

FORECLOSURE OF A DREAM: THE IMPACT OF THE COUNCIL ON AFFORDABLE HOUSING'S NEW REGULATIONS ON THE CONSTITUTIONAL DUTY TO PROVIDE AFFORDABLE HOUSING IN NEW JERSEY.

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Zoning laws can be used to unjustly restrict the poor from moving into adequate housing surrounded by adequate space. This note considers the tension between the constitutional duty in New Jersey requiring municipalities to provide low income housing and the means actually used by those municipalities to provide such housing. The New Jersey Supreme Court has construed the state constitution as placing a duty on municipalities to provide low income housing. Most recently, the Council on Affordable Housing, an agency created by the legislature to ensure that the duty to provide low income housing is fulfilled, has created new standards to ensure that the poor receive adequate housing. Unfortunately, these new standards fall short of the constitutional mark, leaving many of the poor out in the cold. Jean Jacques Rousseau's great work *The Social Contract* has a quote that symbolizes the struggle of the poor in New Jersey:

“Man was born free, and he is everywhere in chains.”²
- Jean Jacques Rousseau

Exclusionary zoning (the imprisonment of people through the combination of economics and land ordinance rules) has been used in New Jersey to chain the poor to low income urban areas. In principle, the New Jersey Supreme Court cut the chains restricting the mobility of the poor by reading the Constitution as creating a municipal duty to house a fair share of the poor.³ The poor's judicial victories, however, may have been fleeting. In 1975, the New Jersey Supreme Court, through its ruling in *South Burlington County NAACP v. Mount Laurel*, (hereinafter “Mt. Laurel I”), determined that every municipality in a growth area has a constitutional duty to provide housing for low to moderate income families.⁴ Consequently, the legislature provided an administrative

¹ L.L.M. in Taxation, New York University School of Law, (2006). J.D., Rutgers School of Law-Camden, (2005).

² JEAN JACQUES ROSSEAU, *THE SOCIAL CONTRACT* 49 (1968).

³ See N.J. STAT. ANN. §52:27D-301 (West 1986 & Supp. 1997).

⁴ 336 A.2d 713 (N.J. 1975). [hereinafter *Mt. Laurel I*] (a developing municipality may not, by a system of land use regulation, make it physically and economically impossible to provide low and

alternative to this constitutional obligation when it enacted the Fair Housing Act.⁵ This Act created an administrative agency, the Council On Affordable Housing (COAH), to establish criteria used by municipalities to determine their fair share obligations and whether they have been satisfied.⁶ Recently, the Council proposed new regulations which municipalities must abide by in order to satisfy their constitutional duties to provide low to moderate income housing.⁷ However, these regulations provide enough loopholes to permit municipalities to satisfy the requirements by doing nothing.⁸ The new regulations allow suburban municipalities to either shift their affordable housing obligations to urban areas or to fulfill their obligations by building housing for the elderly.⁹

The New Jersey Supreme Court has stated that there is a constitutional duty for municipalities to provide low-income housing. The Council on Affordable Housing, however, can effectively overrule its duty if the proposed *Third Round* regulations become law.¹⁰ As seen in the comments, the proposed Third Round regulations are unconstitutional because they overrule the Supreme Court of New Jersey and should be subjected to administrative hearings.

I. HISTORICAL BACKGROUND: *MOUNT. LAUREL*¹¹ AND COAH

Land use regulations in New Jersey have been used to keep the poor out of newly developing suburbs. Even worse, land use regulations have been used to remove the poor from older farmland communities to make room for new money-making suburban families. As chronicled by the book *Our Town*, Ethel

moderate income housing in the municipality for various categories of persons who need or want it) *Id.* at 753.

⁵ See N.J. STAT. ANN. §52:27D-301 (West 1986 & Supp. 1997).

⁶ See *Id.* (stating that “ ‘Council’ means the Council on Affordable Housing established in this act, which shall have primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this state.”)

⁷ See *infra* notes 35-36 and accompanying text, discussing the new Third Round Regulations.

⁸ See *infra* notes 50-55 and accompanying text, discussing loopholes found in the new Third Round Regulations.

⁹ See *infra* notes 74-76 and accompanying text, discussing how municipalities can unjustly satisfy their housing obligations through senior citizen homes.

¹⁰ See *infra* notes 48-86 and accompanying text discussing the four reasons why the new Third Round Regulations overrule *Mount Laurel*.

¹¹ Note: “Mount Laurel” (without a number) refers to collectively to all three cases; “Mt. Laurel I,” “Mt. Laurel II,” and “Mt. Laurel III” refers to each case individually.

Lawrence, an initial Mt. Laurel plaintiff, vividly remembered how a committeeman in charge of zoning explained to the poor of Mt. Laurel, “If you people can’t afford to live in our town, then you’ll just have to leave.”¹² However, as documented in *Our Town*, Ethel Lawrence was able gain the support of the New Jersey Supreme Court which subsequently removed those negative restrictions on land use.¹³

The poor’s first victory occurred in Mt. Laurel I, where the New Jersey Supreme Court held that developing municipalities have a constitutional duty to provide low to moderate income housing.¹⁴ Almost ten years later, a second victory reaffirmed the same message in Mt. Laurel II.¹⁵ The Court held that

¹² See DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1986). “The town’s zoning ordinance didn’t allow garden apartments or any other multifamily housing anywhere in Mt. Laurel, and that, said the committeeman, was exactly how things were going to stay: the township council would never approve the community’s request.” *Id.* at 2. Ethel Lawrence and the other poor farmer in Jacob’s Chapel reflected on just how awful a town committeeman’s speech was at a local Jacob’s chapel. *Id.* The committeemen spoke about all the changes and new prosperity that would be found in Mount Laurel. *Id.* “He then came to the punch line. ‘If you people’ – you poor and black people that is – ‘can’t afford to live in our town, then you’ll just have to leave.’” *Id.*

¹³ See generally Edward A. Zelinsky, *Metropolitanism, Progressivism, and Race*, 98 COLUM. L. REV. 665 (1998) (reviewing DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1986)). The book review pointed out and established the main theme of *Our Town*, “Its authors make clear that the historic failure of central cities like Camden to annex outlying areas lies at the heart of the current problem: central cities with heavy concentrations of impoverished minority populations; suburbs largely confined to white, middle- and upper-income households.” *Id.* at 667. The solution stated in *Our Town* was to diminish the land use authority of local governments and for the courts to require municipalities to zone for low-income housing. *Id.* The book review goes on further to compare *Our Town* to similar books on local government. *Id.* In general, Professor Zelinsky argues, *Our Town* focuses on the role of the judiciary in the integration of the urban poor into suburban municipalities. *Id.* He further argues, “Kirp, Dwyer, and Rosenthal’s story of the Mt. Laurel litigation similarly suggests that those looking to the judiciary to change the face of America’s suburbs will ultimately be disappointed as well.” *Id.* A key criticism of *Our Town* was the fact that “Kirp, Dwyer, and Rosenthal’s counterfactual speculations about an elastic Camden ignore the enormity of the forces that shaped the American suburb after World War II.” *Id.* at 684. The book review then goes into greater detail providing a discussion of several other books on the topic and their possible solutions. *Id.* at 689.

¹⁴ See *Southern Burlington County N.A.A.C.P. v. Mount Laurel Township*, 67 N.J. 151, 188 (N.J. 1975). “We have earlier stated that a developing municipality’s obligation to afford the opportunity for decent and adequate low to moderate income housing extends at least to the municipalities fair share of the present and prospective regional need....” *Id.* The Supreme Court further expanded this holding by stating that, “we feel that every municipality therein must bear its fair share of the regional burden. (In this respect our holding is broader than that of the trial court, which was limited to Mount Laurel – related low and moderate income housing needs.)” *Id.* at 189.

¹⁵ See *Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township*, 92 N.J. 158, (N.J. 1983). [Mt. Laurel II] The New Jersey Supreme Court, held that: “(1) State Development Guide Plan serves as basis remedy for violations of Mount Laurel doctrine; (2) absolute ban of mobile homes would no longer be permissible on grounds of adverse effect on real estate values; and (3) trial courts on remand would determine pursuant to described procedure municipalities obligation to provide opportunity for such housing.” *Id.* at 160. Furthermore, the Court intended to encourage legislative action to ensure that the Mt. Laurel obligation was satisfied. *Id.*

municipalities have an affirmative constitutional duty to provide a realistic opportunity for the city's "fair share" of lower income housing.¹⁶ The Court further held that municipalities must satisfy their constitutional requirements but the satisfaction of Mt. Laurel's obligations would be determined on an objective basis.¹⁷ The Court recognized the idea of inclusionary zoning as a method for forcing municipalities to comply with their fair share burden.¹⁸ Most importantly, the Court in Mt. Laurel II read the New Jersey Constitution as placing an affirmative duty on municipalities to supply housing for poor families.¹⁹ This constitutional duty set New Jersey apart from other states.²⁰ In order to enforce this requirement, the Court allowed municipalities to be sued through builder's remedies.²¹ This resulted in a series of lawsuits that eventually forced most municipalities to undertake inclusive zoning to meet their fair share requirement.²²

However, in 1986 the New Jersey legislature responded by enacting the Fair Housing Act which created the Council on Affordable Housing.²³ The Supreme Court of New Jersey in *Hills Development Co. v. Bernards Township* held the Fair Housing Act to be constitutional.²⁴ The Act vests the Council on

¹⁶ *Id.* at 214-219.

¹⁷ *Id.*

¹⁸ *Id.* at 201-205.

¹⁹ *Id.*

²⁰ See Generally Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127 (1995) (discussing how New Jersey's affordable housing approach differs from most other states, by requiring municipalities to provide low income housing). See also Note, *Connecticut Retrenches: A Proposal To Save The Affordable Housing Appeals Procedure*, 110 YALE L.J. 1247 (discussing how changes to Connecticut's Affordable Housing Appeals Procedure deviated from the statute's original purpose of facilitating housing for the poor).

²¹ *Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township*, 92 N.J. 158, 210 (N.J. 1983).

²² See Naomi Bailin Wish, Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SHLR 1268 (1997). The article reviewed the results of the Mt. Laurel decisions finding that, "civil rights organizations, the New Jersey Department of Public Advocate, and various housing developers filed over 100 lawsuits against 68 suburban towns in New Jersey alleging unconstitutional exclusionary zoning between 1975 and 1985." *Id.* at 1270. A high percentage of the lawsuits were decided or settled, "calling for municipalities to engage in 'inclusionary zoning' i.e., zoning that provides affirmative incentives for the construction of low – and moderate income housing in economically integrated developments." *Id.*

²³ N.J. Stat. Ann. §52:27D-301 (West 1986 & Supp. 1997).

²⁴ *Hills Development Co. v. Bernards Township*, 103 N.J. 1 (NJ. 1986) [hereinafter Mt. Laurel III] (The New Jersey Supreme Court held the Fair Housing Act was constitutional. This included the Act's moratorium on builders' remedies. The Court transferred all pending cases to COAH.

Affordable Housing with the authority to set regulations that ensure municipalities fulfill their fair share obligations.²⁵ COAH is empowered to define housing regions, estimate low to moderate income housing needs, and set criteria and guidelines for municipalities to determine and address their own fair share numbers.²⁶ COAH is a quasi-judicial organization that can impose resource restraints regarding housing plans.²⁷ More importantly, COAH provides municipalities with the option of submitting their fair share plans for certification.²⁸ The COAH certification works as an administrative shield for municipalities from developers' lawsuits.²⁹ Therefore the COAH has taken power away from the judiciary. Despite much criticism, the COAH has achieved some accomplishments.³⁰

(However, the Court stated that it would review future cases where COAH acted inefficiently.) *Id.* at 72.

²⁵ See N.J. Stat. Ann. §52:27D-307 (West 1986 & Supp. 1997).

²⁶ See *About COAH* (last visited Jan. 15, 2004) < <http://www.state.nj.us/dca/coah/about.stml>>. "New Jersey municipalities enter into the COAH process voluntarily. They do so by entering housing elements (required by the Municipal Land Use Law as part of each municipality's master plan) and a fair share plan establishing a realistic opportunity for the provision of a predetermined number of units affordable to low and moderate income households." *Id.* COAH as stated that within two years of filing, municipalities must petition COAH for substantive certification (if a municipality is to remain under COAH's jurisdiction). This is important because petitioning assures continued protection from lawsuits while COAH reviews the municipality's plan to ensure low income housing is built. COAH sometimes requests revisions in the plan and possibly mediates objections from interested parties before COAH grants or denies substantive certification. *Id.* The harshest penalty for failure to assure a realistic opportunity for fair share housing is withdrawal of the six year certification which would leave municipalities exposed to builder's remedy lawsuits. *Id.*

²⁷ N.J. Stat. Ann. §52:27D-315(West 1986 & Supp. 1997).

²⁸ See *About COAH* (last visited Jan. 15, 2004) < <http://www.state.nj.us/dca/coah/about.stml>>. The composition of COAH is as follows: "With 11 members appointed by the Governor on the advice and consent of the Senate, COAH is empowered to: (1) define housing regions, (2) estimate low and moderate income housing needs." *Id.* Most importantly COAH "(3) examine[s] criteria and guidelines for municipalities to determine and address their own fair share numbers and then review and approve housing elements/fair share plans and regional contribution agreements (RCAs) for municipalities." *Id.* The Council on Affordable Housing has described itself "as a quasi - judicial organization" that can "impose resource restraints and cons regarding housing plans." *Id.*

²⁹ See N.J. Stat. Ann. 52:27D - 312(West 1986 & Supp. 1997). See also *About COAH* (visited Jan. 15, 2004) < <http://www.state.nj.us/dca/coah/about.stml>>. "COAH provides municipalities that choose to enter its process and obtain substantive certification that their fair share plans with an administrative shield from developer's lawsuits. Often such lawsuits result in the imposition of 'builder's remedies.'" *Id.*

³⁰ See *About COAH* (last visited Jan. 15, 2004) <<http://www.state.nj.us/dca/coah/about.stml>>. Of the 566 municipalities in the state, approximately 260 are participating as of June 6, 2000. An additional 23 urban aid municipalities are providing affordable housing as receivers of RCA dollars. *Id.* To date, the opportunity for approximately 58,500 affordable housing units has been provided. *Id.* This includes about 26,800 that have been built or under construction. *Id.* There are 14,600 units that have realistic zoning in place, 6,700 Regional Contribution Agreement units, and 10,400

Some of the Council's gains have been surrounded by controversy. Regional Contribution Agreements ("RCA's") allow suburban municipalities to compensate urban municipalities for relieving them of part of their 'fair share' obligation to provide housing.³¹ Under certain conditions, a municipality can pay another municipality to accept up to fifty percent of its affordable housing.³² The policy behind this idea was to provide funding to rebuild substandard housing in urban areas.³³ The notion of these Contribution Agreements has sparked outrage with affordable housing advocates.³⁴ The New Jersey Supreme Court however, has recognized the use of RCAs as a valid means fulfilling of fair share obligations under the Fair Housing Act.³⁵

The COAH has recently produced a new Third Round of regulations.³⁶ The regulations are used to determine the affordable housing needs in any given

units that have been rehabilitated. *Id.* The statistics are based on monitoring performed by COAH from municipalities under COAH jurisdiction. *Id.*

³¹ See generally Harold McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 Temp. L.Rev. 665 (1995). McDougall explores the economic costs and benefits behind the regional development program. *Id.* He argues that exclusionary zoning techniques produce an inefficient housing market and therefore government intervention is justified. *Id.*

³² See *Council on Affordable Housing Newsletter*, COAH UPDATE (last visited Jan. 15, 2004) <<http://www.state.nj.us/dca/coah/2003newsletters/o8003.pdf>>, Aug. 2003 at 1. Most recently two Regional Contribution Agreements were approved. *Id.* Of note, Piscataway will transfer 68 units to the city of New Brunswick (Middlesex County) at \$25,000 per unit, for a total cost of 1.7 million dollars. *Id.* New Brunswick will use the funds for a scattered site housing rehabilitation program. *Id.* This is a prime example of the problem Regional Contribution Agreements present where a suburban municipality simply offloads its *Mt. Laurel* obligations to poor urban areas that use the funds on scattered housing instead of providing a community that could realistically become desirable to live in.

³³ See generally Peter H. Schuck, *Refugee Burden- Sharing: A Modest Proposal*, 22 YALE J INT'L L. 244 (1997) (Giving a multinational overview on whether a burden sharing system between municipalities actually works).

³⁴ See Comments of Peter J. O'Connor, Southern Burlington and Camden County Branches of the NAACP and Fair Share Housing Center on the Proposed Third Round Regulations, (COAH filed Dec. 5, 2003) at 30 (Stating that COAH has allowed the wealthy suburbs to dump one half their obligations to provide low income housing back on impoverished urban areas. The remaining obligations are then left for the upper income range of the beneficiaries thereby ensuring the urban poor will never have access to any housing opportunities that would have been granted.)

³⁵ See, Comments of Stickel, Koenig, and Sullivan, (COAH filed Dec 5,2003) at 2, 3. (Supporting the effectiveness of the Regional Contribution Agreements, a position counter to the Fair Share Housing Center. *Id.* at 2. They argue that, "[t]he 50% RCA statute was sustained by the New Jersey Supreme Court in *Hills Dev. Co. v. Bernards Tp. In Somerset Cty.* 103 N.J. 1 (1986)." *Id.* Their comments characterize the Fair Share Housing Center as demanding that all affordable housing be built in the suburbs, with no federal funding going towards urban revitalization. Their comments indicate that Regional Contribution Agreements "provide a rational means of providing necessary funds to urban areas for that effort." *Id.*

³⁶ See COAH Third Round Regulations 5 N.J. Reg. 94 (2003) (proposed Aug. 25,2003).

community. Unfortunately, the regulations are rife with loopholes that would allow smart municipalities to completely avoid their Mount Laurel obligations.³⁷

II. THE FAIR HOUSING ACT

The Fair Housing Act was created to provide New Jersey citizens with a comprehensive legislative plan to implement and enforce the constitutional duty set out by *Mt. Laurel I*.³⁸ This duty is best summarized by the Fair Housing Act's finding that, "The New Jersey Supreme Court, through its rulings in *South Burlington County NAACP v. Mount Laurel*, 92 N.J. 158 (1983), has determined that every municipality in a growth area has a constitutional obligation to provide through its use regulations a realistic opportunity for a share of its region's present and prospective needs for housing for low and moderate income families."³⁹ This initial statement highlights the need to uphold the *Mount Laurel* constitutional duty and is stated frequently throughout the act.⁴⁰ Furthermore,

³⁷ See *Council on Affordable Housing Newsletter*, COAH UPDATE (last visited Aug. 2003 <<http://www.state.nj.us/dca/coah/2003newsletters/o8003.pdf>>), Aug. 2003 at 1. "The proposed rules were unanimously adopted by the COAH board and will be printed in the October 6 New Jersey Register." *Id.* Susan Bass Levin stated that, "[t]his third round represents a complete overhaul of the existing system. It truly is a top to bottom reform and a way to make New Jersey better for everyone. The plan focuses on growth – as our towns grow and more jobs are created, more affordable housing will be built." *Id.* She even admits that, "[t]he plan also recognizes challenges raised by critical groups in our society – groups that need affordable housing like our senior citizens. . . .The COAH board and I truly believe that this is a plan that will work." *Id.* "It is a plan that makes sense. And it is a plan that is long overdue. We will appreciate your input in discussions during the formal comment period and look forward to working with you to make New Jersey better through providing affordable housing to those who need it." *Id.* at 2.

³⁸ N.J. Stat. Ann. §52:27D-302 (West 1986 & Supp. 1997).

³⁹ See *Id.*

⁴⁰ *Id.* "The interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to the constitutional obligation." §52:27D-302 –c. There are also time requirements set forth by the obligation: "The state can maximize the number of low and moderate income units provided in New Jersey by allowing its municipalities to adopt appropriate phasing schedules for meeting their fair share so long as the municipalities permit a timely achievement of an appropriate fair share regional need for low and moderate income housing as required by Mount Laurel I and opinions." § 52:27D-302-e. Furthermore the act states that, "The Supreme Court of New Jersey in its Mount Laurel decisions demands that municipal land use regulations affirmatively afford a reasonable opportunity for a variety of cost effective housing including low to moderate income cost housing, to meet the needs of people desiring to live there. When the provision for actual construction of that housing by municipalities is not required, they are encouraged but not mandated to expend their own resources to help provide low and moderate income housing." §52:27D-302–h. Furthermore, the Act's declarations section contains the affirmative statement that, "[t]he legislature declares that the statutory scheme set forth in this act is in the public interest in that it comprehends a low and moderate income housing planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court." §52:27D-303.

the Fair Housing Act vests COAH with a duty to calculate the amount of low income housing received by each municipality.⁴¹ The Legislature's driving purpose behind the Act is to provide the best equipped branch of government with the ability to enforce the constitutional duty.⁴² Furthermore, the Fair Housing Act crippled the use of builder's remedy lawsuits as a judicial mechanism for enforcing affordable housing regulations.⁴³ By acquiring the power to decide whether municipalities have fulfilled their obligation, COAH usurped the role of the judiciary.⁴⁴ The Fair Housing Act thus asserts the true intention of the legislature, to take affordable housing decisions away from the Court.⁴⁵

Some academics disagree with the assertion that the New Jersey Legislature signed the Fair Housing Act into law to do anything of useful value. The FHA's statutory history and process of rewriting shows how the statute's actual end product has deviated from its conception.⁴⁶ The statute's actual language definitely upholds and furthers the argument that it was substantively built around the constitutional duty set by the *Mt. Laurel* decisions.⁴⁷

The COAH's underlying make-up and procedure may, however, support another argument. The politics behind the passage of the Fair Housing Act

⁴¹ See N.J. Stat. Ann. § 52:27D-306 (West 1986 & Supp. 1997). "Duties of council: Estimate the present and prospective need for low and moderate income housing at State and regional levels." *Id.*

⁴² *Id.* "In the second Mount Laurel ruling, the Supreme Court stated that the determination of methods for satisfying this constitutional obligation "is better left to the legislature," that the court has "always preferred legislative to judicial action in their field," §52:27D-302. The statute emphasized that the judicial role of upholding the Mount Laurel doctrine "could decrease as a result of legislative and executive action." *Id.*

⁴³ See *supra* note 40.

⁴⁴ See N.J. Stat. Ann. 52:27D-328 (West 1986 & Supp. 1997). "Builder's remedy moratorium: No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation which has been filed on or after January 20, 1983." *Id.*

⁴⁵ See *supra* note 40.

⁴⁶ See KIRP, *supra* note 12, at 126.

The progressive minded bill carried by Senators Stockman and Lipman was known as the Fair Housing Act. It included money for affordable housing in suburbia and a state agency with the authority to make the fair-share hopes of the Mount Laurel cases a reality. In less than a year, a bill bearing the same name and also creating an agency called the Council on Affordable Housing passed the legislature and was signed into law by Governor Kean. By then, however, the bill was really the governor's. It had been so transformed – so gutted, the two original sponsors believed- that, on principle, they cast their votes against it.

Id.

⁴⁷ See *supra* notes 37 – 38 and accompanying text discussing how substantively and superficially the Fair Housing Act appears to uphold the intentions and constitutional duty set out by the New Jersey Supreme Court. See also *Mt. Laurel III*.

protected municipalities at the expense of the Court's original goal.⁴⁸ Certain provisions in the act leave one skeptical of the true intent of those who composed the final version.⁴⁹ The phase-in schedule and other time delaying tactics permit municipalities to prolong compliance with *Mount Laurel*.⁵⁰ Also, the very notion of Regional Contribution Agreements make the legislature's intent questionable.⁵¹

The New Jersey Supreme Court initially upheld the Fair Housing Act with skepticism because it speculated that the Act would not work.⁵² The Court may

⁴⁸ See KIRP, *supra* note 40, at 126.

Along the way, the sponsors rewrote sections of the bill to pick up additional support. The composition of COAH's board was structured to include substantial local representation; the housing subsidy was pegged at a hundred million dollars, half of what the working group had suggested; the fair-share obligation on townships was lightened; most significantly, an extended phase in period, up to twenty years in some cases, was written into the law over developers' objections that this would make it impossible to get financing."

Id.

⁴⁹ See N.J. Stat. Ann. §52:27D-322 (West 1986 & Supp. 1997). The six year immunity period is a prime example of the procedural deviance from the Mount Laurel goal. "Any municipality which has reached a settlement of any exclusionary zoning litigation prior to the effective date of this act shall not be subject to any exclusionary zoning suit for a six year period following the effective date of this act." *Id.* The act goes further to state that municipalities then do not have to do anything: "[a]ny such municipality shall be deemed to have substantially certified housing element and ordinances, and shall not be required during this period to take any further actions with respect to provisions for low and moderate income housing in its land use ordinances or regulations." *Id.* Six years provides a huge gap for a municipality to effectively sit on its hands.

⁵⁰ *Id.* The Act then goes through an rigidly complicated set of procedural requirements that would take an army of legal experts to sort through:

A municipality which has an action pending or judgment entered against it after the effective date of this act, or which had a judgment entered against it prior to that date and from which appeal is pending or which brings an action for declaratory judgment pursuant to section 13 of this act, shall upon municipal request be allowed to phase in its obligation for a fair share of low and moderate income housing. If such phase-in is requested by the municipality, the courts implement a phase-in for the issuance of final approvals, as defined in section 3.1 of P.L.19 c.291 (C. 40:55D-4), for low and moderate income housing, which shall be based on an analysis of the following . . .) N.J. Stat. Ann. §52:27D-322 (West 1986 & Supp. 1997). The statute goes on to list a series of factors that would take an exorbitant amount of time to sort through.

N.J. Stat. Ann. §52:27D-323(a) (West 1986 & Supp. 1997).

⁵¹ See *supra* note 33 and accompanying text. See also Comments of Peter J. O'Connor, Southern Burlington and Camden County Branches of the NAACP and Fair Share Housing Center on the Proposed Third Round Regulations, (COAH filed Dec. 5, 2003) *Id.* at 30 Stating "COAH has never met an RCA it did not like, and it has never rejected an RCA." *Id.*

⁵² See Mt. Laurel III 103 N.J. 1, 43. The Court summarized its role in reviewing the Fair Housing Act:

have only upheld the statute based on the fear of being branded as too judicially active.⁵³ Despite the Court's promise to remain vigilant and to ensure that the Fair Housing Act would enforce the constitutional duty to provide low income housing, the Court has yet to rebuke the statute in any way. The Court did, however, caution that the Act did not weaken the judiciary's resolve and that it would remain active in ensuring that the constitutional right to affordable housing is enforced.⁵⁴

The Fair Housing Act was framed around the constitutional duty laid out by the New Jersey Supreme Court in the *Mount Laurel* cases.⁵⁵ It was enacted with the primary purpose of providing low to moderate income housing for the poor.⁵⁶ However, it weakened the substance of Mt. Laurel with unnecessary

It also asserted that the Act simply will not achieve the construction of lower income housing, the claim not being that there will be a delay, but that there will be no such housing. The argument has as its premises that the Act depends on the voluntary cooperation of municipalities, that the lack of an assured builder's remedy will result in a total loss of interest on the part of builders, which in turn will mean that there will be no construction, and ultimately, that there will never be lower income housing through any device other than a builder's remedy. If true, this attack is substantial. Right now, however, it is speculation. At this point, the presumption of constitutionality must prevail. The judiciary must assume, if the assumption is at all reasonable, that the Act will function well and fully satisfy the Mount Laurel obligation. That need will not be a certainty. But before this Act may be declared unconstitutional on these grounds, the contention that it will not work must be close to a certainty.

Id.

⁵³ *Id.* The New Jersey Supreme Court stated, "We have been criticized strongly for activism in this most sensitive and controversial area. We understand that no one wants his or her neighborhood determined by judges. Our reasons for 'activism' if that's is what it was, are fully set forth in Mount Laurel II." *Id.*

⁵⁴ *Id.* at 63-64. The Court in *Hills* further stated that:

No one should assume that our exercise of comity today signals a weakening of our resolve to enforce the constitutional rights of New Jersey's lower income citizens. The constitutional obligation has not changed; the judiciary's ultimate duty to enforce it has not changed; our determination to perform that duty has not changed. What has changed is that we are no longer alone in this field. The other branches of government have fashioned a comprehensive statewide response to the Mount Laurel obligation. This kind of response, one that would permit us to withdraw from this field, is what this Court has always wanted and sought. It is potentially far better for the State and for its lower income citizens.

Id.

⁵⁵ See *Alexander's Dept. Stores of New Jersey Inc. v. Borough of Paramus*, 125 N.J. 100, 116 (1991) (holding that COAH has the power to determine whether a municipality's fair share plan provides a realistic opportunity for affordable housing. However, such a ruling cannot include whether a proposed ordinance or developer's agreement satisfy substantive and procedural legal standards created by the Mt. Laurel obligations.). Here the Court tried to limit COAH's ability to judge whether Mt. Laurel has been fulfilled. *Id.*

⁵⁶ See *supra* notes 43, 44 and accompanying text discussing the true intent behind the Fair Housing Act.

procedure. The new Third Round numbers have effectively overruled the Constitutional duty stated by both the Court and the Fair Housing Act.⁵⁷

III. THE NEW COAH THIRD ROUND NUMBERS

Recently COAH announced a new plan that drastically overhauls the existing COAH system.⁵⁸ The new Third Round regulations use a “growth share” system to determine municipalities’ fair share housing obligations.⁵⁹ There are both strong advocates and harsh critics of the New Third Round Numbers.⁶⁰ The criticisms focus on the fact that there are so many loopholes in the new third round numbers that enable clever municipalities to effectively avoid the Mount Laurel obligation.⁶¹ First, the new regulations are criticized for giving municipalities a disincentive to expand and show growth, because under the new regulations, municipalities calculate their housing obligations based on the

⁵⁷ See *supra* notes 2, 6, 23 for a discussion of the Constitutional duty set by the Fair Housing Act, and Mt. Laurel I and II.

⁵⁸ See *DCA New Jersey Community Affairs News*, DCA UPDATE (Found. <<http://www.state.nj.us/dca/news/2003/pro82503.shtml>>), Aug. 2003 at 1. The new methodology determines a town’s affordable housing obligation according to two components: “Growth Share – the number of units that must be built based on a town’s actual growth, which would allow municipalities a much greater level of self determination. Rehabilitations share – the number of substandard units a town must rehabilitate as identified by COAH.” *Id.* The purpose behind the new methodology was to give municipalities greater flexibility to determine their fair housing obligations.

⁵⁹ See generally *Council on Affordable Housing Newsletter*, COAH UPDATE (Found. <<http://www.state.nj.us/dca/coah/2003newsletters/o8003.pdf>>), Aug. 2003 at 1. The proposed rules were printed in the New Jersey Registrar for a sixty day comment period. *Id.*

⁶⁰ Steve Chambers, *Affordable Housing Rules Stir Criticism* (last visited Oct. 15, 2003) <<http://www.cahenj.org/media/media.html>>. “New Jersey communities that choose not to allow any new homes of business would be exempt from a state requirement that they provide for housing for lower – income families under a proposal made . . . by the state’s Council on Affordable Housing.” *Id.* The new third round regulations were unanimously approved by the state’s Council on Affordable Housing and abandoned the old quota system that had been in place since the 1975 Mt. Laurel decision. *Id.* Kevin D. Walsh, a staff attorney with the Fair Share Housing Center in Cherry Hill, stated, “This proposal essentially nullifies Mt. Laurel, it will result in the continued ghettoization of Camden, Trenton and Newark.” *Id.* Supporters of the plan argue that sprawl will be prevented because communities will have more say where the housing can be built. *Id.* However, opponents claim the opposite - because municipalities have less fear of housing enforcement they will permit more development with less affordable housing. *Id.*

⁶¹ *Id.* Furthermore, the rules double the number of senior housing units that can count towards a community’s obligation to build affordable housing. *Id.* This leaves little room for low income families with children. *Id.* It should also be noted that one of the main drafters of the new rules was Department of Community Affairs Commissioner Susan Bass Levin, the former mayor of Cherry Hill who fought with affordable housing advocates for years prior to drafting the new rules. *Id.*

number of homes and jobs created.⁶² Second, the new rules are criticized because they do not necessarily help the poor. Instead, the new regulations permit half of the housing numbers to be satisfied by the elderly and the other half to be shifted to other municipalities through RCAs.⁶³ Third, the new regulations are criticized for requiring too low of a standard because the judicial standard was much higher and much more realistic.⁶⁴ Fourth, the new regulations are criticized for creating a statewide bank account that is used by municipalities to buy their way out of their Fair Share obligations.⁶⁵ Despite these criticisms, the COAH has stated that these new regulations will be both constitutional and effective.⁶⁶ It should be

⁶² See COAH Third Round Regulations 5 N.J. Reg. 94 -2.1d (2003) (proposed Aug. 25, 2003). Under the new regulations the need for affordable housing will be calculated through the following formula . . . “ ‘growth share’ will be met when one out of 10 new homes receiving certifications of occupancy is affordable to households of low or moderate income and when one home affordable to households of moderate income is provided for each 30 new jobs created” *Id.*

⁶³ *Id.* “Alternative living arrangements that are age-restricted shall be included with the 50 percent that may be age restricted pursuant to N.J.A.C. 5:94-4.3(m).” N.J.A.C. 5:94-4.3 (d)(4) This effectively allows municipalities to satisfy half of their constitutional obligations to the poor with old folks homes. *Id.* “Not more than 50 percent of the affordable housing provided by a fair share plan may be met with age-restricted housing.” N.J.A.C. 5:94-4.3(m). Furthermore, “Municipalities may propose to transfer up to 50 percent of their housing obligation based on the procedures in N.J.A.C. 5:95-11.” N.J.A.C. 5:94-5.1(a). This allows municipalities to transfer up to half of their housing obligations. As stated above, the other half can simply be built as retirement homes. *See also* Comments of Peter J. O’Connor, Southern Burlington and Camden County Branches of the NAACP and Fair Share Housing Center on the Proposed Third Round Regulations, (COAH filed Dec. 5, 2003) at 2. “COAH has proposed to allow suburbs, in addition to eliminating fifty percent of their obligation with RCA, to address the remaining fifty percent of their obligation with senior housing. This ensures that no families trapped in segregated cities will ever be able to access the suburban opportunities enjoyed by the majority of New Jersey’s citizens.” *Id.*

⁶⁴ *See*, Comments of Peter J. O’Connor, Southern Burlington and Camden County Branches of the NAACP and Fair Share Housing Center on the Proposed Third Round Regulations, (COAH filed Dec. 5, 2003) at 95.

COAH’s Third Round Figures are unconstitutional because they are too low. Actual need is greater than 600,000 units. COAH should recognize that and adjust the growth share ratios accordingly. Further, the reductions from the 148,000 obligation themselves are unconstitutional. COAH subtracts its estimates of filtering and residential conversions from the State and regional numbers to arrive at its adjusted 1999-2014 prospective need of 48,637 housing units. The manner in which COAH does that is not based on sound reasoning, and the assumptions underlying COAH’s positions have been hidden by COAH.

Id.

⁶⁵ *See* N.J.A.C. 5:94 -5.5 (b). “In lieu of entering into an agreement with another municipality, sending municipalities may opt to make contributions to this fund to meet that portion of the municipal fair share of affordable housing that may be met through an RCA.” *Id.* The prior system required a municipality to find a receiving municipality to take on its fair share housing needs. However with the new system, municipalities have no responsibility to find a receiving municipality which gives them the ability to write a check instead of actually building homes.

⁶⁶ *See generally* Council on Affordable Housing Newsletter, COAH UPDATE (Found. <<http://www.state.nj.us/dca/coah/2003newsletters/10-1103.pdf>>) (last visited Nov. 2003) at 1.

noted, however, that together these loopholes are so devastating to the actual implementation of affordable housing that they effectively overrule the constitutional duty stated by the New Jersey Supreme Court in *Mt. Laurel*.

IV. COMMENTS REGARDING THE CONSTITUTIONALITY OF THE NEW THIRD ROUND REGULATIONS

A careful overview of the comments submitted to the COAH regarding the new regulations raises some serious concerns about constitutionality.⁶⁷ COAH has received numerous comments critical of the new third round regulations.⁶⁸ Comments from the Southern Burlington and Camden County Branches of the NAACP and the Fair Share Housing Center tend to be the most critical.⁶⁹ The NAACP and the Fair Share Housing Center began their comments with a long history of *Mt. Laurel* and the background behind the constitutional obligation to provide housing in New Jersey.⁷⁰ The comments voice disgust with the utter ineffectiveness of the COAH.⁷¹ Conversely, comments from the Stickel, Koenig and Sullivan law firm are the most supportive. A comparison of these comments and a few others gives insight into the constitutional problems that are really at issue. There are four main points that question the constitutionality of the new regulations. First, the new rules permit municipalities to calculate their own affordable housing commitments, something strictly forbidden by the Court.⁷² Second, the new rules do not allow regional calculations as required by the

Bass Levin, the Commissioner for the Council on Affordable Housing has stated that, “the methodology (the new third round numbers) reforms a system that has been criticized as cumbersome and rigid. We knew that the other system was not working – so this truly is our attempt at making changes that will work. Through this methodology, we are giving towns the power to control their own growth and increase their options to meet COAH obligations.” *Id.* The COAH newsletter for November contended that the new regulations are in line with Governor McGreevey’s bold plan to stop sprawl and improve quality of life. *Id.* How the new third round numbers accomplishes this task is never discussed.

⁶⁷ See *infra* notes 68-69.

⁶⁸ See *supra* notes 33-34.

⁶⁹ See *infra* note 63.

⁷⁰ See Comments of Peter J. O’Connor, Southern Burlington and Camden County Branches of the NAACP and Fair Share Housing Center on the Proposed Third Round Regulations, (COAH filed Dec. 5, 2003) at 3-28.

⁷¹ *Id.* “The proposed Third Round regulations of the New Jersey Council on Affordable Housing (COAH), will if adopted, complete the final step in COAH’s quest to return New Jersey housing policy to the pre- Mount Laurel days of unconstitutional exclusionary zoning.” *Id.* at 1. The NAACP goes further to state the new third round regulations are so egregious that they are a “direct descendent of Jim Crow.” *Id.*

⁷² See *infra* notes 74-78 and accompanying text.

Court.⁷³ Third, the new rules either discriminate against the elderly, or conversely discriminate against families with children.⁷⁴ Fourth, the new rules fail to ensure the environmental protections provided for by the Court.⁷⁵ Based on an analysis these issues, the new Third Round Regulations appear to be unconstitutional because they simply go against the instructions of the New Jersey Supreme Court.

First, the new Third Round regulations are potentially unconstitutional because they vest municipalities with the ability to calculate their own fair housing obligation.⁷⁶ This ability was strictly forbidden by the Court in *Mount Laurel II*.⁷⁷ The NAACP argues that the Court strictly forbade municipalities from this role because it could potentially work in a self serving manner.⁷⁸

⁷³ See *infra* notes 79-86 and accompanying text.

⁷⁴ See *infra* notes 87-97 and accompanying text.

⁷⁵ See *infra* notes 98-103 and accompanying text.

⁷⁶ See *Mount Laurel II*, 92 N.J. at 258 (directly opposes the concept of municipalities determining their own fair share housing obligation.)

While it would be simpler in these cases to calculate a municipality's fair share by determining its own probable future population (or some variant thereof) such a method would not be consistent with the constitutional obligation (although it could be a factor that could be considered in a fair share calculation in the absence of other proof). Municipal population projections are based on many factors, but in no case that we know of do they include value judgments that such a municipality should bear its fair share of the region's lower income housing need. In fact, in most cases, we believe, one of the factors necessarily involved in such municipal population projections are the prior and probable future effect of the municipality's exclusionary zoning. If, because of that exclusionary zoning, a suburban municipality with substantial developable land has a very, very small probable growth as shown by the most reliable population projections (resulting in part from its very small past growth caused by exclusionary zoning), it should not be allowed to evade its obligation by basing its fair share of the lower income housing need on the small projected population growth. On the other hand, when that municipality is considered as part of the region and the region's population growth is projected, a value judgment is made, based upon the *Mount Laurel* obligation that may result in a substantially greater fair share for that municipality and indeed may result in changing what would otherwise be the population projection of the municipality. It may be that the overall populations for the state of New Jersey and for its various regions are somewhat affected by the aggregate impact of exclusionary zoning – that is something for experts to determine. Even so, when gross population projections are used for a region, it is more likely that the total lower income housing need will be included and much more likely that whatever lower housing income need is in fact included and distributed fairly, not in accordance with prior patterns of exclusionary zoning but in accordance with suitability for such housing. *Id.*

⁷⁸ See Comments of Peter J. O'Connor, Southern Burlington and Camden County Branches of the NAACP and Fair Share Housing Center on the Proposed Third Round Regulations, (COAH filed Dec. 5, 2003) at 97. The NAACP argues, "Those issues were addressed implicitly in *Mount Laurel II*. The Court held that relying totally on municipalities 'would not be consistent with the constitutional obligation.'" *Mount Laurel II*, 92 N.J. at 258 *Id.*

Municipalities could effectively set their growth shares at zero and do nothing. The comments listed in support of the new Third Round regulations fail to address this specific constitutional issue. Instead, they merely state how local planning provides a more realistic figure for actual housing needed.⁷⁹ Most comments supporting the new Third Round regulations do not cite to the language of the Court to support their position. Instead, they merely speak in generalities.⁸⁰ Thus, the new Third Round regulations violate one of the constitutional obligations announced by the Court in *Mount Laurel II*. New regulations are therefore unconstitutional because the new regulations vest local municipalities with the ability to determine their own obligations.

Second, the new regulations are potentially unconstitutional because they leave accounting to individual municipalities and do not account for how much housing is needed on a regional level. As noted in other comments, this grants municipalities too much power for determining their fair share of affordable housing, fostering potential abuses that could create a lack of evenly distributed housing throughout a region.⁸¹ The NAACP states that the new regulations should have “a region wide mechanism for ensuring that municipalities have not hindered growth and have not thus caused an unconstitutional cessation of affordable housing development.”⁸² Furthermore, the NAACP argues for an evaluation of this regional growth once every year.⁸³

⁷⁹ See Comments of Stickel, Koenig, and Sullivan, (COAH filed Dec 5,2003) at 2, 3.

I support the concept of growth share as set for in the proposal. It presents a rational way in which to approach the need for affordable housing, and will probably result in production of a greater number of housing units with less litigation than earlier methods. Instead of providing an artificial number to municipalities, which in many cases was unrealistic, the growth share approach will allow such housing to be created as the result of local planning decisions.

Id.

⁸⁰ See Comments of Michele R. Donato, (COAH filed Dec. 5 2003) at 1. “The growth share approach implements important principles established by the Supreme Court in *Mount Laurel I* where the Court imposed obligations on developing municipalities to accept their fair share of affordable housing needs.” *Id.* It must be noted that the comment does not directly cite the court but talks in overbroad generalities.

⁸¹ See Comments of Meryl A.G. Gonchar, New Jersey State Bar Association Land Use Law Section, (COAH filed Dec. 5, 2003) at 2. “The proposed COAH rules would do precisely what the Supreme Court said could not be done. The rules completely disregard the concept of regions when allocating prospective need This is precisely what *Mount Laurel II* said municipalities could not do without running afoul of the constitution.” *Id.*

⁸² See Comments of Peter J. O’Connor, Southern Burlington and Camden County Branches of the NAACP and Fair Share Housing Center on the Proposed Third Round Regulations, (COAH filed Dec. 5, 2003).

⁸³ *Id.* at 98. “The growth share should be evaluated annually to ensure that if growth would result in segregated housing impacts, it either be remedied, or the system would be rendered unconstitutional.” *Id.*

Supporters of the new regulations, however, contend that the new regulations will give local municipalities more flexibility and will therefore be more effective.⁸⁴ They do not confront the language of the New Jersey Supreme Court found in *Mt. Laurel II*.⁸⁵ The supporters, however, take an extreme position, arguing that there should be no housing obligation for prospective growth. Instead, obligations should only be applied once actual growth has occurred.⁸⁶ According to the supporters, to avoid speculation, growth share should only be based on certificates of occupancy, not potential housing development.⁸⁷ The supporters even argue that instead of evaluating growth shares once every three years as stated in the proposed rules, the review period should be extended to every five years.⁸⁸ It must be noted that a longer time period between reviews would give municipalities greater flexibility to effectively do nothing. The comments supporting the growth share numbers go against the very spirit of *Mount Laurel* by failing to provide the poor with a reasonable opportunity to find reasonable housing.

Third, the new regulations are potentially unconstitutional because municipalities can now shift up to fifty percent of their fair share housing obligations to homes that accommodate people over fifty-five years of age. Previous regulations only permitted twenty five percent of affordable housing to be allotted to elderly housing. The first problem with the increase in age restricted housing is that, “by meeting 50% of their obligation through Regional Contribution Agreements, and the other 50% through age restricted housing, a municipality will be able to satisfy its obligations on the proposed rules without providing any housing for younger families whatsoever.”⁸⁹ Furthermore, in the *Mount Laurel* cases, the New Jersey Supreme Court spelled out a duty to provide low income housing for the poor, not the elderly.⁹⁰ The initial *Mount Laurel* decision did not discuss housing for the elderly and instead only applied the

⁸⁴ See, Comments of Stickel, Koenig, and Sullivan, (COAH filed Dec 5,2003) at 1. “Instead of providing an artificial number to municipalities, which in many cases was unrealistic, the growth share approach will allow such housing to be created as a result of local planning decisions.” *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* “5:94 -2.1. General. a. This section should make clear that the projection of growth share is not the obligation, but a projection of the obligation. The obligation is to be determined based upon what actually occurs over the years.” *Id.* at 3.

⁸⁷ *Id.* “5:94 -2.1 General. c. “Some guidance should be given in this section to how to compute growth share. Specifically, if growth share is to be based upon certificates of occupancy issued after the effective date of regulations; it should be said directly.” *Id.* at 3.

⁸⁸ *Id.* “5:94 3.1. d. General consideration should be given to periodic review every five years instead of three. As the State Planning Act has shown, three years in terms of planning issues is entirely too short a time frame for re-review.” *Id.* at 4.

⁸⁹ See Comments of The Housing and Community Development Network of New Jersey, (COAH filed Dec. 5 2003) at 3.

⁹⁰ See *Id.*

constitutional obligation to low income housing.⁹¹ The Coalition for Affordable Housing and the Environment has two proposals to correct the proposed regulations.⁹² First, they argue that the minimum age for age-restricted housing should be placed at sixty-five instead of fifty-five.⁹³ Second, they argue that the maximum share of age-restricted housing should be lowered from fifty percent to fifteen percent.⁹⁴ Either change would force municipalities to actually provide affordable housing opportunities for the poor instead of providing housing for the elderly.

Supporters of the regulations go beyond approving the increase in possible housing allotted for seniors.⁹⁵ Some supporters would even prefer, “to see no restriction on the number of seniors, and view it as a form of age discrimination.”⁹⁶ The comments further argue that when COAH rules were first formulated there was no restriction upon the number of senior units that could count towards the affordable housing obligation.⁹⁷ Unfortunately these restrictions have resulted in “seniors having long suffered inadequate housing, and as prices and taxes rise more are forced from their homes or prevented from buying in the State.”⁹⁸

The increase in the amount of senior housing further casts the new Third Round regulations in an unconstitutional light. The *Mt. Laurel* decisions do not even contemplate housing for the elderly.⁹⁹ On its face, the increase in the

⁹¹ See *Mount Laurel II*, 92 N.J. 158, (1983).

⁹² See Comments of The Coalition for Affordable Housing and the Environment, (COAH filed Dec. 5 2003) at 1. <<http://www.hcdnj.org/policy/COAH/talking%20Points.htm>>. (last checked Jan. 15, 2004).

⁹³ *Id.* “Incomes of Households headed by individuals from 55 to 64 are typically higher than the median household income in New Jersey. In addition, age-restricted housing is intended to address the specialized needs of the elderly, needs that are typically not shared by those aged 55 to 64. 5:94-1.3(m).” *Id.*

⁹⁴ *Id.* “COAH’s proposal to allow municipalities to meet half of their fair share obligation with age restricted units ignores housing need data and discriminates against families with children, who would be forced to compete with senior citizens for units without age restrictions. Senior citizen households represent about 15 percent of households facing significant housing needs. 5:94 -4.3(m)” *Id.*

⁹⁵ See Comments of Stickel, Koenig, and Sullivan, (COAH filed Dec 5, 2003) at 5. These supporters argue, “5:94-4.3. Optional Components of the Fair Share Plan: Paragraph (m) should provide no limit on the percentage of senior units that may be used to satisfy the obligation. While 50% is better than 25%, any restriction constitutes age discrimination.” *Id.*

⁹⁶ *Id.* at 2.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See Comments of Peter J. O’Connor, Southern Burlington and Camden County Branches of the NAACP and Fair Share Housing Center on the Proposed Third Round Regulations, (COAH filed Dec. 5, 2003).

percentage of affordable housing appears to be another attempt to circumvent *Mt. Laurel* and provide less housing for the poor.

Fourth, the new third round regulations are potentially unconstitutional because they fail to ensure that municipalities take into account the environmental impact of building housing in certain areas.¹⁰⁰ The new regulations fail to define the term “suitable site” in a manner that takes into account the environment.¹⁰¹ In *Mount Laurel II*, the Supreme Court stated that it did not intend to cause harm to the environment.¹⁰² However, the new regulations “ignore the important sound land use planning and environmental protection mandates of *Mount Laurel II*, by providing no mandatory land use planning or environmental standards for evaluating sites proposed for affordable housing.”¹⁰³ The comments argue that the previous COAH regulations stated specific criteria for evaluating sites proposed for affordable housing.¹⁰⁴ The new

¹⁰⁰ See Comments Untitled, (COAH filed Dec. 5, 2003) at 12.

¹⁰¹ COAH Third Round Regulations, 5 N.J. Reg. 94 (2003) (proposed Aug. 25, 2003).

‘Suitable site’ means a site that has clear title and is free of encumbrances which preclude

development of affordable housing; is adjacent to compatible land uses; has access to appropriate streets, water and sewer infrastructure; can be developed consistent with the Residential Site Improvement Standards and the rules or regulations of all agencies with jurisdiction over the site; and is consistent with the policies of the State Development and Redevelopment Plan. A site may be deemed suitable although not currently zoned for affordable housing.

Id. at 1.3.

¹⁰² See *Mount Laurel II*, 92 N.J. 158, at 331. The New Jersey Supreme Court stated:

We emphasize here that our concern for protection of the environment is a strong one and that we intend nothing in this opinion to result in environmentally harmful consequences. See *Mount Laurel I* 67 N.J. at 186-87, 336 A.2d 713. We are however, convinced that meeting housing needs is not necessarily incompatible with protecting the environment.Where a particular proposed lower income development will result in substantial environmental degradation, such a development should not be required or encouraged by trial courts’ enforcement of the constitutional doctrine.

Id.

¹⁰³ See Comments Untitled, (COAH filed Dec. 5, 2003) at 12, Comment 29.

¹⁰⁴ *Id.* at 12, Comment 31:

regulations do not take into account the careful land use provisions of the *Mount Laurel* decisions, and therefore partially overrule *Mount Laurel*, further detracting from the new regulation's constitutional credibility.¹⁰⁵

V. CONCLUSION

The COAH issued new Third Round comments in an attempt to grant municipalities greater flexibility in fulfilling their fair share housing obligations.¹⁰⁶ These new Third Round regulations, however are unconstitutional. The regulations contradict the New Jersey Supreme Court's interpretation of the constitutional duty for municipalities to provide a fair share of low income housing. The regulations subvert the purpose of the duty to provide low income housing by allowing exceptions that swallow the rules. The regulations are unconstitutional for four major reasons: First, the new regulations allow municipalities to calculate their own fair share obligations, something strictly forbidden by the Court.¹⁰⁷ Second, the new regulations only concentrate on local planning, and do not allow for regional planning as required by the Court.¹⁰⁸ Third, the increased percentage of low income housing able to be allotted to the elderly clearly violates the spirit of the *Mount Laurel* doctrine.¹⁰⁹ Finally, the new regulations fail to protect the environment.¹¹⁰ The new regulations should be completely revised to adhere to the New Jersey Constitution in both rule and spirit. Furthermore, as correctly stated by the Fair Share Housing Center's comments, the proposed rules should be subject to a formal trial type hearing. The new regulations openly conflict with New Jersey

The Third Round Proposal contrasts starkly with the COAH's Second Round rules, which have specific mandatory criteria for evaluating sites proposed for affordable housing, including criteria for evaluating sites proposed for affordable housing, including criteria on access to sewer and water infrastructure, compatibility with adjacent land uses, wetlands, flood plains, steep slopes, historic sites, agricultural lands, and access to streets. The Third Round Proposal is not consistent with *Mount Laurel II*.

Id.

¹⁰⁵ See *Mount Laurel II* 92 N.J. 158, 279. The Court emphasized that affordable housing should not be constructed on a site if, "the municipality establishes that because of environmental or other substantial planning concerns the ...proposed project is clearly contrary to sound land use planning." *Id.*

¹⁰⁶ See *supra* note 54 and accompanying text.

¹⁰⁷ See *supra* notes 74-78 and accompanying text.

¹⁰⁸ See *supra* notes 79-86 and accompanying text.

¹⁰⁹ See *supra* notes 87-97 and accompanying text.

¹¹⁰ See *supra* notes 98-103 and accompanying text.

Supreme Court opinions in both substance and spirit and should, therefore, be revised because they are unconstitutional.