THE *MOUNT LAUREL* DOCTRINE AND THE UNCERTAINTIES OF SOCIAL POLICY IN A TIME OF RETRENCHMENT

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The New Jersey Supreme Court's *Mount Laurel* decisions (1975 and 1983)[1] ruled that local zoning had to take into account regional housing needs, obligating the state's 566 localities to provide their "fair share" of affordable housing. Although these two decisions have long been seen across the nation as seminal ones with respect to land use and affordable housing opportunity, their role in New Jersey land use regulation and practice remains hotly contested many decades later. The cumbersome procedures and micro-management of local planning that have ensued have failed to satisfy either local governments or housing advocates, while the Council on Affordable Housing, created to implement the court's mandate, has never found political legitimacy. As the political climate has shifted in recent years, with Governor Christie seemingly committed to abolishing the Council on Affordable Housing and housing advocates fighting a rearguard action, the *Mount Laurel* principles and the entire concept of fair share housing are at risk.

INITIAL PROGRESS

The 1975 *Mount Laurel I* decision arose from a case brought by the Southern Burlington County NAACP on behalf of low-income African-American residents in a section of Mount Laurel Township, a growing suburb of Philadelphia, who were denied the opportunity to build decent housing to replace the dilapidated homes in which many of them lived.[2] The court used the case to establish a clear doctrine that every "developing municipality" had an obligation under the New Jersey Constitution to provide for its "fair share of the regional

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1. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975); S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mount Laurel II*), 456 A.2d 390 (N.J. 1983).

2. *See generally* DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA (1995).

need for low and moderate income housing."[3] The decision, although far-reaching in scope, was weak on specifics; it was widely ignored by local governments, while the lower court decisions that followed were inconsistent, even contradictory, in their holdings.

As a result, in 1983, in *Mount Laurel II*, the court put teeth in the doctrine, establishing clear ground rules, a procedure for expedited hearing of cases by three specially selected judges,[4] and above all, a "builder's remedy,"[5] under which developers who successfully sued municipalities that rejected developments that included a reasonable share of affordable housing could receive approval directly from the court.[6] The decision spawned well over a hundred developer lawsuits, prompting the New Jersey legislature to enact the New Jersey Fair Housing Act in 1985.[7]

The New Jersey Fair Housing Act (NJFHA) created a state agency, the Council on Affordable Housing (COAH), to establish six-year (later amended to ten-year) fair share obligation goals for local governments, and empowered COAH to certify plans adopted by municipalities to meet their fair share goals, thus immunizing those municipalities from the builder's remedy for the duration. A controversial provision of the act was the Regional Contribution Agreement (RCA), which allowed one municipality to pay another to accept up to fifty percent of its fair share obligation, a measure designed to funnel suburban dollars into urban housing programs. Much to the dismay of many housing advocates, who considered the NJFHA a severe dilution of the *Mount Laurel* doctrine for many reasons, of which the introduction of RCAs was but one,[8] the Supreme Court quickly upheld its validity.[9] A subsequent decision also upheld the authority of municipalities to impose development fees on developers *not* building affordable housing, in order to pay for the development of such housing elsewhere in the community.[10]

COAH was organized in 1986, adopted a fair share plan for its first round in 1987, and for its second in 1993. In doing so, it applied

3. *Mount Laurel I*, 336 A.2d at 734.

4. *Mount Laurel II*, 456 A.2d at 438-40.

5. *Id.* at 452-53.

6. *Id.* at 479-81.

7. N.J. STAT. ANN. § 52:27D-301 (West 2008). It is worth noting that roughly similar legislative proposals had been introduced during the 1970s, but in the absence of the impetus provided by the court decision, had failed.

8. Alan Mallach, *Blueprint for Delay: From* Mount Laurel *to* Molehill, 15 N.J. REP. 4 (1985).

9. Hills Dev. Co. v. Twp. of Bernards, 510 A.2d 621 (N.J. 1986) (sometimes referred to as *Mount Laurel III*); *See* Paula A. Franzese, *Mount Laurel III: The New Jersey Court's Judicious Retreat*, 18 SETON HALL L. REV. 30 (1988).

10. Holmdel Builders Ass'n v. Holmdel Twp., 583 A.2d 277 (N.J. 1990).

a complex formula that took into account vacant land area, employment growth, and income distribution to come up with a firm, and sometimes seemingly highly arbitrary number for each municipality. It is not an unreasonable claim that by and large the system established by the legislature in 1985 worked fairly well through 2000. By mid-2001, roughly half of New Jersey's local governments, including nearly all of the state's fast-growing suburban townships, had submitted plans for COAH to certify. By then, those municipalities, along with an additional sixty-eight that were under court jurisdiction, had completed or started construction on nearly 29,000 low- and moderate-income housing units and brought 11,000 existing units occupied by low- and moderate-income households up to code.[11] In addition, RCAs had been used to fund construction or rehabilitation of 7,400 affordable housing units in central cities and inner ring suburbs. These totals fell far short of the total need for low-income housing but were still substantial. Indeed, adjusted for population, New Jersey's record of producing low- and moderate-income housing between 1985 and 2000 was comparable to or better than that of any other state in the country over the same period.[12]

MANY STEPS BACKWARD

Despite these accomplishments, danger signs were apparent. While few builder's remedies were ever actually awarded by the courts, the threat was widely seen by local officials and anti-growth activists as forcing towns to grant approvals and make unwanted zoning changes for builders' projects with or without affordable housing, although documenting actual cases was understandably difficult. Frustration with COAH and the *Mount Laurel* process was widespread. As municipal anger over the real or perceived abuse of the process grew, and as the political climate in suburban New Jersey became gradually more hostile to development of any sort, affordable housing became a convenient scapegoat for those concerned that sprawl was overtaking what was left of rural New Jersey. Affordable housing advocates were equally frustrated with COAH because it appeared to have become more bureaucratic and less concerned with the housing needs of the poor, granting

11. Low- and moderate-income households are defined in the NJFHA as households earning less than fifty percent of the Area Median Income (AMI) and households earning between fifty and eighty percent of AMI respectively. Under COAH rules, at least half of the units provided under a municipality's fair share plan had to be affordable to the former, with the balance affordable to the latter.

12. *See* David Kinsey, *Smart Growth, Housing Needs and the Future of the* Mount Laurel *Doctrine*, *in* *MOUNT LAUREL II* AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING 45 (Timothy Castano & Dale Sattin eds., 2008).

municipalities downward adjustments of their fair share obligations on seemingly trivial grounds, and brushing aside concerns among which were the failure of the process to reach families earning less than forty percent of Area Median Income or to address the evidence that low-income housing built in the suburbs was reaching few people other than white suburbanites.[13] From 2000 onward, the shaky fabric of consent that had been constructed around *Mount Laurel* and COAH began to unravel.

From 2002, if not earlier, one can trace the beginnings of a downward spiral, although as of spring 2011, COAH is still breathing, although barely. When the time arrived for COAH to come up with new fair share numbers for their third round in 1999, the process became caught in the political cycle. With a gubernatorial election slated for November 2001, neither outgoing Governor Christine Whitman, on her way to Washington, nor her replacement, Acting Governor Donald DiFrancesco, were eager to act. As a result, the hot potato was passed on in 2002 to newly elected Democratic Governor James McGreevey. Both McGreevey and Susan Bass Levin, his pick for Community Affairs Commissioner, and by statute chair of the COAH board, were former mayors with personal histories of opposition to affordable housing. Whether their subsequent actions reflected their indifference to the COAH process or a deliberate attempt to discredit it in the public eye is unclear. Yet, in the final analysis, they had that effect.

COAH did not adopt a new set of third round rules and fair share targets until 2004, five years after the end of the previous round. The new figures were based on a new premise, namely, that municipalities incurred an affordable housing "growth share" rather than a fixed obligation and thus should provide affordable units only to the extent that market rate housing and non-residential growth took place.[14] Moreover, through egregious statistical manipulation, including credit for units planned but never produced, local obligations were brought close to the vanishing point.[15] The de facto

13. Naomi Wish & Stephen Eisdorfer, *The Impact of* Mount Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268 (1997) (detailing the results of an empirical study on how well New Jersey's anti-exclusionary zoning measures have lived up to the original goals of *Mount Laurel*).

14. *See* Daniel Meyler, *Is Growth Share Working for New Jersey?*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 219, 326-39 (2010). The issue of whether, in concept, the growth share approach is to be preferred to COAH's prior formulaic allocation approach is a complex one that is well beyond the scope of this paper. It has been a subject of considerable discussion since the idea was first explicitly raised by John Payne. John Payne, Commentary, *Remedies for Affordable Housing: From Fair Share to Growth Share,* LAND USE L. & ZONING DIG., June 1997, at 3.

15. Alan Mallach, *The Betrayal of Mount Laurel*, SHELTERFORCE, Mar./Apr. 2004, *available at* http://www.nhi.org/online/issues/134/mtlaurel.html.

moratorium on imposition of any additional fair share obligations that had existed since 1999, however, had led many local governments to believe that affordable housing obligations were a thing of the past, and they generally welcomed the new rules only grudgingly.

Opposition from both developers and housing advocates to the new rules, however, was intense.[16] New Jersey has a strong community of affordable housing advocates, and both urban- and suburban-oriented advocacy groups find common ground in supporting the *Mount Laurel* doctrine as a core principle. Along with the New Jersey Builders Association, which saw their members' livelihoods threatened,[17] they brought suit to invalidate the third round rules.[18] In January 2007, the appellate division struck down large parts of the rules, including the "growth share" principle as well as other means by which COAH had sought to minimize municipal housing obligations.[19] COAH made an effort to craft new rules that would pass court muster, which were adopted in August 2008.[20] These rules, while retaining a form of "growth share," more than doubled the total municipal fair share obligation, while removing many of the credits and other concessions in the previous rules. Local governments, at least some of which had by this point expended time and money developing plans to meet the requirements of the prior rules, reacted vehemently to the new rules.[21]

16. *See, e.g.*, *id.*

17. A step by COAH that the builders found particularly threatening was the 'guidance' COAH offered municipalities that they could comply with the third round rules by simply imposing a twelve and a half percent affordable housing set-aside on sites already zoned without otherwise changing any other provision of the zoning, a suggestion that municipalities followed widely with respect to sites zoned for very low density development. This step was singled out for particular criticism by the appellate division. *See infra* note 19.

18. *See In re* Adoption of N.J.A.C. 5:94 & 5:95 by the N.J. Council on Affordable Hous., 914 A.2d 348 (N.J. Super. Ct. App. Div. 2007).

19. *Id.* The court found that a "growth share" approach, which made production of affordable housing contingent on a municipality's decision to allow other forms of development, was inconsistent with *Mount Laurel* principles. *Id.* at 379-81. In its subsequent revisions, COAH imposed a growth share "floor" based on independent projections of each municipality's growth. *See* Meyler, *supra* note 14, at 238-39. This was arguably the worse of both worlds, forfeiting whatever benefits were derived from a straight "growth share" methodology without restoring any of the benefits of the planning-related criteria used in a formulaic approach.

20. By this point Commissioner Levin (who had remained in her position when Governor McGreevey was replaced first by Acting Governor Codey and then by Governor Jon Corzine after the 2005 elections) had moved on, and the commissioner was Joseph Doria, an urban politician without strong feelings about *Mount Laurel.*

21. Prior to formal adoption of the 2008 rules, the League of Municipalities sent a circular letter to local governments seeking pledges of $500 from each municipality to help finance a legal change to the rules. Letter from William G. Dressel, Jr., Exec. Dir.,

While this was going on, the political waters were further roiled by legislative action. Driven by newly-elected Assembly Speaker Joe Roberts, a passionate opponent of RCAs, legislation was enacted in the summer of 2008 abolishing them along with other changes to state statutes governing affordable housing.[22] Although few people ever defended RCAs on philosophical grounds, from a pragmatic standpoint, RCAs provided an important safety valve for suburban municipalities, mitigating at least some of their opposition to *Mount Laurel,* while offering a relatively easy way for urban municipalities to obtain funds for politically attractive housing activities.[23] Since the *Holmdel* decision,[24] growing suburban municipalities had been accumulating large amounts of developer fee monies, which they were often reluctant to spend within their boundaries.[25] RCAs provided them with a painless way to spend down a substantial part of those accumulated funds. Adding insult to injury, from the suburban perspective, the Roberts legislation not only abolished RCAs, but added language to require any developer fees collected but not committed within four years to revert to the state.[26] Predictably, both provisions were opposed strenuously by local governments and

N.J. State League of Municipalities, to the Mayors of N.J. (2008), *available at* http://www.njslom.org/COAH-3rd-round.html (last visited Apr. 1, 2011).

22. P.L. 2008, ch.46, 213th Leg. (N.J. 2008). Among other provisions, the law mandated the establishment of a State Housing Commission, and the preparation of an annual state strategic housing plan. P.L. 2008, ch.46 (C.52:27D-329.13), 213th Leg. (N.J. 2008). Neither the former Corzine administration, nor the present Christie administration, has shown any interest in carrying out this legislative mandate.

23. In addition to the resources they represented, RCAs were appealing in that–within very broad parameters–they gave the municipality all but total discretion on how to spend the funds, in contrast to most state and federal programs that required detailed project-specific applications in order to obtain funds. *See* Joel Norwood, *Trading Affordable Housing Obligations: Selling a Civic Duty or Buying Efficient Development?*, 39 CONN. L. REV. 347, 363-64 (2006).

24. Holmdel Builders Ass'n v. Holmdel Twp., 583 A.2d 277 (N.J. 1990).

25. Norwood, *supra* note 23, at 368-69 (describing the COAH review process for RCAs as "only a formality"). By June 2010, municipalities had collected a total of $541 million in developer fees, and spent $276 million, leaving an unspent balance of $265 million. *See* N.J. DEPT. OF COMMUNITY AFFAIRS, MUNICIPAL AFFORDABLE HOUSING TRUST FUND ACTIVITY (2010), *available at* http://www.nj.gov/dca/affiliates/coah/reports/ahtfstatewide.pdf. Simultaneously, COAH has approved $216 million in RCAs. Letter from William G. Dressel, Jr., Exec. Dir., N.J. State League of Municipalities to the Mayors of N.J. (May 6, 2008), *available at* http://www.njslom.org/ml050608a.html. While not all of this has come from the developer fee, it can reasonably be assumed that the great majority has. Thus, it is likely approximately sixty-five to seventy-five percent of all developer fee expenditures have been for RCAs, and only twenty-five percent to thirty-five percent for affordable housing activities in the communities collecting the funds. *Id.*

26. P.L. 2008, ch.46 (C.52), 213th Leg. (N.J. 2008).

by the New Jersey League of Municipalities.[27]

By 2008, when the Roberts legislation was signed into law and COAH adopted its new rules, COAH was already in serious trouble. The delays, false steps, and policy incoherence of the preceding near-decade, coupled with a growing tendency on the part of the agency to micro-manage local housing activities through increasingly detailed rules, had thoroughly antagonized local government, while efforts to use the new rules to mollify developers and housing advocates, who were tired of having to use repeated litigation to force COAH to act, were largely unsuccessful. Unable to project a coherent direction and lacking strong leadership, COAH's credibility, never terribly high, had largely vanished. Late that year, the long-time executive director of the N.J. League of Municipalities was quoted as saying, "In my 34 years of league work, I have never seen so much frustration and anxiety expressed by mayors and governing body officials over an issue . . . . It's urban, suburban and rural alike. [COAH] has done more to unite municipal governments than any other issue . . . ."[28] Legislation to abolish COAH was introduced by the Republican minority in the New Jersey Legislature early in 2009. Lacking Democratic support, it went nowhere, but was a harbinger of things to come. Also early in 2009, Chris Christie, after announcing his candidacy for Governor of New Jersey, told a Monmouth County audience, "If I am governor, I will gut COAH and I will put an end to it."[29] According to the reporter, "the comment got a raise-the-roof response."[30] Incumbent Governor Corzine, running unsuccessfully for re-election, sidestepped the issue rather than defend COAH.[31]

27. *See* Brad Parks, *N.J. Towns Mobilizing Against New Housing Rule,* STAR-LEDGER (Newark), June 29, 2008, at 1. This was one of many cases where the perceptions of housing advocates and those of suburban officials were radically different. From the advocates' perspective, the accumulation of unspent local housing trust fund balances was a disgrace in a state with widespread unmet housing needs. For them, this step was long overdue. From the local officials' perspective, this was *their* money, and for the state to take it away from them, whatever the circumstances, was clearly unacceptable.

28. Tom Hester, *Growing Anxiety Over Affordable Housing Rules*, STAR-LEDGER (Newark), Dec. 1, 2008, at 11.

29. Max Pizzaro, *Christie All But Drives a Stake Through COAH in Monmouth County Remarks*, POLITICKERNJ.COM (Feb. 5, 2009, 5:05 PM) (internal quotation marks omitted), http://www.politickernj.com/max/27179/christie-all-drives-stake-through-coah-monmouth-county-remarks.

30. *Id.*

31. Press Release, Assemblyman Scott Rumana, Rumana Says Corzine's Silence on Affordable Housing Will Have Loud Repercussions (Sept. 24, 2009), *available at* http://www.njassemblyrepublicans.com/press_release.php?id=1003.

IS THIS THE END OF COAH?[32]

With Christie's election in November 2009, the stage was set for the marginalization of COAH. One month after taking office, Christie issued an executive order creating a Housing Opportunity Task Force charged with coming up with an alternative way of meeting *Mount Laurel* obligations, and in the interim, staying any pending COAH proceedings until the task force submitted its report.[33] While the stay was quickly undone by the appellate division, and while COAH's statutory responsibilities remain unchanged, the council, now carefully monitored by the Governor's office, has been effectively dormant since February 2010, and has taken few, if any, substantive actions. In an October 2010 decision, the appellate division found that COAH's 2008 rules had failed to remedy the defects of the earlier rules, striking down large parts of the rules and giving the agency five months to draft new rules,[34] a decision that was largely ignored by the Christie administration.[35]

The Housing Opportunity Task Force report failed to satisfy the Governor, and was quickly shelved after it appeared in March, but by that point the issue had gained considerable legislative momentum.[36] Raymond Lesniak, a powerful Democratic state senator, introduced Senate Bill 1 (S-1) in January 2010 to abolish COAH.[37] While the bill would have given the State Planning Commission some of COAH's ministerial responsibilities, the Commission would neither set fair share numbers nor approve municipal plans.[38] Under S-1, municipalities could choose between adopting a housing plan embodying a self-determined fair share goal or imposing a twenty percent affordable housing set-aside on all new development.[39] While the bill itself was repeatedly amended over the next few months, passing the Senate in June, it never gained strong support in the

32. With apologies to Edward G. Robinson in *Little Caesar*.

33. N.J. Exec. Order No. 12, 42 N.J. Reg. 659(a) (2010)

34. *In re* Adoption of N.J.A.C. 5:96 and 5:97 by the N.J. Council on Affordable Hous., 6 A.3d 445, 476 (N.J. Super. App. Div. 2010).

35. On January 13, 2011, the court issued an order directing COAH to immediately comply with the order and requiring bi-weekly progress reports from the Commissioner of Community Affairs. *See* Matt Friedman, *Court Hands Christie Deadline on Housing Rules on Affordable Units Due by March 8*, STAR-LEDGER (Newark), Jan. 20, 2011, at 24. That order was subsequently stayed by the Supreme Court pending disposition of appeals from the October 2010 appellate division decision.

36. See MARCIA A KARROW, ET. AL., HOUSING OPPORTUNITY TASK FORCE FINDINGS & RECOMMENDATIONS (2010), *available at* http://www.nj.gov/governor/news/reports/pdf/20100323_COAH.pdf.

37. S.B.1, 214 Leg., Reg. Sess. (N.J. 2010).

38. *Id.*

39. *Id.*

Assembly, where housing advocates were successful in finding enough allies to keep its Assembly counterpart from coming to a vote. During the summer and fall of 2010, the Assembly leadership worked to craft an alternative bill that would occupy a middle ground among the many different advocates and interest groups.[40] A-3447, introduced in October 2010, tried to tackle the knotty issue that S-1 had sidestepped: how to establish municipal fair share obligations in a way consistent with the principles of *Mount Laurel*.

In framing this legislation, housing advocates and their friends in the legislature were caught in a painful dilemma. On the one hand, not only had the courts held that municipalities needed firm quantifiable targets, but decades of experience had made clear that no fair share obligations would be meaningful in the absence of some form of higher-level enforcement. On the other hand, such was the extent to which COAH had come to be seen as tainted that not even the advocacy community wanted to argue that COAH should be reformed, not abolished. Indeed, that perceived illegitimacy carried over to the entire realm of state regulation; it was now seen as politically impossible to give any state agency the authority to impose or enforce fair share obligations.

In order to establish such targets, A-3447 embraced a variation on the Massachusetts 40B model.[41] All municipalities would be required to have ten percent of their housing stock as housing affordable to low and moderate income households, albeit with certain exceptions;[42] the municipality would be required to adopt a housing plan that would show how it would fill at least half the gap between the actual number and the ten percent goal over the following ten years, up to a maximum of 1,000 units.[43] In order to provide a means of verifying the legitimacy of the municipal plan, *without giving that responsibility to a state agency*, the bill created a new category of "licensed housing compliance professional" authorized to review and certify municipal housing plans.[44] A-3447, although flawed and arguably cumbersome in places, was a significant improvement over S-1, and reflected the determination of the housing advocacy community to push for legislation that would

40. A.B. 3447, 214 Leg., Reg. Sess. (N.J. 2010).

41. *See generally* MASS GEN. LAWS ch. 40B (2010).

42. A.B. 3447, 214 Leg., 1st Sess. (NJ 2010). Exceptions were municipalities in which over twenty percent of the school children were eligible for free or reduced price lunch, which had an eight percent target, and those in which over fifty percent of the school children were eligible for free or reduced price lunch—largely the older urban centers—whose obligation was limited to rehabilitation of existing substandard housing. *Id.*

43. *Id.*

44. *Id.*

retain the essential principles of the *Mount Laurel* doctrine even after what was seen as the inevitable demise of COAH.

After some negotiations between the leadership of the two houses, A-3447 with minor modifications was substituted for S-1, and the bill passed both houses on a party-line vote in January 2011.[45] On January 24, the Governor issued a conditional veto of the legislation, calling on the legislature to enact S-1 as initially approved by the Senate.[46] Since the legislature was not willing to adopt the changes demanded by the Governor, the bill died.[47]

This in turn may be leading New Jersey into a highly unusual and deeply disturbing legal-political impasse. Since A-3447 has died, COAH remains the state agency charged with the statutory mission of implementing the *Mount Laurel* doctrine. While the appellate division still appears ready to hold COAH to its obligations, the administration has already begun to treat the abolition of that agency as a *fait accompli*, thus creating the potential of yet another conflict between the Christie administration and the judiciary.[48]

Governor Christie has already made clear his intention to politicize the state supreme court[49] and use it as a foil for promoting his political agenda.[50] The supreme court has agreed to take the appeals from the appellate division ruling overturning the COAH rules;[51] in this politicized context, how it ultimately rules will offer

45. Megan DeMarco & Matt Friedman, *Affordable Housing Bill Passes, But Faces Obstacles*, STAR-LEDGER (Newark), Jan. 21, 2011, at 14.

46. Matt Friedman, *Christie Issues Conditional Veto on Affordable Housing Compromise Bill, Favoring Original*, STAR-LEDGER (Newark), Jan. 25, 2011, at 12.

47. In addition to the customary gubernatorial options of vetoing or signing a bill, Article V, Section 14(f) of the New Jersey Constitution gives the Governor the unique power of conditional veto. Under a conditional veto, the Governor can make changes to the bill and resubmit it to the legislature, which has the choice of (1) overriding the conditional veto with a two-thirds majority vote; (2) adopting the bill as amended by the governor on a simple majority vote; or (3) taking no action, in which case the bill dies.

48. *See supra* notes 33-35 and accompanying text.

49. Early in his term, Christie refused to re-appoint John Wallace, a highly-respected and middle-of-the-road member of the court (and the court's only African-American justice), making clear in the process that his decision was meant to send a signal to what he characterized as an "out-of-control" court. Richard Pérez-Pena, *Christie, Shunning Precedent, Drops Justice From Court*, N.Y. TIMES, May 3, 2010, at A22.

50. According to a recent news report, "At a town hall meeting in a Police Athletic League gymnasium, Christie blamed the court for tying his hands on changing the school funding formula and reforming the state's affordable housing system. 'The only way we're going to change that situation is to change the Supreme Court,' said Christie." Matt Friedman, *Christie Blames N.J. Supreme Court for Delay in Changing School Funding Formula, Affordable Housing System*, NJ.COM (Feb. 15, 2011, 8:17 PM), http://www.nj.com/news/index.ssf/2011/02/gov_christie_blames_nj_supreme.html.

51. *In re* Adoption of N.J.A.C. 5:96 and 5:97 by the N.J. Council on Affordable

some insight into the extent of the court's continued commitment to the *Mount Laurel* doctrine, as well as the extent to which the Governor's threats may ultimately become a significant constraint on its willingness to challenge him on this and other socially-charged issues. Even if political pressure does not become a factor, a return to case-by-case resolution of *Mount Laurel* issues by the courts, particularly in a climate of mixed confusion and hostility, is an outcome that will neither satisfy local governments nor appease housing advocates, nor is it likely to get very many affordable units built. While there are many different ways in which the current impasse might ultimately be resolved, few offer much hope for the future of an undiluted *Mount Laurel* doctrine.

THE UNCERTAINTIES OF SOCIAL POLICY

The *Mount Laurel* experience in New Jersey offers a cautionary tale about the intersection of policy, practice, and politics. The *Mount Laurel* doctrine, as it evolved through *Mount Laurel II* and the implementation of the Fair Housing Act, became almost the archetype of a redistributional social policy; while the underlying principle behind the *Mount Laurel* decision may have had to do with the constitutional standards for local government's use of the zoning power, in its application it evolved into a process that drove the allocation of resources—by government or by developers and/or landowners through the imposition of affordable housing set-asides or developer fees—to subsidize the creation of affordable housing.[52]

Hous., 15 A.3d 325 (N.J. 2011) (*granting certification).*

52. This raises a complex series of questions about means vs. ends, and precisely what *outcomes,* as distinct from *procedures*, were dictated by the constitution. The issue that the court grappled with, not only in *Mount Laurel,* but also in *Oakwood at Madison v. Township of Madison*, 371 A.2d 1192 (N.J. 1977), was the extent to which the constitution demands not only facially-neutral zoning, but affirmative steps—invariably involving allocation of financial resources—to overcome not zoning barriers as such, but the effects of the real-world interaction of zoning, housing costs, and real estate economics, in order to achieve the results sought by the court. One could argue that as time passed, the substance of the process as managed by COAH moved gradually further and further away from the initial starting point. Ironically, at least one thoughtful study has found that the Pennsylvania approach to exclusionary zoning, which—not unlike the New Jersey court's position in *Madison,* which was reversed by *Mount Laurel II*—requires that municipalities zone for amounts of different less-expensive land uses, such as townhouses, apartments and mobile homes, rather than being obligated to create a fair share of housing for low- and moderate-income households, has been more effective in terms of its overall impact on availability and affordability of housing. *See generally* James L. Mitchell, *Will Empowering Developers to Challenge Exclusionary Zoning Increase Suburban Housing Choice?*, 23 J. POL'Y ANAL. & MGMT. 119 (2004). The fact remains, however, that market conditions are significantly different in much of New Jersey—particularly the suburban hinterland of the New York Metropolitan Area—than in the Pennsylvania suburbs studied by Mitchell, so that it is unclear whether a Pennsylvania-style remedy

Moreover, it was not only redistributional, but it challenged what has long been seen by its proponents as a central prerogative of local government in suburban America, the ability of suburbs to regulate their land use in order to perpetuate economic exclusion.[53] That prerogative is in part symbol, and arguably in part cause, of the larger social, economic and political fault line separating suburban and urban America.

None of this is to suggest that the case should not have been brought, and that the *Mount Laurel* cases were not properly decided. On the contrary, the practice of suburban exclusion was and is pernicious both from an ethical standpoint and from the standpoint of its effect on the life choices and opportunities for thousands of lower income households. Given the effects of suburban exclusion, a compelling case can be made that an explicitly redistributional policy was the only way in which the system could be changed to benefit any meaningful number of lower income households.

While the extent that suburban land use regulations are deeply entrenched should not be used as an argument against challenging them, state laws or court decisions which attempt to overturn such practices in the interest of affordable housing and social justice must be seen as being inherently at risk in the political process. While local governments can learn, up to a point, to "live with" such laws, they are never fully reconciled to them, and are quick to seize on opportunities to weaken them, or eliminate them altogether. It is in this context that political leadership at the state level becomes critical.

Where state fair share laws, as in Massachusetts, Connecticut, and Rhode Island, have been freely adopted by legislatures, they have not been insulated from controversy, but may have gained a degree of political legitimacy that has helped them weather those controversies that have arisen.[54] New Jersey's legislature enacted the

would have had the same effect on affordability in those areas.

53. On how the central role of land use generally, and application of land use controls for exclusionary ends play in suburban America, see CONSTANCE PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 3 (1977); MICHAEL N. DANIELSON, THE POLITICS OF EXCLUSION 27 (1976).

54. Notably, at the same time as the Christie administration was attacking COAH and *Mount Laurel* in New Jersey, a referendum took place in Massachusetts on the repeal of Chapter 40B, the 1969 state legislation mandating municipal housing obligations and providing for a builder's remedy for projects including certain minimum percentages of affordable housing. Somewhat to the surprise of perhaps overly cynical observers, the referendum failed, with the state's electorate voting to retain Chapter 40B by a 58 to 42 margin. Jonathon L'ecuyer, *Voters Stand by Chapter 40B*, GLOUCESTER TIMES, Nov. 3, 2011. Interestingly, the advocates of Chapter 40B not only ran a significantly more sophisticated and well-organized campaign than the opponents, but also outspent them by a considerable margin. John Chesto, *On State*

NJFHA, not willingly, but solely in order to remove *Mount Laurel* enforcement from the courts' purview; indeed, similar legislative efforts had been proposed without success since the early 1970s.[55] The *Mount Laurel* doctrine gained no political legitimacy as a result of their action.

The *Mount Laurel* decisions and the Fair Housing Act need to be seen in the larger context of this urban/suburban divide. While the boundaries marking that divide may shift, as some older suburbs may begin to identify more with their urban neighbors, and once-rural townships become part of the suburban hinterland, this divide remains a fundamental fault line in New Jersey's political landscape. This divide parallels the racial divide, which may be considered the central fault line in the American body politic. This parallel is particularly strong in New Jersey, where both economic and racial disparities between urban and suburban areas are pronounced.

Measures to impose affordable housing obligations on suburban municipalities, for whom exclusion has historically been part of both their central identity and exclusionary zoning part of their raison d'etre, confront this fault line directly by demanding that suburban towns concede that identity in the interest of fairness, opportunity, or redistribution. While many suburbanites are not indifferent to fairness and opportunity as general propositions, placed in the context of a challenge to suburban zoning prerogatives, fair share measures are widely seen as threatening. Although such limited evidence as is available suggests that few urban minority residents have actually relocated to affluent suburbs as a result of *Mount Laurel* housing,[56] the fact that municipalities were not allowed to give preference to local residents in *Mount Laurel* housing[57]

Ballot Questions, Money Rules, METROWEST DAILY NEWS, Nov. 9, 2010, http://www.metrowestdailynews.com/opinion/x1829921860/Chesto-On-state-ballot-questions-money-rules. Governor Deval Patrick, running successfully for re-election, supported a vote to retain Chapter 40B, but did not actively campaign on the issue. *See* Milton J. Valencia, *Governor Candidates Seek to Move Beyond Controversy*, BOSTON GLOBE, Oct. 13, 2010, http://www.boston.com/news/local/breaking_news/2010/10/governor_candid.html.

55. For a discussion of some of the earlier efforts to enact such legislation, see Alan Mallach, *Do Lawsuits Build Housing? The Implications of Exclusionary Zoning Litigation*, 6 RUTGERS L.J. 653, 678-81 (1975); KIRP ET AL., *supra* note 2, at 114-19.

56. Given the scale of *Mount Laurel* housing production, and the importance of this issue for both practical and social policy reasons, it is appalling that so little data is available and so little research has been done on this subject. The only study that has yielded quantifiable findings is Wish & Eisdorfor, *supra* note 13, 1306-37. While the study's findings are strong and valuable, it is based on a limited sample, and moreover, was published fourteen years ago, while the data they used is much older.

57. A proposed COAH regulation that would have allowed municipalities to provide preference for up to fifty percent of their fair share housing for households that live or work in the municipality was struck down by the Supreme Court in *In re*

reinforced the perception that their ability to control their future as a community was being challenged.[58]

The growing controversy over *Mount Laurel*, however, did not exist in a policy vacuum. It was layered on top of a number of other powerful forces that tended to exacerbate the state's urban/suburban divide, laying the groundwork for the politics of middle-class resentment, as it were, to emerge as a significant force in New Jersey politics. While suburban communities were facing what they perceived as burdensome affordable housing obligations, they were also feeling the effects of the New Jersey Supreme Court's *Abbott v. Burke* decision, which ordered the state to redress the imbalance in school spending between urban and suburban districts.[59] The state's efforts to comply with the uniquely generous redistributional standards of the *Abbott* decision led to shifts in state spending, so that, by fiscal year 2007, $4.235 billion or nearly sixty percent of all state school aid was being directed to thirty-one urban school districts containing roughly twenty-three percent of the state's public school students.[60] Between 2002 and 2007, while support for those thirty-one districts steadily grew, state aid to non-Abbott districts declined by roughly seven percent in constant dollars.[61]

Rightly or wrongly, *Abbott* and *Mount Laurel* were both widely seen as reflecting an urban, low-income tilt by the courts and by a series of state administrations.[62] They were linked, moreover, to

Warren, 622 A.2d 1257 (N.J. 1993).

58. While this is certainly in part a reflection of hostility to state control over local land use decisions, it has as much to do with the subject matter of those decisions as with a debate over who makes them. Reflecting widespread anti-growth sentiment, New Jersey suburbanites have widely if not universally tended to accept state environmental regulation of land use matters in the interest of natural resource protection and prevention of growth; as a result, New Jersey arguably has the most extensive body of such regulations in the United States. *See* Alan Mallach, *Challenging the New Geography of Exclusion: The* Mount Laurel *Doctrine and the Changing Climate of Growth and Redevelopment in New Jersey*, *in* MOUNT LAUREL II AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING 21, 31-32 (Timothy Castano and Dale Sattin, eds., 2008).

59. Abbott v. Burke (*Abbot I*), 495 A.2d 376 (N.J. 1985). Through 2009, there have been a total of twenty decisions by the New Jersey Supreme Court with the name "Abbott v. Burke." *See* Jeremiah Lenihan, Note, *Lurking Behind the Shadow of Enduring School Reform? School Funding and New Jersey's School Funding Reform Act of 2008*, 34 SETON HALL LEGIS. J. 119, 125 n.37 (2009).

60. *History of Public School Funding in New Jersey*, N.J. LEGISLATURE (Aug. 10, 2006), http://njleg.state.nj.us/PropertyTaxSession/DPI/jcsf_presentation_files/frame.htm (follow "24 State Aid, Abbott and Non Abbott Districts, FY 2002 and FY 2007" hyperlink); *id.* (follow "Percent State Aid and Enrollment, Abbott and Non Abbott Districts, FY 2002, FY 2005 and FY 2007" hyperlink).

61. *Id.*

62. They were also heralded by progressive social policy advocates as bold steps toward redressing historical inequities and fostering both social justice and

growing resentment of the high burden of both state and local taxes, particularly local property taxes, a burden that was being felt far more strongly as the economy slipped into recession in 2007, and as the unprecedented increases in house values that had characterized the first half of the decade came to an end. A *New York Times* article in Fall 2009 stressed the central role of the property tax burden in the forthcoming gubernatorial election,[63] while the effect of affordable housing obligations in general, and the 2008 COAH rules in particular, on municipal tax burdens is a recurrent theme in the litany of municipal objections.[64]

It would be a mistake, however, to conclude that this is nothing more than knee-jerk hostility to affordable housing in all its forms by suburban New Jersey. While suburban politicians' repeated protestations that they support affordable housing and only object to the manner in which COAH pursues those goals are often self-serving rhetoric, they may contain a measure of substance. Some suburban townships have resisted affordable housing tenaciously; others, however, have accommodated—willingly or not—large numbers of low- and moderate-income housing units. Lawrence Township (Mercer) has produced nearly 1,000 such units, while many townships, including Mahwah, South Brunswick, Bedminster and Franklin (Somerset) have accommodated well over 500 such units since *Mount Laurel II*. Even Mount Laurel Township contains close to that number of affordable units.[65] Many suburban officials believe that they have made considerable room for affordable housing in their communities, often feeling that they have done as much as they reasonably could in light of both the need to balance it with other municipal priorities and their constituents' hostility to affordable housing, triggered not only by social pressures and fear of loss of property values, but by their concern over high property taxes and their hostility to growth in general.[66]

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opportunity for New Jersey's urban and lower income residents.

63. Peter Applebome, *As Property Taxes Become a Real Burden, Can Backlash Be Far Off?*, N.Y. TIMES, Oct. 5, 2009, at A17.

64. *See* Parks, *supra* note 27.

65. STATE OF N.J. DEP'T OF CMTY. AFFAIRS, PROPOSED AND COMPLETED AFFORDABLE UNITS 18, 19 (2010), *available at* http://www.state.nj.us/dca/affiliates/coah/reports/units.pdf.

66. A 1973 survey of local officials in selected New Jersey suburban municipalities found that in response to the statement (agree or disagree) "each municipality should be required to allow the development of a fair share of the low and moderate income housing units needed in the region in which the town is located" that 83% of the local officials agreed with the statement. Only 44% of the local officials, however, felt that their constituents would agree with the same statement. ALAN MALLACH ET AL., STATE OF N.J. CNTY. & MUN. GOV'T STUDY COMM'N 1974, HOUSING AND SUBURBS: FISCAL & SOCIAL IMPACT OF MULTIFAMILY DEVELOPMENT 91 (1974).

The gap, not only in substance, but in perception between housing advocates and local officials is wide. Housing advocates understandably feel, after decades of fighting both COAH and local governments over compliance with the principles of *Mount Laurel*, that meaningful results demand not less but more state or judicial oversight, and that stricter, more detailed regulations are needed to address the many ways in which affordable housing goals have been manipulated to benefit developers, favor local residents, and disfavor families with children who burden local schools. Their positions are often echoed by the courts, which—when they have chosen to act—tend to adopt mechanistic positions indifferent to the complexities of the issue.[67] Local officials, caught between their constituencies and the state (or the courts), and under severe pressure to keep taxes down, preserve open space and deliver quality public services, become defensive and use affordable housing or COAH as a code word for larger problems that lie beyond their control.

These issues have been rendered more contentious by the constant wrangling between COAH and local governments over each municipality's fair share numbers, a matter that never ceased to be a bone of contention. In that light, advocates' success in getting COAH to adopt higher fair share targets in the revised third round rules[68] and in achieving the much-heralded abolition of Regional Contribution Agreements can be seen as symbolic victories that may only have exacerbated the inherent conflict in the process.[69]

67. For many years, the courts tended to defer to COAH, a practice that John Payne described as "encourag[ing] COAH to constantly test the limits in the not-unwarranted belief that more often than not the courts will give it free rein." John Payne, *The Unfinished Business of* Mount Laurel II in *MOUNT LAUREL II* AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING 5, 13 (Timothy N. Castano & Dale Sattin eds., 2008).

68. Once again, this issue reflects the conflict in perspectives that is a recurrent theme of this paper. From the advocates' perspective, it was seen as important that the fair share numbers reflect, to the extent realistically feasible, the actual need for low- and moderate-income housing. While this is hard to argue with as such, the conflict arose from the fact that the resources were never available to meet more than a small part of the need, realistically measured. This gap became far greater after the housing bubble collapsed in 2007, and the amount of both new inclusionary development and developer fee collections plummeted. From the suburban perspective, higher fair share numbers mean that they were being required to make provision for far more housing units than could actually be built with available resources, and that they were at risk of being required under the COAH rules to come up with the funds to subsidize large numbers of low- and moderate-income housing units.

69. It is hard to evaluate the weight to be given to such issues in contrast to the larger issues discussed earlier. While it is likely that the average New Jersey suburbanite is little aware if at all of the wrangling over fair share numbers or regional contribution agreements, to the extent that such wrangling further exacerbated the opposition of local officials—led by the New Jersey League of Municipalities, which has maintained a steady anti-*Mount Laurel*, anti-COAH

In such a politically fraught environment, the role of state government, and the Governor in particular, becomes critical. The state government becomes the essential fulcrum needed to maintain the system in balance. For the first fifteen years, the system created by the Fair Housing Act worked, though imperfectly, to be sure. Grounded in broad if not universal political acceptance that the *Mount Laurel* doctrine was to be respected, however grudgingly, and administered by officials who for the most part steered a reasonable course between the concerns of local government and those of housing advocates, the tensions inherent in the process were managed successfully.[70] They were managed, however, but never resolved. When New Jersey's state government under McGreevey and Levin moved away from playing that balancing role, their actions opened up the political system for the opponents of *Mount Laurel* to mount increasingly direct attacks, not only on COAH but on the underlying principles behind it as well.

McGreevey and Levin, however much they may have wanted to dilute the framework created by *Mount Laurel* and the Fair Housing Act, never sought to precipitate a constitutional confrontation by challenging it *as such*. With the election of a Governor not even concerned with giving lip service to the principles of *Mount Laurel,* and who clearly believes that fanning the flames of suburban resentment represents the path to political success, housing advocates, along with at least some remaining members of the legislature, find themselves fighting a rearguard action. The courts may be seen as a potential counterweight in this battle, but judges are caught themselves in the dilemma of finding their own balance between attacking thorny social issues and acknowledging the election returns. It is far from clear how far they can or want to go in the absence of greater political legitimacy on this issue.

The future of the *Mount Laurel* doctrine at this point remains highly uncertain. While the prognosis may look grim, times change and political climates shift. The legislative stalemate over abolishing COAH and undoing *Mount Laurel* may continue beyond the current Governor's term in office, and the doctrine may well retain enough support to rise again under other future state leadership. The picture

drumbeat—the perception of these constituents could well have been affected.

70. While none of New Jersey's governors between 1985 and 2001—Tom Kean, Jim Florio, and Christine Todd Whitman–could be characterized as strong affordable housing advocates, none were hostile to affordable housing, either in principle or practice. Although Kean fulminated over the *Mount Laurel II* decision, once the Fair Housing Act was enacted, he gave a reasonable amount of policy room to COAH to pursue its statutory responsibilities and, for the most part, made responsible appointments to its board, as did his immediate successors.

a few years from now could look very different from that of today.

The *Mount Laurel* doctrine has accomplished much good; this author, for one, would argue that it has made New Jersey a better state. It has created greater affordable housing options for its lower income residents over the past twenty-five years, and while New Jersey has seen more than its share of sprawl during that period, there are no credible grounds to place the blame on *Mount Laurel*, either in principle or execution.[71] The doctrine remains nonetheless a cautionary lesson on the risks inherent in pursuing social policy changes through means that fail to confer political legitimacy on those policies or the outcomes that they seek to bring about.

CLOSING NOTE

John Payne, whom I remember well as colleague and friend, played an important role in many of the events chronicled in this paper, particularly during the years immediately following the *Mount Laurel II* decision. That role included serving as counsel to public interest plaintiffs, both then and later, and as chair of the Alliance for Affordable Housing, which successfully countered efforts to promote a constitutional amendment to undo the *Mount Laurel* decision. His wise counsel and buoyant spirit are both badly missed, particularly in today's trying political climate.

71. An in-depth study of housing outcomes during the 1990s in eight states with smart growth policies concluded that "New Jersey provides an exception to the generally poor showing [in terms of housing affordability] of the smart growth states. . . . While New Jersey's housing costs were high, its renter cost burden increased less during the 1990s than in the other smart growth states." GREGORY K. INGRAM ET AL., SMART GROWTH POLICIES: AN EVALUATION OF PROGRAMS AND OUTCOMES 85 (2009).