

Stop trying to roll back the Mount Laurel affordable housing doctrine

By [Frank Askin](#)

May 28, 2010, 11:57AM

On a Sunday in October 1970, Jacob's Chapel, an African Methodist Episcopalian congregation in Mount Laurel, had invited Mayor Bill Haines to discuss a nonprofit organization's plan to build 36 garden apartments.

As in many other suburban municipalities, Mount Laurel's zoning ordinance prohibited garden apartments and any other form of multifamily housing. Haines delivered the town's response to the housing proposal to the congregation: "If you people can't afford to live in our town, then you'll just have to leave."

That incident led to the landmark New Jersey Supreme Court decision known as *Southern Burlington County NAACP v. Township of Mount Laurel*, which established the doctrine that all municipalities must provide "reasonable opportunity" for the creation of affordable housing.



Patti Sapone/The Star-LedgerGov. Chris Christie, seen here with Department of Community Affairs acting commissioner Lori Grifa, has proposed abolishing the Council on Affordable Housing and repealing the Fair Housing Act. This doctrine has recently come under attack by both Gov. Chris Christie and Sen. Ray Lesniak. It is not the first time it has faced challenges. Suburban mayors have long sought to overturn it; state Supreme Court watchers thought the Court might toss out the doctrine in a heated 2002 case; and Gov. James McGreevey's administration proposed regulations to undermine Mount Laurel.

Yet the reasons why the doctrine has survived all of these years have much to do with what happened at Jacob's Chapel.

The Mount Laurel doctrine is, in some ways, conservative in the traditional sense of the word. It has always included a strong property-rights element. Mayor Haines' message was, in large part,

about what “you people” could do on land that they owned with funds that they had secured; only the township’s zoning regulations stood in the way.

Similarly, today most landowners, either nonprofit or for-profit, seeking to build modestly priced housing face daunting regulatory challenges from local zoning codes that have more to say about what may or may not be done on private land than comparable laws anywhere in the country.

Contrary to popular belief in our state, this is not a New Jersey issue only. For example, Pennsylvania courts have long held that every developing municipality must allow for a mix of land uses, including multifamily housing; New Hampshire has explicitly cited the Mount Laurel decision as a basis for its own, similar laws.

Both Christie and Lesniak have proposed new laws to replace the Fair Housing Act of 1985. That legislation — not the courts — created the Council on Affordable Housing. Municipalities that agreed to allow construction of affordable housing units as determined by COAH were protected against future litigation. In 1986, the Supreme Court unanimously upheld the constitutionality of the Fair Housing Act because it found that a voluntary, administrative process might help produce housing and overcome the thicket of overregulation more quickly than a court-driven process. As a result, over 40,000 homes affordable to low- and moderate-income people were built — along with over 100,000 homes affordable to middle-class New Jerseyans, spurred through the relaxation of zoning restraints that accompanied the process.

Over the years, hundreds of thousands of people have occupied these units, which would not have been developed if discriminatory municipalities had their way.

Unfortunately, neither Christie’s nor Lesniak’s proposal deals with the core concern of past court cases, namely regulations that exclude modestly priced housing. Instead, both of their proposals try to let towns keep discriminatory zoning in place and come up with various justifications for doing so through a system of self-policing. For example, under both proposals, a growing municipality and job center could zone all of its residential land for three-acre lots, and simply collect a small fee from those developers that could be used in some vague way for affordable housing.

Courts are not likely to find such approaches credible, and indeed struck down a similar plan in 2007 that had been proposed by the McGreevey administration. Their reasons for doing so are soundly rooted in our state Constitution’s prohibition of use of municipal regulatory power to include some groups and exclude others.

Christie and Lesniak would be wise to accept the lesson of prior generations of elected officials and try to work within the constraints of our state Constitution, instead of wasting resources on another court battle.

Frank Askin is distinguished professor of law and director of the Constitutional Litigation Clinic at Rutgers Law School/Newark.