

**Compromise within Coercion: A System for Eliciting Municipal Compliance
within the Realm of Affordable Housing and Integration**

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Table of Contents

Introduction.....	2
Literature Review.....	4
Research Design	18
Historical Overview	27
Case Study: 1985 – 1999	45
Case Study: 2000 – 2014	54
Case Study: 2015 – 2018	63
Analysis.....	76
Conclusion.....	95
Works Cited.....	98

INTRODUCTION

The problem addressed in this thesis is how the current segregation of many wealthy, white, American suburbs by race and class manifests itself in part in the lack of affordable housing available in such areas. This de facto segregation of US neighborhoods is the product of many historical forces, but in part resulted from acts of overt racial discrimination and violence that dominated power structures in the US until the 19th Century. It also resulted from affluent white Americans' migration out of urban centers and into the suburban fringes of metropolitan areas in the 1950s and 1960s. Lastly, the economic segregation thereafter played a largely similar, if coded, role in segregating these suburban neighborhoods by race and class, through realtors' use of racial steering techniques in forming neighborhoods, landlords' rent setting, and the use of income exclusionary zoning laws.

The central issue addressed is how the local governments of these segregated areas should be approached in order to best ensure the undoing of racial segregation of housing and allow for true economic class movement. The question I ask to frame my research is thus, how can white affluent and middle class suburbs be convinced, or even coerced, into doing their fair share to alleviate the racial segregation of metropolitan areas that has resulted in the concentration of poor people of color in inner cities and inner suburbs?

This paper first summarizes the main scholarly debate surrounding its topic, categorizing scholars into categories of Coercivists, Incentivizers, and Cooperativists, depending on their argument as to how affordable housing can be created in wealthy white suburbs. It finds that most scholars traditionally argue that coercion of local governments is necessary in order to open up suburbs to affordable housing initiatives. However, some scholars also argue that other methods can aid in the creation of affordable housing. Some argue that positive incentives make

municipalities feel that building affordable housing is worth it to them. Others argue that more cooperation with municipalities, through the making of concessions by builders, affordable housing advocates, the state government, and municipalities themselves, will make affordable housing movements more effective. This thesis affirms the logic of cooperation, but expands upon it, hypothesizing that concessions made in a cooperative way can make affordable housing production more likely, but only when these cooperative attempts occur within a larger framework of coercion that is already binding municipalities to the cause ethically.

After presenting its hypothesis, the paper provides a brief historical overview of racial segregation in housing in the United States, tracing its roots in slavery to its manifestations in the contemporary world. This section discusses concepts less traditionally focused on when analyzing racial segregation, such as landlords' high rent setting, realtors' racial steering, and suburbs' exclusionary zoning laws. The thesis then hones in on the state of New Jersey, and its *Mount Laurel* Doctrine, as a case study through which coercion, incentivizing, and cooperation interact with specific cases of racial discrimination. Additionally, it explains how the aforementioned historical instances of racial segregation became integrated into the municipalities' housing in New Jersey, and how the state's Supreme Court addressed them.

Next, the paper studies the landscape of affordable housing in New Jersey over the course of three time periods, spanning from the 1980s to the present, and identifies various housing policies implemented throughout them to try and further the mission of creating affordable housing and promoting residential integration. Along with these case studies, the paper provides an analysis of each one and attempts to translate patterns of municipal attempts to either promote or subvert residential integration into larger lessons that can be learned about the types of

pressure that affordable housing developers, builders, and advocacy groups place on such municipalities.

The finding of this thesis is that within a structure of coercion, positive incentives and avenues for local cooperation can produce a system of compliance from local municipalities that is more efficient, from the perspectives of the state, affordable housing advocates, builders, planners, academic scholars, and municipalities.

LITERATURE REVIEW

The research question that motivated this thesis is, how can white affluent and middle class suburbs be convinced, or even coerced, into doing their fair share to alleviate the racial segregation of metropolitan areas that has resulted in the concentration of poor people of color in inner cities and inner suburbs? The body of academic literature surrounding the topic of how to best elicit suburban municipal compliance, in the process of promoting residential integration through the construction of affordable housing, reveals a key debate, which is how suburbs should be regarded as parties in the process of doing their fair share. Some scholars take an adversarial approach towards local government and argue that it must be coerced, by state and federal governments, to do its fair share through the creation of its own affordable housing projects and its increased acceptance of government sponsored housing voucher programs. These Coercivists make up a large body of the scholarly community. Other scholars, still taking an adversarial view of local government in solving the problems and still agreeing with affordable housing programs as a solution, advocate instead for a system of better incentivizing local governments to reach affordable housing, community integration, and racial diversity goals. These Incentivizers suggest policies like the revision of government funds to pay more to

wealthier landlords and economic rewards for those who combat racially discriminatory practices in local ordinance and local government's complacency in working towards fair housing goals. These scholars are not as numerous as the Coercivists, but still make a compelling case. The last main school of thought on this issue takes a largely unconventional perspective on this issue and instead advocates trust and compromise between federal, state, and local government as partners working towards the common goal of economically and racially diverse communities. These Cooperativists argue that compromises and concessions made by all three levels of government can lead to plans that are digestible for all of them, and claims that most of the difficulty in reaching this goal so far has been from higher levels of government being unwilling to trust local governments and consider their needs in implementing previous programs.

Coercivists

The Coercivist school of thought is strongly based around the example of Mount Laurel, New Jersey and the Ethel Lawrence Homes affordable housing community, which stands as the biggest bastion of successful action in the realm of affordable housing. In *Climbing Mount Laurel: the Struggle for Affordable Housing and Social Mobility in an American Suburb*, Douglass Massey (2013) studies the Ethel Lawrence Homes affordable housing community, and traces its history, from 1967 through the present. He finds that the *Mount Laurel* case study is a model for favorable housing reform due to its success where other programs have failed, in addressing the concentration of poverty and people of color in certain neighborhoods. Massey reaches this conclusion by studying the ways in which the movement to establish Ethel Lawrence Homes as an affordable housing community overcame the entrenched opposition that many similar efforts have failed to overcome. *Mount Laurel* was a success story because the New

Jersey state government interjected itself into local affairs and mandated integration, through its decisions in the *Mount Laurel I* and *Mount Laurel II* New Jersey Supreme Court decisions. Furthermore, as other many Coercivists advocate, affordable housing builders, developers, and advocates continually engaged themselves with the process of affordable housing creation, monitored its success or failure carefully, and confronted municipalities when it ceased to work. This involvement is what led to the *Mount Laurel II* court case, without which the Ethel Lawrence project would have been doomed to failure. *Mount Laurel I*, in 1978, had merely given municipalities the task of implementing affordable housing, but left the specific timeline and ways in which housing was implemented to local discretion. *Mount Laurel II*, in 1983, removed the trust in local governments to fulfill their fair share burden and to determine what that burden might be. In this case study, as in many others, local governments had begun implementing limited affordable housing, but in outlying areas of their communities, such as on factory land and in swampy areas far away from public water and sewer systems. Additionally, they used duplicitous tactics to make affordable housing inaccessible to poor families, like prohibiting children in one-bedroom units, making families have to purchase multiple units to move to the community. *Mount Laurel II* placed specific burdens on local governments, such as setting aside 20% of its funding for development for low-income housing, and setting aside land in more integrated residential areas. Additionally, it created the Council on Affordable Housing (COAH), which was a state agency that would monitor local governments' progress towards affordable housing goals, and could file legal complaints if they were noncompliant with the *Mount Laurel* Doctrine. Massey found that this state oversight, in the form of giving municipalities specific affordable housing goals and monitoring their progress systematically, was instrumental to Ethel Lawrence Homes having tangible success, as compared to affordable housing projects that have

been solely left to local oversight. In framing local government as the adversaries to neighborhood integration *Climbing Mount Laurel* set the standard for oppositional tactics towards local government being effective in solving the housing question. Massey paved the way for the largest school of thought in this scholarly debate.

Lerman (2006) explains how New Hampshire is another state that has addressed exclusionary zoning through coercive methods. The main difference between it and New Jersey is that it has done so in a way that does not address the idea of towns having a proactive constitutional requirement to provide inclusionary zoning. Instead, the New Hampshire courts simply declared a zero tolerance policy on exclusionary zoning. In a sense, this circumvents one of the more difficult problems for developers challenging exclusionary zoning ordinances, as the court allows for a constitutional attack by developers on municipalities without the latter finding a violation of due process or equal protection on the part of the former. Lerman explains how these types of cases have been allowed based upon a definition of general welfare that extends beyond the community living in a municipality, but one that does so without requiring municipalities to provide a fair share of affordable housing on their own, or of their own volition.

Lerman uses the New Hampshire court case of *Britton v. Town of Chester*, in 1991, which held that once a municipal zoning law is found suspect, the developer who challenges it is entitled to construct their development, provided it is reasonable and creates low-income or middle-income housing. The New Hampshire court essentially held that it will not accept exclusionary zoning measures, and that it will use coercive power to bypass such measures if they are brought before the court. However, in the case of New Hampshire, though cases must be brought to the courts to be challenged as exclusionary zoning, municipalities have no affirmative obligation to further the goals of inclusion in their communities, as in the case of New Jersey.

What this means is that, while the New Hampshire state government offers pathways for developers to use coercive pressure on municipalities, there is no larger system of coercive pressure mandating some level of standardized, minimum level of work from all municipalities. Ultimately, this renders the case of New Hampshire less effective than New Jersey, though still demonstrative of the success of coercion as a type of pressure in affordable housing matters.

The most recent major case study in affordable housing has been President Obama's section 8 housing voucher program, which he implemented in his second term. Semuels (2015) critiques the section 8 housing voucher program under Obama and comes to the conclusion that both structural flaws in the design of the program as well as aspects of its implementation do not allow for enough definitive options to use the vouchers. For instance, landlords in low-income areas end up aggressively recruiting voucher-holders and trying to draw them in, as the vouchers are a much more reliable source of rent than what other low-income tenants have available. Since tenants lose their voucher if they do not use it within 90 days or receipt, landlords in wealthy areas can easily refuse to accept them by simply drawing out the process of purchasing property to longer than 90 days, as a way of informally closing off their buildings. The possibility and use of this practice allows voucher holders no choice but to find housing in low-income areas, nearly always composed of a majority of people of color. Semuels looks at the success of Mount Laurel based on state government overseeing specific plans and argues that local landlords should have an obligation under law to take section 8 vouchers, since their lack of good-faith efforts to do so without oversight have undermined the affordable housing program.

Within the debate over the federal section 8 program, the case of the city of Austin, Texas stands out as one that is often used for Coercivists as a reason why more force from higher level government is the solution for the lack of progress towards affordable housing. Semuels does a

small analysis of the city and addresses the Texas state law that allowed landlords to refuse to accept section 8 families in their buildings, explaining how it was created to overturn an Austin city law mandating that landlords accept section 8 families, and establishing that clearly some sort of enforcement on landlords to take vouchers is needed in order for a housing voucher program such as section 8 to avoid the pitfalls it has encountered. Building on this, a more in-depth study done by the Austin Tenant's Council concluded that, out of all apartment complexes with at least 50 units in the city, while 56% had rents that would make them accessible to section 8 users, only 6% of these units accepted vouchers and did not have minimum income requirements for tenants (Austin Tenants' Council 2012). Furthermore, most were located on the east side of Austin, in high-poverty areas with underperforming schools and high crime rates (Austin Tenants' Council 2012). The implications of the study for Coercivists are that the US needs more specific requirements for affordable housing, in terms of mandating that it should be built in areas integrated with the community, and needs to give less leeway to the communities in terms of both setting goals and measuring their progress to their goal in their own status reports. The Austin study's recommendations heavily mirror the *Mount Laurel II* court decision in its focus on the placement of affordable housing within a municipality, as when affordable housing units in Austin were created and available for section 8, they existed in the poorer areas of the city, effectively continuing segregation within the community, but reducing it to the neighborhood level, such that numbers alone would not capture this fact.

King (2013) elaborates on this argument, but broadens it and suggests that, much as the New Jersey Supreme Court set specific standards in the *Mount Laurel II* court case, that the US federal government needs to set specific legislative standards for fair housing goals and more carefully monitor local progress reports towards completion of those goals. King cites the 2009

Westchester housing settlement that revealed the county's years of making insubstantial progress towards affordable housing production while still taking in federal money for the purpose and using it in other areas.

Schwemm (2011) further elaborates on the 2009 Westchester housing settlement as a point of study to reflect on how local government opposition to affordable housing can be overcome through court action. He explores how this can be done not only through injunctions and court orders, as has been done in the past with some amount of success, but also through courts setting precedent. For instance, courts can choose to hold local communities accountable by putting not just their affordable housing grants at stake, but also their entitlement grants, which constitute a much greater threat to the community's well being due to the much larger amount of money and the hand it plays in other areas, such as education. Schwemm's work lays out the potential that courts hold for furthering future affordable housing efforts, through their enforcement of regulations and coercion of local communities who resist regulations (Schwemm 2011). Later, Schwemm studies the 2015 Supreme Court decision on *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, which recognized that municipalities were responsible for the disparate impact of their decisions in terms of racist effects, even if not motivated by racist intent. Schwemm emphasizes the importance of using the court system to hold local governments accountable for affordable housing requirements, or for setting requirements if none exist.

Leonard (2014) supports the arguments of other Coercivists in saying that opening up affluent white suburbs to affordable housing through use of specific requirements is the only way for HUD, as a federal body, to succeed in its affordable housing goals. He states, "HUD should provide negative incentives for jurisdictions that fail to engage in regional assessments and

planning when the opportunity presents itself. Negative incentives are particularly important because positive incentives, especially if earmarked for integration, may be viewed as more costly than beneficial to affluent suburbs” (183 – 184). However, Leonard takes a radical view in further claiming that white affluent suburbs’ very existence is part of the problem, and that they need to be dismantled, physically and ideologically, in order for integration to take hold.

Solow (2009) continues with the focus on specific neighborhoods within municipalities and proposes that the Obama administration reform the section 8 housing program so as to concentrate on the quality of neighborhoods that families move to and to structure affordable housing programs in a theoretically different way, which she terms an opportunity housing voucher system. She argues that the theoretical and ideological goal of affordable housing initiatives should be aimed specifically at ending racial segregation in the US, rather than just providing those in low income and impoverished communities with as many options as possible for where they can live, and that this more active philosophy will develop more driven, specific, and effective programs. An opportunity housing voucher system would differ significantly from section 8 policies because it would restrict voucher holders to only certain geographic areas that were determined to have sufficient economic opportunity, and thus save them from the systems that landlords often set up to entrap them within low income communities.

Berry’s (1979) work argues that pressure from state and national level governments is necessary to stimulate neighborhood integration, as he claims local government will always tend to oppose it and will succeed unless checked by a higher power. He uses 1960s and 1970s Chicago as a case study and concludes that white flight in Chicago was a result of opposition to neighborhood integration on the local level, through the use of taxes, loans, and realtor prejudice, that would be solved with more constant evaluation and scrutiny from a state government body.

He also explores attempts that have been made to racially integrate suburbs but notes that these are always done by stimulating movement and action only on the part of people of color rather than white people as well, such as having black realtors appointed to white suburban real estate boards in order to gain access to suburban housing markets. It highlights the basic necessity of suburbs doing their part in helping with integration efforts and underlines the Coercivist mindset that suburbs will always resist this duty.

Finally, Nolon (1986) compares the cases of Mount Laurel, New Jersey and Berenson, New York, on the basis that they were very similar cases that had drastically different incomes, which in turn led to communities with large differences in progress toward affordable housing creation. Some of the differences that Nolon identifies between the two cases include the means by which affordable housing is measured and prescribed and who is given the responsibility to create it. For instance, the Mount Laurel case's specific use of the fair share principle to refer to low income housing was more effective than Berenson's use of fair share to refer to all types of housing. Additionally, the Mount Laurel court dedicated a specific numerical amount that constituted fair share, which Berenson did not. When combined, Nolon suggests, similarly to other Coercivists, that these differences between cases show why courts should be used to induce a rise in affordable housing developments in suburbs and small communities.

Incentivizers

The Incentivizers are in the minority among scholars in advocating more of a reward and positive reinforcement strategy for ensuring that local governments meet their goals for affordable housing, but nevertheless, they serve as an important group that moderates between the more extreme views of the Coercivists and the Cooperativists. Collinson and Ganong (2014) introduce the idea that government should pay more to wealthy area landlords and less to poor

area landlords in terms of maximum rent accepted for section 8. They claim that it would open up more options for voucher holders by making more neighborhoods and areas affordable, outside of the problem of landlords actually accepting vouchers. They discuss changes that the Obama administration could make to the US Department of Housing and Urban Development (HUD) regulations in how fair market rents are determined. By fair market rents, they refer to what is covered by the federal government section 8 vouchers as a reasonable cost to cover for tenants' housing. At the time of writing they were done regionally, but Collinson and Ganong find that ameliorating this to a local zip code based system would raise rent ceilings in wealthy neighborhoods and lower them in poorer neighborhoods. They claim that this zip code rent method would be more effective than any sort of voucher program because it makes a larger market change, and thus a cultural change to existing neighborhoods as a whole, in providing the money to make this change through rents. Alternatively, they argue that voucher programs, like Moving to Opportunity under President Bill Clinton, are both expensive and do not change the overall culture of a municipality to one of inclusion and integration, because they allow only a small number of families to move out of impoverished and crime heavy neighborhoods, but do not change the conditions of those neighborhoods at all.

Termine (2010) argues for *qui tam* actions to be legalized as a valid means by which government and individual ordinary citizens within suburban municipalities can hold local municipalities accountable for developing affordable housing. *Qui tam* actions essentially reward people for bringing discriminatory or illegal practices to court, and the definition Termine uses, taken from the 1997 US Court of Appeals Third Circuit case, *Anthony J. Dunleavy v. County of Delaware*, reads, when a “private person with knowledge of fraud against the government, acting as a de facto ‘attorney general,’ [instigates] litigation on the government's behalf against the

parties responsible” (Termine 2010, 1370). Termine uses the example of *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, in which a nonprofit organization won a large settlement in a residential desegregation case against Westchester County in New York. He uses the example of why the Anti-Discrimination Center used a *qui tam* action towards Westchester to show what benefits *qui tam* actions bring to the realm of residential integration.

Termine offers up for consideration that Westchester has agreed to build the most of its required affordable housing in mostly white neighborhoods, which would not have been a requirement even explicitly required in the law that other municipalities comply with. He also claim that lawsuits like the one in this case set an example and encourage other organizations to police municipalities, using state mechanisms for compensation like the *qui tam* lawsuit. Additionally, he makes the point that *qui tam* action that provides compensation is the only way in which a private party can be involved in the process of confronting discriminatory residential conditions. In short, he feels that allowing wealthy white people within suburbs to sue their municipalities and gain from it would incentivize people to both sue when wealthy suburban conditions are discriminatory and not be discriminatory themselves.

Cooperativists

The Cooperativists advocate the polar opposite of the Coercivists in trying to solve the same problem. They ask for trust in local government to set and work towards integration of affordable housing, or otherwise a suggestion of federal and state governments to work alongside local governments and cooperate with them to ensure that interests at all levels of government are met. For Cooperativists, local government is not the antagonists, but a potential partner working towards a common goal.

Payne (2000) proposes what he terms a government matrix, with different roles for each level of government, as well as different incentives and compromises between them. He analyzes the *Mount Laurel I* and *Mount Laurel II* court cases and the affordable housing that has been created as a result. However, he then states that more can be done to fight exclusionary zoning and support low-income housing. Payne claims that both local and state regulations must exist, and exist in concert, in order to most effectively combat these problems. He proposes a system of interconnected governmental programs to expand the Mount Laurel doctrine that he terms as his matrix. Essentially, these consist of separate efforts from local and state regulations as well as subsidies from both levels, all working in combination to improve upon the success in affordable housing that Mount Laurel represents.

Krefetz (2000) builds on this theory of compromise rather than antagonism and cites a historical example to show its success. She studies the Massachusetts Comprehensive Permit and Zoning Appeals Act, or as it is referred to in the paper, chapter 40B and focuses on the success that 40B had as a law promoting affordable housing, while drawing comparisons and contrasts to the New Jersey Fair Housing Act, which came after 40B, but which had a much rockier and resistance-laden path than the Massachusetts law did, through the Mount Laurel court cases. She holds 40B up as a potential model for locally-initiated action towards developing affordable housing, noting that most recent efforts have involved judicial action towards or state coercion of local bodies, where the local body is resistant to affordable housing development. Her main finding is that the way the 40B law was structured, with a specific fair share housing quota based on the percentage of lands used and the percentage of total community housing stock, and the fact that the law was supported by the state through the creation of the HAC, a state body that resolved disputes regarding housing development, enabled the law to be successful where other

efforts at affordable housing have not. She also notes the ways in which local resistances or reservations to the initial law's passage were overcome, either through compromises with locals, such as the development of smaller scale housing complexes that would blend in with the community, or through clever framing, such as advertising housing as family housing rather than low-income housing. Overall, Kefetz believes that compromises can be made w/ local government, as evidenced by 40B, and will allow tighter federal control as well as local satisfaction with the process of building more affordable housing in wealthy communities.

Chetty et al. (2015) analyze the effects of the Bill Clinton Moving to Opportunity Program (MTO) through examining all recorded tax return data on the program's families over time and concludes that housing voucher programs can have positive effects on reducing poverty for the next generation, but only if children are below a certain age threshold and not fully mentally developed before the move. For Chetty et al., forming psychological and social roots is imperative for positive change in the reduction of poverty and conversely, if these ties are already formed, breaking them could actually prove more detrimental to a child. They use this analysis to propose that MTO and future programs like it focus on keeping local family values and building from a shared base of family welfare, rather than the contentious subject of race.

Seicshnaydre (2016) studies the state program for affordable housing in New Orleans, and concludes that voucher households in the New Orleans metropolitan area had less access than national section 8 voucher holders to low-poverty neighborhoods of opportunity. For Seicshnaydre, this case study is indicative of the need for local and federal compromise in affordable housing endeavors, if improving people's lives throughout the country is the goal. Engdahl (2009) comes to similar conclusions when looking at the very different case of the Baltimore Housing Mobility Program in Maryland, which has been successful in bringing

affordable housing to the city. Engdahl finds that this is largely because of regional cooperation working in Baltimore's favor, as both local and state governments can put resources and organization into developing affordable housing. Key for Engdahl is that compromises were made, such as conducting strict background checks on all voucher acceptees to assure locals that crime is not being brought into their suburbs. The Baltimore Housing Mobility Program also has an independent organization that helps people find housing so that locals do not have to do too much work. Eagle (2017) and Hannah (2015) both come to similar findings, with Eagle finding that local municipalities are more likely to compromise when the concept of local housing is framed in such a way that goals consider wealthy locals' needs, as well as those looking for better neighborhoods. Among goals that Eagle thinks will bring about compromise are: making available housing of different price ranges, attracting voucher holders who will contribute to the growth and economic prosperity of cities, and ensuring that neighborhood housing remains available for existing residents, while preserving their cultural values. For Eagle, affordable housing will only bring about an end to poverty if it is done in a targeted, mindful way. Hannah (2015) finds that mixed income housing units, the most common system used, are too standardized an approach to affordable housing, and that there is a need for federal and state governments to work with local based systems that tailor affordable housing to each situation that they are in. She identifies three goals of economic desegregation, poverty alleviation, and urban revitalization and claims that no single governmental body can fully understand them, but an approach that integrates the knowledge of all three of these bodies will prove successful. She proposes to use mechanisms such as community land trusts, deed restrictions, and limited cooperatives to create housing that is affordable, but also rejuvenate the neighborhoods that

people currently live in rather than displacing people in the process of finding them affordable housing.

Finally, Boyack (2016) finds that focusing on urban centers rather than on suburbs, as has traditionally been the case, will better address the problem of both economic and racial stratification of communities. She argues that urban centers are seeing an uptick in popularity as a housing destination, and that if cities act strategically then they can capitalize on this momentum to remake their neighborhoods and improve them in terms of safety, infrastructure, and community feel. This can be done through altering zoning laws and federal economic grants so as to make cities more attractive places to live. The benefit of this for the authors is that it will create more racial diversity by reversing the process of white flight and drawing white upper class families back to urban centers without explicitly using race as its mobilizing factor, making it a more diplomatic and potentially bipartisan solution to racial segregation of communities.

Conclusion

Overall, while many scholars agree on the causes of racial segregation of metropolitan areas and the concentration of poverty in their inner limits and the need for suburbs to play a larger role in alleviating these problems, there is much disagreement in terms of what suburbs' role should be, and whether their relationship to state and local governments is wholly adversarial, as history suggests, or whether compromise may actually be a more efficient way of solving the neighborhood problems of the US.

RESEARCH DESIGN

After reviewing the literature surrounding my question, how can white affluent and middle class suburbs be convinced, or even coerced, into doing their fair share to alleviate the racial segregation of metropolitan areas that has resulted in the concentration of poor people of

color in inner cities and inner suburbs? I developed a hypothesis. White affluent and middle class suburbs must be coerced to some extent into doing their fair share to alleviate the racial segregation of metropolitan areas that has resulted in the concentration of poor people of color in inner cities and inner suburbs. However, compromise with local governments and positive incentives may exist at a limited capacity within this framework of accountability and responsibility instated by higher-level governments and enforced by housing builders, developers, and advocates. My literature review suggests that coercion is necessary for the success of any affordable housing program implemented locally, as all cases involving no coercion either fail or are less effective. For instance, even the big success story in integration and affordable housing, Ethel Lawrence Homes in Mount Laurel, New Jersey, only succeeded after multiple court cases, the last of which was needed to force local governments to comply with its previous decisions, through the creation of an official obligation, a state body with oversight over the process, and explicit means by which municipalities could be punished for not complying with the Court's decisions in a timely and reasonable manner (Massey 2013). In a more modern case, the response of wealthy suburbs in Westchester, New York to President Obama's affordable housing development plan has been to stall and make superficial steps towards meeting the goals his administration set out for them and the only situations that have seen success are those in which the federal government has taken municipalities to court or forced them to comply by taking responsibility for goal setting and progress out of their hands (King 2013). Lastly, since these suburban areas were initially built and segregated through coercive means, such as realtors' use of racial steering techniques, landlords' rent setting, and the use of income exclusionary zoning laws (Massey and Denton 1998), it is likely that it will require some coercion to undo the segregation. These reasons come together to explain the key to

ensuring the success of more US affordable housing programs in the future, and I want to organize them all together to really prove and establish which strategies state governments, builders, and affordable housing advocates can use to implement affordable housing projects most effectively moving forward.

My hypothesis is that the amount of coercion used by state governments, builders, and affordable housing advocates towards local governments positively corresponds to the probability that they do their fair share to develop affordable housing. However, where I differ from the scholars I have read is that I contend that compromise with local governments and positive incentives must exist at a limited capacity within this framework of accountability and responsibility that would be enforced coercively by state governments, builders, and affordable housing advocates. Coercion is most effective when paired with one of the other two strategies. Positive incentives can correspond to greater probability of fair share, but only when they are used in tandem with coercion. Cooperation with local government, by making compromises with them and by allowing them to be proactive and set their own goals, can correspond to more fair share being done, but only when done within a larger framework of accountability and when not too trusting of local government. I believe that while trust increases efficiency, there can only be so much trust in local governments to solve this problem.

Hypotheses

Likely Causation

- Greater amount of state government oversight and builders and affordable housing advocate enforced coercion implemented on local municipalities → Greater probability that local municipalities work to integrate and inclusively zone within their communities, by developing affordable housing

Possible Causation

- Greater state government, affordable housing builder, and advocate cooperation and trust in local governments within a larger binding system of accountability → Greater probability that local municipalities work more proactively and efficiently to integrate and inclusively zone within their communities, by developing affordable housing
- Greater amount of positive incentivizing done by state government or affordable housing advocates towards local municipalities → Greater probability that local municipalities work to integrate and inclusively zone within their communities, by developing affordable housing
- Greater state government, affordable housing builder, and advocate cooperation and trust in local governments without any coercive measure or larger binding system of accountability → Lower probability that local municipalities work to integrate and inclusively zone within their communities, by developing affordable housing

Defining Concepts

1. *Fair Share*- When a suburban municipality does a sufficient amount to economically and racially integrate their community and begins to undo the effects of white flight and suburban segregation, they are said to have done their fair share. This can manifest itself in many ways, but one is the expansion of affordable housing within its boundaries. The term originates from the *Mount Laurel* court cases in the 1970s and 1980s, as the Mount Laurel Doctrine created though them obligated New Jersey jurisdictions to “provide realistic opportunities for their ‘fair share’ of the region’s need for affordable housing for low and moderate-income people” (Fair Share Housing Center n.d.).

2. *Coercion*- When builders and affordable housing advocates interject themselves into local affairs and mandates integration. This is done through having state bodies oversee local governments and take periodic status reports on their progress towards reaching fair share, as well as builders and affordable housing advocates taking local governments to state courts when they do not make substantive effort to reach fair share goals (Nolon 1986); (Massey 2013).
3. *Incentivizing*- When state government or affordable housing advocates provide positive reinforcement, through use of rewards, for those helping to aid in the process building affordable housing. This is exemplified by policies like the use of government subsidies to pay more to municipalities who develop more affordable housing (Collinson and Ganong 2014), or economic rewards for those who take local government to court for complacency or for taking superficial steps in working towards fair housing goals (Termine 2010).
4. *Cooperation*- When state government, affordable housing builders and advocates, and local government can each make concessions and work together towards the shared goal of affordable housing. One way in which this manifests itself is state governments allowing for suburban governments to build smaller affordable housing communities that fit in with the aesthetics and flow of life of their neighborhoods so as not to be overly disruptive (Krefetz 2000). Alternatively, it can look like state governments conducting strict background checks on all affordable housing program participants to assure locals that crime isn't being brought into their suburbs (Engdahl 2009), or in state governments promoting affordable housing programs using a shared idea of family welfare, rather than the contentious subject of race (Chetty et al. 2015).

Case Studies

My main case study will be the suburban municipalities of the state of New Jersey, because they actually have in law a statewide fair share affordable housing obligation, established in the late 1970s and early 1980s through the *Mount Laurel* court decisions. I expect there to be a lot of information on the extent to which municipalities have complied with the Mount Laurel decisions, but also a lot of data on different compliance strategies being implemented, so this state case study will be greatly helpful in evaluating my hypothesis. I will do a brief overview of all New Jersey municipalities, in what will end up being a 5-10 page section in my thesis with charts showing how municipalities throughout the state have complied with *Mount Laurel* court decisions over the past 40 years. Then I will hone in on two municipalities and categorize each of the municipalities' situations as corresponding to one or more of the three classes of strategies I developed in my literature review: coercion, incentivizing, or cooperation, and find out why they have or have not fulfilled their obligation, and how the state has dealt with their differing levels of success in outcomes.

I will also be using three distinct time periods as associated with the implementation of the *Mount Laurel* doctrine as my case studies. I will be studying:

1. The Prior Round (First and Second Rounds combined) under COAH (1987 – 1999)
2. The Third round under COAH (2000 – 2014)
3. The Third Round under the New Jersey Courts (2015 – Present)

These time periods are important to study because the effectiveness of attempts to implement the *Mount Laurel* Doctrine has varied over time, as have the uses of coercion, incentivizing, and cooperation.

Measuring Variables

Fair Share

I plan to measure the fulfillment of fair share by a municipality in the same way that the Council on Affordable Housing (COAH) in New Jersey does, by how many units of affordable housing that the municipality has built, where those units are placed, how many it plans to build in future, and how accountable it has been to its affordable housing development goals or plan, assuming as a precursor that it has developed either of these (Kinsey 2015).

Coercion

I plan to measure Coercion as any legal action that affordable housing builders and advocates, the New Jersey state government, or COAH takes that allows for action against a local municipality which will enforce an obligation to build affordable housing upon it.

Incentivizing

I plan to measure Incentivizing as any action that the New Jersey state government or COAH takes that offers benefits to a local municipality for being proactive in building affordable housing.

Cooperation

I plan to measure Cooperation as any action that the New Jersey state government, COAH, or affordable housing advocates take that has both a measure of cost for local municipalities but also one of benefits and positive reinforcement. Additionally, distinct from coercion, these are actions that municipalities agree to willingly.

Data Collection and Analysis

First, I interviewed an expert on New Jersey housing, Alan Mallach, an urban planning scholar and senior fellow at the Center for Community Progress in Washington DC and former special master in Mount Laurel doctrine cases. Mallach explained some general trends in how many municipalities have been responding to their affordable housing obligations. Especially

because there was a lack of conclusive data, but a large number of news stories and court documents covering the many municipalities of New Jersey, Mallach was helpful in that he directed me towards certain time periods, time shifts, and case studies that I should pay attention to, specifically in the first two COAH rounds, before 2000. This interview heavily informed my process of generally characterizing municipalities and choosing cases.

I also evaluated my hypothesis by looking at data from the Council on Affordable Housing, which was a New Jersey state agency that set municipalities' affordable housing obligations, in terms of units required and generally where they are built. Builders could also file legal complaints in state courts if localities were incompliant with COAH's interpretation of the *Mount Laurel* Doctrine. I examined the municipalities with the greatest obligation for affordable housing, and attempted to trace their compliance with the Mount Laurel doctrine from 1983 to the present. Unfortunately, the Fair Share Housing Center (FSHC) and COAH data on affordable housing obligations for all New Jersey townships is very spotty and not very detailed for the most part, leading it to be conclusive only to a certain extent (Kinsey and Fair Share Housing Center 2015).

I used newspaper articles from local New Jersey newspapers to better inform my specific case studies. I also looked at court documents to determine how the state government has used New Jersey courts coercively towards local bodies. Lastly, I conducted more interviews in the Spring 2018 semester, through Mid-March.

I interviewed Alan Mallach, one of the most well known affordable housing scholars, and one who did extensive work in New Jersey in the 1980s and 1990s. Mallach has studied affordable housing in New Jersey from the inception of the Mount Laurel doctrine and is an

extremely knowledgeable source, particularly on the period before the collapse of the Council on Affordable Housing in 2000.

I also interviewed David Kinsey, a Princeton University professor and affordable housing scholar who has done extensive research on New Jersey affordable housing in both the pre-2000 period and the post 2000 period, through the present day.

I communicated briefly with Kevin Walsh, the director of the Fair Share Housing Center, a New Jersey-based affordable housing advocacy group that has been absolutely instrumental in advancing the cause of affordable housing development in the state.

I interviewed Jeffrey Surenian, a New Jersey Attorney who has represented many municipalities in the third round, both under COAH and under the courts.

I interviewed Stephen Eisdorfer, a New Jersey Attorney who currently represents builders in *Mount Laurel*-related litigation. Eisdorfer has been involved in New Jersey affordable housing litigation since the mid-1970s and worked previously as a Public Advocate for civil rights groups until 1994, at which time he became a Builder's Attorney. He is also an alum of Haverford College.

I interviewed Richard Hoff, a Developer's Attorney in New Jersey who had perspective on dynamics between planners and municipalities both under COAH and under the courts.

I interviewed Philip Caton, a New Jersey planner who has also served as the longtime favored Special Master Planner for many judges when they resolve affordable housing obligation situations. Caton served as the Special Master in the landmark *Mount Laurel I* New Jersey Supreme Court case.

I interviewed Elizabeth McKenzie, a New Jersey Planner and Special Master who has a large municipal practice.

These interviews gave me a sense of different perspectives on the how the *Mount Laurel* doctrine has been implemented over time, and how various aspects of its implementation have been positive or negative for the various parties involved. In addition to factual knowledge, these interviews helped me classify how different parties, such as developers, municipalities, and affordable housing advocates, have felt or acted towards attempts to establish affordable housing.

HISTORICAL OVERVIEW: AFFORDABLE HOUSING IN NEW JERSEY

Creation of the Racially Segregated State 1500s – 1900s

Segregation of housing in the United States on the basis of race has existed since the transatlantic trade first brought slaves to the colonies in the late 15th Century and beginning of the 16th Century, and prevails today in different more institutionalized forms. Termine (2010), states, “Residential segregation is viewed as a late-blooming offshoot of the institution of slavery... the artificial and insidious nature of racial isolation shines through” (1374). Segregation of housing thus has its origins in slavery. Beginning with the conditions imposed on black Americans during plantation life and then, when slavery was formally outlawed, and then continuing to the conditions of sharecropping under the Jim Crow laws, this racial segregation of living spaces historically manifested and then entrenched itself in issues of class, which it is still tied to in some capacities today. As Massey and Denton state in their 1993 book, *American Apartheid: Segregation and the Making of the Underclass*, “The emergence of the black ghetto did not happen as a chance by-product of other socioeconomic processes. Rather, white Americans made a series of deliberate decisions to deny blacks access to urban housing markets and to reinforce their spatial segregation. Through its actions and inactions, white America built and maintained the residential structure of the ghetto. Sometimes the decisions were individual, at other times they were collective, and at still other times the powers and prerogatives of

government were harnessed to maintain the residential color line; but at critical points between the end of the Civil War in 1865 and the passage of the Fair Housing Act in 1968, white America chose to strengthen the walls of the ghetto” (19). Massey and Denton underscore a key concept, which is that the segregation of Americans by race and class is not just the result of subtle strategies and passive apathy towards historical injustices. White Americans’ segregation of wealthy suburban areas by race and class has been an active process throughout history. Furthermore, some methods used were blatantly discriminatory along lines of race, such as racially restrictive covenants, lynching, and other aspects of physical violence used to prohibit black Americans’ entry into white communities. Others, like realtors’ racial steering, landlords high rent setting, and exclusionary zoning however, built upon historically racist economic structures like sharecropping and, at first glance, discriminated only on the basis of class, but upon further examination are clearly also discriminatory on the basis of race as well. The latter are the structures that some wealthy white communities still deny and defend to this day as economic issues.

In the years following blatantly racist behavior of slavery through the implementation of the Emancipation Proclamation in 1863 and the passage of the 13th Amendment in 1865, black Americans began moving from the south to northern cities. According to Termine (2010), “White southerners took advantage of the vulnerable position of blacks by binding them in sharecropping contracts that strongly favored the white landowners and merchants. Black codes reinforced the master-slave dichotomy and maintained the status quo: economic subordination of the newly freed slaves. This concentration of economically disadvantaged blacks set the stage for an industrial revolution-induced black migration to cities and the creation of segregated urban ghettos” (1375). However, it was not until the dawn of World War I, the Great Migration truly

began, as “labor shortages... forced key industries – notably railroads, steel and coal – to look south. War production created in excess of 3 million new manufacturing jobs... as news spread that factories were finally opening their payrolls to African Americans, black southerners headed north in numbers that were much larger than ever before” (Gregory 2005, 24). As a result, “Between 1910 and 1920, some 525,000 African Americans left their traditional homes in the south and took up life in the north, and during the 1920s the outflow reached 877,000” (Massey and Denton 1993, 29).

Termine (2010), documents the effect of this mass migration in terms of race relations, describing how “[n]orthern whites viewed this rising tide of black migration with increasing hostility and considerable alarm. An upsurge in racial violence and a decrease in white willingness to interact and transact business with African Americans ... creating an increasingly exclusionary environment for newly arrived African American city- dwellers. The seeds of tense race relations were planted by the 1960s, when another 1.38 million blacks left the South for northern cities. White northerners’ decreased willingness to interact with blacks amplified the effect of institutional structures, further entrenching the segregation of the races” (1376). Termine also explains how racially restrictive covenants, as “provisions written into property deeds preventing the transfer of property to certain races,” were used throughout the Great Migration, stating that “deeds in nearly every new housing development in the North prevented the use or ownership of homes by anyone other than the Caucasian race ... Despite the 1948 invalidation of racially restrictive covenants, for the next twenty years the covenants, continued to be incorporated into deeds as unenforceable but ‘valuable’ signals for current and would-be property owners in covenanted neighborhoods” (1376-1377). Thus, overt forms of racism such as racially restrictive covenants sorted neighborhoods by race during the Great Migration.

By the time the Civil Rights Act of 1964 outlawed all forms of legally enforced segregation and the Fair Housing Act of 1968 prohibited discrimination in the selling and renting of housing, the damage was already done, and many factors, both preceding and following the law, led to the continued separation of people of different races.

Additionally, black Americans again began to move in mass to northern cities in the 1970s, with cities like Detroit, Chicago, and Philadelphia seeing their population of black Americans rise exponentially. One of the main motivations for the large-scale migration of black Americans into northern cities was the abundance of industrial jobs left as a result of whites leaving to fight in World War II and a lack of new European immigrants coming in during the war (Carr 2008. 48). However, this time, “attitudes of white northerners and institutional actions ... triggered yet another segregation force: white flight” (Termine 2010, 1377).

Beginning in the 1950s and ‘60s, around the time of both the Civil Rights Act and the 1954 *Brown v. Board of Education of Topeka* US Supreme Court case, white Americans began to move from more racially diverse urban areas into racially homogenous suburbs in a phenomenon termed “white flight.” This mass movement of people led to the creation of more homogenous areas in both suburbs and inner cities, as well as a large loss of industrial jobs in the latter. The loss of income for many Black inner city residents played a major role in their being financially unable to leave inner cities.

Other factors in the creation of this newly fashioned geography of mobility included realtors’ use of racial steering techniques in forming neighborhoods, landlords’ use of rent setting as a tool to attract white people and deter black people, and suburbs’ use of income exclusionary zoning laws to prevent low income families from purchasing homes and prevent the creation of affordable housing projects within their jurisdiction.

Realtors: Racial Steering

Realtors' use of racial steering techniques was impactful in forming neighborhoods that were divided by race, even if not explicitly legally segregated. A HUD study done in 2000 to measure patterns of racial discrimination in urban housing markets found that "the incidence of steering since 1989 increased significantly" (Briggs 2005, 94). This steering took a few different forms, but most broadly, they can be categorized into three groups. "Information steering means that whites get information about a wide diversity of neighborhoods while minorities are limited to just a few... Segregation steering means that whites are encouraged to consider more predominantly white neighborhoods than their black or Hispanic counterparts... Class steering means that whites are encouraged to consider more affluent neighborhoods than comparable blacks or Hispanics" (Briggs 2005, 95). Here, it can be seen that generally, racial steering is composed of white families being shown more neighborhoods than black families, and within that pool, the neighborhoods shown to white families are both more white and affluent, while neighborhoods shown to black Americans are more black and less affluent.

There are many ways that this manifested itself specifically, including fabricated regulations about children or bedrooms. For instance, according to Brian Berry in his 1979 book *The Open Housing Question: Race and Housing in Chicago, 1966-1976*, "the most common, overt method of discrimination against black people was the 'no children allowed' prohibition. Most of the people looking for two and three bedroom apartments have children. By using this device, the owner or agent felt he was on safe ground, since, obviously, this refusal does not involve the individual's color" (Berry 1979, 36). He continues to explain some other similar excuses given by realtors for not showing certain homes to black families, including "'this apartment has just been rented,' ... a 'six month employment clause' restriction; the insistence

that a family needs more bedrooms than are available or than they can afford... the ‘bedroom ploy’” (37). In reality, many of these practices were actually illegal under state law, but realtors engaged in them anyway. In the end, they were targeted at black families based on some general trends relating to who was trying to move. They prohibited low or middle class black families looking for stable work from finding housing that they could afford within white neighborhoods.

Additionally, other realtors used more overt tactics for racial steering of people seeking homeownership. Berry continues to give an example in which a man looking for a family home in 1968 was outright ignored many times by realtors. He explains, “several [real estate] firms took his application and told him nothing was available... [or] to telephone a specific person, but this individual was never available to talk to him... apartments listed as ‘available now’ ... no apartment would be available until March of 1969... told repeatedly that the manager... of one building... was on vacation... never returned any of his calls” (38). Essentially, white realtors resorted to just ignoring black families when they did not want to make more complicated excuses for racial steering. In some situations, people seeking apartments were denied the opportunity to even examine open apartments because the building’s “black quota was filled” (96), but in many other cases, white realtors refused to acknowledge the patterns by which they would selectively show or not show housing to black families as opposed to white families.

One of the main justifications for steering was that it was just a result of economic class. However, a comparative examination of the economic status of various black and white families in Chicago in the 1960s showed that “in the actual spatial distribution of the black population in 1960 to achieve income standard inequality... ghetto concentrations would have had to be reduced by 60-80 percent and the black population of the suburban areas would have had to be increased to 10 percent of the total population” (Berry 1979, 9). This reveals that income

differences could not have been the main factor responsible for the segregation of neighborhoods by steering, so race must have been involved in the process.

Landlords: High Rent Setting

One of the other methods used to create the racially segregated state was landlords' use of rent setting as a tool to attract white people and deter black people. This mainly took the form of landlords making rents in their buildings too high for most of the black families living in inner cities to afford, especially since many of these families lost jobs in the relocation of industrial jobs away from the centers of cities (Elorza 2007). Additionally, landlords engaged in this practice largely in the 1950s and 1960s, at the height of white flight, so there was already a widespread desire by white Americans to create their own exclusive suburban neighborhoods at the time. Landlords basically gave white people a structure by which they could pay more to not have to live with black people if they so desired. These types of conditions persist even today in instances of housing voucher acceptance.

Additionally, many suburbs encouraged more expensive housing to be built within their borders by using building permit caps to limit the size of developments in their neighborhoods by law. This encouraged construction of expensive houses rather than large housing units. "Since they are not guaranteed permission to build the volume of attached housing necessary to attain a desired profit level, [builders] may shift to up-market housing, for which they can obtain a higher total profit per unit... favor large houses and encourage ... expensive amenities" (Briggs 2005, 228). Situations in which building owners and landlords were encouraged to set high prices of living, both by municipalities and by the market of white families interested in segregated neighborhoods, were extremely common in the 1950s and 1960s and led to suburbs remaining closed to black families during the peak of white flight.

Suburbs: Exclusionary Zoning

Lastly, suburbs' use of income exclusionary zoning laws prevented low income families from purchasing homes and prevented the creation of affordable housing projects within their borders. As Danielson explains "zoning involves the specification of land uses for designated areas within a local jurisdiction" (Danielson 1976, 50). He elaborates, "Suburbanites, however, have employed local political autonomy with considerable success to keep subsidized housing out of their communities. Suburban jurisdictions have refused to participate in subsidized housing programs which require active involvement by local government. Zoning and other land use controls have been employed to block the construction of subsidized units under a variety of housing programs which rely on private developers to acquire project sites. As a consequence of local opposition... relatively little housing for lower-income American has been built in the suburbs" (Danielson 1976, 79). In New Jersey, such zoning has often been used to restrict the "location, size and other features" (Danielson 1976, 53) of housing. Zoning laws, like restrictions on renting houses and encouragement of homeownership and redlining, are created in order to place certain restrictions on the use of land within certain areas. They often manifest themselves in minimum lot size requirements that require people to purchase large portions of land, or limits on the number of people per land area effectively prohibit multi-family housing and small project based housing. However, while they can be used for positive ends, historically, suburbs have used this power to make homeownership more accessible to white people by guaranteeing their loans, and have explicitly refused to back loans to black people. This redlining essentially destroyed the possibility of investment wherever black people lived and prevented them from accessing many neighborhoods (Carr 2008, 72).

Racist zoning laws have historically targeted other characteristics of black families, such as economic class, in order to prevent them from entering certain communities. For instance, many black families in the 1960s tended to rent their housing after first moving into northern US areas. Suburbs realized this, and as Briggs explains, they used the logic that “single family houses tend to be owned by their occupants; multifamily dwellings tend to be rented. Any regulation that promotes the construction of single family houses and discourages the development of attached dwellings will also tend to attract more owner occupants and limit opportunities for renters... by reserving certain zones for narrowly defined families” (Briggs 2005, 228-229). On paper, zoning policies were not openly racist after the 1910s, but in reality, they targeted other characteristics of black families, and often ones created as a result of related systems of racial oppression, in order to prevent such families from moving into white suburbs. By the 1970s and 1980s the word segregation had disappeared almost entirely from the public sphere and academia, signifying that segregation was no longer being scrutinized or studied, though it still remained a major problem in the US (Massey and Denton 1993).

Manifestations in New Jersey

In New Jersey, similar conditions to those in the rest of the nation prevailed, where suburbs were utilizing economic controls to regulate those who could reside within them. As New Jersey housing scholars Martha Lamar, Alan Mallach, and John M. Payne explain in their study, *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, “By zoning for large single-family houses on large lots, by excluding apartments altogether, or by subjecting new apartments to severe limitations, towns sought to attract only well-off families who would be substantial taxpayers” (Lamaer et al. 1988, 1199). One example of this is in Mount Laurel, a town within Burlington County, where these conditions were heavily present. Historically known

as a town in which escaped slaves would settle after using the Underground Railroad to flee from the South, Mount Laurel began to see a change in demographics when the municipal government began major redevelopments in the 1960s meant to build up a community catered to the affluent. These redevelopments, termed Planned Unit Developments, involved constructing “more than 10,000 homes, industrial parks and commercial centers,” but none of them were going to be specifically designated as affordable housing (“Mount Laurel Doctrine | Fair Share Housing Center”). Thus, when rents rose as a result of all of the town rejuvenations, black families who had historically inhabited the town were unable to remain there without affordable housing, due to the cost of living.

Additionally, while the Planned Unit Development buildings were being planned, Mount Laurel’s local government enforced a stricter building and zoning code in order to remove its black residents, since, as a result of new highways displacing them from their previous housing, many were living in the Springville neighborhood, consisting of “a ramshackle area of converted farm structures, modest cottages not fit for year round use... built over hard-packed dirt floors, with leaky roofs and raw sewage regularly backing up” (Massey 2013, 33). The township condemned all of these people’s housing and simply ordered its occupants, longstanding residents of the town, to leave, without any help in relocating them. The goal was to get them out of the Township in order to enhance the Planned Unit Development marketing plan to attract predominantly white wealthy families and more industrial jobs, and as the mayor at the time, Bill Haines, told 60 black congregants at Jacob’s Chapel A.M.E. Church, “if you people can’t afford to live in our town, then you’ll just have to leave” (Massey 2013, 34). As Massey explains, “with no realistic alternative other than moving into the slums of Camden or Philadelphia, residents grew increasingly concerned about rising pressure to leave” (Massey 2013, 33). Ethel R.

Lawrence, a day-care teacher and mother with nine children, was among the 60 residents present for Mayor Haines' ultimatum, and as the township began condemning these residents' homes in the late 1960s, she organized them and petitioned in 1969 to permit a nonprofit to create 36 garden apartments for the displaced families. When the township refused, the NAACP of Southern Burlington County sued the township on behalf of the families. These conditions set the stage for the Mount Laurel decisions.

The Affirmative Obligation: *Mount Laurel I*

The black residents of Mount Laurel's solution to both the problems plaguing the whole nation and their own local problems emerged as the result of a series of state Supreme Court cases. Ethel Lawrence, one of the residents of Mount Laurel, was the lead plaintiff in a complaint that alleged that "Mount Laurel Township had, in effect, systematically excluded people on the basis of class and race through its zoning ordinances and preferential treatment of middle-class housing in its Planned Unit Developments" and that "the township, in fact, had an affirmative obligation to create realistic opportunities for people of all races and incomes to live within its boundaries and enjoy its benefits" (Massey 2013, 36). After winning the court case at the local level in 1972 in which the court ruled that Mount Laurel Township had adopted "exclusionary zoning ordinances..." and thus engaged in "economic discrimination," both parties were dissatisfied and appealed the case to the Supreme Court of New Jersey. After hearing the lower court's appeal, the Supreme Court rendered the *Mount Laurel I* decision in 1975. The court, in addition to ruling that Mount Laurel needed to "enact land policies that made 'realistically possible the opportunity for an appropriate variety and choice of housing'" (Massey 2013, 38), ruled that all developing New Jersey municipalities have an affirmative obligation to "allow for the construction of their 'fair share' of regional needs for low- and moderate-income housing"

(Massey 2013, 39). Essentially, this was an indirect mandate for the suburban municipalities that had tried to racially segregate historically to open up their borders and begin to undo the damages caused by racial and economic discrimination during that period and beforehand. “However, while Mount Laurel I laid down the principle for affordable housing obligations, the Supreme Court assumed by crafting Mount Laurel I that municipalities would act and do the right thing, but they were wrong” (Mallach 2018). Nearly all of New Jersey's 565 municipalities defied the ruling, including Mount Laurel Township. “‘They basically gave the finger to the court,’ Peter O'Connor, a lawyer and affordable-housing advocate who helped litigate *Mount Laurel I*, recalled” (O'Reilly and Writer 2016).

The Call to Action: *Mount Laurel II*

While the *Mount Laurel I* decision was extremely important, it left much to be desired. Field et al. (1997) stated, “This seemingly simple declaration of policy proved extremely difficult to implement, however, as subsequent lawsuits challenged the manner in which ‘regions,’ housing ‘need,’ and local ‘fair share’ were determined” (7). As affordable housing scholar Alan Mallach (2018) explained, “[Mount Laurel I] laid down the principle, but townships hardly any took action.” As Douglass Massey (2013) corroborates, “from the outset, authorities took every opportunity to drag their feet in complying with the court’s directive, and when it finally did amend the zoning ordinance, the effort was halfhearted, at best (39). Between 1975 and 1983, despite some other housing lawsuits, there was little change in municipalities’ affordable housing practices. The Supreme Court had likely assumed that municipalities would voluntarily comply with the constitutional mandate laid down in *Mount Laurel I*, but this did not happen in reality. The case involving Ethel Lawrence and Mount Laurel Township came back to

the Supreme Court because no affordable housing had been built in eight years since the decision was rendered.

Thus, Ethel Lawrence and other residents of Mount Laurel went back to court in 1978 to challenge Mount Laurel's lack of compliance with the Court's decision. After appealing the trial court's ruling, that the township had not engaged in exclusionary zoning practices, to the state Supreme Court again in 1980, the plaintiffs finally got their desired ruling in 1983, in the *Mount Laurel II* case. This case actually set up a framework for enforcing the fair share principle, through designating many of its own resources and priority to hearing Mount Laurel cases, as well as requiring trial courts to decide what each township's fair share would be.

Most importantly, as explained by Lamar et al. (1988), the *Mount Laurel II* opinion spelled out in detail how to make municipalities comply with affordable housing mandates. While *Mount Laurel II* left a wide range of choices open to towns in terms of complying with the *Mount Laurel* obligation, it is clear that towns must go beyond simply passively removing obstacles to inexpensive housing and actually take some proactive steps to encourage the construction of low- and middle-income housing. To encourage litigation to counter exclusionary zoning, the Court created the builder's remedy lawsuits for developers, who would gain a right to build a development refused by a municipality if the proposed development was proven to be providing lower-income housing and the municipality was proven to have failed to meet its affordable housing obligation. According to Field et al. (1997), "By putting teeth into the Mount Laurel mandate, the builder's remedy fundamentally shifted the bargaining power between a community and a developer. Courts effectively told cities and towns to expedite permit approvals or face adverse judicial rulings" (8).

A builder's remedy lawsuit occurs when a builder or developer sues a municipality for failing to meet their *Mount Laurel* affordable housing obligation. As explained on the website for the Borough of Dumont, New Jersey (2016), when resolved in favor of the builder or developer plaintiff, a builder's remedy lawsuit "requires a municipality to utilize zoning techniques such as mandatory set-asides or density bonuses which provide for the economic viability of a residential development which is not for low and moderate income households." The result of this requirement to municipalities is that they are forced to make certain housing developments economically viable, or affordable, for low- and middle-income families. Builder's remedy lawsuits can occur when: a builder proposes an affordable housing project or a project that contains a level of affordable housing consistent with *Mount Laurel* guidelines, a municipality rejects that project, and the builder claims that the municipality is thus incompliant with the *Mount Laurel* doctrine. Importantly, when a municipality loses a builder's remedy lawsuit, "the town and its planning and zoning boards lose all control over the zoning of the subject property, which is left to the special master, who only reports to the court." Thus, by losing a builder's remedy suit, a municipality loses all control and voice in its own zoning, and over projects in its own borders. Additionally, when they lose, "municipalities in builder's remedy lawsuits may be held liable for developers' attorney's fees and costs of suit, the fees of a special master appointed by the court to assist in developing the zoning scheme on the affected property, the costs of any infrastructure improvements, such as sewer and water system upgrades and road improvements." This expense is placed on the municipality in addition to its own court fees.

The aforementioned consequences for losing a builder's remedy suit are important for municipalities are important because, as the Borough of Dumont (2016) claims, "Over the course of history, it is nearly impossible to find a New Jersey municipality that prevailed in a builder's

remedy lawsuit. Like being in quicksand, the more you fight, the deeper you sink. When a builder's remedy is granted, the municipality is left paying the attorneys on both sides of the lawsuit, the court appointed Special Master, as well as all infrastructure improvements such as sewer and water system upgrades and road improvements, required by the court imposed development plan. The municipality also loses all control of site plan, including density, height, setbacks, landscaping. These decisions are made by an outside party who could live in Hunterdon or Middlesex or Ocean County and has little or no regard for Dumont." Ultimately, it seems almost a guarantee that a municipality will lose a builder's remedy lawsuit and thus, when by placing itself at risk of being sued in such a way, a municipality has already likely subjected itself to the consequences of losing the lawsuit. This makes municipalities want to avoid builder's remedy lawsuits if at all possible.

Coupled with its creation of the builder's remedy, the Court thus stated that municipalities that adopt acceptable housing programs and zoning practices were to be given six years of immunity from builder's remedy lawsuits. As elaborated by COAH and clarified for the court period by the Borough of Dumont (2016), "the only way any community can be protected from a Builder Remedy Lawsuit is to submit a Housing Element and Fair Share Plan that complies with the required obligations and received a Judgment of Compliance/Repose from the Court. This replaces the previously granted Substantive Certification, which was granted by COAH. A Judgment of Compliance/Repose should be for a ten-year period, during which the Borough will be 'immune' from any future Builder Remedy Lawsuits so long as it is complying with its Housing Plan." Obtaining immunity from builder's remedy lawsuits would thus become extremely important for all townships. Lastly, the Court in *Mount Laurel II* also stated that the

each town must be given a specific number calculation that would be its fair share, in terms of how many affordable units it was obligated to build.

From 1983 to 1986 there were over 100 new lawsuits filed against 70 different municipalities by developers, in which developers took municipalities to court for blocking their affordable housing projects (Lamar et al. 1988; Field, Gilbert, and Wheeler 1997). According to affordable housing scholar John Payne, “The avalanche of lawsuits put added pressure on the legislature to assume responsibility for regional housing policy” (Payne 1995, 666). Additionally, municipalities began to exert pressure on the state legislature. Payne (1995) adds that “I can attest from personal experience that towns took the process seriously only when it became clear to them that something was actually going to happen, that the Mount Laurel doctrine had actually arrived. That did not happen until 1984, and as soon as it did, the League of Municipalities rushed down to Trenton, reported to the Legislature that ‘home rule’ was not all that it was cracked up to be, and virtually begged for a state law that would get the courts out of the land use business” (666).

Thus the Supreme Court appealed to the state legislature to begin managing the process of creating affordable housing and the Fair Housing Act of 1985 was enacted. The law essentially removed jurisdiction over affordable housing issues from the courts and gave it to the Council on Affordable Housing (COAH), which the act established as well. COAH’s mandate was to combat exclusionary zoning by helping municipalities to make plans to ensure their affordable housing obligation (Massey 2013). Additionally, Mallach (2018) explained that while COAH had the power to approve or disapprove individual municipalities’ plans, it was reliant on affordable housing developers to sue the municipality in the case that the municipality did not submit a plan. However, he stated that situations like the latter were not the norm during

COAH's first two rounds. In short, COAH tells municipalities how many units to build, but municipalities do not build the new units. Rather, they simply zone for them, and affordable housing developers end up doing the actual building. So in practice developers determine whether a municipality is in compliance and take them to court if necessary. Generally, if affordable housing developers set aside 15 to 20% of the units in a development for lower-income households they are considered compliant (O'Reilly and Writer 2016).

Field et al. (1997) recount how parties on both sides of the affordable housing issue were happy with the establishment of COAH. "Communities and housing advocates alike welcomed the potential improvements that the Fair Housing Act offered. For municipal officials, the change at least signaled possible relief from costly and unpredictable lawsuits. Housing advocates, in turn, now could look to a state coordinating agency for more successful implementation of the 'fair share' standard" (9) Also, COAH was important for developers because, as Hoff (2018) explains "the *Mount Laurel II* decision established that a developer could sue a town for a builder's remedy if they don't comply, but the flip side of that is if a town wants to comply, why would the builder sue it if they don't need to? If the town is willingly participating, then it should be able to do that. After COAH was created, the towns' path to voluntary compliance was pretty easily established. They could just file a petition with COAH and COAH would be the arbiter of whether they complied with their affordable housing obligation" (Hoff 2018). The path to voluntary compliance being made clearer for towns showed more clearly what non-compliance was as well.

Mount Laurel III

On February 20, 1986 the New Jersey Supreme Court ruled in *Mount Laurel III*, upholding the constitutionality of the Fair Housing Act and ordering that that all *Mount Laurel*

doctrine court cases whose purpose was to determine a municipality's affordable housing obligation be transferred to COAH. The court said it was willing to give COAH time to work and establish rules, but warned that the promises of the Fair Housing Act had to be met and that if COAH began to delay or stopped producing results, the court would be forced to step in again (Lamar et al. 1988). This *Mount Laurel III* decision likely established the precedent for the courts stepping in and retaking control of the Mount Laurel doctrine's enforcement in 2015, when COAH had failed to be effective for an extended period of time.

The 21st Century: Fragmentation and Disarray

Between the 1980s and 2000, there was significant progress made towards building affordable housing in wealthy suburbs. As Mallach (2018) stated, "A lot of municipalities complied between 1985 and 2000, when there was strong pressure from the courts and an effective COAH. In that period, compliance became pretty general. Communities like Mount Laurel Township, Lawrence Township, and South Brunswick Township built many units of affordable housing, and even problematic townships like Cherry Hill and Middletown were compliant with the doctrine to at least some extent. Then from 2000 to about 2014, almost everything came undone. The administration even actively tried to subvert the doctrine and had no interest in keeping records on any part of it."

Beginning with the start of COAH's third round in 2000, the state body lost all effectiveness. "The Council on Affordable Housing started to pretty much disintegrate, because of political pressures coming from anti-affordable housing governors and community affairs commissioners. The municipalities pulled back" (Mallach 2018). COAH stopped keeping data and keeping track of the *Mount Laurel* Doctrine under pressures from anti-affordable housing governors like Chris Christie and Jon Corzine, who actively tried to undermine the doctrine and

had no interest in keeping records. Without a strong state backing and COAH, municipalities pulled back from building affordable housing, with no big incentives for compliance. Currently, the authority to manage the *Mount Laurel* Doctrine resides within the state courts and is being handled through a series of settlement cases that began with the COAH's dissolution in 2015.

THE ADVENT AND PRIME OF THE COUNCIL ON AFFORDABLE HOUSING: 1985 – 1999

As detailed by Lamar et al. (1988), in 1986, the Council on Affordable Housing released its first round rules, which included: the definition of the six housing regions in the state, the methodology to determine low- and moderate-income housing need within these regions, a formula to determine the numerical obligation for the housing obligation of each municipality, and a procedure by which municipalities could get certified by COAH, which involved complying with the Fair Housing Act's requirements, but also provided protection from builder's remedy lawsuits. Within each region, present housing need was calculated by estimating the number of deficient housing units in the region using census data, and then estimating the percentage of such units occupied by low- and middle-income households. Deficient housing units were those that required renovation or repairs to be up to state standards. Next, a projection of the number of new low- and middle-income households expected to form in each region by 1993 was used to form the estimate of prospective housing need in each region. This number was added to its fair share obligation in a separate category. All municipalities were expected to submit a plan under COAH's first round except for municipalities whose percentage of existing need exceeded the regional average for need. Because this group was comprised mostly of large cities, they had their excess present need reallocated to other, suburban municipalities within its housing region, in the spirit of the Mount Laurel doctrine. This reallocation was done using a

formula that measured each municipality's capacity to provide affordable housing, based on the municipality's area for potential new developments (in acres), its total employment number, any recent employment growth, and its income level as compared to the region as a whole.

While builder's remedy lawsuits were the primary mechanism for coercive compliance, COAH understood that municipalities strongly feared and felt vulnerable to such lawsuits, so offered protection against these lawsuits as a compromise for municipalities that submitted a plan to it, so long as the municipality could continually demonstrate that they were following their approved plan. McKenzie (2018) explains this, saying, "the protection that is offered for towns that settle is immunity against builders remedy lawsuits. The builder's remedy is a very powerful threat because the *Mount Laurel II* Court's approach to enforcing the constitutional obligation used the threat of a builder's remedy as a stick. A developer would be able to get a development approved someplace in town and decide the destiny of the town. The carrot was created by the Legislature in the form of COAH. It gave towns the opportunity to come in, to not have to pay for litigation, to be able to get their plan blessed, and to move on without ever having to deal with the courts." What McKenzie refers to as the carrot is more similar to what I term cooperation, rather than what I term incentivizing.

Additionally, John Payne (1988) describes how rental-housing credits were created as a source of accessibility for municipalities and convenience for low- and middle-income families in his report, *Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?* He explains: "Because rental projects are currently difficult to achieve through the private market, the state now offers a 'bonus' for towns that meet part of their fair share in rental form" (363). Essentially, it is not as cost effective for towns to build rental units due to their lower rent, and many wealthy municipal residents dislike renters because they view them as temporary members

of their community and now present to further its betterment in the long run. COAH realized this and thus offered municipalities an incentive that would entice them to build rental housing units. Payne details: “Rental units count as 1.33 units when credited toward the municipality’s fair share obligation, thus reducing the net number of units for which the municipality must provide” (363). This provision benefitted municipalities who did not want to build as much affordable housing, or to build it densely, by cutting down on their actual numerical obligation. He continues, “Rental units are more readily available to poor households because no down payment is required and expensive main tenance obligations that accompany homeownership are reduced” (363). The provision also benefitted families who might have sought to move into the suburbs but were unable to do so financially and needed to rent property. In this sense, COAH’s incentive benefitted both municipalities and lower- and middle-income families.

Payne explains that in implementation, most affordable housing units are not like Ethel Lawrence Homes: “The typical suburban Mount Laurel development is usually a townhouse-style, multi-family project with between 250 and 1500 units, of which 20% are ‘set aside’ for low- and moderate-income households” (363). Payne also explains that while affordable housing developments were generally built at densities ranging from six to twelve units per acre, the land on which development occurred was typically land that had previously been zoned for less dense residential use, usually three units per acre or less, or was an area that previously did not permit any residential zoning. This shows how the Mount Laurel doctrine may have raised the density of suburban housing in some areas, angering municipal residents, but also how it made use of lands that were previously unused, in order to create more physical spaces in neighborhoods for potential housing integration.

Unfortunately, no data was kept for housing units built in the first round of Mount Laurel. It is unclear why COAH did not keep specific data for the first round, with one possible explanation being that the data was lost when COAH was dismantled. However, Mallach, Lamar, and Payne estimate that about 1,900 affordable housing units constructed were and occupied in New Jersey between 1986 and early 1988 (Payne 1988). During this time period, the system of affordable housing under COAH made improvements and was successful in mandating the construction of affordable housing. The COAH data that does exist shows that in the first year after COAH's implementation, 22 municipalities got certified, including South Brunswick Township and Lawrence Township and, by early 1988, when Mallach, Lamar, and Payne made their estimate, 31 municipalities were certified. In total, 161 municipalities signed under COAH in the first round (New Jersey Council on Affordable Housing 1987). While the number was only just over a fourth of New Jersey municipalities, it represented substantial progress in beginning to practice inclusionary zoning, especially for a state in which such little progress had been made historically, over a much larger span of time.

In the second round of COAH, many of the same municipalities got re-certified and many other municipalities got certified for the first time. In total 245 municipalities received COAH certification in this round, including South Brunswick again. As McKenzie (2018) explains, "In the first and second rounds of COAH, particularly the first round, there was more emphasis on the builder's remedy approach as the primary mechanism to meet affordable housing obligation. This involved the use of inclusionary developments, which took the form of high-density housing projects in which a portion of the units built would be designated as low- and moderate-income housing units. In round two, towns began to take advantage of other mechanisms that COAH provided as legitimate ways of attempting to meet affordable housing

obligations. A lot of those had been permitted by the first round rules but they weren't used as extensively" (McKenzie 2018). As explained, in the second round, more towns began to take advantage of what COAH provided in terms of other options. In the second round, COAH began to emphasize its incentives, housing credits, and the potential for compromise through temporary immunity from builder's remedy lawsuits for COAH certified towns. Additionally, towns likely began to notice these alternative pathways to compliance after seeing so many builder's remedy cases after 1983 and in most cases would have likely opted to utilize such alternatives rather than risk being sued by builder's remedy.

The Fair Housing Act of 1985 created another incentive for municipalities to build affordable housing in the form of regional contribution agreements (RCAs), which allowed a municipality to fulfill up to half its fair share obligation by paying for affordable housing in another municipality. The intended effect of RCAs was to link the economic strength of the suburbs to the financial need of the cities by having urban developers pay another municipality instead of constructing actual Mount Laurel units in their developments, and then having that payment fund the creation of affordable housing units in the receiving municipality units. Also, the RCAs involved cash transfers instead of transfers of actual housing units in order to try and give the receiving municipalities more flexibility in determining how to serve their affordable housing needs. For instance, the money could be used to fund rental status in existing housing units, to serve households whose incomes were too low to take advantage of conventional Mount Laurel units. COAH's methodology reallocated housing obligation from mostly urban communities that had excessive numbers of poor families to developing suburban communities that had the strong housing markets capable of supporting more inclusionary lower-income housing developments.

McKenzie (2018) explained some positive and intended uses of regional contributions, stating, “In the cases of rural towns that didn’t have developable land with sewer and water access, the advantage to Regional Contribution Agreements was that they could meet the rest of their obligation with things like accessory apartments and group homes. They didn’t need to worry about the fact that they didn’t have developable land with sewer and water access because they could ship their obligations out. Their obligations were often fairly low, so this was manageable. There were urban areas that were really grateful to have that money because it helped them with new construction and rehabilitation programs that they were trying to get off the ground and that they needed to help subsidize.” McKenzie also highlighted some of the ways in which regional contributions were misused. “The drawback to RCAs is that developers started suing towns to build a higher density project that would include a set-aside of low and moderate income units, but would end up settling with the town and agreeing to give the town money to fund an RCA rather than building the affordable units as part of the development. So that was an abuse of the Regional Contribution Agreement concept because, if a developer is going to sue a town because the town is not providing adequate low- and moderate-income housing, but the town could be building it because they have sites with sewer and water access that are capable of being developed, the builder should produce the low and moderate income units on site within the development” (McKenzie 2018). In the long run, Regional Contribution Agreements were abolished, and while it is clear that they yielded some positive results when they were allowed, it also seems that they were misused often as well.

Other incentives that COAH established during this period included bonus credits for rental homes, group homes, and elderly homes. McKenzie provided some detail on these, saying “In terms of other mechanisms for meeting affordable housing obligations, group homes for

persons with special needs have always been an important component of municipal plans, and FSHC likes them because they work with a lot of other nonprofits and support their work. Towns can also receive rental bonuses for meeting their rental obligations (25% of the total obligation). If they make a deal with a prospective developer to do rental affordable units, they can get those rental bonuses up front” (McKenzie 2018).

Alan Mallach (2018) recalled that “the state approved many plans in the first and second rounds, and by and large, most municipalities made reasonable efforts to comply with the Council on Affordable Housing and to come up with plans that made at least some kind of sense.” Notable for Mallach as a municipality that resisted building affordable housing and actively sought to undermine COAH was Cherry Hill, under mayor Susan Bass-Levin, but it seems as if municipalities like this were less frequent in the first two COAH rounds.

Mount Laurel Township

Mount Laurel was mandated to fulfill its affordable housing requirements through the COAH first and second rounds by the *Mount Laurel II* decision, and so was already certified under COAH. As corroborated by notable housing scholars David Kinsey (2018) and Alan Mallach (2018), Mount Laurel Township was compliant in terms of meeting its affordable housing obligation during this time. Evidence of this can be seen in that its third round present need of 56 units was drastically decreased from its obligation in the first two rounds of 815 (Kinsey 2017), meaning that it must have made significant steps towards its affordable housing obligation during the prior rounds.

South Brunswick Township

South Brunswick was compliant for COAH’s first round (1987 – 1993). In the first round, it adopted a fair share plan that addressed its 669 unit, before application of credits,

obligation, then petitioned COAH, and received certification from COAH in August 1987 (Sears 2015).

The Township also petitioned COAH for certification in the second round in March 1995. Its 1987 - 1999 cumulative first and second round obligation was 937 units, pre-credits. COAH approved the South Brunswick’s second round plan and granted them second round certification in February 1998 (Sears 2015).

South Brunswick’s Prior Round Affordable Housing Progress [data from (Sears 2015)]

Development (Units)- type of housing
Deans Apartments (40)- prior cycle credits
Charleston Place I (54)- prior cycle credits
Regal Point (5)- affordable family sales
Monmouth Walk (43)- affordable family sales
Nassau Square (49)- affordable family sales
Woodhaven (80)- affordable family rentals
Charleston Place II (30)- affordable senior rentals
Summerfield (70)- affordable family sales
Deans Pond Crossing (20)- affordable family sales
Southridge/Southridge Woods (124)- affordable family rentals
CIL-Wynwood (7)- alternative living arrangements
CIL Woods (16)- alternative living arrangements
Wheeler Rd Group Home (3)- alternative living arrangements
Major Rd Group Home (3)- alternative living arrangements
Oak Woods (73)- affordable senior rentals

Buckingham Place (23)- affordable senior rentals
ARC of Middlesex County (15)- alternative living arrangements
Dungarvin/Eclipse (8)- alternative living arrangements
Community Options (8)- alternative living arrangements
Triple C Housing (6)- alternative living arrangements
REACH (18)- Market to Affordable; affordable family sales
Rental Bonus Credits (187)- Prior Round
TOTAL CREDITS (882)

In summary, the Township fully addressed its prior round (combined first and second rounds) obligation of 878 units, and actually surpassed it, with 882 built affordable units, leaving it with a credit of 4 units to be applied to its third round obligation. As a result, as David Kinsey (2018) detailed, “South Brunswick had immunity during 1999-2015 by virtue of its Second Round substantive certification, its interim certification from COAH post-1999, and its status as a municipality that petitioned COAH for Third Round certification.”

However, South Brunswick endured some challenges to its zoning during the prior round. In *New Jersey Chapter of the National Association of Industrial and Office Parks v. the Township of South Brunswick*, an association of developers and owners of nonresidential property filed suit, and the court ruled on whether South Brunswick’s municipal law, which imposed a development fee on all new residential and nonresidential development, was subverting the state constitution. The law stated that “The fee must be paid as a condition to subdivision or site plan approval, and is computed based on square footage, ranging from 10¢ to 15¢ per square foot for residential development, and 25¢ to 50¢ per square foot for

nonresidential development. The declared purpose of the ordinance was to receive contributions into a fund to permit rehabilitation of substandard housing by the municipality in order to provide its fair share of affordable housing” (Supreme Court of New Jersey 1990). The court found that “The ... South Brunswick ordinance ... is nothing more than a revenue-raising device which shifts the burden of providing affordable housing to a discrete segment of the population. Further, neither ordinance gives a reasonable compensating benefit to off-set the development fee expense” and concluded that, “the ordinances are unlawful taxes, imposed without legislative sanction” (Supreme Court of New Jersey 1990). Another complaint regarding South Brunswick was that it had some atypical developments, such as a 60-unit project in South Brunswick that contained only 12 Mount Laurel units (Payne 1988).

Overall, South Brunswick, despite some challenges, was compliant in the Prior Round of COAH.

THE COUNCIL IN DISARRAY: 2000 – 2014

COAH worked extremely well from 1985 – 1999, but, beginning in 2000, COAH started to disintegrate from pressures from anti- affordable housing governors, and itself had to be dragged into the third round by the courts. The Christie administration even actively tried to subvert the doctrine and kept no records on any part of it. This began in 2001, when the governor appointed a commissioner of community affairs set out to battle it (Eisdorfer 2018). During this time period, municipalities pulled back from developing affordable housing because taxes had risen with more residents from previous rounds, as a result of dense affordable housing complexes built before the 2000s. Additionally, as Mallach (2018) explained, “the reality with towns is that a lot of how they behave is a function of the political climate at a particular moment, so you could have a town that was compliant, constructive, or positive and then

elections happen and attitudes can change.” From 2000 – 2014, almost no progress was made in terms of affordable housing obligation and construction.

Additionally, with COAH in a state of disorganization, some of its historic data was lost and no one was keeping track of the Mount Laurel Doctrine. As Mallach (2018) clarified, “Unfortunately, the Council on Affordable Housing about 15 years ago, just stopped collecting data. After the first two rounds of the allocation process there’s basically nothing.” COAH simply stopped collecting detailed data on affordable housing in the early 2000s, making it almost impossible to track municipal progress during this time.

Stephen Eisdorfer (2018), a longtime New Jersey builder’s attorney, provided me with a general overview of this period. Essentially, because municipalities relied on the Council to tell them whether something counted towards their fair share obligation, not many continued to fulfill their affordable housing obligation when the Council failed to release valid third round rules in 2001. Towns did submit plans in the 2000s but these plans did not really go anywhere, and any affordable housing built was outside of Mt Laurel context. Furthermore, the condition of not having COAH oversight actually provided a major disincentive for compliance, because municipalities might build affordable housing, but not know if it actually met proper standards and thus actually counted towards their obligation. Thus, while COAH worked well from 1997 to 2001, it did nothing between 2001 and 2004.

In 2004, it attempted to adopt new third round rules, using a system called growth share, which set no specific numerical obligation of units for municipalities, but just defined a municipality’s affordable housing obligation as a percentage of its growth. The downside of this was that municipalities could just refuse to grow or exclusionary zone, essentially meaning that towns determined their own fair share numbers and had no system of coercion implemented

upon them. In 2007, these COAH regulations were struck down, and the body said that it would abandon growth share. However, in 2008, when it adopted new regulations, they ended up being the same regulations in practice, with only different language. Again, COAH was using an ineffective means of growth share. Finally, in a series of decisions between 2010 and 2013, the New Jersey Supreme Court mandated COAH to bring back its old style of regulations, which had involved setting obligations for municipalities based on existing municipal conditions and not municipal population growth alone, and to truly abandon growth share as a means of determining municipalities' affordable housing obligations. Ultimately though, COAH was not meeting frequently enough and was not organized enough to do this by 2015.

McKenzie (2018) explained period as well, though through the legal decisions that were made. She states, "The third round was supposed to start in 2000 or late 1999 but it did not, and COAH did not adopt new third round rules until 2004. Those were invalidated. They then adopted another set of third round rules in 2008... they were invalidated in 2010 by an appellate decision. That appellate decision was affirmed in a 2013 Supreme Court decision, which upheld the appellate court's invalidation of the third round rules. Then by March 2015, the Supreme Court, after giving COAH a lot of chances to adopt new valid rules, took back jurisdiction over affordable housing compliance."

One of the few positive aspects to come from the 2000-2014 period was the removal of Regional Contribution Agreements from COAH's incentives. In 2008, Governor Corzine signed the A-500 law into effect, preventing wealthy towns from transferring their affordable housing obligations to poor towns through these RCAs ("Assembly Committee Substitute for Assembly, No. 500: State of New Jersey 213th Legislature" 2008). RCAs were used to positive effect in some cases, like the Highlands townships, which did not have much developable land but were

able to fund affordable housing developments in other suburbs, with more land and less money, to construct and subsidize affordable units (McKenzie 2018). In other situations though, RCAs were used by wealthy suburbs to pay to have their affordable housing obligations shipped off to other municipalities, often to urban areas with large concentrations of low- and middle- income families.

Field et al. (1997) study the usage of RCAs over the course of the prior round and claim that “between 1987 and 1996 New Jersey townships produced fifty-four such agreements, involving a total of more than ninety-two million dollars and 4,700 units of affordable housing” (1). They continue, detailing that “in the eight years after the first agreement under the Fair Housing Act between sender Tewksbury and receiver Perth Amboy in 1988, the COAH approved fifty-three other RCAs” (11). ... In examining trends in these cases, they stated, “higher income communities preferred to satisfy their fair share obligations by using RCAs rather than inclusionary zoning or density bonuses. More recent deals reflect related trends: wealthier, predominantly white communities pay poorer, more densely populated and more racially diverse communities to assume the wealthy communities’ affordable housing obligation. The average sending community had a two percent poverty rate, with a corresponding poverty rate of seventeen percent for receivers. In addition, only two percent of households in sending communities were black, compared to twenty-seven percent in receiving communities. Only one of the fifty-four RCAs involved a poorer community sending its housing obligations to a wealthier community” (Field, Gilbert, and Wheeler 1997, 11-12). Generally, it seems as if RCAs were misused by wealthy white communities to actually resist the goal of residential integration. Such municipalities contributed to the segregation of neighborhoods based on class and race by using their own affordable housing obligation to keep their community closed off.

Field et al. (1997) also give the example of the 1993 RCA between the municipalities of Wayne and Paterson, NJ. In Wayne, “between 1988 and 1989, four developers brought builder’s remedy lawsuits, pressuring Wayne officials to act” (19). These suits likely placed pressure on Wayne to propose its own affordable housing plan or risk continuing to lose control over its own property zoning powers. Additionally, many other avenues of compliance were not desired by the community because of their cost. Field et al. explain, “Using mixed income projects to meet its fair share obligation would have required Wayne to construct 5,000 new units, a prospect that alarmed residents who wished to preserve Wayne’s character and avoid expensive additions to infrastructure. RCAs offered a less costly alternative” (19). Thus, Wayne moved forward by proposing an RCA to Paterson. “Wayne officials chose Paterson because of its proximity to Wayne and its willingness to assume the entire 500 unit obligation” (19). Field et al.’s example perfectly illustrates the effectiveness of cooperation in eliciting compliance when coercive force is the alternative. They detail that, “Despite reservations on both sides, Wayne and Paterson ratified the deal in early 1993. The Wayne Town Council hesitated before approving the RCA, but the township’s lawyer warned that if the township did not take action, then a judge would appoint a special master to develop fair share housing. A court-imposed plan might disregard Wayne’s priorities and replace current plans for senior citizen and handicapped units with other types of low income housing” (21). What the deal here represents is the effectiveness of a system of builder’s remedy suits in making municipalities proactively fulfill their affordable housing obligation. Because Wayne had witnessed builder’s remedy lawsuits and did not want to be sued further, it developed its own plan to address its affordable housing obligation and chose to cooperate with COAH.

Unfortunately, Field et al. (1997) also note that, while the effect of producing cooperation between municipalities, builders, and COAH is a good one, that RCAs as a specific mechanism for incentivizing towns to comply with COAH have problems. They state that, “the system reinforces existing patterns of racial and economic segregation because most of the deals involve wealthy senders and poor receivers. Critics also contend that the RCA agreements result from great disparity in bargaining power. Poor cities simply cannot afford to say no” (27).

Ultimately, RCAs were abolished in 2008 due to misuse by suburbs, and especially wealthy suburbs, to exploit central cities. Such municipalities were using RCAs to essentially pay to not have to build affordable housing, even if they had developable land and money (“Mount Laurel Doctrine | Fair Share Housing Center”).

South Brunswick

While South Brunswick met its affordable housing obligations in COAH’s first and second rounds, it, like almost all municipalities, did not do much in the third round, during which COAH was dysfunctional.

South Brunswick’s 2015 petition to the New Jersey courts for immunity from builder’s remedy suits summarizes its interactions with COAH in the 2000s (Sears 2015). On December 16, 2005, the Township petitioned COAH for third round certification by submitting a fair share plan addressing COAH’s original third round rules. However, COAH had not acted on South Brunswick’s 2005 plan before the Appellate Division Courts invalidated COAH’s third round growth share ruled in *In re Adoption of N.J.A.C. 5:94 & 5:95*, in 2007, and told COAH to adopt revised Third Round rules. South Brunswick was then required to re-petition COAH for certification under its revised 2008. It submitted a new third round plan in 2008 that addressed its cumulative 1987 - 2018 affordable housing obligation, which was a prior round obligation of 841

units and a third round obligation of 948 units. Although COAH began to review South Brunswick’s plan, it did not certify the plan before the 2010 New Jersey Appellate Court decision that invalidating COAH’s second attempt at a third round methodology based on growth share, or before the Supreme Court decision in September 2013 on the same issue, which altogether invalidated COAH’s amended third round rules.

Despite the fact that COAH never certified the South Brunswick’s third round affordable housing plan, the township claimed that it proceeded to take steps to produce affordable housing. In petitioning the courts for immunity in 2015, it outlined all of the affordable housing it built in the 2000 – 2014 gap period:

South Brunswick COAH Third Round Compliance [data from (Sears 2015)]

Development (Units)- type of housing
Woodhaven Terr (40)- affordable family rentals; Deans Apts
Sassman development (1)- affordable family sales
Menowitz development (8)- affordable senior sales
Dungarvin/Eclipse (4)- alternative living arrangements
REACH (128)- Market to Affordable; affordable family sales/rentals
Wilson Farm Redevelopment (399)- affordable senior and alternative living rentals; 1.33 credits per 1 unit
Prior Round Excess credits (4)
TOTAL CREDITS 584

Ultimately, South Brunswick was determined to have earned a brief immunity from builder's remedy lawsuits when affordable housing oversight was transferred to the courts in 2015, not because it had necessarily been compliant with its affordable housing obligation, which was doubtful, but because COAH itself had not been organized enough to tell South Brunswick to improve its affordable housing plan, and point out what needed to be improved. When South Brunswick was given temporary immunity by the courts, it was under the condition that the municipality would fix its affordable housing plan.

Princeton Towers and Affordable Housing

Princeton Towers is a 500-unit development built in South Brunswick the mid-1980's, with some of its units set aside as affordable units to fulfill its affordable housing obligation. It was evaluated in 2008 as part of a larger study on conflicting groups of homeowners in South Brunswick. According to the study, "the Princeton Towers developer somehow found a way to evade a State of New Jersey's affordable housing mandate, as it apparently existed at the time, decreeing that affordable housing be integrated with other housing in a visually imperceptible manner" (Lael 2008, 97). While the developer apparently had built the required number of affordable rental units to satisfy the affordable housing obligation for their development, these units were separated from the other units in the development. As the author explains, "these townhouse-style units are a separate enclave adjoining Princeton Towers. The rental units are designated by a logo bearing no reference to Princeton" (Lael 2008, 97).

Additionally, the affordable rental units are separated from the other units by a five-foot high wooden fence that the developer built between the two housing complexes, as a response to a problem of car headlights from the affordable rental complex shining into the houses of the other complex at night. However, "years after its installation the fence is clearly not the object of

undue attention and is in fact showing signs of disrepair” In essence, the homeowners have forgotten about their problems that required the fence, bringing up the question of why it was ever necessary. Furthermore, the study shows that “on the Princeton Towers side the fence is shielded by bushes. In all probability a majority of homeowners are unaware of its existence. On the side of the affordable housing rentals, however, it gives the impression of being a boundary marker” (Lael 2008, 98). This construction of the affordable units as separate from other housing units is clearly at odds with the spirit of the Mount Laurel doctrine, but with no clear enforcer of the doctrine when COAH was in disarray, instances like this can arise, especially if townships choose to be in compliance with the more nuanced aspects of the affordable housing obligation.

The intentionality of this development’s layout is shown in the attitudes of South Brunswick inhabitants who live in the nearby Princeton Towers units. According to the study, “for Princeton Towers residents, the separation of the affordable housing units from the main development is fully justified. ‘(The mayor) wanted us to have affordable housing,’ explains a homeowner. ‘But how could you subsidize a \$200,000 house? The builder wouldn’t be able to sell a \$300,000 house next to subsidized housing. No one would buy. Houses would look about the same on the outside, but would be different on the inside. And people in the subsidized housing would be poor’” (Lael 2008, 98). Though South Brunswick Township fulfilled its affordable housing obligation, it is clear that the municipality required coercion from state laws to do so, and would not have opted to otherwise.

Even with COAH regulations, the behaviors of Princeton Towers residents in 2008 effectively countered the spirit of the Mount Laurel Doctrine. The study concludes that for most South Brunswick and Princeton Towers residents, “the suggestion of a poor or working class presence is to be avoided. This interest is borne out in a stance assumed at least by some

residents vis-à-vis affordable housing units, the fence that separates owner-occupied housing from the affordable rental units, and efforts at least by some residents to ban the presence of pickup trucks or of cars displaying business logos” (Lael 2008, 109). Overall, the behaviors of South Brunswick residents in the case of Princeton Towers in the 2000s suggests that the municipality was noncompliant with meeting its affordable housing obligation because it was not coerced by builders and affordable housing advocates to do so.

INTERVENTION OF THE NEW JERSEY TRIAL COURTS: 2015 – 2018

Mount Laurel IV

In March 2015, on a complaint filed by Fair Share Housing Center (FSHC), the New Jersey Supreme Court dissolved what it called a “dysfunctional” COAH and ordered every municipality to draft new plans. The Supreme Court also shifted power to enforce the *Mount Laurel* doctrine back to the trial courts, stating, “the courts may resume their role as the forum of first resort for evaluating municipal compliance with Mount Laurel obligations” (Supreme Court of New Jersey 2015). *Mount Laurel IV* was the point at which the Court determined that COAH’s ineffectiveness was unlikely to cease, and so it took jurisdiction over *Mount Laurel* doctrine compliance back from the state government body, as it stated it could back in *Mount Laurel II*. This decision also recognized the FSHC as a party to all declaratory judgment cases, due to its sheer influence over getting municipalities to file for both declaratory judgment actions and builder’s remedies. As Caton (2018) explained, “The Supreme Court said that, because Fair Share Housing Center was so instrumental in bringing the matter before the court and demonstrating that COAH was no longer functional, they ought to be able to participate in every municipal action.”

Trial Court Period

FSHC calculated that the state was obligated to zone for 200,000 affordable units by 2025, a number likely higher than what all municipalities desired. Municipalities such as Cherry Hill (1,000 units), Winslow (794 units), Harrison (546 units), Maple Shade (311 units), Medford (483 units), Jackson (1,250 units), and Toms River (1,285 units) settled by the end of 2016 with FSHC. However, many others, about 300 towns, including Mount Laurel, initially joined forces to convince the courts that the state obligation number should have been closer to 40,000 units (O'Reilly and Writer 2016). One major shift on affordable housing under COAH and under the courts is that the process of certification is now initiated by towns, rather than the state government, as each town gets to choose how it fulfills its obligation. While this can result in a declaratory judgment case, it can also result in a town waiting to even think about its own affordable housing obligation until a builder's remedy lawsuit arises against it. These circumstances put more pressure on builders and advocacy groups like FSHC to confront noncompliance with the *Mount Laurel* doctrine as they find it or become aware of it, and on an individual level, because municipalities will otherwise not be held accountable for building affordable housing.

The trial courts also later ruled on the "gap period" between 2000 and 2014 and decided that municipalities would have to provide for such a period through an additional affordable housing obligation, to be added to whatever value the court prescribes for each municipality in the post-2015 period (Fair Share Housing Center 2017).

While this period is still ongoing, FSHC has made significant progress. As of March 2018 it has negotiated over 150 cases with municipalities, and has as many as 200 more cases pending (Fair Share Housing Center 2017). In this era, many municipalities have engaged in

negotiations with the courts and FSHC, but almost none have taken voluntary action in initiating such negotiations, and coercive mechanisms such as builder's remedy lawsuits filed by developers still seem to be necessary for the completion of affordable housing obligations. However, without COAH, the process now is always one in which municipalities have more time and leeway to be noncompliant. During the prior rounds of COAH, municipalities were all required to submit plans after a certain time, but under the courts, each municipality's affordable housing obligation must be determined before it can submit a plan, allowing municipalities to delay the process by not coming to the courts themselves, and then by contesting the size of their obligation in court. While some towns are using this newfound power to drag their feet, and are simply doing nothing and waiting to be sued, many townships are willing to negotiate in order to avoid the worst, in builder's remedy lawsuits, as evidenced by the high number of declaratory judgment cases seen in the courts.

Without COAH, each township's affordable housing obligation is truly up for debate, and thus the townships themselves, as well as plaintiff organizations like FSHC, have more influence over what these numbers are. Unfortunately, because this process is occurring midway through the third round, some municipalities that have tried to comply with the doctrine have been unable to get their plans certified when they have tried. McKenzie (2018) addresses this, saying that "Because there were towns who had legitimately submitted third round plans to COAH under the COAH rules before they had been invalidated, the Supreme Court gave those towns the ability to file declaratory judgment actions to get their plans approved by the courts. In those cases, these towns received the same immunity that they would've gotten from COAH, but covering a longer period of time, to account for all the years that COAH had failed to adopt valid Rules. But of course none of their plans were valid as written because they were based on the invalidated

COAH methodology of growth share. Thus, the Supreme Court told municipalities that they would have to use the methodology that hadn't been invalidated, that of the prior round, to come up with fair share numbers. The court thought that they were making it an easy task for the trial courts, but it has not been an easy task for the trial courts. Basically, there was no agreed upon methodology for calculating fair share numbers that towns could use, so there has been a huge negotiation process with FSHC and all the court appointed masters to try and get settlements.” McKenzie’s statement encapsulates that the current process has been one of confusion for both courts and municipalities, because municipalities which were long considered compliant under a dysfunctional COAH are now being asked to plan for much higher obligations than in the previous fifteen years. However, these municipalities have also been trying to use their COAH third round plans as evidence of valid compliance when most of these plans do not provide for affordable housing proportional to the prior round. Ultimately, it creates confusion in the courts as to which municipalities actually want to comply and submit their own affordable housing plans and which ones are simply seeking immunity from builder’s remedy lawsuits and plan to drag their feet in terms of actual development. The only way for the courts to resolve this COAH-created mess has been to grant temporary immunity to towns that tried to get certified under COAH and then meet with every one of those towns after a period of time to determine whether they have actually come up with a viable plan.

In explaining how townships plan for affordable housing now, Caton (2018) explains, “COAH rules provide incentives for family rental housing, which is that, up to a certain limit, you get double credit for these units towards your affordable housing obligation... Towns that would otherwise have no interest in affordable housing are now enthusiastically pursuing tax credits because they provide the opportunity of getting credits for the actual units built without

the other multiplier effect of market rate units, so ... they get credit not only for the affordable housing units built but also for the rental bonuses on those units. In the case of a 60 unit affordable housing job, the municipality might get 120 units worth of credit for those 60 units of construction, as opposed to having to zone for 300 units, where 20%, or 60, would be affordable, and the other 240 are market rate. For towns that are sensitive to growth and multifamily housing, which pays relatively lower taxes than single family, detached homes, there's a big incentive to try to get funding for these 100% affordable jobs. COAH created the incentive, and it works. Towns are actively organizing their fair share plans to take advantage of the incentives created." The 100% affordable housing projects seem like a positive shift for towns, but one concern raised by McKenzie (2018) is that, "What occurs more now is that many towns are committing to do 100% affordable projects to avoid all the market rate development that attends an inclusionary residential development. They're all counting on low-income housing tax credits coming their way, which is getting increasingly competitive and difficult. A town that puts a 100% affordable project in its plan has to commit, if they can't get the low-income housing tax credits within one or two rounds, to pay to build and produce those units themselves. There are a few towns that are willing to do it, have the capacity and will do it if they have to. There are other towns for whom doing that is simply overwhelming. They can't do it and they don't have any ability to come up with the money for those units. So judges have to be careful that, in such cases, the towns have a backup plan to do inclusionary zoning if they don't get the 100% affordable projects that they were hoping to get. Sometimes towns have an 'either-or' plan going in. If 100% affordable projects look realistic, though, Fair Share is likely to accept them as part of a settlement." It seems as if municipalities in the third round under the courts are using certain types of developments in their planning in a good way, but sometimes in an unrealistic way.

However, it seems from McKenzie's statement that FSHC has done a good job of only settling with the municipalities it brings to court when the latter's plans are realistic.

To further characterize the type of planning that municipalities have done in the current round, McKenzie continues, "I can divide towns into two different types. There's one type of town that doesn't mind using inclusionary developments, which involves associating with builders in some way, whether through a builders remedy or just through zoning that the town implements. They don't mind doing that to get a 15—20% set aside of affordable housing units as part of a market priced residential development. There are some towns that really don't want any more development, particularly residential development, so they'll try to meet their affordable housing obligations with as many 100% affordable projects as they can to maximize control over growth. But such projects require them to spend a great deal of money because there isn't always outside funding available for these mechanisms, such as buying down market units to an affordable level, subsidizing the creation of accessory apartments that are deed restricted, 100% affordable housing projects, and subsidizing special needs group homes. These are perfectly valid mechanisms, and there are many towns whose whole plan revolves around these kinds of mechanisms. There are also towns that really don't use any of those mechanisms and just use inclusionary zoning. And there are towns that use various combinations of the two." In what might also be correlated with towns that plan to use 100% affordable developments, it seems that some towns fear overdevelopment, as a byproduct of new high-density project construction, more than others. However, it seems that there are a plethora of options open to towns to produce their fair share of affordable housing without having to build all of their required units from scratch. Other methods like buying down market rate units and redevelopment exist as incentives, along with housing bonus credits, for towns that are averse to

building large portions of new housing units. Many of these alternative means are only realistic for townships with large amounts of money though, so it seems small townships that are not as wealthy must rely on inclusionary developments and high density, high volume construction to meet their affordable housing obligation.

Caton (2018) corroborates what McKenzie states in terms of some municipalities having worries about high density development, and also introduces the worry of municipalities that affordable housing units will lose the town money that will decrease the quality of its municipal services. He states, “Most towns recognize that affordable housing, particularly with two bedroom or three bedroom units, will cost the town money where the taxes that they get from the units are not going to cover the cost of providing municipal services such as schools.” It seems that many municipalities worry about the low tax rate specifically on multifamily housing and are thus averse to building it as part of their affordable housing plans. Additionally, Caton continues, “Then there are towns that don’t really have a problem with providing affordable housing to low and moderate income households but are anxious about growing too fast and about the impacts of high density development on their town... such as more schoolchildren to educate and more traffic on the street... High density development generally takes the form of market based units where 15 or 20% of the units are affordable... so if [towns] have an obligation of 100 units, they would have to build 500 units, 400 of which are market-based and 100 of which are affordable” (Caton 2018). These are likely smaller towns which fear the impacts of growing too fast and of high-density development on their town, due to changes it would cause to the town culture, as a bigger and more populated area. According to Caton, these municipalities sometimes feel that FSHC is pushing for zoning for higher than preferred densities, even if they want to build and develop affordable housing in their community.

With so many different factors influencing whether municipalities are resistant to their affordable obligation, I sought to find a pattern or formula that would determine which municipalities would be more likely to comply with the *Mount Laurel* doctrine and which are more likely to resist. McKenzie (2018) explains that this formula does not exist, and much of the way municipalities act is determined by uncontrollable circumstances. She explains, “The towns that can settle easily are the towns that either have an inherently low number that they can manage, or towns that are going to get a vacant land adjustment anyway. In towns that get vacant land adjustments, the size of their number, even if it sounds offensive to them, doesn’t really matter because while they’ll have to adopt mechanisms to try to capture affordable housing opportunities going forward to meet the unmet need, they aren’t expected to come up with a hard plan for dealing with anything more than their realistic development potential. This potential could just be a handful of units, but it is manageable and is something they can readily do at the time they’re settling with FSHC. So, a lot of times the number matters and can be a huge stumbling block. But there is a wide range of numbers that can be considered unacceptable. It’s not automatic that towns won’t settle with high numbers. It’s just that the ability of the town to look at their number and say ‘we can do this’ has a lot to do with whether or not they are likely to get into a settlement with Fair Share. That varies from town to town. There’s no formula.” Essentially, the geography of towns plays a bigger role than I initially expected, both in terms of its potential for compliance and in terms of the actual affordable housing development obligation that it receives.

In the new, court run system, the court itself decides whether each municipality’s plan complies with the *Mount Laurel* Doctrine directly, and can draw on previous COAH regulations for examples of possible obligation numbers. However, according to Caton (2018), who has

served as a municipal planner and as a special master planner to the court, the courts would prefer to act as a mediator in the current stage of affordable housing obligation determinations. Ultimately, he explained, “the courts would like to see settlements whenever possible ... If a case is settled with a builder plaintiff or a nonprofit plaintiff, after the court finishes a case, there are still going to be elected officials and appointed officials and builder that have to get along together after the court case is finished. If there’s a settlement, it’s much more likely that they’re going to relate reasonably to one another than if they’ve been battling in court and a court calls the case. There’s a priority in trying to get cases to settle, within the standards that have developed over time” (Caton 2018). Caton alludes to the importance of cooperation for creating a system of effective and efficient compliance. He explains that when a case is settled between builder or nonprofit and a municipality, it is much more likely that the two parties will relate reasonably to one another in the process of actually building housing, which will take place for some time after the trial. A settlement will likely lead to much more expedient results in terms of actual development than a court verdict for one side, as the opposing side will likely seek to drag their feet if left totally unsatisfied. This cooperation is key because the more that the municipality and the builder each feel as if they had power over the decision, the more likely they will be to comply with it efficiently instead of stalling.

Caton also explained that “The Supreme Court has made it clear to the trial courts that even though COAH is not actively engaged anymore, that it doesn’t want trial courts to be making up policy. Thus, the trial courts are still trying to rely as much as possible on the COAH rules” (Caton 2018). Trial courts are reluctant to make policy and still rely heavily on COAH rules for precedent, even though COAH is no longer actively engaged in the process. This is likely because the judges do not always have expertise on the matter of housing and COAH did.

The effect of this is that FSHC and municipalities can push for different COAH regulations and both be justified by COAH's historical behavior in drafting such rules. For instance, FSHC prefers COAH's third round rules, while municipalities often prefer the second round rules. This often contributes to the already slow process of evaluating each municipality in court. However, the presence of FSHC and its advocacy for the original principles of the *Mount Laurel* doctrine are important in creating avenues by which towns can be coerced, but also by which towns can compromise and choose to comply of their own volition.

The incentives available under COAH are essentially the same now, but offered by FSHC instead. Towns can still pursue tax credits because they provide the opportunity to get multiple types of credit for the same affordable housing units. For example, one incentive for towns sensitive to growth is that multifamily housing units each count as two affordable housing units, even though towns often worry because such housing pays lower taxes than single-family detached homes. Towns also still have incentive to compromise with FSHC though, as they can still receive immunity from builder's remedy cases. In terms of cooperation, FSHC has implemented benefits of compromise even beyond what COAH did, which now includes a 30% reduction in affordable housing obligation in exchange for other concessions if towns settle with them.

While some structures of the court system are similar to the COAH system, in terms of the types of incentives that exist and cooperation that can be accomplished, the court's system is less standardized in terms of how one township's obligation might be proportional to another's. Thus, the size of the obligation number assigned to a township, in terms of the number of units of affordable housing they must develop, makes a bigger difference than it used to, in terms of whether that township will settle or not. Under COAH, a municipality could compare its

obligation to that of others around it and realize that they were all being compelled to build affordable housing in a proportional way. With the court system being managed by multiple judges, it is possible that a municipality will get a much higher obligation by simply cooperating with the process than if it resists using only FSHC's numbers.

Surenian (2018) brings the perspective of a municipality, explaining that with COAH, municipalities needed a number to reach, but would reach their number if it was fair. With the courts, this number is less informed by expertise, and thus requires municipalities to take certain actions to protect their own interests. In his experience of representing municipalities' interests, Surenian explains that "the first order of business for municipalities is to obtain immunity. If you have immunity, fight to maintain it, and if you don't have it, get it, because if you're not protected, then you are at the mercy of developers, who are almost always shameless in builder's remedy lawsuits. They'll make absurd demands in terms of land density and they'll make you spend a fortune. So the first order of business is to get protected and stay protected" Surenian's words show that, despite some misgivings about standardization under the courts, municipalities' priority is always to obtain immunity from builder's remedy lawsuits by making and submitting their own affordable housing plans. In the case of a builder's remedy lawsuit, the township would lose most of its voice in determining its affordable housing obligation, and be at solely mercy of developers. Municipalities have to stay protected, from their perspective. Municipalities have this attitude because the threat of coercion is still worse than the municipality having to cooperate in a way that it does not want to and having to build affordable housing.

Surenian does bring up municipalities' concerns over their affordable housing obligation, stating, "The second order of business is to figure out your number... That's an essential bright

line, because you need to know the number for which you're planning. Then figure out how to satisfy that number, and do it in a way that is best for the town... You try to avoid over-developing the town because if you can reach your number without overwhelming the municipality with development, that's preferable. That's the challenge for towns" (Surenian 2018). However, Surenian is careful to explain that, despite any misgivings over the size of their affordable housing obligation, towns would rather have that obligation and be in control of how they meet it than risk facing builder's remedy lawsuits and losing all of their control to court-appointed special master planners. Ultimately then, municipalities seem likely to fight their affordable housing obligation number only insofar as they can also avoid builder's remedy lawsuits.

Mount Laurel

In early December 2016, Mount Laurel Township completed a settlement agreement with the courts and the Fair Share Housing Center. It was previously part of a coalition of municipalities that were challenging their potential affordable housing obligations in court but dropped out of that case once it reached a settlement. The town's mayor and council agreed to zone for 1,074 new low- and middle-income housing units between 2016 and the next round of affordable housing obligations, beginning in 2035. Due to various bonus credits, the actual number of units that will be built is 879, though this means that some of these units will be rental or multifamily homes. Additionally, in Burlington County, the median household income is \$81,500, so a family of four is considered "low income" by the county if it earns less than \$40,750 annually, and "very low income" if it earns less than \$24,450. For the next round, Mount Laurel has agreed that 13% of all its affordable housing units will be built for "very low income" households (O'Reilly and Writer 2016).

South Brunswick

According to Kinsey (2018), South Brunswick had immunity during the 1999-2015 period because it was certified under COAH's second round. Additionally, the township had immunity for a period of time between 2015 and 2016 because submitted a plan to COAH for certification in the third round, before Mount Laurel IV transferred jurisdiction to the courts.

In July 2015, South Brunswick filed a declaratory judgment action to gain immunity from builder's remedy lawsuits, under the reasoning that the town was practicing ethical opportunities for producing its fair share of low- and middle-income affordable housing. South Brunswick provided the court with its own calculation of the state's and municipality's need for low-income homes, and pitted its methodology against that of FSHC's. Judge Wolfson ultimately accepted FSHC's calculations, which also created the complication that it was South Brunswick's methodology that would have resulted in some of its more expensive affordable properties being counted as affordable. Judge Wolfson concluded that South Brunswick was not proceeding in good faith, and was "determined to be non-compliant." He stated that, "despite a span of seven months and several extensions of its immunity, South Brunswick's progress had been minuscule" at best. Its insistence in relying upon mechanisms that were legally improper was entirely unacceptable" (Wolfson 2017). Based on those findings, he revoked South Brunswick's longstanding immunity from builders remedy actions at the close of the case, in 2016.

It seems that, despite being compliant in earlier rounds, South Brunswick has become anti-growth insofar as the obligations that FSHC and the court want, and is now waiting to be sued to the bitter end.

ANALYSIS

First Round under COAH

The first round under COAH shows what municipal lawyer Jeffrey Surenian (2018) claims, which is that “After *Mount Laurel I*, the Supreme Court authorized a numberless approach. However in *Mount Laurel II*, referring to the ‘lessons of history,’ the Supreme Court noted that without bright lines, there will be an insufficient response to constitutional requirement. Little happens because towns need bright lines so they can plan accordingly.” Kevin Walsh at FSHC expressed a similar view, though in slightly different terms, which is that “most towns are not clearly good or bad but merely do what is expected of them and nothing more. Thus, if doing absolutely nothing is an option, almost all of them would do nothing. Almost all towns need pressure to meet their affordable housing obligation” (Walsh 2018). Walsh and Surenian express a similar view of municipalities in the sense that they both seem to believe that municipalities require specific expectations and guidelines to be present in order for them to build affordable housing. This view is likely perpetuated in some capacity by the lack of progress that was made in New Jersey in terms of affordable housing development prior to *Mount Laurel II*, even after *Mount Laurel I*. The lack of progress is especially visible when it is contrasted with the amount of development that occurred both in the direct aftermath of *Mount Laurel II* and after COAH was formed, in the first round. One point of divergence is that Walsh, who has personally had to sue many municipalities in numerous builder’s remedy lawsuits, may feel that the absence of municipal progress in pre-*Mount Laurel II* and similar conditions is due to lack of municipal interest in affordable housing development and residential integration, and maybe even due to a municipal desire to oppose such goals. Surenian, on the other hand, who has represented municipalities in many builder’s remedy cases, may feel that this absence of progress

is mostly due to lack of clarity on municipalities' part, rather than any sort of apathetic or ill intent towards residential integration. However, where Walsh and Surenian ultimately converge, and where the first round of COAH allows for a conclusion to be drawn, is that a system by which municipalities can be made overtly aware of their affordable housing obligation will ultimately be more effective in furthering residential integration than a system based on principles and vaguer value statements.

It may not be necessary to ascertain the attitude of municipalities towards the goal of increasing affordable housing development within their jurisdiction if it is clear that, regardless of their intent, municipalities will make more concrete steps to reach this goal within a system of clear, specific obligations, like the ones implemented under *Mount Laurel II*. Additionally, when the goal of furthering affordable housing production is affirmed by the New Jersey state constitution, it can be assumed that municipalities will not object to attempts to make them reach the goal, regardless of their disposition towards it. While municipalities may in other cases argue that attempts to help them reach this goal are unhelpful or misdirected, in the instance of the COAH first round, it is clear that municipalities, builders, and affordable housing advocates alike agree that the system implemented there was effective in furthering progress towards the goal.

In categorizing the types of pressure utilized towards municipalities in the COAH first round, the term coercion is most appropriate. Firstly, the state government asserted coercive pressure on municipal governments by putting COAH in place. More importantly though, builder's remedy lawsuits undertaken by affordable housing developers and builders were the main mechanism for compliance with the *Mount Laurel* doctrine during this period. Given the structure of builder's remedy lawsuits, it is clear that they are a mechanism by which municipalities are coerced into fulfilling their obligation to develop affordable housing. More

specifically, because in every builder's remedy lawsuit a builder is attempting to prove that a municipality has been in compliance with the *Mount Laurel* doctrine, it is always a means by which builders and developers are trying to push municipalities in a direction that the latter is not going. Additionally, because when a builder wins a builder's remedy lawsuit, they succeed in getting zoning control transferred from a municipal planner to a court-appointed special master planner, the goal of the lawsuit is to take away municipal control in the matter, and thus engage in coercive behavior.

Mount Laurel Township

Mount Laurel's behavior in the first round under COAH was compliant with the *Mount Laurel* doctrine, as evidenced by the fact that they fulfilled their affordable housing obligation. Given that Mount Laurel was involved, not long before the first round, in litigation between some of its residents and the municipality, it can still be inferred that the coercive process of undergoing litigation was effective in getting the municipality to do its fair share to develop affordable housing.

South Brunswick Township

South Brunswick was compliant in COAH's first round due to the fact that it submitted an affordable housing development plan to COAH within the first year of the round. It got its plan approved shortly afterwards. Additionally, the municipality actually built all of the required affordable units for the first round, showing at the very least that the COAH system of coercion worked better than the pre-*Mount Laurel II* system.

What is also notable about South Brunswick's is that the township submitted its own affordable housing development plan to COAH and took proactive steps to build housing. At the very base level, this is cooperation, even if it is within a larger motivation of coercion. South

Brunswick witnessed the results of *Mount Laurel II* and saw the results of the numerous builder's remedy trials that proceeded, between 1983 and 1987. The municipality likely realized that it would be in its own interest to submit an affordable housing plan to COAH, rather than wait to be sued by builder's remedy lawsuits, lose control of its own zoning powers, and have to pay for all court proceedings.

Overall analysis of the period

By the time that the COAH system was put in place in 1987, the power of builder's remedy lawsuits had been established to municipalities, along with the precedent of courts deciding on such lawsuits in favor of developers and against municipalities. Municipalities wanted to avoid builder's remedy lawsuits at all costs, even if it meant finally committing to planning for affordable housing. Thus, COAH's decision to offer immunity from builder's remedy lawsuits as a benefit of cooperation was an effective use of the strategy and likely resulted in more municipal cooperation with builders, developers, and affordable housing advocates. Though municipalities were motivated to cooperate and build affordable housing by their fear of builder's remedy lawsuits, builder's were motivated by a mix of profit and desire to provide affordable housing, and the state government, along with affordable housing advocates, was motivated by a desire to promote residential integration, COAH's mechanism by which towns could develop their own plans allowed all of the parties to cooperate and work together toward the shared goal of building affordable housing. Thus, by the first round, cooperation, within the larger system of coercion, resulted in more affordable housing than the coercive forces alone would have.

Overall, comparing the time between *Mount Laurel I* and *Mount Laurel II* to the time after *Mount Laurel II* indeed shows that the principle-based approach without specific guidelines

taken in *Mount Laurel I* cannot work on its own. The coercive approach used after *Mount Laurel II* and in the first round of COAH addressed the concerns expressed by Walsh's and Surenian's perspectives, and created a tangible framework of coercion within which municipalities would build affordable housing. In addition, the opportunities for cooperation provided within the COAH system, which had not been available when the courts held jurisdiction over *Mount Laurel* cases, made this coercive system more efficient in terms of time money, and compliance, in that it allowed towns to cooperate with the goal of building affordable housing without having to pay for court fees and run a full builder's remedy trial for every municipality.

Second Round under COAH

The second round under COAH also demonstrates the effectiveness of a system of coercion. This is seen through the fact that the number of towns complying with the Mount Laurel Doctrine did not decrease, and in fact increased. Part of the reason for this increase was that more towns began to do their fair share to provide affordable housing, through submitting their own plans and getting certified by COAH. This increase was also demonstrative of the continued effectiveness of cooperation. Towns continued to submit their own plans and seek COAH certification, which indicates that the cooperative avenues for municipalities established in the first round were continuing to be used and to work. Of note however, was that many more towns than in the first round submitted plans and got certified under COAH. This trend is indicative of multiple things. Firstly, the passage of more time could potentially have been effective in getting more municipalities to comply with the *Mount Laurel* doctrine, as more municipalities became aware of the avenues towards compliance available to them. However, due to the fact that builder's remedy cases continued to be run and generally decided against municipalities, the increase in towns submitting COAH plans demonstrates that coercion

becomes more effective as a system of coercion is continually reaffirmed, so the more likely that coercion is to occur in instances of non-compliance, the more likely that townships are to use other mechanisms to avoid it. When clear, functional avenues of cooperation exist within a system of reaffirmed coercion, those avenues are likely to become more effective and more used, as subjects try to avoid coercion. In this case, townships realized that they were likely to get sued by builders in any situation in which they were incompliant with the *Mount Laurel* doctrine. Additionally, they realized that these lawsuits were unlikely to end in their favor, and knowing the consequences, they realized that engaging in cooperation was more beneficial to them than waiting to be coerced.

The results of the second round also demonstrate how affordable housing initiatives become more effective when incentives get added. Part of the reason for the increase in municipalities attempting certification in the second round was the increased emphasis by COAH on incentives and promoting settlement of affordable housing plans with the courts (McKenzie 2018). One such incentive, rental housing, is addressed in the COAH second round rules, which read, “A municipality shall receive two units (2.0) of credit for rental units available to the general public. 2. A municipality shall receive one and one-third (1.33) units of credit for age restricted rental units” (New Jersey Council on Affordable Housing 1994b). With the addition of incentives like rental housing credits, municipalities began to use such housing credits to make their COAH obligations smaller and more to their liking in the second round. While in certain cases, such as the misuse of RCAs, these incentives were problematic, in many other cases they served to make municipalities more amenable to meeting their affordable housing obligations, especially in cases where their original number of units required was large.

Mount Laurel Township

Mount Laurel submitted its own housing plan and built the required affordable units in the second round in order to avoid builder's remedy lawsuits. The township's avoidance of builder's remedy lawsuits through maintaining immunity in the second round shows that it learned from its own experience with the courts that compliance through use of cooperation is immutably preferable to being forced to comply and losing one's power in the decision.

South Brunswick Township

Similarly to Mount Laurel, South Brunswick's compliance in these rounds demonstrates that it preferred to follow COAH's guidelines and take incentives than to reckon with builder's remedy cases. Due to the incentives in COAH's second round rules, South Brunswick's development of affordable housing included five affordable developments with rental housing and a total of 187 rental bonus credits. Additionally, eight of South Brunswick's constructed affordable housing developments were family housing. Thus, at least in the case of South Brunswick, it is clear that incentives allowed the municipality to meet its second round obligation of 882 units in a way that did not cause the municipality to feel as if it was overdeveloping within a five year span. That the township actually went beyond its affordable housing obligation for the second round is evidence that over time, cooperation is more efficient in producing actual affordable housing units than coercion. If South Brunswick had waited to be brought to court in a builder's remedy suit, the time the municipality spent in court, in addition to the time during which it was noncompliant and waited to be sued, would have had to come before the municipality even began forming its own affordable housing development plan, and far before it built any actual affordable housing. By providing a means of cooperation, COAH ensured that municipalities could comply with the *Mount Laurel* doctrine without waiting for the slow processes of coercion to reach them and complete. South Brunswick is one such example

that built on a strong foundation of compliance through cooperation in the first round with an even stronger showing of cooperation in the second round. South Brunswick is also a strong example of a municipality that used incentives to maintain its compliance, even though it received a higher obligation in the COAH second round than in the first.

Overall analysis of the period

By the time the second round concluded, in 1999, towns had an array of incentives offered by COAH that they could use for compliance, namely bonus credits such as rental unit and group home credits. While some of these incentives had been present since the first round, it likely took municipalities some time to figure out how to use them most effectively and to actually implement them into plans, and so the second round, between 1993 to 1999, demonstrates the effectiveness of incentives within compliance. Additionally, other incentives, like rental bonus credits, were defined in COAH's second round rules and became a staple for municipalities' affordable housing plans. Such incentives likely caused many municipalities to engage in cooperation and make their own affordable housing plans, since doing so became more manageable. These municipalities would otherwise have been coerced into complying with the *Mount Laurel* doctrine, so it is clear that incentivizing furthered the process of cooperation, and thus contributed to more timely compliance on the part of many municipalities. Municipalities that previously might have waited for a builder's remedy lawsuit if they felt their affordable housing obligation was too high and would require overdevelopment could instead take COAH's incentive and build rental affordable units, and halve their actual production of units. The bonus for such municipalities was less development. However, these rental units were also beneficial to the goal of the *Mount Laurel* doctrine because they made for more accessible housing that could

be used by families that could only pay for rental housing. Additionally, many towns used the incentive of RCAs in their affordable housing plans during this time.

Overall, comparing the results of the second round to the first round suggests that the addition of incentives might not have made the difference between towns complying and not complying with the *Mount Laurel* doctrine, but it likely resulted in more towns choosing to comply with the number of affordable housing units they were required to build rather than choosing to fight their obligation through builder's remedy lawsuits. The 245 municipalities that got certification through COAH in the second round (New Jersey Council on Affordable Housing 1994a), also far surpasses the 161 municipalities that did so in the first round (New Jersey Council on Affordable Housing 1987). This demonstrates that some combination of time, cooperation, and added incentives made more municipalities choose to comply with COAH in a proactive way. The second round under COAH continues to show that avenues of cooperation within a system of coercion increase the effectiveness of the system in eliciting compliance from municipalities. Lastly, the second round demonstrates that incentives make municipalities more likely to comply with their affordable housing obligation because they make the number of units in that obligation more manageable.

Third Round under COAH

The widespread drop in compliance throughout the third round under COAH demonstrates how municipalities truly do require a framework of strong coercion to make any progress whatsoever towards fulfilling their affordable housing obligation, even if options for cooperation and incentivizing remain for them. Without a system of coercion, municipalities' general preference against large amounts of growth, as expressed by Surenian, becomes a factor that governs their probability of compliance in a stronger way. Essentially, if municipalities are

not made to build affordable housing and are not given clear numbers for how much housing they are obligated to build, they will not act. While this can be for a variety of reasons, as elaborated earlier, including lack of clarity, high cost of development, and potential disinterest in affordable housing development, all of the reasons lead to a lower potential for compliance without coercion.

However, during this period, RCAs were removed as an incentive for municipal compliance due to misuse. McKenzie explained, “There were times when Regional Contribution Agreements were a legitimate mechanism that seemed to work well for both urban areas and very rural municipalities. They should not have been allowed everywhere and they should not have been allowed in lieu of an inclusionary development or a builder’s remedy situation, where a developer was allowed to build a higher density project in exchange for providing affordable housing. However, a lot of towns in the first and second rounds used these Regional Contribution Agreements” (McKenzie 2018).

Mount Laurel Township

In the third round under COAH, interestingly, Mount Laurel and South Brunswick diverge. Mount Laurel stands as an interesting case, as even beyond the 140 unit Ethel Lawrence Homes, the most famous affordable housing development in New Jersey, the municipality has committed to building more affordable housing, even slightly through the gap period. From 1985 to 2015, Mount Laurel created 653 affordable units to meet its obligations (O’Reilly and Writer 2016). However, the municipality, like many others, did not build as much during this period, which demonstrates that a coercive system elicits greater municipal compliance, even if the municipality has a desire to comply.

South Brunswick Township

South Brunswick made little progress towards compliance in this period, as it is clear from its 2015 immunity seeking suit that they attempted not only to manipulate the rules of affordable housing and do minimal amounts when not required to do more, but attempted to present this minimal amount as compliant with the Mount Laurel Doctrine, and even argue it in court. The municipality's actions, in not acting and then attempting to claim compliance and immunity from builder's remedy lawsuits, show that it required coercive pressure in order for it to make any sort of substantive effort at compliance.

Overall analysis of the period

While municipalities took different paths during the third round under COAH, the divergence between such municipalities, such as Mount Laurel and South Brunswick, in this round cannot be fully explained by pressures exerted on them and the avenues they had for compliance. In some capacity, municipal compliance is determined by random factors, such as geography and local governance. As previously explained by Eisdorfer (2018) and McKenzie (2018), local politics can often determine whether a municipality makes proactive effort to comply with the *Mount Laurel* doctrine. If a more conservative mayor is elected, the municipality may opt not to utilize cooperative avenues, not submit its own affordable housing plan, and instead even fight its affordable housing obligation in court. Additionally, as McKenzie (2018) mentioned, the geography of municipalities ultimately influences the number of units they are obligated to build, and so unpredictable factors may cause municipalities with otherwise similar conditions to have different affordable housing obligations. At some level, a municipality's decision to not fight its affordable housing obligation depends on these other factors, and so Mount Laurel and South Brunswick's differing paths cannot be accurately explained by comparing only the two municipalities. However, broader analyses may be made

based on the conditions that all municipalities were exposed to during the third round under COAH.

The conditions during this period partially mirror the ones that existed prior to *Mount Laurel II*, and especially in the period between *Mount Laurel I* and *Mount Laurel II*. However, where the third round under COAH differs is that, despite the absence of coercive force, there were still some incentives for compliance and limited cooperative avenues. Towns could still choose to build affordable housing and receive the same benefits as in the prior round, as well as engage in a cooperative effort by submitting a plan to COAH. However, cooperative avenues for municipalities were somewhat restricted by the fact that COAH's substantive rules and regulations were invalidated by the courts multiple times, forcing municipalities to resubmit plans that met COAH's new regulations each time the rules changed. Regardless of these conditions though, municipalities still had an obligation to build affordable housing during the third round under COAH, and still could have built projects without COAH certification. However, the fact that few did shows that municipalities require a system of coercion to make any sort of substantive progress toward their *Mount Laurel* doctrine obligation. It also shows that incentives and cooperative avenues alone do not cause a higher probability of municipal progress toward affordable housing development. This period is not the most conclusive to analyze in terms of cooperation though, as COAH was unable to provide much feedback to towns that submitted plans, like South Brunswick, regardless of whether methods of cooperation existed. In short, what the COAH third round does make clear is that almost all wealthy New Jersey suburbs still need coercive pressure, as they did in the 1980s, in order to get them to build affordable housing. Without this coercion, even the most interested of municipalities will make less progress towards residential integration.

Third Round under Courts

The current round of affordable housing, under the New Jersey courts, reaffirms, as prior rounds have demonstrated, that the threat of coercion elicits compliance from municipalities, and that it allows for mechanisms of cooperation to work effectively. This is again because the coercion itself sets a precedent for what can happen to municipalities that do not comply, so faced with such an undesirable situation, municipalities would be willing to compromise to remove themselves from it. In some ways, the coercive force in the third round under the New Jersey courts is similar to the conditions that existed between the 1983 *Mount Laurel II* ruling and the 1987 start to COAH's first round. All municipalities must interact with the courts in order to be compliant, unless they choose to undergo affordable housing development proactively and completely independent of state guidelines. However, the coercive force in this round is slightly different from previous rounds, including the 1983-1986 period. While previously, the courts could only be used to resolve builder's remedy cases and coerce municipalities, in the current round they can also open avenues of cooperation for municipalities.

Currently, municipalities can file declaratory judgment actions, in which they submit an affordable housing plan to the courts for approval. If successful, they obtain immunity from builder's remedy lawsuits, just as they would have under COAH. The main way in which this process differs is that different judges rule on all *Mount Laurel* doctrine-related cases for each housing region of New Jersey. Unfortunately, as Eisdorfer (2018) explained, progress is slower and less consistent under the courts than under COAH, as the court's system consists of 15-17 judges each working separately and independently. This means that cases, both builder's remedy and declaratory judgment, have varied greatly depending on which judge is assigned them. McKenzie confirms that, "Often local politics determine whether a town will settle, but

sometimes it depends on the judge. There are some judges who have been very successful in making towns settle, because they meet with the towns regularly, they keep meeting and keep pressuring the towns, they set dates for trials, and if a town doesn't settle before that, they're going to a numbers trial. That was how Judge Cassidy treated it in Union County, and all her towns that I've worked with have settled, with just a few cases waiting for final judgments on their compliance plans. Judge Wolfson was also successful in getting settlements in all but two cases. Ultimately, Judge Wolfson held a numbers trial for one of these towns. So, it often takes a strong judge to get these settlements to happen. They don't happen in a vacuum, and if towns feel like the courts aren't pressing them, they are less likely to settle. That doesn't mean that towns that don't settle have indifferent judges. There are many other reasons for not settling. However, a lot of towns that did settle were unlikely to settle, but for the judge" (McKenzie 2018). Thus, it is clear that the judge in this round can influence the outcome of a case, and whether a municipality ends up cooperating or having to be coerced when the court determines their current obligation for affordable housing development. Additionally, unlike COAH, the judges have no institutional expertise, so they are forced to appoint municipal planners as experts, giving a lot of power to whichever planner is chosen.

Furthermore, while the potential for cooperation exists in this round again, through municipalities settling in declaratory judgment actions, it is largely through the efforts of FSHC, who are currently offering a 30% reduction on what they advocate for in terms of municipal obligation, if a municipality agrees to settle. While this achieves a similar effect in terms of its utilization of the strategy of cooperation, there are some inherent drawbacks to FSHC being the party providing these avenues and not a state body like COAH. As McKenzie (2018) explains, "If a municipality is settling now, in the declaratory judgment actions that are before the Superior

Courts, with Fair Share Housing Center... they get a 30% reduction, but that could change.” Essentially, FSHC can provide avenues for cooperation with municipalities, such immunity and now a reduction on affordable housing obligation, but those incentives are not based in law, and rather in FSHC’s willingness to attempt cooperation with municipalities. The group could choose to withdraw those benefits from its settlement cases, and even in many cases choose to pursue only builder’s remedy litigation, with no legal ramifications. However, these decisions are the FSHC’s to make as it sees fit, and not guaranteed to be made.

With COAH, incentives and compromise potential were guaranteed because the legislative body itself was not a party to the proceedings of affordable housing development, but rather an organizer and overseer. Its goal was to make the process work more effectively and for more townships, as well as create faster paths to compliance for townships that have interest in complying on their own. FSHC, on the other hand, has a vested interest in exactly how high a municipality’s affordable obligation turns out to be, and is more concerned with getting the most affordable housing built than with determining calculations it deems to be comfortable and reasonable for municipalities. Thus, groups like FSHC sometimes even push to measures considered unrealistic by developers. Eisdorfer (2018) explains how, though FSHC’s motives are pure, on occasion it will be solely focused on maximizing the number of units a township has to build, whether or not the municipality has the developable land or money to build the units in reality. He says that this is seen through the fact that many towns’ plans depend on the very limited 100% affordable housing units funded through the federal government. If the towns do not receive grants to build these developments, their affordable housing number may be high, but they will not be actually building any units. For developers, it is always a balance between

maximizing affordable housing obligations and getting townships to plan to zone for the types of developments that can actually be implemented.

Regardless of the FSHC's actions, it is clear, while both FSHC and COAH can provide municipalities with means by which they could cooperate, for a quicker, ore efficient compliance process, that COAH could provide more stable means to towns by virtue of the fact that it is governed by law and has to codify its use of various strategies. This caveat aside however, FSHC provides avenues for cooperation in the current round, along with it presence as a plaintiff in court determined processes of coercion that have been reinstated. While some of the specific mechanisms may differ, in the third round under the New Jersey courts, a system of coercion, along with incentives for compliance and avenues for cooperation, is back in effect, to a similar effect as in the first and second rounds under COAH. The coercion exists in the New Jersey courts systematically evaluating each town's situation and determining its affordable housing obligation, in terms of the number of units it must build. The incentives remain as they have since the prior round under COAH, and still take the form of various bonus credits. The avenues for cooperation manifest in a municipality's ability to file a declaratory judgment action, have their affordable housing plan evaluated by a judge, and gain both immunity from builder's remedy lawsuits and a 30% reduction in the size of their affordable housing obligation.

Mount Laurel Township

Mount Laurel's behavior in the third round represents cooperation. The fact that it settled its affordable housing obligation through a declaratory judgment action, rather than a builder's remedy lawsuit, is proof of this. Additionally, the speed with which it was able to come to a conclusion on its plan, in late 2016, just a year after municipal affordable housing obligations were shifted back to the New Jersey court system, shows that the municipality had a desire to

cooperate rather than drag its feet, even if it was motivated to make an affordable housing plan by constitutional obligation. The other evidence of cooperation comes from the feelings of the municipality and Fair Share Housing Center when the deal was finished. While the FSHC initially pushed for Mount Laurel's obligation to be 2,410 units, much higher than the 1,074 unit obligation it agreed to, FSHC's current Director, Kevin Walsh, explained in an interview with the *Philadelphia Inquirer* that "there's much you can fight about. Or you can come to an agreement . . . if it gets shovels in the ground" (O'Reilly and Writer 2016). Similarly, Mount Laurel's attorney, Tyler Prime, said, "there's still some resentment that we have to build so much [to meet a quota.] But many people recognize that some good comes from this, [and the township stepped up] because our experience [with affordable housing] has taught us that it's not going away" (O'Reilly and Writer 2016). Clearly, both parties have aspects of the cooperation that they would rather have another way, but ultimately, the municipality's, court's and FSHC's allowance for compromise has resulted in an outcome in Mount Laurel that is effective in getting affordable housing built, and done so in a timely manner. The township likely decided to settle its obligation before the court decided so that it can choose its own settlement numbers, which is the benefit for municipalities of allowing for compromise within a coercion-based system. The benefits of cooperation can be seen in Mount Laurel, as according to Kevin Walsh, though compromises were made to get the municipality to settle its obligation more quickly, theirs "is still an aggressive plan," (O'Reilly and Writer 2016). Furthermore, the municipality was able to begin implementing its affordable housing plan because it settled sooner, as within a week of settling, the township had already identified 7 - 10 plots of land where the new units might be built. Mount Laurel's actions in this round show that cooperation can again be effective in the court round, after a less stable third round under COAH.

South Brunswick Township

The example of South Brunswick in the third round, and following, in the court round, shows that it, and likely many other municipalities, does not care about the meaning behind the *Mount Laurel* Doctrine, so is willing to challenge the principle of affordable housing obligation when the courts tell it to build. Alternatively, South Brunswick, and many municipalities like it, is much more willing to comply when a body like COAH, which is integrated into state government, simply gives it a number, tells it to plan, and does not concern itself with the ethical or moral impetus around the planning. Even Surenian (2018), representing municipalities, claims that “it was imperative for COAH to act during the third round, because going to 15 Mount Laurel judges was a recipe for disaster. FSHC knew that and municipalities knew that. At least 30 towns adopted resolutions pleading with COAH to act and not to force the Supreme Court’s hand, but their pleas fell on deaf ears and COAH didn’t respond. Christie did more damage by shutting them down, and appeared to have been the puppeteer behind all of this.” As Surenian (2018) shows, municipalities would prefer to have a body like COAH overseeing affordable housing implementation. For them, it would mean less time guaranteed in court, and the possibility of avoiding long, drawn out, and costly court processes altogether. From the municipal perspective, having a goal, a schedule, and a deadline will make them most compliant in terms of building affordable housing, which is what COAH provided. Under the courts, South Brunswick chose not to engage in cooperation and instead to fight back against the court’s mandate and ultimately be coerced. This occurrence can be attributed to the possibility that, with the court-governed system so recently instated, its coercive capabilities were not yet seen as a likelihood for towns, and did not yet have the precedent set under COAH, which was

consistently against municipalities in cases of dispute. Overall, South Brunswick was coerced into doing its fair share in the current round.

Overall analysis of the period

While imperfect in some ways and less effective than the prior rounds under COAH in others, the third round under the New Jersey courts has seen more effective implementation of coercion and cooperation than existed in the third round under COAH. Due to a lack of organization on the part of COAH in the third round, municipalities could not be effectively coerced and additionally could not cooperate by getting their plan approved. In this round however, such strategies are again viable because an organized central body, the courts, has implemented them into a system, albeit a less standard one than COAH. Due to the ultimate inferiority of the court system in enforcing coercion in a standardized way, municipal planners such as McKenzie think that after the current round of housing ends in 2025, they would like to see control over affordable housing shift from the courts back to a state agency, for the sake of consistency, and for towns to be able to avoid the court system and even have the possibility of coming up with their own plans and getting approval. McKenzie (2018), outlines, “I think that the third round, which now encompasses a 26 year period of time, should be finished with the courts. Going forward, I would like to see a state agency appointed that determines numbers, makes rules, and provides towns the opportunity to come in and get their plans blessed. ... Having a state agency is less costly, uses less of the court’s resources, and ultimately creates a kind of uniformity, as long as it is working properly, as it really was in the 2nd Round. It just stopped working in the 3rd Round. It wasn’t perfect, but neither is this situation. However, both were better than what COAH was not doing between 2000 and 2015” (McKenzie 2018).

Comparing the third round under COAH to the third round under the courts demonstrates that having a state agency oversee processes of affordable housing development in suburbs is more standardized and more money and time efficient than relying on 15 different judges. Overall though, much progress toward residential integration is being made in the court rounds by municipalities now. Nearly as many municipalities as in the second round have been able to receive an affordable housing obligation and either receive or submit a plan to begin planning for that housing. The fact that the current process is working better than in COAH's third round shows that coercion is ultimately necessary to elicit widespread municipal compliance, even if municipalities would still have incentives to build affordable housing in the absence of coercion. Most importantly, the success of the third round under the courts is yet another example that cooperative opportunity within a larger framework of coercion provides an even more likely probability that municipalities will look to integrate their communities through the construction of affordable housing.

CONCLUSION

Overall, the changes in types of pressure implemented within New Jersey in the periods between 1985 and 2018, as well as what impacts those changes had on municipalities like Mount Laurel and South Brunswick, show that the hypothesis of this paper that is most interesting to analyze is the assertion that cooperation between municipalities and builders, developers and affordable housing advocates increases the probability that municipalities participate in processes of residential integration by building affordable housing. Connecting back to my literature review, this thesis finds, expectantly, that Coercivists have merit, but also that the propositions of Cooperativists may be understudied and hold more merit than traditionally thought.

The traditional hypothesis is that coercion of municipalities by affordable housing builders, developers, and advocates increases the probability that municipalities participate in processes of residential integration by building affordable housing. While, this hypothesis is proven to be true in this thesis, there are other papers that advocate for this theory already. The COAH third round shows how disastrous it can be to implement municipal integration through affordable housing without a coercive framework, but my theory expands further on these traditional theories to show that coercive systems can be enhanced in terms of effectiveness and efficiency when combined with incentive elements opportunities for compromise. What this thesis adds to the discourse on affordable housing is that the binary view of municipalities, as entities that need to be either fed the carrot or given the stick in order to elicit their compliance with measures of affordable housing development, can be expanded on by reframing municipalities as potential parties in the process, rather than always as adversaries. Past theories do have good reasons for asserting that municipalities are often adversaries, which I do not dispute. However, this thesis asserts that municipalities have interests even within a system by which they are coerced into building affordable housing. Systems that rely solely off of coercion, as in certain time period in the history of New Jersey, often end up taking a long time to implement, as every step is a battle that must be fought in court, and do not always yield actual housing in a timely manner. Systems that implement cooperative aspects can still have a heavy hand with municipalities based on their historical track record, but can increase the efficiency and speed by which affordable housing is developed and physically built.

While supported by much evidence, the research done in this thesis has some drawbacks. Firstly, by only honing in on two municipalities within the vast pool of 565 in New Jersey, it limits the type of broad conclusions in can make. Further research on this topic that covers a

broader swath of municipal case studies within New Jersey can serve to further test this thesis' claims in that regard. Secondly, many alternative explanations for the way that municipalities act conflict with the conclusions that this thesis draws. For instance, local politics, geography, and other factors can also play a large part in determining how municipalities behave towards processes that involve building affordable housing. More specific research on these factors would have to be done to definitively dispute them.

In short, suburban municipalities can best be persuaded to do their fair share to integrate by first coercing them to the point that they understand that they will have to integrate, either with their approval or resistance. However, after this initial coercive framework is established, concessions can be made to municipalities in exchange for their own concession of voluntary compliance with processes of affordable housing development. Such concessions create an environment much more likely to produce affordable housing, in the most physical sense, not related to pieces of paper or court decisions. Given how many actors are involved in the process of producing affordable housing, this thesis makes the important claim that they will be more likely to produce the actual housing when they can find ways to work together.

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