Fordham Urban Law Journal

Volume 40
Number 5 *Symposium - "What is Urban Law Today?": A Symposium on the Field's Past, Present, and Future in Honor of the Urban Law Journal's Fortieth Anniversary*

Article 5

March 2016

Saving Mount Laurel?

Roderick M. Hills
New York University Law School

SAVING *MOUNT LAUREL*?

Essay

Roderick M. Hills, Jr.[*]

> *This is about getting Trenton the hell out of the business of telling people how many units they're supposed to have—some arbitrary, ridiculous formula that nobody could ever explain.*[1]
>
> – New Jersey Governor Chris Christie, on his efforts to dismantle the Mount Laurel doctrine

[*] William T. Comfort III Professor of Law, New York University Law School. The author gratefully acknowledges the comments of Adam Gordon, staff attorney at the Fair Share Housing Center in New Jersey as well as the superlative research assistance provided by Andrew Neidhardt, NYU Class of 2014. The usual caveat that the commenter does not endorse and is not responsible for the errors contained herein applies with special force to Adam Gordon, who disagrees with much of what is contained in this Essay.

1. Lisa Fleisher, *Gov. Chris Christie Proposes Eliminating Affordable Housing Quotas, Fees*, NJ.COM (May 13, 2010, 9:07 PM), http://www.nj.com/news/index.ssf/2010/05/gov_chris_christie_proposes_el.html.

INTRODUCTION

Mount Laurel is in trouble—again. But has there ever been a time when this statement has not been true? The *Mount Laurel* doctrine seems perennially hovering on the brink of extinction. It was surrounded by controversy when it was finally made effective with a "builder's remedy" in 1983,[2] and it barely survived its transition to statutory implementation in the form of the New Jersey Fair Housing Act in 1985. Both Governors James McGreevey, a Democrat, and Chris Christie, a Republican, made open war on it.[3] Governor Christie has gone so far as to attempt to abolish by executive order the Council on Affordable Housing (COAH), *Mount Laurel*'s statutorily created guardian.[4] COAH itself has attempted to weaken the doctrine with a "growth share" definition of the "fair share" obligation that the New Jersey appellate division has ruled illegally weak.[5]

Yet Mount Laurel stubbornly draws breath, albeit on life support: Despite the important constituencies in New Jersey that would like to pull the plug, there are other constituencies that stop the euthanizing of the doctrine. The State Assembly, controlled by Democrats with leadership from New Jersey's impoverished cities, has refused to let Governor Christie gut the doctrine with his own version of "growth share,"[6] and the New Jersey state courts doggedly resist Governor Christie's efforts to dismantle COAH or municipalities' "fair share" obligation. [7]

It is an oddity when a legal doctrine cannot settle down to a comfortable middle age after thirty years of turmoil. One might impatiently say about *Mount Laurel* what Oscar Wilde's Lady

2. On the controversy associated with the "builder's remedy," see John M. Payne, *Reconstructing the Constitutional Theory of* Mount Laurel II, 3 WASH. U. J.L. & POL'Y 555, 563–64 (2000).

3. *See, e.g.*, Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 852, 855 (2011) (on the opposition of James McGreevey and Chris Christie to *Mount Laurel*).

4. *See* Salvador Rizzo, *N.J. Supreme Court Blocks Christie's Plan to Abolish Affordable-Housing Agency*, NJ.COM (July 10, 2013), http://www.nj.com/politics/index.ssf/2013/07/nj_supreme_court_blocks_christies_plan_to_abolish_affordable-housing_agency.html.

5. *See* In re Adoption of N.J.A.C. 5:94 & 5:95 by the N.J. Council on Affordable Hous., 914 A.2d 348, 363–64 (N.J. Super. Ct. App. Div. 2007) [hereinafter *In re* Adoption of 5:94 & 5:95].

6. *See* Mallach, *supra* note 3, at 857–58.

7. *See, e.g.*, In re Plan for Abolition of Council on Affordable Hous., 70 A.3d 559 (N.J. 2013).

Bracknell said about Algernon's fictional friend Bunbury in *The Importance of Being Earnest*: "It is high time that [*Mount Laurel*] made up [its] mind whether [it] is going to live or to die. This shilly-shallying with the question is absurd."[8]

Why cannot *Mount Laurel* make up its mind whether it is going to live or die? The dilemma arises from *Mount Laurel*'s serving a genuine need in a clumsy way. On one hand, as I explain in Part I, the doctrine helps New Jersey's 566 municipalities and townships overcome collective action problems that otherwise might excessively impede an adequate supply of housing.[9] On the other hand, the specific design of the doctrine—in particular, the assignment of specific numbers of housing units to particular municipalities—undermines the doctrine's effectiveness as a device for overcoming these collective action problems. As I suggest in Part II, this "unit-based" rule—that is, a rule that assigns housing units to particular jurisdictions—places extraordinary informational burdens on judges and bureaucrats, because such a rule forces public officials to do the job of siting housing, a task usually reserved for housing markets rather than law.[10] Because the data and siting criteria are so controversial, unit-based doctrines invite maximum homeowner resistance, as each suburban and rural jurisdiction vies with each other to skew the contestable formulae in their own favor. Inner-ring suburbs, for instance, will want to emphasize "buildable land," as a factor for siting affordable housing, while rural townships will want to encourage infill and redevelopment. This bureaucratic and legislative infighting reproduce the very collective action problem that *Mount Laurel* was supposed to solve. In this sense, *Mount Laurel* has created, in Governor Christie's pungent phrase, "some arbitrary, ridiculous formula that nobody could ever explain," because the *Mount Laurel* formula does not reassure each homeowner that they are being treated fairly—a major point of any "fair share" doctrine.

In Part III, I will suggest that these informational burdens and, less confidently, the political controversy, might be mitigated by supplementing or even replacing *Mount Laurel*'s unit-based rule with a doctrine targeting zoning restrictions.[11] In particular, I will suggest

8. OSCAR WILDE, THE IMPORTANCE OF BEING EARNEST 13 (Kenneth McLeish et al. eds., Nick Hern Books 1995) (1898).

9. *See infra* Part I.

10. *See infra* Part II.

11. *See infra* Part III.

that state law might impose on every municipality a minimum zoned residential density to eliminate excessive restriction of multi-family and other forms of "least-cost housing"—that is, housing that uses the smallest marketable amount of land and materials to construct. The point of this density requirement would not be to second-guess housing markets by siting units in particular jurisdictions, but instead to create a sufficient reserve of zoning entitlements so that builders could decide where housing could be most profitably produced in response to consumer demand. By removing regulatory barriers to housing supply, this revised doctrine would alleviate the problem of housing affordability without dictating to the market where housing ought to be located. Using "anti-snob zoning" statutes in Massachusetts, Connecticut, and Rhode Island as rough models, I will suggest that Mount Laurel might face less opposition if it focused less on fixing the precise number of units to be allocated to each municipality and more on forcing municipalities to justify the exorbitant quantities of land that they require per dwelling unit.

I. THE NEED FOR *MOUNT LAUREL*: MUNICIPAL COLLECTIVE ACTION PROBLEMS

Consider, first, how "affordable housing"—meaning, for the purposes of this Essay, housing priced at less than the price of the median residential structure in the municipality where the housing is located—gives rise to a collective action problem. The problem arises from a conflict between affordable housing's local costs and regional benefits. On the one hand, affordable housing imposes uncertain local fiscal, political, and social costs on municipalities that host it. The fiscal cost results from affordable housing's being liable for lower *ad valorem* property taxes than the median structure, allowing the former's occupants to consume the same level of services for a lower tax price than that paid by the occupants of median-valued housing. This effective redistribution of wealth from high-valued to low-valued property will be capitalized into the price of both, raising the price of the latter, lowering the price of the former, and reducing the tax revenue available to both for local services.[12] The political cost arises from correlation of tastes for local public goods with income. Assuming that services like parks and recreation, education, and

12. Stephen M. Calabrese et al., *Inefficiencies from Metropolitan Political and Fiscal Decentralization: Failures of Tiebout Competition*, 79 REV. ECON. STUD. 1081, 1102–04 (2012).

environmental enhancement are normal goods, demand should rise with income, leading to conflicts between different socio-economic groups about their local government's spending priorities. Economic heterogeneity leads to ideological heterogeneity, which, in turn, leads to fights that undermine the trust needed for political cooperation.[13] Finally, affordable housing can have social costs to the extent that it is occupied by very poor households with unstable family structures; both crime and low educational achievement are correlated with either concentrated poverty of a neighborhood or parental instability associated with such poverty.[14]

Exclusionary zoning is a rational way for individual municipalities to reduce the risks of these fiscal, political, and social costs. By requiring residents to purchase an identically valued structure on which a uniform tax rate is levied, such zoning transforms the *ad valorem* property tax into a lump-sum fee, insuring that each resident pays the same amount in taxes, receives the same package of services, and thereby reveals by their migration to the municipality that they value the services at the taxes charged.[15] Uniformity of housing type promotes uniformity of income and, thus, uniformity of demands for social services. The exclusion of poor households is also a heartless but effective way for higher-income groups to insulate themselves from the social costs of poverty.

---

13. *See* DAVID E. CAMPBELL, WHY WE VOTE: HOW SCHOOLS AND COMMUNITIES SHAPE OUR CIVIC LIFE 50–75 (2006) (describing relationship between ideological homogeneity and social trust); MARION ORR, BLACK SOCIAL CAPITAL: THE POLITICS OF SCHOOL REFORM IN BALTIMORE, 1986–1998, at 140–41 (1999) (describing how inter-ethnic strife distracted from Baltimore schools' educational mission); Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 142–43 (2007) (describing relationship between ideological homogeneity and social trust).

14. *Compare* Robert J. Sampson, *Crime and Public Safety: Insights from Community-Level Perspectives on Social Capital*, *in* SOCIAL CAPITAL AND POOR COMMUNITIES 89 (Susan Saegert et al. eds., 2001) (arguing that concentrated poverty within a neighborhood leads to higher crime and lower educational achievement), *with* Philip Orepoulos, *The Long-Run Consequences of Living in a Poor Neighborhood*, 118 Q.J. ECON. 1533 (2003) (arguing that poverty of household rather than neighborhood leads to crime and lower educational achievement). On the effects of parental instability and single-parent households on child welfare and behavior problems, see Terry-Ann Craigie et al., *Fragile Families and Child Wellbeing*, 20 FUTURE OF CHILD. 87 (2010).

15. Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 207 (1975). Calabrese, Epple and Romano suggest that household heterogeneity and lot-size heterogeneity will likely persist even with exclusionary zoning. Calabrese et al., *supra* note 12, at 1109.

The solution of exclusion, however, has regional costs that individual municipalities are likely to discount or ignore. The co-existence of households with different incomes can produce benefits for all income groups—jobs for poorer households, workers for richer municipalities, and various agglomeration benefits from denser housing that permits multiple employers to locate in the same community.[16] Low-income households can avoid neighborhood violence and increase their income and employment by residing in a community with higher median household income.[17] Moreover, low-income households can gain these benefits at little cost to the neighbors if the number of affordable dwelling units is small. Consider, for instance, Ethel R. Lawrence Homes (ERLH), the residential development built as a result the original *Mount Laurel* litigation. ERLH contains only 140 dwelling units,[18] a tiny number compared to Mount Laurel Township's 18,249 dwelling units reflected in the 2010 census.[19] Len Albright, Elizabeth Derickson, and Douglas Massey found ERLH had no effect on Mount Laurel's crime, property values or taxes when Mount Laurel was compared to

16. See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1507 on the tension between sorting households based on their preference for local public goods and agglomerating different sorts of firms together to produce beneficial interaction among them. See id. at 1529 for a discussion of the tension between sorting households based on their preference for local public goods and agglomerating different sorts of firms together to produce beneficial interaction among them.

17. Douglas S. Massey, *Lessons from Mount Laurel: The Benefits of Affordable Housing for All Concerned*, POVERTY & RACE RES. ACTION COUNCIL (May/June 2012), http://prrac.org/full_text.php?item_id=13429&newsletter_id=123&header=Current%20Projects. Len Albright, Elizabeth Derickson, and Douglas Massey found that the occupants of Ethel Lawrence Homes reaped substantial benefits from living in Mount Laurel in terms of higher employment, less exposure to violence, greater total income, and lower rates of welfare dependency when compared to similar residents in communities with a larger share of low-income households. Len Albright et al., Do Affordable Housing Projects Harm Suburban Communities? Crime, Property Values, and Property Taxes in Mt. Laurel, New Jersey 27–28 (June 15, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865231.

18. *See Ethel R. Lawrence Homes*, FAIR SHARE HOUS. DEV., http://fairsharedevelopment.org/housing/development/ethel-lawrence/ (last visited Sept. 16, 2013).

19. *Profile of General Population and Housing Characteristics, Mount Laurel Township, Burlington County, New Jersey*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml#none (search "Mount Laurel Township, Burlington County, New Jersey"; then follow "Housing" hyperlink) (last visited Sept. 16, 2013).

a matched set of neighboring townships.[20] Indeed, in a survey conducted by Massey and his colleagues, one-third of the neighbors did not even know affordable housing existed in the neighborhood, and, among those who did know, only forty percent could successfully name the project.[21]

Individual municipalities will often ignore these benefits of affordable housing. Each municipality does not internalize the benefits that their affordable housing confers on neighboring employers, because the employees who work for neighboring municipalities' employers can take advantage of such housing even if those employees cross a municipal border when commuting to work.[22] A similar incentive for free-riding arises among affluent communities with altruistic preferences. Even if each wealthy community wanted low-income households to benefit from integrated schools and residential markets, they would nevertheless have an incentive to free-ride off of neighboring communities' efforts to provide these benefits. The collective problem is exacerbated by uncertainty. A small amount of affordable housing might be costless—but how small is small enough? Neighbors whose largest investment consists of the down payment on their owner-occupied home are likely to be risk-averse in calculating the safe number of dwelling units.[23] This anxiety about setting the number of dwelling units too high is exacerbated by the collective action problems faced by individual households trying to anticipate whether their neighborhood's social-economic composition will rapidly change because their neighbors will sell.[24]

20. Albright et al., *supra* note 17, (manuscript at 27).

21. Massey, *supra* note 17.

22. *See* WILLIAM A. FISCHEL, *Political Structure and Exclusionary Zoning: Are Small Suburbs the Big Problem?*, *in* FISCAL DECENTRALIZATION AND LAND POLICIES 111, 130–31 (Gregory K. Ingram & Yu-Hung Hong eds., 2008).

23. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 8–10, 268–69 (2001).

24. For Thomas Schelling's classic account of how individual households face a collective action problem in determining whether a neighborhood will maintain an ideal racial or social composition, see Thomas C. Schelling, *A Process of Residential Segregation: Neighborhood Tipping*, *in* RACIAL DISCRIMINATION IN ECONOMIC LIFE 157 (Anthony H. Pascal ed., 1972). For evidence that fear of neighborhood unraveling continues to make stable racial integration challenging, see INGRID GOULD ELLEN, SHARING AMERICA'S NEIGHBORHOODS: THE PROSPECTS FOR STABLE RACIAL INTEGRATION (2000).

Each municipality is, therefore, trapped in a prisoner's dilemma in which it is always rational to exclude affordable housing regardless of whether neighboring municipalities host such housing (in which case exclusive communities will reap the regional benefits without the attendant local risks) or exclude it (in which case exclusive communities will avoid being the sole site for the region's affordable housing).

II. THE PROBLEM WITH *MOUNT LAUREL*: INFORMATIONAL BURDENS OF THE UNIT-BASED APPROACH

Given the strategic bind in which each municipality finds itself when it tries to accommodate affordable housing, one might think that *Mount Laurel* would be welcomed by the suburbs as a way of freeing them from the risk of bearing a disproportionate share of low-income households. Moreover, because the effects of housing heterogeneity could be anticipated by homebuyers, *Mount Laurel* can perform this coordinating function with a very modest redistribution of wealth. While buyers of more expensive structures could be expected to bid less as a result of *Mount Laurel*, buyers of cheaper structure would bid more, anticipating good services at the cost of a lower tax bill.[25] The redistributive effect of *Mount Laurel* is dampened not only by the magic of capitalization but also by the New Jersey Appellate Division's moderation in pursuit of equality, such as the court's exclusion of cost-burdened households from the definition of "present regional need" for affordable housing.[26]

Yet *Mount Laurel* and its implementation through the New Jersey Fair Housing Act have attracted apparently endless suburban anger

25. Bruce W. Hamilton, *Capitalization of Intrajurisdictional Differences in Local Tax Prices,* 66 AM. ECON. REV. 743 (1976).

26. The COAH's "second round" rules excluded "cost-burdened" households—meaning low- and moderate-income households paying more than fifty percent of their gross income on housing—from the definition of "present regional need," thereby substantially lowering the total number of housing units that each region would have to supply. Given that overcrowded housing counts as part of this "present need," the exclusion of cost-burdened household might seem to be irrational, because a cost-burdened household could convert to an overcrowded household simply by spending less on rent and more on food, clothing, and transportation. The Appellate Division upheld COAH's definition, however, on the prudential ground that otherwise the number of affordable units required to meet present need would be too large. *In re* Adoption of 5:94 & 5:95, *supra* note 5, at 369 (noting that 636,000 households were cost-burdened, requiring 260,000 new market-rate units to be constructed per decade with twenty percent set aside as affordable units).

from the moment Chief Justice Wilentz imposed the "builder's remedy" to make *Mount Laurel* effective.[27] Why the fuss, when the doctrine seems to help the protesting municipalities escape from a collective action dilemma?

I suggest that *Mount Laurel*'s effort to assign specific numbers of housing units to particular jurisdictions—what I call a "unit-based" approach to exclusionary zoning – creates problems for the doctrine. This unit-based approach creates two difficulties that make the doctrine inspire political controversy. First, as a pragmatically empirical matter, the unit-based approach places heavy informational burdens on public officials that they cannot easily discharge to the satisfaction of politicians. Second, the unit-based approach takes the focus off policies that municipalities fully control—the restrictiveness of their zoning rules—and instead concentrates on housing production and price, policy outcomes that are mostly the product of household wealth and consumer demand outside of municipal power. Such a refocusing on bad private economic conditions (poverty and high land rents from escalating private demand) naturally gives rise to the question: "Why are municipalities being charged with the duty of banishing poverty?" It makes more sense to focus instead on the question, "why are municipalities exacerbating poverty with overly restrictive land-use rules?"

The first complaint against unit-based approaches is familiar not only from statements by *Mount Laurel*'s critics but also those of its supporters. As the late Professor John Payne observed, the formulae used to implement *Mount Laurel* "became almost impossible to explain succinctly to lay audiences."[28] David Kinsey essentially re-stated Governor Christie's criticism of *Mount Laurel* more diplomatically when Kinsey wrote that the unit-based approach (or what Kinsey called "the formulaic approach") "produced confusion and cynicism due to its complexity and opacity, and consequently failed to rally the political support needed to sustain an unpopular,

27. S. Burlington Cnty. NAACP v. Mount Laurel, 456 A.2d 390, 452–53 (N.J. 1983). *Southern Burlington* is frequently cited as *Mount Laurel II*. *E.g.*, John M. Pyane, *Politics, Exclusionary Zoning and Robert Wilentz*, 49 RUTGERS L. REV. 689, 689 n.1 (1997). On the ineffectiveness of *Mount Laurel* prior to the builder's remedy—basically, a writ of mandamus entitling the plaintiff to a building permit—and the suburban outrage that the builder's remedy provoked, see DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA, 85–92, 121–27 (1995).

28. John M. Payne, *The Paradox of Progress: Three Decades of* Mount Laurel *Doctrine*, 5 J. PLAN. HIST. 126, 132 (2006).

judicially driven policy that interfered with local land use prerogatives."[29]

COAH's initial effort to carry out a unit-based approach to *Mount Laurel* took the form of rules implementing the New Jersey Fair Housing Act,[30] rules largely based on the formulae devised in turn by the three "*Mount Laurel* judges" selected by Chief Justice Wilentz[31]—in particular, Justice Serpentelli's decision in *AMG Realty Co. v. Township of Warren*.[32] This *AMG Realty* formula bases municipal fair shares on each municipality's share of a region's buildable land, employment, regional income, and substandard housing.[33] The data required by this multi-factored assignment of units to places is enormous, including (in Kinsey's catalogue) "journey-to-work patterns existing housing quality . . . housing rehabilitation, household income, population projections, headship rates, household formation projections, housing price filtering, residential conversions, housing demolitions, equalized nonresidential property valuation (ratables), and undeveloped land."[34]

Aside from this voracious appetite for disputable data, *AMG Realty*'s criteria contain contestable policy assumptions about where housing ought to be located, assumptions that neither the courts nor COAH have bothered to defend. Why, for instance, base fair shares of housing on the municipality's share of buildable land in a region? Demolition and vertical construction obviously allow a built-out municipality to increase its residential densities. Building denser structures in municipalities with less land might make more sense than spreading out low-density developments in more rural areas. *AMG Realty* implicitly assumes without comment, however, that the existing low-density use of parcels can trump the need for affordable housing. Low-density suburban jurisdictions like Cherry Hill, which contains only 1.7 dwelling units per acre, exploit this vacant land

29. David N. Kinsey, *The Growth Share Approach to* Mount Laurel *Housing Obligations: Origins, Hijacking, and Future*, 63 RUTGERS L. REV. 867, 869 (2011).

30. For COAH's basic method for calculating municipal "fair shares" under its "first round" and "second round" of rules, see N. J. ADMIN. CODE 5 § 93-2.1 (2001).

31. The three judges and their formulae were Steven Skillman, who wrote Countryside Props. v. Mayor and Council of Ringwood, 500 A.2d 767, 769 (N.J. Super. Ct. Law Div. 1984); L. Anthony Gibson, who wrote Van Dalen v. Washington Twp., 500 A.2d 776, 779–80 (N.J. Super. Ct. Law Div. 1984); and Eugene Serpentelli, who wrote AMG Realty Co. v. Twp. of Warren, 504 A.2d 692, 727 (N.J. Super. Ct. Law Div. 1984).

32. *AMG Realty*, 504 A.2d at 727.

33. *See generally AMG Realty*, 504 A.2d 692.

34. Kinsey, *supra* note 29, at 869.

factor to reduce their "fair share" on the ground that their territory is already occupied by detached single-family homes—as if, somehow, a multi-family structure cannot replace an existing low-density or non-residential building.[35] By contrast, the *AMG Realty* formula originally did not directly consider each municipality's share of the regional property tax base in calculating fair shares, an omission that seems puzzling given that *Mount Laurel* was expressly designed to counteract municipal incentives to exclude housing for fiscal reasons.[36] (Share of regional employment, which *AMG Realty* does include in its "fair share" formula, constitutes only an imperfect proxy for tax base, given that some employers—non-profit universities and government, for instance—are tax-exempt). Again, neither *AMG Realty* nor *Mount Laurel* explains this decision.

Because the data selected as relevant by *AMG Realty* is so dense, courts and bureaucrats must rely on crude proxies, slight modifications of which can have dramatic effects on the number of affordable units that a jurisdiction is obliged to host. Consider, for instance, COAH's varying definitions of "substandard housing": in its Second and Third Rounds of rules, COAH relied on different census proxies[37] to define "substandard housing" that radically reduced the present need for housing from 60,281 units[38] to 24,847 units.[39] As one would expect, the appellate division largely upheld these changes based on deference to "COAH's broad discretion in selecting an

35. *See* CHERRY HILL TWP. PLANNING BD., MASTER PLAN 2003, at 190, 202 (2003), *available at* http://www.cherryhill-nj.com/DocumentCenter/Home/View/437.

36. The omission of tax base share was remedied in 1993. *See* Substantive Rules of The New Jersey Council on Affordable Housing for the Period Beginning June 6, 1994, N.J. ADMIN. CODE § 5:93 (2011).

37. COAH's second round rules used seven "surrogates" from the 1990 Census to approximate the number of deficient or dilapidated housing units, with two proxies indicating a deficient unit. The seven surrogates were (1) units built prior to 1940; (2) overcrowded units, that is, units having 1.01 or more persons per room; (3) inadequate plumbing; (4) inadequate kitchen facilities; (5) inadequate heating fuel, that is, no fuel at all or using coal or wood; (6) inadequate sewer services; and (7) inadequate water supply. N.J. ADMIN. CODE § 5:93 app. A, at 93-50. COAH's Third Round rules, however, used only three surrogates for dilapidated housing, consisting of (1) overcrowded units built prior to 1940; (2) units lacking adequate plumbing facilities; and (3) units lacking adequate kitchen facilities. Likewise, the Third Round rules reduced certain towns' obligation by subtracting numbers for "spontaneous rehabilitation" of housing from those towns' numbers. N.J. ADMIN. CODE § 5:94 app. a, at 94-33.

38. N.J. ADMIN. CODE § 5:93 app. a, at 93-52.

39. N.J. ADMIN. CODE § 5:94 app. a, tbl.4, at 94-36.

appropriate methodology."[40] Such broad discretion is unavoidable when the informational demands of the doctrine dwarf the capacity of a court to evaluate or find alternative data to those which the agency selects.

Efforts to simplify the unit-based approach have failed, because the problems with the approach are endemic to the challenge of assigning housing to particular jurisdictions. Recognizing that the complexity of unit-based formulae endangered *Mount Laurel*'s legitimacy and predictability, some of *Mount Laurel*'s supporters initially pressed in the 1990s for some version of "growth share" by which to assign units to jurisdictions.[41] The general idea of "growth share" is that municipalities should require some number of affordable units to be built in some fixed ratio to new market-rate housing units or new commercial square footage.[42] The most frequently used ratio, for instance, would require twenty percent of all new market-rate housing or one affordable unit for every 2000 square feet of new nonresidential space to be set aside for low- and moderate-income housing.[43]

Growth share is allegedly an improvement on *AMG Realty,* because it seems to give municipalities the option not to build any affordable housing if they decide not to issue any new building permits, thereby placating environmentalists dismayed at the countryside's being eaten up by *Mount Laurel* obligations.[44] At the same time—and contradictorily—advocates of affordable housing believed that properly designed growth share ratios would not induce municipalities simply to ban all growth as a way to exclude affordable housing, because it is in their interest to "accommodate some growth or redevelopment" given that "local governments in New Jersey are heavily dependent on property tax ratables."[45]

Growth share, therefore, involves the same empirically intractable balancing of rival values as *AMG Realty.* Growth share ratios require a subtle balancing of municipal incentives for tax revenues and developers' incentives for market-based units against the costs

40. *See In re* Adoption of 5:94 & 5:95, *supra* note 5, at 371.

41. John Payne was an early supporter of growth share. *See, e.g.*, John M. Payne, *Remedies For Affordable Housing: From Fair Share To Growth Share*, 49 LAND USE & ZONING DIG. 6, 3–9 (1997).

42. *Id.*

43. *See* Payne, *supra* note 28, at 136; *see also* Kinsey, *supra* note 29, at 871.

44. *See, e.g.*, Andrew Jacobs, *New Jersey's Housing Law Works Too Well, Some Say*, N.Y. TIMES, Mar. 3 2001, at A1.

45. Payne, *supra* note 28, at 139.

(perceived and real) of affordable units for both developers asked to build them and municipalities asked to host them. If the shares of affordable units are set too high, then developers might build nothing, leaving low- and moderate-income households worse off, because new market-rate units contribute to the downward filtering of existing housing to less wealthy occupants.[46] Likewise, municipalities might calculate that the tax revenues generated by market-rate residential units are not sufficient to cover the costs of services to the affordable units, inducing them to favor commercial over residential development and thereby also reducing the downward filtering of existing housing.[47] The Appellate Division has recognized that growth share is a covertly exclusionary device unless the ratios of market-rate to affordable growth actually encourage sufficient market-rate growth with density bonuses.[48] If the density bonuses

46. Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L REV. 1167 (1981) argues that inclusionary requirements can actually be exclusionary devices, to the extent that developers do not gain extra development rights from inclusionary units sufficient to cover those units' costs, because the units constructed as a result of the inclusionary requirement might be more than offset by the units lost as a result of reduced filtering. Ellickson's argument against inclusionary zoning has attracted a lot of criticism. *See, e.g.*, Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23 (1996); Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539 (1995); Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971 (2002). For a defense of Ellickson's argument and response to critics, see Benjamin Powell & Edward Stringham, *"The Economics of Inclusionary Zoning Reclaimed": How Effective Are Price Controls?*, 33 FLA. ST. U. L. REV. 471 (2005). As Powell and Stringham note, there is wide consensus in the economic literature that used and new housing compete with each other to some extent in most housing markets, such that the latter cause the former to filter downwards at some varying rate, depending on the structure of local housing demand. *See, e.g.*, Richard Green, *Metropolitan-Specific Estimates of the Price Elasticity of Supply of Housing, and Their Sources*, 95 AM. ECON. REV. 2, 336 (2005).

47. For an example of a fiscal impact analysis recommending precisely such a choice of commercial over residential development to fund Mount Laurel units, see PETER G. STECK, FISCAL IMPACT ANALYSIS FOR COMMERCIAL DEVELOPMENT LOTS 2 & 3 IN BLOCK 2802, GRAND AVENUE WEST, MERCEDES DRIVE & PHILLIPS PKWY AND FOR MT. LAUREL HOUSING, LOTS 3 & 5 IN BLOCK 1002, SUMMIT AVENUE, BOROUGH OF MONTVALE (2013), *available at* http://www.montvale.org/files/MontvaleHekFiscal6.pdf.

48. *In re* Adoption of N.J.A.C. 5:96 & 5:97, by the N.J. Council On Affordable Hous., 6 A.3d 445, 461 (N.J. Super. Ct. App. Div. 2010) [hereinafter *In re* Adoption of 5:96 & 5:97] ("Permitting municipalities to demand that developers build affordable housing without any additional incentives provides municipalities with an effective tool to exclude the poor by combining an affordable housing requirement with large-lot zoning . . . . A regulatory regime that relies on developers to incur the

become too large, however, then they risk inspiring a popular backlash against *Mount Laurel* by local lovers of open space objecting to the development of neighboring countryside by thousands of market-rate units required to finance relatively small number of affordable units.[49] Rigid growth share ratios that do not adjust with downturns in the real estate market can operate as *de facto* bans on new housing.[50] Yet such flexible adjustment of the ratios would not likely be forthcoming from slow-moving bureaucratic or political actors, some of whom might be all too happy to exclude all new housing with an apparently generous growth share ratio.

Apart from these intractable empirical problems, there is a normative or conceptual difficulty with growth share: Like any other unit-based approach to exclusionary zoning, growth share offers a formula for siting affordable housing without much normative explanation to justify its siting criteria. Why exactly should growing communities be more responsible for promoting affordable housing than communities with stable population? Whether viewed from the perspective of households' needs, housing's cost, or municipalities' culpability, there is no intuitively obvious reason why municipalities with a growing population should have such a special obligation to promote affordable housing. It is not obvious, for instance, that low- and moderate-income households especially want to live in growing municipalities. Moreover, the cost of acquiring land for affordable housing is likely to be higher in high-growth areas. Likewise, growing municipalities have not necessarily thrown up more impediments to affordable housing than municipalities that issue no new building permits. What, then, is the normative basis for growth share?

The New Jersey Supreme Court has never provided a convincing answer to that question. The Court has upheld municipalities' imposing development fees on new *non-residential* development to fund affordable housing on the theory that new employers attract

uncompensated expense of providing affordable housing is unlikely to result in municipal zoning ordinances that make it realistically probable that the statewide need for affordable housing can be met.").

49. *See* John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685, 1693–97 (1998) (describing controversy over Cranbury Township being required to host more than 4000 units, only 2444 of which were affordable units, when the township's original population was less than 2000 occupying only 750 dwelling units).

50. *See* Christopher Swope, *Little House in the Suburbs*, GOVERNING MAG., Apr. 2000, http://www.governing.com/templates/gov_print_article?id=105880063. (describing dependence of inclusionary zoning on demand for market-rate units).

employees who bid up the price of housing, creating a special need for affordable housing.[51] There is some rough justice to such "linkage" of housing obligations to employment. But why require developers of new market-rate *housing* to bear the burden of affordable housing? The New Jersey Supreme Court relied on the notion that "private developers . . . possess, enjoy, and consume land, which constitutes the primary resource for housing," thereby increasing the costs of building affordable housing.[52] This theory that new market-rate housing increases the cost of affordable housing, however, confuses cause and effect: if new housing is not built to accommodate demand, then those new buyers will likely bid up the cost of *existing* housing. To the extent that market-rate units absorb housing demand that might otherwise buy up existing units, new developments *reduce* rather than increase the need for lower-income development.[53]

The justification for charging developers of new market-rate housing with the cost of affordable housing is less a matter of distributive justice than political economy. It is simply more politically palatable for existing residents to saddle non-resident homebuyers or owners of vacant land with the cost of redistributing wealth to low- and moderate-income households. Developers who

51. Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277, 288 (N.J. 1990) ("[T]here is a reasonable relationship between unrestrained nonresidential development and the need for affordable residential development. We do not equate such a reasonable relationship with the strict rational-nexus standard that demands a but-for causal connection or direct consequential relationship between the private activity that gives rise to the exaction and the public activity to which it is applied. Rather, the relationship is to be founded on the actual, albeit indirect and general, impact that such nonresidential development has on both the need for lower-income residential development and on the opportunity and capacity of municipalities to meet that need.").

52. *Id.*

53. There is a plausible argument that new residential development might increase housing demand if the occupants of the new development enhance demand for neighboring lots more than the occupants of existing housing—say, by being wealthier, more fashionable, or louder "squeaky wheels" with local politicians. The theory that new luxury housing in low-income urban neighborhoods leads to gentrification rests on the idea that demand for housing will increase if new and wealthier neighbors arrive. *See generally*, Veronica Guerrieri et al., *Endogenous Gentrification and Housing Price Dynamics* (Nat'l Bureau of Econ. Research, Working Paper No. 16237, 2010), *available at* http://faculty.chicagobooth.edu/erik.hurst/research/gentrification_may25_2010_circulate.pdf. Such a theory, however, does not fit the facts of new migrants' occupying new developments in the suburbs, because the new migrants typically are not notably more wealthy the existing residents and do not increase the desirability of the suburban neighborhood.

bear the cost of affordable housing can either pass that cost forward to new homebuyers (if land within the jurisdiction is non-fungible and demand, cost-inelastic) or backwards to the owners of vacant land (if the land is fungible such that newcomers will not pay the extra cost). Neither constituency is likely to be powerful in local politics—the first, because they largely consist of non-residents, the second, because they are likely to be isolated minorities in jurisdictions with substantial numbers of homeowners.[54] In this sense, *Holmdel* might be correct in asserting that the development of new market-rate housing could sometimes create "the opportunity and capacity of municipalities to meet that need [for affordable housing]"[55]: charging new housing with the cost of affordable housing is a politically feasible way to redistribute wealth, while the outright taxation of local residents for the same purpose would not be politically feasible.

Market-rate housing's capacity to finance affordable units, however, depends on the cost-inelasticity of demand for the former: If it turns out that demand is soft, then developers will likely build fewer units anticipating that buyers will refuse to cover the costs of fees or in-kind dedications for affordable housing. Requiring new housing to pay for affordable units, in short, is a hazardous undertaking that requires a careful estimate of housing demand. The appellate division recognized as much when it struck down COAH rules that did not limit the discretion of municipalities to require developers to pay for affordable housing, holding that such inclusionary requirements could be effectively exclusionary if the municipality did not create sufficient zoning incentives for developers to bear the costs of the affordable units.[56]

54. For an account of the demographic changes from farmer-dominated politics to homeowner-dominated politics that lead to downzoning of land, see Adesoji O. Adelaja & Paul D. Gottlieb, *The Political Economy of Downzoning*, 38 AGRIC. & RESOURCE ECON. REV. 181, 194 (2009). On the political dominance of owners of developed land in the zoning process, see Christian A.L. Hilber & Frédéric Robert-Nicoud, *On the Origins of Land Use Regulations: Theory and Evidence from US Metro Areas*, 75 J. URB. ECON. 29 (2013).

55. *Holmdel Builders Ass'n*,, 583 A.2d 277 at 288.

56. *In re* Adoption of 5:96 & 5:97, *supra* note 48, at 461 ("Permitting municipalities to demand that developers build affordable housing without any additional incentives provides municipalities with an effective tool to exclude the poor by combining an affordable housing requirement with large-lot zoning . . . . A regulatory regime that relies on developers to incur the uncompensated expense of providing affordable housing is unlikely to result in municipal zoning ordinances that make it realistically probable that the statewide need for affordable housing can be met.").

Growth share theories, in sum, do not avoid the empirical difficulties of other unit-based attacks on exclusionary zoning. Instead, these theories conceal such difficulties with apparently simple ratios that disguise the tough choices and possibly harmful consequences. It is not likely that judges and bureaucrats can easily determine the "sweet spot" where mandates to create affordable housing are not too expensive to avoid deterring market-rate construction but also not so cheap that developers create affordable housing insufficient to meet the regional need. Proponents of growth share approaches to *Mount Laurel* have complained that COAH's version of growth share hijacked the idea for the goal of merely reducing municipal obligations to promote affordable housing using "manipulated data and tortured explanations."[57] This complaint is accurate, but it is equally accurate to say that growth share lends itself to being hijacked, because the task of calculating the proper ratios by which to match affordable housing with growth is beyond the capacity of courts to gauge.

The problem is not with growth share theories in particular but rather with any unit-based approach in general. The basic difficulty with all such theories is that they attempt to assign to judges and bureaucrats the task of siting units in particular jurisdictions, a function normally left to housing markets. Such a task requires enormous amounts of information that courts and agencies cannot easily collect or assess. As *AMG Realty* illustrates, judges are forced to invent crude proxies for the nuanced considerations that influence markets in assigning housing to places, proxies that are far from a finely tuned balance of the innumerable factors—distance to work, distance from friends and family, price, quality of policing and schools, congestion and crowding, infrastructure and amenities, availability of social support, and so forth—that guide housing markets. Unit-based formulae, therefore, will always appear to have a crude and bureaucratic rigidity—"some arbitrary, ridiculous formula that nobody could ever explain,"[58] as Governor Christie complained.

57. Brief for Petitioner at 2, *In re* Adoption of N.J.A.C. 5:94 & 5:95 by the N.J. Council on Affordable Hous., 914 A.2d 348 (N.J. Super. Ct. App. Div. 2007) (No. A1960-04-T3).

58. Fleisher, *supra* note 1.

III. A SOLUTION TO *MOUNT LAUREL*'S PROBLEMS? FOCUS ON ZONING RESTRICTIONS

There is an alternative to unit-based approaches to exclusionary zoning: rather than focus on the regional need for affordable housing, the courts could instead focus on the municipal need for zoning restrictions. More precisely, the courts could demand a more substantial justification for the extraordinary restrictions that municipal zoning imposes on residential uses.

There are remedial, normative, and informational advantages to focusing on zoning restrictions rather than creating affordable housing. As a remedial matter, zoning restrictions are fully within municipal control, whereas housing rents are not: municipalities have the power to fix the excessive restrictiveness of their zoning laws, whereas they are not well-suited for redistributing wealth or financing housing subsidies. As a normative matter, the focus on zoning restrictions goes to the basis for municipal liability: municipalities create neither poverty nor the housing demand that leads to escalating rents, but municipalities *do* restrict housing supply with excessive zoning. Finally, as an informational matter, it is much simpler to fix a presumptive minimum zoned density for municipalities than to regulate housing markets to match supply with demand.

But would a restriction-based rule mitigate the political blowback confronted by *Mount Laurel*'s unit-based strategy? This is a harder question, because, as explained below, minimum densities might well face as much or even more popular hostility than "fair share" formulae. There are, however, some reasons, albeit uncertain and here tentatively suggested, to believe that a restriction-based strategy might have some political advantages over the unit-based strategy. In any case, a combination of both might, if politically manageable, be ideal.

A. The Proposal: A Presumptive Ceiling on Zoning Restrictiveness

How might a focus on zoning restrictiveness change the character of *Mount Laurel*? One simple approach would be to suspend deference to municipal zoning restrictions whenever municipal zoning exceeds a stipulated level of restrictiveness. Such a ceiling would not be imposed on each lot within a municipality's territory but instead define an overall "zoning budget" that the municipality could allocate freely over different parcels, allowing municipalities to severely

restrict the use or density of some parcels just so long as the sum of all such restrictions within the jurisdiction did not exceed the stipulated regulatory level defined by the ceiling.[59]

This ceiling could be defined either as a required minimum percentage of favored multi-family residential uses, expressed as a percentage of dwelling units in multi-family structures, or as a required minimum level of residential density, expressed as dwelling units per acre. As an example of a minimum percentage requirement, state law could presume that municipal zoning laws should accommodate the same percentage of multi-family structures within the municipality as the statewide percentage of housing units within multifamily structures. In New Jersey, thirty-six percent of all housing units consist of units in structures containing two or more dwelling units.[60] Using this figure as a ceiling on restrictiveness, local zoning laws would have to allow thirty-six percent of the housing within the municipality to consist of units in multi-family structures. Alternatively, the law could define the ceiling in terms of an overall residential density, requiring that municipal zoning laws allow a minimum level of gross residential zoned density necessary to insure that, in a jurisdiction of average housing demand, low- and moderate-income households could afford to rent or buy housing.

Consider the following illustration of how such a minimum zoned density requirement might operate. "Ruralville" is a small township containing five square miles or 3200 acres of land. The relevant state agency decrees that, in order to avoid excessive restriction of housing opportunity for all income levels, the zoning ordinance of all municipalities should presumptively permit four dwelling units per acre, including all land within the municipality however zoned or used as part of the denominator except those lands outside municipal control because of state environmental law.[61] Ruralville's zoning law,

59. For a discussion of "zoning budgets" in general, see Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget"*, 62 CASE W. RES. L. REV. 81 (2011).

60. *Census of Housing, Historical Census of Housing Tables—Units in Structure*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/housing/census/historic/units.html (last visited Sept. 16, 2013).

61. For an account of the complexities of measuring residential densities, see ANN FORSYTH, MEASURING DENSITY: WORKING DEFINITIONS FOR RESIDENTIAL DENSITY AND BUILDING INTENSITY (2003), *available at* http://www.corridordevelopment.org/pdfs/from_MDC_Website/db9.pdf; Vicky Cheng, *Understanding Density and High Density*, *in* DESIGNING HIGH-DENSITY CITIES: FOR SOCIAL AND ENVIRONMENTAL

therefore, would presumptively have to allow 12,800 dwelling units to be built unless the town could reduce its denominator by pointing to land such as the Pine Barrens that were unbuildable under state law. The town, however, could allocate these zoned units over different parcels any way that it pleased—for instance, setting aside seventy-five percent of its land for single-family detached houses on one-acre lots (thereby accommodating 2400 units of housing) while zoning only ten percent of its land (320 acres) for higher-density apartments at thirty-two dwelling units per acre. These zoned densities would not have to result in actual construction, and Ruralville, if it liked, could zone land for multi-family structures cumulatively for commercial or industrial uses as well. Construction of structures on such cumulatively zoned lots would depend on the relative market for commercial, industrial, or residential uses.[62]

To provide for some fine-tuning of the densities imposed by state law, the density could be treated as a rebuttable presumption rather than an absolute minimum. If Ruralville's zoning did not meet the state's zoned density benchmarks, the developers seeking to build housing at densities at or greater than four dwelling units per acre could seek a builder's remedy—a writ of mandamus—to build such housing on any parcel within Ruralville. Ruralville could rebut the presumption that such housing should be accommodated by suggesting an alternative lot, either within Ruralville itself or in another jurisdiction. In the latter case, Ruralville would be obliged to join the other potential host jurisdiction as a co-defendant and bear the burden of proving that that jurisdiction was a superior location for the proposed housing. For instance, Ruralville could invoke the lack of sewer and water lines at the site chosen by the plaintiff-developer to rebut the presumption that the site should accommodate the proposed residential use, but then Ruralville would have to prove by the preponderance of the evidence that existing sewer and water lines should not extended to the proposed site. If the utility service area was located in a neighboring jurisdiction—call it "Infrastructureville"—then Infrastructureville could be expected to use its expert and attorney resources to defeat Ruralville's case

SUSTAINABILITY 1, 4 (Edward Ng ed., 2012), *available at* http://arhitectura2tm.files.wordpress.com/2012/09/understanding-density-and-high-density.pdf.

62. Lest one think that cumulative zones are anomalous, it bears mention that cumulative zoning was the norm up through the 1950s. For the case against non-cumulative industrial zones, see Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249 (2010).

against extension, making an alliance with the plaintiff-developer. In this way, the presumption would enlist developed jurisdictions to promote densities in suburban areas and vice versa.

In suspending the deference that municipalities normally receive for their zoning laws, the ceiling proposed here resembles the "anti-snob land use laws" of Massachusetts,[63] Connecticut,[64] and Rhode Island.[65] All three of these statutes have the character of suspending deference for zoning exclusions when less than ten percent of the housing stock within the local government's jurisdiction meets affordability criteria satisfied by the proposed development.[66] Unlike these state laws, however, the ceiling here proposed would not require that the proposed development charge "affordable" prices, nor would the safe harbor for municipalities be defined in terms of the affordability of housing within the municipality. Instead, the focus would be exclusively on the restrictiveness of the zoning, suspending deference for zoning laws that exceed a state ceiling on regulatory severity. In this sense, the proposed ceiling would be focused on what the *Mount Laurel* decisions call "least-cost housing"[67]—that is, housing that can be constructed at the lowest possible cost but, based on potential market demand, rented for more than low- and moderate-income households could afford to pay.[68]

Unlike unit-based approaches to exclusionary zoning, such a ceiling on zoning's overall restrictiveness is practically easy to implement. The data necessary to measure gross residential densities—that is, the number of dwelling units within a particular geographic area minus land outside municipal control—is readily available from the Census.[69] Likewise, the size of the municipal zoning "envelope"—

63. Massachusetts Comprehensive Permit Act, MASS. ANN. LAWS ch. 40B, §§ 20–23 (LexisNexis 2006).

64. Affordable Housing Land Use Appeals Act of 1990, CONN. GEN. STAT. § 8-30g (West 2010).

65. R.I. GEN. LAWS § 45-24-46.1 (2009).

66. For an overview of anti-snob land use laws, see Spencer M. Cowan, *Anti-Snob Land Use Laws, Suburban Exclusion, and Housing Opportunity*, 28 J. URB. AFFAIRS 295 (2006).

67. Oakwood at Madison, Inc. v. Twp. of Madison, 371 A.2d 1192, 1206–08 (N.J. 1977).

68. *See id.* (explaining the meaning of "least-cost housing").

69. For simple step-by-step instructions on calculating gross residential densities, see JULIE CAMPOLI & ALEX MACLEAN, LINCOLN INST. OF LAND POLICY, VISUALIZING DENSITY WORKSHOP: STEPS FOR USING THE CENSUS 2000 TO MEASURE

that is, the maximum number of dwelling units that can be built on a particular lot consistent with the relevant zoning law—can be calculated with GIS software.[70] The simplicity of the data required by such a ceiling on zoning restrictiveness is a consequence of the modesty of the ceiling's mission. Unlike unit-based approaches, the point of the ceiling on zoning restrictiveness would not be to guarantee that any particular amount of multi-family housing actually would be constructed or that any level of residential density actually would be achieved: the purpose of the ceiling, instead, would only be the elimination of zoning barriers to housing. The actual construction of the housing would depend on the market demand for the uses that zoning allows but does not require.

Despite the proposed ceiling's apparent modesty, the elimination of low-density zoning could have dramatic effects on the price of all housing. Limiting zoning restrictions can enlarge the quantity of affordable housing even when the new developments prohibited by the restrictions are not themselves affordable. Occupants of older and cheaper housing can move into the new "least-cost" units, thereby creating housing opportunities at the bottom of the housing market when they vacate older and cheaper housing. As Quigley and Raphael note, "the supply of bottom-quality housing is dependent on new housing construction at all levels, not just newly built 'affordable housing.'"[71] Measuring the precise magnitude of the deregulatory effect is difficult, in part because there is no standard index of zoning restrictiveness that allows inter-jurisdictional comparisons of

DENSITY (UNITS PER ACRE), *available at* http://www.lincolninst.edu/subcenters/visualizing-density/census.pdf.

70. N.J. DEP'T OF TRANSP., ROUTE 1 REGIONAL GROWTH STRATEGY: FINAL REPORT 22 (2010), *available at* http://policy.rutgers.edu/vtc/rgs/Final%20Report%20Sept%2021%202010.pdf (describing use of GIS software to calculate "zoning build-out" defined as "the theoretical maximum amount and type of new development that would occur if development occurred on all developable land according to its municipal zoning"). For an example of such calculations in New Jersey's Monmouth and Somerset Counties, see JOHN HASSE, ET AL., EVIDENCE OF PERSISTENT EXCLUSIONARY EFFECTS OF LAND USE POLICY WITHIN HISTORIC AND PROJECTED DEVELOPMENT PATTERNS IN NEW JERSEY: A CASE STUDY OF MONMOUTH AND SOMERSET COUNTIES (2011).

71. John M. Quigley & Stephen Raphael, *Is Housing Unaffordable? Why Isn't It More Affordable?*, 18 J. ECON. PERSP. 191, 205 (2008) ("[T]o the extent that cities make it difficult to build new housing, any type of new housing, the availability of low-cost housing will be reduced and the affordability of all housing will decline.").

restrictions' effects on prices.[72] The most recent and sophisticated measures of regulatory restrictiveness indicate that the effect of excessive regulation on the cost of housing is substantial.[73]

New Jersey, in particular, is afflicted with regulations that require large amounts of land per dwelling unit, effectively foreclosing multi-family housing from much of the fastest growing parts of the state. In the Route 1 area of New Jersey, for instance, sixty-two percent of the residentially available land is zoned for densities of acre per dwelling unit or higher, while eighty percent of such land is zoned at densities of two dwelling units or less per acre.[74] Given that multi-family structures rarely provide a half-acre of land for each dwelling unit contained within the structure, eighty percent of the most densely populated and economically active territory within New Jersey is likely off-limits to a type of housing occupied by a third of New Jersey's residents. Even relatively developed suburbs like Cherry Hill have extraordinarily low gross densities of 1.7 dwelling units per acre.[75] A glance at Cherry Hill's zoning map and measure of residential density suggests the degree to which multi-family housing has a tiny share of the jurisdiction's land, surrounded by a sea of single-family detached housing.[76] In Monmouth County, only three

72. John M. Quigley & Larry A. Rosenthal, *The Effects of Land-Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8 J. POL'Y. DEV. RES. 69, 100 (2005).

73. A survey of over 2000 jurisdictions sponsored by the Wharton Business School's Zell/Lurie Real Estate Center provided a cross-jurisdiction dataset of regulatory restrictiveness allowing inter-jurisdictional comparisons. *See* Joseph Gyourko et al., *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693 (2008). Using this dataset, Theo Eicher found price effects of up to $200,000 per dwelling unit resulting from land-use restrictions. *See* Theo Eicher, Housing Prices and Land Use Regulations: A Study of 250 Major US Cities (May 2, 2008) (unpublished manuscript) (on file with author); *see also* Elizabeth Rhodes, *UW Study: Rules Add $200,000 to Seattle House Price*, SEATTLE TIMES, Feb. 14, 2008, http://seattletimes.com/html/businesstechnology/2004181704_eicher14.html (describing Professor Eicher's analysis). Other measures of regulatory restrictiveness have found substantial price effects associated with regulatory restrictiveness. *See, e.g.*, Edward Glaeser et al., *Why Is Manhattan so Expensive? Regulation and the Rise in Housing Prices*, 48 J. L. & ECON. 331 (2005); Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulations: Evidence from Greater Boston*, 65 J. URB. ECON. 265 (2009).

74. N.J. DEP'T OF TRANSP., *supra* note 70, at 22.

75. CHERRY HILL TWP. PLANNING BD., *supra* note 35, at 190.

76. DAVID J. BENEDETTI, TWP. OF CHERRY HILL DEP'T OF CMTY. DEV., ZONING MAP 2007 (2007), *available at* http://nj-cherryhill.civicplus.com/DocumentCenter/View/1754.

percent of the remaining undeveloped land is zoned for densities of more than two dwelling units per acre, meaning that ninety-seven percent of the land precludes apartment or townhouse development. Eighty percent of the land is zoned for *fewer* than one dwelling unit per acre.[77]

In sum, one can imagine a deregulatory *Mount Laurel* doctrine, one that would demand a more substantial justification for the draconian municipal restrictions on residential uses. Such an approach could either supplement or replace *Mount Laurel*'s unit-based assessments of housing need.

B. Comparing *Mount Laurel*'s Fair Shares to a Ceiling on Zoning Restrictiveness

How does such a restriction-based approach to exclusionary zoning stack up, either as a matter of policy, politics, or law, when compared to *Mount Laurel*'s efforts to assess the regional need for affordable housing?

Consider, first, the comparative policy merits of these two methods for fighting exclusion. As Part II argued above, the chief difficulty with *Mount Laurel,* as a matter of policy, is that it makes excessive informational and conceptual demands on judges and bureaucrats. Public officials cannot calculate "fair share" obligations that capture the true need for housing. They are, therefore, forced to rely on crude proxies, the choice among which is essentially arbitrary. Such proxies leave the public perplexed and give local officials strong incentives to game the formulae to favor their own municipalities, reproducing the very collective action problem that *Mount Laurel* was intended to solve. Because of these political incentives, the proxies that actually end up defining "fair shares" tend to systematically understate the need for affordable housing. *Mount Laurel*, for instance, admittedly undercounts housing needs by excluding cost-burdened households from its definition of substandard housing. Likewise, in calculating "present need," both *AMG Realty* and COAH's rules also ignore the plight of persons in structurally sound households but living in neighborhoods plagued by high unemployment, high crime, and poor schools. These are merely two examples of ways in which the unit-based formulae of *Mount Laurel* are poor benchmarks for whether local zoning laws are

77. For examples of such calculations in New Jersey's Monmouth and Somerset Counties, see JOHN HASSE ET AL., supra note 70, at 18.

excessively restrictive. As Part II notes, the catalogue of *AMG Realty*'s flaws could be extended indefinitely. Moreover, the under-counting of "fair share" formulae extends to any unit-based system for assigning specific types of housing to particular jurisdictions. The informational demands of such systems are so great that the assessments of how many units are needed will generally be inaccurate, and the political competition for suburban votes will insure that the numbers always come in on the low side.

If *Mount Laurel* simply endorsed the unit-based strategy of "fair shares" as merely one tool with which to fight exclusionary zoning, then these flaws would be pardonable: better low numbers than no numbers, one might reasonably argue. Such low "fair shares" could always be supplemented by the libertarian strategy of trimming back on excessive regulation and thereby opening up the spigots of downward filtering of existing housing. *Mount Laurel*, however, did not embrace the unit-based strategy in such a partial way: Chief Justice Wilentz arguably put all of his affordable housing eggs in one "fair share" basket in *Mount Laurel II*, placating angry suburbs with the soothing thought that, once they achieved the numbers demanded by *AMG Realty* and, later, COAH, they would be off the hook and could freely enact "large-lot and open space zoning, that would maintain its beauty and communal character."[78] As Justice Skillman, one of the three original *Mount Laurel* judges, noted in upholding a township's ten-acre minimum lot size, "under *Mount Laurel II*, once a municipality discharges its obligations regarding housing for low and moderate-income households . . . it has no constitutional obligation to provide through zoning for a variety of other forms of housing."[79] On this reading, *Mount Laurel* purchases political support for the "fair share" obligation by foregoing other more libertarian attacks on exclusionary zoning. This political calculation may have been sensible: striking down excessively restricting zoning even after a municipality ponied up their bureaucratically specified "fair share" of affordable housing would likely be perceived as piling on. Given the inaccuracy of the "fair shares" thus defined, however, the New Jersey Supreme Court may have bet its political capital on the wrong horse.

What about the relative political merits of the unit- and restriction-based theories? That is a much closer case: homeowners will

78. S. Burlington Cnty. NAACP v. Mount Laurel, 456 A.2d 390, 390 (N.J. 1983).

79. New Jersey Farm Bureau v. Twp. of East Amwell, 882 A.2d 388, 394 (N.J. Super. Ct. App. Div. 2005).

certainly object to minimum residential densities. The experience in both Oregon and New Jersey suggests that such opposition can be fierce and successful.[80] There are, however, two reasons for believing that density minimums may avoid some of the most intense aversion to *Mount Laurel.*

First, in addition to the usual opposition that any new construction might inspire among homeowners, "fair shares" of affordable housing also attract the residual opposition to the *fiscal* collective action problem described in Part I above that is especially salient when prospective residents require more expensive services or live in less expensive structures. Worries about "tipping" from one racial or socio-economic group to another are exacerbated to the extent that housing is reserved for lower-income groups. Precisely because *Mount Laurel* focuses its attention on low- and moderate-income housing, the doctrine would seem to be more prone to trigger these fears more directly than a mere density minimum. As the late Professor Payne argued, the theory requires recognition of a "constitutional right to shelter and the governmental obligation to meet the housing need to the maximum practicable extent . . . ."[81] Such a right to shelter, however, faces the obstacle of stable public opinion: while public opinion regarding welfare rights shifts over time and in response to elite and media influence,[82] there is plentiful evidence that Americans consistently favor rights to minimum levels

80. In 2002, an organization called "Oregonians In Action" placed a ballot initiative on the state-wide ballot to overturn the state Land Conservation & Development Commission's Metropolitan Housing Rule requiring minimum residential densities within urban growth boundaries. The measure was defeated only after supporters of the rule placed an alternative measure purporting to curb density increases. *See* ANTHONY FLINT, THIS LAND: THE BATTLE OVER SPRAWL AND THE FUTURE OF AMERICA 202–03 (2006); Nancy Chapman & Hollie Lund, *Housing Density and Livability in Portland*, *in* THE PORTLAND EDGE: CHALLENGES AND SUCCESSES IN GROWING COMMUNITIES 206, 213–14 (Connie P. Ozawa ed., 2004). In New Jersey, a proposal to require minimum residential densities died in the state legislature in part because of opposition from South New Jersey representatives from low-density counties who objected to the obligation to increase densities when their housing was more affordable than denser jurisdictions in Northern New Jersey. To view the withdrawn proposal, see S.B. 1, 214th Leg. (N.J. 2010), *available at* http://www.njleg.state.nj.us/2010/Bills/S0500/1_R3.pdf. For further discussion of this topic, see Adam Gordon, *The South Jersey S-1 Controversy*, BLUE JERSEY (June 18, 2010), http://www.bluejersey.com/diary/15923/the-south-jersey-s1-controversy.

81. Payne, *Reconstructing*, *supra* note 2, at 576.

82. For an account of how elite and media opinion likely altered public support for welfare rights during the 1990s, see Saundra K. Schneider & William G. Jacoby, *Elite Discourse and American Public Opinion: The Case of Welfare Spending*, 58 POL. RES. Q. 367 (2005).

of welfare only when these rights are conditioned on the recipients' making good-faith efforts to obtain employment and achieve financial independence, and they support constraints such as time limits on those rights as ways to insure that the right-holders meet these conditions.[83]

Unsurprisingly, in light of public hostility towards unconditional welfare rights, *Mount Laurel II* defends a right to shelter that dare not speak its name: *Mount Laurel II* self-consciously backs away from any explicit defense of a right to shelter in favor of language calling for a realistic "opportunity" for shelter.[84] *Mount Laurel II* is reticent not only in rhetoric but also in remedy: *Mount Laurel II* does not require municipalities to raise revenue for affordable housing through ordinary property taxation, even though such taxation would seem to be "practicable."[85] Instead, *Mount Laurel II* compels only those financing mechanisms that export burdens to non-residents or locally weak owners of vacant land, such as inclusionary zoning or applying for federal and state grants. According to Professor Payne, these limits are the result of the justices' recognition that "enforcement of a broadly-stated constitutional right to shelter . . . would be well beyond the practical capacity of the judicial system."[86] But the phrase "practical capacity of the judicial system" here appears to be a euphemism for "political acceptability of the entitlement." This tension between the rhetoric and the right undermines the legitimacy of *Mount Laurel*. Indeed, to the extent that *Mount Laurel* is explicitly framed as a constitutional right of the poor to a minimum level of welfare, the doctrine triggers negative beliefs and stereotypes that fuel opposition to affordable housing, such as the belief that the

83. For evidence from public opinion surveys regarding American attitudes towards welfare rights, see STEVE FARKAS ET AL., THE VALUES WE LIVE BY: WHAT AMERICANS WANT FROM WELFARE REFORM 16–20, 44–46 (1996); MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY PROGRAMS 2–8 (Susan Herbst & Benjamin Page eds., 1999).

84. *See* S. Burlington Cnty. NAACP v. Mount Laurel Twp., 456 A.2d 390, 465 (N.J. 1983).

85. *Southern Burlington* discusses the required "affirmative measures." *Id.* at 443–45, 456. While applying for available state and federal subsidies is among these required measures, raising taxes to finance affordable housing is not.

86. Payne, *supra* note 2, at 567.

poor "do not have a strong work ethic and prefer public assistance over self-sufficiency."[87]

By contrast, while minimum densities will certainly trigger the usual NIMBY reaction to changes in the housing status quo, such densities do not carry the extra baggage of welfare rights. The right to be free from excessive regulation has been championed by opinion leaders on the Right: Jack Kemp, President George Bush's Secretary of Housing & Urban Development, embraced the goal of breaking down regulatory barriers to affordable housing.[88] To be clear, New Jersey homeowners are not likely to be swayed by abstract considerations of ideology. But Republican leaders are more likely to be swayed by considerations of abstract ideology than the rank and file. By styling the right to be free from exclusionary zoning as a right that applies to all housing types and not only income-constrained housing, the anti-restriction theory also casts the housing question "as an issue affecting all Americans" rather than an issue of importance only to the poor, thereby avoiding stigmatizing stereotypes that inflame homeowner opinion against affordable housing.[89]

There is a second structural reason why minimum densities might be politically easier to implement than "fair shares" of actual units. "Fair shares" require identification of specific "*Mount Laurel* units" that must be built or rehabilitated in order to satisfy a municipal obligation. By contrast, the minimum density does not require specific developments to be proposed and sited. It requires only that zoning be relaxed, a process that can occur through relatively diffuse text amendments, such as adding apartments to industrial or commercial zones or by changing the definitions of permissible residential uses. Oregon's experience provides anecdotal evidence that such purely regulatory change, unconnected to specific ground-breakings, can be smuggled past neighborhood opposition for extended periods of time. The Metropolitan Housing Rule only

87. Mai Thi Nguyen et al., *Opposition to Affordable Housing in the USA: Debate Framing and the Responses of Local Actors*, 30 HOUSING THEORY & SOC'Y 107, 122 (2012).

88. *See* Jack Kemp, *Mandate to the Commission*, *in* ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., "NOT IN MY BACK YARD": REMOVING BARRIERS TO AFFORDABLE HOUSING (1991), *available at* http://www.huduser.org/publications/pdf/NotInMyBackyard.pdf.

89. Nguyen et al., *supra* note 87, at 112.

generated serious neighborhood opposition in the mid-1990s, a decade after it was promulgated.[90]

The claim that a density-based strategy will confront less political opposition than the unit-based strategy, however, must be taken as a hypothesis and not a proven fact. Incumbent landowners have strong economic incentives to defend restrictive zoning to protect their home values regardless of whether proposed housing is income-restricted.[91] Professor Payne is surely correct to note that an all-out assault on zoning would likely fail, because "land use controls have substantial social value in their own right" and are "not about to wither away anytime soon in the modern state."[92] Any attack on zoning restrictiveness, therefore, is politically feasible only if it is temperate and limited, attacking only those restrictions that are the product of the sorts of collective action problems described in Part I. The anti-restriction theory outlined here attempts to meet these requirements by giving municipalities broad latitude to apportion their "zoning budget" across parcels as they please, by making the ceiling on restrictiveness a rebuttable presumption, and by defining the ceiling in terms of the state-wide mix of housing types.

C. Implementing a Ceiling on Zoning Restrictiveness Through Filtering Credits

What legal basis could there be for imposing such a presumptive ceiling on municipal zoning power? Ordinary constitutional theories of substantive due process and statutory ultra vires theories have limited value, because they generally require proof that a municipality has singled out a neighborhood or landowner for distinctively unfavorable treatment. *Bailes v. Township of East Brunswick*[93] illustrates this prohibition on "singling out." In *Bailes*, the plaintiffs challenged a special "rural preservation zone" that had been imposed on mostly undeveloped lots in particular areas of the township and that limited the development of such lots of six acres for every residential dwelling unit while leaving place higher density

90. On the growth of neighborhood opposition in the mid-1990s over the planning of Southwest Portland, see Bradshaw Hovey, *Making the Portland Way of Planning: The Structural Power of Language*, 2 J. PLANNING HIST. 140, 147–57 (2003).

91. For the classic discussion of these incentives, see FISCHEL, *supra* note 23. For recent empirical confirmation, see Hilber & Robert-Nicoud, *supra* note 54.

92. *See* Payne, *supra* note 2, at 574.

93. Bailes v. Twp. of E. Brunswick, 882 A.2d 395 (N.J. Super. Ct. App. Div. 2005).

zoning for the balance of the township's residents. In holding that the zoning violated New Jersey's Municipal Land Use law,[94] Justice Skillman relied heavily on the State Planning Commission's "equity policy," because "[m]ost of East Brunswick, including substantial parts of the RP zone, has been developed with residences on small lots," while "[p]laintiffs are a relatively small group of landowners who have continued to farm and conduct other low-intensity uses of their properties."[95]

Focusing on the "singling out" of landowners by their neighbors is useless against even-handed zoning that imposes low-density restrictions on all or most residential uses within a jurisdiction. Such laws do not involve intra-municipal exploitation of landowners by their neighbors, but rather inter-municipal collective action problems. Their flaw is not that they single out landowners within a municipality for unfavorable treatment compared to the landowner's neighbors but rather that they inefficiently restrict residential uses beneath levels that everyone would prefer if only they could coordinate their zoning laws. To deal with such even-handed laws one needs a doctrine similar to *Mount Laurel* in its focus on limiting the exclusion of residential uses.

The state legislature of any state, of course, could authorize a restriction-based strategy against exclusionary zoning similar to that outlined here. Indeed, one legislature has already done so: The Oregon state legislature has adopted planning statutes authorizing the Oregon Land Conservation & Development Commission (LCDC) to adopt land-use planning "goals,"[96] and, pursuant to this mandate, the LCDC has adopted Goal 10 on Housing, requiring local plans to "encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."[97] Unlike *Mount Laurel*, Goal 10 is not focused exclusively on protecting the supply of housing affordable by low- and moderate-income groups but instead requires

94. N.J. STAT. ANN. § 40:55D-62(a) (West 2008)("The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land.").

95. *Bailes*, 882 A.2d at 409.

96. *See* OREGON REV. STAT. ANN. § 197.040(2)(a) (West 2009) ("Pursuant to ORS chapters 195, 196 and 197, the commission shall: (a) Adopt, amend and revise goals consistent with regional, county and city concerns . . . .").

97. OR. ADMIN. R. 660-015-0000(10) (2013), *available at* http://www.oregon.gov/LCD/docs/goals/goal10.pdf.

that municipalities accommodate all housing types at every income level. Accordingly, the LCDC has construed Goal 10 in its "Metropolitan Housing Rule" to require municipal zoning to accommodate minimum levels of residential density such that smaller cities must provide for an overall density of at least six units per acre, medium-sized cities provide for at least eight units per acre, and that the larger urbanized areas provide for at least ten units per acre.[98]

Unfortunately, Oregon's system is also accompanied by aggressive enforcement of urban growth boundaries that reduce the supply of buildable land in suburban and rural areas.[99] Those boundaries were the quid pro quo by which advocates of "smart growth" in Oregon persuaded environmentalists to support higher urban densities.[100] As a result, Oregon's experience with increased densities is difficult to compare to New Jersey's experience with fair share. The evidence suggests that Oregon's system of smart growth performed worse than New Jersey's unit-based system in controlling housing costs,[101] perhaps because the effects of urban growth boundaries cancelled out the effects of higher densities. On the other hand, the LCDC's rules do not seem to have inspired the political resentment of COAH's rules, and unlike COAH, the LCDC enforces Goal 10 aggressively, rejecting fifty-two of fifty-three plans submitted by cities with populations over 5000 for failing to comply with Goal 10.[102]

98. OR. ADMIN. R. 660–007-0035 (West, Westlaw through Oregon Bulletin dated July 1, 2013).

99. For an overview of Oregon's system of urban growth boundaries and mandated densities, see Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961–2011*, 45 J. MARSHALL L. REV. 357 (2012).

100. For a description of the alliance between environmentalists and developers that created the urban growth boundaries in Oregon, see PETER A. WALKER & PATRICK T. HURLEY, PLANNING PARADISE: POLITICS AND VISIONING OF LAND USE IN OREGON 43–75, 114–18 (2011). For a general history of Oregon's experience with the urban growth boundaries, see PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION (Carl Abbott, et al. eds., 1994).

101. Oregon had a larger share of cost-burdened renter households than New Jersey and added fewer rental units than New Jersey. GREGORY K. INGRAM ET AL., SMART GROWTH POLICIES: AN EVALUATION OF PROGRAMS AND OUTCOMES 78–79 (2009), *available at* http://www.lincolninst.edu/pubs/Smart-Growth-Policies-Ch-6-Affordable-Housing.pdf.

102. GERRIT KNAAP & ARTHUR C. NELSON, THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON 80 (1992). The LCDC has often used aggressive rhetoric in defense of its state housing goals. *See, e.g.*, Seaman v. City of Durham, Or. LCDC, No. 77-0925 (1978) ("Goal 10 speaks of the housing needs of Oregon households, not the housing needs of Durham's households. Its meaning is clear: planning for housing must not be parochial. Planning jurisdictions

Short of the New Jersey legislature's improbably adopting a density mandate similar to Oregon's, is there anything that the New Jersey courts or COAH could do to introduce a limit on the restrictiveness of zoning laws within the framework set out by *Mount Laurel* and the New Jersey Fair Housing Act? One possibility is to give "fair share" credit to local governments who adopt higher overall residential densities and promote multifamily housing, even when such housing is not deed-restricted regarding the amounts for which it can be sold or rented. The theory behind such credits is that new market-rate housing would indirectly result in affordable units through downward filtering.

Unfortunately, COAH has given filtering a bad name among advocates of affordable housing.[103] The New Jersey Appellate Division has lent its authority to their criticisms of COAH by invalidating COAH's use of filtering calculations to reduce estimates of total regional housing need. COAH assumed that some sound housing units would become less expensive over time as they aged, eventually becoming affordable to low- and moderate-income households, allegedly resulting in 59,156 sound housing units becoming affordable to low- or moderate-income households between 1999 and 2014.[104] Based on this estimate, COAH subtracted 59,156 units from the overall statewide projected need of 140,365 units. The appellate division rejected this theory by noting that COAH produced no "data that would demonstrate whether, in 2004 or 2006, there exists an overall housing surplus in New Jersey, that more houses are being built than households being formed, and that housing with moderate operating costs is now being constructed."[105] In effect, COAH simply assumed that the supply market-rate housing was somehow growing faster that housing need, creating automatic filtering, without any proof that any municipality actually loosened up the regulation of market-rate housing.

It would be unfortunate if COAH's dishonest abuse of the filtering concept led to its abandonment by the friends of *Mount Laurel*. If

must consider the needs of the relevant region in arriving at a fair allocation of housing types. . . ."), *quoted in* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 785 (3d ed. 2005)

103. Alan Mallach, *The Betrayal of* Mount Laurel*: Will New Jersey Get Away with Gutting its Landmark Fair Housing Legislation?*, SHELTERFORCE ONLINE (March-April 2004), *available at* http://www.shelterforce.com/online/issues/134/mtlaurel.html.

104. N.J. ADMIN. CODE. § 5:94, app. a, tbl.10, at 94-42 (2011).

105. *In re* Adoption of 5:94 & 5:95, *supra* note 5, at 371.

deployed with integrity, filtering credits could provide an important incentive for municipalities to deregulate their housing markets. The critical problem with COAH's use of filtering was that COAH required nothing in return from municipalities in return for the filtering reduction: the reduction was not a carrot but a gift. The proper use of filtering would create an incentive for municipalities to reduce regulation of market-rate housing by reducing the "fair share" obligation only for those municipalities that amend their zoning laws to meet state standards for minimum percentages of multifamily housing and gross residential density. Those standards should be stringent and data-driven. In return for any filtering credit, the state ought to insist on zoned gross densities far higher than the one-acre lot minimums that prevail in suburban New Jersey, and the state should provide data that a such deregulation actually reduces housing costs to the point where the bottom tier of existing housing will likely filter down to low- and moderate-income households.

Such a use of filtering credits will prove controversial among friends of *Mount Laurel*, because these credits reduce the obligation to encourage the production of income-restricted units that *Mount Laurel*'s advocates regard as the doctrine's central purpose. But such units are fragile benefits—beneficial to the lucky few who receive them, but useless to the majority of New Jersey's low- and moderate-income households who will inevitably be housed in filtered structures. New Jersey's median family income was $65,370 in 1999; according to the 2000 Census, there were well over 300,000 families making less than fifty percent of this income.[106] By contrast, *Mount Laurel* has been estimated to have made available only 60,731 affordable units,[107] leaving much more than eighty percent of New Jersey's poor dependent on housing made available through means other than *Mount Laurel*'s unit-based strategy.

Given these disparities, it may be worthwhile to sacrifice some of those *Mount Laurel* units if such sacrifice will yield a substantial deregulation of market-rate units. The informational burdens and political turmoil from which *Mount Laurel* has suffered over its

106. U.S. CENSUS BUREAU, NEW JERSEY: 2000, at 4 (2002) *available at* http://www.census.gov/prod/2002pubs/c2kprof00-nj.pdf.

107. *Mount Laurel* is estimated to have made available 60,731 affordable units between 1980 and 2000. *See* STUART MECK ET AL., REGIONAL APPROACHES TO AFFORDABLE HOUSING 39 (2003).

thirty-year history suggest, at least, that it might be worth giving an anti-restriction based strategy a try.