusively show that these requirements make the project economically unfeasible.⁸⁹ On the other hand, this proposal also requires that all affordable units consist of 50% low-income housing and 50% moderate-income housing—for advocates of the poor, this is an improvement over the 2008 reforms.⁹⁰ Lastly, the Lesniak bill would eliminate non-residential development fees, but it would also replace the projected revenue from these fees by adding \$15 Million to the Affordable Housing Trust Fund.⁹¹ To be sure, this proposal does feature some specific differences in policy from the current system, but its overall implementation system would not differ

⁸⁵ S.1 SCS 1R, 214th Sess. (N.J. 2010), 26. Under this burden, approval should be granted as long as it would not cause “substantial detriment to the public good.”

⁸⁶ Defined as more than five units; small-scale developments contain five or fewer units. See S.1 SCS 1R, 214th Sess. (N.J. 2010), 5t-u.

⁸⁷ S.1 SCS 1R, 214th Sess. (N.J. 2010), 20-21.

⁸⁸ S.1 SCS 1R, 214th Sess. (N.J. 2010), 22.

⁸⁹ S.1 SCS 1R, 214th Sess. (N.J. 2010), 26.

⁹⁰ S.1 SCS 1R, 214th Sess. (N.J. 2010), 21f.

⁹¹ S.1 SCS 1R, 214th Sess. (N.J. 2010), 13a.

greatly from what now exists; the primary change would be the replacement of COAH with the State Regional Planning Commission.

In some ways, the replacement of COAH with a state-level planning body could have clear benefits. The initial sections of the Lesniak bill discuss the need to satisfy the *Mount Laurel* obligation in the context of larger planning efforts in transportation, environmental protection, and economic development.⁹² In these words, one is reminded of the state Court's attempt to link *Mount Laurel II* to a comprehensive statewide planning effort by using the State Development Guide Plan (SDGP) to determine regional housing needs, which were then intended to guide COAH's need calculations. In practice, however, the influence of both the SDGP and the State Planning Commission have been limited, as New Jersey municipalities have maintained broad overall authority over land-use regulation.⁹³ It is also quite possible that the State Planning Commission would be subject to the same political pressures that currently impact COAH; the Planning Commission's 17 members are either state politicians or others appointed by the Governor and approved by the Legislature.

Conclusion

At its core, affordable housing development is a controversial issue, particularly in a state with a high reliance on property tax revenue for municipal budgets. The incentives of this system led to the original exclusionary zoning ordinances that started this legal and legislative debate, and in New Jersey, the problem is compounded by the influence of suburban constituencies in state government and a strong tradition of home rule. These factors explain why a legislative response to the *Mount Laurel* Doctrine was so long in coming, and they also explain the recent turmoil

⁹² S.1 SCS 1R, 214th Sess. (N.J. 2010), 3.

⁹³ Interview with Alan Mallach (2010).

surrounding COAH. The lesson here may be that any *administrative* solution that is subject to political pressures can face difficulty operating in this environment. The fact that the state Judiciary is somewhat insulated from these pressures allowed the State Supreme Court to be as bold as it was in crafting its own *Mount Laurel* solution, and for this reason, a *judicial* solution may be more desirable. The judicial solution crafted in *Mount Laurel II* was ultimately politically untenable, and it is a matter of debate whether a different judicial system could have survived the political controversy. It is also necessary to remember the separation-of-powers issues that judicial solutions raise, of which the New Jersey Supreme Court was keenly aware in *Mount Laurel II*.

It is the subject of another paper entirely to consider New Jersey's fair share efforts in light of those in other states. Several states, most notably Massachusetts, have banned exclusionary zoning by statute and created administrative structures similar to COAH to compel enforcement.⁹⁴ The approach in Washington State has been to plan for affordable housing in the context of statewide growth management efforts; while this suggests similarities with the reform efforts under consideration, it is important to note the relative strength of statewide planning authority in Washington State compared to that in New Jersey.⁹⁵ Several other states have addressed exclusionary zoning through judicial means, particularly New York, Pennsylvania, and New Hampshire. In *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975), and *Surrick v. Zoning Hearing Board*, 382 A.2d 105 (Pa. 1977), the state courts struck down exclusionary zoning ordinances and promoted the fair share principle but chose not to mandate specific fair-share requirements, similar to the New Jersey Court's decision in *Oakwood at Madison*.⁹⁶ In *Britton v. Town of Chester*, 595 A.2d. 492 (N.H. 1991), the New Hampshire Supreme Court advanced the general regional welfare

⁹⁴ Interview with Alan Mallach (2010). The Massachusetts statute is known as Section 40B of the Comprehensive Permit Act, 1969 Mass Acts 774. See also Payne (2000 – 2001).

⁹⁵ Interview with Alan Mallach (2010).

⁹⁶ Mandelker et. al. (2008), pp. 459-461; Alan Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the Berenson Doctrine*, Pace Environmental Law Review (1986) at p. 43-44.

argument of *Mount Laurel* and supported the use of builder's remedies to overturn exclusionary zoning, but it was also clear not to incorporate specific fair-share calculations to guide the use of these remedies.⁹⁷ In this national context, the efforts of both the New Jersey Supreme Court and the Council on Affordable Housing appear stronger than one might expect.

Although some may wish otherwise, the New Jersey Supreme Court's landmark decisions in *Mount Laurel I* and *II* have firmly established the existence of a state constitutional obligation for municipalities to use their land-use regulation to provide a fair share of the region's affordable housing need. This obligation is firmly planted in Section 2 of the New Jersey Fair Housing Act, and indeed it is even acknowledged in the introduction of Governor Christie's task force report. To be sure, these statements must be tied to a workable implementation system for them to have any meaning. Since its creation under the Fair Housing Act in 1985, the COAH administrative framework has facilitated the development of some affordable housing, particularly in suburban locations that had previously resisted such development. During this time, it has also fallen frequent victim to political pressures that have limited development efforts and likely undercounted actual need. I would suggest that the Council on Affordable Housing has made novel accomplishments in light of the political constraints under which it operates. These political constraints have strongly diluted what the agency, or any other system, could have achieved. I am hopeful and cautiously optimistic that future reform efforts will build upon these modest efforts. In the end, it will be up to the state Judiciary to ensure that any legislative solution effectively fulfils the *Mount Laurel* Doctrine, and it may be called upon again to modify this solution if it finds it lacking. A new judicial foray into active enforcement of the Doctrine is unlikely, although the Court may once again be prompted to create an innovative solution to counter a fractious state political system and uphold an established constitutional principle.

⁹⁷ *Britton v. Town of Chester*, 595 A.2d. 492 (N.H. 1991), 441-443; Mandelker et. al. (2008), pp. 457.

Cases and Legislation

Year	Title	Citation
New Jersey Cases		
1952	<i>Fisher v. Bedminster</i>	93 A.2d 378 (1952)
1953	<i>Lionshead Lake, Inc. v. Wayne</i>	89 A.2d 693 (1953)
1962	<i>Gruber v. Mayor and Township Committee of Raritan Township</i>	186 A.2d 489 (1962)
1962	<i>Vickers v. Gloucester Township</i>	181 A.2d 129 (1962)
1973	<i>Robinson v. Cahill</i>	303 A.2d 273 (1973)
1975	<i>Southern Burlington County NAACP v. Township of Mount Laurel (I)</i>	336 A.2d 713 (1975)
1977	<i>Oakwood at Madison</i>	371 A.2d 1192 (1977)
1983	<i>Southern Burlington County NAACP v. Township of Mount Laurel (II)</i>	456 A.2d 390 (1983)
1986	<i>Hills Development Company v. Township of Bernards</i>	510 A.2d 621 (1986)
1993	<i>In Re Petition for Substantive Certification Filed by the Township of Warren</i>	622 A.2d 1257 (1993)
2007	<i>In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing</i>	914 A.2d 348 (2007)
New Jersey Statutes, Proposed Statutes, and Executive Material		
1985	Senate, No. 2046	S. 2046 201st Sess. (N.J. 1985)
1985	Senate, No. 2334	S. 2334 201st Sess. (N.J. 1985)
1985	New Jersey Fair Housing Act	N.J.S.A. 52:27D (1985)
2008	Assembly, No. 500	A. 500 ACS, 213th Sess. (N.J. 2008)
2010	Senate, No. 1	S. 1 SCS 1R, 214th Sess. (N.J. 2010)
2010	Executive Order No. 12	N.J. Exec. Ord. No. 12 (Feb. 9, 2010)

Year Title

Citation

Other State Cases

1965	<i>National Land & Investment Co., Inc. v. Kohn</i>	215 A.2d 597 (Pa. 1965)
1970	<i>Appeal of Girsch</i>	263 A.2d 395 (Pa. 1970)
1975	<i>Berenson v. Town of New Castle</i>	341 N.E.2d 236 (N.Y. 1975)
1977	<i>Surrick v. Zoning Hearing Board</i>	382 A.2d 105 (Pa. 1977)
1991	<i>Britton v. Town of Chester</i>	595 A.2d. 492 (N.H. 1991)

Other State Statutes

1969	Massachusetts Comprehensive Permit Act	1969 Mass Acts 774
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Federal Cases

1971	<i>James v. Valtierra</i>	402 U.S. 137 (1971)
1972	<i>Lindsey v. Normet</i>	405 U.S. 56 (1972)
1974	<i>Village of Belle Terre v. Boraas</i>	416 U.S. 1 (1974)
1975	<i>Warth v. Selden</i>	422 U.S. 490 (1975)

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1968	1968 Civil Rights Act, Title VIII	42 U.S.C. §§ 3601-3619 (1968)
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