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THIRD TIME'S THE CHARM?: THE MOUNT LAUREL SOLUTION TO EXCLUSIONARY ZONING

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Introduction

Exclusionary zoning¹ is a complex dilemma that engages a mixture of constitutional law, land use law, and political ideals. As such, exclusionary zoning has been one of the most controversial and debated issues in American jurisprudence. Although most people recognize the problem, a subject of great debate is how to rectify it.

New Jersey tried to set the precedent in how to deal with the problem of exclusionary zoning, but what resulted was a clash between the state supreme court and the state legislature. From the state judiciary came the *Mount Laurel* doctrine;² from the state legislature came the Fair Housing Act of 1985.³ The *Mount Laurel* doctrine requires every municipality in the state to provide a realistic opportunity for the construction of regional low and moderate-income housing.⁴ The *Mount Laurel II* decision reinforced the *Mount Laurel* mandate and the judiciary who determined the regional fair share and who supervised the process. Two years after the

¹ Exclusionary zoning is defined as “[z]oning that excludes a specific class of people or type of business from a district. Black’s Law Dictionary 674 (Pocket ed. 1996).

² The *Mount Laurel* doctrine developed from two holdings of cases known as *Mount Laurel I* and *Mount Laurel II*. They are, respectively, *S. Burlington N.A.A.C.P v. Township of Mount Laurel*, 67 N.J. 151 (1975) [hereinafter *Mount Laurel I*]; *S. Burlington N.A.A.C.P v. Township of Mount Laurel*, 92 N.J. 158 (1983) [hereinafter *Mount Laurel II*]. The *Mount Laurel* doctrine basically requires that every municipality must provide opportunities for their fair share of the regional need for low and moderate-income housing.

³ N.J. Stat. §§ 52:27D-301 to -329 (West 2001).

⁴ *Id.*

Mount Laurel II decision, the New Jersey Legislature finally acted and passed the Fair Housing Act of 1985, which in turn created the Council on Affordable Housing.⁵ Even though the Council on Affordable Housing's stated function was to enforce the *Mount Laurel* mandate, many critics felt that the underlying intention was to "de-claw the judiciary without running afoul of the state constitution."⁶ Since the inception of the Fair Housing Act, state legislative and administrative regulations (in particular, credits without controls⁷ and regional contribution agreements⁸) have undermined the constitutional imperative of the original *Mount Laurel* cases.⁹ Constitutional attacks against the Fair Housing Act and the Council on Affordable Housing have failed due to the lack of data to support the challenging party's contentions, and poor reasoning on the part of the judiciary.¹⁰

In the summer of 2001, the New Jersey Supreme Court for the first time in a decade agreed to hear a *Mount Laurel* case.¹¹ The main issue in *Toll Brothers, Inc.* is narrow, dealing

⁵ N.J. Stat. §§ 52:27D-301 to -329 (West 2001).

⁶ Richard Lorenz, *Good Fences Make Bad Neighbors*, 33 URB. LAW. 45, 91 (2001).

⁷ N.J. A.C. §5:92-6.1 (2001). Credits without controls will be explained in greater detail later in this paper. This grant municipalities a credit against their fair share obligations for units built between 1980 and 1986 and occupied by low or moderate-income families. Unlike units built after 1986 (when the New Jersey Fair Housing Act was passed), units built between those dates do not have "controls on affordability" which *restrict* the residency to low or moderate-income families.

⁸ N.J.S.A. §52:27D-312 (West 2001). Regional contribution agreements will be explained in greater detail later in this paper. Regional contribution agreements allow two municipalities to enter into a contract where one municipality to transfer up to fifty percent of its determined fair share obligation to another municipality.

⁹ Rachel Fox, *The Selling Out of Mount Laurel: Regional Contribution Agreements In New Jersey's Fair Housing Act*, 16 FORDHAM URB. L.J. 535 (1988); *Mount Laurel I*, 67 N.J. 151 (1975); *Mount Laurel II*, 92 N.J. 158 (1983); *Non-profit Affordable Housing Network v. Council On Affordable Housing*, 265 N.J. Super. 475, 627 A.2d 1153, 1156 (N.J. Super. A.D. 1993).

¹⁰ *In Re Township of Warren*, 247 N.J. Super. 146 (App. Div. 1991), *Non-Profit Affordable Housing*, 627 A.2d 1153 (N.J. Super. App. Div. 1993), John Payne, *Politics, Exclusionary Zoning, and Robert Wilentz*, 49 Rutgers L. Rev. 684, 710 (1997).

¹¹ *Toll Brothers, Inc. v. Township of West Windsor*, 168 N.J. 295 (2001).

with the use of market factors in determining whether a municipality has provided a “realistic opportunity” for the development of affordable housing, but the New Jersey Supreme Court could use this case as a spring board to dive back into the *Mount Laurel* saga.¹²

The beginning of this note will provide a history of exclusionary zoning in New Jersey. Next, it will explain how the town of Mount Laurel came to the fore front on the issue of exclusionary zoning, with the *Mount Laurel I* and *Mount Laurel II* cases, and the New Jersey Fair Housing Act. The second part of this note examines *Mount Laurel* litigation that followed the passage of the Fair Housing Act. The last part will analyze how regional contribution agreements and credits without controls are contrary to the original *Mount Laurel* mandate, and why it is now time for the New Jersey Supreme Court to reestablish the constitutional imperative of the original *Mount Laurel* doctrine.

Background

A. Exclusionary Zoning in New Jersey

At the end of World War II, there was a great migration of commerce, industry, and upper income residents out of New Jersey’s inner cities and into the suburbs.¹³ Through their zoning ordinances, municipalities excluded low-income families from the suburbs.¹⁴ By having minimum lot size and minimum floor space requirements, municipalities were able to restrict residency to upper-income families.¹⁵ There were two reasons for this course of conduct, the first being New Jersey’s tax structure.¹⁶ Under its system, municipalities fund the cost of county

¹² *Toll Brothers, Inc. v. Township of West Windsor*, 303 N.J. Super. 518, 528 (Law Div. 1996).

¹³ *Mount Laurel II*, 92 N.J. at 210, n.5.

¹⁴ *Id.*

¹⁵ *Mount Laurel I*, 67 N.J. at 164.

¹⁶ *Id.* at 171.

and municipal government operations (including the school system) through its local real estate taxes.¹⁷ The school system is the largest municipal expense, so “the fewer the school children, the lower the tax rate.”¹⁸ Since municipalities rely so much on local real estate taxes for funding, they (through their zoning laws) encouraged tax-generating business expansion and discouraged the development of housing for “revenue absorbers”- the people who would be employed by these business.¹⁹ The second reason for exclusionary zoning was the desire for “the creation of ‘new towns’ in virgin territory.”²⁰ The people who came to these suburban towns “[did] so with the specific intention of living in affluent, socially homogenous communities and of escaping what they perceive to be the problems of inner cities.”²¹

The above actions not only deprived the poor an opportunity to share in the suburban growth, but they also increased the concentration of the poor in the cities.²² This had the effect of more business and the middle class leaving the cities and seeking haven in the suburbs.²³ “A vicious cycle set in as increased business and middle class flight led to more urban decay, and more urban decay led to more flight, etc.”²⁴ This restrictive pattern threatened the socio-economic stability of the state.²⁵ Besides affecting the urban areas, the plight of the cities began

¹⁷ *Id.*

¹⁸ *Id.* at 171.

¹⁹ Fox, *supra* note 10 at 538.

²⁰ *Id.* at 166.

²¹ *Mount Laurel I*, 67 N.J. at 196 (Pashman, J., concurring).

²² *Mount Laurel II*, 92 N.J. 158, 210, n.5 (1983).

²³ *Id.*

²⁴ *Id.*

²⁵ Fox, *supra* note at 539.

to impact the suburbs.²⁶ “Violent crimes and drug abuse spawned in the urban slum . . . spread out to the suburbs and infect[ed] those living there.”²⁷ As the “vicious cycle” kept repeating itself, business and industry began to leave New Jersey.²⁸

Municipalities used exclusionary zoning as a tool to create a dual subsidy to the upper-income families.²⁹ By having restrictions on the number of housing units per acre of land, the value of the land would be artificially lowered, benefiting upper income families.³⁰ Normally, a high density³¹ developer building an apartment complex stands to make greater profits, thus giving him more leverage in bidding for the property against a single family purchaser.³² Likewise, a group of low-income families, collectively, would be able to pay more for that land to live in a high density development.³³ By eliminating competition with high density developers, low density zoning enabled upper income families to purchase single-family lot at a reduced price.³⁴

The second way exclusionary zoning was used as a subsidy was through taxes.³⁵ Although low-income families living in high density housing produced more tax revenues than

²⁶ *Mount Laurel II*, 92 N.J. at 210, n.5.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Fox, *supra* note 10 at 540.

³⁰ *Id.* at 539

³¹ “High density” developers means a developer seeking to build apartment buildings, condominiums, any complex that housed a “high density” of people.

³² Fox, *supra* note 10 at 539.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 541.

upper-income families living on single family lots, low-income families created a larger tax burden.³⁶ Low-income families in high density housing meant more children in school and more of a need for public services, which in turn meant higher taxes for upper income residents.³⁷ The municipality not permitting high density housing enabled upper income residents to pay lower taxes.³⁸

B. *Mount Laurel I*

In the early 1970's, Mount Laurel grew rapidly due to the construction and improvement of main highways through or near it.³⁹ The residential area in the town was divided into four major subdivisions each having various lot size minimums (the lowest being 9,375 square feet and the highest being 20,000 square feet).⁴⁰ Mount Laurel began to use a new device for development known as planned unit development.⁴¹ A planned unit development left the type, density and placement of buildings in a development to be determined by contracts between the developer and the municipality. From these planned unit developments, 10,000 various types of units were to be built over a period of years.⁴²

Before approving these projects, the municipality had restrictions put into the contract.⁴³ First, the approval drastically lowered the number of apartments having more than one

³⁶ Rachel Fox, *supra* note 10 at 540.

³⁷ *Id.*

³⁸ *Id.* at 539-540.

³⁹ *Mount Laurel I*, 67 N.J. 157, 162 (1975).

⁴⁰ *Id.* at 164.

⁴¹ *Id.* at 166.

⁴² *Mount Laurel I*, 67 N.J. at 167.

⁴³ *Id.*

bedroom.⁴⁴ Second, the developer was required to put into the leases that “no school-age children shall be permitted to occupy any one-bedroom apartment and that no more than two such children shall reside in any two-bedroom apartment.”⁴⁵ For property that on which multi-family housing was to be constructed, the developer was required to record a covenant with the land that if more than .3 school children per multi-family unit attend the public school, the developer would pay the cost of tuition and other excess expenses.⁴⁶ Mount Laurel, like most towns in New Jersey at that time, did not permit the construction of adequate low-income housing.⁴⁷

Plaintiffs brought against the town attacking the land-use regulation of Mount Laurel Township.⁴⁸ The Plaintiffs represented the minority, poor group seeking housing in Mount Laurel.⁴⁹ The Plaintiffs fell into four categories: (1) present Mount Laurel residents residing in decaying or substandard housing; (2) former residents who were forced to move elsewhere because there was no suitable housing; (3) nonresidents living in central city substandard housing in the region who wanted to secure decent housing; (4) three organizations representing the housing and other interests of racial minorities.⁵⁰ At the trial court, Judge Martino started his opinion by citing some examples of the deplorable living conditions of the poor in Mount Laurel:

The factual situation . . . indicates one of [the plaintiffs] moved into a house which was originally used as a summer quarters for a

⁴⁴ *Id.* at 168.

⁴⁵ *Id.*

⁴⁶ *Mount Laurel I*, 67 N.J. at 168.

⁴⁷ *Id.* at 172.

⁴⁸ *Id.* at 157.

⁴⁹ *Id.* at 159.

⁵⁰ *Mount Laurel I*, 67 N.J. at 159, n.3.

summer camp. The electrical wiring is in an exposed condition and she often gets shocks from outlets; one space heater by the front door provides inadequate intermittent heat and she must use the gas stove to provide sufficient heat; . . . the county board of health . . . want[ed] to be advised when she [left] so that they can post the house as unfit for human habitation.⁵¹

The trial court declared the zoning ordinances invalid, but it did not stop there.⁵² The court further ordered the township to undertake an immediate study to identify: 1.) The existing sub-standard dwelling units in the township and the number of families who would be displaced by an “effective code-enforcement program; and 2.) The housing needs for persons of low and moderate income: a.) residing in the township; b.) presently employed by the township or the commercial and industrial sector; and c.) expected to be employed in the above areas.⁵³ The defendant Township appealed the decision.⁵⁴ Before oral arguments at the Appellate Division, the appeal was certified by the New Jersey Supreme Court.⁵⁵

The Supreme Court, led by Justice Hall who wrote the opinion, found that Mount Laurel’s zoning ordinances violated the state zoning enabling act⁵⁶ and the state constitution.⁵⁷ The court recognized the fact that “[a]most every [municipality] acts solely in its own selfish

⁵¹ 119 N.J. Super 164, 166-7 (Law Div. 1972); another situation cited was “[a] plaintiff was born in [Mount Laurel] township but was forced to move to Camden. The family had lived in a structure in Mount Laurel called ‘Diamond Apts.’ Their quarters were heated by a single kerosene heater; there was little or no hot water; the cesspool backed up and the place was infected with vermin. The family consisted of a husband and wife and four children.” *Id.*

⁵² *Id.* at 180.

⁵³ *Id.* at 178.

⁵⁴ *Mount Laurel I*, 67 N.J. at 159.

⁵⁵ *Id.* at 159.

⁵⁶ N.J.S.A. 40:55-32, repealed by L.1975, c. 291, §80 (West 2001).

⁵⁷ N.J. Const. Art.I, para. 1 (1947): “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” *Id.* at 174

and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing.”⁵⁸ The court declared that the zoning enabling act and Article IV of the state constitution⁵⁹ recognize a *regional* general welfare for which all municipalities in a geographic region bear responsibility.⁶⁰ Land use regulation is included in the state’s police power, and the zoning enabling act delegated to the municipalities the power to create land-use laws.⁶¹ “It is elementary theory that all police power enactments, *no matter what level of government*, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. These are inherent in Art. I, par. 1 of our Constitution⁶², the requirements of which may be more demanding than those of the federal Constitution.”⁶³ Therefore, a state’s police power must promote the general welfare, and a zoning ordinance that violates the general welfare is unconstitutional.⁶⁴ The court noted that shelter and food are the most basic human needs and whether a person has adequate housing is a “primary consideration”

⁵⁸ *Id.* at 172.

⁵⁹ “The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and *the exercise of such authority shall be deemed to be within the police power of the State. Such shall be subject to repeal or alteration by the Legislature.*” N.J. Const. Art. 4, Sec. VI, Para. 2 [emphasis added]

⁶⁰ *Mount Laurel I*, 67 N.J. at 175.

⁶¹ *Id.* at 174; the Zoning Enabling Act, N.J.S.A. 40:50-30 was repealed in 1976 and later modified by the Fair Housing Act, N.J.S.A 40:55D-62: “The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon.” N.J.S.A. 40:55D-62(a).

⁶² N.J. Const. Art. I, par.1 (1947).

⁶³ *Mount Laurel I*, 67 N.J. at 175 [emphasis added].

⁶⁴ *Id.*; “[A] zoning regulation, like any police enactment, must promote public health, safety, morals or the general welfare. Conversely, a zoning enactment which is contrary to the general welfare is invalid.” *Id.*

in assessing the general welfare.⁶⁵ The court also recognized that the general welfare obligation extended beyond the borders of a particular municipality.⁶⁶ The court concluded:

[E]very [developing] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the class of people mentioned for low and moderate-income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's *fair share* of the present and prospective regional need thereof.⁶⁷

The court also noted that the same conclusion follows even if the conduct of the town was unintentional.⁶⁸ The court viewed the conduct of the municipality as attempting to prevent housing for “various categories” of people based on their income.⁶⁹ The court was hesitant to describe Mount Laurel’s actions as racially exclusionary, so the court treated it as exclusion based on economics. The reason for this decision was not only to rectify the housing shortage in New Jersey⁷⁰, but to integrate the economic classes of New Jersey⁷¹.

C. *Mount Laurel II*

After eight years of massive non-compliance and legislative inaction, *Mount Laurel II*⁷² was brought before a slightly changed New Jersey Supreme Court.⁷³ The court blasted Mount

⁶⁵ *Id.*

⁶⁶ *Id.* at 177.

⁶⁷ *Mount Laurel I*, 67 N.J. at 174.

⁶⁸ *Id.*, n.10.

⁶⁹ *Id.* at 159.

⁷⁰ *Id.* at 205.

⁷¹ *Mount Laurel I*, 67 N.J. at 180.

⁷² 92 N.J. 158 (1983).

Laurel for “remain[ing] blatantly afflicted with a blatantly exclusionary ordinance.”⁷⁴ The court also emphasized the negative impact that exclusionary zoning was having on New Jersey’s cities and its economy:

The continuing disintegration of our cities encourages business and industry to leave New Jersey altogether, resulting in a drain of jobs and dollars from our economy. In sum, the decline of our cities and the increasing economic segregation of our population are not just isolated problems for those left behind in the cities, but a disease threatening us all.⁷⁵

Besides the issue of non-compliance, there were many questions left unanswered from *Mount Laurel I*⁷⁶: “What was a ‘developing municipality’? What was the ‘region’ and how was it to be determined? Precisely what must a municipality do to ‘affirmatively afford’ an opportunity for the construction of low-income housing?”⁷⁷

Mount Laurel II was the consolidation of six cases⁷⁸ concerning all these questions left unanswered.⁷⁹ In this exceptionally long opinion⁸⁰ there is very little law; it essentially acted as a guideline on how to adhere to policy of the original *Mount Laurel* decision.⁸¹ The court

⁷³ *Mount Laurel I*, 67 N.J. at 151 (Hughes, C.J., Jacobs, Hall, Mountain, Sullivan, Pashman and Clifford); *Mount Laurel II*, 92 N.J. at 195 (Wilentz, C.J., Sullivan, Pashman, Clifford, Schreiber, Handler and Pollock.).

⁷⁴ *Mount Laurel II*, 92 N.J. at 198.

⁷⁵ *Id.* at 210, n.5.

⁷⁶ *Mount Laurel I*, 67 N.J. at 158.

⁷⁷ *Mount Laurel II*, 92 N.J. at 205.

⁷⁸ *Southern Burlington County N.A.A.C.P. v. Tp. of Mount Laurel*, 161 N.J. Super. 317 (Law Div. 1978); *Urban League of Essex Co. v. Tp. of Mahwah*, No. L-17112-71(Law Div. 1979); *Glenview Development Co. v. Franklin Tp.*, 164 N.J. Super. 563 (Law Div. 1978); and *Caputo v. Township of Chester* (this case was on certification to the New Jersey Superior Court Law Div. when the Supreme Court granted certiorari). *Id.* at 158, 200, n.1.

⁷⁹ *Mount Laurel II*, 92 N.J. at 201-4.

⁸⁰ The opinion is two hundred sixteen pages with a three page table of contents. *Id.* at 196.

⁸¹ Payne, *supra* note 11 at 694.

affirmed that every municipality has the obligation to provide a “realistic opportunity for decent housing for its indigenous poor.”⁸² The Chief Justice was concerned about the decay of the inner cities and insisted that the zoning power could not favor the rich over the poor.⁸³ He also said that, although the government may not eliminate poverty in the state, it cannot allow further disadvantages to be placed on the poor.⁸⁴

[P]oor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, . . . and other attractive locations could not accommodate them, but simply because they are not wanted.⁸⁵

The court abandoned the passive stance of *Mount Laurel I* and went beyond the invalidation of zoning ordinances; it imposed upon each municipality a series of affirmative remedies to enforce the constitutional mandate set forth in *Mount Laurel I*.⁸⁶ First, the court declared that satisfaction of the *Mount Laurel* obligation would be determined by an objective test: in other words, whether the town “in fact” provided a realistic opportunity for the construction of its fair share of low and moderate-income housing.⁸⁷ This rule rejected the decision in *Oakwood v. Madison*⁸⁸, which allowed municipalities to satisfy their fair share obligation by proof of a “bona fide attempt” to provide a realistic opportunity to construct its

⁸² *Mount Laurel II*, 92 N.J. at 214-5.

⁸³ *Id.* at 209.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Mount Laurel II*, 92 N.J. at 214-20.

⁸⁷ *Id.* 92. N.J. at 221.

⁸⁸ 72 N.J. 481 (1977).

fair share obligation.⁸⁹ Second, the court incorporated the State Development Guide Plan (SDGP)⁹⁰ to determine whether a town is a “developing municipality”.⁹¹ The SDGP resulted from an intense study of all the factors related to New Jersey’s growth and development (at that time) combined with the physical assets of the state (natural resources, farmland, infrastructure, location of current development, etc.). The SDGP divides the state into six basic areas: growth, limited growth, agriculture, conservation, pinelands, and coastal zones.⁹² The Court saw the SDGP as a “blueprint for the implementation of the *Mount Laurel* doctrine;”⁹³ anywhere labeled a “growth area” under the SDGP would be subject to the *Mount Laurel* doctrine.⁹⁴

The court also established a builder’s remedy for plaintiffs in *Mount Laurel* litigation on a case-by-case basis.⁹⁵ Pursuant to a builder’s remedy, the successful developer-plaintiff could bypass the local zoning ordinance and receive a court order permitting the developer’s project to be built, so long as the builder proposed a substantial contribution to the a regions fair share obligation through an “inclusionary development.”⁹⁶ An inclusionary development is one in

⁸⁹ *Id.*

⁹⁰ N.J.S.A. 13:1B-15.52.

⁹¹ *Mount Laurel II*, 92 N.J. at 225. Originally, there was six criteria used by the courts to determine whether a town was a developing municipality: “A developing municipality (1) has a sizeable land area, (2) lie outside the central cities and older built-up suburbs, (3) has substantially shed rural characteristics, (4) has undergone great population increase since World War II or is now in the process of doing so, (5) is not completely developed and (6) is in the path of inevitable future residential, commercial and industrial demand and growth.” *Id.* at 224 (quoting *Glenview Development Co. v. Franklin Tp.*, 164 N.J. Super. 563, 567-8 (Law Div. 1978).

⁹² *Mount Laurel II*, 92 N.J. at 225; N.J.S.A. 13:1B-15.52.

⁹³ *Mount Laurel II*, 92. N.J. at 226.

⁹⁴ *Id.* at 226-7.

⁹⁵ *Id.* at 218.

⁹⁶ *Id.*

which an appropriate portion of the units⁹⁷ are made affordable to low and moderate-income households.⁹⁸

Next, the court sought to remedy the most troublesome dilemma, determining the regions “fair share”.⁹⁹ The court noted that this concern “involve[d] highly controversial economic, sociological and political questions of innate difficulty and complexity.”¹⁰⁰ Despite those problems, the court took it upon itself to rectify this issue:

The situation must be remedied. In the absence of executive or legislative action to satisfy the constitutional obligation underlying *Mount Laurel*, the judiciary has no choice but to enforce it itself. Enforcement, to be effective, will require firm judicial management.¹⁰¹

Three specially assigned judges, picked by Chief Justice Wilentz, would handle all *Mount Laurel* litigation.¹⁰² The Chief justice felt under this system, in time, the problems of “fair share” and “region” would be answered through litigation.¹⁰³

D. The Fair Housing Act of 1985.

The specially assigned judges began to expeditiously process the *Mount Laurel* litigation in New Jersey. Between the years of 1983 and 1986 one hundred suits were filed

⁹⁷ COAH regulations now require twenty percent be set aside for inclusionary developments when the municipality receives a vacant land adjustment due to additional available land. N.J.A.C. 5:93-5.6(b)(1).

⁹⁸ *Mount Laurel II*, 92 N.J. at 218.

⁹⁹ *Id.* at 248.

¹⁰⁰ *Id.* at 250 (quoting *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 533 (1977)).

¹⁰¹ *Id.* at 252.

¹⁰² *Mount Laurel II*, 92 N.J. at 253.

¹⁰³ *Id.*

against seventy municipalities.¹⁰⁴ These judges imposed large fair share burdens on municipalities, thus encouraging municipalities to comply voluntarily with the *Mount Laurel* mandate.¹⁰⁵ Many people criticized the court for interfering with a traditionally legislative function.¹⁰⁶ The municipalities began to put a lot of pressure on the legislature to narrow the reach of the judges.¹⁰⁷

In 1985, the state legislature passed the Fair Housing Act to enforce the *Mount Laurel* directive.¹⁰⁸ The Act provides a statutory method designed to enable every municipality to determine and to provide for its fair share obligation. The Fair Housing Act acknowledged the constitutional obligation of every growth area municipality (as determined by the SDGP) “to provide through its land use regulations a realistic opportunity for a fair share of its region’s present and prospective needs for housing for low and moderate-income families.”¹⁰⁹ The main focus of the act was to make sure municipalities took part in satisfying their fair share obligation.¹¹⁰ By doing this, the legislature removed the New Jersey courts from determining and administering fair share obligations.¹¹¹ Many people felt that the Fair Housing Act was “intended to gut the *Mount Laurel* decision.”¹¹² There were two important aspects to this act:

¹⁰⁴ John Payne, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J., 577 (1997).

¹⁰⁵ Fox, *supra* note 10 at 553.

¹⁰⁶ *Id.*

¹⁰⁷ Kevin Walker, *Mount Laurel: An eviscerated legacy*, New Jersey Lawyer March 27, 2000.

¹⁰⁸ N.J.S.A. 52:27D-302 (West 1986).

¹⁰⁹ N.J.S.A 52:27D-302(a).

¹¹⁰ *Id.*

¹¹¹ N.J.S.A 52:27D-302.

¹¹² Kevin Walker, *supra* note 107.

1.) creating the Council on Affordable Housing¹¹³, and 2.) establishing regional contribution agreements.

Council On Affordable Housing (COAH)

The Council On Affordable Housing (hereinafter “COAH”) is an administrative agency, created by the FHA, charged with the task of implementing the *Mount Laurel* doctrine. COAH is essentially responsible for determining housing regions in the state,¹¹⁴ calculating the present and prospective need for affordable housing,¹¹⁵ and providing guidance to municipalities in establishing their fair share obligation.¹¹⁶ COAH divided the state into six regions.¹¹⁷ COAH then used its own methodology to determine the present and prospective need. The present need for affordable housing is composed of “indigenous need,” which accounts for units of deficient housing in a municipality that are occupied by low-and moderate-income households, and the “reallocated present need,” which reflects the degree that a municipality’s deficient housing exceeds the regional need for affordable housing, based on statistical projections of population growth and the formation of new households.¹¹⁸ The prospective need is a calculation of the future regional need for affordable housing based on statistical projections of population growth and the formation of new households.¹¹⁹

¹¹³ N.J.S.A. 52:27D-305 (West 1986).

¹¹⁴ N.J.S.A. 52:27D-307(a) (West 1986).

¹¹⁵ N.J.S.A. 52:27D-307(b).

¹¹⁶ N.J.S.A. 52:27d-307(c).

¹¹⁷ N.J.S.A. 13:1B-15.52 (West 2001).

¹¹⁸ N.J.A.C. 5:92-5.4 (West 2001).

¹¹⁹ N.J.A.C. 5:92-5.6.

COAH also provides for the allocation of a municipality's fair share of the regional need for affordable housing.¹²⁰ The allocation of prospective need is based on four factors, each given equal weight: (1) the ratio of annual employment change in the municipality to annual employment change within the region, (2) the ratio of employment in the municipality to regional employment, (3) the ratio of land available for growth in the municipality to land available for growth in the region, and (4) the ratio of municipal aggregate per capita income to regional aggregate per capita income.¹²¹

Any municipality (provided it files a housing-element¹²² and other required resolutions) may petition the COAH for "substantive certification" of their housing element and ordinances.¹²³ COAH is required to issue "substantive certification" if no objection is filed within 45 days of publication of notice of the municipality and if it finds that the fair share plan "is consistent with the rules and criteria adopted by the Council" and makes "the achievement of the municipality's fair share of low and moderate income housing realistically possible."¹²⁴ In any *Mount Laurel* lawsuit filed against a municipality that has received substantive certification, the plaintiff will be required to prove noncompliance "by clear and convincing evidence."¹²⁵ Therefore, if municipalities comply with COAH's guidelines, a successful *Mount*

¹²⁰ N.J.A.C. 5:92-5.3; 5.4.

¹²¹ *Id.*

¹²² The housing-element "shall contain an analysis demonstrating that [a municipality] will provide . . . a realistic opportunity [for its fair share of low and moderate income housing], and the municipality shall establish that its land use and other relevant ordinances have been revised to incorporate provisions for low and moderate income housing." N.J.S.A. 52:27D-311(a).

¹²³ N.J.S.A. 52:27D-313 (West 1986).

¹²⁴ N.J.S.A. 52:27D-314 (a),(b).

¹²⁵ *Hills Dev. Co. v. Bernards*, 103 N.J. 1, 35 (1986).

Laurel lawsuit should be a rarity.¹²⁶ COAH guidelines makes challenges from housing advocates difficult because the housing advocates lack politically the kind of power they had in the courts.¹²⁷

Credits Without Controls

The power of COAH is extremely broad; it is free to decide based on its own determination of appropriate policy.¹²⁸ In an effort to provide guidance to municipalities in determining a municipalities fair share obligation, COAH issued a regulation that gave municipalities credits toward their fair share obligation.¹²⁹ Originally, COAH's regulations limited a municipality's credit for its fair share obligation of regional needs to the following factors: 1.) housing units created or rehabilitated between 1980 and 1986, 2.) occupancy restricted to low or moderate income households, and 3.) compliance with COAH affordability standards.¹³⁰ These regulations were challenged in *Bernards Township v. Dep't of Com. Affairs*.¹³¹ In *Bernards Township*, the court held that the portion of the regulation that required that credits be available to a municipality only if "a unit's occupancy is restricted to low or moderate income households"¹³² violated the FHA.¹³³ COAH interpreted this decision as prohibiting consideration of affordability and issued new regulations known as "credits without

¹²⁶ *Id.*

¹²⁷ John M Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685, 1689 (May 1998).

¹²⁸ *Hills Dev. Co.*, 103 N.J. at 32.

¹²⁹ N.J.A.C. 5:92-6.1.

¹³⁰ *Non-Profit Affordable Housing Network v. Council on Affordable Housing*, 265 N.J Super. 475 (App. Div. 1993).

¹³¹ 233 N.J Super. 1 (App. Div. 1989).

¹³² N.J.A.C. 5:92-6.1a

¹³³ *Bernards*, 233 N.J. Super. at 12-3.

controls,” which allowed a one-to-one credit for habitable housing units in sound condition built or rehabilitated between 1980 and 1986 and occupied by low or moderate-income families.¹³⁴ There was no factor restricting the unit to affordability in these regulations.¹³⁵ Thus, housing created between 1980 and 1986 are not subject to “controls on affordability” (like newly constructed units are), which require that municipalities adopt measures assuring that “newly constructed low and moderate income sales units remain affordable to low and moderate-income households for a period not less than twenty years.”¹³⁶ This is done through restrictive covenants in transfers or mortgage liens adopted by COAH.¹³⁷

Regional Contribution Agreements

The regional contribution agreement provision¹³⁸ under the FHA is one of the major differences between the judicially created *Mount Laurel* doctrine and the FHA. Under this provision, “a municipality may propose to transfer up to [fifty percent] of its fair share to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter.”¹³⁹ An early examination of the regional contribution agreements concluded that it was the preferred way for wealthy cities to meet their fair share requirements.¹⁴⁰

¹³⁴ N.J.A.C. 5:92-6.1, amended and adopted 1991.

¹³⁵ *Non-Profit Affordable Housing Network*, 265 N.J Super. at 480.

¹³⁶ N.J.A.C. 5:92-12.1.

¹³⁷ N.J.A.C. 5:92-12.1(a).

¹³⁸ N.J.S.A. 52:27D-312.

¹³⁹ N.J.S.A. 52:27D-312(a).

¹⁴⁰ Lorenz, *supra* note 7 at 92.

Any municipality that plans to enter into a regional contribution agreement (RCA) must submit it in its housing element and must include: (1) the reasons for entering into the RCA; (2) the agreement between the two municipalities involved; (3) the number of units transferred; and (4) an explanation of the compensation provided to the receiving municipality and the nature and source of the compensation.¹⁴¹ COAH may approve an RCA if it finds that “the agreement provides a realistic opportunity for low and moderate income housing with in convenient access to employment opportunities, and that the agreement is consistent with sound, comprehensive regional planning.”¹⁴² A municipality that is receiving money for the construction of low and moderate-income units does not satisfy any portion of its own fair share obligation by accepting the RCA. Contributions in an RCA agreement may include “an amount agreed upon to compensate or partially compensate the receiving municipality for infrastructure or other costs generated to the receiving municipality by the development.”¹⁴³

Under the RCA procedure, the two municipalities negotiate the transfer unit price on their own (subject to COAH approval).¹⁴⁴ “The municipality that is able to offer the lowest price will receive the transferred housing,”¹⁴⁵ which fosters “poor communities bidding against one another for much needed housing.”¹⁴⁶

¹⁴¹ Fox, *supra* note 10 at 557, n.89 (citing *Transferring Housing Obligations via RCAs*, Council on Affordable Housing Newsletter 5 (Aug. 1986)).

¹⁴² N.J.S.A. 52:27D-312(c).

¹⁴³ N.J.S.A. 52:27D-312(f).

¹⁴⁴ Fox, *supra* note 10 at 559.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

B. *Mount Laurel* Litigation:

***Hills Dev. Co. v. Bernards*¹⁴⁷**

The Fair Housing Act of 1985 was the creation of a combined effort of the legislative and executive branches of the New Jersey state government seeking to “vindicate the *Mount Laurel* constitutional obligation.¹⁴⁸ The New Jersey Supreme Court seemed relieved that the other branches of government finally decided to act, citing some of its own language from *Mount Laurel II*¹⁴⁹: “[A] brief reminder of the judicial role in this sensitive area is appropriate, since powerful reason suggest, and we agree, that the matter is better left to the legislature.”¹⁵⁰ As mentioned earlier, one of the more important aspects of this act was the creation of COAH.¹⁵¹ Section sixteen of the Fair Housing Act transferred all pending and future *Mount Laurel* litigation to the COAH.¹⁵² Developers and public advocates objected to Fair Housing Act as a whole, proclaiming that it would not work and that its purpose was to sabotage the *Mount Laurel* doctrine.¹⁵³ The Public Advocate first argued that the Fair Housing Act impermissibly interfered with the Supreme Court’s exclusive power over prerogative writs¹⁵⁴

¹⁴⁷ 103 N.J. 1 (1986).

¹⁴⁸ *Id.* at 21.

¹⁴⁹ 92 N.J. 158 (1983).

¹⁵⁰ *Id.* at 212.

¹⁵¹ *Hills Dev. Co.*, 103 N.J. at 19.

¹⁵² *Id.* at 20; *N.J.S.A. 52:27D-316*.

¹⁵³ *Hills Dev. Co.*, 103 N.J. at 20.

¹⁵⁴ Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary. N.J. Const. of 1947 Art. VI, Sec. V, para. 4.

actions by transferring the litigation to COAH.¹⁵⁵ The next contention was that the Fair Housing Act was unconstitutional because the case transfers and the certification process would cause a delay in municipalities satisfying their fair share obligation.¹⁵⁶ Another claim was that the builders remedy was unconstitutional because it was part of the *Mount Laurel* obligation.¹⁵⁷

Bernards was the consolidation of twelve appeals, each involving the validity of a trial court's decision to deny the motion to transfer *Mount Laurel* litigation to the COAH (except one case where the motion was granted, but was still appealed).¹⁵⁸ The court elected to hear five of the cases for oral argument, structured to cover all the issues in all twelve cases.¹⁵⁹ In all of the cases developers claimed "manifest injustice" would result from the transfer due to delay in construction of low and moderate income housing, as well as loss of expected profits.¹⁶⁰ In four of those cases, the motion was denied and the municipalities appealed to the Appellate Division. In one of those cases, the motion was granted, and the developer appealed.¹⁶¹

The issue before the court was the trial court's decision on the motion to transfer. The developers (including those in the cases in which the motion was denied) claimed that even if the motion to transfer was granted, the matter should stay in the trial court because the Fair Housing Act, which required COAH to resolve these issues, was unconstitutional.¹⁶²

¹⁵⁵ *Hills Dev. Co.*, 103 N.J. at 40.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 42.

¹⁵⁸ *Id.* at 26.

¹⁵⁹ *Hills Dev. Co.*, 103 N.J. at 26..

¹⁶⁰ *Id.* at 27-31.

¹⁶¹ *Id.* at 31.

¹⁶² *Hills Dev. Co.* 103 N.J. at 31.

The court reversed all the judgments, except for one where the motion to transfer was granted, and held that the Fair Housing Act, in its entirety, was constitutional and that all cases pending before the court be transferred to the COAH.¹⁶³ The Court recognized that the COAH's responsibility was to grant (or withhold) substantive certification and that the COAH may use this power in a variety of ways "in order to accomplish its mission of bringing about statewide compliance with the *Mount Laurel* obligation."¹⁶⁴

The court rejected the Public Advocate's first argument that the Fair Housing Act was unconstitutional because it would result in a delay in the satisfaction of the *Mount Laurel* obligation.¹⁶⁵ The court noted that there was never any timetable implicit in the *Mount Laurel* obligation.¹⁶⁶ The court also rejected the argument that the builder's remedy was unconstitutional, stating that the remedy was never part of the *Mount Laurel* obligation, and "[i]t was simply a method for achieving the 'constitutional mandated goal' of providing a realistic opportunity for lower income housing needed by the citizens of this state."¹⁶⁷ The court held that the Fair Housing Act did not interfere with the plaintiff's right of judicial review because nothing prevents the plaintiff seeking judicial review after COAH has made a ruling.¹⁶⁸

Even though regional contributions were not specifically challenged, the court did mention them briefly when it discussed the constitutionality of the Fair Housing Act in

¹⁶³ *Id.* at 25.

¹⁶⁴ *Id.* at 58.

¹⁶⁵ *Id.* at 40.

¹⁶⁶ *Hills Dev. Co.*, 103 N.J. at 40.

¹⁶⁷ *Id.* at 42.

¹⁶⁸ *Id.* at 45.

general.¹⁶⁹ The court noted that regional contribution agreements were intended to aid in the construction of lower income housing in urban areas, but that is where the analysis ended.¹⁷⁰

Many supporters of the *Mount Laurel* doctrine felt that the *Hill* decision was a retreat by the courts.¹⁷¹ The court in reviewing the Fair Housing Act “amount[ed] to a high stakes game of ‘chicken’, [where] the Legislature had watered down or outright eliminated various features of Mount Laurel compliance that had been developed and tested in the courts.”¹⁷² For the court to hold the Fair Housing Act unconstitutional, after this same court pleaded for the legislature to take action¹⁷³, would have brought a “firestorm” of criticism and would have stimulated the growing movement to amend the New Jersey constitution.¹⁷⁴

In Re Township of Warren¹⁷⁵:

Warren Township was one of the twelve other municipalities that were sued in *Bernards*.¹⁷⁶ The Supreme Court’s ruling in *Bernards* entitled Warren Township to have its case transferred to the COAH.¹⁷⁷ The COAH treated Warren’s motion to transfer as a petition for substantive certification and granted it for Warren Township’s fair share plan.¹⁷⁸

¹⁶⁹ *Id.* at 37.

¹⁷⁰ *Hills Dev. Co.*, 103 N.J. at 38.

¹⁷¹ Payne, *supra* note 11 at 702.

¹⁷² *Id.* at 697.

¹⁷³ “So while we have always preferred legislative to judicial action in this field, we shall continue – until the legislature acts – to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine.” *Mount Laurel II*, 92. N.J. 158, 212 (1983).

¹⁷⁴ Payne, *supra* note 11 at 699-700.

¹⁷⁵ 247 N.J Super. 146 (1991).

¹⁷⁶ 103 N.J. 1 (1986).

¹⁷⁷ *Id.* at 47-56.

¹⁷⁸ *Id.* at 38, n.10.

COAH determined that Warren Township’s fair share of housing for lower income households was 367 units.¹⁷⁹ The township planned to meet this obligation through the rehabilitation of [thirty-four] “indigenous substandard units,” the construction of 145 new units, a [twenty-two] units rental bonus credit for [sixty-six] units (which would be rented to lower income persons), and the execution of a regional contribution agreement with the city of New Brunswick.¹⁸⁰ This regional contribution agreement required Warren Township to pay \$4,399,000 to the city of New Brunswick for the construction (or rehabilitation) of 166 lower income units in New Brunswick.¹⁸¹

Warren Township’s fair share plan also stated that households which at that time resided in Warren Township shall be granted an “occupancy preference”¹⁸² with respect to the purchase or rental of new lower-income housing constructed in the municipality.¹⁸³

The Public Advocate in this case objected to the COAH granting substantive certification to Warren Township’s fair share plan.¹⁸⁴ The COAH rejected these objections, which led to the Public Advocate appealing to the New Jersey Superior Court, Appellate Division. The Public Advocate argued that Warren Township’s regional contribution agreement with New Brunswick and the occupancy preference violated the *Mount Laurel*

¹⁷⁹ *In Re Warren Township*, 247 N.J. Super. 146, 155 (A.D 1991).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *N.J.A.C. 5:92-15.1*: “For all low and moderate income housing units provided in inclusionary zoning developments, municipalities shall establish occupancy such that initially, no more than 50 percent of the units are made available to income eligible households that reside in the municipality or work in the municipality and reside elsewhere.”

¹⁸³ *Id.* at 156.

¹⁸⁴ *In Re Warren Township*, 247 N.J Super. at 155.

doctrine by “perpetuating exclusionary zoning and violate[d] the constitutional and statutory prohibitions against racial discrimination by perpetuating racial stratification with in the housing region.”¹⁸⁵

First, the Public Advocate argued that the regional contribution agreement was exclusionary and racially discriminatory because it would result in a shift of lower income housing from a municipality with a small number of lower income households and few minority residents to a municipality with a large percentage of lower income households and minorities.¹⁸⁶ The Public Advocate contended that the regional contribution agreements “[foster] and [perpetuate] a destructive pattern of economic segregation that the constitutional prohibition on exclusionary zoning seeks to undo.”¹⁸⁷

The Public Advocate also argued that the occupancy preference violated the *Mount Laurel* doctrine because it decreased the amount of low and moderate-income housing available to nonresidents.¹⁸⁸ It argued that the occupancy preference violated constitutional prohibitions against discrimination because it would decrease the number of minorities who occupy *Mount Laurel* housing in Warren Township.¹⁸⁹

The Appellate Division rejected both of the Public Advocate’s arguments and affirmed the COAH’s decision granting substantive certification to Warren Township’s fair share plan.¹⁹⁰ Even though this argument was directed specifically toward the regional contribution

¹⁸⁵ *Id.* at 156.

¹⁸⁶ *Id.* at 157.

¹⁸⁷ *Id.* at 164.

¹⁸⁸ *In Re Township of Warren*, 247 N.J. at 146.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 183.

agreement between Warren Township and the city of New Brunswick, the court recognized that this argument was equally applicable to any regional contribution agreement, and in effect, the argument challenges the constitutionality of N.J.S.A. 52:27D-312 (authorizing regional contribution agreements).¹⁹¹

The court began its discussion by noting that the New Jersey Supreme Court held in *Hills Dev. Co.*¹⁹² that regional contribution agreements were consistent with the *Mount Laurel* doctrine.¹⁹³ It specifically quoted a section of that decision where the Court stated the regional contribution agreements were intended to supply funds to urban areas to aid in the construction of decent lower income housing in areas where low-income households were located.¹⁹⁴ The court then stated three reasons why the Public Advocate’s argument failed.¹⁹⁵ First, the court noted that the regional contribution agreements only limited a maximum of fifty-percent of a municipality’s fair share obligation, thus, it did not “permit a municipality to remain solely an enclave for the rich and middle class.”¹⁹⁶

¹⁹¹ *Id.* at 157, n.4.

¹⁹² 103 N.J. 1 (1986).

¹⁹³ *In Re Township of Warren*, 247 N.J. at 162.

¹⁹⁴ *Id.* at 163. “[T]he FHA authorizing RCAs seem intended to allow suburban municipalities to transfer a portion of their obligation to urban areas . . . thereby aiding in the construction of decent lower income housing in the area where most lower income households were found, provided, however, that such areas are ‘within convenient access to employment opportunities,’ and conform to ‘sound comprehensive planning.’” (quoting *Hills Dev. Co.*, 103 N.J. at 38).

¹⁹⁵ *In Re Township of Warren*, 247 N.J. at 163.

¹⁹⁶ *Id.*

Second, the court stated that the New Jersey Supreme Court never said that a municipality's fair share obligation may not be transferred to another municipality.¹⁹⁷ In fact, the court stated that *Mount Laurel I* even contemplated that such a transfer might be appropriate.¹⁹⁸ The court quoted from *Mount Laurel I*:

Frequently it might be sounder to have more of such housing, like some specialized land uses, in one municipality in a region than in another, because of greater availability of suitable land, location of employment, accessibility of public transportation or some other significant reason. But under present New Jersey Legislation, zoning must be on an individual basis, rather than regionally. So long as that situation persists under the present tax structure, or in the absence of some kind of *binding agreement among all the municipalities of a region*, we feel that every municipality must bear its fair share of the regional burden.¹⁹⁹ [emphasis added].

The court went on to state that regional contribution agreements may have been an authorization by the legislature of these “binding agreements”.²⁰⁰

Third, the court mentioned that it must be assumed that the COAH will only give approval of these regional contribution agreements in a manner that implements the goals of the *Mount Laurel* doctrine.²⁰¹ The court asserts that COAH is statutorily required to determine that a particular regional contribution agreement “provides a realistic opportunity for low and moderate income housing within convenient access to employment opportunities, and . . . is consistent with sound comprehensive regional planning.”²⁰²

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *In Re Warren Township*, 247 N.J. Super. at 163 (quoting *Mount Laurel I*, 67 N.J. at 189).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* (citing *N.J.S.A. 52:27D-312(c)*).

After concluding that regional contribution agreements conformed with the *Mount Laurel* doctrine and the Fair Housing Act of 1985, the court went on to discuss the Public Advocate's second argument. This argument was that the occupancy preference violates the *Mount Laurel* doctrine because it decreases the amount of low and moderate income housing to nonresidents. The court noted the established principle that "[a]n administrative agency's exercise of statutorily-delegated responsibility is accorded a strong presumption of validity and reasonableness."²⁰³ Also the court stated that an administrative agency may adopt regulations which are appropriate in exercising its general responsibilities.²⁰⁴ The court stated that, due to the speculative nature of the impact occupancy preferences would have and the public policies that would be served, COAH could have reasonably concluded that occupancy preferences accommodated the legitimate desire of municipalities to grant a preference to those already living in the township.²⁰⁵

The Public Advocate in *In Re Warren Township* appealed to the New Jersey Supreme Court.²⁰⁶ The court denied petition for certification as to the issue of regional contribution agreements but accepted the petition for the occupancy preference issue.²⁰⁷ The Court reversed the Appellate Division's decision in upholding the occupancy preference, stating that the *Mount Laurel* doctrine recognized a municipality's constitutional obligation of low and moderate income housing for the region.²⁰⁸ Therefore, the occupancy preference did not

²⁰³ *In Re Warren Township*, 247 N.J. Super. at 170 (quoting *Van Dalen v. Washington Township*, 120 N.J. 234, 244-5 (1990)).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 174.

²⁰⁶ *In Re Warren Township*, 132 N.J. 1 (1993).

²⁰⁷ *Id.* at 9.

²⁰⁸ *Id.* at 39.

further the statutory goals of the Fair Housing Act in implementing the *Mount Laurel* doctrine.²⁰⁹

Non-Profit Affordable Housing Network v. Council On Affordable Housing²¹⁰

As mentioned earlier in this paper, the Appellate Division held in *Bernards Township v. Dep't of Com. Affairs*²¹¹ that the portion of N.J.A.C 5:92-6.1a requiring credits to be available to a municipality only if the unit's occupancy is restricted to low or moderate income households, violated the Fair Housing Act.²¹² After that decision, COAH amended N.J.A.C. 5:92-6-1a to not allow a restriction of affordability to low and moderate income households as a factor considered in giving credits.²¹³ The Public Advocate objected to these "credits without controls" to the New Jersey Superior Court Appellate Division.²¹⁴ The Pubic Advocate argued that the COAH's regulations (which do not include affordability as part of the standard for determining credits against a township's fair share): 1.) were ultra vires, and 2.) violate the general welfare provision under the police powers of the state constitution, and the substantive due process and equal protection provisions in the state constitution.²¹⁵

Eight days after oral argument, the Fair Housing Act was amended and specifically directed the COAH to grant credits to the specified household "even though it is not in fact

²⁰⁹ *Id.*

²¹⁰ 265 N.J Super. 475 (App. Div. 1993).

²¹¹ 233 N.J. Super. 1 (App. Div. 1989).

²¹² *Id.* at 12-3.

²¹³ *Non-Profit Affordable Housing Network*, 265 N.J. Super. at 478.

²¹⁴ *Id.* at 481.

²¹⁵ *Id.* at 475.

realistically affordable to such households.”²¹⁶ The Public Advocate conceded that based upon the new amendments, the regulations were not ultra vires, but still contended that the amendments were unconstitutional because “they [were] inconsistent with the *Mount Laurel* doctrine requiring municipalities to create realistic opportunities for the construction of housing that is affordable to low and moderate income people.”²¹⁷

The court declined to decide the constitutional issue based on an inadequate record.²¹⁸ The court said that the data submitted were not complete and the reliability of the data was not established.²¹⁹ Since it could not determine what the dilutionary effect the amendments would be, it remanded the matter to the COAH to develop a full record on the issue of impermissible dilution.²²⁰

Toll Brothers, Inc. v. Township of West Windsor²²¹

The plaintiff in, Toll Brothers, Inc., was a housing developer that owned a large tract of land in West Windsor.²²² Toll Brothers brought this action against the township alleging that West Windsor “engaged in a pattern of exclusionary zoning” violating the Fair Housing Act

²¹⁶ *Id.* at 480.

²¹⁷ *Non-profit Affordable Housing*, 265 N.J. Super. at 480.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 482.

²²¹ 303 N.J. Super. 518 (Law Div. 1996).

²²² *Id.* at 526.

and *Mount Laurel* cases.²²³ Toll Brothers sought a rezoning of its property to permit low and moderate-income housing and the construction of single-family detached houses.²²⁴

The Toll Brothers first contention was that land in West Windsor zoned for affordable housing had been severely impacted by environmental constraints, such as freshwater wetland buffers and flood plain areas.²²⁵ The plaintiff contended that these environmental constraints not only “decreased the quality of buildable acreage, but also impact[ed] the feasibility of accessing this acreage with road and utility infrastructure.”²²⁶

Toll Brothers also argued that the towns sewer policy was designed to discourage development of inclusionary (affordable housing) sites.²²⁷ West Windsor required the area where Toll Brothers owned land to be sewered by “gravity-flow systems”, which are deep in the ground and over-sized compared to other systems.²²⁸ The town also required that the first developer “front” the cost for the system that would be used not only in his development, but for all future developments in the area.²²⁹

Toll Brothers also asserted that market factors (such as demand) should be considered to determine whether the township has provided a “realistic opportunity” for development of

²²³ *Id.* at 528.

²²⁴ *Id.*

²²⁵ *Toll Brothers, Inc.*, 303 N.J. at 534.

²²⁶ *Id.*

²²⁷ *Id.* at 535.

²²⁸ *Id.* at 527, 528.

²²⁹ *Toll Brothers, Inc.*, 303 N.J. at 535

affordable housing.²³⁰ Toll Brothers requests that its property be rezoned to permit the construction of single-family units rather than multi-family units to meet market demand.²³¹

The court held that West Windsor’s zoning ordinances and policies, such as the sewer requirements and environmental constraints, were designed to discourage inclusionary development sites and fell short of the constitutional obligation of the *Mount Laurel* cases, thus granting Toll Brothers a builders remedy.²³² The court also concluded that market factors, such as market demand, should be considered when determining whether a municipality has provided a “realistic opportunity” for the development of affordable housing.²³³

On appeal, the Appellate Division affirmed the decision of the trial court as to granting the builders remedy, but reversed for further proceedings on a procedural issue.²³⁴ On May 22, 2001, the New Jersey Supreme Court granted certiorari to hear the case.²³⁵

C. Analysis

1. Studies on the Effect of *Mount Laurel*:

As seen in *Non-Profit Affordable Housing Network*,²³⁶ the biggest hurdle organizations have in attacking the Fair Housing Act or COAH regulations is the high burden of proof.²³⁷ The

²³⁰ *Id.* at 527.

²³¹ *Id.*

²³² *Id.* at 528.

²³³ *Toll Brothers, Inc.*, 303 N.J. at 528.

²³⁴ *Toll Brothers, Inc. v. Township of West Windsor*, 334 N.J. Super. 77, 102 (App. Div. 2000); The case was reversed and remanded to determine what rights the intervenors had under the 1985 consent judgment obtained in the original *Mount Laurel II* case.

²³⁵ *Toll Brothers, Inc. v. Township of West Windsor*, 168 N.J. 295 (2001).

²³⁶ 265 N.J. Super. 475 (App. Div. 1993).

²³⁷ Any COAH decision must stand unless it is arbitrary and capricious; Acts by the legislature have a strong presumption of validity and can only be held unconstitutional by clear and convincing evidence. *Id.* at 479.

court mentioned in *Non-Profit Affordable Housing Network*, judicial review of agency action is presumed reasonable and valid.²³⁸ The trouble lies in that there have been no recent comprehensive, independent studies as to the results of *Mount Laurel* housing, it leaves the Public Advocate to base its arguments on trends and speculations.²³⁹ Clearly, without numbers to support their contentions, it is extremely difficult for anyone to challenge legislative and administrative regulations.²⁴⁰ That is not to say that there has not been an effort but obtaining these numbers is extremely difficult. For example, in 1989, the Rutgers University School of Law published a study on affordable housing from 1983 through 1988.²⁴¹ Questionnaires were sent out to eighty municipalities out of five hundred fifty seven; fifty-four municipalities responded.²⁴² Another study was conducted in 1992 for the New Jersey Department of Community Affairs; this study had a questionnaire response rate of three hundred fifty out of five hundred sixty seven.²⁴³ As noted by Rutgers Law Professor John M. Payne, these studies are out of date and incomplete.²⁴⁴

²³⁸ *Id.*

²³⁹ Jeffrey Kanige, *Doctrines Don't Build Houses*, New Jersey Lawyer (May 1993); John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 674 (1996)

²⁴⁰ *Id.*

²⁴¹ Martha Lamar, *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, RUTGERS L. REV. 1197 (1989).

²⁴² Payne, *Making the Theory Fit the Facts*, *supra* note 242 at 671.

²⁴³ Robert Fitzpatrick, *The Math of Mount Laurel*, N.J. Dept. Comm. Aff. (March 1993).

²⁴⁴ Payne, *Making the Theory Fit the Facts*, *supra* note 242 at 672.

COAH also has the responsibility for producing data, yet “nothing that could properly be called ‘study’.”²⁴⁵ The main problem is that the COAH is a small agency with a small budget and is not equipped to monitor compliance.²⁴⁶

Even if the studies were published, the reliability of them would be suspect for two reasons: first, many scholars feel that the “unstated purpose” of COAH was to significantly lower the fair share numbers of communities.²⁴⁷ Second, COAH has “the political need of any bureaucracy to demonstrate ‘success,’ creating an incentive for it to inflate the numbers as much as possible.”²⁴⁸ For example, prior to the Fair Housing Act, in *AMG Realty v. Warren Township*²⁴⁹, Judge Serpentelli (one of the three specially assigned judges) estimated the actual need for low and moderate-income housing in New Jersey to be 244,000 units.²⁵⁰ After the passage of the Fair Housing Act and the creation of COAH, the new agency determined the actual need to be 145,000 units.²⁵¹ In 1993, the COAH had to issue new numbers estimating the need for low and moderate income housing between 1993 and 2000.²⁵² This number came out to be 86,000 units.²⁵³ In 1991, the New Jersey’s Comprehensive Affordable Housing Strategy (CAHS) determined the total number of households experiencing some kind of housing need to

²⁴⁵ *Id.* at 672.

²⁴⁶ *Id.*

²⁴⁷ John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365, 367 (2001).

²⁴⁸ Payne, *Making the Theory Fit the Facts*, *supra* note 242 at 672.

²⁴⁹ 504 A.2d 692 (N.J. Super. Ct. Law Div. 1984).

²⁵⁰ *Id.* at 734, 767. Judge Serpentelli never actually stated these numbers in his opinion, but were used in charts provided in the opinion.

²⁵¹ Payne, *Making the Theory Fit the Facts*, *supra* note 242 at 673.

²⁵² N.J.S.A 52:27D-307.

²⁵³ Payne, *Making the Theory Fit the Facts*, *supra* note 242 at 673.

be approximately 675,000.²⁵⁴ The estimation by the CAHS considers factors not used by COAH (such as the homeless and households paying more than thirty percent of their income to live in decent housing), thus making the number drastically larger.²⁵⁵ Moreover, COAH's estimation is driven by a need to keep the numbers low, making the objective attainable.²⁵⁶ But by keeping the numbers artificially low, the COAH is not doing the job it was created to do.²⁵⁷

Furthermore, besides the reliability of the groups publishing the data, the reliability of the people giving the information also causes a problem.²⁵⁸ The usual way information is obtained from residents is through the mail.²⁵⁹ The COAH sends out monitoring forms, and responding to it is on a voluntary basis.²⁶⁰ Only a small percentage actually respond, either because people choose not to respond (considering junk mail, etc.) or because they do not live in a developing municipality and are not subject to COAH.²⁶¹ Therefore, any conclusion drawn from the information gathered may be skewed due to the small percentage of responses.

²⁵⁴ *Id.* at 674.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 673; As mentioned earlier, the COAH determined the state low and moderate income housing need to be approximately 146,000 between 1986 through 1993. Between 1983 and 1992, there were a total of 370,400 housing units started for construction in New Jersey. To meet the affordable housing need, forty percent of the total units built would have to have been low and moderate income units. "As Henry Hill, the chairman of the Land Use Division of Princeton's Hill Wallack [put] it, 'that ain't gonna happen'." Kanige, *supra* note 242.

²⁵⁷ N.J.S.A. 52:27D-307.

²⁵⁸ Telephone interview with Jeff Surenian, author of *Mount Laurel II and the Fair Housing Act*. [Mr. Surenian was the law clerk for Judge Serpentelli, one of the three specially assigned judges Chief Justice Wilentz appointed to hear *Mount Laurel* litigation. (Sept. 24, 2001).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

2. Credits Without Controls

Under N.J.A.C. 5:92-6.1(b), low and moderate-income units that are in excess of the municipal 1987-1993 fair share calculation shall be given a credit on a “one-to-one basis” against its future fair share.²⁶² These credits will be given as long as the units have been restricted to low or moderate income families and that the municipality has implemented measures to continue the units affordability.²⁶³ This continued affordability must be consistent with the “Controls on Affordability,”²⁶⁴ which states that the municipality must assure that the newly constructed units remain affordable to low and moderate income households for a period of no less than twenty years.²⁶⁵ This is achieved by requiring all conveyances to contain a restricted covenant and mortgage lien adopted by COAH.²⁶⁶

Low and moderate income housing units created before the Fair Housing Act receive credits known as “Credits without Controls”. N.J.A.C 5:92-6.1(a) states that the “[m]unicipal present and prospective fair share shall be determined after crediting, on a one to one basis, those housing units created or rehabilitated after April 1, 1980.”²⁶⁷ A housing unit constructed between April 1, 1980 and December 15, 1986 “shall receive a credit if it is in sound condition and currently occupied by a low or moderate income household.”²⁶⁸ These credits are not controlled like the affordability assurances of units created after the Fair Housing Act.

²⁶² N.J.A.C. 5:92-6.1(b).

²⁶³ *Id.*

²⁶⁴ N.J.A.C. 5:92-12.

²⁶⁵ N.J.A.C. 5:92-12.1(a).

²⁶⁶ *Id.*

²⁶⁷ N.J.A.C. 5:92-6.1(a).

²⁶⁸ N.J.A.C. 5:92-6.3(a).

As the Public Advocate contended in *Nonprofit Affordable Housing*,²⁶⁹ these credits for units created between 1980 and 1986 dilutes the present and prospective fair share because there are no “controls” on them.²⁷⁰ As mentioned earlier, most of these units receiving credits are occupied by moderate income households.²⁷¹ Since these households are not regulated, these units could later be sold and no longer be occupied by moderate-income households.²⁷² Also, these units are not required to remain affordable for any period of time, like newly constructed units.²⁷³ Therefore, housing units could be affordable at the time they received the credits, but are no longer affordable.²⁷⁴ [In addition, the rationalization for credits without controls has run its course. The purpose of credits without controls was to provide an avenue of relief for municipalities that did have low and moderate income housing in its township, but had no controls on them because the units were created or rehabilitated prior to the Fair Housing Act. Each municipalities fair share number was based upon the 1980 census. The Fair Housing Act passed in 1985. Thus, if low and moderate income units were created or rehabilitated between 1980 and 1986, those municipalities would not receive any credit for those units because, through no fault of the municipalities, there was no controls on affordability. Credits without controls sought to ameliorate the inherent unfairness in the gap by providing credits for such units. The only drawback of credits without controls in those situations is that there is no guarantee that those units will remain affordable for any period of

²⁶⁹ 265 N.J. Super 475 (App. Div. 1993).

²⁷⁰ *Id.* at 478.

²⁷¹ Naomi Bailin Wish & Stephen Esidorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1296 (1997).

²⁷² Telephone Interview, *supra* note 261.

²⁷³ N.J.A.C. 5:92-6.3(a), N.J.A.C. 5:92-12.1(a).

²⁷⁴ Telephone interview, *supra* note 261.

time. The second round cycle of fair share numbers is from 1992 – 1999 and is based upon the 1990 census. The need for credits without controls is no longer justifiable because any low or moderate income units created or rehabilitated between 1980 and 1986 would be counted in the 1990 census, and reflected in the municipality’s fair share number. By continuing to permit municipalities claim credits without controls, COAH is allowing the municipalities to “double-dip” the amount of units counted, thus artificially diminishing a municipality’s fair share obligation.

For both these reasons, the “credits without controls” for units created between 1980 and 1986 dilute the present and prospective fair share need.

3. Regional Contribution Agreements:

In spite of the fact that the stated goal of the Fair Housing Act of 1985 was to fulfill the *Mount Laurel* policy, many critics felt that the intended purpose was to water down the *Mount Laurel* doctrine.²⁷⁵ The most troubling aspect of the Fair Housing Act is the “regional contribution agreements” provision. As stated earlier, this permits one municipality to transfer up to fifty percent of its fair share obligation to another municipality in the region by means of a contractual agreement.²⁷⁶ Many supporters of the regional contribution agreements argue that it is great for revitalizing the decaying cities.²⁷⁷ Close to \$120 million has been poured into urban areas, and regional contribution agreements constitute the largest source of housing

²⁷⁵ Lorenz, *supra* note 10 at 91.

²⁷⁶ N.J.S.A 52:27D-312.

²⁷⁷ Payne, *supra* note 250 at 368-9.

subsidy in New Jersey.²⁷⁸ But these agreements further the economic and racial segregation that the *Mount Laurel* doctrine sought to remedy.²⁷⁹

a. RCAs and Economic Segregation

Although the New Jersey Supreme Court in *Mount Laurel I & II* discussed the problem of exclusionary zoning in terms of economic segregation, it noted that exclusionary zoning was based on fears and prejudices of other “social, economic, and racial groups.”²⁸⁰ One cannot deny in New Jersey that there is a strong correlation between poverty and race.²⁸¹ For example, one study conducted by the Department of Community Affairs’s Division on Housing, focused on the top twenty-five municipalities having the greatest percentage of minority population within New Jersey.²⁸² The study’s figures demonstrate that the majority of New Jersey’s minority population resided in urban areas; twenty-three of the twenty-five municipalities were listed as urban areas.²⁸³ The study also showed that these twenty-five municipalities have a poverty rate averaging seventeen percent, which is substantially higher than the state average of five percent.²⁸⁴ The DCA’s Division on Housing also stated that there was a correlation between the minority population and per capita income.²⁸⁵ “While the State average is \$20,773 per capita, the top [twenty-five] municipalities [in this study] average some [forty] percent less

²⁷⁸ *Id.* at 368.

²⁷⁹ Payne, *supra* note 242 at 675.

²⁸⁰ *Mount Laurel I*, 67 N.J. 151, 196 (1975).

²⁸¹ Department of Community Affairs – Division on Housing, Table 5.

²⁸² DCA- Division on Housing, Table 5.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

in earnings.”²⁸⁶ Clearly, economic segregation, either directly or indirectly, leads to racial segregation.

A different study done by two Seton Hall University professors in 1996 concluded that most *Mount Laurel* housing units have served moderate rather than low-income population.²⁸⁷ The *Mount Laurel* units created are occupied almost entirely by non-minority families who already lived in the suburbs close to the site.²⁸⁸ Households earning less than forty percent of the median income have not benefited from the *Mount Laurel* policy of the Fair Housing Act.²⁸⁹ Furthermore, the Seton Hall study concludes that few low or moderate urban residents have actually been able to move into suburban communities.²⁹⁰

Statistical analysis clearly evinces that wealthy municipalities can still “build up walls” around their communities to keep out the poor. The regional contribution agreements are one of the ways that these wealthy municipalities are able to accomplish this: “the RCA directly circumvents the constitutional requirement by allowing wealthy suburbs to escape from its *Mount Laurel* obligation by bargaining with the poor urban areas.”²⁹¹ In fact, regional contribution agreements have been the “preferred way” for the affluent municipalities to meet their fair share obligation.²⁹² Although COAH has set the minimum price per transfer unit at

²⁸⁶ DCA- Division on Housing, Table 5.

²⁸⁷ Naomi Bailin, *supra* note 259 at 1296.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Bernard Ham, *Exclusionary Zoning and Racial Segregation: A reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L. J. 577, 602 (1997).

²⁹² Lorenz, *supra* note 7 at 91

\$25,000,²⁹³ negotiated prices have ranged from a high of \$27,500 per unit to a low of \$11,500 per unit.²⁹⁴ With numbers like that, it would be cheaper for wealthy municipalities to pay for a regional contribution agreement than to challenge the requirements in court.²⁹⁵

b. Misuse of Funds

Another deficiency in regional contribution agreements is the monitoring of these funds to make sure that the cities are using it for low and moderate income housing. Under the current system, the Housing and Mortgage Finance Agency (HMFA) monitors the regional contribution agreement process to ensure that the compensation received by a transferee is used to build the housing intended for the transferor municipalities.²⁹⁶

Receiving municipalities could abuse regional contribution agreements by “clearing out their lower income, service-needy population and use RCA funds to build infrastructure to attract business and the middle class.”²⁹⁷ Without some sort of oversight as to where the regional contribution agreement funds are going, those funds could be used to hurt the very people whom the *Mount Laurel* doctrine sought to protect.²⁹⁸

c. The Defective Bidding Process:

Another inadequacy with regional contribution agreements is the way two municipalities come together to form an agreement. It is clear to see that “[t]he focus of the RCA process is on the ability of the sending municipality to get rid of half of its share, rather

²⁹³ [http:// www.state.nj.us/dca/coah](http://www.state.nj.us/dca/coah).

²⁹⁴ Lorenz, *supra* note 7 at 91, In 1988, Franklin Township and Perth Amboy entered into an RCA contracted at \$27,500 per unit. In 1993, Trenton and Hamilton Township entered into an RCA contracted at \$11,500 per unit.

²⁹⁵ *Id.*

²⁹⁶ Fox, *supra* note 10 at 568

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 569.

than the need of the receiving municipalities to get the housing.”²⁹⁹ That is not to say these receiving municipalities are not benefiting from regional contribution agreements. The problem lies in that the sending (or wealthy) municipalities have all the bargaining power.³⁰⁰ Many times the urban cities compete with each other to receive these funds from wealthy communities.³⁰¹ As one former director of housing for the city of Trenton put it, “I go out and hustle RCAs . . . because we need the money and we can put it to good use. On the other hand, it’s a trickle and we can’t plan for it.”³⁰²

Another default in the regional contribution agreement bidding process is that cities in the process of gentrification³⁰³ are the “favored recipients of wealthy municipalities’ fair share because the former can bid lower transfer unit prices than other needy municipalities.”³⁰⁴ Cities undergoing gentrification already have a reinforced infrastructure and buildings available for renovation.³⁰⁵ These cities thus would be able to bid lower than decaying urban areas.³⁰⁵

d. Flawed reasoning in upholding the constitutionality of RCAs.

Despite the inconsistent nature of regional contribution agreements, the New Jersey Appellate Division upheld the constitutionality of RCAs.³⁰⁶ In *In Re Township of Warren*, the

²⁹⁹ *Id.*

³⁰⁰ Fox, *supra* note 10 at 570.

³⁰¹ *Id.* at 569.

³⁰² Allan Mallack, quoted in Jeffrey Kanige, *Doctrines Don’t Build Houses*, New Jersey Law Journal (May 31, 1993) pg. 1.

³⁰³ Gentrification is defined as “the immigration of middle-class people into a deteriorating or recently renewed city area. *Webster’s Ninth New Collegiate Dictionary*, Merriam-Webster, Inc. at 512.

³⁰⁴ Fox, *supra* note 10 at 569.

³⁰⁵ *Id.*

³⁰⁶ *In Re Township of Warren*, 247 N.J. Super. 146 (App. Div. 1991).

New Jersey appellate court, in a “poorly reasoned opinion”,³⁰⁷ upheld the constitutionality of regional contribution agreements.³⁰⁸ The court supported its contention by stating that first, the transfer was limited to only fifty percent of a municipality’s fair share obligation, and second, the New Jersey Supreme Court never said that a municipality may not transfer their fair share obligation to another municipality.³⁰⁹ More astonishing than the weakness of these arguments is that fact that the New Jersey Supreme Court denied certification of the RCA issue when the Court agreed to hear the case.³¹⁰

The appellate court’s first argument was that the transfer provision had a limitation of fifty percent, thus, regional contribution agreements did not permit a municipality to remain solely an enclave for the rich and middle class.³¹¹ This argument fails because the numbers show that the moderate-income families and the middle class are the ones that are benefiting from the *Mount Laurel* housing.³¹² Professor John Payne³¹³ notes “[a] largely unintended by-product of the creation of Mount Laurel housing has been the creation of a substantial amount of middle income housing in suburban areas.”³¹⁴ This is not to say that middle class families living in the suburbs is a bad thing, but it still ignores the fact that the poor are being funneled

³⁰⁷ Payne, *supra* note 11 at 710.

³⁰⁸ *In Re Township of Warren*, 247 N.J Super 146.

³⁰⁹ *Id.* at 163.

³¹⁰ *In Re Township of Warren*, 132 N.J. 1 (1993).

³¹¹ *Id.* at 163.

³¹² Payne, *supra* note 250 at 369.

³¹³ Professor at Rutgers School of Law – Newark.

³¹⁴ Payne, *supra* note 250 at 368.

into the cities. This funneling is done, in part, by regional contribution agreements.³¹⁵ So, the fifty percent limitation in the regional contribution agreements provision does *not* prevent municipalities from becoming an “enclave for the rich and middle class.”³¹⁶ Furthermore, municipalities are able to construct up to 25% of its *Mount Laurel* obligation in age-restricted units. The numbers demonstrate that it is more profitable for developers to build age-restricted units rather than family low-income units. Further, municipalities like age-restricted affordable units because there are no new school children that results in increased property taxes. So in the end, out of a municipality’s whole *Mount Laurel* obligation, it only needs to construct 25% towards family low and moderate income housing. When one takes into account the fact that the majority of low and moderate income housing units are actually moderate income housing units, maybe 5% to 10% of an obligation is actually being built for family low-income housing.

The second argument of the court in supporting its decision to reject the constitutional challenge of regional contribution agreements was that neither *Mount Laurel* I nor II expressly says a municipality could not transfer part of its fair share obligation to another municipality.³¹⁷ In fact, the court stated that *Mount Laurel* I hinted that some type of transfer agreement might be appropriate.³¹⁸ The court cited a piece of the decision in *Mount Laurel* I where the Supreme Court said “[s]o long as [the] situation persists under the present tax structure, or *in the absence of some kind of binding agreement among all the municipalities of a region*, we feel that every municipality therein must bear its fair share of the regional burden.”³¹⁹ The court then stated

³¹⁵ Ham, *supra* note 294 at 603.

³¹⁶ Wilentz and *Mount Laurel*, New Jersey Law Journal, page 26 (Oct. 21, 1996).

³¹⁷ *In Re Township of Warren*, 247 N.J Super. 146, 163 (1991).

³¹⁸ *Id.*

³¹⁹ *Id.* (citing *Mount Laurel* I, 67 N.J. 151, 189 (1975)) [emphasis added].

that this view was cited with approval in *Mount Laurel II*.³²⁰ The court took that piece of the *Mount Laurel I*, and determined that regional contribution agreements “may be considered authorization for [these] ‘binding agreements’ between municipalities.”³²¹

That argument fails by simply comparing the statement in *Mount Laurel I* to the reasoning in *In Re Warren Township*. The court in *Mount Laurel I* when referring to a “binding agreement” talked about it as an agreement between *all municipalities of a region*. Regional contribution agreements, however, are between two individual municipalities.³²² The binding agreements referred to in *Mount Laurel I* cannot be scene as approval for regional contribution agreements, agreements that “compromise the goal of the eradication of exclusionary zoning.”³²³

Conclusion

The New Jersey judiciary, after years of legislative and executive inaction, took it upon themselves to ameliorate the problem of exclusionary zoning.³²⁴ Although the Court was sharply criticized for intruding on a traditional legislative function, it recognized that it was its job to protect the constitutional rights afforded to its citizens. It noted that the government had a constitutional obligation: “the State controls the use of land, all of the land. In exercising that control it cannot favor rich over poor.”³²⁵ However, with legislative regulations such as regional contribution agreements and credits without controls, that is exactly what the State is doing:

³²⁰ *Id.* (citing *Mount Laurel II*, 92 N.J. 158, 237-8 (1983)).

³²¹ *In Re Township of Warren*, 247 N.J. Super. at 163.

³²² N.J.S.A. 52:27D-312.

³²³ Fox, *supra* note 10 at 565.

³²⁴ *Mount Laurel II*, 92. N.J. 158, 212 (1983).

³²⁵ *Id.* at 208.

favoring the rich over the poor. Constitutional attacks on these regulations have failed due to lack of data to support the Public Advocate's contentions and poor reasoning on the part of the courts.³²⁶ It is now 2002 and in last years New Jersey gubernatorial race, *Mount Laurel* was as hot an issue as ever, with one candidate³²⁷ "vowing the repeal of *Mount Laurel*".³²⁸ The New Jersey Supreme Court is preparing to rule on its first *Mount Laurel* case³²⁹ in ten years.

Although the issue before the court in *Toll Brothers* is whether market factors should be included in determining whether a municipality had provided a realistic opportunity to build affordable housing, the court could delve deeper into the *Mount Laurel* issue.³³⁰ It is now time for the New Jersey Supreme Court to step back into the *Mount Laurel* arena and use *Toll Brothers* to reestablish the constitutional imperative of the original *Mount Laurel* doctrine.

³²⁶ *In Re Township of Warren*, 247 N.J. Super. 146 (Law Div. 1991); *Non-Profit Affordable Housing Network v. COAH*, 265 N.J. Super. 475 (App. Div. 1993).

³²⁷ Republican Candidate Bret Schundler (who ultimately lost the election).

³²⁸ Rocco Cammarere, *Politically Explosive Issues on Tap*, New Jersey Lawyer (August 2001).

³²⁹ *Toll Brothers, Inc. v. Township of West Windsor*, A-103/104-00.

³³⁰ *Toll Brothers, Inc. v. Township of West Windsor*, 303 N.J. Super. 518, 528 (Law Div. 1996).