

IS GROWTH SHARE WORKING FOR NEW JERSEY?

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INTRODUCTION

The principle that people are free to choose where they want to live serves as the foundation for New Jersey’s *Mount Laurel* doctrine. The New Jersey Supreme Court’s landmark 1975 *Mount Laurel* decision arose out of a community group’s constitutional challenge to a

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local government's exclusionary zoning regulation.¹ By holding that Mount Laurel Township had violated the state constitution by zoning out low- and mid-income residents,² the New Jersey Supreme Court began the struggle to devise an intelligent affordable housing scheme for the state. The current iteration of this scheme, known as "Growth Share," ties communities' affordable housing obligations to their overall development; the more a community develops, the more affordable housing it must provide.³

The purpose of this Note is to determine whether Growth Share is working. To answer this question, we must first clarify the purpose underlying the *Mount Laurel* doctrine, and then establish a metric to evaluate whether that purpose has been achieved. This Note presents several alternate purposes for which the doctrine was created but ultimately concludes that the fundamental purpose of *Mount Laurel* was to limit the power of local governments to make exclusionary zoning decisions. Up until *Mount Laurel*, it had been the abuse of local authority that allowed exclusionary decisions to be made—oversight and control at the state level was seen as the only way to end this provincialism. This Note goes on to conclude that the Council on Affordable Housing (COAH)—the state agency charged with overseeing *Mount Laurel*—is the institution best suited to achieve this goal.⁴ While COAH should maintain ultimate authority, over localities' compliance with *Mount Laurel*, COAH could improve compliance in several areas by accommodating certain municipalities that have a track record for past "good behavior."

Since its origination in 1975, the *Mount Laurel* doctrine has both modified and been modified by the political and geographical landscape of New Jersey. The doctrine originated as a judge-made constitutional command,⁵ morphed into a litigation remedy,⁶ and then a

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

2. *Id.* at 713.

3. N.J. ADMIN. CODE §§ 5:97-2.1 to -2.5 (2008) (codifying Growth Share).

4. As of February 2010, Governor Christie has announced that he will "gut COAH." Paul Mulshine, *Gut COAH? Gov. Christie Now Says Whoa!*, STAR LEDGER, Feb. 2, 2010. He has begun a "regulatory review" of COAH's usefulness, though he later backtracked, saying the legislature, not the governor, has the responsibility for "put[ting] an end" to COAH. *Id.* State Senator Raymond Lesniak has introduced senate bill S-1 which would abolish COAH. Though COAH's future is in doubt, the conclusion drawn in this article, that affordable housing construction should not be based on sprawl, and should be administered with tempered discretion to account for local nuance, continues to hold true.

5. See *Mount Laurel I*, 336 A.2d 713.

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

legislative edict,⁷ to finally become the administrative matrix used today.⁸ To many who initiated and inspired the *Mount Laurel* movement, the present form of the law barely resembles the civil-rights-inspired rulings of the New Jersey Supreme Court from the 1970s. What was once a command that prohibited towns from using exclusionary zoning, has now become what many see as an administrative boondoggle to those on all sides of the issue.

Despite the controversy that has developed as the doctrine changed over the years, *Mount Laurel* has not been a failure. Since 1983, the doctrine has generated 40,000 new low- and moderate-income housing units throughout New Jersey.⁹ It also has provided for the refurbishing of 15,000 substandard units, and generated over \$200 million to refurbish urban housing.¹⁰ Nonetheless, COAH and the State Planning Commission—the two agencies charged by the legislature with overseeing implementation of *Mount Laurel*—have been the targets of sharp criticism by builders, municipalities, and housing advocates.

Part I of this Note examines how the *Mount Laurel* doctrine has changed over the years and how it has arrived at its current form. Part II provides various viewpoints regarding the underlying purposes for which the *Mount Laurel* doctrine was created. It addresses the positions taken from all sides of the affordable housing debate in New Jersey: advocates who seek to remedy a history of racial injustice and housing homogeneity throughout the state, municipalities burdened by what they see as arbitrary affordable housing requirements unrelated to harms committed in recent collective memory, and builders compelled by business concerns to create sprawl in America's most densely populated state.¹¹ Part II concludes that *Mount Laurel*'s main purpose is to limit the power of local governments. Part III evaluates the relative successes and failures of Growth Share. This Note concludes that Growth Share is linked with suburban sprawl, and is both over- and under-inclusive in its aim to limit local control. As a result, Growth Share has aroused the ire of several municipalities throughout

7. See N.J. STAT. ANN. § 52:27 D-301 (West 2008).

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

9. Richard Keevey, *Mount Laurel Ruling at 25; Still in Search of a Remedy*, BERGEN RECORD, Feb. 20, 2008, at L.07.

10. *Id.*

11. U.S. Census Bureau, *Geographic Comparison Table: Population, Housing Units, Area, and Density* (2000), http://factfinder.census.gov/servlet/GCTTable?_bm=Y&-ds_name=DEC_2000_SF1_U&-CONTEXT=gct&-mt_name=DEC_2000_SF1_U_GCTPH1_US9&-redoLog=False&-_caller=geoselect&-geo_id=&-format=US-9-US-9S&-_lang=en.

the state, and damaged COAH's credibility in carrying out its administrative duties. Part IV provides possible solutions to the pitfalls surrounding the current Growth Share scheme. One such solution would be for COAH to emulate the successful affordable housing scheme employed in Montgomery County, Maryland. A second solution is for COAH to further distinguish between New Jersey's municipalities based on their overall history of inclusion and prior compliance with the *Mount Laurel* doctrine. This would require those communities that have never provided affordable housing to bear a greater burden moving forward, thus relieving those places that have previously provided homes for middle-income residents.

I.

BACKGROUND

A. *Development in New Jersey*

The geography and demographic make-up of New Jersey have contributed to the unique nature and role that local governments play in the state's political process. New Jersey ranks as the nation's second wealthiest state,¹² but also contains some of its poorest cities. Newark, Camden, Paterson, and Trenton were among the first to suffer from urban decay in the mid- and late-twentieth century. But while cities elsewhere in America are enjoying a period of growth and prosperity, New Jersey's urban areas persist in blight. Plagued by crime and chronic under-investment, several of New Jersey's most populous cities often top annual lists identifying the most dangerous cities in the United States.¹³

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

13. Some suggest this phenomenon is directly related to the now outlawed practice of creating Regional Contribution Agreements. See Joseph J. Roberts, Jr., *Can We Afford Affordable Housing?*, BERGEN RECORD, July 27, 2008 at O1. The oft-cited Morgan Quitno Rankings of the twenty-five "most dangerous" cities in the United States lists Camden as the fifth most dangerous city followed by Trenton (fourteenth) and Newark (twenty-second). MORGAN QUITNO PRESS, CITY CRIME AMERICA'S SAFEST (AND MOST DANGEROUS) CITIES (2006), available at <http://www.statestats.com/cit07pop.htm#25>. Note that Camden and Philadelphia are in as close proximity to one another as Brooklyn is to Manhattan, but because of the arguably arbitrary drawing of municipal lines, these small, statistically isolated jurisdictions appear more dangerous in rankings like Morgan Quitno. Rather than being purely the product of public policy, the "dangerousness" of a place like Camden is largely due to the limits on the methodology chosen for data collection.

Geographically, New Jersey is the fourth smallest state and contains 566 municipalities.¹⁴ Unlike many states where municipalities sit as islands within large, unincorporated counties, New Jersey municipalities often abut one another with little unincorporated land between them. All New Jersey municipalities have local control over zoning, which is power that is derived directly from the State Constitution.¹⁵

The suburban boom of the late twentieth century is well documented. Nestled between the population centers of New York City and Philadelphia, New Jersey saw its suburban population bulge as residents began moving out of these larger neighboring cities into more rural areas. Additionally, New Jersey's own cities, like Newark and Camden, experienced a similar exodus, resulting in residents moving to suburbs like Edison, Middletown, and Mount Laurel.¹⁶ It is also well documented that most of those who left the cities from 1950 through the 1980s were white, and many of those who remained behind were black.¹⁷

B. *The Mount Laurel Cases*

Historically, the Township of Mount Laurel was rural and diverse, consisting of a mix of black, white, Cuban, and Jewish residents, all living in relatively poor conditions.¹⁸ As the 1960s and 1970s progressed, Mount Laurel transformed from this rural past into a growing suburb. This sudden change was a result of flight from nearby Philadelphia and Camden, and was exacerbated by the expansion of the New Jersey Turnpike and Interstate 295.¹⁹ As a result, farmers began selling off their plots as subdivisions in an attempt to take advantage of this increase in demand for new land.²⁰ As land prices began to rise, it became apparent that poorer residents of the

14. See, e.g., Kevin Coyne, *Infinite Poetry, From a Finite Number*, N.Y. TIMES, May 15, 2009, at NJ1 (“566, the number of municipalities in New Jersey, more per square mile than any other state”).

15. See N.J. CONST. art. IV, § 6, ¶ 2 (providing that “[t]he Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein . . .”).

16. See, e.g., DAVID L. KIRP ET AL., *OUR TOWN* (1995).

17. See, e.g., KEVIN MUMFORD, *NEWARK: A HISTORY OF RACE, RIGHTS, AND RIOTS IN AMERICA* 2–3 (2007).

18. Older residents described the population as “poor Jews, Cubans, poor whites, black”; with respect to their housing, it was said that “[t]he chicken coops they lived in were like places where you cage an animal.” *Id.* at 45. People literally lived in chicken coops, abandoned by Mount Laurel’s chicken farmers. *Id.* at 3.

19. *Id.* at 48.

20. *Id.*

community would have difficulties adjusting to the economic changes taking place. In order to help these residents, community organizers applied for and received a state grant to develop affordable garden apartments. However, before any of these units could be built, Mount Laurel would have to change its zoning laws to permit multifamily units.²¹ A simple state grant to provide affordable housing would mark the beginning of a movement crossing political, constitutional, and socio-economic lines.

Prior to the *Mount Laurel* decisions, the New Jersey Supreme Court (the court)²² had held that the state's municipalities had broad power to exercise discretion over local land use.²³ The court's anti-urban bias was clear: "[P]eople who move into the country rightly expect more land, more living room, indoors and out, and more freedom in their scale of living than is generally possible in the city. City standards of housing are not adaptable to suburban areas and especially to the upbringing of children."²⁴ The mid-century court deferred heavily to municipalities' parochial desire to protect only their own general welfare, allowing them to exclude factors they believed caused the iniquities found in cities.²⁵ In *Vickers v. Township Community of Gloucester*, the court defined "general welfare" narrowly²⁶ to include only the welfare of the municipality enacting a zoning ordinance.²⁷ This meant that a municipality could zone only for single-family homes on one-acre plots, thereby excluding all of those unable to afford single-family homes from residing in the community. Under the guise of protecting the "rustic character" of the community, municipalities began using the court's "general welfare" standard to make zoning decisions to exclude poorer residents.²⁸ Unfortunately, this practice served to solidify the racial boundaries that were developing between New Jersey cities and their respective suburban communities.

21. *Id.* at 46.

22. References hereinafter to "the court" refer to the New Jersey Supreme Court.

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

24. *Id.*

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

26. Though the court uses the term "broadly" to describe its definition of "general welfare," I refer to the definition as "narrow" in the geographic sense, and in contrast to the later *Mount Laurel* Court's "broad" definition of the term.

27. 181 A.2d 129, 137 (N.J. 1962).

28. See KIRP, *supra* note 16, at 66.

In 1975, however, the court overruled these cases in *Southern Burlington County NAACP v. Mount Laurel Township*,²⁹ commonly known as “*Mount Laurel I*.” The court expanded the once-narrow view of general welfare with respect to a municipality’s zoning power: “[f]requently the decisions in this state . . . spoke[] only in terms of the interest of the enacting municipality.”³⁰ Considering that zoning power is a police power derived from the state and is delegated to municipalities, the court found that municipalities must now account for external effects that result from its zoning decisions. In analyzing the state constitution, the court determined that when a municipality exercises a police power that has a “substantial external impact” on neighboring areas, it is constitutionally bound to serve the welfare of state citizens beyond its border.³¹ Thus, municipalities could no longer base their zoning decisions solely on the desires of local residents.³² *Mount Laurel I* established that a municipality could not use zoning to exclude the poor, and that each municipality in the state must take affirmative steps to make housing available to low- and moderate-income persons “to the extent of the municipality’s fair share of the present and prospective regional need[s].”³³

The requirements mandated by *Mount Laurel I* are widely praised.³⁴ Even those now vigorously challenging COAH’s regulations conclude that the prohibition of exclusionary zoning is fairly implied in the New Jersey State Constitution.³⁵ *Mount Laurel* stands for the idea that municipalities should have to care for those outside their borders when they cause direct negative externalities. Local government scholar Gerald Frug explains that a city’s zoning law “affects not only its own identity but also the identity of other cities within the region. Suburban exclusiveness is dependent on the neighboring cities’ refusal to exclude; some places have to be open for others to be closed.”³⁶ *Mount Laurel I* calls into question this idea of suburban exclusiveness and forces suburban municipalities to house those who would otherwise be forced to live in places that do not (or cannot)

29. 336 A.2d 713 (N.J. 1975).

30. *Id.* at 726.

31. *Id.* at 726–28.

32. See GERALD FRUG, CITY MAKING 78–79 (Princeton Univ. Press 1999).

33. *Mount Laurel I*, 336 A.2d at 724.

34. All of the attorneys interviewed for this Note agreed that the inclusionary vision of *Mount Laurel I* is a positive improvement to the state’s local government law.

35. Interview with Michael Jedziniak, Senior Assoc., Jeffrey R. Surenian & Assocs., Special Mount Laurel Counsel for over forty New Jersey municipalities and co-counsel for the N.J. League of Municipalities (Oct. 7, 2008) [hereinafter Jedziniak Interview].

36. See FRUG, *supra* note 32, at 79.

exclude them.³⁷ Though the court provided specific requirements in *Mount Laurel I*, it left undefined critical terms such as a “municipality’s fair share” and the “present and prospective regional need.” Defining those terms would prove over the years to be far more controversial than the constitutional pronouncements of 1975.

In the first eight years after its founding, the *Mount Laurel* doctrine achieved only tepid success. The court was unwilling to give real teeth to the doctrine, and in several decisions, seemed to draw back from specific mandates for municipalities. In *Oakwood at Madison, Inc. v. Madison Township*, the court balked at defining municipalities’ “fair share” and refused to demarcate regional boundaries within which municipalities bore some housing responsibility.³⁸ The *Madison Township* decision rubber stamped any definition of a “region” that expanded a municipality’s zone of care beyond its own political borders, failing to provide the doctrine with any substantive definition to improve its effectiveness.³⁹ In *Pascack Associates Ltd. v. Mayor of Washington Township* the court further limited the number of municipalities required to provide their fair share of housing, reasoning that the requirements set forth in *Mount Laurel I* only extended to growing municipalities.⁴⁰

But in 1983, the New Jersey Supreme Court thoroughly reaffirmed and strengthened the *Mount Laurel* doctrine in what became known as “*Mount Laurel II*.”⁴¹ Not only did the court reaffirm the doctrine espoused in *Mount Laurel I*, but in a 123-page opinion it created a procedure, coined the “Builder’s Remedy,” to allow courts to determine and enforce municipalities’ obligations to provide low- and moderate-income housing.⁴² The *Mount Laurel II* decision also repudiated *Oakwood* and *Pascack*, holding that “[t]he general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare—in this case the housing needs—of those residing outside of the municipality but within the region that

37. See GREGORY WEIHER, *THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* 188 (1991). Weiher equates suburbs to theme parks where, for an admission price, one is greeted with a planned, isolated caricature of culture. A system where exclusionary zoning is permitted creates a race to zone out low-income residents, increasing the burden on dense, large cities.

38. 371 A.2d 1192 (N.J. 1977); see also CHARLES M. HAAR, *SUBURBS UNDER SIEGE* 33 (1996).

39. HAAR, *supra* note 38, at 33–34.

40. 379 A.2d 6, 11 (N.J. 1977); see also HAAR, *supra* note 38, at 34.

41. 456 A.2d 390 (N.J. 1983).

42. *Id.* at 452; see also *In re Adoption of N.J.A.C. 5:94 and 5:95*, 914 A.2d 348, 357 (N.J. Super. Ct. App. Div. 2007).

contributes to the housing demand within the municipality.”⁴³ Finally, the court installed three trial judges to manage *Mount Laurel* cases, replacing the patchwork of litigation that had preceded *Mount Laurel II*.⁴⁴

The Builder’s Remedy, created in *Mount Laurel II*, capitalized on the incentives that builders already had—namely to build as much as possible—in order to encourage municipalities to zone for affordable housing. A builder who successfully demonstrated that a noncompliant municipality’s zoning was exclusionary would be granted permission to build at a higher density than would otherwise be provided so long as the builder also provided a portion of affordable housing in its construction.⁴⁵ Just as the Growth Share scheme of today utilizes market forces to measure a municipality’s fair share, the Builder’s Remedy of 1983 gave profit-driven parties the incentive to litigate over affordable housing. By marrying the interests of builders and affordable housing advocates, the Builder’s Remedy incentivized towns to avoid litigation by providing their fair share of affordable housing.⁴⁶

The *Mount Laurel II* court was aware that giving builders such an incentive could have a number of unintended consequences.⁴⁷ Particularly, the court’s decision raised two primary concerns. First, a court-ordered Builder’s Remedy that required a municipality to alter the character of its housing stock and build more housing units over rural land could lead to suburban sprawl.⁴⁸ The result would be the over-consumption of undeveloped land in suburban communities.

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

44. *Id.* at 490.

45. HAAR, *supra* note 38, at 44–45. “A developer is entitled to a builder’s remedy if: (1) it succeeds in *Mount Laurel* litigation; (2) it proposes a project with a substantial amount of affordable housing; and (3) the site is suitable, that is, the municipality fails to meet its burden of proving that the site is environmentally constrained or construction of the project would represent bad planning.” *Mount Olive Complex v. Twp. of Mount Olive*, 774 A.2d 704, 712 (N.J. Super. Ct. App. Div. A.D. 2001).

46. Jedziniak Interview, *supra* note 35.

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

48. “Suburban Sprawl” is popularly defined as “the spreading out of a city and its suburbs over more and more rural land at the periphery of an urban area. . . . [involving] the conversion of open space (rural land) into built-up, developed land over time.” See SprawlCity.org, What is Sprawl?, <http://www.sprawlcity.org/hbis/wis.html> (last visited Feb. 12, 2010); see, e.g., Richard A. Oppel, Jr., *Efforts to Restrict Sprawl Find New Resistance From Advocates for Affordable Housing*, N.Y. TIMES, Dec. 26, 2000, at A18. See also PlannersWeb.com, Sprawl Guide: Definitions of Sprawl, <http://www.plannersweb.com/sprawl/define.html> (last visited Feb. 12, 2010) (citing filtering theory in affordable housing as one of ten traits associated with sprawl).

Second, the Builder's Remedy would open the floodgates for future litigation.⁴⁹ In the three years after *Mount Laurel II* was decided, more than one hundred lawsuits were filed against some seventy New Jersey municipalities.⁵⁰ While courts themselves have taken steps to curtail the increase in litigation over the years,⁵¹ the immediate increase in litigation after *Mount Laurel II* drew the attention and concern of the state legislature.⁵²

To end what many saw as judicial activism by the court in *Mount Laurel I* and *II*, the New Jersey Legislature enacted the state's Fair Housing Act of 1985 (FHA)⁵³ to create a friendlier forum for adjudicating land-use disputes.⁵⁴ The FHA codified many of the court-created provisions of the *Mount Laurel* doctrine, but added additional innovations for dealing with the affordable housing issue, including the now-prohibited Regional Contribution Agreements, which permitted municipalities to transfer their affordable housing obligations to other municipalities for a transfer fee.⁵⁵ The FHA also created the Council on Affordable Housing (COAH), a division of the state's Department of Community Affairs.⁵⁶ COAH was the state agency charged with setting fair-share guidelines for municipalities and certifying *Mount Laurel* compliance. Thus, primary enforcement responsibilities were taken out of the hands of the courts and placed under the purview of COAH.⁵⁷

49. John M. Payne, *The Unfinished Business of Mount Laurel II*, in MOUNT LAUREL II AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING, 6 (Timothy N. Castano & Dale Sattin, eds., 2008) (citing A. Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the Berenson Decision*, 4 PACE ENVTL. L. REV. 37, 119 (1986)).

50. *Id.*

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

52. Jedziniak Interview, *supra* note 35.

53. N.J. STAT. ANN. § 52:27D-301 (West 2008).

54. *See* Payne, *supra* note 49 at 6.

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

56. *See* N.J. STAT. ANN. § 52:27D-305 (West 1985).

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

COAH first established a fair share calculation to provide every New Jersey municipality with the number of affordable units it was required to build.⁵⁸ Originally devised by Professor Robert Burchell at Rutgers University, the Fair Share Methodology has been widely panned by housing advocates and municipalities alike.⁵⁹ Susan Kraham, a leading practitioner and scholar in environmental and land-use law, described Burchell's original fair share calculations as a "black box" that lacked transparency. Michael Jedziniak, who exclusively represents municipalities throughout New Jersey as "special Mount Laurel counsel," challenges "anyone on Earth, other than Dr. Burchell, to understand how the calculations were made."⁶⁰ Burchell's methodology was used through 2004, and in that time, it proved difficult for any municipality to challenge the numbers. As a result, courts simply deferred to the findings and numbers that COAH produced.⁶¹

Finally, in 2004, COAH replaced Burchell's Fair Share methodology with the Growth Share methodology, described more fully below. Growth Share simplified the fair share calculation for affordable housing, pegging a municipality's *Mount Laurel* obligations to the number of actual building permits issued. Thus, towns were now required to build affordable housing in proportion to the production of market rate housing within the municipality.⁶²

C. Terminology

Any discussion of *Mount Laurel* and Growth Share requires use of somewhat technical terminology. A brief roadmap of terms will help the reader navigate through the discussion below. The knowledgeable reader might skip this section, while newcomers to this material might make use of this section for reference throughout this Note.

58. N.J. ADMIN. CODE § 5:93-2.1, *et seq.* provides the formerly used method for calculating "fair share."

59. Interview with Susan Kraham, Senior Staff Attorney, Columbia University School of Law Environmental Law Clinic (Sept. 30, 2008) [hereinafter Kraham Interview].

60. Jedziniak Interview, *supra* note 35; *c.f.* KIRP, *supra* note 16, at 160 ("That COAH could manipulate the numbers as easily as it did—with the assistance . . . of [Burchell's] Center for Urban Policy Research—suggests that the [fair share] methodology is . . . so squishy that it doesn't guarantee objectivity.") (quoting John Payne).

61. Jedziniak Interview, *supra* note 35. Courts generally afford great deference to administrative decisions by COAH. *See, e.g., Hills Development Co. v. Twp. of Bernards*, 510 A.2d 621 (N.J. 1986); *In re Twp. of Ocean*, COAH 04-1608, 2006 WL304134 (N.J. Super. Ct. App. Div. Oct. 27, 2006); *Sod Farm Assoc. v. Twp. of Springfield*, 840 A.2d 885 (N.J. Super. Ct. App. Div. 2004).

62. *See* N.J. ADMIN. CODE § 5:94 app. A at 74.

Fair Share is a non-technical term used by the court in *Mount Laurel I* to refer to the fair amount of affordable housing a town should build. Coloring this term has taken thirty-three years and is still an ongoing process.

Growth Share is the name for the current system used by COAH to administer the *Mount Laurel* doctrine. It is a method of determining a municipality's fair share. The amount of housing a municipality must build is determined as a percentage of the amount of market-rate growth it experiences.

Pure Growth Share is an idea that has never been implemented in New Jersey. Pure Growth Share differs from Growth Share in that it would have a community build one affordable unit for every four market-rate units completed, which does not happen under Growth Share as it is currently implemented. Instead, under Growth Share, COAH makes projections based on many factors to determine how many houses a town will likely build by 2018. Those projections are used to determine what a municipality's affordable housing obligation *will* be, rather than the current numbers of units are.

Third Round is the current "era" of *Mount Laurel*. The prior regulations, the Second Round Rules, governed affordable housing obligations for the period of 1987 to 1999. COAH is responsible for promulgating the Third Round Rules for the period that ends in 2018. The Third Round Rules implement Growth Share by requiring a municipality to build one affordable unit for every four market-rate units it constructs. Their promulgation has been an ongoing process since 2003, and, frustratingly, will likely be ongoing through most of the period during which those Rules are meant to be effective. Some iteration of the Third Round Rules is in place even while they are being challenged. Note that participation in the Third Round is *optional*, but nonparticipation creates the risk that a municipality will be sued under the Builder's Remedy. The Third Round Rules calculate municipalities' affordable-housing obligations by combining rehabilitation share (the measure of a municipality's old or run-down housing occupied by low- and mid-income residents),⁶³ unsatisfied prior round obligation, and Growth Share.⁶⁴

Filtering is the process by which units decline in value and therefore become affordable to lower-income households. This process begins when higher-end housing is built by private developers.

63. *In re* Adoption of Third Round Substantive Rules of the N.J. Council on Affordable Hous., 914 A.2d 348, 381 (N.J. Super. Ct. App. Div. 2007). The Third Round Rules must now comply with this decision.

64. *See Third Round*, 914 A.2d at 363–64 (showing that in the Third Round, COAH drastically reduced some municipalities' prior-round obligations by finding that "filtering" would reduce prospective need in the state from approximately 140,000 to 52,725 units).

When higher-income consumers move into these new units, the demand for their prior units declines, causing values or rents to drop; the units then become affordable to consumers at a lower income level. In this way, the construction of new, market-rate housing may reduce affordable housing needs by freeing up additional existing units for purchase or rent by moderate-income households. Filtering is most likely to take place in housing markets containing sound housing undergoing significant turnover and in close proximity to substantial new development.⁶⁵

II.

PERSPECTIVES ON *MOUNT LAUREL*

A. *Opinions on the Purpose Underlying Mount Laurel*

While the original purpose of the *Mount Laurel* decisions was to cure a constitutional deficiency in the state's housing allocation scheme, there are various theories as to the primary purpose of *Mount Laurel* as it is applied today. Discussions with experts on *Mount Laurel* revealed three principal themes underlying the doctrine: (1) combating racial segregation, (2) increasing heterogeneity in housing, and (3) limiting local power. By exploring the potential purposes of *Mount Laurel*, one can best evaluate which theory COAH is most institutionally suited to promote. After analyzing recent court decisions criticizing COAH, I conclude that the limitation of local power over the control of zoning decisions is the primary purpose for which *Mount Laurel* and Growth Share were developed, and that COAH must act appropriately moving forward in furthering this goal.

1. *The Racial Perspective*

The NAACP brought suit in *Mount Laurel I* to force Mount Laurel to permit affordable housing construction for the poorer residents of that municipality. While the original plaintiffs were mostly rural African-Americans, all long-time Mount Laurel residents,⁶⁶ courts

65. N.J. ADMIN. CODE § 5:97 app. A at 81; cf. Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988) (illustrating the issue of gentrification and the perpetuation of racial segregation in regards to filtering); Keith Aoki, *Race, Space and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 799 (1993) (demonstrating the controversy surrounding the filtering theory); Andrew Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 92–98 (1996) (explaining the effect of gentrification on filtering).

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

have deemphasized the racial element of the *Mount Laurel* decisions from the start. In *Mount Laurel I*, the court framed its decision in economic terms as opposed to racial, holding that economic classification in New Jersey invokes the strict scrutiny standard (contrary to the position of the U.S. Supreme Court).⁶⁷ Regardless of the legal construction taken by the court, commentators agree that the amelioration of segregation played, and continues to play, an important role in the *Mount Laurel* doctrine;⁶⁸ thus, a further review into the racial perspective of *Mount Laurel* is warranted.

Adam Gordon, one of the leading attorneys at the Cherry Hill-based Fair Share Housing Center (FSHC), the public interest organization founded by the plaintiffs in the original *Mount Laurel* case, argues that while integration was one of the primary goals of the first *Mount Laurel* decision, that decision is not framed in terms of race.⁶⁹ The original decision was a narrow attempt to remedy exclusionary use of municipalities' zoning powers. According to Gordon, the racial element of *Mount Laurel* is an effect of the history of segregation between New Jersey's cities and suburbs. Richard Hoff, who has represented various New Jersey builders' associations, argues that *Mount Laurel* is meant to give those who wish to leave cities the means to do so through affordable housing.⁷⁰ Hoff believes that *Mount Laurel* was once about racism, but no longer is. He believes that racism in southern New Jersey was one of the chief motivators that sparked the initial litigation in *Mount Laurel I*, but that the doctrine itself has changed over the years to account for other issues surrounding zoning decisions.

67. HAAR, *supra* note 38, at 23. See generally *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955) (exemplifying the federal courts' use of the rational basis test when assessing due process violations involving economic classifications).

68. Interview with Adam Gordon, staff attorney and Equal Justice Works Fellow at Fair Share Hous. Ctr. (Sept. 18, 2008) [hereinafter Gordon Interview]; see also Naomi Bailin Wish, *Mount Laurel Housing Symposium: The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268 (1997). Wish identifies three core goals of *Mount Laurel*. In addition to ameliorating segregation, *Mount Laurel* was meant to increase opportunities for low- and moderate-income housing and provide housing in the suburbs for currently poor urban residents. Wish adds that there are also a number of fluctuating goals of the *Mount Laurel* Doctrine. For instance, should the purpose be to stabilize or revitalize urban neighborhoods or focus only on creating inclusive suburbs, and should the doctrine focus only on middle income residents, or extend to the poorest residents of New Jersey's inner cities? *Id.*

69. Gordon Interview, *supra* note 68. Additional comments by Mr. Gordon provided Feb. 16, 2010.

70. Interview with Richard J. Hoff, attorney at Flaster Greenberg (Oct. 9, 2008) [hereinafter Hoff Interview].

There is no evidence in current legislation, administrative materials, or recent court decisions that *Mount Laurel* is primarily meant to address racism. This is likely due to the fact that even if exclusionary behavior is motivated by racism, government is better able to target the behavior itself as opposed to the attitudes causing such behavior. For example, the court and the FHA have never explicitly distinguished between cities and suburbs. Prior to 2004, cities had no new *Mount Laurel* construction obligations because of the perception that they were already doing their “fair share” of providing affordable housing.⁷¹ And if *Mount Laurel* obligations are now falling most heavily on suburbs, it is solely a result of their rapid growth. Whether that growth was caused by economic opportunity or white flight⁷² is unrelated to the remedies that were initially applied by the court, and later applied by COAH.

The conclusion to be drawn is that rapid growth in certain New Jersey suburbs is merely *related* to racial concerns that defined a previous era. The negative reputation still borne by New Jersey’s cities contains a racial element of its own, but the flight from those cities that occurred during the latter part of the twentieth century is only distantly related to the speedy growth of certain New Jersey suburbs today. Communities like Egg Harbor Township, that barely existed fifty years ago, can attribute their current heavy Growth Share burden to rapid growth rate as opposed to racism by residents. The point of highlighting this type of “weed” municipality (rapidly growing with few roots) is to point to the type of place where *Mount Laurel* protections are most needed and most appropriate.

2. *The Reduction of Housing Homogeneity Perspective*

It is also possible that the reduction of housing homogeneity could be one of the fundamental goals set forth in the *Mount Laurel* doctrine. In *Mount Laurel I*, the court provided a broad definition of economic exclusion, explaining that a person is excluded when he is forced to pay too large a portion of his income on housing.⁷³ Implicit in this definition is the idea that municipalities should be prohibited

71. Gordon Interview, *supra* note 68. Additional comments by Mr. Gordon provided Feb. 16, 2010.

72. See DAVID J. AMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 174 (1996).

73. The report in note 75, *infra*, uses slightly confusing terminology. Instead of “homogeneity,” the report uses the terms “inequality” and “equality.” “Inequality” in this context is considered a *good* thing—a town should have people from many different socio-economic backgrounds. Conversely, “equality,” is used to describe towns where everyone is of the same socio-economic class, i.e., all-wealthy, or all-poor.

from pricing out middle-income residents by only permitting the development of single-family homes.

Given the broad approach taken by the court, one may conclude that the court was attempting to reduce housing homogeneity in municipalities. Homogeneity in this sense could be best described as the absence of intra-community boundaries drawn along the lines of wealth. Heterogeneity, conversely, exists when a city's or region's residents live at all points on the socio-economic spectrum.⁷⁴ Some, admittedly speculative,⁷⁵ evidence suggests that states or commuter-sheds that are homogenous (i.e., ones with either all-wealthy or all-poor residents), enjoy faster growth in population and income, less crime, and report less unhappiness among residents.⁷⁶ But heterogeneous communities should be considered a good in themselves, regardless of resulting benefits that are conferred or lost. *Mount Laurel* helps bring to life the theory that inclusionary zoning creates the most sustainable communities; if some cities are rich and others are poor, those residing in the poor cities will have limited access to decent schools and job opportunities.⁷⁷ Additionally, intuition suggests that living in a diverse community, in the broadest sense of the word "diverse," allows one to become accustomed to cultural, racial, and economic differences, which results in increased tolerance.⁷⁸ But given the speculative nature of theories concerning the relative benefits and costs of having all-wealthy/all-poor versus mixed communities, the courts have never used such a theory for supporting the *Mount Laurel* doctrine.

3. The "Limit Local Power" Perspective

The above two sections describe phenomena surrounding the affordable-housing dilemma in New Jersey but fail to hone in on any

Because equality is usually considered a positive goal, and since it is something to be avoided in the current context, I use "homogeneity" instead.

74. A recent Princeton study found that most migration out of New Jersey is by low-income individuals, while those coming into New Jersey are wealthy. See CRISTOBAL YOUNG ET AL., TRENDS IN NEW JERSEY MIGRATION: HOUSING, EMPLOYMENT, AND TAXATION 2 (2008).

75. Edward L. Glaeser et al., *Urban Inequality 27* (Harvard Institute of Economic Research, Discussion Paper No. 2168, 2008), available at <http://www.economics.harvard.edu/pub/hier/2008/HIER2168.pdf> ("All of these explanations remain speculation . . .").

76. *Id.* at 26–27.

77. Gordon Interview, *supra* note 68.

78. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (discussing the value of ethnic diversity as conceived by the framers of the U.S. Constitution in the context of educational affirmative action program).

particular problem that lends itself to judicial and administrative management. For better or worse, courts have little ability to address racial animosity borne by residents, and administrative agencies have only indirect control in determining who lives where. However, the courts and COAH can address the powers that local governments have in making zoning and planning decisions. This Note posits that *Mount Laurel* and COAH primarily exist to limit municipalities' power over local zoning decisions. In the first *Mount Laurel* opinion, the court expanded the meaning of the term "general welfare" to include the entire, interrelated region in which the municipality sits. No longer could municipalities hide behind their parochial political boundaries; local zoning decisions suddenly became a concern of the state.⁷⁹

Mount Laurel's core insight that, no matter what, people need to have affordable housing, means that affordable housing must be accomplished even if it is the less profitable choice for a municipality. By requiring municipalities to build affordable housing at all costs, *Mount Laurel* limits their ability to take economic considerations into account when making zoning decisions. As market actors, municipalities seek to increase their tax base in order to generate revenue. Affordable housing can be seen as a form of wealth redistribution that limits local governments' ability to maximize tax revenue, and so was avoided pre-*Mount Laurel*. From the start, the *Mount Laurel* doctrine has required municipalities to turn their attention outward and play a part in the welfare of the entire region in which they are located, rather than act solely in their own interests. The limit-local-power purpose lends itself to broader application than either of the other two purposes discussed above because the application of local power—not the attitudes of residents or the demographics of the location—is the most direct cause of the harm *Mount Laurel* seeks to remedy. No city is designed to care for those who do not live within its boundaries; *Mount Laurel* is designed to make them care.

Parochialism has been somewhat remedied by COAH, but the New Jersey Fair Housing Act, which created COAH, still incorrectly left the implementation of *Mount Laurel* with municipalities. It is still the responsibility of municipalities to plan for growth by submitting a master plan to COAH; such planning ultimately determines their fair share numbers.⁸⁰ Thus the feature in the New Jersey Constitution⁸¹

79. See *Mount Laurel I*, 336 A.2d 713, 727–28 (N.J. 1975); HAAR, *supra* note 38, at 25.

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

81. The State Constitution provides:

that required the court in the first *Mount Laurel* decision to “treat[] every city as an individual decision-maker required to confront regional needs by itself as a matter of thought,”⁸² continues to linger, with deleterious effect, under COAH’s management. Despite this limitation, the New Jersey Constitution grants the state legislature the power to repeal or alter local ordinances.⁸³ This could provide further room for COAH to limit local power—COAH could be granted the authority to execute this provision of the constitution on behalf of the legislature to directly alter obstructing local ordinances.

B. *Mount Laurel Today and Growth Share*

As previously discussed, this Note has hypothesized that the main purpose of the *Mount Laurel* doctrine is to limit local power in zoning and planning. With that in mind, we turn now to the central feature of the modern *Mount Laurel* doctrine, Growth Share, to determine whether it can accomplish that goal.⁸⁴ This section will address two weaknesses in Growth Share that prevent it from effectively limiting local power: 1) Growth Share has the potential to inhibit predictability in city planning and 2) Growth Share fails to distinguish between municipalities based on their past behavior with respect to exclusionary zoning.

Introduced in 2004 as a simplification to the Fair Share calculation, Growth Share pins affordable housing obligations to residential and commercial construction in a municipality. COAH provides growth projections for each municipality,⁸⁵ based on New Jersey Department of Labor and Workforce Development county projections, which are then allocated to the municipal level based on historical trends.⁸⁶ The projections contain the number of market-rate units ex-

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

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

82. FRUG, *supra* note 32, at 80.

83. *See* N.J. CONST. art. IV, § 6, ¶ 2.

84. *See generally* N.J. ADMIN. CODE § 5:97-2.1-2.5 (2008).

85. *See generally* N.J. ADMIN. CODE § 5:97-2.4. (2008). Municipalities may use their own projections if they exceed COAH’s projections. N.J. ADMIN. CODE § 5:97-2.2(d), 2.3(d) (2008). COAH has also stated that if, using local data, municipalities come up with projections believed to be more accurate, municipalities can appeal to COAH to change their projections. *See* Daniel Howley & Jamie Romm, *Agency Responds to Criticisms about COAH*, THE INDEPENDENT, Oct. 9, 2008, at 1.

86. N.J. ADMIN. CODE § 5:97-2.2(d) (2008).

pected to be built in the municipality through the year 2018.⁸⁷ The current rules require one affordable unit to be built for every four market-rate residential units built, and one affordable unit for every sixteen new jobs created.⁸⁸ Actual growth is measured bi-annually in the municipality based on the number of building certificates issued, which is how the municipality's actual growth share is determined.⁸⁹ If the municipality fails to build more than ten percent of its projected share, COAH has the authority to order the municipality to modify its plans to build more affordable units.⁹⁰ If actual growth is *less* than projected, the regulations provide that "the municipality shall continue to provide a realistic opportunity for affordable housing to address the projected growth share."⁹¹

C. Growth Share Challenged

Growth Share, in its first implementation, was challenged by the New Jersey Builders Association, Fair Share Housing Center, and the Coalition for Affordable Housing and the Environment, among others, in *In re Adoption of N.J.A.C. 5:94 and 5:95 (Third Round)*.⁹² The Appellate Division struck down COAH's implementation of Growth Share on the grounds that it permitted too much discretion to remain with municipalities; Growth Share did not go far enough in limiting the local power that municipalities had in zoning decisions. In response to this decision, COAH promulgated new Growth Share rules that were aimed at curtailing this discretion. This section discusses the New Jersey Appellate Division's analysis of the original Growth Share rules as a stepping stone for determining whether the current Growth Share rules go far enough in limiting local power. The court found that COAH's original rendition of Growth Share ran counter to the goal of *Mount Laurel* because it allowed "each municipality [to]

87. As discussed more fully in the next section, this was not originally the case—COAH used to receive local projections from municipalities.

88. *See id.* Job creation is "measured based upon the square footage of non-residential development converted to jobs based on the use group ratios provided in chapter Appendix D." N.J. ADMIN. CODE § 5:97-2.5(b) (2008). Appendix D provides, for example, that in an office building, 1000 square feet creates 2.8 jobs, so a municipality must produce one affordable unit for every 5714 square feet of office space it builds (16 jobs = 5714 sq. ft.). N.J. ADMIN. CODE § 5:97 app. D. N.J. ADMIN. CODE § 5:97 app. D (2008).

89. N.J. ADMIN. CODE § 5:97-2.5(a)(1) (2008). *See* N.J. ADMIN. CODE § 5:96-10.1 (2008) for a description of the review process.

90. *See* N.J. ADMIN. CODE § 5:96-10.4(a) (2008).

91. N.J. ADMIN. CODE § 5:97-2.5(e) (2008). This vague phrase operates to free municipalities from any further obligations once they've met their numbers.

92. *See In re Adoption of Third Round Substantive Rules of the N.J. Council on Affordable Hous.*, 914 A.2d 348 (N.J. Super. Ct. App. Div. 2007).

control[] its destiny.”⁹³ To correct this, the court clarified the housing requirements for each municipality and demanded that COAH reformulate its Growth Share scheme. Relevant for our purposes, the court found that Growth Share encouraged municipalities to adopt master plans that retarded growth in order to minimize their prior obligation.⁹⁴ Additionally, those municipalities that had met their fair share were not required to do anything and could choose stasis to avoid the obligation of providing *additional* affordable housing.⁹⁵ In this respect, Growth Share was (and still is) a baseline requirement, above which the state will not scrutinize whether a place is actually inclusionary. Because the original implementation of Growth Share left municipalities with the obligation to set their own new-construction projections, and therefore their own affordable housing obligations, the court concluded that “[a]ny growth share approach must place some check on municipal discretion,”⁹⁶ and sent COAH back to the drawing board.

COAH has since revised its Growth Share rules (Revised Rules).⁹⁷ The Revised Rules clearly reflect a response to the court’s concern that the prior rules permitted too much discretion to individual municipalities. Section 2.4 of the prior rules provided that: “Municipalities shall project the residential component of growth share obligations . . . based on the data and analysis of growth projections pursuant to [Section 2.2].”⁹⁸ Section 2.2 in turn required each municipality to develop projections of how much and where they intended to grow (residentially and commercially) through the year 2015 and submit those plans to the State Planning Commission for approval.⁹⁹ The *Third Round* court found this approval process to be an insufficient check on municipalities for ensuring compliance with the Growth Share scheme. So COAH promulgated the Revised Rules with the relevant revision providing: “A municipality shall determine the residential component of its growth share obligation . . . based on the household projections *provided in chapter Appendix F. . .*”¹⁰⁰ Rather

93. *Id.* at 377.

94. *Id.*

95. Gordon Interview, *supra* note 68.

96. *In re* Adoption of Third Round Substantive Rules of the N.J. Council on Affordable Hous., 914 A.2d 348, 381 (N.J. Super. Ct. App. Div. 2007).

97. Compare N.J. ADMIN. CODE § 5:94, and N.J. ADMIN. CODE § 5:95, with N.J. ADMIN. CODE 5:97.

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

99. N.J. ADMIN. CODE § 5:94-2.2(b)(4).

100. N.J. ADMIN. CODE § 5:97-2.4(a) (emphasis added).

than allow each municipality to calculate its own projection for future growth, COAH provided projections for the entire state in Appendix F.¹⁰¹

To remedy the problem identified by the Appellate Division, COAH provided every municipality with a set of projected growth figures with which to comply, eliminating the possibility for manipulation. Though municipalities are no longer allowed to determine their own projected growth numbers, the issue remains whether COAH's Revised Rules have sufficiently limited municipalities' control over their own "destiny."

III. EVALUATION OF GROWTH SHARE

Although the current implementation of Growth Share has improved upon the faults found by the Appellate Division in *Third Round*, several problems still remain. Section A of this Part addresses the issue of sprawl in relation to the implementation of Growth Share. It discusses the concerns that arise with Growth Share in slow or non-growing municipalities and focuses on the issues surrounding the process of filtering. Section B addresses how the presumption of continuous growth interferes with a municipality's right to define itself from a city-planning perspective. By denying municipalities the discretion to create an appropriate identity for themselves, Growth Share creates a rally point for opponents to big government. Section B utilizes anecdotal evidence from several key municipalities in New Jersey to illustrate just how Growth Share wrongly limits local control, while continuing to permit behavior that is ultimately contrary to the spirit of *Mount Laurel*.

101. Appendix F to N.J. ADMIN. CODE § 5:97 is a 372-page report prepared by a number of consultants for COAH, directly responding to the *Third Round* decision. In *Allocating Growth to Municipalities*, consultant Econsult reported to COAH that by 2018, New Jersey's population would be 9,411,670 (up from 8,675,880 in 2004). The report further concluded that New Jersey would build 269,448 new housing units in the *Third Round* period, with the fastest growth in the central and southwestern counties. Generally, Econsult predicted slower growth for the northern, more urban counties, and faster growth for the central coastal, and western rural counties. Ocean County, with its vast shoreline, is projected to have the highest growth in the state with construction of over 38,000 units in the *Third Round* period. *Allocating Growth to Municipalities* also contains projections for every municipality in the state. For example, Middletown Township, a large suburban township in northern Monmouth County, is projected to grow by 1,149 units between 2004 and 2018. Thus, following the revised Growth Share ratio (1:4), Middletown will have to create approximately 287 affordable units based on its residential growth.

A. *Growth Share and Sprawl*

Growth Share is premised on continuous sprawl; for affordable housing to be built in New Jersey, all municipalities must continue to build. Though Growth Share prevents municipalities from making exclusionary construction decisions, for it to work properly it requires and assumes the constant construction of new housing. The notions that such construction will continue unabated, and that such construction is a good thing are not necessarily true. However such value judgments—which have been criticized by housing advocates for years¹⁰² in reference to flaws with the “black box formula”—are the type of judgments that ought to continue to be left to municipalities. The problem with Growth Share, which is a problem often present when a larger government tells a smaller government what to do, is that it eliminates the locality’s ability to preserve idiosyncrasies important to local residents and create nuanced policies that conform to the unique needs of any given place.

Suburban communities in New Jersey are presently experiencing the most rapid growth in the state. The Growth Share formula tags those boomtowns with an affordable housing obligation in proportion to the growth they are enjoying. As the *Third Round* court put it: “[t]he growth share methodology is based on the premise that municipalities that add jobs and housing . . . should also accommodate their fair share of the statewide and regional need for affordable housing.”¹⁰³ But this reveals a disjoint in the rationale for Growth Share. Growth Share operates on the assumption that new market-rate development will attract new residents. New construction is used as a proxy for demand, and affordable housing then acts as a tax on that demand.¹⁰⁴

However, there is reason to believe that new construction makes a poor proxy for demand. Builders may not be able to predict the attractiveness of a locale, though they may hope to *attract* residents by building new housing instead of building as a response to a known desire to move to an area. Finally, housing scarcity may actually increase demand, making a place more exclusive. This suggests that housing construction is not only an imprecise proxy for a municipal-

102. See, e.g., Brief for Coal. for Affordable Hous. and the Env’t, *In re* Adoption of Third Round Substantive Rules of the N.J. Council on Affordable Hous., 914 A.2d 384 (N.J. Super. Ct. App. Div. 2007).

103. *In re* Adoption of Third Round Substantive Rules of the N.J. Council on Affordable Hous., 914 A.2d 384 (N.J. Super. Ct. App. Div. 2007).

104. See Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981).

ity's fair share obligation, it is also an unsustainable way to allocate burden—Growth Share is premised on unlimited, unchecked suburban sprawl.¹⁰⁵ The choice not to create sprawl is one aspect of local decision-making that *ought* to remain local. This type of community development is the proper domain for the locality, not the state.

The process by which Growth Share relies on sprawl is known as “filtering.”¹⁰⁶ Filtering theory provides that when new housing ages, it becomes affordable to middle- and low-income buyers. Increased housing construction leads to increased supply, which, according to the theory, affects all housing prices by lowering them. The mere fact that Growth Share exists at all suggests that filtering does not provide enough affordable housing on its own; if it did, growth itself would cause older units to come on the market for middle- and low-income buyers. Thus Growth Share provides for artificial filtering. Rather than relying on the wealthiest home-buyers to vacate their homes at the completion of new construction, municipalities must build direct stand-ins for those older houses that would have been vacated. In this sense, Growth Share has the potential to be over inclusive in that it targets solely those municipalities where filtering might actually be occurring, and requires that they build even more, while those not building (and where filtering is presumably not occurring) have less of an obligation to provide a share of affordable housing.

The *Mount Laurel* framework has long been criticized for its reliance on suburban sprawl. In 1986, the New Jersey Supreme Court in *Hills Development Co.*, acknowledged criticism that the Builder's Remedy was also based upon continuing growth and sprawl to justify its existence. When a builder sued a municipality for the right to construct housing (including affordable units), it was typically awarded the right to build four units of market-rate housing for every unit of affordable housing constructed.¹⁰⁷ Thus, a fair share number handed down by COAH was “viewed as requiring the municipality to build, in the aggregate, five times that number.”¹⁰⁸

The same conclusion holds true under the current Growth Share ratio. To support such sprawl, there must be adequate space. COAH asserted that there is ample vacant land in the state to accommodate sprawl, concluding that there are 1.01 million acres of developable

105. See *supra* note 48 for a definition and discussion of “sprawl.”

106. See *supra* Part I.C.

107. *Hills Dev. Co. v. Bernards Twp.*, 510 A.2d 621, 636 n.4 (N.J. 1986).

108. *Id.* at 637 n.4.

land in the state¹⁰⁹ and noting that in the past 240 years, only 1.42 million acres have been developed.¹¹⁰

But COAH's land analysis does not take into account the fact that much of the vacant land in the state is outside the range of sewage treatment facilities, thus limiting realistic growth.¹¹¹ This forces new development on towns in already-developed regions of the state that consist of old communities with dense, weathered housing, and that lack obvious tracts for further growth. Driving through many of New Jersey's shore communities, for example, one has trouble imagining areas for further growth that do not require the bulldozing of the last few clumps of foliage in sight. An exception, or alternative measures, should be made for municipalities already laid out in dense grids.

Finally, there is a sense in which Growth Share is under-inclusive, though this explanation appeals more to moral theory than to any legal duty. No correlation exists between construction of new housing and one's duty to provide affordable housing for New Jersey residents. In this way, Growth Share lacks the tools to measure whether a municipality is actually inclusionary. Growth Share creates the presumption of inclusion that, once satisfied, will shield the municipality from further inquiry by the state as to whether it is really a welcome place for residents of all income levels. Advocates of Growth Share have provided no principled reason that, once a town meets its Growth Share obligations, it has "done enough" to provide affordable housing. Growth Share paints with a broad brush and by doing so, it hinders municipalities' autonomy creating palpable political backlash, as the next section will explore.

B. Municipalities' Experience with Growth Share

This section addresses the experiences of specific municipalities in their attempts to comply (or avoid compliance) with Growth Share. This anecdotal evidence suggests that COAH is losing the public-relations campaign for affordable housing; it has become a symbol of bad

109. See HENRY J. MAYER, ANALYSIS OF VACANT LAND IN NEW JERSEY AND ITS CAPACITY TO SUPPORT FUTURE GROWTH 27, 30 (2008). In response to *Third Round*, COAH undertook to study available vacant land in New Jersey. *In re Adoption of Third Round Substantive Rules of the N.J. Council on Affordable Hous.*, 914 A.2d 384, 400 (N.J. Super. Ct. App. Div. 2007). COAH had previously calculated two million acres of vacant land in New Jersey, but that most of that vacant land was in areas of the state designated as protected. *Id.* at 380.

110. MAYER, *supra* note 109.

111. *Id.* at 31 ("29 percent of the State's vacant lands are located in State Planning Areas 1 or 2, a Designated Center or other areas having access to centralized wastewater treatment systems (collectively referred to as growth areas)").

bureaucracy within a power struggle over local and state control. COAH fundamentally fails to distinguish between municipalities that have always excluded and those that have merely failed to meet their current fair share numbers, despite having built abundant affordable housing in the past.

Growth Share has aroused the ire of many New Jersey municipalities.¹¹² Despite its promise to streamline and localize affordable housing planning, a combination of recalcitrance and honest hesitation while litigation settles continues to stymie construction of affordable units. For example, Beach Haven, a small seaside borough in Ocean County, has had an affordable housing obligation of seventy units since 1994, and a Growth Share obligation of nine additional units as of October, 2008.¹¹³ Despite this requirement, Beach Haven officials have not built a single unit. According to a local official, Beach Haven “[does not] have a fast and steady number, especially with what is going on at the state level.”¹¹⁴ Beach Haven sought temporary immunity from *Mount Laurel* suits until it could develop a new Fair Share Plan.¹¹⁵ This is despite one developer proposing to build a total of thirty-five units, including seven (twenty percent) affordable units.¹¹⁶

Michael Jedziniak, whose firm represents a number of municipalities, including Beach Haven, believes that many municipalities in New Jersey, especially shore communities, will struggle to satisfy their *Mount Laurel* obligations under Growth Share.¹¹⁷ Egg Harbor, the fastest growing community in Atlantic County, is currently being sued by FSHC. FSHC seeks to ensure that the township ultimately complies with its *Mount Laurel* obligations.¹¹⁸ Egg Harbor Township (population 40,000)¹¹⁹ currently has no COAH-certified affordable housing,¹²⁰ and its combined Growth Share, Rehabilitation Share, and

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

113. State of N.J. Dep’t of Cmty Affairs, Rehabilitation Share, Prior Round Obligation & Growth Projections, at 14 (Oct. 20, 2008) [hereinafter Prior Round Obligation & Growth Projections].

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

115. *Id.*

116. *Id.*

117. Jedziniak Interview, *supra* note 35.

118. *Id.*; Michelle Lee, *End of Year is Key Deadline in Egg Harbor Township Affordable Housing Suits*, PRESS OF ATLANTIC CITY, Oct. 18, 2008, at C5.

119. 39,493, U.S. Census Bureau, 2007 Population Estimates.

120. Lee, *supra* note 118. According to Michael Jedziniak, Egg Harbor Township is currently in the process of getting approval from the court for group homes and mobile homes in the township to satisfy its 2033-unit combined obligation. Such ap-

Prior Round obligations total 2,033 units.¹²¹ Such statistics belie statements by local officials like Freeholder Tom Ballistreri who stated that “[t]he Trenton politicians are forcing towns to cram more low and moderate income housing into areas which cannot sustain any more growth.”¹²² Egg Harbor Township can clearly support more growth, suggesting the opposition’s motives are less earnest than concern for “cramming.”

Evesham Township, in Burlington County, complains that it had to abandon development of a shopping center¹²³ because it would have required construction of thirty-seven affordable housing units and cost taxpayers \$6 million.¹²⁴ Municipal officials often cry “high taxes!” as a tactic to rally opposition to affordable development.¹²⁵ Alternatives to raising taxes include collecting local development fees, gaining access to the new statewide pool of funding for affordable housing,¹²⁶ gaining access to federal funds, and requiring inclusionary development by private developers mixing affordable and market-rate units.¹²⁷ The misconception that affordable housing construction will lead to higher taxes is premised on the unspoken belief that such housing is somehow subsidized, or that it is a form of welfare. It should be

proval will not fully satisfy its obligations. Interview with Michael Jedziniak, Senior Assoc., Jeffrey R. Surenian & Assocs., Special Mount Laurel Counsel for over forty New Jersey municipalities and co-counsel for the N.J. League of Municipalities (Feb. 16, 2010) [hereinafter Jedziniak Interview II].

121. Prior Round Obligation & Growth Projections, *supra* note 113.

122. *Affordable Housing Plan Will Make Atlantic County Less Affordable*, GALLOWAY TWP. REPUBLICAN LEAGUE, Jul. 2008, at 3, http://www.gtrl.org/files/July_2008_Volume_VII.pdf.

123. In addition to requiring affordable housing construction in proportion to residential construction, Growth Share also requires affordable housing construction in proportion to job growth. N.J. ADMIN. CODE § 5:97-2.4(b) (2009). Job growth is measured based on square-footage and use-type. N.J. ADMIN. CODE § 5:97 app. D. So, for example, Appendix D provides that a “business” like a bank or law office produces 2.8 jobs per 1000 feet of space constructed. *Id.*

124. Maya Rao, *Officials Decry New Housing Mandate*, PHIL. INQUIRER, Sept. 19, 2008, at B1. This \$6 million figure is arrived at by multiplying the thirty-seven unit obligation by \$161,000, the average subsidy applied to affordable units. In residential development this subsidy is absorbed by builders who are also building market-rate housing. Such builders are generally given a density bonus to construct affordable housing. But commercial construction does not usually include housing construction. In order to get credit for its COAH obligation, a town must adopt a resolution of “intent to buy,” effectively putting the municipality on the hook for the subsidy of the affordable housing obligation generated by commercial development. Jedziniak Interview II, *supra* note 120.

125. N.J. Dep’t. of Cmty Affairs, COAH Fact Sheet, <http://www.state.nj.us/dca/affiliates/coah/reports/factsheet.html>.

126. See N.J. STAT. ANN. § 52:27D-320 (West 2009). As of February 2010, the future of this funding is in doubt. Jedziniak Interview II, *supra* note 120.

127. See COAH Fact Sheet, *supra* note 125.

emphasized that *Mount Laurel*, unlike the Federal “Section 8” program, is aimed at building middle-, not low-, income housing. If anything, market-rate housing, fueled by realtors’ speculation in recent years, has done more to raise property taxes than *Mount Laurel* developments ever could.¹²⁸

Oldmans Township, similarly affected, is a farming community in northern Salem County that is largely undevelopable because of farmland preservation¹²⁹ and Department of Environmental Protection regulations.¹³⁰ Prior to the adoption of Growth Share, Oldmans negotiated a deal for a 3.14 million square foot business park to serve regional business needs. After the implementation of Growth Share in 2004, Oldmans was saddled with a roughly 200-unit growth share linked to the business park project which it has been unable to meet. These anecdotes display resistance to the imposition of the COAH regulations. One may criticize the towns for resisting their constitutional obligations in bad faith, but perhaps criticism is more properly directed at COAH, whose responsibility it is to properly motivate and negotiate with municipalities to build *some* affordable housing. A less combative approach, with more discretion afforded to COAH to reward good behavior would be more effective than the current carrot-less (and stick-less) method.

Evidence suggests that Growth Share fundamentally fails to distinguish between growing towns that already provide for affordable housing and those that presently have no affordable housing. Eatontown, for example, has a projected Growth Share of 490 units, and a prior round obligation of 504 units.¹³¹ But Eatontown’s Mayor, Gerald Tarantolo, stated that “[m]ore than 50 percent of our residents live in apartments, which [are] affordable housing, yet we get no credit for that.”¹³² Tarantolo was referring to a provision of the FHA that prohibits housing built before 1980 from counting toward a municipality’s affordable housing quota.¹³³ He adds that Eatontown’s

128. See Matt Bai, *State of Distress*, N.Y. TIMES, Oct. 20, 2009, at MM38 (describing how the issue of property taxes is the perennial number one concern of New Jersey voters).

129. Salem County Cross-Acceptance III Public Hearing, State Planning Comm’n, Dep’t of Comty. Affairs (Apr. 17, 2007), available at <http://www.nj.gov/dca/divisions/osg/docs/salemcaminutes041707.pdf> (89% of the land in Salem County has been set aside for preservation, 11% for growth).

130. Jedziniak Interview, *supra* note 35.

131. COAH Fact Sheet, *supra* note 125.

132. Daniel Howley, *Mayors Seek Change to Affordable Housing Law*, ATLANTICVILLE, Sept. 18, 2008, at 1.

133. *Id.* N.J. STAT. ANN. § 52:27D-307(c)(1) provides: “[A] municipality shall be entitled to a [credit against its affordable housing quota] for a unit if it demonstrates

growth projections are impossible given that the borough is “97 percent developed.”¹³⁴ According to the New Jersey League of Municipalities, COAH used an aerial survey of Eatontown to determine developable area, and took into account protected or otherwise undevelopable area in compiling its growth projections including cemeteries, schoolyards, and private homes’ backyards.¹³⁵ COAH responded that it “would never require or permit affordable housing development to be placed in homeowners’ backyards, parks or in the median of a highway. . . . These ludicrous claims are being used by people trying to keep affordable housing out of their community.”¹³⁶ COAH explained that it used data available state-wide and acknowledged that localities often have more precise data about vacant land: “any municipality may submit actual local data to COAH and we will work with the municipalities and adjust the projections accordingly.”¹³⁷ These examples serve to demonstrate that the fight between COAH and the municipalities is often political, not legal. If municipalities can succeed in depicting COAH as incompetent or sloppy, they can undermine its credibility. Yet COAH rightfully acknowledges that local data will often be more accurate than its own data.

Yet the intuition remains that towns like Eatontown should be treated differently than towns simply trying to avoid zoning for affordable housing. In 1975, Eatontown was the poster child of inclusionary development. It has never used its zoning power to exclude the poor; nonetheless, COAH requires thirty-year deed restrictions that units will remain affordable.¹³⁸ Thus a town could have 100% affordable units but, under Growth Share, would be treated the same as a town that has never provided affordable units.¹³⁹ From the municipalities’ point of view, Growth Share, while administratively simple, brushes too broadly and does not take into account towns’ previous good behavior. That said, Eatontown is home to Fort Monmouth, a soon-to-

that the municipality issued a certificate of occupancy for the unit, which was either newly constructed or rehabilitated between April 1, 1980 and December 15, 1986.” The court has held such provisions “enjoy a presumption of validity” for administrative ease. *In re Adoption of Third Round Substantive Rules of the N.J. Council on Affordable Hous.*, 914 A.2d 348, 364 (N.J. Super. Ct. App. Div. 2007). Older housing did count toward keeping municipalities’ prior-round obligations lower. Gordon Interview, *supra* note 68; additional comments provided Feb. 16, 2010.

134. Howley, *supra* note 132.

135. Daniel Howley, *Agency Responds to Criticisms about COAH*, ATLANTICVILLE, Oct. 9, 2008, at 1.

136. *Id.* (quoting former DCA Commissioner Joseph Doria).

137. *Id.*

138. Jedziniak Interview, *supra* note 35.

139. *Id.*

close army base with extensive housing facilities. COAH, or its successor, should be empowered with the flexibility to make use of such housing when it becomes available, to satisfy regional need.¹⁴⁰

The builders would remind municipalities that the ultimate constitutional burden rests *with the municipalities*. The doctrine, the courts, the legislature, and COAH are all supposed to create incentives for builders. This puts the towns on the hook for behavior not completely within their control.¹⁴¹ Richard Hoff explains that it is not possible for builders to fit units into the small spaces left over through towns' exercise of zoning power.¹⁴² The real opposition from municipalities, according to Hoff, is their desire to avoid high density and families with children. If a town zones for senior living centers, it does not have to use tax dollars to build as many schools. One may rightfully say that New Jersey's municipalities are self-interestedly trying to minimize expenditures, but on this analysis, they are not trying to exclude outsiders for more invidious purposes. Such self-interest may prove short-sighted if one agrees that equal access to good schools and jobs will ultimately improve life for everyone. Less controversially, such self-interest violates the same spirit of *Mount Laurel* that Regional Contribution Agreements violated, and which *Mount Laurel* has opposed—the spirit that municipalities must care for those who live outside of them, and who cannot vocalize their zoning desires.

IV.

POSSIBLE FIXES FOR GROWTH SHARE

The current iteration of Growth Share is not the only choice COAH could have made in carrying out its administrative duties. One suggestion for decreasing municipal discretion has been the implementation of Pure Growth Share. This section will address the concept of Pure Growth Share and conclude that though such a system would eliminate unwanted discretion, it would also critically limit cities' ability to plan. I will go on to argue that while Growth Share does limit local control, concerns over sprawl and the general intuition that a municipality should be able to determine what type of *place* it is going to be, ought to prevent the complete removal of local power over zoning decisions.

140. Gordon, *supra* note 68; additional comments provided Feb. 16, 2010.

141. Hoff Interview, *supra* note 70.

142. *Id.*

A. *The Pure Growth Share Option*

A system of *pure* growth share, while completely eliminating local control, would also eliminate any input from COAH and destroy both state and local efforts to engage in effective community planning. New Jersey's current fair share allocation system is not *pure* growth share. In its *Third Round* brief, the Coalition for Affordable Housing and the Environment (CAHE)¹⁴³ proposed the adoption of a pure system of growth share.¹⁴⁴ Such a system would operate in real time, using monthly data published by the state for each New Jersey municipality.¹⁴⁵ Pure growth share would use actual building permits approved by a city and numbers already reported to the state to determine a city's growth share obligation. Rather than guess how many market-rate units would be built between now and 2018, a city's obligation would fluctuate each year depending on the number of permits actually issued. The frequent monitoring and adjusting of a municipality's obligations was one essential difference between CAHE's proposal and the prior Third Round Rules.¹⁴⁶ By using actual growth numbers instead of projections, CAHE argued that pure growth share would eliminate the need for a rehabilitation share formula.¹⁴⁷ This would also eliminate the complicating elements of current affordable housing plans,¹⁴⁸ as well as *all* discretion (by both municipalities and COAH) to assign or flout compliance numbers.

Adoption of a pure growth share system would inhibit predictability, though it would fully limit any ability by municipalities to manipulate their own affordable housing obligations. This reveals the tension between the goal of *Mount Laurel* to limit local control over the ability to exclude middle- and low-income residents, and the need for municipalities to retain the ability to plan for future growth in an intelligent way.

143. CAHE is a "group of planning, environmental and housing organizations" seeking to find "multi-faceted solutions that would create a New Jersey with abundant open spaces, a clean environment, healthy cities, and reasonable housing opportunities for all its residents." Coalition for Affordable Housing and the Environment, <http://www.cahenj.org/> (last visited Feb. 12, 2010).

144. Brief for Coal. for Affordable Hous. and the Env't, *supra* note 102, at 17.

145. See N.J. Dep't of Cmty. Affairs, The New Jersey Construction Reporter, 2008 Monthly Data, <http://www.state.nj.us/dca/codes/cr/monthly2008.shtml> (last visited Feb. 12, 2010).

146. Brief for Coal. for Affordable Hous. and the Env't, *supra* note 102, at 17.

147. The rehabilitation share formula determines a portion of a municipality's housing obligation based not on the number of new units being built (that is what Growth Share is for), but on the number of dilapidated units needing repair. *Id.*

148. *Id.* at 36–37.

Pure growth share, without projections, would make planning very difficult. Even if the Fair Share calculation was opaque, it did, at least, provide non-changing numbers around which city planners could intelligently plan for municipalities' future housing needs.¹⁴⁹ Pure growth share numbers, on the other hand, would have to be constantly adjusted based on new development data for the municipality. *Mount Laurel II* recognized that growth in New Jersey had to be "smart growth," and that such a small state could not simply keep building to provide affordable housing. Some accommodation had to be made for those units that could be refurbished, and for municipalities that already provided a substantial share of affordable housing (and historically have done so). Projections, rather than pure growth share, allow for state-wide planning and coordination. COAH can determine which state regions continue to lack sufficient affordable housing, and which regions provide reasonable opportunities without having to wait on local yearly reports, and conduct town by town review of all the new construction approvals handed out by the municipalities. Predictability is thus important to COAH's quest for ensuring that affordable housing is equitably distributed throughout the state. Predictability is also important to builders. With COAH's projections, a builder can identify which municipality will likely need further construction of affordable housing, and can plan its own business targets accordingly. Under a pure growth share scheme, builders would be at the mercy of municipalities who chose to issue building permits in any given year.

B. Other Choices

Any implementation of Growth Share must provide for predictability and planning, and must afford sufficient localized control to municipalities to maintain the nature of their community. While a municipality must afford the opportunity for all ranges of housing, it should not be required to convert itself into a suburban megaplex to comply with its obligations. With those requirements in mind, we turn to one model that could successfully limit localities' ability to control their own development, while still permitting them to plan for future housing needs in a way that suits each individual's needs.

New Jersey can accomplish its inclusionary housing project without limiting a municipality's ability to combat sprawl. Models do exist that are not premised on sprawl. Take the example of Montgomery County, Maryland, a community that boasts one of the nation's most

149. Hoff Interview, *supra* note 70.

comprehensive inclusionary housing programs.¹⁵⁰ Montgomery County has succeeded with a program that was a precursor to New Jersey's Growth Share method, in the 1970s. Montgomery County required builders to build fifteen percent affordable units¹⁵¹ for developments of more than fifty market-rate units.¹⁵² In exchange, builders would receive a density bonus, allowing them to build more units per lot than would normally be allowed under zoning laws.¹⁵³ This density bonus permits building up, not out. Such a model satisfies environmentalists, who seek to prevent the bulldozing and flattening of wilderness and the dotting of pastoral areas with McMansions. It also satisfies urban planners who seek to revitalize New Jersey's struggling, but resurging, downtown areas.

The Maryland program differed from *Mount Laurel* because it was not derived from a state constitutional mandate, and did not require complex planning projections to be approved by a state agency. However, it still accomplished *Mount Laurel's* main purpose of restricting local municipalities' control over zoning without jeopardizing important local decisions. It was much closer to the *pure* growth share proposed by CAHE. Most importantly, the Montgomery County program put responsibility for provision of affordable housing squarely on the party with the capacity to create that housing: the builders. Municipalities played no role. As a result, Montgomery County's program has succeeded in creating 10,000 units in a county with under one million people, and has not created the type of community outrage caused by *Mount Laurel*.¹⁵⁴

In New Jersey, the burden to build affordable housing remains with municipalities. If incentives were transferred directly to builders municipalities would be largely removed from the equation. One possible solution to this problem would be strengthening COAH by authorizing it to veto municipal zoning choices.¹⁵⁵ So long as COAH

150. See Christopher Swope, *Little House in the Suburbs*, GOVERNING MAGAZINE, Apr. 2000, at 18.

151. The nationally accepted definition of "affordable housing" is housing that costs no more than thirty percent of a family's yearly income. See Danilo Pelletiere et al., *Introduction*, in OUT OF REACH 2006 2 (Danilo Pelletiere et al. eds.), available at <http://www.nlihc.org/oor/oor2006/introduction.pdf> (last visited Feb. 12, 2010).

152. Swope, *supra* note 150, at 19; see also KAREN DESTOREL BROWN, BROOKINGS INST. ON URBAN AND METRO. POLICY, *Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area 29-30* (2001), available at <http://www.brookings.edu/es/urban/publications/inclusionary.pdf>.

153. Swope, *supra* note 150, at 19-20.

154. *Id.* Compare that number to the approximately 40,000 units created in New Jersey, a state of nearly 9 million.

155. Kraham Interview, *supra* note 59.

retained zoning oversight to ensure that municipalities were not acting to prevent construction of affordable units where demand for those units exists, there would be less danger of reversion to the pre-*Mount Laurel* extreme polarization of the state between rich suburbs and poor cities.¹⁵⁶

Further improvement could come from distinguishing between communities based on their past behavior of exclusionary zoning and on their present character as booming “weed” communities. Such places are considered by some to be the most desirable to live, but are often the results of monolithic zoning decisions that price out middle-income buyers. COAH should utilize greater discretion in its treatment of municipalities; the recalcitrant ones ought to continue to face their obligations, but those, like Eatontown, that already offer numerous affordable opportunities, should be left alone. A “manual override” option would allow COAH, with appropriate process, to set aside strict Growth Share requirements for certain municipalities’ good behavior. While this Note does not advocate the re-introduction of the “black-box” fair share method, it does propose allowing a discretionary, qualitative judgment to go into the promulgation of a community’s fair share obligation.

CONCLUSION

This Note asked whether Growth Share was working for New Jersey. My working hypothesis is that, of the many possible purposes, the main purpose of the *Mount Laurel* doctrine has been to limit local control over zoning decisions because such local control has caused exclusionary zoning in the past. When left to their own devices, some municipalities have not cared enough for those who live outside but want to move in.

COAH has attempted to limit municipalities’ local control over zoning by connecting affordable housing obligations to growth. This has provided a clear way for municipalities to know their Fair Share. Matching affordable housing share to municipalities’ own behavior is more streamlined than simply providing top-down numbers to be achieved. Growth Share *is* working then to the extent that it has created a more logical, more readily understandable system for affordable housing. But there is a very serious sense in which Growth Share is not working. Many municipalities have chosen to opt out of the Third Round rules, and others challenge COAH’s projections, delaying ap-

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

proval of their plans, and, ultimately, the construction of affordable housing for those who need it.

Municipalities' opposition to COAH will likely remain. If a municipality is only required to care for those already there, it will do everything in its power to maintain the status quo for its own citizens. This self-interest justifies the need for a regional government like COAH to pop the balloon of localism. COAH has largely done this in the revised Third Round Rules by providing municipalities with their affordable housing obligations, rather than allowing them to calculate those obligations on their own. This satisfied the superior court's concern that "each municipality control[led] its destiny."¹⁵⁷ But does such a gesture go far enough to combat the parochialism that prevents municipalities from broadening their definition of the "general welfare"? Growth Share has not caused municipalities to become more altruistic, or even more compliant; it has only given municipalities new numbers to argue against. The litigation and abuse spawned by the Builder's Remedy has been traded under Growth Share, for endless administrative review. COAH has the unenviable job of requiring municipalities to cooperate, while not demanding so much of them that its numbers become a joke, a statist goal never to be achieved in this lifetime, or a target for free-marketers. COAH is likely a more competent steward of affordable housing policy than the courts (bound only to cases chosen to be litigated), or the lumbering, partisan legislature. COAH's main objective, therefore, may not be a legal one, but a political one: It must prove to skeptical municipalities that it has their individual concerns in mind while requiring them to build housing that they often do not wish to build. This may mean making a stronger case to the public that heterogeneous communities are in everyone's interest, or that the construction of affordable housing could help alleviate the most hated problem faced in New Jersey—high property taxes. COAH may be the most able to give deference to municipalities to define the land within their boundaries, while making opportunities for all New Jersey residents to live in the town of their choice.

157. *In re* Adoption of Third Round Substantive Rules of the N.J. Council on Affordable Hous., 914 A.2d 348, 377 (N.J. Super. Ct. App. Div. 2007).