

# Searching for Justice

## Court-Inspired Housing Policy as a Mechanism for Social and Economic Mobility

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Recent scholarship questions the role of the judiciary in promoting social change. This article examines the long effort of the New Jersey Supreme Court to assure social and economic choice for urban residents through inclusionary zoning and concludes that although the judiciary is constrained, the constraints are not necessarily structural. Rather, the court plays a crucial role in agenda setting and prompting other governing institutions to act. As such, the question is not whether the courts can cause social change but what the proper role of the judiciary is in the broad interplay of governing institutions.

Suburban integration, both racial and economic, has long been proposed as a way to help alleviate some of the problems (e.g., poverty or fiscal distress) faced by central cities (Downs 1973). The argument, although couched in many forms, is based on calls for social and economic justice. Those arguing for social justice make the obvious case that racial and class exclusion is antithetical to standard American codes of fairness and personal choice. Another view is that urban areas have lost their comparative advantage in manufacturing and are no longer large consumers of unskilled labor (Peterson 1985) and that Blacks and

other minorities migrated to central cities at a time when industry was declining and opportunities for unskilled labor were shrinking. With the concurrent forces of suburbanization and the globalization of capital, urban minorities are trapped in a linked spiral of unemployment, poor education, poverty, family dissolution, and crime (Wilson 1985; Orfield 1985; Moor and Laramore 1990). The way to break this spiral, it is said, rests with free movement of trapped individuals into circumstances in which jobs are plentiful, education is better, and the social mores are conducive to labor-force participation (Danielson 1976; Downs 1973; Orfield 1985).

By themselves, these arguments should be compelling statements for desegregation by race and income; however, when desegregation is tried through various policy mechanisms, there has been massive opposition (Lukas 1986). The most embattled form of exclusion may be restrictive zoning, in which a suburb can prevent renters and those unable to purchase large lots from living in the community. Because many low-income individuals can afford only to rent, they are effectively barred from living in communities with growing economies and good schools (Danielson 1976).

Of all the judicial efforts to promote inclusionary zoning, perhaps none has been so extensively watched as the long effort by the New Jersey Supreme Court to open the suburbs to the urban poor.<sup>2</sup> A series of rulings beginning in 1973 led to the state supreme court decision, in the case of *Southern Burlington County NAACP vs. Township of Mt. Laurel (Mt. Laurel I)*<sup>3</sup> in 1975, that by promulgating exclusionary zoning, the township of Mt. Laurel was violating the equal protection clause of the state constitution. In this far-reaching ruling, the court argued that municipalities developing in the same region as a central city were obligated to provide low-income housing within their boundaries (Erber 1983; King 1978). For nearly ten years, municipalities failed to comply with the court's edict. In 1983, the court handed down a second ruling (*Mt. Laurel II*),<sup>4</sup> providing more stringent guidelines and remedies for local compliance.

The second court ruling and the accompanying remedies forced the legislature to enact a statute that, when implemented, fostered the production of moderate-income housing (Zax and Kayden 1983). The New Jersey Fair Housing Act of 1985<sup>5</sup> created the Council on Affordable Housing (COAH) and a variety of other tools to help increase the production of low- and moderate-income housing in the suburbs (Zax and Kayden 1983).

In this article, I examine the history of court-ordered inclusionary housing in the state of New Jersey, ending with the legislative enactment of the fair housing act. The conclusion is that, instead of clarifying and adding to the supreme court's intent, the fair housing act diluted the court's effort with policy mechanisms

that failed to foster low-income housing (Mallach 1985).<sup>6</sup>

The central question for this analysis is the following: To what extent can the judiciary, alone or in concert with other branches of government, produce significant housing and, by extension, economic opportunities for central-city residents?

## The Structurally Constrained Judiciary

Recent scholarship has cast doubt on the judiciary's ability to produce social change (Rosenberg 1991; Rabkin 1989). Examining the areas of civil rights, abortion and women's rights, the environment, and criminal law, Rosenberg (1991) concluded that the U.S. Supreme Court's role in placing these issues on the agenda and constructing viable policies that lead to substantive changes in the lives of minorities and women has been overstated.

The argument is provocative and rather pessimistic, given the strong sense in a number of quarters that rulings such as *Brown vs. the Board of Education* and *Roe vs. Wade*<sup>7</sup> ushered in a great expansion of rights and opportunities for minorities and women. Rosenberg (1991, 169) argued that in most instances, the Court did not cause social change but, rather, gave its judicial stamp to trends that were proceeding in the wider society. Thus the Court was not strictly the agenda setter that supporters of judicial activism claim. More to the point, Rosenberg (1991, 30-36) argued that the court is constrained by the following:

- the "limited" nature of rights granted by the Constitution,

- the lack of any direct mechanism for implementing rules,
- the often imperfect causal link between any stated remedy and stated policy,
- varying popular and institutional support, and
- intervening social and economic trends.<sup>8</sup>

Given these constraints, which Rosenberg admitted can be mitigated, the court can be a *weak* avenue for social reform. Rosenberg noted (p. 343) that U.S. courts can never be effective producers of *significant* social reform. He explained (p. 338),

[A]t best, they can second the social reform acts of the other branches of government. Problems that are unsolvable in political context can rarely be solved by courts....Turning to the courts to produce significant social reform substitutes the myth of America for its reality. It credits courts and judicial decisions with a power...they do not have.

Rosenberg further argued that reliance on this myth misdirects the efforts and resources of activists. By implication, more effort should be placed on "mobilizing citizens to participate more effectively" (p. 343).

Clearly, Rosenberg's question has relevance to *part* of the question in this article (housing policy produced by the courts). The New Jersey Supreme Court was very constrained in producing a housing policy that attended the stated goal of opening economic and social mobility for urban residents in the suburbs. The constraints were much the same as those posited by Rosenberg.

Though Rosenberg's analysis can help explain a great deal in the New Jersey case, problems arise when one adapts

his analysis without question. The main problem with the structural-constraints argument is that it has the potential to over determine the case. An analytic construct built upon a statement that the court can or cannot produce significant social reform is analogous to saying that Congress cannot legislate clean air through the Clean Air Act; of course it cannot, but stating this is much too simple. Congress is part of a complex web of governing institutions that affect the level of air pollution. Congress can set the agenda, formulate rules, and provide funds, but ultimately, other governing institutions (e.g., sites, localities, and, at times, the judiciary) play a part in affecting the level of air pollution. Whatever the intrinsic limits of the Clean Air Act, it is not fair or analytically correct to say that Congress cannot limit air pollution.

Returning to the judiciary, it is then limiting to ask the question, "Can the courts bring about social change?" Here, the broader interplay between the judiciary and other governing institutions in the formation of public policy is observed (Warren 1988). The judgment is that the courts perform an important functional role in providing a deliberative form that has direct consequence for other governing institutions (Warren 1988). This is not to say that the constraints argument is incorrect in its descriptive force. Rather, as will be seen in this case analysis, the New Jersey Supreme Court was structurally constrained, and the outcomes were limited (relative to the original goal), but the court performed effectively within these constraints. The New Jersey legislature, for various reasons, did not build on the political cover provided by the Mt. Laurel rulings. This was somewhat

predictable, given the incremental nature of the policy process. Put in a larger theoretical perspective, the question is not so much if the court can bring about social reform, but whether the judiciary can, at various points, push the other parts of the governing complex toward action on any given policy.

### **Making History: The First Mount Laurel Decision**

The New Jersey Supreme Court, in its Mt. Laurel I decision, held that the township's zoning laws violated the state's constitution. Mt. Laurel's zoning statutes were held to be unconstitutional because they unduly restricted the construction of low- and moderate-income housing. At the time, Mt. Laurel's zoning laws allowed only detached, single-family housing with a minimum lot size.

The crux of the Mt. Laurel I decision was that developing towns had an obligation under the equal protection clause of the state's constitution to provide for a realistic supply of affordable housing. The court recognized that many developing municipalities surrounded stagnant central cities. Zoning, a state-granted policy power that must promote the general welfare, was being used to prevent central-city dwellers from *potentially* taking advantage of employment opportunities in these growth areas. Accordingly, the court ruled that due process and equal protection were being denied to individuals of various income classes wishing to live in these growth areas.

### **Initial Redress**

In its decree, the court maintained that developing municipalities had a con-

stitutional duty to provide a fair share of affordable housing in their respective regions. Unfortunately, the court left open the meaning of *fair share*. The decree did not suggest an objective method of determining geographic regions or regional need, nor did the court broach the issue of what constituted affordability (Rose 1983). It left these issues for the trial courts to decide. The court ruling did not produce a substantial number of affordable housing units (Martha Lamar Associates 1988, 4). Instead, the ruling started a great deal of litigation in the lower courts initiated by municipalities, civil rights groups, and developers aimed at clarifying the initial ruling (Rose 1983).

In 1977, the state supreme court, faced with many Mt. Laurel cases in the lower courts, returned to the question of inclusionary zoning. The major issues in the case of *Oakwood at Madison, Inc. vs. Township of Madison*<sup>9</sup> was the court's position on municipal fair-share obligations. In what some termed a major retreat, the court lessened the impact of its first ruling by stating that the lower courts did not have to redefine what constituted a region, nor should they have to assign numerical guidelines for fair-share obligations by municipalities.<sup>10</sup> Perhaps reacting to the difficulty of empirically defining what constitutes affordable housing, the court directed that the municipalities had only to make a good-faith effort at providing *least-cost housing* instead of low-income housing (Rose 1983; Payne 1983). Least-cost housing was a nebulous concept. Basically, the court acknowledged that suburban jurisdictions were experiencing difficulty promoting low-income housing. Thus, the court allowed suburbs to substitute

a good-faith effort at promoting housing at the least cost relative to prevailing housing and rental prices.

Specifying least-cost housing changed the target population of Mt. Laurel I: the urban poor. The only logical beneficiaries of a least-cost strategy were middle-income individuals and families living in either central cities or the suburbs. In effect, the ruling released developing municipalities from an obligation to provide housing for the urban poor. The court addressed this perception by stating a hope that the new criterion (least-cost) would increase the total number of available housing units, thus (in theory) speeding the filtering of housing to the poor.<sup>11</sup>

The court also established additional safeguards, such as the *builder's remedy*, which allowed a builder or developer a density bonus, as a way to ensure that its edict would not be ignored. This bonus gave developers the ability to construct higher-density housing even if the density was at variance with local municipal zoning laws. If a municipality resisted, the builder could sue the municipality under the builder's remedy.

Any developer could sue a town that had zoning laws that prevented construction of a project in which some units were set aside as affordable units. The remedy proved to be an effective stimulant in that it flooded the courts with many suits initiated by builders. It did not prove effective, however, in stimulating a significant number of low-income or affordable-housing units (Martha Lamar Associates 1988).

### **Dissecting the Solution**

The fact that Mt. Laurel I and the court's subsequent ruling in 1977 pro-

duced much conflict and little housing is a matter of historical record (Martha Lamar and Associates 1988). Why did the court's initial ruling produce such limited results, and what might have happened if the ruling had been implemented in the best possible circumstances?

Judicial policymaking can present an attractive alternative to the fractious push-pull of mutual adjustment between elected officials, bureaucrats, and the public (Lowi 1979). It is attractive in the sense that the judiciary can, theoretically, deliver justice and act in the real interest of the policy without the constraints of the extreme compromises that often limit public policy (Lowi 1979).

It is not clear, though, that judicial policymaking can escape the standard problems of implementing public policy (Mazmanian and Sabatier 1989). For example, a major problem with implementing policy is the construction of clear directive policy statements that frame the nature of the problem and the solution. Mt. Laurel I, although bold, did not provide a clear path for achieving the court's intent. Most importantly, at this stage, the court did not specify how to define the base for municipal fair-share obligations. Additionally, the court did not specify, technically, what constituted affordable housing. This is why, in the years following the first Mt. Laurel ruling, the lower courts were deluged with cases attempting to clarify issues of what constituted affordability and how much court-designated housing each municipality was required to build (Rose 1983).

By not articulating clear directives, the court exacerbated the presence of these issues and, ultimately, undermined the goals of the ruling. To be fair, it is

not clear what the court could have done to avoid this situation. The value of judicial intervention is to set a course, not to draft legislation. Although the ruling was a bold and perhaps correct initiative, it should have been a precursor to legislative debate and action. This is clearly what the court hoped would happen (Rose 1983). As a result of perceived public sentiment against open housing, elected officials avoided the issue, thus forcing the court to make public policy that may have been outside its institutional jurisdiction.<sup>12</sup>

Because the ruling did not immediately lead to a response from the legislature, external conflict limited the intent of the ruling. Many of the affected parties, specifically suburban municipalities, had no real incentive to encourage the construction of affordable housing. Some would argue that they had an incentive not to help this process along (Tiebout 1956; Peterson 1981; White 1978). Granted, there may have been recalcitrance of the part of many suburban jurisdictions, but the court did not provide meaningful guidance on how a local political entity could intervene in private-housing markets. The court did suggest tax incentives, but it is doubtful that any local jurisdiction could have provided the amount of incentives needed to spur a *significant* number of low- and moderate-income housing units.

The first round of the Mt. Laurel rulings did not provide clear direction for the process of implementing low-income housing for the urban poor. The subsequent 1977 ruling, *Oakwood at Madison, Inc. vs. Township of Madison* (see note 9), added to the confusion. In rethinking its original ruling, the court may have

recognized the difficulty of providing clear directions for implementation. The court retreated from its previous emphasis on low-income housing. With this ruling, the court used the term least-cost housing instead of housing for low- and moderate-income individuals. Basically, the court recognized the difficulty in influencing the production of low- and moderate-income housing. They removed the stricture with the hope that least-cost housing (defined simply as the cheapest market-rate housing in suburban jurisdictions) would trickle down to low- and moderate-income urban residents.

It was evident, though, that the reformulation of low-income housing to least-cost housing significantly changed the intent of the first ruling. Suburbs, under this ruling, had only to make a good-faith effort at providing a given number of housing units at the lowest possible price. This housing was not targeted by income class. Instead of providing a specific strategy to help urban minorities and cities, the reformulation had the potential to hasten the death of cities by siphoning the remaining urban middle class through the lure of cheap housing (Rose 1983; Hughes and Vandoren 1990). Also, by simply making suburbs responsible for a good-faith effort and least-cost housing, the court opened the door for easy circumvention. Least-cost housing was bound to be a relative concept when put into practice.

## **Mt. Laurel II**

The lower courts interpreted the 1977 ruling as a retreat and acted accordingly. In some cases, the lower courts refused to censure jurisdictions that were found

guilty of blatant exclusionary practice before *Oakwood at Madison, Inc. vs. Township of Madison* (Payne 1983). Even with this lessening concern by the lower courts, the unresolved issues still generated a number of suits. The state supreme court re-entered the fray in 1980 by considering six cases, all with the old problem of how to decide what constituted a municipality's fair share of least-cost housing—not low-income housing (Payne 1983).

The court started its deliberation in October 1980 by hearing testimony from interested parties. Acting much as a legislature, the court required concerned parties to form themselves into interest-group blocs (e.g., municipalities, developers, or civil rights groups). As Payne (1983, 88) put it,

The "argument" itself was as extraordinary as its setting. Because virtually all the lawyers involved were intimately familiar with the actual process of housing development, their arguments had the feel of testimony at a legislative hearing, rather than appellate advocacy. The members of the court in turn slipped readily into the role of legislators, peppering the speakers with well-informed questions to elicit facts (seldom law) about housing economics and the mechanics of land development. The court heard arguments and deliberated for 27 months.

A decision was reached in June 1983. The court again changed course and returned to many of the principles outlined in the 1973 decision (Payne 1983). *Mt. Laurel II* (see note 4), as the decision has come to be called, was direct and decisive. Unlike *Mt. Laurel I*, *Mt. Laurel II* set specific standards and methods for determining fair-share obligations. In the past, part of the problem was forecasting growth areas of the state that the

court could use to assign fair-share obligations. The court ruled that growth areas were to be determined by the State Development Guide Plan (SDGP), which was a product of the Division of State and Regional Planning located in the Department of Community Affairs (DCA) (Erber 1983; Rose 1983).

The SDGP allowed the court to target specific regions as developing areas or areas of conservation. In developing regions, the court separated housing into two parts: present need and prospective need. Present need covered existing housing that was physically dilapidated, crowded, or occupied by low- or moderate-income individuals. Prospective need described an attempt to predict the increase in eligible low- and moderate-income households for a six-year period (Martha Lamar Association 1988, 5).

The court directed *Mt. Laurel* litigation to a three-judge tribunal. The tribunal was given a mandate to

- guide the revision of local zoning ordinances,
- suspend construction on projects until local ordinances were deemed satisfactory,
- invalidate any local municipal restriction governing land use, and
- approve specific applications for low- and moderate-income housing.

Overall the court specified a number of strictures and remedial devices. For example, it

- affirmed the right of government intervention to encourage low-income housing through government subsidy (if available) and tax abatements,
- permitted density bonuses for private contractors (here, localities could award higher densities to contractors,

who would then set aside a certain number of low-income units in a market-rate housing development),

- limited mobile home construction as a mechanism to satisfy municipal fair-share obligation,
- precluded the use of the Mt. Laurel decision as a base for encouraging middle-income housing (the court also limited the least-cost doctrine to extreme cases where low-income housing could not be built), and
- held that some exclusionary devices, such as large-lot zoning, were legal if the municipality could satisfy its Mt. Laurel obligation.

This stronger thrust by the court prompted the legislature and the governor to act, whereas before, they had avoided direct action on Mt. Laurel. Governor Thomas Kean pronounced the ruling as something akin to communism (Weissman 1985). The fact is, the court's ruling forced elected officials to confront the issues that they had avoided for five years because of their collective perception that their constituents would be against inclusionary housing.

The remedial actions by the court, particularly the density bonuses and the actions of the three-judge tribunal overseeing local land-use decisions, had an immediate impact. Local governments in rapidly growing areas (much of New Jersey in the 1980s) were besieged by developers seeking density bonuses and suing localities under the builder's remedy. From 1980 to 1985, seventy of the state's 567 municipalities were sued by developers seeking zoning changes. Local government officials pressed the governor and the legislature for help in fending off these suits (Payne 1983).

Electoral politics was brought into the fray. In 1984, the Republican legislative leadership in the state assembly threatened to bar the judiciary from the field of exclusionary zoning by a constitutional amendment (Mallach 1985, 22). Democrats, sensing a battle that would harm the original aim of the court, introduced legislation ostensibly to bring order to the issues of inclusionary zoning. Two bills were introduced. One bill (S.2046) created a statutory body with strong powers to determine fair-share numbers and compliance standards (Mallach 1985, 23). The other bill (S.2334), although similar, included a buyout clause that allowed municipalities to escape half of their fair-share obligations by contributing to a regional house fund. The two bills submitted by Democratic members were brokered and combined.<sup>13</sup>

The main objection to S.2046 was the lack of control given to municipalities. The bill remained faithful to the spirit of the court. Thus local officials argued that it deprived local control, but the real reason for their argument may have been their fear that S.2046 might force them to build low-income housing in their communities (Mallach 1985). The final bill weakened the powers of the COAH. Instead of the COAH setting municipal numbers for fair-share obligations, the municipal officials would essentially tell the COAH what they desired as fair-share obligations. The buyout clause was also amended to make such arrangements bilateral. Instead of a municipality contributing to a general fund, each suburban municipality would negotiate a buyout with another municipality. After further amendment from the governor, the final bill was passed on July 2, 1985.

## **The New Jersey Fair Housing Act of 1975**

The fair housing act (see note 5) created the COAH. This administrative agency, with a nine-member governing board composed of private citizens, developers, and public officials, was responsible for separating the state into five regions to establish and project the need for low- and moderate-income housing in these regions. The COAH set limits for municipal fair shares based on the size of existing housing, present and projected employment opportunities, and open land.

After housing need was determined, COAH set time limits for compliance by the municipalities. It was given quasi-judicial power to enforce its regulations. Thus, in the extreme, COAH could deny access to state-generated infrastructure when that infrastructure was necessary for future development.

Given the political realities, the legislature did not mandate participation in the COAH; it was entirely voluntary. The incentives to participate, however, were immunity from the builder's remedy and a municipality being sued could transfer the case to COAH's arbitration process.<sup>14</sup> If a municipality chose to become part of the COAH process, the fair housing act required the municipality to adopt a housing element in its master plan. This housing element was composed of

- a municipal inventory of its housing stock,
- projection of future housing stock along with projection of future construction of low- and moderate-income housing six years into the future,
- determination of the local present and future fair-share obligation and the

municipality's ability to satisfy the obligations, and

- specification of land most appropriate for construction of affordable housing (the locality was also responsible for an inventory of existing stock most suitable for conversion or rehabilitation into low- and moderate-income housing).

The locality was responsible for outlining remedial measures once its housing element was approved. The remedial options open to localities included residential rezoning for higher densities, state funds, tax abatements, funds from regional contribution agreements (RCAs) (explained later), and land donated by the municipality. Clearly, the aim of the legislation was to insert or return a measure of control to the localities. Granted, the COAH had target fair-share obligation figures, but allowing the municipalities to construct their own figures gave control to the municipalities.<sup>15</sup>

Upon filing its housing plan with COAH, the municipality could seek substantive certification of its plan. Certification gave the locality the legal presumption of having met its fair-share obligation for six years. It must be noted that once the locality had submitted its plan to COAH, anyone could file an objection. COAH mediated any differences between the objecting party and the municipality. Ultimately, COAH granted or denied certification based on the results of the mediation.

### **Regional Contribution Agreements**

Perhaps the most interesting part of the fair housing act was the inclusion of RCAs. Section 12 of the act provided that a municipality could "send" (transfer) 50

percent of its fair-share obligation to a receiving municipality. The sending municipality would pay the receiving municipality to build affordable-housing units inside the boundaries of the receiving community.<sup>16</sup> In return, the sending municipality would receive credit from COAH against its fair-share obligation.

The argument for RCAs was that some suburban municipalities did not have the capacity (e.g., land or infrastructure) to support new development, nor did they have the employment and educational opportunities that the Mt. Laurel rulings hoped to confer on low-income urban residents. Thus framers of the legislation thought the best way to achieve a just solution in cases like this was to transfer the obligation to another municipality, usually an urban center with existing capacity (Selig 1988).

The framers of the legislation saw the potential for some urban revitalization (Selig 1988). The city receiving the fair-share obligation could use the money to provide affordable housing for urban residents through new construction, housing rehabilitation, or conversion of non-residential space. The fair housing act ensured the short- and medium-term affordability of RCA units. Owner-occupied, single-family units had to remain within income guidelines of affordability for six years. Rental units and conversions had to remain affordable for a minimum of twenty years before they reverted to market rents.

COAH was responsible for determining regulations concerning the amount of contributions to any given RCA and the overall feasibility of the project. Negotiating an RCA was designed to be an arduous process (Mallach 1985). The

receiving municipality had to submit a proposal to the county planning board, which then certified that the proposed RCA fit within state and local goals of sound regional planning (Selig 1988). Additionally, a project plan had to be submitted to the New Jersey Housing Mortgage and Finance Agency (HMFA). This agency determined the feasibility of the city's and developer's plan for obtaining a site for a project and whether the units targeted for rehabilitation did indeed meet the guidelines for substandard dwellings (Selig 1988).

### **State Funding of the Fair Housing Act**

The fair housing act apportioned \$125 million in total assistance for local governments through the DCA's Neighborhood Preservation and Balanced Housing Program and the HMFA's mortgage assistance programs.

The Neighborhood Preservation and Balanced Housing Program granted loans for rehabilitation, conversions, acquisition of property, some pre-construction costs, new construction, and infrastructure costs. Funds from this program were made available to local governments with certified housing elements. Projects using these funds were required to put affordability limits on applicable units for twenty years.<sup>17</sup>

### **The Fair Housing Act in Practice**

The substantive aim of the fair housing act was twofold. The first component, and maybe the most important from the perspective of elected officials, was to remove the issue of inclusionary afford-

able housing from the purview of the New Jersey Supreme Court (Selig 1988; Mallach 1985; Weissman 1985). The second component, which follows from the first, was to respond programmatically to the ongoing concern of the court. At this point, the critical questions were how well the act was implemented and if analysts could record any positive effects of the statute.

### **Dislodging Inclusionary Housing from the Courts**

If dislodging the issue of inclusionary housing from the courts was partly the intent of the fair housing act, then COAH has experienced only limited success. By April 1990, COAH had processed applications from ninety municipalities and certified their housing elements for a potential of 17,659 low- and moderate-income units. An additional forty-four municipalities applied for certification with the potential construction of 12,001 low- and moderate-income units.

By most accounts, certification by the council has reduced time spent in litigation. The process has compressed the average litigation time from nine years to an average of 1.4 years through COAH. With the builder's remedy, attorneys for developers generally followed a strategy of delay through various motions, depositions, and interrogatories. This strategy, of course, was costly to local governments.<sup>18</sup> Although many municipalities relented under heavy legal fees, the outcomes did not necessarily serve the public interest. The builder's remedy did force some low-income units to be included within larger market-rate developments, but this was a scattershot process without much planning. Thus the builder's

remedy may have contributed to unplanned suburban sprawl (Rose 1983). It is doubtful that this type of development, without public transportation and ready access to schools and shopping, could provide a comfortable atmosphere for the target population under the Mt. Laurel rulings (Mallach 1984, 14-15).

The combative nature of litigation also lessened with the increased use of COAH. The burden of proof, which formerly rested with the municipality, was removed by the certification process. With the presumption of validity, the burden of proof rested with challengers to any given COAH certification. Even then, the next course open to challengers (by statute) was mediation, not automatic reversal to the courts. In practice, though, some municipalities went back to the court when faced with an adverse ruling by the COAH process.

The advantages of COAH (less time and money spent in the courts) results in the COAH becoming a focus of attention in efforts to foster inclusionary housing. Thus the strident voice and actions of the state supreme court were softened. The COAH became a quasi-judicial organization but without the organizational capacity to handle increased caseloads and service functions.<sup>19</sup> Without expansion of the COAH, the courts may once more become the center of attention simply because they possess the capacity (e.g., personnel) to handle the cases.

Another reason the courts might again become a battleground is the structure and function of COAH itself. A solid argument to be made is that COAH was constituted as an alternative to the state supreme court, but its limited formal powers prevent COAH from being a final

arbitrator on inclusionary disputes (Mallach 1985). In a 1988 ruling against the town of Fanwood, COAH displayed a marked level of independence during the mediation process. Fanwood was assigned a fair share of eighty-seven subsidized low-income units. The township resisted compliance with the target figure, claiming that no space was available within township borders for development. Three developers petitioned COAH to force Fanwood to change its zoning laws to accommodate multifamily dwellings if they, the developers, were permitted to raze structures on parcels that they already owned. These developers had purchased parcels with single-family homes with the intent of building seventy-five condominium units, and fifteen units were reserved for low-income residents.

The council ruled that because the developers were willing to subsidize the cost of razing, thus providing suitable sites, the township had to accept the offer or present alternative methods of producing their fair share of units. The decision had an intuitive logic, but municipalities saw it as a direct threat to their ability to make local zoning decisions. Fanwood appealed the results of the mediation to the state supreme court. The supreme court upheld the COAH's decision, but the lawsuit was an indication that municipalities, even those who chose to participate in the COAH process, would not summarily accept an adverse judgment. The hope that COAH would displace the court as the arena of conflict over inclusionary zoning may have been premature.

### **Substantive Challenges to COAH**

The Fanwood controversy was a challenge to COAH, but it was not the only

one. Perhaps the biggest challenge to the COAH process came from those charging that the RCAs subverted the intent of the Mt. Laurel decision.<sup>20</sup> Many observers were concerned that a suburban municipality's ability to transfer affordable housing obligations violated the spirit of the Mt. Laurel rulings and continued the racial and economic discrimination by suburban areas.

The data in Table 1 substantiate that concern. In the majority of sending municipalities, the number of resident African-Americans and Latinos is small compared to the numbers of resident African-Americans and Latinos in receiving municipalities. The charge that RCAs continue racial segregation can be supported. One can also make the case that RCAs continue economic segregation. Table 1 clearly shows that most of the receiving jurisdictions are urban with less per capita income than the sending suburban jurisdictions.

Proponents counter that RCAs are an optimal solution to the quandary of limited building capacity in one locality. This problem is solved by redistributing money to another locality with the capacity to handle development but without the capital necessary to develop or redevelop parcels of land and substandard housing. Indeed, approximately \$60 million in RCA money has been transferred to date from mainly suburban jurisdictions to urban areas.<sup>21</sup>

The problem, however, was that to lower the price of the affordable housing units, the sending municipalities bargained with more than one potential receiving municipality. This bargaining was clearly logical in the context of a market economy, but the result was that receiving

**Table 1: Regional Contribution Agreements, 1988-1991**

<b>Sending Municipality/County</b>	<b>% Black</b>	<b>% Hispanic</b>	<b>Per Capita Income, 1987</b>	<b>Receiving Municipality/County</b>	<b>% Black</b>	<b>% Hispanic</b>	<b>Per Capita Income, 1987</b>	<b>Units</b>	<b>Cost Per Unit</b>
Tewksbury/Hunterdon	0.7	1.2	\$40,978	Perth Amboy/Middlesex	11.8	11.8	\$10,369	45	\$26,667
Warren/Somerset	1.2	2.2	\$25,786	New Brunswick/Middlesex	29.6	19.3	\$9,983	166	\$26,500
Franklin/Somerset	21.4	4.5	\$17,595	Perth Amboy/Middlesex	11.8	55.5	\$10,369	20	\$27,500
Scotch Plains/Union	11.1	2.8	\$21,407	Linden/Union	20.2	7.5	\$13,547	175	\$20,000
Passaic Twp./Morris	0.5	2.6	\$21,261	Newark/Essex	58.8	26.3	\$7,622	42	\$20,000
Watchung/Somerset	0.9	2.7	\$33,168	Phillipsburg/Warren	2	2.6	\$10,766	57	\$22,000
Hillsborough/Somerset	3.3	2.7	\$18,612	Phillipsburg/Warren	2	2.6	\$10,766	79	\$22,000
East Hanover/Morris	0.9	2.3	\$17,251	Newark/Essex	58.8	26.3	\$7,622	14	\$20,000
Freehold Twp./Monmouth	4.7	3.5	\$16,948	Freehold Boro/Monmouth	18.3	11.3	\$13,351	150	\$18,000
Roseland/Essex	0.5	1.3	\$23,764	Newark/Essex	58.8	26.3	\$7,622	66	\$17,000
Bernardsville/Somerset	0.3	3.2	\$32,733	New Brunswick/Middlesex	29.6	19.3	\$9,983	41	\$21,000
Holmdel/Monmouth	0.5	2	\$16,948	Keansburg/Monmouth	0.8	11.8	\$9,832	313	\$18,600
Ramsey/Bergen	0.8	2.2	\$21,118	Jersey City/Hudson	46.2	19.7	\$10,125	107	\$16,635
Middletown/Monmouth	1.9	2.7	\$18,202	Union Beach/Monmouth	0.6	4.5	\$10,764	75	\$17,000
Middletown/Monmouth	1.9	2.7	\$18,202	Highlands Boro/Monmouth	1	2.2	\$17,069	50	\$18,500
Middletown/Monmouth	1.9	2.7	\$18,202	Red Bank/Monmouth	26.4	5.9	\$14,962	45	\$18,000
Middletown/Monmouth	1.9	2.7	\$18,202	Long Branch/Monmouth	19.5	13.6	\$12,702	150	\$17,500
Denville/Morris	0.7	1.9	\$18,464	Newark/Essex	58.8	26.3	\$7,766	136	\$15,000
Middletown/Monmouth	1.9	2.7	\$18,202	Asbury Park/Monmouth	59.4	9.1	\$9,440	180	\$19,500
Ramsey/Bergen	0.8	2.2	\$16,948	Jersey City/Hudson	46.2	19.7	\$10,125	43	\$20,000
Cranbury/Middlesex	4.1	1.8	\$19,557	Perth Amboy/Middlesex	11.8	55.5	\$10,369	76	\$25,000
Florence/Burlington	7	1.7	\$11,512	Pemberton/Burlington	22.8	8.1	\$9,728	103	\$15,000
Wall Twp./Monmouth	0.6	1	\$15,776	Long Beach City/Monmouth	19.5	13.6	\$12,702	150	\$17,500
Wall Twp./Monmouth	0.6	1	\$15,776	Neptune Twp./Monmouth	33.8	4.2	\$13,112	250	\$17,500
East Hanover/Morris	0.9	2.3	\$17,251	Newark/Essex	58.8	26.3	\$7,622	65	\$20,000
Berkely Heights/Union	1.4	1.9	\$23,539	Newark/Essex	58.8	26.3	\$7,622	129	\$23,500
Branchburg/Somerset	1.4	1.6	\$20,476	New Brunswick/Middlesex	29.6	19.3	\$9,983	100	\$26,500
Parsippany/Morris	3.6	4.2	\$17,512	Newark/Essex	58.8	26.3	\$7,622	294	varies
Rockleigh/Bergen	1.5	1.9	\$19,465	Jersey City/Hudson	46.2	19.7	\$10,125	5	\$22,500

Source: Council on Affordable Housing

municipalities bid the price down to a level that could not cover the cost of building the RCA units. Many receiving municipalities, mainly revenue-starved cities, had to cover the difference between the below-market cost of the units and their own resources. Additionally, many of these agreements did not cover operating costs in the short and long term. These costs clearly had the potential to burden central-city resources.<sup>22</sup>

Why did cities enter into agreements that caused them to commit money to arrangements that were meant to be redistrictive in their favor? The answer is complex and indicates the level of fiscal distress and need for affordable housing in New Jersey's cities. Even though older distressed cities like Newark and Elizabeth expended some money to cover the difference between the real cost of the development and what the sending municipality was willing to pay, it was still a sizable portion of the amount necessary to build or redevelop affordable housing units (Byrd 1987).<sup>23</sup> This was not revitalization through redistribution of resources (as the legislature hoped) but a situation in which suburbs divested 50 percent of their fair-housing obligation and cities paid in part for the sending suburb's desire to exclude racial minorities and poor individuals.

There are situations where RCAs have worked without the price reduction brought by bidding down the unit price of affordable housing. These instances occur because only one central city is in the region. The city of New Brunswick in central New Jersey is a good example. New Brunswick has made extensive use of RCA money to build affordable housing units for local residents without much

investment of its own resources. Conversely, the cities of Newark and Elizabeth compete with each other for RCAs from suburbs in their region, thus creating a less than optimal bargaining situation for these cities (Byrd 1987). The effect of this competition has been to fund minimal rehabilitation and not new construction (Martha Lamar Associates 1988).

### **External Limits on the Effectiveness of COAH**

Although the RCAs did provide some incentive for producing affordable housing, the approach must be placed in the broader perspective of the total number of units produced. COAH stipulated that the process, as a whole, would produce 145,000 units of new and rehabilitated affordable housing over the six-year period from 1987 to 1993. This target figure was not achieved. In fact, a survey of local governments by the New Jersey DCA found that only approximately 7,500 affordable housing units were built or were being built as a direct result of the COAH process.<sup>24</sup> How can we account for the great disparity between the targeted figure and the units actually produced?

The answer to why the production of affordable units has been limited rests primarily with market forces (Mehegan 1992). Stringent state building regulations, though, must also be assessed some of the blame. Even with the remedies dictated by the fair housing act, the fact remains that the production of affordable housing is directly tied to the production of market-rate housing. New Jersey's permit process is long; the average time for granting a permit for new development is approximately two years.

This process has dampened overall building in the state, as has the national recession. To date, the result has been the disappointingly small production of affordable units (Council on New Jersey Affairs 1991).

After fifteen years of court-ordered intervention and then legislative action, the number of affordable housing units is negligible relative to the need COAH established. The original intent of the court, that of allowing the mobility of low-income minorities, is clearly not part of the current agenda of the legislature or the COAH (Seglem 1990). The current effort, with the emphasis on affordable housing and not low-income housing, resembles a face-saving affair for all involved.

### **The Court Is a Force in Causing Social Change**

In this article, I have attempted to assess the role of the judiciary in using housing as a means for social and economic mobility. Given the slim results in the New Jersey case, one might draw the conclusion that the court cannot be a force in causing social change—at least in the area of housing policy. This conclusion would seem to support a constrained view of the judiciary in this and other efforts to promote social justice.

Another view of this case is that the court was very successful—the judiciary is an arena in which the aggrieved can state a complaint, receive a fair hearing, and have the decision passed along to the next branch of government. Initially, the state supreme court attempted a statement of justice with the first Mt. Laurel ruling. The reluctance of elected officials, perceiving little popular support

for open housing, to fashion a legislative response presaged further judicial action and active redress. Legislative movement on inclusionary housing came only after the court allowed builders and developers to sue localities if they refused to grant the zoning of low-income housing. Without this judicial valve, it is doubtful that supporters of inclusionary housing would have access to an institutional forum that at one level promised justice and at another level attempted redress.

Although the court was not successful in the direct movement of low-income individuals from the state's urban areas, its decision eventually forced the legislature to act. The legislative response (the fair housing act) created an organizational entity, the COAH, that was supposed to satisfy the intent of the court. There is sparse evidence that the council has satisfied the original intent of the court. Most of the problem centers on the limitations inherent in the structure and power of the original legislation (Mallach 1985).

COAH was constructed to remove the issue of inclusionary housing from the judiciary. The legislation attempted a compromise between the court's strong concern for justice and the interests of local and state elected officials who perceived strong opposition to inclusionary housing. The result was an entity that did not mandate participation on the part of local governments.


The legislation and its eventual implementation provided many avenues to circumvent a forceful inclusionary housing policy (Mallach 1985). A clear example was the use of RCAs, which allowed localities to transfer 50 percent of their COAH-stipulated low- and moderate-income responsibilities to another locality. Evidence

suggests that this mechanism has not provided economic opportunities for low-income urban minorities. The majority of the transferred obligations are to urban areas with large concentrations of the poor and limited economic opportunities. Affordable housing units are being built in urban areas, but this violates the court's intention—to provide economic opportunity in growing areas of the state.

This politically directed diminution of the judiciary's intent, coupled with the organizational limits of COAH, has stymied justice, which is defined as free movement and choice by urban minorities. However, this is a political choice by elected officials (Mallach 1985). The judiciary played a strong role in forcing the other branches of government to protect minorities' rights granted by the New Jersey's constitution. This is, perhaps, all that can be asked of any court (Warren 1988).

Arguably, one can say that the substance of this case challenges the view that the judiciary is constrained only in view of the process and not in the argument's predicted outcome. If so, this study might be an addition to the debate on the effectiveness of the court but little value to those concerned with justice. Again, theoretical perspective is important to concerns for justice. What can be learned from this case is that the search for court-inspired justice is incremental, like much of American public policy (Warren 1988).

There are many policy iterations in which proponents sue and the court rules against, for example, restrictive zoning or funding for education based solely on the property tax. The rest of society, including the legislative branch, may or may not respond. Yet, proponents again sue in what becomes a prolonged game

of response, nonresponse, and shades in-between. The process is slow and tedious and seems to deny swift justice. The point, though, is that movement and, sometimes, meaningful change do occur (Warren 1988). In the case of inclusionary zoning in New Jersey, the next chapter will be written when proponents again petition the courts. 

## Notes

<sup>1</sup> Author's note: This research was supported by grants from the Schumann Foundation of New Jersey and the Provost's Office, Rutgers University. I wish to thank Alan Rosenthal and Carl Van Horn of the Eagleton Institute for their continued support. Norman Glickman, director of the Center for Urban Policy Research, arranged release time to complete the analysis and writing.

<sup>2</sup> New Jersey is not the only state in which the supreme court has ruled against exclusionary zoning. New Hampshire's court recently ruled that suburbs cannot use zoning laws to prevent the construction of low-income housing, and California, Pennsylvania, and New York courts have all used part of the New Jersey rulings to strike down exclusionary zoning.

<sup>3</sup> *Southern Burlington County NAACP vs. Township of Mt. Laurel* (67 N.J. 151, 336 A.2d 713, 1975), appeal dismissed and certified (Mt. Laurel I).

<sup>4</sup> The New Jersey Fair Housing Act of 1985 (P.L. 1985, c.222).

<sup>5</sup> *Brown vs. Board of Education* (98 F. Supp. 797, D. Kan. 1951); *Brown vs. Board of Education* (U.S. 483, 1954); *Brown vs. Board of Education* (349 U.S. 294, 1955); *Roe vs. Wade* (314 F. Supp. 1217, N.D. TX, 1970); *Roe vs. Wade* (410 U.S. 113, 1973).

<sup>6</sup> In fairness, Rosenberg set up a theoretical dichotomy: the *constrained* and *dynamic* views of the judiciary. Although Rosenberg attempted a critical evaluation of both paths, it is clear very early that he finds the constrained-judiciary argument most persuasive.

<sup>7</sup> *Oakwood at Madison, Inc. vs. Township of Madison* (72 N.J. 481, 371 A.2d 1192, 1977).

<sup>8</sup> The original ruling resulted in an array of "experts" flooding the lower courts with expert

testimony on what constituted appropriate regions and fair-share numbers. This became statistical overload for the lower courts, which then delayed swift decision in Mt. Laurel cases.

<sup>9</sup> There is some question as to the effect of the least-cost strategy. One questionable effect, if the ruling had been able to make a difference in housing production, would have been to encourage middle-class urban residents to relocate to the suburbs, further depleting cities of these very important individuals.

<sup>10</sup> Unfortunately, no survey evidence either supports or refutes the perceptions of elected officials at this particular time period (i.e., 1977). A 1985 survey of 500 respondents conducted by the Eagleton Institute determined that New Jerseyans were evenly divided between those who approved (48 percent) and disapproved (42 percent) of the court's effort to promote inclusionary housing.

<sup>11</sup> The combined bill was called *Senate Committee Substitute for Senate Bills 2046 and 2334*. It was approved by the state senate and sent to the floor of the assembly in January 1985. See Mallach (1985) for a full account of the legislative history.

<sup>12</sup> The fair housing act was conceived as a direct alternative to litigation in the courts; thus the act stipulated that Mt. Laurel cases, if filed before May 2, 1985, could be transferred to COAH. Any party in the case could request such a transfer. The courts agreed to honor such a request unless the transfer resulted in what was termed *manifest injustice*. The act further stated that the builder's remedy could not be granted after July 2, 1985, thus providing relief to the courts.

<sup>13</sup> The council reduced the 277,808 affordable housing units stipulated by the courts to 145,707. Individually, the council reduced many municipal fair-share quotas outright or through allowing renovated housing and subsidized apartments built since 1980 to qualify as part of their municipal obligation. COAH even credited basement apartments toward a town's fair-share quota. Municipalities were also excused if they had large tracts of land that were deemed environmentally sensitive.

<sup>14</sup> The minimum a sending municipality could pay was \$10,000 per housing unit.

<sup>15</sup> Much of the assistance offered through the HMFA was through its low-interest mortgage loans. The same set of municipalities eligible for assistance under the Neighborhood Pres-

ervation and Balanced Housing Program were eligible for HMFA financing.

<sup>16</sup> See, for example, COAH internal memorandum "Municipal costs with COAH versus the courts," 8 May 1990.

<sup>17</sup> COAH has a staff of approximately 19 individuals. A detailed look at the administrative limitations of COAH can be found in COAH internal memorandum "COAH and its proposed realignment of existing staff responsibilities and reorganization for expanded and new services," 20 April 1990.

<sup>18</sup> This challenge has come from a number of organizations and groups, including the New Jersey Office of the Public Advocate.

<sup>19</sup> The \$60 million figure is reported by COAH.

<sup>20</sup> By March 1990, 1,388 RCA units were certified by COAH, with only 677 actually completed.

<sup>21</sup> In many cases, state government, through the DCA and its various urban revitalization programs, has subsidized the remaining difference between what the suburb pays for transferring its obligation and the actual cost of building the unit.

<sup>22</sup> The 7,500 figure comes from unpublished surveys by the New Jersey DCA and only covers court-supervised towns that are now part of the COAH process.

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