

# AFFORDABLE HOUSING IN NEW JERSEY:

## REVIVING THE PROMISE



**DEPARTMENT OF THE PUBLIC ADVOCATE  
DIVISION OF PUBLIC INTEREST ADVOCACY  
240 WEST STATE STREET  
P.O. Box 851  
TRENTON, NJ 08625-0851  
[www.njpublicadvocate.gov](http://www.njpublicadvocate.gov)  
[PublicAdvocate@advocate.state.nj.us](mailto:PublicAdvocate@advocate.state.nj.us)**

**OCTOBER 25, 2007**

New Jersey has an extreme shortage of affordable housing that has persisted for well over 30 years. In the early 1970s, both Governor William T. Cahill and the New Jersey Supreme Court described the housing shortage as a “crisis.”<sup>1</sup> A generation later, New Jersey still faces an acute shortage of affordable housing. In 2006, the Brookings Institution said New Jersey “faces the toughest housing challenges of any state in the nation.”<sup>2</sup> The New Jersey Department of Community Affairs recently described the lack of affordable housing as “one of New Jersey’s biggest challenges” as “the cost of housing and land in New Jersey [is] at an all time high.”<sup>3</sup>

This housing shortage has a profound impact on millions of New Jerseyans. As the New Jersey Supreme Court has declared, “There cannot be the slightest doubt that shelter, along with food, are the most basic human needs.”<sup>4</sup> The significance of housing, however, reaches far beyond the need for shelter.<sup>5</sup> Where a family lives helps determine the quality of schools, access to jobs, availability of health care, access to public transportation, and the quality of emergency services, parks, roads, municipal services, and the environment in general.<sup>6</sup> This is particularly true in New Jersey, where local services are largely funded by local property tax revenue.<sup>7</sup> In short, a family’s quality of life depends heavily on where it lives.

Yet millions of New Jersey residents have little choice about where to live because of the lack of affordable housing, especially in the suburbs, but increasingly also in all but the most depressed neighborhoods in the cities. When families do find housing, they often pay one third, one half or even more of their income to live there. This high price limits their ability to pay for daily needs, such as transportation, child care or health care. And for many, exorbitant housing costs make saving for long-term needs like retirement or their children’s higher education an impossibility. Moreover, the financial constraints that New Jersey’s housing prices put on individuals – and the corresponding impact this

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<sup>1</sup> S. Burlington County NAACP v. Twp. of Mount Laurel, 67 N.J. 151, 158-59 (1975) (“Mount Laurel I”) (referring to two special messages by Governor Cahill to the Legislature, A Blueprint for Housing in New Jersey (1970) and New Horizons in Housing (1972)).

<sup>2</sup> Bruce Katz, Vice President and Director, & Robert Puentes, Fellow, Metropolitan Policy Program, The Brookings Institution, Address at 2006 Land Use Institute at the New Jersey Institute for Continuing Legal Education: Why Housing and Land Use Matter for New Jersey’s Toughest Challenges (May 2, 2006), [http://www3.brookings.edu/metro/speeches/20060502\\_NewBrunswick.pdf](http://www3.brookings.edu/metro/speeches/20060502_NewBrunswick.pdf), 2.

<sup>3</sup> N.J. Dep’t of Cmty. Affairs, The State of New Jersey Housing Policy and Status Report 4 (2006) [hereinafter Housing Policy and Status Report].

<sup>4</sup> Mount Laurel I, 67 N.J. at 178; see id. at 175 (describing land use regulations that determine the availability of low- and moderate-income housing as fundamentally important and of “constitutional dimension”); see also N.J. Mortgage Fin. Agency v. McCrane, 56 N.J. 414, 420 (1970) (noting that “adequate and sufficient housing” is a “prime consideration[]” in assessing the health and welfare of a citizenry); 42 U.S.C. § 5301 (primary purpose of the federal Community Development Act is “the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income”).

<sup>5</sup> As the N.J. Department of Community Affairs has noted, “For low-income residents, the inability to pay for basic necessities on top of housing costs further increases the magnitude of this problem.” Housing Status and Policy Report, *supra* note 3, at 4.

<sup>6</sup> Oakwood at Madison, Inc. v. Twp. of Madison, 72 N.J. 481, 540 (1977).

<sup>7</sup> See Mount Laurel I, 67 N.J. at 171.

has on businesses trying to attract and retain employees – have a detrimental effect on New Jersey’s economic competitiveness.<sup>8</sup>

The housing shortage has affected low- and moderate-income households.<sup>9</sup> As the state supreme court has stated, “Upper and middle income groups may search with increasing difficulty for housing within their means; for low and moderate income people, there is nothing to search for.”<sup>10</sup>

### **The New Jersey Constitution’s Affordable Housing Mandate**

When the government regulates the use of land, it must do so in a way that promotes the general welfare.<sup>11</sup> The New Jersey Constitution gives meaning to the term “general welfare” by guaranteeing to every individual “certain natural and unalienable rights,” including “those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”<sup>12</sup> Land use regulations must give all New Jersey residents a fair and equal opportunity to realize the promise of those rights.

The New Jersey Supreme Court has elucidated these principles in a series of decisions that are commonly and collectively referred to as the Mount Laurel cases.<sup>13</sup> These cases began in 1971 when organizations and individuals sued the town of Mount Laurel for employing land use policies that excluded low- and moderate-income families. Invalidating those policies in 1975, the state’s highest court described the government’s constitutional obligation in strong terms:

It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. . . . [B]roadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and

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<sup>8</sup> See Katz & Puentes, supra note 2, at 26-30 (quoting business leaders, government officials and researchers acknowledging connection between the affordability of housing and economic competitiveness).

<sup>9</sup> Mount Laurel I, 67 N.J. at 158.

<sup>10</sup> S. Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158, 212 (1983) (footnote omitted) (“Mount Laurel II”).

<sup>11</sup> Mount Laurel I, 67 N.J. at 175; Mount Laurel II, 92 N.J. at 208-09.

<sup>12</sup> N.J. Const. art. I, ¶ 1.

<sup>13</sup> Toll Bros. Inc. v. Twp. of W. Windsor, 173 N.J. 502 (2002); In re Petition for Substantive Certification by the Twp. of Warren, 132 N.J. 1 (1993); Van Dalen v. Washington Twp., 120 N.J. 234 (1990); Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1 (1986); Mount Laurel II, 92 N.J. 158; Pascack Ass’n v. Mayor of Washington, 74 N.J. 470 (1977), overruled in part by Mount Laurel II, 92 N.J. 158; Madison, 72 N.J. 481; Mount Laurel I, 67 N.J. 151.

resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.<sup>14</sup>

“All local land use regulation,”<sup>15</sup> triggers this constitutional obligation because the government’s power to dictate the use of land – whether through zoning, public projects, approval of new development or redevelopment, or by any other means – derives from its power to promote the general welfare and may be exercised only in a manner consistent with that purpose.<sup>16</sup> As the court has reiterated, “regulations that do not provide the requisite opportunity for a fair share of the region’s need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection.”<sup>17</sup>

Over the years, the court has described in clear terms what this constitutional affordable housing mandate means for each municipality in New Jersey:

**Every municipality must provide its fair share of the region’s need for affordable housing. This includes the present housing needs of the low- and moderate-income people already living in the region and the prospective needs of those who may later seek housing there.**

The present need includes each municipality’s obligation to provide affordable housing for the resident poor. “[E]ach municipality must provide a realistic opportunity for decent housing for its indigenous poor except where they represent a disproportionately large segment of the population as compared with the rest of the region.”<sup>18</sup> The exception refers to cities where poor people are concentrated. The Mount Laurel cases require the surrounding municipalities in a single regional housing market to absorb some of the need of such concentrated populations, rather than demanding that over-burdened cities meet the entire present need of their ill-housed residents.<sup>19</sup> Even municipalities that are not developing in a way that allows them to absorb their fair share of the regional need must nevertheless create decent housing opportunities for their own poor residents.<sup>20</sup>

In addition to meeting the present need of the region’s low- and moderate-income population, each municipality must manage its growth or development to accommodate

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<sup>14</sup> Mount Laurel I, 67 N.J. at 179-80.

<sup>15</sup> Id. (emphasis added).

<sup>16</sup> Id. at 174-80; Mount Laurel II, 92 N.J. at 208-09.

<sup>17</sup> Mount Laurel II, 92 N.J. at 208-09.

<sup>18</sup> Id. at 214-15, see also id. at 243; In re Twp. of Warren, 132 N.J. at 14.

<sup>19</sup> Mount Laurel II, 92 N.J. at 214-15; In re Twp. of Warren, 132 N.J. at 14-15; AMG Realty Co. v. Twp. of Warren, 207 N.J. Super. 388, 420-21 (Law Div. 1984).

<sup>20</sup> Mount Laurel II, 92 N.J. at 243-44.

“prospective need.” Prospective need refers to the affordable housing requirements of anticipated future low- and moderate-income residents of the region.<sup>21</sup>

The court has also described in clear terms the two steps municipalities must take to meet their Mount Laurel obligation:

**1) Every municipality in New Jersey is prohibited from regulating land in a way that excludes low- or moderate-income households.**

Local land use regulations that exclude low- and moderate-income families exacerbate the shortage of affordable housing. Such policies have resulted in the “de facto” segregation of poor and minority households in high-poverty, low-opportunity areas and away from higher-income and more desirable areas.”<sup>22</sup>

New Jersey’s towns have used a wide range of exclusionary devices such as requiring extensive minimum floor space or lot size; restricting the number of bedrooms to discourage households with children; prohibiting multi-family housing and mobile homes; and zoning for nonresidential land uses to minimize the land available for housing.<sup>23</sup> Some communities have imposed exacting demands on developers to build or bear the operating costs of schools as a way of discouraging developments that would bring school-age children into the community.<sup>24</sup> And some towns have attempted to use their redevelopment powers to condemn some of the limited affordable housing that exists in the town without definite plans to replace it.<sup>25</sup>

The Mount Laurel doctrine prohibits municipalities from enforcing policies that in effect bar lower-income families from the area.<sup>26</sup> The state supreme court has summarized this constitutional rule as follows:

The basis for the constitutional obligation is simple: the State controls the use of land, all of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos

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<sup>21</sup> Id. at 218 (“The Mount Laurel obligation to meet the prospective lower income housing need of the region is, by definition, one that is met year after year in the future . . .”).

<sup>22</sup> Legal Servs. of N.J. Poverty Research Inst., Poor in the Garden State: Beginning to Assess New Jersey’s Progress in Addressing Poverty 46 (2007) [hereinafter Poor in the Garden State]. This stark segregation is well reflected in the income and racial composition of two towns located just ten miles from each other: Newark and Millburn, both in Essex County. Millburn, with a poverty rate of 1.5 percent, is 88 percent White. On the other hand, Newark, with a poverty rate of 28 percent, is 81 percent Hispanic or Black and 14 percent White. Id.

<sup>23</sup> See Mount Laurel I, 67 N.J. at 197-203 (Pashman, J., concurring), for a comprehensive discussion of exclusionary devices.

<sup>24</sup> See Madison, 72 N.J. at 566-67.

<sup>25</sup> See, e.g., Pet. Cert. & App. for Pls.-Pt’rs, Citizens in Action v. Twp. of Mount Holly, No. 61,445, at 11-19 (N.J. Sept. 3, 2007) (on file with the Public Advocate); Br. Amicus Curiae Public Advocate, LBK Assocs., L.L.C. v. Borough of Lodi, No. A-001829-05T2, at 35-43 (N.J. Super. Ct. App. Div. Nov. 8, 2006), available at <http://www.state.nj.us/publicadvocate/home/reports/pdfs/lodiedbrief.pdf>.

<sup>26</sup> Mount Laurel I, 67 N.J. at 174; Mount Laurel II, 92 N.J. at 208-09.

for the poor and decent housing elsewhere for everyone else. The government that controls this land represents everyone. While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.<sup>27</sup>

**2) Every municipality is required to take affirmative measures to provide housing opportunities for all low- and moderate-income households.**

It is not enough that towns refrain from excluding residents based on income. The New Jersey Constitution requires that all municipalities take affirmative steps to provide housing opportunities for low- and moderate-income households.<sup>28</sup> “‘Affirmative,’ in the Mount Laurel rule, suggests that the municipality is going to do something, and ‘realistic opportunity’ suggests that what it is going to do will make it realistically possible for lower-income housing to be built.”<sup>29</sup>

The state supreme court has identified two types of affirmative measures: (1) encouraging or requiring the use of available state or federal housing subsidies, and (2) providing incentives for or requiring private developers to set aside a portion of their developments for lower-income housing.<sup>30</sup> For example, towns may grant tax abatements for subsidized housing; withhold approval for a development unless the developer agrees to dedicate some portion of total units to lower-income residents; zone for mobile home parks; allow the construction of more units per acre than would otherwise be permissible in return for the creation of affordable units; or adopt other creative solutions.<sup>31</sup> Courts may order such affirmative steps if a town violates the Mount Laurel doctrine.<sup>32</sup>

**Implementing New Jersey’s Constitutional Affordable Housing Mandate**

In 1985, the Legislature passed the Fair Housing Act (FHA) to help implement this constitutional obligation.<sup>33</sup> The FHA created the Council on Affordable Housing (COAH) to be the administrative body that facilitated the fulfillment of the Mount Laurel doctrine. COAH does this by estimating the present and future need for affordable housing across the state, and translating that projection into an affordable housing obligation for each municipality.<sup>34</sup>

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<sup>27</sup> Mount Laurel II, 92 N.J. at 209.

<sup>28</sup> Mount Laurel I, 67 N.J. at 174; Mount Laurel II, 92 N.J. at 214-15.

<sup>29</sup> Mount Laurel II, 92 N.J. at 260-61.

<sup>30</sup> Id. at 262.

<sup>31</sup> Id. at 262-78.

<sup>32</sup> Id. at 281; see also Mount Laurel I, 67 N.J. at 214 (Pashman, J., concurring) (“The affirmative obligations of developing municipalities . . . are legally binding and judicially enforceable.”).

<sup>33</sup> N.J. Stat. Ann. § 52:27D-301 to -329; see also Hills Dev. Co., 103 N.J. at 31-40, for a concise description of the Fair Housing Act.

<sup>34</sup> N.J. Stat. Ann. § 52:27D-307.

COAH also writes rules that govern how municipalities can meet this obligation. Municipalities may then draft housing plans outlining how they intend to meet their housing requirement, and submit them to COAH for approval. If a municipality's plan is adequate, COAH will certify that town as compliant with its constitutional affordable housing obligation. Although participation in the COAH process is voluntary, it is the primary way that towns comply with the Mount Laurel mandate.<sup>35</sup>

When COAH was created, housing advocates and the court had high hopes for its success in implementing Mount Laurel. The court called the passage of the FHA and the creation of COAH the “kind of response [from the Legislature] . . . this Court has always wanted and sought.”<sup>36</sup> The court went on to say “we must assume that the Council will pursue the vindication of the Mount Laurel obligation with determination and skill. If it does, that vindication should be far preferable to vindication by the courts, and may be far more effective.”<sup>37</sup>

In its more than 20 years of existence, however, COAH has not fulfilled those expectations. Instead, its work has been characterized by delays and underestimates of the need for affordable housing, and COAH has facilitated the creation of far fewer units of affordable housing than advocates or the courts had hoped.<sup>38</sup> Moreover, some have incorrectly come to perceive the FHA and the COAH process as the exclusive mechanism by which affordable housing obligations are articulated and enforced. Recent decisions have reminded us, however, that the New Jersey Constitution imposes overarching obligations on government entities, which transcend the statutory or regulatory duties imposed by the FHA and COAH.<sup>39</sup>

COAH has calculated the statewide affordable housing need on three occasions.<sup>40</sup> In 1986, COAH projected a need of roughly 147,000 new units. In 1994, COAH estimated

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<sup>35</sup> Hills Dev. Co., 103 N.J. at 34-36 (describing the COAH process as noncompulsory but explaining that municipalities have incentives to participate because the process can insulate them from litigation). As of August 2007, 296 towns were participating in the COAH process, N.J. Dep't of Cmty. Affairs, 3<sup>rd</sup> Round COAH Towns, available at <http://www.state.nj.us/dca/coah/status3.xls> (listed in field “COAH Jurisdiction”).

<sup>36</sup> Hills Dev. Co., 103 N.J. at 65.

<sup>37</sup> Id. at 21.

<sup>38</sup> See generally Hon. Gary Stein, Address at Princeton University: Courts, Affordable Housing and Sound Planning: The Future of the New Jersey Mount Laurel Doctrine (April 26, 2007), video available at [http://uc.princeton.edu/main/index.php?option=com\\_content&task=view&id=1815&Itemid=1](http://uc.princeton.edu/main/index.php?option=com_content&task=view&id=1815&Itemid=1).

<sup>39</sup> In re Adoption of N.J.A.C. 19:3, 393 N.J. Super. 173, 179-80 (App. Div. 2007) (finding that, despite “[Meadowlands] Commission’s claim that it has no direct Mount Laurel responsibilities under the FHA, we are satisfied that it is constitutionally obliged to do more than merely assist municipalities in the manner indicated by [administrative regulations]”); In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. 1 (App. Div. 2007) (invalidating parts of the most recent COAH regulations because they failed to fulfill the constitutional mandate to create realistic affordable housing opportunities).

<sup>40</sup> See In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. at 23-30. The 1986 estimate, called the first round, was codified in N.J. Admin. Code §§ 5:92-1.1 to -18.20 and accompanying appendices. The 1994 estimate, under the second round rules, is codified in N.J. Admin. Code §§ 5:93-1.1 to -15.1 and accompanying appendices. The third round rules, completed in 2004 and partially invalidated by the Appellate Division in

a need of roughly 86,000 new units. And in 2004, COAH estimated a need of fewer than 53,000 units.<sup>41</sup> In subsequent sections, this paper will offer some data to illustrate the degree to which these projections underestimate the real need for affordable housing in New Jersey.

The most recent rules issued by COAH (commonly referred to as the “third round rules”) estimate the housing need through 2014. Although these rules were supposed to be issued in 1999, they were not adopted until 2004. During this five-year delay, more than 140,000 units of new housing were built in New Jersey, but in the absence of COAH rules the pipeline for new affordable housing units ran dry, and the state missed out on the chance to include affordable housing in much of this growth.<sup>42</sup> In January 2007, New Jersey’s intermediate appeals court (the Appellate Division, Superior Court) invalidated significant parts of the third round rules because they failed to live up to the constitutional mandate.<sup>43</sup> COAH is now under court order to modify the rules by the end of 2007,<sup>44</sup> eight years after they were supposed to take effect and with only seven years remaining to meet the housing needs for the entire 15-year period the rules were supposed to cover.

The net result of these and other factors is that the state and its municipalities have fallen far short of living up to New Jersey’s constitutional affordable housing requirement. Since the FHA was enacted in 1985, New Jersey municipalities have reported to COAH the completed construction of only 41,000 units of affordable housing.<sup>45</sup> The lack of affordable housing opportunities, and the racial and socioeconomic segregation that it causes, persist.<sup>46</sup>

The work of COAH is just part of what must be a larger effort by the state to address the extreme shortage of affordable housing. Environmental laws, transportation policies, and an array of other government actions directly affect the construction of affordable housing. All levels and branches of government should take whatever steps are possible to facilitate the creation of housing that low- and moderate-income families can afford. But the Fair Housing Act charges COAH with the chief responsibility for fulfilling the constitutional mandate set out in the Mount Laurel cases. If implemented effectively, the

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2007, are contained in N.J. Admin. Code §§ 5:94-1.1 to -9.2 with accompanying appendices and N.J. Admin. Code §§ 5:95-1.1 to -15.3.

<sup>41</sup> See In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. at 27-30.

<sup>42</sup> This estimate is based on data obtained from The New Jersey Construction Reporter (1983-2006), N.J. Dep’t of Cmty. Affairs, and on building permit information obtained from the N.J. Dep’t of Labor, prepared by David Kinsey, Ph.D., Kinsey & Hand, consultants (Mar. 23, 2007) (on file with the Public Advocate).

<sup>43</sup> In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. 1.

<sup>44</sup> Order on Motion to extend time to adopt rules, In re Adoption of N.J.A.C. 5:94, No. A-001960-04T3 (N.J. Super. Ct. App. Div. June 19, 2007).

<sup>45</sup> Memorandum from Kathy McGlinchy, COAH, to David Kinsey, Ph.D., Kinsey & Hand, consultants (April 12, 2007) (on file with the Public Advocate).

<sup>46</sup> “[T]he state has seen a de facto segregation of poor and minority households in high-poverty, low-opportunity areas and away from higher-income and more desirable areas.” Poor in the Garden State, *supra* note 22, at 46.



Mount Laurel mandate can leverage the talents and resources of the state, local governments and developers to create housing opportunities across New Jersey. But rather than maximizing the impact of this mandate, COAH has often minimized it.

As COAH rewrites the third round rules, it has an opportunity to lead the state in a new direction – to realize the potential of the Mount Laurel doctrine and direct us on a path toward compliance with this constitutional obligation. If COAH generates an accurate estimate of the real need for affordable housing in New Jersey, accompanied by strong and clear rules that will facilitate the creation of housing for families at all eligible income levels, it will be a major step toward addressing our decades-long affordable housing crisis.

What follows is a discussion of some specific areas in which COAH’s recent rules fall short of this goal, along with some steps our Department believes COAH must take to facilitate the effective implementation of the Mount Laurel doctrine.

### **Affordable Housing for Low-Income Families**

The Mount Laurel doctrine articulates a clear obligation for municipalities to provide “adequate housing to all categories of people,”<sup>47</sup> including “low and moderate income housing.”<sup>48</sup> The FHA and COAH define moderate-income families as those making between 50% and 80% of median income, or up to roughly \$52,000 annually. The FHA and COAH define low-income households as those earning less than 50% of median income, under roughly \$32,000 annually.<sup>49</sup> Actual COAH income-eligibility limits vary considerably based on region and family size.<sup>50</sup>

The most recent COAH rules, however, are written in a way that will not lead to the creation of significant housing for families earning less than 40% of median income, roughly \$26,000 annually. Instead, towns can be certified as COAH compliant by creating affordable housing opportunities almost exclusively for families earning more than this amount.

Thus, under COAH’s rules, towns can still exclude most of New Jersey’s low-income families. In this sense, the rules allow precisely what the Mount Laurel doctrine is intended to prevent: land regulations that exclude people from substantial areas of the

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<sup>47</sup> Mount Laurel I, 67 N.J. at 179.

<sup>48</sup> Id. at 174; see also Order, In re Application of the Twp. of Jackson, No. OCN-L-822-92, at 2(b) (N.J. Super. Ct. Law Div. June 21, 2007) (ordering construction of 32 affordable units, 17% of all units in development, for families earning no more than 30% of median income).

<sup>49</sup> U.S. Census Bureau, 2006 American Community Survey, New Jersey Selected Economic Characteristics: 2006, available at [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=04000US34&-qr\\_name=ACS\\_2006\\_EST\\_G00\\_DP3&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-\\_lang=en&-\\_sse=on](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US34&-qr_name=ACS_2006_EST_G00_DP3&-ds_name=ACS_2006_EST_G00_&-_lang=en&-_sse=on). These income figures are derived from the median household income in New Jersey, which is \$64,470. This is an aggregate statistic based on households of all sizes and types, including single-person households and group quarters such as nursing homes. For the disaggregated data COAH uses, see COAH 2007 Regional Income Limits, attached hereto as Appendix 1 and available at <http://www.state.nj.us/dca/coah/incomelimits.pdf>.

<sup>50</sup> COAH 2007 Regional Income Limits, Appendix 1, supra note 49.

state, “not because housing could not be built for them but because they are not wanted.”<sup>51</sup>

### ***Creating Low-Income Housing***

There are roughly 580,000 households in New Jersey that make less than 40% of median income.<sup>52</sup> They reside throughout the state, but live in high concentrations in cities like Newark, Jersey City, Paterson, Camden, Elizabeth and Trenton.<sup>53</sup> Wage earners in these households hold jobs such as security guard, retail salesperson, receptionist, home health aide and waiter.<sup>54</sup> Roughly three-quarters of these families pay more than 30% of their income on housing, and roughly half pay more than 50% of their income toward housing.<sup>55</sup>

The third round rules contain three provisions aimed at helping create housing for low-income New Jerseyans:

- 1) Half of a town’s COAH obligation must be priced for households at or below 50% of median income.<sup>56</sup>
- 2) 10% of COAH rental units (as distinct from units for sale) must be affordable to families making 35% of median income or below.<sup>57</sup>
- 3) If a town helps create a unit of housing affordable to families making 30% of median income or less, roughly \$19,000 annually (“very low-income” households), that unit counts twice toward its obligation to provide affordable housing.<sup>58</sup>

Unfortunately, these rules will be ineffective in creating significant housing opportunities for families earning less than 40% of median income.

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<sup>51</sup> Mount Laurel II, 92 N.J. at 209-210.

<sup>52</sup> There are 579,992 households in New Jersey with incomes ranging from \$0 - \$24,999 annually. U.S. Census, 2006 American Community Survey, New Jersey Selected Economic Characteristics: 2006, available at [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=04000US34&-qr\\_name=ACS\\_2006\\_EST\\_G00\\_DP3&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-lang=en&-sse=on](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US34&-qr_name=ACS_2006_EST_G00_DP3&-ds_name=ACS_2006_EST_G00_&-lang=en&-sse=on).

<sup>53</sup> U.S. Census, 2006 American Community Survey, New Jersey Selected Economic Characteristics: 2006, custom survey tool, available at [http://factfinder.census.gov/servlet/CTGeoSearchByListServlet?ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-lang=en&-ts=208957499349](http://factfinder.census.gov/servlet/CTGeoSearchByListServlet?ds_name=ACS_2006_EST_G00_&-lang=en&-ts=208957499349).

<sup>54</sup> New Jersey Dep’t of Labor and Workforce Dev., Occupational Employment Statistics (OES) Wage Survey (August, 2007), available at [http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/lmi23/nj\\_all.pdf](http://www.wnjin.state.nj.us/OneStopCareerCenter/LaborMarketInformation/lmi23/nj_all.pdf).

<sup>55</sup> N.J. Dep’t of Cmty. Affairs, Consolidated Plan FY 2007 Action Plan 66-70 (May 15, 2007) (“DCA 2007 Action Plan”), available at <http://www.nj.gov/dca/dh/pubs/conplan2007final.pdf>. These figures were derived using the data for families in the <30% median income and then adding half of those in the 30% - 50% range.

<sup>56</sup> N.J. Admin. Code § 5:94-4.18; N.J. Admin. Code § 5:80-26.3(a).

<sup>57</sup> N.J. Admin. Code § 5:80-26.3(d).

<sup>58</sup> N.J. Admin. Code § 5:94-4.22. The rules also provide that the average affordability of COAH-certified rental apartments within each development must be at or below 52% of median income, and the average sales price must be affordable to households earning 55% of median income. N.J. Admin. Code § 5:80-26.3(d), (e).

Under the first provision, towns can fulfill the requirement with units that are affordable only at the top of this income range, generally from 40% to 50% of median income. Unless COAH's rules require the development of housing below this range, towns can simply choose not to do so.

The second provision addressing rental housing imposes a deeper affordability requirement, but it is inadequate for at least three reasons:

- 1) Only one quarter of Mount Laurel units must be available for rent; the rest can be homes for sale.<sup>59</sup> Therefore, only 2.5% of all Mount Laurel housing (10% of the required rental units) must be set aside for those making 35% of median income or less. This is clearly inadequate, given that more than 35% of Mount Laurel-eligible households earn 35% of median income or less.<sup>60</sup>
- 2) Under COAH rules, although these units must be affordable to families with incomes at or below 35% of the median, no regulation prevents landlords from renting the units to families making as much as 50% of median income.<sup>61</sup>
- 3) A town can eliminate a large portion of its low-income rental obligation by selling it to another town through a Regional Contribution Agreement, or RCA.<sup>62</sup> An RCA allows Town A to pay Town B to build affordable housing on its behalf, relieving Town A of its obligation to provide that housing. Thus, RCAs could further dilute the impact of the low-income rental requirement.

In sum, a town can fulfill the low-income rental "requirement" without ensuring that any household making less than 35% of median income actually occupies a COAH-certified apartment in that town.

The third provision, offering towns a "bonus credit" for providing a unit of very low-income housing, subverts the constitutional mandate. Imagine two families in need of affordable housing: Family A makes 30% of median income and Family B makes 50% of median income. Both families are trying to move to Town X, hoping to take advantage of the job growth and decent schools there. Under COAH's third round rules, if Town X has an affordable unit for Family A, then the town is "rewarded" by being relieved of its constitutional obligation to help create affordable housing for Family B. Thus, housing provided to Family A comes at the expense of Family B, even though the constitutional obligation dictates that the town help provide housing opportunities to both families.

Between 1987 and 1999, bonuses that COAH awarded to encourage the creation of rental units led to the elimination of more than 6,500 units of COAH's projected housing

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<sup>59</sup> N.J. Admin. Code § 5:94-4.20(a).

<sup>60</sup> DCA 2007 Action Plan, *supra* note 55, at 67.

<sup>61</sup> N.J. Admin. Code § 5:80-26.3(d) requires that the rent be set so that "at least 10 percent of all low- and moderate-income units shall be affordable to households earning no more than 35 percent of median income." This determines the price of the unit, not who can rent it. N.J. Admin. Code § 5:80-26.13(a) requires that "[l]ow-income rental units shall be reserved for households with a gross household income less than or equal to 50 percent of median income." No regulation demands that units affordable to households at or below 35% of median income actually be rented to such households.

<sup>62</sup> N.J. Stat. Ann. § 52:27D-312; N.J. Admin. Code § 5:95-11.1.

need.<sup>63</sup> This highlights the real impact of such bonuses – the affordable housing needs of thousands of families are simply dismissed by an accounting device. Instead of promoting the maximum creation of affordable housing, such bonuses absolve towns of their responsibility to help house needy families.

### *The Need for Low-Income Requirements*

The courts and the Legislature have acknowledged that the Mount Laurel doctrine will not be implemented without clear and specific housing obligations for each town, accompanied by oversight and enforcement mechanisms to ensure that housing is created.<sup>64</sup> COAH's very existence is an acknowledgement this fact.

Yet under COAH's third round rules, a town can be considered compliant even if no family earning less than 40% of median income owns or occupies a unit of COAH-certified housing there. In other words, the COAH rules essentially make the provision of housing for families making less than 40% of median income voluntary. This is at odds with what New Jersey's constitution requires and will perpetuate the lack of housing opportunities for such families.

**The COAH rules must set specific requirements for a substantial number of units that are affordable for households at several income ranges below 40% of median income** (e.g., 0-30%, 30-40%). Experience has demonstrated that broader income ranges create housing opportunities only at the high end: a mandate to build housing for those who earn less than 50% of median income, for example, primarily yields options for those in the 40-50% range. Mandates to build housing for lower income ranges must also be combined with adequate incentives and the coordination of public subsidies so that low-income units actually are built.

### **COAH's Calculation of the Affordable Housing Need in New Jersey**

COAH's projection of how many affordable units of housing are needed throughout New Jersey is immensely influential. It is the mechanism through which an abstract constitutional obligation is translated into real homes where families can affordably live.

For COAH to carry out its mission, it must estimate the affordable housing need in a manner that is clear, transparent, logical, and accurate. Unfortunately, the process has not been fully transparent, and some methodologies are not strongly supported by timely and objective data.

The third round projection that only 52,726 new affordable units are needed through 2014 grossly underestimates the real need for affordable housing in New Jersey. According to the New Jersey Association of Realtors, the median sales price of a single-family home in New Jersey rose from \$186,700 in 2000 to \$344,300 in 2005 – an increase of more than

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<sup>63</sup> E-mail from Kathy McGlinchy, COAH, to David Kinsey, Ph.D., Kinsey & Hand, consultants (Mar. 30, 2004) (on file with the Public Advocate).

<sup>64</sup> Mount Laurel II, 92 N.J. at 351-52.

84% in just five years.<sup>65</sup> During this time, median income in New Jersey rose by less than 14%.<sup>66</sup> Yet COAH's latest estimates are by far the lowest it has ever issued. The third round rules estimated a need of just 3,515 new affordable homes per year (52,726 total over 15 years). This is 46% lower than the second round projection (6,465 new homes per year) and 68% lower than the first round need projection (10,849 new homes per year).<sup>67</sup>

Below are two specific examples of how the Public Advocate believes COAH has underestimated the housing need in New Jersey.

### ***Cost-Burdened Households***

The inaccuracy of COAH's housing need projection is highlighted in a 2007 report issued by the Department of Community Affairs.<sup>68</sup> The report, which outlines housing needs in New Jersey, states that almost 700,000 low- and moderate-income households are "cost-burdened," meaning they pay more than 30% of their pre-tax income toward housing.<sup>69</sup> That is more than 60% of all the low- and moderate-income families in the state. Roughly 325,000 of these households pay more than 50% of their pre-tax income toward housing.<sup>70</sup>

Yet COAH's need projection does not count families solely because they are cost-burdened. Instead, COAH's projection has two components:

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<sup>65</sup> National Association of Realtors' New Jersey Home Sales Reports, available at [http://njar.com/research\\_statistics/pdf/quarterly\\_stats/2001Q4.pdf](http://njar.com/research_statistics/pdf/quarterly_stats/2001Q4.pdf) (2000 data), and [http://njar.com/research\\_statistics/pdf/quarterly\\_stats/2006Q4.pdf](http://njar.com/research_statistics/pdf/quarterly_stats/2006Q4.pdf) (2005 data).

<sup>66</sup> Median household income in 2000 was \$54,276. U.S. Census Bureau, American Community Survey, 2000 Supplementary Survey, available at <http://www.census.gov/acs/www/Products/Ranking/2000/R07T040.htm>. Median household income in 2005 was \$61,672. U.S. Census Bureau, 2005 American Community Survey, available at [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=04000US34&-qr\\_name=ACS\\_2005\\_EST\\_G00\\_DP3&-ds\\_name=ACS\\_2005\\_EST\\_G00\\_&-\\_lang=en&-redoLog=false](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US34&-qr_name=ACS_2005_EST_G00_DP3&-ds_name=ACS_2005_EST_G00_&-_lang=en&-redoLog=false); see also U.S. Census Bureau, Current Population Survey, Historical Income Tables, available at <http://www.census.gov/hhes/www/income/histinc/h08.html>.

<sup>67</sup> This compares COAH's projected net new construction need for affordable housing on an annual basis. The net new construction need for the first round rules, issued in 1986, was 65,093, or 10,849 units per year over the six years covered by the first round. The net new construction need for the second round rules, issued in 1993, was 77,580, or 6,465 units per year over the twelve years covered by the second round. The third round net new construction need estimate of 52,726 was intended to cover a 15 year period, or 3,515 units per year over 15 years. For the first two rounds, the estimated need is obtained by deducting from the "Pre-Credited Need" the "Indigenous Need" and adding to it the "Spontaneous Rehabilitation." See N.J. Admin. Code §§ 5:92-1.3, 5:92 app. A, 5:93-1.3, 5:93 app. A. For the third round, the estimated need is obtained by deducting secondary sources of housing supply from the total projected need. See N.J. Admin. Code §§ 5:94-1.4, 5:94 app. A.

<sup>68</sup> DCA 2007 Action Plan, *supra* note 55.

<sup>69</sup> Id. at 66.

<sup>70</sup> Id.

- 1) the number of low- and moderate-income New Jersey households currently living in deficient housing that is in need of rehabilitation<sup>71</sup>, and
- 2) the number of affordable units needed to house the future low- and moderate-income residents of New Jersey (i.e., new households that form or move to New Jersey between now and 2014).

Based on this methodology, a low- or moderate-income family with an affordable home that does not have a functioning kitchen sink (one of the criteria for deficient housing) is in need of decent affordable housing, but a similar family paying more than 50% of its income to rent an apartment in a crime-ridden neighborhood is not in need of decent affordable housing. By excluding cost-burdened households, COAH considerably understates the real affordable housing need in New Jersey.

The New Jersey Supreme Court has defined “affordable” housing to mean that a low- or moderate-income family “pays no more than 25 percent of its income for such housing.”<sup>72</sup> In subsequent decisions, however, lower courts have not required COAH to include cost-burdened households in calculating the need for affordable housing.<sup>73</sup> These courts have straightforwardly acknowledged that “[t]he sheer size of the numbers [of cost-burdened households] does not justify their exclusion from the formula.”<sup>74</sup> This only makes sense: the daunting magnitude of the problem cannot be a reason to ignore it.

Instead, the lower courts have approved COAH’s decision not to count cost-burdened households because of the difficulty of making an accurate calculation.<sup>75</sup> It is by no means impossible, however, to adopt a fair and reasonable methodology for counting such households. The alternative to making this effort is to ignore thousands of families for whom housing costs are such an inordinately large part of their already scarce income

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<sup>71</sup> See N.J. Admin. Code § 5:94 app. A (“Rehabilitation Share is the total deficient housing signaled by selected housing unit characteristics unique to each community. It is assumed that units so indicated will be prime candidates for rehabilitation. Characteristics indicating a need for rehabilitation are:

(1) Persons per Room: 1.01 or more persons per room in housing units built 1939 or before. These are old units that are overcrowded.

(2) Plumbing Facilities: Inadequate plumbing sufficient for rehabilitation is indicated by incomplete plumbing facilities, i.e., lack of hot and cold piped water, flush toilet or bathtub/shower.

(3) Kitchen Facilities: Inadequate kitchen facilities signaling rehabilitation are indicated by the non-presence of kitchen facilities within the unit, or the non-presence of one of three components: a sink with piped water, a stove or a refrigerator.”).

<sup>72</sup> Mount Laurel II, 92 N.J. at 221, n.8 (citations omitted).

<sup>73</sup> See In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. at 33-38; AMG Realty Co., 207 N.J. Super. at 420-23.

<sup>74</sup> AMG Realty Co., 207 N.J. Super. at 423; see also In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. at 35.

<sup>75</sup> See In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. at 35 (“First, many people do not fully report their income. Second, some people, by choice, pay ‘a disproportionate amount of their income for housing.’ Third, some people choose lesser quality housing than they can afford, thereby creating a housing ‘mismatch.’ If household unit income and housing unit cost were more closely correlated, more units would be available for needy families. Fourth, many retirees who have lower incomes nonetheless have substantial assets. Fifth, the needs of lower income households could be met more appropriately through income maintenance programs rather than revision of land use regulations. Sixth, many of the cost-burdened poor also occupy substandard units, thereby creating a duplication in the present need count.”) (quoting AMG Realty Co. v. Warren, 207 N.J. Super. at 423).

that they are unable to afford other basic life essentials. Identifying and accounting for such families is no more difficult than the many other calculations COAH makes to estimate present need, prospective need, various discounts from these figures, and the many other components of each municipality's "fair share" of the regional need for affordable housing.

It may be true, as COAH has successfully argued,<sup>76</sup> that some cost-burdened families elect to buy or rent relatively expensive housing despite cheaper alternatives. For example, a family making 80% of median income may choose to buy a home that costs 35% of its annual income instead of a smaller but livable home that would cost 25% of its income.

It is not reasonable to assume, however, that a majority or even a substantial minority of low-income households would voluntarily elect to spend more than a third or a half of their incomes on housing. Among the 700,000 cost-burdened low- and moderate-income families in New Jersey, a high percentage simply has no viable alternative. This is particularly true at the lower income ranges. In the absence of public subsidies or other resources, a family making 25% of median income (roughly \$16,000) needs an apartment that rents for approximately \$400 per month (30% of monthly income).<sup>77</sup> Yet the median rent in New Jersey is \$974 per month, third highest in the nation.<sup>78</sup> Nine out of 10 apartments statewide are not affordable to such a family, and many communities have virtually no such low-cost options.<sup>79</sup>

If instead, this family ends up spending 50% of its income on housing, as roughly 325,000 low- and moderate-income families in New Jersey do, it will have less than \$8,000 left each year to cover all other expenses, including food, transportation, health care and child care. Families in this financial predicament generally do not have decent affordable housing options that they are electing not to pursue.

To calculate the realistic present need for affordable housing in New Jersey, COAH must count more than just those living in deficient housing. COAH's third round estimate

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<sup>76</sup> See In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. at 35; AMG Realty Co. v. Warren, 207 N.J. Super. at 423.

<sup>77</sup> The annual income for a full-time worker at New Jersey's \$7.15 minimum hourly wage, N.J. Dep't of Labor and Workforce Dev., Minimum Wage in New Jersey, available at [http://lwd.dol.state.nj.us/labor/wagehour/content/minimum\\_wage.html](http://lwd.dol.state.nj.us/labor/wagehour/content/minimum_wage.html), is roughly \$14,500, based on a 40-hour work week.

<sup>78</sup> U.S. Census Bureau, 2006 American Community Survey, Median Monthly Housing Costs for Renter-Occupied Housing Units: 2006, available at [http://factfinder.census.gov/servlet/GRTTable?\\_bm=y&\\_box\\_head\\_nbr=R2514&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-\\_lang=en&-format=US-30&-CONTEXT=grt](http://factfinder.census.gov/servlet/GRTTable?_bm=y&_box_head_nbr=R2514&-ds_name=ACS_2006_EST_G00_&-_lang=en&-format=US-30&-CONTEXT=grt).

<sup>79</sup> U.S. Census Bureau, 2006 American Community Survey, Selected Housing Characteristics: 2006, available at [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=04000US34&-qr\\_name=ACS\\_2006\\_EST\\_G00\\_DP4&-ds\\_name=&-\\_lang=en&-redoLog=false](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US34&-qr_name=ACS_2006_EST_G00_DP4&-ds_name=&-_lang=en&-redoLog=false). The number of units that rent for \$400 or less was derived by adding total units that rent for under \$300 and half of those in the \$300-\$499 range; this sum (84,332 units) was then divided by the total number of renter-occupied units (1,025,182), yielding nearly 10%. The remaining nine out of 10 residential rentals in New Jersey cost more than \$400 per month.

counted fewer than 41,000 such units.<sup>80</sup> This estimate overlooks hundreds of thousands of cost-burdened families who do not have affordable options. **In redrafting the third round rules, COAH should develop a fair and reasonable method to account for the present affordable housing need of cost-burdened families.** If tight deadlines preclude this, COAH should initiate a process for amending the rules immediately after their timely adoption. Cost-burdened families, who live at and beyond the limits of their scarce resources and whose needs have long been ignored, should not have to wait years for COAH's next round of rule-making.

Even if one accepts COAH's decision that such households should not be counted, there is a serious problem implementing a policy that is meant to create affordable housing for only some of the families that are in need. COAH may ignore the sizable presence of cost-burdened households in calculating the need, but in practice those families will still be competing with the families that COAH does count to occupy the limited number of units that are built to meet COAH's need projections. In this competition, many needy families will be left without the affordable housing options to which they are constitutionally entitled, as they vie for too few homes.

### ***Filtering***

The second example of how COAH has underestimated the housing need in New Jersey is its use of filtering. Filtering refers to a process by which homes occupied by middle- and upper-income families are vacated and then become affordable to low- and moderate-income families. In other words, the cost of the home decreases relative to the incomes of COAH-eligible families, making a once unaffordable unit affordable.

COAH's third round rules projected that filtering would address the affordable housing needs of 59,156 families.<sup>81</sup> The Appellate Division struck down this projection, saying it "lacks support."<sup>82</sup> COAH is currently in the process of rewriting these rules and re-examining these filtering projections, and recent reports from its consultants suggest significant improvements in the methodology used to calculate filtering.<sup>83</sup> But COAH's original filtering estimate serves as an object lesson in the importance of avoiding questionable assumptions and methodologies that underestimate the need for affordable housing.

According to COAH and the academic literature on filtering, five conditions must be present in the housing market for filtering to be a viable source of decent housing:<sup>84</sup>

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<sup>80</sup> N.J. Admin. Code § 5:94 app. A. tbl. 4.

<sup>81</sup> In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. at 41.

<sup>82</sup> Id. at 43.

<sup>83</sup> Econsult Corp., New Jersey Council on Affordable Housing Task 2 – Estimating the Degree to Which Filtering Is a Secondary Source of Affordable Housing (Oct. 5, 2007) (draft).

<sup>84</sup> In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. at 42.



- 1) There must be an overall surplus of decent housing in the market, i.e., there must be more decent quality housing units available than households who want to occupy those units.
- 2) There must be a surplus of new housing construction, i.e., the number of new units being built must exceed the number of new households moving into the housing market.
- 3) Low-income households must not have non-price barriers to mobility in the housing market, i.e., there must be no discrimination against households based on factors such as race or family makeup.
- 4) Newly built housing units must have moderate operating costs; i.e., if most new housing units are very large single-family homes, such units cannot be filtered down because the costs of operating and maintaining such a home are too high for low- and moderate-income families.
- 5) The number of very poor households<sup>85</sup> that cannot afford decent housing must be small and declining over time.

In its original third round estimate, COAH's filtering calculations relied on the assumption that these five conditions exist in housing markets throughout New Jersey. Yet recent data raise serious doubts about the degree to which these conditions exist. As noted earlier, the median sales price of single family homes in New Jersey increased more than 80% from 2000-2005 alone,<sup>86</sup> which indicates that there has not been an excess of available housing, certainly not in most desirable real estate markets. And historically, families have faced significant non-economic barriers in attempting to move to certain communities across New Jersey: The central claim in the Mount Laurel cases, sustained by the court, was that towns were using land regulations that excluded families of certain classes, races and compositions. Moreover, New Jersey has not had a small number of very poor households. Roughly one out of every eight households in New Jersey is very low-income.<sup>87</sup>

Given the significant impact of these filtering projections, and the serious questions about the assumptions underlying them, COAH should have offered compelling data and hard facts to support its claim. But COAH did not offer such evidence. In fact, COAH's entire filtering assertion was supported by a single source of outdated data, without any accompanying research to show that the conditions for filtering exist.<sup>88</sup>

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<sup>85</sup> This term is not precisely defined in the filtering literature. The COAH handbook at page 9 defines "very low-income households" as those earning 30% of median income or less, available at <http://www.state.nj.us/dca/coah/handbook/handbook2006.pdf>.

<sup>86</sup> See supra note 65.

<sup>87</sup> Roughly one in eight households earn at or below 30% of median income, or approximately \$19,000 a year. U.S. Census Bureau, 2006 American Community Survey, available at [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=04000US34&-qr\\_name=ACS\\_2006\\_EST\\_G00\\_DP3&-ds\\_name=&-\\_lang=en&-redoLog=false](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US34&-qr_name=ACS_2006_EST_G00_DP3&-ds_name=&-_lang=en&-redoLog=false). This figure was derived by adding the total number of households under \$15,000 and half of those in the \$15,000 - \$24,999 range, for a sum of approximately 448,653 households, and dividing by the total number of households in New Jersey (3,135,490). This number equals roughly 14%, or one in eight households.

<sup>88</sup> See N.J. Admin. Code § 5:94. app. A, tbl. 10, referring to the American Housing Survey covering the period 1989 to 1999.

Moreover, even if COAH had substantiated its filtering projection, there was a major problem with how it was used to discount projected statewide need. COAH made no attempt to document where filtering was occurring. In prior rounds, COAH used region- and town-specific data to show that filtering was occurring in specific markets. In its third round rules, however, COAH simply took statewide filtering projections and applied them across the state, reducing by 40% the projected need of virtually every municipality.

Therefore, if Town X had a COAH obligation of 100 units, that figure would have been reduced by over 40 units due to filtering, even if there was no evidence that any filtered units would become available in that town. This methodology is inaccurate and ignores one of the core principles underlying the Mount Laurel obligation, which is that low- and moderate-income families should not be excluded from any community. Thus, it is not only important that affordable units are available, but it matters where they are available.

The reality is that filtering is most likely to occur in New Jersey in communities that already have a substantial supply of affordable housing. After all, the conditions for filtering presume a housing market with excess supply and housing prices that are declining relative to incomes. These conditions typically characterize less desirable housing markets, and do not typically describe housing markets that offer good schools, economic opportunity, and plentiful public services. Therefore, filtered units may not be available in the very communities that Mount Laurel aims to open up to low- and moderate-income families. Instead, filtering may perpetuate the type of socioeconomic segregation that Mount Laurel was supposed to address in the first place. In fact, a paper prepared for COAH by the Brookings Institution warns that filtering “is a partial cause of neighborhood socio-economic segregation.”<sup>89</sup>

**As it rewrites the third round rules, COAH should support any filtering projections with timely, location-specific data, and document that the conditions for filtering exist.** The consultants COAH has hired to reexamine its filtering projections seem to be headed in this direction. Their recent draft report relies on comprehensive data on actual home transactions in New Jersey between 1989 and 2006, bases its projections on statistically significant changes in both a unit’s value and the income of the household that occupies the unit, and breaks down its projections to the municipal level.<sup>90</sup> This geographical analysis reveals that “the areas which experienced the largest gains in affordable housing units due to net downward filtering are generally the older, urban population centers of the state” including Jersey City, Camden, Paterson, Union, Newark, Asbury Park and Trenton.<sup>91</sup> The Department of the Public Advocate is hopeful that COAH will rely on these and other well supported data to derive realistic filtering projections and a more realistic overall projection of the statewide need for affordable housing.

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<sup>89</sup> Anthony Downs, New Jersey and Other Locations: The Filtering Process as a Source of Housing For Low-Income Households 10 (Robert W. Burchell ed.) (Oct. 1, 1990) (cited with permission of author).

<sup>90</sup> Econsult Corp., supra note 83.

<sup>91</sup> Id. at 14.

## **Principles for Improving COAH's Third Round Rules**

The examples above illustrate how COAH's approach to developing rules and projecting the statewide housing need have fallen short of fulfilling the Mount Laurel constitutional mandate. The Public Advocate believes COAH must take the following steps to address the particular issues identified here:

- **Require that a substantial portion of units be affordable to and occupied by households at income ranges below 40% of median income.**
- **Develop a fair and reasonable method to account for the present affordable housing needs of cost-burdened families.**
- **Support any filtering projections with timely, location-specific data, and document that the conditions for filtering exist.**

Full implementation of the Mount Laurel doctrine, however, will require more than just following these recommendations. The problems described in this paper are exemplary of a general approach that has led COAH to underestimate the statewide housing need and to facilitate the creation too few affordable homes.

The impossibility of meeting New Jersey's real affordable housing need by 2014 no doubt contributed to the impulse to understate this need. But understating the problem does not mitigate it. Acknowledgment of the true scope of the problem, in contrast, could provoke a constructive conversation about how best to solve it.

As COAH rewrites its third round rules, the Public Advocate implores it to take this opportunity to generate a clear and accurate projection of the real need for affordable housing in New Jersey, and to develop rules that will help create housing opportunities for lower-income families. The Public Advocate believes COAH can achieve this goal by adhering to some basic principles:

- **Use a transparent and open process** – All interested parties should be able to access and understand the data and methodologies that COAH relies on to develop its need projections. COAH should regularly publish updates that document progress made toward meeting the state's affordable housing need. The Public Advocate commends COAH for taking steps toward a transparent, open and inclusive process since it began rewriting the third round rules.
- **Substantiate assumptions with relevant and timely data** – Relevant and timely data are crucial to developing an accurate and defensible estimate.
- **Avoid incentives that do not create actual housing opportunities** – The use of methodologies like low-income bonuses gives towns credit for affordable housing that does not in fact exist. COAH should credit towns with fulfilling their obligations only when they create real affordable housing opportunities.
- **Use assumptions and methodologies that reflect the real life experiences of New Jersey families** – Some of the assumptions in COAH's needs projection are at odds with the actual experiences of households in need of affordable housing. For example, if a town demolishes and does not replace 25 affordable market-rate

units as part of a redevelopment project, no COAH rule requires an upward adjustment to the town's affordable housing obligation. The 25 displaced families, however, need alternative housing they can afford. COAH's rules often ignore such realities. As COAH rewrites its rules, it must ensure that they reflect the experiences and needs of the population it is trying to serve.

- **Stay true to the underlying principles of New Jersey's constitutional affordable housing obligation** – As described at the beginning of this paper, the Mount Laurel doctrine is based on a few clear principles. COAH's rules must reflect these principles. For example, COAH must impose requirements that will lead to the creation of housing for all eligible households, including families earning below 40% of the median. Similarly, COAH's rules should help ensure affordable housing opportunities throughout the state. Thus, filtering discounts must be applied based on real evidence of where filtering is occurring, so that COAH's rules begin to counteract the type of socioeconomic segregation that the Mount Laurel obligation is intended to redress.

The creation of affordable housing in diverse and inclusive communities will require determination at all levels of New Jersey government, continuing advocacy by those who represent low- and moderate-income families, and insistent demands from those families that they finally receive the fair and equal opportunities for decent housing they have long been promised. It will take time to meet this real and pressing need. It is long past time, however, to map and follow a path that can lead to fulfillment of the promise of the Mount Laurel cases. COAH has an opportunity in redrafting the third round rules to move us in the direction our constitution requires.

## **APPENDIX 1**

## APPENDIX 1

### COUNCIL ON AFFORDABLE HOUSING (COAH) 2007 REGIONAL INCOME LIMITS

|   |                 | 1 Person | *1.5 Person | 2 Person | *3 Person | 4 Person | *4.5 Person | 5 Person  | 6 Person  | 7 Person  | 8 Person  | Max. Increase**<br><i>Rents/Sales</i> | Regional Asset Limit*** |
|---|-----------------|----------|-------------|----------|-----------|----------|-------------|-----------|-----------|-----------|-----------|---------------------------------------|-------------------------|
| <b>Region 1</b><br>Bergen, Hudson,<br>Passaic and<br>Sussex       | <i>Median</i>   | \$51,839 | \$55,541    | \$59,244 | \$66,650  | \$74,055 | \$77,017    | \$79,979  | \$85,904  | \$91,828  | \$97,753  | 3.80%                                 | \$144,693               |
|   | <i>Moderate</i> | \$41,471 | \$44,433    | \$47,395 | \$53,320  | \$59,244 | \$61,614    | \$63,984  | \$68,723  | \$73,463  | \$78,202  |                                       |                         |
|   | <i>Low</i>      | \$25,919 | \$27,771    | \$29,622 | \$33,325  | \$37,028 | \$38,509    | \$39,990  | \$42,952  | \$45,914  | \$48,876  |                                       |                         |
|   | <i>Very Low</i> | \$15,552 | \$16,662    | \$17,773 | \$19,995  | \$22,217 | \$23,105    | \$23,994  | \$25,771  | \$27,548  | \$29,326  |                                       |                         |
| <b>Region 2</b><br>Essex, Morris,<br>Union and Warren             | <i>Median</i>   | \$57,510 | \$61,618    | \$65,726 | \$73,941  | \$82,157 | \$85,443    | \$88,730  | \$95,302  | \$101,875 | \$108,447 | 3.80%                                 | \$156,034               |
|   | <i>Moderate</i> | \$46,008 | \$49,294    | \$52,580 | \$59,153  | \$65,726 | \$68,355    | \$70,984  | \$76,242  | \$81,500  | \$86,758  |                                       |                         |
|   | <i>Low</i>      | \$28,755 | \$30,809    | \$32,863 | \$36,971  | \$41,079 | \$42,722    | \$44,365  | \$47,651  | \$50,937  | \$54,224  |                                       |                         |
|   | <i>Very Low</i> | \$17,253 | \$18,485    | \$19,718 | \$22,182  | \$24,647 | \$25,633    | \$26,619  | \$28,591  | \$30,562  | \$32,534  |                                       |                         |
| <b>Region 3</b><br>Hunterdon,<br>Middlesex and<br>Somerset        | <i>Median</i>   | \$64,960 | \$69,600    | \$74,240 | \$83,520  | \$92,800 | \$96,512    | \$100,224 | \$107,648 | \$115,072 | \$122,496 | 3.80%                                 | \$178,769               |
|   | <i>Moderate</i> | \$51,968 | \$55,680    | \$59,392 | \$66,816  | \$74,240 | \$77,210    | \$80,179  | \$86,118  | \$92,058  | \$97,997  |                                       |                         |
|   | <i>Low</i>      | \$32,480 | \$34,800    | \$37,120 | \$41,760  | \$46,400 | \$48,256    | \$50,112  | \$53,824  | \$57,536  | \$61,248  |                                       |                         |
|   | <i>Very Low</i> | \$19,488 | \$20,880    | \$22,272 | \$25,056  | \$27,840 | \$28,954    | \$30,067  | \$32,294  | \$34,522  | \$36,749  |                                       |                         |
| <b>Region 4</b><br>Mercer,<br>Monmouth and<br>Ocean               | <i>Median</i>   | \$57,432 | \$61,535    | \$65,637 | \$73,841  | \$82,046 | \$85,328    | \$88,610  | \$95,173  | \$101,737 | \$108,301 | 3.80%                                 | \$154,438               |
|   | <i>Moderate</i> | \$45,946 | \$49,228    | \$52,509 | \$59,073  | \$65,637 | \$68,262    | \$70,888  | \$76,139  | \$81,390  | \$86,641  |                                       |                         |
|   | <i>Low</i>      | \$28,716 | \$30,767    | \$32,818 | \$36,921  | \$41,023 | \$42,664    | \$44,305  | \$47,587  | \$50,869  | \$54,150  |                                       |                         |
|   | <i>Very Low</i> | \$17,230 | \$18,460    | \$19,691 | \$22,152  | \$24,614 | \$25,598    | \$26,583  | \$28,552  | \$30,521  | \$32,490  |                                       |                         |
| <b>Region 5</b><br>Burlington,<br>Camden and<br>Gloucester        | <i>Median</i>   | \$50,120 | \$53,700    | \$57,280 | \$64,440  | \$71,600 | \$74,464    | \$77,328  | \$83,056  | \$88,784  | \$94,512  | 3.80%                                 | \$133,688               |
|   | <i>Moderate</i> | \$40,096 | \$42,960    | \$45,824 | \$51,552  | \$57,280 | \$59,571    | \$61,862  | \$66,445  | \$71,027  | \$75,610  |                                       |                         |
|   | <i>Low</i>      | \$25,060 | \$26,850    | \$28,640 | \$32,220  | \$35,800 | \$37,232    | \$38,664  | \$41,528  | \$44,392  | \$47,256  |                                       |                         |
|   | <i>Very Low</i> | \$15,036 | \$16,110    | \$17,184 | \$19,332  | \$21,480 | \$22,339    | \$23,198  | \$24,917  | \$26,635  | \$28,354  |                                       |                         |
| <b>Region 6</b><br>Atlantic, Cape<br>May, Cumberland<br>and Salem | <i>Median</i>   | \$44,015 | \$47,159    | \$50,303 | \$56,591  | \$62,879 | \$65,394    | \$67,909  | \$72,940  | \$77,970  | \$83,000  | 3.80%                                 | \$117,814               |
|   | <i>Moderate</i> | \$35,212 | \$37,727    | \$40,243 | \$45,273  | \$50,303 | \$52,315    | \$54,327  | \$58,352  | \$62,376  | \$66,400  |                                       |                         |
|   | <i>Low</i>      | \$22,008 | \$23,580    | \$25,152 | \$28,296  | \$31,440 | \$32,697    | \$33,955  | \$36,470  | \$38,985  | \$41,500  |                                       |                         |
|   | <i>Very Low</i> | \$13,205 | \$14,148    | \$15,091 | \$16,977  | \$18,864 | \$19,618    | \$20,373  | \$21,882  | \$23,391  | \$24,900  |                                       |                         |

\*These columns are for calculating the pricing for one, two and three bedroom sale and rental units as per N.J.A.C. 5:80-26.6(b) and N.J.A.C. 5:80-26.12(a).

\*\*This column is used for calculating the pricing for resale and rent increases for units as per N.J.A.C. 5:94-7.2(b)2. Affordable prices and rents may be raised a maximum of 3.8 percent, based on the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index (CPI), United States, All Urban Consumers Housing. However, low income tax credit developments may increase based on the low income tax credit regulations.

\*\*\*The Regional Asset Limit is used in determining an applicant's eligibility for affordable housing pursuant to N.J.A.C. 5:80-26.16(b)3.

**Note:** Since the income limits for 2007 are less than the 2006 income limits, applicants who were qualified using COAH's 2006 income limits, on or before July 1, 2007, may continue to qualify under COAH's 2006 income limits. (Moderate income is between 80 and 50 percent of the median income. Low income is 50 percent or less of median income. Very low income is 30 percent or less of median income.)