SUPREME COURT OF NEW JERSEY
DOCKET NO. 67,126
A-90/91/92/93/94

IN THE MATTER OF THE ADOPTION OF N.J.A.C. 5:96 AND 5:97 BY THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING

PETITIONING FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, WHOSE OPINION IS REPORTED AT 416 N.J. Super. 462 (App. Div. 2010)

ARGUED DEC. 1, 2009
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CIVIL ACTION

ON APPEAL FROM THE COUNCIL ON AFFORDABLE HOUSING

SAT BELOW:
HON. STEPHEN SKILLMAN
HON. JOSE L. FUENTES
HON. MARIA P. SIMONELLI

BRIEF AND APPENDIX OF AMICI CURIAE

NEW JERSEY FUTURE, AMERICAN PLANNING ASSOCIATION, AMERICAN PLANNING ASSOCIATION--NEW JERSEY CHAPTER, AND THE HOUSING & COMMUNITY DEVELOPMENT NETWORK OF NEW JERSEY

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TABLE OF CONTENTS -- BRIEF

PAGES

TABLE OF CONTENTS -- APPENDIX

PAGES

TABLE OF AUTHORITIES

Pages

CASES

STATUTES AND PROPOSED LEGISLATION

REGULATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

As leading national and statewide groups concerned with smart growth and effective development, we urge this Court to reaffirm the constitutional underpinnings of the Mount Laurel doctrine, thereby furthering the State's economic, environmental, and equitable health. We submit this brief to explain the critical role affordable housing plays in sound development, and to underscore the doctrinal importance of the regional allocation of affordable housing need and of appropriate limitations on municipal discretion in land-use decisions. We respectfully request that this Court affirm the Appellate Division with regard to two issues: (1) the invalidation of the growth share methodology the Council on Affordable Housing ("COAH") attempted to use for allocating the prospective need for affordable housing, and (2) the Appellate Division's order that COAH use a methodology "similar" to that used in prior rounds "to prevent further delay in the adoption of valid third round rules."

For the past twelve years, COAH has failed to comply with its obligations under the Fair Housing Act ("FHA") and the general welfare clause of the New Jersey Constitution by not promulgating valid Third Round Rules that govern municipal affordable housing obligations. Before the Court is COAH's second failed attempt to use a "growth share" methodology that, as the Appellate Division held, "has the same basic deficiencies as the original version" struck down by that court in 2007.

COAH's growth share methodology is unconstitutional and contrary to the FHA because it fails to place sufficient limits

on municipal discretion. Indeed, COAH concedes in its brief that the revised Third Round Rules permit municipalities to avoid their affordable housing obligations by simply deciding not to grow. Moreover, both the Constitution and the FHA require that affordable housing obligations be allocated to municipalities in a manner that meets the regional need. The revised Third Round Rules, however, subvert this requirement by tying the obligation to self-interested municipal decisions about growth, without regard for the region's affordable housing needs. In these ways, COAH's Third Round Rules violate the constitutional and statutory obligation to ensure that low- and moderate-income families have a realistic opportunity to find decent housing close to jobs, transit, and quality education.

The importance of this legal conclusion is reinforced by the real-world dynamics the State faces. As this Court recognized in the early Mount Laurel decisions, New Jersey's heavy reliance on property taxes and the multiplicity of local jurisdictions creates strong incentives for local governments to exclude affordable housing. Recent studies show that these pressures have only increased as a result of substantial, ongoing land development, which has resulted in among the highest housing costs in the nation. Statewide build-out is expected by mid-century. At the same time, the extensive development that has taken place continues to occur disproportionately in places that have little affordable housing and few low-income families. And in the "lost decade" during which COAH has failed to issue valid regulations, certificates of occupancy have issued for more than

250,000 housing units, 76 million square feet of office space, and 40 million square feet of retail.

A prompt remedy to develop valid regulations is important not only for those families in need of affordable housing, but to all of us in the State. The State cannot achieve economic and fiscal health without rational development that conforms to Mount Laurel's constitutional principles and fully integrates affordable housing and sound planning, as set forth in the FHA and the State Planning Act. This animating insight of Mount Laurel -- that affordable housing and sound planning are mutually reinforcing -- has contributed to its national significance, leading the American Planning Association to designate Mount Laurel I as a National Planning Landmark.

Time is of the essence here. In the face of COAH's refusal or inability to develop valid Third Round Rules for so long, even after the Appellate Division's deferential remand in 2007, it is necessary to provide an expeditious and effective remedy. While the Appellate Division would have been well within its authority to take more definitive action, its order stands as an appropriately tailored means of compelling COAH's constitutional and statutory compliance.

STATEMENTS OF INTEREST OF AMICI CURIAE

New Jersey Future

New Jersey Future is a nonprofit, nonpartisan organization that brings together concerned citizens and leaders to promote responsible land-use policies. The organization employs original research, analysis, and advocacy to build coalitions and drive land-use policies that help revitalize cities and towns, protect natural lands and farms, provide more transportation choices beyond cars, expand access to safe and affordable neighborhoods, and fuel a prosperous economy.

Founded in 1987 by senior corporate, civic, and environmental leaders to advance smarter land-use and growth policies, New Jersey Future today is a leading voice on policies for curbing sprawl, spurring center-based redevelopment, and coordinating state efforts behind a single state planning vision. A critical component of the smart growth and sustainable development agenda is access to housing that is affordable to households of all incomes and located near jobs. Through research, policy advocacy, and identification of best practices, New Jersey Future advocates for a public policy approach that would create housing opportunities for lower-income households in high-opportunity places, especially near transit, and that would create mixed-income housing opportunities that reduce concentrations of poverty and revitalize the market in low-opportunity places. New Jersey Future has been involved as amicus before this Court in Toll Brothers v. Township of West Windsor, 173 N.J. 502 (2002).

American Planning Association

The American Planning Association ("APA") is a nonprofit public-interest and research organization advancing the art and science of physical, economic, and social planning at the local, regional, state, and national levels. APA traces its origins to 1909 and has operated under its current corporate name since 1978. APA and its professional institute, the American Institute of Certified Planners, represent more than 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues. APA regularly files amicus briefs in cases of importance to the planning profession and the public interest in the federal and state appellate courts, including in 2001 when APA joined its New Jersey Chapter as an amicus in Toll Brothers v. Township of West Windsor, 173 N.J. 502 (2002).

APA's National Board of Directors has adopted policy guidelines to its positions on pending legislation and its role in court cases, including the following provision on housing:

> APA and its chapters should support a regional fair share distribution of housing, in general, and affordable housing, in particular, in proximity to employment centers and moderate- and low-wage jobs. APA and its chapters recognize that housing is a regional issue in metropolitan areas, usually requiring inter-jurisdictional dialogue and cooperation.[1]

[1] APA, Policy Guide on Housing (2006), available at http://www.planning.org/policy/guides/adopted/housing.htm.

Reflecting the significance the APA attaches to the appropriate development and location of housing, the APA declared Mount Laurel I as a National Planning Landmark in 2000.[2]

American Planning Association-New Jersey Chapter

The New Jersey Chapter of the American Planning Association ("APA-NJ") supports the efforts of the national APA. It acts as a resource for guidance on major policy areas that are important to planners and affect New Jersey's public interest. APA-NJ is devoted to fostering livable communities through effective, comprehensive land-use planning.

APA-NJ consists of approximately 1,000 licensed professional planners, academics, students, planning and zoning board members, and others interested in municipal, regional, and state planning. Members of APA-NJ are routinely involved in comprehensive land-use planning and its implementation with land-use regulations. The chapter was involved as an amicus in Mount Laurel I (Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151 (1975) (as a chapter of the former American Institute of Planners)); Mount Laurel II (Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158 (1983)),

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[2] APA, National Planning Awards 2000, available at http://www.planning.org/awards/2000/index.htm. APA participates only in certain portions of the brief: Statements of Interest of Amici Curiae, Procedural History, Background, and Point I and Point II of the Argument below. APA's amicus participation in any case depends upon how its adopted planning policies inform a particular case. APA does not have a policy on remedies in this situation but supports the decision of its New Jersey Chapter to take a position.

and with the national APA in Toll Brothers v. Township of West Windsor, 173 N.J. 502 (2002).

Housing & Community Development Network of New Jersey

The Housing and Community Development Network (the "Network") was founded in 1989 to support New Jersey's affordable housing and community development sector by building a strong network of community development corporations ("CDCs") with other individuals and organizations that support their work. Today, the Network represents more than 150 CDCs as core members and an additional 100 associate members, organizations, and individuals who support our mission. The Network supports its members who are seeking to build and rehabilitate the homes of lower-income New Jerseyans in suburban and rural as well as urban communities. In addition, the Network is a policy advocate at the state and local level in New Jersey for affordable housing production, increased economic opportunities for low-income households, and stronger, healthier communities for all New Jerseyans.

The Network believes that promoting equitable and healthy development policies and strategies is the best way to create thriving communities, and bring about positive, sustainable change in the lives of New Jersey's vulnerable and low-income residents. The Network sees support for the Mount Laurel doctrine and for an effective state administrative process for meeting fair-share obligations as a critical element in fostering such development policies and strategies in New Jersey. To that end, the Network has been involved as an amicus in numerous Mount Laurel and COAH cases, including with other Amici

here in Toll Brothers v. Township of West Windsor, 173 N.J. 502 (2002). In addition, the Network has actively sought policy and administrative changes at COAH in recent years.

PROCEDURAL HISTORY

On October 8, 2010, the Appellate Division, in a comprehensive opinion by Judge Skillman, addressed the validity of the revised Third Round Rules COAH had promulgated pursuant to its statutory responsibility under the Fair Housing Act. In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462 (App. Div. 2010). In particular, that court (1) invalidated the "growth share" methodology COAH had used for allocating the prospective need for affordable housing, and (2) ordered that COAH use a methodology similar to that used in prior rounds "to prevent further delay in the adoption of valid third round rules." Id. at 483-84. Following petitions for certification by multiple parties, this Court granted review on March 31, 2011. In re Adoption of N.J.A.C. 5:96 & 5:97, 205 N.J. 317 (2011).

Although the Second Round Rules expired in 1999, COAH did not adopt its first version of the Third Round Rules until 2004, a delay that the Appellate Division described as "dramatic and inexplicable" and "frustrat[ing]" to the public policies underlying the Fair Housing Act. In re Six Month Extension, 372 N.J. Super. 61, 95-96 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005).

The most significant change from the First and Second Round Rules to the Third was COAH's adoption of a "growth share" approach for determining the portion of a municipality's

affordable housing obligation that arises from the prospective need. See, e.g., In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 17-20 (App. Div. 2007) (explaining present and prospective need).

A brief description of how the Rules have worked helps to demonstrate the sharp break between the growth share approach and the methodology COAH previously used, which the courts generally upheld. Id. at 25 (noting that challenges to the First and Second Round Rules "have been largely unsuccessful"). In the First and Second Rounds, prospective need was allocated based on four factors:

- the number of jobs in the municipality as compared to the number of jobs in the region;
- municipal employment growth as compared to regional employment growth over the preceding period;
- municipal land located in growth areas (as defined in the State Plan) as a percentage of regional land located in growth areas; and
- municipal per capita income as a percentage of regional per capita income.

In re Twp. of Warren, 132 N.J. 1, 17-18 (1993). This allocation of regional need resulted in a specific affordable housing obligation for each municipality, and the factors reflected each municipality's capacity to absorb the obligation as compared to its neighbors. Two factors touched on employment because "an important objective of the Mount Laurel doctrine is to provide workers with housing in the vicinity of their place of employment." Id. at 18. The amount of land located in growth

areas reflected the municipality's relative "physical capacity to accommodate new housing units," and the income factor reflected its "financial capacity to absorb infrastructure costs incidental to high-density development." Ibid.

In contrast, the growth share methodology in the Third Round Rules leaves the municipality to determine whether it will incur a prospective obligation, and this obligation will not track regional need or relative municipal capacity to meet it. In a 2007 decision, the Appellate Division invalidated COAH's first attempt at devising a growth share approach. In re N.J.A.C. 5:94, 390 N.J. Super. at 47-56. Under that approach, COAH imposed a prospective affordable housing obligation as a percentage of a municipality's actual growth in residential units and jobs. Id. at 49-50. The court held that COAH had failed to show that the methodology would generate enough affordable housing to meet the regional need and fulfill the constitutional obligation under Mount Laurel. Id. at 49-55. In addition, the court concluded that the growth share methodology impermissibly allowed municipalities to avoid satisfying any prospective housing need by adopting land-use regulations that discouraged growth. Id. at 55-56.

In 2008, COAH promulgated a new set of Third Round Rules that retained a growth share approach based on a revised proportion of the growth in jobs and residences in each municipality. In re N.J.A.C. 5:96, 416 N.J. Super. at 480 (summarizing N.J.A.C. 5:97-2.2(d)). While the revised Third Round Rules purport to require municipalities to fulfill minimum

projected obligations, the Appellate Division noted that COAH intends, through the use of periodic reevaluations and waivers, to tie the obligation, once again, to actual municipal growth. Id. at 481-83. The State does not dispute this conclusion and, in fact, confirms that the obligation is "determined by actual growth in that community." (Brief on Behalf of Respondent New Jersey Council on Affordable Housing in Support of Petitions for Certification, dated Feb. 4, 2011 ("COAH Br.") at 17; see also id. at 15 ("[I]f a municipality does grow, it will have an affordable housing obligation.").) Because such a system allows municipalities to escape their obligation and to default in meeting the regional need, Judge Skillman (for the panel) held that the rules remained deficient "for the reasons set forth in our prior opinion." In re N.J.A.C. 5:96, 416 N.J. Super. at 483.

In determining the appropriate remedy, the Appellate Division concluded that, because "more than a decade has elapsed since expiration of the second round rules," it was not appropriate to allow COAH to attempt to adopt another regulation based on a growth share approach. Id. at 484. Instead, the most reasonable means of filling the regulatory vacuum "is to require COAH to adopt third round rules that incorporate a methodology similar to the methodology set forth in the first and second round rules." Ibid.

In the briefing related to the petitions for certification filed in this matter, neither the State nor any other party argues that the revised Third Round Rules should be upheld as promulgated.

BACKGROUND

A. Sound Planning Requires the Appropriate Development of Affordable Housing for Economic, Environmental, and Equity Reasons.

From the outset, the Mount Laurel doctrine has recognized that the constitutional imperative of advancing the general welfare through the development of affordable housing must be informed and guided by what has come to be known as "smart growth." See S. Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158, 226-27 (1983) [hereinafter Mount Laurel II].

Smart growth refers to a set of best practices for development that involve "comprehensive planning to guide, design, develop, revitalize and build communities for all" through the following sound planning principles:

- creation of "a unique sense of community and place";
- preservation and enhancement of "valuable natural and cultural resources";
- equitable distribution of "the costs and benefits of development";
- expansion of "the range of transportation, employment and housing choices in a fiscally responsible manner";
- valuing "long-range, regional considerations of sustainability over short term incremental geographically isolated actions"; and
- promotion of "public health and healthy communities."

APA, Policy Guide on Smart Growth § 1 (2002), available at http://www.planning.org/policy/guides/adopted/smartgrowth.htm.

In New Jersey, these values have been translated into law and policy through the State Planning Act ("SPA") and the State Development and Redevelopment Plan (the "State Plan"). See N.J.S.A. 52:18A-196 to -207.

The purpose of smart growth is to help guide development in a logical and constructive fashion to further the economic, environmental, and equity interests of residents, communities, regions, and the State as a whole. See, e.g., N.J.S.A. 52:18A-196; N.J. State Planning Comm'n, New Jersey State Development and Redevelopment Plan, Vol. I at 5-7 (2001). The SPA emphasizes this straightforwardly:

> New Jersey, the nation's most densely populated State, requires sound and integrated Statewide planning . . . to conserve its natural resources, revitalize its urban centers, protect the quality of its environment, and provide needed housing and adequate public services at a reasonable cost while promoting beneficial economic growth, development and renewal . . . .
>
> [N.J.S.A. 52:18A-196a.]

In ordering State departments and agencies to adopt policies that conform to the State Plan, Governor Florio stated "haphazard patterns of growth have threatened the quality of life in New Jersey and have failed to provide for the revitalization of our urban centers, sufficient affordable housing stock, or adequate conservation of natural resources." Gov. James J. Florio, Exec. Order No. 114 (1994).

To overcome these adverse consequences of unplanned or poorly planned development, a key strategy is to address the

relationship between where people work and where people live. Smart growth principles encourage growth that allows people to live near where they need or wish to be: employees near jobs, students near schools, and everyone near transit options. For this to occur, it is necessary to have a diverse mix of quality housing choices across the affordability spectrum "integrated with shopping, schools, community facilities and jobs." APA, Policy Guide on Smart Growth, supra, § 1.K. According to APA, housing policy should endeavor to bring about a "broad reversal of the negative consequences of imbalance" between jobs in an area and an appropriate mix of housing. APA, Policy Guide on Housing (2006), available at http://www.planning.org/policy/guides/adopted/housing.htm.

Sound planning must incorporate affordable housing not simply because many people need affordable housing, although this is also true, but also because such integrated development furthers the fiscal and environmental health of the State and promotes the interests of all of its residents. Increasingly, as economic development experts have noted, "[t]he economic health of a region is dependent on the presence of a competitive workforce, which in turn is strongly related to the availability of suitable and affordable housing."[3] Conversely, the failure to

[3] Madeleine Pill, Neighborhood Reinvestment Corp. & Joint Ctr. for Housing Studies of Harvard Univ., Employer-Assisted Housing: Competitiveness Through Partnership 7 (2000), available at http://www.jchs.harvard.edu/publications/mpill_W00-8.pdf. Housing workers near their jobs also furthers the overall economic benefits of sound planning. See Gov. Florio, Exec. Order No. 114, supra ("[T]he State Plan is based upon an economic impact assessment which estimates that full implementation can

make jobs accessible to housing that is affordable for all income levels exacerbates traffic congestion and sprawl, thus undermining important national and state environmental goals, such as the reduction of greenhouse gas emissions.[4]

Smart growth principles also recognize that land-use decisions implicate fundamental values regarding fairness and equal opportunity: housing in proximity to employment, and life's other necessities and amenities, should not be the sole province of wealth and privilege.[5] Residents from all walks of life should have a realistic opportunity to live in stable and vibrant communities that efficiently use resources so as to provide the quality of life that comes with affordable, quality housing. Further, especially in light of the growing diversity of this nation and this State, the wide distribution of affordable housing promotes racially and ethnically diverse living patterns, helping to overcome legacies of discriminatory housing practices and create inclusive communities that better

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save taxpayers $1.3 billion in capital infrastructure costs over 20 years and up to $400 million annually in operating costs statewide.").

[4] See, e.g., NJDOT, Route 1 Regional Growth Strategy Final Report 27-28 (2010), available at http://policy.rutgers.edu/vtc/rgs/Final%20Report%20Sept%2021%202010.pdf.

[5] See APA, Policy Guide on Housing, supra, at Specific Position 1A ("[M]arkets prevent some households, especially the poor, from gaining access to jobs, schools, shopping and other services, reducing the quality of life for those excluded households and exacerbating the problems associated with concentrated poverty and minorities.").

prepare all residents for the demographic realities of the 21st century.[6]

B. The Mount Laurel Doctrine Has Emphasized and Catalyzed the Connection Between Smart Growth Planning and Affordable Housing Development in New Jersey.

Although the term "smart growth" did not come into common usage until significantly after this Court's initial Mount Laurel decisions, Mount Laurel jurisprudence has long emphasized and, in fact, catalyzed sound land-use planning in New Jersey. Twin principles central to smart growth -- development that accounts for regional considerations and a meaningful check on municipal discretion -- have long formed basic elements of the Mount Laurel doctrine and subsequently the State's planning framework.

In Southern Burlington County NAACP v. Township of Mount Laurel (, this Court underscored the challenges faced by the State's low-income and urban residents who struggled to find affordable housing accessible to employment opportunities as urban flight and suburban sprawl took hold. 67 N.J. 151, 172-73 [hereinafter Mount Laurel I], appeal dismissed, cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975). The Court placed the plight of these residents in the broader context of the

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[6] See, e.g., William H. Frey, Brookings Inst., Melting Pot Cities and Suburbs: Racial and Ethnic Change in Metro America in the 2000s, at 7-8, 11 (2011) available at http://www.brookings.edu/papers/2011/0504_census_ethnicity_frey.aspx# (analysis of 2010 Census showing that more than half of America's cities are now majority non-white and that minorities represent 35% of suburban residents nationally).

State's existing land-use structure that permitted local governments broad discretion to engage in parochial and frequently exclusionary land-use practices. Id. at 173. The decision underscored the necessity for regional planning in New Jersey by placing the constitutional fair share housing obligation in the context of regional housing need:

> We conclude that every [developing] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. . . . [W]hen regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served. . . . [T]he presumptive obligation arises . . . to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.
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> [Id. at 174, 177, 179.]

As Professor John Payne has pointed out, the Court was limited at that time by the existing framework of land use statutes, but made clear that "land use planning, to be of any value, must be done on a much broader basis than each municipality separately." John M. Payne, General Welfare and Regional Planning: How The Law of Unintended Consequences and the Mount Laurel Doctrine Gave New Jersey a Modern State Plan, 73 St. John's L. Rev. 1103, 1105-06 (1999) (quoting Mount Laurel I, 67 N.J. at 189 n.22).

In Mount Laurel II, as the Court strengthened the doctrine to address the failures of the intervening eight years, it emphasized the importance of state planning as a key mechanism to address how affordable housing development could be tied into

a regional framework. Characterizing an early iteration of the State Plan as "a statewide blueprint for future development," the Court stated that "[i]ts remedial use in Mount Laurel disputes will ensure that the imposition of fair share obligations will coincide with the State's regional planning goals and objectives." Mount Laurel II, 92 N.J. at 225.[7]

In response to these decisions, the Legislature enacted two significant statutes in the same session: the Fair Housing Act ("FHA"), N.J.S.A. 52:27D-301 to -329.19, and the State Planning Act ("SPA"), N.J.S.A. 52:18A-196 to -207. In doing so, the Legislature acknowledged and accepted key precepts emphasized by this Court concerning the necessity of a regional approach to affordable housing and the importance of incorporating affordable housing development into broader sound planning policies. In the FHA's legislative findings, for example, the Legislature declared:

> [T]he 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.
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> [N.J.S.A. 52:27D-303.]

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[7] As Mount Laurel expert David Kinsey has observed: "Mount Laurel II was a pro-planning, pro-environment, pro-affordable housing decision, all important elements of any credible definition of smart growth." David N. Kinsey, Smart Growth, Housing Needs, and the Future of the Mount Laurel Doctrine, in Mount Laurel II at 25: The Unfinished Agenda of Fair Share Housing 45-46 (Timothy Castano & Dale Sattin, eds., 2008).

Similarly, in the SPA's legislative findings, the Legislature stated: "An adequate response to judicial mandates respecting housing for low- and moderate-income persons requires sound planning to prevent sprawl and to promote suitable use of land." N.J.S.A. 52:18A-196h. When this Court subsequently reviewed the FHA and found it to be constitutional, it emphasized that the combined statutes would help to ensure that "the location and extent of lower income housing will depend on sound, comprehensive statewide planning . . . ." Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1, 21 (1986).

As the relevant state agencies began to develop their respective regulations to implement these statutes, each took steps at least initially to connect the frameworks for affordable housing and state planning. For example, as COAH developed its initial regulations governing affordable housing and the State Planning Commission ("SPC") developed and adopted the State Plan after a multi-year consultation process, the two agencies entered into a Memorandum of Understanding under which COAH agreed to use the map in the State Plan to allocate housing need and advance the preference for development in "centers." State Planning Commission Memorandum of Understanding and Flow Charts, N.J.A.C. 5:93 App. F. When the SPC adopted a revised State Plan in 2001, it declared that New Jersey has "a moral and legal obligation to provide all its citizens with the opportunity to meet their housing needs at prices they can afford." N.J. State Planning Comm'n, New Jersey State Development and Redevelopment Plan at 85 (2001). It also provided twenty-eight detailed housing policies

that "exemplif[ied] standard housing planning theory and best practices." See Kinsey, supra, at 45, 50-51.

Over the past decade, the State has taken an array of other statutory, regulatory, and policy steps related to "smart growth" ranging from executive orders, amendments to the Redevelopment Law, and efforts to align investments in "smart growth areas." See id. at 51. During this same period, but at cross-purposes, COAH has failed to promulgate valid Third Round Rules and thus has left the State with no mechanism to address affordable housing obligations.

C. The Development of Affordable Housing, Consistent with Sound Planning Principles, Remains Especially Important in New Jersey Today.

For reasons long noted by this Court and by planning and development experts, the link between affordable housing and smart growth is of particular importance to a high cost, heavily built-out state like New Jersey. It will become even more so.

New Jersey is the most developed state in the nation, and New Jersey's land development has outpaced its population growth at a higher rate during the last two decades than at any other period in the State's history. John Hasse & Richard Lathrop, Changing Landscapes in the Garden State 5 (2010), available at http://gis.rowan.edu/projects/luc/changinglandscapes2010.pdf. The challenges of balancing competing land-use interests continue to intensify. Along one spectrum, existing developable land is becoming more urban, as noted in recent studies which show that between 2002 and 2007 the rate at which

land in New Jersey became urbanized increased four times as rapidly as the population grew. Ibid. Along another, the State continues to take admirable and important steps to preserve open space. See Stuart Meck, New Jersey, in Gregory K. Ingram, et al., Smart Growth Policies: An Evaluation of Programs and Outcomes 184-85 (2009), available at http://www.lincolninst.edu/pubs/smart-growth-policies.aspx [hereinafter Smart Growth Policies]. All told, the amount of the State's developable land is now estimated to be less than one million acres, and "build-out" in the State is expected to occur around the middle of the century.[8] See Hasse & Lathrop, supra, at 20, 22.

In part because of the scarcity of developable land, New Jersey remains one of the most expensive states of the nation in which to live, even accounting for its high median income. Bruce Katz & Robert Puentes, Brookings Inst., Why Housing and Land use Matter for New Jersey's Toughest Challenges 6 (2006), available at http://www.brookings.edu/~/media/Files/rc/speeches/2006/0502metropolitanpolicy_katz/20060502_NewBrunswick.pdf (ranking New Jersey 5th most expensive based on housing price/income ratio). The cost of housing is so high that over one-fifth of all households spend more than 35% of their income on housing -- the third highest percentage in the country. Id. Calculated in another manner, a family must earn an hourly wage

[8] While the approach of total build-out has important implications to the State's effort to provide affordable housing for all residents, redevelopment and rehabilitation of existing structures also play a vital and increasingly significant role in the implementation of the Mount Laurel doctrine.

of $24.54 to be able to afford the rent and utilities for a median-priced home as determined by the federal government -- the fourth highest rate in the country. Hous. & Community Dev. Network of N.J., Out of Reach 1 (2011). This so-called "Housing Wage" has increased 56% since 2000. Ibid.

At the same time, the State's development continues to be marked by economic growth in areas that historically have little affordable housing and few low-income households. According to New Jersey Future, twenty-one municipalities in the New Jersey have 50% of the State's affordable housing even though these localities account for just 20% of the State's population. N.J. Future analysis of N.J. Dep't of Community Affairs, Guide to Affordable Housing in New Jersey (2010), at http://www.state.nj.us/dca/divisions/codes/publications/developments.html. Most municipalities hosting large numbers of jobs do not have accompanying supplies of affordable housing, and those that do tend to be losing jobs. Tim Evans, N.J. Future, Realistic Opportunity: The Distribution of Affordable Housing and Jobs in New Jersey 1 (2003), available at http://209.197.108.165/wp-content/uploads/2011/06/Housing-and-Jobs-07-03.pdf. Moreover, as many of New Jersey's job centers of the past decline in importance, the newer job centers are more dispersed and less accessible by public transportation. Tim Evans, N.J. Future, Getting to Work: Reconnecting Jobs with Transit 3 (2008), available at http://www.njfuture.org/research-publications/research-reports/getting-to-work-reconnecting-jobs-with-transit/. As a result, according to data through 2007, New Jersey's 30-

minute average work commute is the third longest in the United States and has experienced the fourth largest increase from 1990-2007. N.J. Future analysis of Census Bureau, 2005-2007 American Community Survey 3-Year Estimates, at http://factfinder.census.gov/servlet/ADPGeoSearchByListServlet?ds_name=ACS_2007_3YR_G00_&_lang=en.

Among the central reasons for this enduring mismatch between the location of affordable housing and employment has been the ongoing challenge created by the multiplicity of local governments with land-use responsibilities as reinforced by the State's tax structure. New Jersey has more municipalities and school districts per square mile than any other State in the country. N.J. Future analysis of Census Bureau, 2002 Census of Governments, Local Governments and Public School Systems by Type and State: 2002, at http://www.census.gov/govs/www/gid2002.html. Similarly, the State continues to rely on the property tax as the primary means of funding local government.[9] Taken together, what this Court noted decades ago remains true today: there are significant and ever increasing fiscal incentives to zone in a fashion that excludes affordable units and, by extension, lower-income families.[10]

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[9] See N.J. League of Municipalities, Local Property Taxes and N.J. State Government 1 (2011), available at http://www.njslom.org/SG-Property_Taxes.html (property taxes in New Jersey account for about 98% of all locally collected revenues compared to the national average of 72%); see also Mount Laurel I, 67 N.J. at 171 (recognizing that "most of the cost of municipal and county government and of the primary and secondary education of the municipality's children" is borne by local real estate tax).

[10] In this regard, the observations of this Court in Mount Laurel

D. The Creation of Affordable Housing in New Jersey Under Mount Laurel Has Been Substantial and Led to the State's National Recognition.

Especially given these and other challenges that inhibit affordable housing development in New Jersey, the State's track record under the Mount Laurel doctrine has been notable. Between 1980 and 2000, more than 60,000 affordable housing units were developed in New Jersey, including 28,855 new units built, 13,231 additional units approved or made possible by zoning, 7,396 units transferred through regional contribution agreements, and 11,249 units rehabilitated. See Stuart Meck et al., APA, Regional Approaches to Affordable Housing 39 (2003) (citing COAH, COAH Options: COAH's 2001 Annual Report (2001)).[11] Moreover,

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I continue to be relevant today. Compare 67 N.J. at 171 ("[T]he fewer the school children, the lower the tax rate. . . . Large families who cannot afford to buy . . . are definitely not wanted, so we find drastic bedroom restrictions for, or complete prohibition of, multi-family or other feasible housing."), with Tim Evans, N.J. Future, Chasing Their Tails: Municipal "Ratables Chase" Doesn't Necessarily Pay 1 (2010), available at http://www.njfuture.org/wp-content/uploads/2011/06/Ratables-Chase-07-10.pdf ("Conventional wisdom among municipal leaders says that the key to keeping property tax rates down is to discourage residential development -- particularly housing likely to attract families with children -- while courting large non-residential projects like office parks, shopping malls, or hotels. This practice is commonly referred to as the 'ratables chase' . . . .").

[11] COAH has reported that approximately 24,000 additional affordable housing units have been built or planned for since 2000. See COAH, Proposed and Completed Affordable Units (2010), at http://www.state.nj.us/dca/affiliates/coah/reports/units.pdf. Much of this post-2000 development appears to be attributable to ongoing compliance with housing plans (both COAH-certified and court-approved) developed under the Second Round Rules. Such housing plans frequently extended well into the first decade of the 21st Century because many municipalities applied for and received substantive certification late in the period covered by these rules (1993 to 1999), as well as during the interim extension of these rule, see In re Six Month Extension, 372 N.J.

these units were not built exclusively in areas of the urban core as occurred in many areas of the country. This record of accomplishment compares favorably with other states that have undertaken significant anti-exclusionary zoning initiatives.[12]

Even more significantly, leading national studies make clear that New Jersey historically has been more successful than many other (and perhaps all) states in meshing a focus on affordable housing with a commitment to smart growth principles. According to a 2009 study published by the Lincoln Institute of Land Policy, one of the leading land-use research institutions, New Jersey was the only state of those evaluated to both foster smart growth and control housing costs. Stuart Meck & Timothy MacKinnon, Affordable Housing, in Smart Growth Policies, supra, at 76, 78. As part of a comprehensive study into the impact of state smart growth programs, the report evaluated four states that had instituted significant land-use controls (Florida, New Jersey, Maryland, and Oregon) and four that had not (Colorado, Indiana, Texas, and Virginia). Relying on data from 1989 and 1999, the authors concluded that "New Jersey provides an

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Super. 314 (App. Div. 2004), and development pursuant to these plans typically occurred over many years following plan approval.

[12] By way of example, under the Massachusetts Comprehensive Permit Law, approximately 26,000 residential units affordable to households below 80% of median income (and thus in the Mount Laurel range) were built between 1970-2006, less than half of what New Jersey produced in the shorter span between 1980-2000. See Kinsey, supra, at 57-58. Similarly, California has produced far fewer affordable units per capita than New Jersey, with most of California's new units targeted toward comparatively higher income residents. See id. at 58.

exception to the generally poor showing of the smart growth states [regarding housing affordability, including affordable housing creation]." Id. at 85. Significantly, among all eight states, including those without land-use controls intended to further smart growth, "New Jersey had the largest share of counties adding rental units over the decade" and "low increases in cost burden" for renters in the 1990s. Id. at 83.[13]

Thus, the Mount Laurel doctrine represents not just a significant aspirational framework, but one with great practical consequence as well. Not only has it influenced land-use practice within New Jersey, it has sparked significant national attention, as reflected in the American Planning Association's designation of Mount Laurel I as a National Planning Landmark. While the APA has designated multiple planning enterprises and innovative developments as Landmarks, it has so designated only two court cases: Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), a United States Supreme Court case upholding the basic tenets of zoning, and Mount Laurel I.

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[13] The study drew national lessons from New Jersey's experience as the only state undertaking seriously both smart growth implementation and affordable housing development. It observed: "In summary, New Jersey was the only smart growth state to add significantly to its rental and multifamily stocks and to post limited increases in the share of cost-burdened households." Meck & MacKinnon, supra, at 79. Based on this experience, the study concluded that "if smart growth programs are to have a positive impact on housing affordability or avert the negative impact from constraints on the land market, they must explicitly require the production of housing for low- and moderate-income households, rather than merely plan for it or ignore it completely." Id. at 86.

The impact on other jurisdictions is equally significant, with many states taking steps in the aftermath of Mount Laurel to address the ways that local zoning can undermine regional needs and the broader general welfare. Under California land-use law, for example, regional councils of government in concert with the State make regional allocations of housing need that municipalities are required to include in a housing element that is part of their comprehensive plans. See Cal. Gov't Code §§ 65580 to 65589. In New Hampshire, the State Supreme Court held that the zoning enabling act required municipalities to take into account regional as well as local affordable housing needs, Britton v. Town of Chester, 595 A.2d 492 (N.H. 1991), and the Legislature responded by enacting a law requiring municipalities that enacted land use ordinances to provide "reasonable and realistic opportunities for the development of workforce housing," N.H. Rev. Stat. Ann. § 674:59.[14]

[14] Likewise, in Oregon, the Land Conservation and Development Commission has used Mount Laurel explicitly to define the meaning of fair share housing obligations under Oregon law. Robert L. Liberty, Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates, 30 B.C. Envtl. Aff. L. Rev. 581, 592 (2003).

E. Over the Past Twelve Years, COAH's Failure To Adopt Valid Rules Has Allowed Significant Development To Occur Without Furthering Smart Growth Principles Related to the Inclusion of Affordable Housing.

It is against this backdrop that the more than decade-long failure of COAH to issue valid Third Round Rules has occurred. As this Court has noted, "any land that is developed for any purpose reduces the supply of land capable of being used to build affordable housing[, and] unrestrained nonresidential development can itself deepen the shortage of affordable housing." Fair Share Hous. Ctr., Inc. v. Twp. of Cherry Hill, 173 N.J. 393, 409, 410 (2002) (quoting Holmdel Builders Assoc. v. Twp. of Holmdel, 121 N.J. 550, 565-66, 572 (1990) (emphasis omitted)). And during this "lost decade," significant development has occurred. From 2000-2009, certificates of occupancy were issued in New Jersey accounting for 253,575 dwelling units, 76 million square feet of office space, and 40 million square feet of retail. See N.J. Dep't of Community Affairs, New Jersey Construction Reports, available at http://www.state.nj.us/dca/divisions/codes/reporter/co.html. Even in the first three quarters of 2010, with the real estate market depressed and the overall economy struggling, nearly 9,000 building permits were issued, more than 8,000 units were completed, and more than four million square feet of office or retail space was built. Id.

In the face of this growth, COAH's failure to promulgate valid rules amounts to a de facto moratorium on

affordable housing obligations because many municipalities have continued to petition COAH for substantive certification and thereby received immunity from potential builder's remedy lawsuits.[15] All told, more than 300 municipalities have obtained such protection without a concomitant obligation to produce affordable housing. COAH, COAH Third Round N.J.A.C. 5:96 and 97 Status, available at www.state.nj.us/dca/affiliates/coah/reports/newthirdround.xls (spreadsheet indicating municipalities participating in Third Round that have petitioned for certification).

A recent study by the New Jersey Department of Transportation ("NJDOT"), evaluating development in the Route 1 corridor in central New Jersey, makes clear the consequences of development that proceeds with little or no attention to affordable housing. See NJDOT, Route 1 Regional Growth Strategy Final Report (2010), available at http://policy.rutgers.edu/vtc/rgs/Final%20Report%20Sept%2021%202010.pdf [hereinafter Route 1 Report]. The report illustrates that the failure to zone for homes affordable at all income levels over the past decade has already had negative consequences for key regions of the State. Examining the economically active area comprising fifteen towns between New Brunswick and Trenton, the report assessed the

[15] Municipalities that have filed plans with COAH and petitioned for substantive certification, regardless of whether COAH has granted their request or whether the rules under which COAH operated were valid, are immune from exclusionary zoning litigation by virtue of the FHA's exhaustion requirement. See N.J.S.A. 52:27D-316b.

existing zoning, transportation, and economic trends and found that "[i]ncreasing development and congestion in the corridor are threatening prospects for future economic development and sustained quality of life." Id. at 6. Local zoning prioritized commercial uses and constrained housing opportunities. Under the existing land-use trajectory, the area would provide almost four times as many jobs as residences, and most of the housing options would not be affordable. Id. at 22 (only 7% of the area was zoned for residential development of six units or more per acre, a density typically necessary for multi-family housing or expansion of transit systems).

Through an extensive outreach effort, NJDOT proposed an alternative to reduce the jobs-to-housing disparity, concentrate development in select centers, and improve transit access. Id. at 43. A key ingredient in the proposal was the generation of "a greater diversity of housing unit types including a higher proportion of multi-family units, smaller units, and less expensive units" which "would improve affordability for all income levels and provide greater housing opportunities for persons who work in the region." Ibid. To accomplish this goal, the report noted, municipalities must undertake "to revise their planning documents, particularly their master plan and zoning ordinance," and all stakeholders must "strive to attain coordinated and consistent decision-making in support of regional planning efforts." Id. at 45. In short, the Route 1 Report illustrates that the failure to plan for a diversity of housing has already harmed the area, and shows how a growing imbalance

between jobs and housing will have increasingly adverse environmental, economic, and equity consequences for the State.

In another recent study, leading land-use researchers at Rowan University performed a detailed analysis of what current zoning law allows in Monmouth and Somerset Counties, two of the State's fastest growing areas. John Hasse, John Reiser & Alexander Pichacz, Rowan Univ., 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), available at http://gis.rowan.edu/projects/exclusionary/exclusionary_zoning_final_draft_20110610.pdf. While planning literature suggests a preferred jobs-to-housing ratio of 1.5 to 1, Monmouth County's zoning permitted a jobs-to-housing ratio of almost 7:1, and Somerset County's was over 16:1. Id. at 19, 21. Thus, the report concluded that existing zoning in these economically growing areas of the State promoted commercial but restricted residential development. Further, to the extent that areas of high-density zoning existed in each county, the researchers found that they were often created to fulfill Mount Laurel requirements. Id. at 18, 21. Thus, the report concluded that the zoning patterns in both counties were effectively exclusionary and that, without outside intervention, "[r]esidential land use patterns are unlikely to change, especially in suburban areas, for decades." Id. at 23.[16]

[16] The conclusion that municipalities in New Jersey continue to engage in exclusionary zoning practices is bolstered by other

Ultimately, the challenge of smart development that appropriately incorporates affordable housing requires sustained and direct action. Smart growth is not possible without the creation and rehabilitation of housing that is affordable to low, middle, and high income families. As noted by Amicus New Jersey Future:

> [O]ur affordable-housing process must ensure that . . . places contain a healthy mix of housing that is affordable to both high and low-income households. The affordable-housing system cannot solve our land-use problems, and likewise our land-use system cannot solve our affordable-housing problems, but they must work together to place a mix of housing in appropriate places.
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> [N.J. Future, Memo to New Jersey Housing Opportunity Task Force 2 (Mar. 5, 2010).]

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national and noted researchers. See Rolf Pendall, From Traditional to Reformed: A Review of the Land Use Regulations in the Nation's 50 Largest Metropolitan Areas 13 (2006); Allan Mallach, Challenging the New Geography of Exclusion: The Mount Laurel Doctrine and the Changing Climate of Growth and Redevelopment in New Jersey, in Mount Laurel II at 25 at 32 ("[E]xclusionary zoning may be more widespread today in New Jersey's suburbs than it was prior to the Mount Laurel decision.").

ARGUMENT

POINT I

THE THIRD ROUND RULES' GROWTH SHARE METHODOLOGY IS UNCONSTITUTIONAL BECAUSE IT FAILS TO HOLD MUNICIPALITIES TO THEIR REGIONAL OBLIGATION TO PROVIDE A REALISTIC OPPORTUNITY FOR AFFORDABLE HOUSING.

From its earliest to its most recent iteration, the Mount Laurel doctrine has rested on two pillars: a meaningful check on municipal discretion and a requirement that municipalities create real opportunities to meet the regional (as opposed to the merely local) need for affordable housing. A system that fails to uphold either of these pillars violates the general welfare clause of the New Jersey Constitution and cannot stand. The "growth share" methodology in the current Third Round Rules, like its predecessor in the earlier version of these Rules, gives municipalities license to ignore their constitutional obligations and fails to take regional need into account. This Court should therefore affirm the Appellate Division in striking down COAH's growth share methodology.

A. COAH's Growth Share Methodology Is Invalid Because It Fails To Hold Municipalities to Their Affordable Housing Obligation.

The constitutional duty to provide a fair share of regional housing need is not discretionary. It is not optional; it does not depend on municipal self-interest. Yet, COAH's growth share methodology subordinates the constitutional obligation to the policy choices of individual municipalities.

Under growth share, if a municipality adopts a policy of non-growth, it does not have to meet its constitutional obligation to provide its fair share of the region's prospective affordable housing need. Accordingly, COAH's growth share methodology conflicts with the Mount Laurel doctrine.

In Mount Laurel I, this Court analyzed at length how municipal discretion led to unconstitutional exclusionary zoning. As noted above, the Court found that the root of the problem was "New Jersey's tax structure, which has imposed on local real estate most of the cost of municipal and county government and of the primary and secondary education of the municipality's children." 67 N.J. at 171. This led municipalities to adopt zoning ordinances tailored to attract industrial and commercial ratables and to "keep out those people or entities not adding favorably to the tax base." Ibid. In addition, competition for tax revenue precluded "intermunicipal or area planning or land use regulation" and made it impossible for the "lower paid employees of industries [that the municipalities] have eagerly sought . . . to live in the community where they work." Id. at 171-72. In this way, sound planning fell prey to the same tax chase that made affordable housing so critically scarce.

The constitutional obligation was thus intended from the start to serve as a counterweight to the prevailing forces that drove municipalities toward exclusionary zoning policies. The Court emphasized that, tempting as it might be, "no municipality may exclude or limit categories of housing" as a means to lift the "heavy burden of local taxes." Id. at 186.

In Mount Laurel II, the Court signaled its mounting determination to end exclusionary zoning and injected some "steel" into the doctrine. 92 N.J. at 200. Expressing frustration that, years after its original decision, "widespread non-compliance" persisted, the Court announced, "To the best of our ability, we shall not allow it to continue." Id. at 198-99. In the service of ensuring compliance, the Court took additional steps to curb municipal discretion. One such step was its wholesale adoption of the then-current State Development Guide Plan ("SDGP") to help determine municipal obligations. Having previously imposed affordable housing obligations only on "developing municipalities," the Court in Mount Laurel II turned instead to considering whether a municipality was slated for growth in the SDGP. Id. at 215. The Court noted that its reliance on the SDGP would decrease local "political pressures . . . to take the position . . . that the constitutional remedy or obligation does not apply." Id. at 224. In other words, municipalities could no longer resort to the argument that they did not qualify as "developing" to avoid a constitutional obligation.[17]

In the same vein, the Mount Laurel II Court eschewed a "'[n]umberless' resolution of the issue based upon a conclusion

[17] The Court also described in detail other advantages of linking the obligation to the SDGP, including that affordable housing "would be built where it should be built," id. at 225, with due regard for planning principles such as the preservation of open space and environmentally sensitive areas, the maximization of infrastructure and transportation through compact development, and the placement of homes near jobs and schools, id. at 223-48.

that the ordinance provides a realistic opportunity for some low and moderate income housings." Id. at 216. The Court candidly admitted that it had "underestimated the pressures that weigh against lower income housing," id. at 251, and corrected course by insisting on "a precise region, a precise regional present and prospective need, and a precise determination of present and prospective need that the municipality is obliged to design its ordinance to meet," id. at 257. The Court demanded such precision, "not because we think scientific accuracy is possible, but because we believe the requirement is most likely to achieve the goals of Mount Laurel." Ibid. In particular, hard numbers would prevent municipalities from relying on their history of exclusionary zoning to project minimal growth, thereby evading a real prospective constitutional obligation "by basing [their] fair share of the lower income housing need on that small projected population growth." Id. at 258.

In the decades since Mount Laurel II, both this Court and the Appellate Division have continued to insist on checks on municipal discretion, in the frank recognition that "absent adequate enforcement, the Mount Laurel doctrine can deliver little more than a vague and hollow promise that a reasonable opportunity for the development of affordable housing will be provided." Toll Bros., 173 N.J. at 567; see also In re N.J.A.C. 5:94, 390 N.J. Super. at 55 ("[M]unicipalities will adopt land use regulations to minimize affordable housing obligations if permitted to do so.").

Despite this judicial drumbeat requiring that each municipality actually "do something" to "make it realistically possible for lower income housing to be built," Mount Laurel II, 92 N.J. at 261, COAH has frustrated enforcement of the obligation for going-on twelve years, first by stalling and then by issuing two sets of invalid Third Round Rules. The Appellate Division has twice identified the core problem with COAH's growth share methodology: it fails to place any effective "check on municipal discretion." In re N.J.A.C. 5:94, 390 N.J. Super. at 56; see also In re N.J.A.C. 5:96, 416 N.J. Super. at 483 ("[W]e conclude that the growth share methodology . . . 'permit[s] municipalities with substantial amounts of vacant developable land and access to job opportunities in nearby municipalities to adopt master plans and zoning ordinances that allow for little growth, and thereby a small fair share obligation.'" (citation omitted)). As COAH itself described the methodology in its brief in support of certification, "if a municipality does grow, it will have an affordable housing obligation." (COAH Br. at 15.) While an "obligation" thus imposed may be "objective," as COAH argues (id. at 17), it is nonetheless avoidable. Because municipalities as a general matter cannot be compelled to expand, they retain under COAH's growth share methodology the discretion whether to shoulder any affordable housing obligation.

The consequences of such surrender to municipal discretion will be to entrench exclusionary land use patterns, as the Rowan University study discussed above has confirmed. Hasse, Reiser & Pichacz, supra, at 18, 20. Take, for example, Monmouth

County. As of today, 84% of the remaining land zoned for residential use is designated as "rural," permitting less than one unit per acre. Id. at 18. In contrast, just 2.7% of the remaining residential land allows high-density development at five units per acre (which would be needed for multi-family affordable housing). Ibid. If Monmouth County municipalities can maintain or institute land-use regulations that discourage growth, and thereby avoid any prospective affordable housing obligations, there will be no affordable units constructed even on the scarce land now zoned for high-density residential use. Under such a growth share approach, exclusionary patterns like those identified in the Rowan University study might never change.

Now, just as in 1975, a municipality's parochial land-use decisions will not produce a realistic opportunity for low- and moderate-income families to settle there. The entire line of Mount Laurel decisions is arrayed against the notion that the constitutional obligation can be satisfied through voluntary municipal action. Just as this Court required precise targets so that municipalities could not rely on past exclusionary zoning to project small future growth and avoid a prospective obligation, Mount Laurel II, 92 N.J. at 257-58, so too a municipality may not adopt policies to control future growth and thereby constrict its obligation. The Appellate Division was therefore correct to conclude that the methodology is invalid for the same reasons as was the earlier iteration. In re N.J.A.C. 5:96, 416 N.J. Super. at 483.

B. COAH's Growth Share Methodology Is Invalid Because It Does Not Take Account of Regional Need.

One important reason for the check on municipal discretion is to ensure consideration of the housing needs of low- and moderate-income families in the region as a whole. The Mount Laurel doctrine rests on the "fundamental" observation that "the zoning power is a police power of the state, and the local authority is acting only as a delegate of that power." Mount Laurel I, 67 N.J. at 177. In wielding the delegated power of the State, the municipalities are bound to recognize and serve "the welfare of the State's citizens beyond the borders of the particular municipality." Ibid. Because the need for affordable housing "is so important and of such broad public interest," the local government "cannot be parochially confined to the claimed good of the particular municipality." Id. at 179-80; see also Mount Laurel II, 92 N.J. at 237 ("[T]he zoning power that the State exercised through its municipalities would have constitutional validity only if regional housing needs were addressed by the actions of the municipalities in the aggregate."). Responsiveness to regional need is thus an essential element of the constitutional obligation. Yet, COAH's growth share methodology ignores regional considerations in favor of purely local municipal interests.

Under the Third Round Rules, the obligation to provide for prospective need is triggered solely by the individual municipal decision to grow. This decision is intra-municipal; it fails to consider regional needs and interests. See Mount

Laurel II, 92 N.J. at 258 (stating that municipal growth projections are "based on many factors, but in no case that we know of do they include a value judgment that such municipality should bear its fair share of the region's lower income housing need"). A prospective obligation that derives exclusively from actual municipal growth thus fails to ensure that a municipality will assume its "fair share of the present and prospective regional need" for affordable housing. Id. at 174, 188 (emphasis added).

Contrary to COAH's assertion in its brief (COAH Br. at 11-12, 15), Mount Laurel II's rejection of a pure intra-municipal growth share methodology reflected the requirements of the constitutional obligation and was not a simple judicial preference for a particular remedy. In addressing how regional need could be apportioned, the Mount Laurel II Court rejected a different but still purely intra-municipal growth share approach. Id. at 257-58. There, the Court noted that prospective need could be calculated as a proportion of the projected growth of the individual municipality -- a "growth share" approach that would result in a specific number. Ibid. The Court rejected this approach in favor of regional growth projections, however, because pure intra-municipal growth did not take into account regional need. Ibid. Mount Laurel II's rejection of pure intra-municipal growth share is not a remedial preference but a reflection that any purely intra-municipal system for satisfying regional need is incompatible with the constitutional obligation.

In In re Warren, this Court again made explicit that a municipality cannot satisfy its constitutional obligation "without addressing the housing needs of low- and moderate-income [(sic)] families within the region who might wish to reside there." 132 N.J. at 10-11. In re Warren was a challenge to one of COAH's First Round Rules, granting an occupancy preference that reserved 50% of the municipality's regional fair share for households that lived or worked in the municipality. Id. at 5. The Court squarely rejected this preference as incompatible with the Mount Laurel doctrine. Id. at 35. Stressing that the obligation consisted of "the municipality's fair share of the region's need," the Court held that the occupancy preference impermissibly excluded from a municipality's affordable housing stock "members of the class for whose benefit the obligation to construct that housing was established," i.e., lower-income families in the region who neither worked nor already lived in the municipality. Ibid. Likewise, COAH's purely intra-municipal growth share methodology -- which generates a prospective affordable housing obligation only if a municipality decides, for its own reasons, to grow -- is irreconcilable with the constitutional obligation to provide for regional affordable housing need.

Again, this constitutional flaw has untenable consequences for New Jersey. The most serious result is that the regional need will continue to go unmet, trapping lower-income families in areas of substandard housing and concentrated poverty. See In re N.J.A.C. 5:94, 390 N.J. Super. at 49-55

(invalidating COAH's first version of growth share methodology in part because of unlikelihood that disaggregated municipal decisions about growth would result in fulfillment of overall need COAH had calculated). In addition, the lack of any meaningful regional obligation impedes sound planning. The State's own Department of Transportation found that the Route 1 corridor, between New Brunswick and Trenton, has growing disparities between jobs and housing, leading to "longer commute distances and times, lost productivity, and increased emissions, among other impacts." Route 1 Report, supra, at 27. The prevalence of low-density residential development keeps lower-income employees from moving into the region where they work and makes alternative transit options infeasible. Ibid. It is simply not possible to solve such regional problems without regional solutions, including the fair distribution of affordable housing throughout the area. See AMG Realty Co. v. Twp. of Warren, 207 N.J. Super. 388, 433 (Law Div. 1984) ("A major goal of Mount Laurel is to enable people to live in decent housing near their place of employment.").

This Court spent years exhorting the other branches of government to join it in ensuring that all of New Jersey's residents could find a decent place to live. E.g., Mount Laurel II, 92 N.J. at 212 ("[W]e have always preferred legislative to judicial action in this field."). At the same time, the Court has made clear that it will fill any void left by the other branches. E.g., id. at 213 ("In the absence of adequate legislative and executive help, we must give meaning to the

constitutional doctrine . . . ."). COAH's growth share methodology does not implement the constitutional obligation, but undermines it. Once again, therefore, this Court is called upon to enforce "constitutional rights [that] cannot await a supporting political consensus." Id. at 212.

POINT II

THE THIRD ROUND RULES' GROWTH SHARE METHODOLOGY ALSO VIOLATES THE LEGISLATIVE MANDATE OF THE FHA TO HOLD MUNICIPALITIES TO THEIR REGIONAL OBLIGATION TO PROVIDE FOR AFFORDABLE HOUSING IN A MANNER CONSISTENT WITH SOUND PLANNING PRINCIPLES.

COAH's growth share methodology also violates the legislative mandate of the FHA, which parallels and, in some respects, refines the constitutional duty of municipalities to provide their fair share of affordable housing based upon regional need, rather than the vagaries of individual municipal decision-making.

The Legislature enacted the FHA expressly to "satisf[y] the constitutional obligation" and to do so "in accordance with regional considerations and sound planning concepts." Id. 52:27D-303. The FHA requires that COAH satisfy the constitutional obligation by determining statewide and regional housing need and then allocating that need to the municipalities based on sound planning concepts. N.J.S.A. 52:27D-302, -307. As this Court has found,

> The clear and recurring theme of the Fair Housing Act is its recognition and implementation of the requirement that

> municipalities must provide through their zoning ordinance a realistic opportunity to satisfy their fair share of their region's present and prospective need for low- and moderate-income housing.
>
> [In re Warren, 132 N.J. at 12 (citing N.J.S.A. 52:27D-302a, d, e; -311a, 314a, b).]

The FHA explicitly states that "[i]t shall be the duty of the council" to "[e]stimate the present and prospective need for low and moderate income housing at the State and regional levels." N.J.S.A. 52:27D-307b. The FHA then requires that COAH restrict municipal discretion by generating the rules and guidelines that will hold each municipality to its regional obligation through an allocation of that need. Id. 52:27D-307c. Finally, the Legislature directed that, consistent with both the judicial and legislative policy of this State, COAH allocate regional need in accordance with sound planning principles and specifically consider the State Plan. Id. 52:27D-303, -307.

The growth share rules violate this legislative mandate for the same reasons that COAH's version of growth share is unconstitutional. Under the Third Round Rules, COAH has ostensibly determined regional and statewide need but has not in any meaningful way allocated that need in a manner that restricts municipal discretion. As the Appellate Division concluded and COAH confirms, the agency intends to permit municipalities to decide when and if they incur any obligation. In re N.J.A.C. 5:96, 416 N.J. Super. at 481-83 (citing N.J.A.C. 5:97, App. A; N.J.A.C. 5:96-10.1(a); N.J.A.C. 5:96-15.1; 40 N.J.R. 5965(a), 5994 (Oct. 20, 2008)); COAH Br. at 15, 17. Thus, growth share

violates the legislative mandate of the FHA to hold municipalities to their regional obligations.

Growth share also undermines the sound planning mandate by allowing development that is inconsistent with the distribution of suitable vacant land, transportation, and infrastructure. The FHA requires that COAH allocate regional need in accordance with sound planning principles and specifically with consideration for implementation of the State Plan. N.J.S.A. 52:27D-303, -307. As noted above, the FHA, SPA, the State Plan, and sound planning principles require that affordable housing be developed near jobs and schools, and in municipalities that have suitable vacant land and sufficient infrastructure. Growth share is blind to these considerations, however. Under growth share, municipalities incur an affordable housing obligation in proportion to their growth, regardless of their suitability for affordable housing. A municipality with inadequate vacant land or infrastructure may grow, while a neighboring community with jobs, land, and infrastructure may successfully prevent growth. Thus, growth share fails to meet the statutory as well as the constitutional obligation: it will allow exclusionary zoning where it should be struck down and produce housing where it should not.

Perhaps for these and similar reasons, the Legislature has twice rejected growth share as a legislative policy. Contemporaneous with the Legislature's consideration of the FHA and SPA, a constitutional amendment was introduced that would have redefined the prospective Mount Laurel obligation to

accommodate only those lower income people who might in the future be employed in a given municipality. S24, 1984 Leg. Session (1a-3a). The amendment was rejected by the State Senate. David L. Kirp, et al., Our Town: Race, Housing, and the Soul of Suburbia 134-35 (1996). More recently, in 2010, the Legislature considered a bill that would have replaced COAH with a system based largely on residential growth share. S1/A3447, 2010 Leg. Session, available at http://www.njleg.state.nj.us (for access to complete legislative history, follow "Bills 2010-2011" hyperlink; then follow "Bill Number" hyperlink; input "S1" in search field; then follow "S1" hyperlink). Although the bill passed the Senate, the Assembly removed all growth share references at least in part because of constitutional concerns raised by the Office of Legislative Services ("OLS"), OLS, Legal Opinion on S1 (Apr. 13, 2010) (4a-12a), and the amended version was passed by both houses.[18]

Growth share surrenders regional considerations and sound planning to parochial municipal interests that dictate whether or not a municipality experiences growth. Such a result is inconsistent with the legislative mandate of the FHA, undermines the stated legislative policy of this State embodied in the FHA and the SPA, and introduces a methodology the

[18] Governor Christie conditionally vetoed the bill, however, and returned it to the Legislature to place residential growth share back into the legislation. Gov. Chris Christie, Conditional Veto of Senate Committee Substitute for Senate Bill No. 1, available at http://www.njleg.state.nj.us/2010/Bills/S0500/1_V2.PDF. The Senate declined to do so, and withdrew the bill from consideration.

Legislature has rejected. The "growth share" rules are therefore invalid as inconsistent with the legislative mandate.

POINT III

THE COURT SHOULD AFFIRM THE REMEDY ORDERED BY THE APPELLATE DIVISION.

A. COAH's Inexplicable Delay in Promulgating Valid Third Round Rules Has Created a Regulatory Vacuum That, If Unabated by an Expeditious Remedy, Will Inhibit the Construction of Affordable Housing in Much of New Jersey.

The remedy ordered by the Appellate Division is necessary because, as each day passes without valid and effective COAH rules, development continues to occur without meeting the affordable housing needs of lower-income families and individuals. A 2010 study concluded that New Jersey only has approximately one million acres left for development and that "near total build-out will likely be approached in New Jersey sometime within the middle of this century." Hasse & Lathrop, supra, at 22. This Court has already expressed concern in the context of existing areas where there are few tracts left that are suitable for development. Hills Dev. Co., 103 N.J. at 25. With the State racing towards build-out, further delay in promulgating valid Third Round Rules can defeat much of the promise of Mount Laurel.

In response to COAH's long delay, the Appellate Division adopted a swift and certain remedy, ordering the agency to adopt new rules that determine prospective need based upon a methodology similar to that used in the First and Second Rounds -

- a methodology that had already been "approved by the courts in most respects." In re N.J.A.C. 5:96, 416 N.J. Super. at 484. The court explained, "we are unwilling to allow COAH to further delay the discharge of its duty to adopt valid third round rules by undertaking to devise yet another methodology for allocating municipal obligations for the prospective need for affordable housing that relies upon a growth share approach." Id. at 485. The court's directive was wholly justified in light of the rapidly disappearing land and other resources available for the development of housing affordable to lower income families.[19]

B. The Court Should Affirm the Remedy Ordered by the Appellate Division Because COAH Has Repeatedly Failed To Promulgate Valid Third Round Rules and an Expeditious Remedy Is Needed.

The Appellate Division's remedy is appropriate because COAH has failed for more than a decade to fulfill its obligation to promulgate valid Third Round Rules. This Court and other courts faced with similar refusals by governmental entities to comply with their constitutional and statutory obligations, or with court orders mandating compliance, have applied more

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[19] To the extent that over a decade ago some of the Amici here suggested a generalized concept of growth share, they note that they, like this Court in Mount Laurel II, "underestimated the pressures that weigh against lower income housing." 92 N.J. at 251. With the passage of another decade, COAH has now failed twice to promulgate a constitutionally sufficient growth share methodology. During this time, extensive development has occurred and continues to occur without concomitant affordable housing obligations. Amici therefore reiterate the importance of an order from this Court that ensures the adoption of valid rules as quickly as possible. Given the dynamics associated with rule development, Amici believe this is best achieved by upholding the Appellate Division's remedy.

vigorous remedies that result in actual and expeditious compliance.

In its 2007 decision invalidating the first version of the Third Round Rules, the Appellate Division "declined to specify the procedure that COAH must use to cure the defects." In re N.J.A.C. 5:94, 390 N.J. Super. at 87. It deferred to COAH with the expectation that its order would be sufficient to induce compliance. However, the court explained that COAH needed to do its job and promulgate valid Third Round Rules in an expeditious manner:

> Time, however, is critical. The second round rules expired in 1999. The third round rules apply from 1999-2014, but the effectuation of these rules has been compressed to a ten-year period and three years have already elapsed. We, therefore, direct that the rule-making process required by this opinion must be completed in six months.
>
> [Id. at 88.]

Notwithstanding the Appellate Division's clear admonition that COAH expeditiously adopt valid Third Round Rules, COAH again failed to meet its obligation by, among other things, adopting a growth share methodology with "the same basic deficiencies as the original version." In re N.J.A.C. 5:96, 416 N.J. Super. at 483.

While deference by the judicial branch may have been warranted in 2007 when the Appellate Division remanded to COAH without specific instructions for calculating prospective need, the time for such deference has passed. COAH has failed to implement valid Third Round Rules from 1999 through 2011 and has persisted in this failure in the face of court orders mandating

compliance. COAH cannot continue to "run the clock" while opportunities for affordable housing disappear. An administrative agency may not simply flout its constitutional and statutory obligations by repeatedly failing to comply with court orders, with the only consequence being a remand to try again. See Oakwood v. Madison, 72 N.J. 481, 595 (1977) ("Obviously, if the municipality fails to submit an adequate remedial plan in a timely manner, or if having done so it fails to faithfully execute that plan, a court will be required to issue stronger remedial measures . . . ."). To permit such flagrant disregard of a court order to continue would not only undermine the constitutional and statutory scheme at issue, but would also undermine the integrity of the judicial branch. Mount Laurel II, 92 N.J. at 287 ("Judicial legitimacy may be at risk if we take action resembling traditional executive or legislative models; but it may be even more at risk through failure to take such action if that is the only way to enforce the Constitution.").

This Court has clearly stated that it will not permit such dilatory behavior by governmental entities and that it is prepared to apply vigorous remedies that result in actual and expeditious compliance. In Madison, this Court ordered the use of an enhanced remedy because, after the trial court struck down the town's prior ordinance, Madison Township failed to amend it consistent with the guidelines of the trial judge whose rationale "in both of his opinions in the case is substantially that adopted by this court in Mount Laurel." 72 N.J. at 494. The

Court refused to allow the township's failure to comply to further delay the production of affordable housing:

> Further the defendant [township] was correctly advised by the trial court as to its responsibilities in respect of regional housing needs in October 1971, over five years ago. It came forth with an amended ordinance which has been found to fall short of its obligation. Considerations bearing upon the public interest, justice to plaintiffs, and efficient judicial administration preclude another unsupervised effort by the defendant to produce a satisfactory ordinance. The focus of the judicial effort after six years of litigation must now be transferred from theorizing over zoning to assurance of the zoning opportunity for production of least cost housing.
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> [Id. at 552-53.]

Like the Appellate Division below both this Court and federal courts have ordered more extensive and specific remedies in cases where the vindication of constitutional rights was unreasonably delayed. See, e.g., Robinson v. Cahill, 69 N.J. 133, 146, 148-51 (1975) (stating that "[t]he need for immediate and affirmative judicial action at this juncture is apparent" and directing how funds allocated by Legislature were to be directed to local governments for the 1976-77 school year); see also United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 233-35, 89 S. Ct. 1670, 1674-76, 23 L. Ed. 2d 263 (1969) (affirming district court's decision to set a specific ratio of African-American to white teachers per school for purpose of effectuating desegregation following ten years of intransigence); Green v. County Sch. Bd., 391 U.S. 430, 437-38, 88 S. Ct. 1689,

1693-94, 20 L. Ed. 2d 716 (1968) (holding school board's promulgation of "freedom-of-choice plan" for integration inadequate because, after inexplicably delaying for more than ten years in adopting any plan for desegregation, board had chosen a plan "at this late date [that] fails to provide meaningful assurance of prompt and effective disestablishment of a dual system.").

These decisions rest on the familiar principle that the judicial branch is vested with the equitable power to fashion vigorous remedies to induce expeditious compliance with constitutional or statutory mandates, in particular when prior orders providing for more traditional forms of relief have failed. See Mount Laurel II, 92 N.J. at 287 (explaining that "history of Chancery" would "show that as obligations were recognized that could not be satisfied through such conventional remedies, the courts devised further remedies."); see also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 91 S. Ct. 1267, 1276, 28 L. Ed. 2d 554 (1971) ("If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable powers.").

Here, COAH's failure to timely promulgate Third Round Rules and its repeated failure to draft valid rules leaves little reason for this Court to believe that COAH would comply with

another generalized remand. As the Appellate Division explained in 2004:

> The impact of the delay [by COAH] is global, not just bearing upon one municipality and those involved in it . . . . [T]he actual facts are that no new obligations have been effected. For nearly the equivalent of one full round of Mount Laurel administration, no municipality has been held to updated standards reflecting its present and prospective fair share of the housing needs of its region. The public policies underlying the FHA and the Mount Laurel cases have, quite obviously, been frustrated by inaction.
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> [In re Six Month Extension, 372 N.J. Super. at 96.]

Surely, if the constitutional and statutory mandate concerning fair share housing obligations was undermined by COAH's nearly five-year delay in adopting Third Round Rules, now that almost twelve years have passed without valid rules, it is safe to say that COAH has completely undermined the Mount Laurel decisions and the FHA. Such conduct cannot be permitted to continue. This Court should affirm the remedy ordered by the Appellate Division.

C. The Remedy Ordered by the Appellate Division Is Restrained.

The Appellate Division's remedy is appropriate because it seeks to effectuate actual compliance with the Constitution and the FHA in a manner least invasive to an agency residing in another branch of government. Indeed, when the remedy is viewed in light of the panoply of remedies the court could have employed against an agency that fails to comply with a court order, the restraint is self-evident.

In Mount Laurel II, this Court set forth "remedies for non-compliance" that trial courts are permitted to employ after a municipality fails to comply with an order requiring revision of its zoning ordinance in a manner satisfying the town's Mount Laurel obligation. First, this Court authorized trial courts to order that non-complying municipalities adopt resolutions with particular amendments or provisions. See Mount Laurel II, 92 N.J. at 285. Second, it authorized trial courts to prevent municipalities from moving forward with development plans until satisfactory ordinances were passed or affordable housing. Ibid. Third, it authorized trial courts to void the zoning and land-use ordinances of non-compliant municipalities. Ibid. Fourth, it authorized trial courts to order "that particular applications to construct housing that includes lower income units be approved by the municipality, or any officer, board, agency, authority (independent or otherwise) or division thereof." Id. at 286. In sum, the Court authorized trial courts to issue remedial orders "with complete specificity." Ibid.

While Mount Laurel II addressed the scope of remedies available to trial courts when municipalities fail to comply with court orders mandating that they adopt valid ordinances, the concepts apply to COAH's recalcitrance as well. It is within the proper domain of a court to use an enhanced remedy for the purpose of inducing compliance by a governmental entity that has already demonstrated its unwillingness or inability to comply with a conventional court order.

When the Appellate Division's remedy is viewed in the context of the Mount Laurel II remedies, it is apparent that the court below judiciously exercised its remedial power and, in fact, could have employed even more vigorous remedies had it chosen to do so. The Appellate Division's remedy, that COAH adopt Third Round Rules using a methodology for calculating and allocating prospective need similar to that used in the First and Second Rounds, is akin to the mildest of the four remedies identified in Mount Laurel II -- "that the municipality adopt such resolutions and ordinances, including particular amendments to its zoning ordinance, and other land use regulations, as will enable it to meet its Mount Laurel obligations." Id. at 285. Indeed, the Appellate Division's remedy is even less cumbersome than this first remedy in Mount Laurel II, which authorized trial courts to require specific amendments to ordinances and land use laws. Id. at 286-87. Under that rationale, the Appellate Division might, for example, have employed a special master to draft Third Round Rules that include a valid methodology for calculating and allocating prospective need and then ordered COAH to adopt it. See, e.g., Madison, 72 N.J. at 553 (ordering Madison Township to adopt revised ordinance within 90 days, which was required to be submitted to trial court and was to include a minimum of seven criteria such as "modify[ing] the restrictions in [certain areas] which discourage the construction of apartments of more than two bedrooms"). Instead, the Appellate Division here gave COAH the contours for fulfilling the

obligation, but allowed it to update the methodology, and make the calculation and allocation.

Thus, the Appellate Division's remedy goes no further than necessary to resolve COAH's decade-long foot-dragging in promulgating valid Third Round Rules, while paying due respect to the agency's rule-making authority.

CONCLUSION

Insofar as set forth herein, Amici respectfully request that this Court affirm the decision of the Appellate Division.

Date: June 15, 2011

Respectfully submitted,

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APPENDIX

SENATE CONCURRENT RESOLUTION No. 24

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1984 SESSION

By Senators DORSEY, GAGLIANO, DiFRANCESCO, SAXTON, HURLEY, FORAN, HAGEDORN, CONNORS, BUBBA, CARDINALE, EWING, BASSANO, DUMONT, ZANE and GARIBALDI

A CONCURRENT RESOLUTION proposing to amend Article VIII of the Constitution of the State of New Jersey by adding a new Section VI.

BE IT RESOLVED *by the Senate of the State of New Jersey (the General Assembly concurring):*

1. The following proposed amendment to the Constitution of the State of New Jersey is agreed to:

PROPOSED AMENDMENT

Amend Article VIII by adding a new Section VI to read as follows:

SECTION VI

The right of a municipality to determine through its zoning and planning ordinances the extent of housing opportunities to be provided to meet the needs of persons of diverse financial means shall not be impaired by the Legislature, the Governor, or any court, except that each municipality shall provide through those ordinances opportunities for affordable housing for all persons residing in the municipality and for all persons who will be employed in the municipality in continuing positions reasonably anticipated to result from zoning or planning determinations made by the municipality on or after the adoption of this amendment.

2. When this proposed amendment to the Constitution is finally agreed to, pursuant to Article IX, paragraph 1 of the Constitution, it shall be submitted to the people at the next general election

Matter printed in italics thus is new matter.

occurring more than three months after the final agreement and be published at least once in at least one newspaper of each county designated by the President of the Senate and the Speaker of the General Assembly and the Secretary of State, not less than three months prior to the general election.

3. This proposed amendment to the Constitution shall be submitted to the people at the election in the following manner and form:

There shall be printed on each official ballot to be used at the general election, the following:

a. In every municipality in which voting machines are not used, the following legend shall immediately precede the question:

If you favor the proposition printed below make a cross (×), plus (+) or check (√) in the square opposite the word "Yes." If you are opposed thereto make a cross (×), plus (+) or check (√) in the square opposite the word "No."

12 b. In every municipality the following question:

	Yes.	MUNICIPAL RIGHT TO ZONE HOUSING OPPORTUNITIES Shall the amendment to the State Constitution, prohibiting the Legislature, the Governor, and the courts from impairing the right of a municipality to determine through its zoning and planning ordinances the extent of housing opportunities to be provided to meet the needs of persons of diverse financial means, and requiring each municipality to provide through those ordinances opportunities for affordable housing for all persons residing who will be employed in the municipality in continuing positions reasonably anticipated to result from zoning or planning determinations hereafter made by the municipality, be adopted?
	No.	INTERPRETIVE STATEMENT If this constitutional amendment is adopted, the Legislature, the Governor, and the courts will be prohibited from restricting the discretion of a municipality to determine through its zoning and planning ordinances the extent of housing opportunities to be provided to meet the needs of persons of diverse financial means, and each municipality will be required to provide through these ordinances opportunities for affordable housing for its own residents and for those persons who will be employed in the municipality in continuing positions reasonably anticipated to result from zoning or planning determinations hereafter made by the municipality.

STATEMENT

The purpose of this proposed constitutional amendment is expressed in the interpretive statement.

New Jersey State Legislature

OFFICE OF LEGISLATIVE SERVICES
STATE HOUSE ANNEX
PO BOX 068
TRENTON NJ 08625-0068

ALBERT PORRONI
Executive Director
(609) 292-4625

April 13, 2010

You have requested a legal opinion concerning whether certain provisions of Senate Bill No. 1 SCS (1R) ("S-1 SCS(1R)" or "the bill"), which would materially revise the "Fair Housing Act," N.J.S.A.52:27D-301 et al., violate the constitutional obligation to provide a realistic opportunity for housing affordable to low- and moderate-income families within the State's various housing regions. Specifically, you asked about provisions of the bill that would abolish the Council on Affordable Housing and would permit municipalities to satisfy their obligation to provide a realistic opportunity for the provision of affordable housing through the adoption of an "inclusionary zoning[1]" ordinance, without regard to the municipality's allocated regional need.

It is our opinion that the Legislature can abolish the Council on Affordable Housing. We believe, however, that the provisions in S-1 SCS(1R) providing for satisfaction of the affordable housing obligation through inclusionary zoning, without regard to regional affordable housing need, may be susceptible to a constitutional challenge on the basis that relying solely on inclusionary zoning ordinances may violate the constitutional requirement that the exercise of a municipality's land use regulations promotes the general welfare.

[1] "Inclusionary zoning" is a land use practice that encourages or requires real estate developers to set aside a percentage of the units in a market-rate residential development as housing that is affordable to households having low or moderate incomes. See, e.g., Lerman, "Mandatory Inclusionary Zoning - The Answer to the Affordable Housing Problem," 33 B.C. Envt'l Aff. L. Rev. 383, 385 (2006).

The Legislature may amend and repeal certain provisions of the "Fair Housing Act" and abolish the Council on Affordable Housing

The constitutional mandate to provide a reasonable opportunity for affordable housing, set forth in the Mount Laurel cases[2] and their progeny, raises a question about the constitutionality of abolishing the Council on Affordable Housing.

In Mount Laurel I, the New Jersey Supreme Court concluded that each developing municipality in New Jersey, through its zoning practices, must ". . .presumptively make realistically possible an appropriate variety and choice of housing" for low and moderate income people, ". . .at least to the extent of the municipality's fair share of the present and prospective regional need therefor." 67 N.J. at 174. Ten years after the trial court decision in Mount Laurel I, the New Jersey Supreme Court addressed ". . .widespread non-compliance with the constitutional mandate" with a decision intended to ". . .strengthen it, clarify it, and make it easier for public officials . . . to apply it." Mount Laurel II, 92 N.J. at 198-199. In 1985, the Legislature enacted the "Fair Housing Act,"[3] codifying the Mount Laurel doctrine[4] and providing an administrative enforcement mechanism. See N.J.S.A.52:27D-302. Prior to enactment of the "Fair Housing Act," the Mount Laurel constitutional obligation was enforced by judicial intervention in response to exclusionary zoning litigation. Hills Development Co. v. Twp. of Bernards, 103 N.J. 1, 41 (1986); see Mount Laurel II, 92 N.J. at 278-292. The "Fair Housing Act" established the Council on Affordable Housing as a body in, but not of, the Department of Community Affairs and charged it with numerous tasks, including determining the housing regions of the State and promulgating criteria to help municipalities determine their fair share of the affordable housing obligation within their housing region. N.J.S.A.52:27D-305 and 52:27D-307.

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[2] Southern Burlington County N.A.A.C.P. v. Twp. of Mount Laurel, 67 N.J. 151 (1975), cert. den., 423 U.S. 808 (1975) ("Mount Laurel I") and Southern Burlington County N.A.A.C.P. v. Twp. of Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II").

[3] P.L.1985, c.222.

[4] The Mount Laurel doctrine has been described by the Court as requiring ". . .that local zoning ordinances permit construction within each municipality of affordable-housing units sufficient to provide not only for any local need, but also for a municipality's fair share of the region's need," and as prohibiting zoning practices that exclude lower-income people from living within its confines because of the limited extent of their income and resources. In re Twp. of Warren, 132 N.J. 1,10,35 (1993).

Our review has not revealed anything in the New Jersey Constitution or case law preceding the "Fair Housing Act" that explicitly required the establishment of a State executive body or the enactment of specific legislation to ". . .make realistically possible an appropriate variety and choice of housing." Mount Laurel I, 67 N.J. at 174.[5] In Mount Laurel II, the Court stated that "[a]chievement of the constitutional goal, rather than the method of relief selected to achieve it, [is] the constitutional requirement." 92 N.J. at 237.

The New Jersey Constitution vests the legislative power in the General Assembly and Senate. N.J. Const. (1947) Article IV, Section I, par.1. The Article IV delegation of legislative authority to the General Assembly and Senate carries with it, by implication, the ordinary incidents of the legislative power. See 16 Am. Jur. 2d. Const. Law §68. The authority to repeal statutes and the power to amend or supplement legislation are ordinary incidents of the legislative power. 16A Am. Jur. 2d. Const Law §276. Since the Council on Affordable Housing was established by legislative enactment, it is a "creature of the Legislature" and so, in the absence of a constitutional directive, the Legislature is free to repeal or amend the provisions of the "Fair Housing Act" and abolish the Council on Affordable Housing by statutory enactment.[6]

Section 2 of S-1 SCS(1R) abolishes the Council on Affordable Housing. Section 35 of the bill repeals N.J.S.A.52:27D-305, which establishes the council, and N.J.S.A.52:27D-307, which charges the council with duties related to assisting municipalities to meet their Mount Laurel obligations. We believe that, for the reasons set forth above, both of these sections represent a valid exercise of the legislative power.

The bill lacks provisions requiring a municipality to make realistically possible a fair share of the regional affordable housing need

Section 21 of S-1 SCS(1R) requires municipalities to set aside "one out of every five residential units," or 20 percent, of residential construction in residential development

[5] The opinion in Mount Laurel II stressed that upholding the constitutional mandate was better left to the Legislature 92 N.J. at 212.

[6] For an example of an enactment that abolishes a department, see P.L.1994, c.58 ("An Act abolishing the Department of the Public Advocate, providing for the transfer of certain of its functions, powers and duties and revising parts of the statutory law.")

projects[7], as low- or moderate-income housing. For projects resulting in less than five units, a developer may provide an affordable unit, or make a payment in lieu of constructing affordable units.[8] Ibid. We believe that the reliance, in the bill, on mandatory set-aside requirements may fail to satisfy the requirements of the Mount Laurel doctrine because the bill does not also require the State Planning Commission to estimate and allocate housing needs on a regional basis or include some other mechanism to assure that Statewide affordable housing needs will be addressed.

In Mount Laurel I, the New Jersey Supreme Court held that the New Jersey Constitution requires a growing municipality exercising the municipality's land use powers to provide a realistic opportunity for a fair share of the need for low- and moderate-income housing in the region in which a municipality is located. 67 N.J. at 174. The Court reasoned that any exercise of the authority to zone, like any State police power, must promote the general welfare, of which adequate housing is a prime consideration.[9] Id. at 175, 178. The Court stated that the widespread and unvarying need for housing affordable to households at all income levels is so significant and of such general public interest in New Jersey that municipalities regulating land use must acknowledge concerns extending beyond municipal borders in considering the general welfare. Id. at 179.

The Constitution requires that a municipality affirmatively afford a realistic opportunity for construction of its fair share of the present and prospective regional need for low and moderate income housing. Mount Laurel I, 67 N.J. at 174. The core of the pre-"Fair Housing Act" decisions:

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[7] Section 5 of S-1 SCS(1R) defines a "residential development project" as new construction resulting in five or more dwelling units. The bill designates a residential development resulting in less than five units as a "small residential development project." Ibid.

[8] Fees are a valid and flexible alternative to set-aside zoning that may be used to encourage the use and development of municipal lands to satisfy housing obligations. See N.J.S.A.52:27D-329.2 and -329.3; Holmdel Builders Association v. Township of Holmdel, 121 N.J. 550, 569 (1990).

[9] The Constitution provides that the Legislature may delegate the power to regulate land use, a police power, to municipalities. N.J. Const. (1947) Article IV, Section VI, par.2. Most recently, the Legislature delegated this power to municipalities in 1975 by enacting the "Municipal Land Use Law," N.J.S.A.40:55D-1 et seq.

> . . . is that *every* municipality. . . must provide a *realistic*, not just a theoretical, opportunity for the construction of lower-income housing. . . .[T]he solution to the shortage of affordable housing could not 'depend on the inclination of developers to help the poor, [but rather must rely] on affirmative inducements to make the opportunity real.' [Holmdel Builders Association, 121 N.J. at 562-563 (quoting Mount Laurel II, 92 N.J. at 261).]

Municipal zoning ordinances are required to go further than merely permitting or allowing an opportunity to build affordable units; they must include affirmative measures, such as mandatory inclusionary zoning. Mount Laurel II, 92 N.J. at 261; see Holmdel Builders Association, 121 N.J. at 569. Mandatory set-asides have been determined to be an effective method of meeting the affordable housing obligation where other practices have failed. Mount Laurel II, 92 N.J. at 267.

The Court's experience enforcing the constitutional obligation of the Mount Laurel doctrine has indicated that setting aside approximately 20 percent of housing as affordable will encourage builders to participate in the development of projects containing affordable units. Any requirement in excess of 20 percent may defeat the actual construction of affordable housing. In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 20 (App. Div. 2007), certif. denied, In re Adoption of N.J.A.C. 5:94 & 5:95, 192 N.J. 72 (2007); see also Matter of Egg Harbor Associates, 94 N.J. 358, 367 (1983). Generally, municipalities may not compel set-asides that are so high that they ". . .impose an excessive and unfair burden upon middle income households when there are other suitable means of achieving" a realistic opportunity for affordable housing. In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. at 21.

Since Mount Laurel II recognized that mandatory inclusionary zoning, as a land use practice, constitutes an affirmative means to meet a municipality's affordable housing obligation, set-asides have been used throughout the State to meet affordable housing obligations and have been endorsed as a technique for meeting a municipality's fair share affordable housing obligation by the Council on Affordable Housing. See N.J.A.C.5:97-6.4. Statewide mandatory inclusionary zoning, as required by section 21 of the bill, is therefore a valid means that will make realistically possible opportunities for lower-income housing in each municipality of the State.

The Mount Laurel doctrine, however, requires that municipal land use practices address regional housing needs, not merely affordable housing needs generated within the municipality. We believe that the percentage set-aside system proposed in the bill, by itself,

would fail to provide for specific numeric goals necessary to assure that the regional need for low- and moderate-income housing is adequately being addressed.

The courts have determined that a municipality's obligation to provide a realistic opportunity for low- and moderate income housing extends at least to the municipality's fair share of the regional affordable housing needs. Mount Laurel I, 67 N.J. at 188. Municipalities are required to address not only the housing needs of their own citizens, but also the housing needs "of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality." Mount Laurel II, 92 N.J. at 208-209.

The Mount Laurel doctrine requires[10] local zoning ordinances to allow for construction within each municipality of affordable units sufficient to provide for any local need, but also for a municipality's fair share of the region's affordable housing needs. See In Re Twp of Warren, 132 N.J. at 35; AMG Realty Co. v. Twp. of Warren, 207 N.J. Super. 388,424 (Law Div. 1984).

Specifically, as to present need[11],

> [e]*very* municipality's land use regulations should provide a realistic opportunity for decent housing for at least some part of its resident poor who now occupy dilapidated housing. . . . In other words, each municipality must provide a realistic opportunity for decent housing for its indigenous poor except where they represent a disproportionately large segment of the population as compared with the rest of the region. This is the case in many of our urban areas. [Mount Laurel II, 92 N.J. at 214-215.]

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[10] This requirement is applicable whether enforced by the courts or codified in the "Fair Housing Act," which provides that the act is a "planning and implementation response" to the Mount Laurel decisions. N.J.S.A.52:27D-302.

[11] Present lower income housing need is "generated by present dilapidated or overcrowded lower income units" in a region. Mount Laurel II, 92 N.J. at 243. A municipality is obliged to provide opportunities for a fair share of the region's present need, which may far exceed the share generated in the municipality itself. Id.

Consequently the "excess" obligation of the urban poor areas is reallocated to other municipalities in the region. See Mount Laurel II, 92 N.J. at 243; see AMG Realty Co. v. Twp. of Warren, 207 N.J. Super. at 422.[12]

Prior to enactment of the "Fair Housing Act," a trial court determining a municipality's fair share was required to make specific findings identifying the relevant housing region, determining the region's present and prospective housing needs, and allocating those needs to the municipality or municipalities involved in the lawsuit. Mount Laurel II, 92 N.J. at 248; In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. at 15-16. A determination that a municipality had provided a fair share of housing needs based on the understanding that an ordinance provided a realistic opportunity for some low and moderate income housing, without more, did not meet the constitutional threshold. Mount Laurel II, 92 N.J. at 216. The Court, in Mount Laurel II, reasoned that if there was no determination of a specific number of units comprising the fair share obligation, the pressures that weigh against lower income housing would make ". . .the temptation for municipalities. . . to provide the absolute minimum of *apparently* realistic opportunity for *some* lower income housing. . . irresistable [sic]," 92 N.J. at 251-252, and thus never satisfy a gross or aggregate regional goal. 92 N.J. at 257-258.

In August 2004, the Council on Affordable Housing promulgated rules for the housing period beginning December 20, 2004 ("third round"). The regulations permitted municipalities to determine their fair share based on their own municipal growth projections, and to comply with the fair share obligation through set-asides. In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. at 29. The council did not assign a specific number of units comprising a fair share obligation to each municipality. Id. at 49. The rules were held to be invalid, in part, because they did not allocate regional affordable housing needs. Id. at 53. The court concluded that an inclusionary zoning approach would be legitimate only if the Council on Affordable Housing had data from which it could reasonably conclude that the allocation formula would result in satisfaction of regional and Statewide needs. Id. at 54.

The "third round" rules also required the municipality to project real estate development and job growth in the municipality, and to set aside one affordable housing unit

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[12] The underlying logic is that, "[i]n a society which came to depend more and more on expensive individual motor vehicle transportation for all purposes, low income employees very frequently could not afford to reach outlying places of suitable employment and they certainly could not afford the permissible housing near such locations. . . .This category of city dwellers desperately needs much better housing and living conditions than is available to them now, both in a rehabilitated city and in outlying municipalities." Mt. Laurel I, 67 N.J. 172-173; see also In re Twp. of Warren, 132 N.J. at 33.

per eight market-rate units projected to be built, and one affordable unit per every 25 jobs anticipated to be created. N.J.A.C.5:94-2.1(d). The Appellate Division concluded that a method allowing municipalities to determine their own fair share might provide an incentive for municipalities to adopt master plans and zoning ordinances that slow or halt growth, in order to minimize their share of opportunities for affordable housing within the housing region. In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super 1 at 55. The court added that any legitimate "countless" set-aside approach would, therefore, be required to place a check on municipal discretion in land use decisions. Id. at 56.

Section 18 of S-1 SCS(1R) makes the State Planning Commission responsible for determining the housing regions of the State. Section 35 of the bill also repeals N.J.S.A.52:27D-307, which charges the Council on Affordable Housing with determining New Jersey's housing regions, periodically estimating present and prospective regional need, and assisting municipalities with estimating fair share.

As described above, section 21 of the bill requires municipalities to set aside "one out of every five residential units," or 20 percent of residential construction in residential development projects, as low- and moderate-income housing. This language would have the effect of authorizing an "unnumbered" system to satisfy Statewide needs for lower-income housing because the bill requires neither the State Planning Commission nor individual municipalities to determine regional housing needs and allocated municipal needs. There would be no link, in the form of data or estimates, between the set-asides prescribed by the bill and satisfaction of allocated regional and Statewide needs. We believe that the absence of a nexus between the mandatory inclusionary zoning proposed by the bill and satisfaction of regional and Statewide affordable housing needs would permit a challenge to the sufficiency of the bill under the Mount Laurel doctrine.[13]

You should be aware, however, that the provisions of S-1 SCS(1R) can be distinguished from the 2004 rules of the Council on Affordable Housing that were invalidated

[13] The bill could be amended to address regional and Statewide housing considerations, which we believe to be required by the Mount Laurel doctrine, by authorizing the State Planning Commission to both estimate regional and Statewide needs and to reactively investigate and adjust set-asides in the event that the Commission learns or suspects regional needs are not being met. If such an amendment were adopted, this legislation would still embrace a fundamental change in philosophy to a "simple, market-driven system" for the administration of housing obligations, as section 1 of the bill puts it. We believe, however, the common law requires, at a minimum, the administering entity to reconcile regional and municipal housing priorities where necessary.

by the Appellate Division. Unlike the 2004 regulations, S-1 SCS(1R) does not allow "each municipality to determine its capacity and desire for growth. . . ." N.J.A.C.5:94-1.1(c). The set-aside requirements of the bill are mandatory in every municipality and are not linked to projections of growth or a municipality's particular housing plan element. In contrast to the set-aside regulations at issue in In re N.J.A.C.5:94 & 5:95, the bill's zoning obligation is mandatory for residential development projects, whereas the set-aside commitments imposed pursuant to N.J.A.C.5:94-2.1(d) accrued as actual obligations only upon issuance of final certificates of occupancy in the municipality. In addition, the affordable housing set-aside required by S-1 SCS(1R) is, on its face, more substantial than those required by the invalidated 2004 regulations of the Council. It is possible that the more substantial nature of the set-aside requirements in the bill may be enough to distinguish them from the invalidated set-asides contained in the 2004 "third round" regulations.

. . .

In conclusion, the Legislature has the power to abolish the Council on Affordable Housing and establish a new approach to satisfy the Mount Laurel doctrine. The unnumbered inclusionary zoning plan that would be established if S-1 SCS(1R) is enacted, however, may deviate from the goal, established by the Mount Laurel cases, of addressing the need for low- and moderate-income housing on a regional basis, and may be susceptible to legal objections on constitutional grounds.

Very truly yours,

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