STATE MANDATED VERSUS MARKET-BASED LOCATIONS OF
AFFORDABLE HOUSING: THE IMPACT OF STATE HOUSING PROGRAMS
ON THE PRODUCTION OF AFFORDABLE HOUSING IN THE
UNITED STATES
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ABSTRACT OF THE DISSERTATION

State Mandated Versus Market-Based Locations of Affordable Housing: The Impact of State Housing Programs on the Production of Affordable Housing in the United States

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Dissertation Director: Professor Robert W. Burchell

This dissertation argues that despite massive public interventions at the federal and state levels, the private delivery of affordable housing in amounts sufficient to satisfy local demand is impossible to achieve. That the vast socio-economic differences within and between states has never been taken into account or incorporated into national housing policies. Instead, the distribution of finite housing resources has been skewed to a median statistic for nearly half a century, providing a majority of benefits to a narrow band of households earning between 50 and 80 percent of the Area Median Income (AMI).

That the national affordability standard fails to accommodate the great variation in both income and housing costs has left individual states to devise statutory schemes aimed at addressing challenges unique to their individual jurisdictions. The most celebrated is found in New Jersey, where the landmark Mount Laurel decisions were codified into legislation that in 1985 established the most progressive affordable housing process in the nation. Over the past quarter century, Mount Laurel has taught many lessons. Perhaps most important is that the adequate provision of affordable housing will never be accomplished where there is strong demand and high delivery costs. Similarly,
attempts to overreach are met with considerable resistance, impeding the delivery of even modest amounts of affordable housing.

These lessons have helped to form the foundation of this research, where an assessment of the affordable housing produced in all fifty states is examined within the context of state mandated programs like *Mount Laurel*. To accomplish this objective required the use of both the 1990 and 2000 decennial censuses, where the output generated identifies both the least and most productive affordable housing states in the nation. These results are used to substantiate the conclusions drawn, which advocate for a new national housing affordability standard and more cogent public policies to ensure the equitable distribution of scarce housing resources.
ACKNOWLEDGMENTS

It is almost impossible to adequately thank the many people who have helped me through this journey, but this effort never would have been possible without the constant support, guidance and patience of my committee. To have worked under such renowned scholars as Javier Cabrera, Jim Hughes, David Listokin and Bob Burchell has been an absolute honor and a personal privilege. I am especially grateful to Bob Burchell, who has served as both my supervisor and mentor. I am also deeply indebted to Javier Cabrera, who made sure that I checked and rechecked my data, methods and results for accuracy. Thank you all from the bottom of my heart.

I have a very personal relationship with Rutgers, which began as an undergraduate in the Department of Landscape Architecture. While more than thirty years removed from that experience, today I still count several professors among my closest and dearest friends. At the same time my mother worked in the Undergraduate Admissions Department; a career that lasted for twenty-three years. I wish she was here to share this moment with me. But most importantly, Rutgers is where I met my wife.

To say I am blessed by a loving and supportive family would be an understatement. To my son, Ryan, you are my hero. Every day I am humbled by your courage and so very proud of the man that you have become. To my beautiful daughter, Katie, who brings love and laughter to the world every day, you are the most precious of gifts. But it is to the love of my life that I totally and completely dedicate this achievement, for I owe all that is good in my life to you, Sandy.
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<tbody>
<tr>
<td>AHMS</td>
<td>Affordable Housing Management Services</td>
</tr>
<tr>
<td>AHS</td>
<td>American Housing Survey (NJ)</td>
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<tr>
<td>ARRA</td>
<td>American Recovery and Reinvestment Act of 2009</td>
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<tr>
<td>CDBG</td>
<td>Community Development Block Grant</td>
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<td>CHAS</td>
<td>Comprehensive Housing Affordability Strategy</td>
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<td>COAH</td>
<td>Council on Affordable Housing (NJ)</td>
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<td>CPI</td>
<td>Consumer Price Index</td>
</tr>
<tr>
<td>CRA</td>
<td>Community Reinvestment Act</td>
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<td>CSHPF</td>
<td>Case/Shiller House Price Index</td>
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<tr>
<td>CUPR</td>
<td>Center for Urban Policy Research (Rutgers)</td>
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<tr>
<td>DDA</td>
<td>Difficult to Develop Area</td>
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<tr>
<td>FHA</td>
<td>Federal Housing Administration</td>
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<td>FHFA</td>
<td>Federal Housing Finance Agency</td>
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<tr>
<td>FMR</td>
<td>Fair Market Rent</td>
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<tr>
<td>GSE</td>
<td>Government Sponsored Enterprise</td>
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<tr>
<td>HAR</td>
<td>Housing Allocation Report</td>
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<tr>
<td>HCIR</td>
<td>Housing Cost to Income Ratio</td>
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<tr>
<td>HERA</td>
<td>Housing and Economic Recovery Act of 2008</td>
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<td>HMDA</td>
<td>Home Mortgage Disclosure Act</td>
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<td>HOPE</td>
<td>Home Ownership &amp; Opportunity for People Everywhere</td>
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<td>HOPWA</td>
<td>Housing Opportunities for People with AIDS</td>
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<td>HUD</td>
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JCHS - Joint Center for Housing Studies (Harvard)
LIHTC - Low Income Housing Tax Credit
MBS - Mortgage Backed Securities
MDI - Municipal Distress Index
MFI - Median Family Income
MSA - Metropolitan Statistical Area
NJAC - New Jersey Administrative Code
NJHMFA - New Jersey Housing and Mortgage Finance Agency
NJR - New Jersey Reporter
NJSA - New Jersey Statutes Annotated
NLIHC - National Low Income Housing Coalition
OOR - Out of Reach
PUMS - Public Use Microdata Sample
QCT - Qualified Census Tract
RCA - Regional Contribution Agreement (NJ)
SDGP - State Development Guide Plan (NJ)
TCAP - Tax Credit Assistance Program
INTRODUCTION: THE SCOPE OF THE RESEARCH EFFORT


To mark the occasion of its 25th anniversary, the American Planning Association (APA) compiled a series of lists to rank order the most important planning and zoning milestones since its founding in 1978. Published in 2003, one survey identified the “Top 25 Most Significant Planning Laws (1978-2003)” and included such landmark legislation as the Tax Reform Act of 1986 (#5), the Community Reinvestment Act (#6), and the American’s with Disabilities Act (#8). (www.planning.org/25anniversary/laws.htm)

While each of these federal pieces of legislation has had an impact on the lives of all Americans, it was a state statute from New Jersey that was elevated to an even higher status. Ranked as the 4th most “significant” planning law enacted in the United States from 1978 to 2003 was the 1985 New Jersey Fair Housing Act (N.J.S.A. 52:27 D-301).

There is more than a touch of irony to the timing of this recognition by the nation’s most prestigious planning organization, for it was also in 2003 that the first in what has become a long and destructive series of lawsuits was filed against the process mandated by New Jersey’s Fair Housing Act. That process, which is more commonly known and referenced as Mount Laurel throughout the literature, has now languished in and out of the courts for most of the new millennium. And while the final outcome has yet to be decided, the damaged inflicted to both the process and the production of affordable housing in New Jersey can only be described as “significant.”
It is even more ironic that New Jersey’s Fair Housing Act, which codified both the 1975 (67 N.J. 151) and the 1983 (92 N.J. 158) Mount Laurel decisions by the New Jersey State Supreme Court, is revered nationally while reviled locally. But the fact that Mount Laurel is the most maligned housing program in the country is beyond debate. Since its inception, Mount Laurel has been subjected to an almost constant onslaught of legal challenges. Although severely battered and bruised as a result, it has been the resiliency of Mount Laurel to remain viable in the wake of these attacks that is truly deserving of a national award. But if the Bard was right and the past is merely prologue, then the future of New Jersey’s landmark affordable housing legislation may soon become a remnant of history.

In theory, it is the goal of every progressive housing policy to achieve equilibrium between the demand and supply of affordable housing. But theories tend to work best in a political vacuum, where competing ideologies are not at odds, and where the specific policy is not used as a powerful wedge issue to inflame public opinion. In New Jersey, where scapegoating has been raised to a political art form, every manner of environmental, social and economic catastrophe, whether real or perceived, has been attributed to Mount Laurel and the need to produce a modest amount of affordable housing.

While success is both relative and subjective, in a 2008 paper delivered to mark the 25th anniversary of the second Mount Laurel decision (1983-2008) total statewide production in New Jersey was estimated at 70,000 units of affordable housing. (Kinsey) By every measure this is an unequivocal success, as no other state in the nation has achieved a more impressive result. But despite the record of accomplishment, which is
acknowledged by even the most hardened critics of this process, *Mount Laurel* remains the object of intense opposition and litigation.

True to its history, at issue is the quantification of need. A single number produced by a methodology whose very construct was shaped by the original vision of the court. In the aggregate, it is a measure of every developing municipality’s “fair share” obligation to produce the total number of units required to satisfy the state’s projected demand for affordable housing. By law it is a number that has changed only three times since the passage of the 1985 Fair Housing Act. But with each new estimate a new battle line is drawn. Like Pavlov’s dog, both the response and the adversaries remain virtually unchanged. On one side of the reaction stands the advocacy community, enraged that the number is too low. While on the other end of the spectrum is an equally loud cacophony of municipal voices claiming the number to be too high. And while the composition of each of the antagonists has varied only slightly over time, the end result remains exactly the same. A lawsuit is filed, the process stalls, nothing gets done and by the time there’s some resolution, markets change. This is precisely where the *Mount Laurel* process stands today.

How and when the current situation is resolved remains to be seen. But in the interim it seems appropriate to ask whether this fight, which began in 1975, has been worth it. It is a question that goes beyond the total number of units produced, or the hundreds of millions of dollars expended to create this inventory, or the untold millions spent trying to avoid, challenge, change, or fight the process altogether. While there can be no one simple or definitive answer, the question deserves an unbiased response.
Perhaps the recognition bestowed on New Jersey’s Fair Housing Act by the APA was predicated more by the equity embodied in the legislation than by its practical application. After all, only 70,000 units of affordable housing have been produced in nearly a quarter century under the Fair Housing Act. Given this result, is it fair to ask whether an annual average production of less than 3,000 units is a reasonable return on investment? Or would the private market have generated a similar or greater volume of affordable housing without either a judicial or legislative mandate? Or does the value of a process like *Mount Laurel* demand a calculation beyond the quantitative to value the qualitative as well?

These questions will serve as the foundation for this thesis. In addition to *Mount Laurel*, which will be a major focus of this dissertation, the research objective seeks to measure the production of affordable housing across each of the fifty states. This examination will be done within the context of local housing policy and its effect on the total volume of units produced. Although few states are as progressive as New Jersey in terms of housing policy, many possess some form of specialized initiative. Several states impose a minimum supply standard, typically established at 10 percent, to gauge municipal productivity and compliance as a percentage of the total number of occupied housing units within each local jurisdiction. Other states simply “encourage” the production of affordable housing through the use of inclusionary zoning or other incentives. Except for New Jersey, no other state in the country has ever even attempted to calculate and assign the individual municipal obligation for affordable housing.

While the state of Florida has now established targets of local supply by allocating the number of cost burdened households contained within a specified “region,”
this metric distorts the true dimension of the demand parameter. In addition to producing an artificially high result, the number generated is both politically untenable and practically impossible to achieve. (http://flhousingdata.shimberg.ufl.edu) Nevertheless, the same logic is being applied across many states. For example, in 2001 the New Jersey Department of Community Affairs (DCA) estimated the number of cost burdened households to be in excess of 650,000. (2001 NJ. Comp. Plan) However, data from the 2000 census revealed that over the previous decade the total number of new households in New Jersey exceeded the total inventory of new housing units produced by some 30,000 units. This would seem to suggest that New Jersey lacks the production capacity necessary to satisfy even normal market demand.

Structure of the Dissertation

This chapter serves to frame the debate, where the controversy surrounding state mandated programs like Mount Laurel in New Jersey has produced almost as much litigation as it has affordable housing. Although not all state mandated programs have endured similar histories, almost all have suffered by the unrealistic expectations of their sponsors. Given its rightful place among all such state initiatives, the Mount Laurel doctrine will be used as a benchmark throughout this research to compare and contrast the efforts and outcomes produced across the United States. This effort, however, will not be a simple regurgitation of the disappointment that is usually expressed throughout the literature, but rather an objective discussion of the most comprehensive and tortured housing program in the country.

Chapter One will introduce what I categorize as the most progressive affordable housing states, providing a synopsis of their legislative origins and histories. These states,
which include California, Massachusetts, Maryland, Oregon, Washington and Florida, are by the nature of their respective “coastal” locations, high cost housing states. This fact serves to underscore the economic conditions under which these states and their various initiatives must operate. Although each program is unique to the geopolitical forces by which it was created and operates, the reality among all state mandated programs is that the mandate is artificial. The fact that every mandated program is in fact completely voluntary, in part explains why the production of affordable housing is so difficult to achieve.

Chapter Two will briefly discuss the distinction among high cost housing states relative to their more recent attempts to help fund the production of affordable housing. The comparison is couched within the dysfunction that has crippled the affordable housing process in New Jersey, where the vacuum created by a lack of political leadership has been filled by a steady stream of lawsuits. While many state housing programs have had to fend off legal attack, none have had to defend themselves against charges of racism. In this regard, a 1996 study by Seton Hall University is examined, which receives considerable attribution in the literature since it alleges that the Mount Laurel doctrine failed in its ability to desegregate New Jersey. By rightfully ignoring these allegations, a detailed description of the methodology that I have constructed to evaluate the affordable housing achievements on a state-by-state basis is provided.

Chapters Three and Four will present a comprehensive overview of the history of the first two Mount Laurel court decisions, which achieved immediate landmark status upon their respective publication. In order to put both decisions into context, I begin by providing a brief legal and political history that led up to the decision in Mount Laurel I,
which is followed by the events that precipitated the court’s second opinion in Mount Laurel II. Once decided, the process of implementing the court’s vision into a methodological construct to satisfy the mandate is examined and described in great detail.

Chapters Five and Six continues the discussion on the impact of the Mount Laurel doctrine within the legislative response embodied in the 1985 New Jersey Fair Housing Act. While this law incorporates much of the court’s vision, it was also the byproduct of political process. The art of inevitable compromise produces a novel funding mechanism called a Regional Contribution Agreement (RCA), which was created to achieve greater levels of acceptance among New Jersey’s powerful suburban electorate. Responsibility to achieve the Mount Laurel mandate was transferred to a new administrative body created by the Fair Housing Act called the Council on Affordable Housing (COAH).

Chapters Seven and Eight examine the Mount Laurel legacy within the context of contemporary opinion. While there have been just two books devoted entirely to the subject of Mount Laurel, the number of journal articles devoted to the legal, social and economic implications of the doctrine is extensive. While most of the published opinion is polemic in nature, I take the opportunity to interject the research of several prominent urban scholars to place the Mount Laurel commentary into a national framework.

Chapter Nine examines a series of events as significant as any in the history of Mount Laurel and the Fair Housing Act. From a legislative attempt to all but eviscerate both the doctrine and the law, to the efforts of a new elected governor to reign in out-of-control development, each was precipitated by the obligation to produce affordable housing. At the same time a builder’s remedy lawsuit motivated the State Supreme Court
to intervene. Although not nearly as celebrated as the earlier landmark decisions, the ruling of the court would serve notice that the *Mount Laurel* doctrine was alive and well.

Chapter Ten begins by providing a historical perspective on the development of the national eligibility standard, which is predicated upon a housing cost to (household) income ratio (HCIR). Given that this benchmark has been in place for more than thirty years, its utility as an accurate measure of the overall demand parameter is called into question. Despite being overly simplistic and outdated, the current HCIR standard is still in place. As a result, this threshold is used to calculate the income eligible population in each of the fifty states. This is achieved through the use of the decennial census and the Public Use Micrdata Sample (PUMS) database.

Chapters Eleven and Twelve provide a detailed description of the PUMS dataset and the specific data culled to produce a series of variables constructed to define both the demand and the supply response in each of the fifty states. In order to measure the relative change in supply and demand over time, data from the 1990 and the 2000 PUMS are utilized. Critical to the analysis is the construction of a dummy variable that serves as a proxy for each state’s effort to promote the production of affordable housing.

Chapter Thirteen reveals how the PUMS data is used to construct two “success” ratios, which in turn are used to measure both the least and most productive affordable housing states in the country. As an absolute measure of the quantity of affordable housing produced within each state, Ratio #1 represents the proportion of the number of units occupied by fully qualified households as a function of all the new housing units created within each state. To identify the fully qualified household population, the three standards of eligibility are applied: income, cost burden and crowding. While Ratio #2
represents a more relative measure of success by identifying the proportion of all fully qualified households as a function of all income eligible households.

Chapter Fourteen highlights the results produced through a series of regression analyses that utilize both success ratios as dependent variables. In the attempt to construct the best model possible, as opposed to simply conducting a series of model-testing procedures, both an Adjusted R-Square and a Stepwise procedure are performed for comparative purposes.

The concluding chapter assesses the results of the regression analyses and provides an update relative to the findings by comparing the outcomes with some new and more contemporary data. This additional information is used to revisit a public policy question that was first publicly debated in 1990 that remains unresolved to this day. Also discussed is the HCIR standard and the implications for changing the thresholds of eligibility. The chapter concludes by discussing the implications of the findings on the future of affordable housing policy in the United States.
CHAPTER ONE: THE BREADTH OF STATE HOUSING INITIATIVES

While every state housing initiative is unique to the geopolitical forces upon which it was created, there is no clear national consensus on what state planning regime best promotes the development of affordable housing. (Pindell) And yet despite obvious limitations against extraordinary odds, programs like *Mount Laurel* are often labeled as failures in the eyes of those who continue to demand the impossible. Even though states like New Jersey will never be able to build their way out of this crisis, neither facts nor logic have been able to sway the debate.

In truth, the complexity of the calculus used to generate the *Mount Laurel* obligation has been one of its greatest liabilities. Whenever the process has been updated from one cycle to the next, housing advocates have always claimed statistical slight-of-hand. Conversely, the public-at-large echoes the same criticism, convinced that the methodology is simply a smoke screen to manipulate the outcome. For these and other reasons that will be explored more thoroughly by this thesis, the *Mount Laurel* process has not traveled well beyond the confines of New Jersey. (Payne 98)

In terms of history, only the “anti-snob” zoning law in Massachusetts comes close to matching the political theater that has played out over the past quarter century in New Jersey. But the affordable housing standard imposed by Chapter 40B of the Massachusetts General Laws (M.G.L. c40B) only obligates each of the state’s 351 municipalities to dedicate 10 percent of its housing stock to income-eligible households. Defined under the law as those earning no more than 80 percent of the median family income (MFI), failing to achieve these thresholds expose a community to a 40B challenge. Like *Mount Laurel*, the intent of Chapter 40B is often abused by politicians
and developers alike, as a successful challenge provides for expedited development approvals and an increase in project density. Unlike Mount Laurel, the 40B process is still very productive.

In the four-year period from 2002 to 2006, nearly 80 percent of all rental housing produced within the greater Boston area (excluding the City of Boston) is attributed to Chapter 40B. (CHAPA) Although impressive, these results may also be responsible for subjecting Chapter 40B to repeal, as a ballot initiative in the 2010 elections gave voters in Massachusetts the opportunity to rescind this legislation. By a margin of 12 percentage points (58%-42%) (http://www.massachusettslandusemonitor.com/commentary/40b-repeal-defeated/) the referendum was defeated and voted down.

Enacted in 1969, Chapter 40B is one of the very first inclusionary zoning programs in the country. As such, the amount of affordable housing created is both a function and a percentage of the total number of housing units approved through a successful 40B challenge. So while recent production appears robust, the total amount of affordable housing produced over the 40-year life of the statute is estimated at roughly 26,000 units. (CHAPA) The simple math reveals that over the course of its history, Chapter 40B has achieved an average annual rate of production of some 650 units of affordable housing in Massachusetts.

In California, where the first law promoting the inclusion of affordable housing was also implemented in 1969, (Cal. Gov’t Code § 65580 et seq) total production to date has been estimated at roughly 53,000 units. (Kinsey) While this sum seems paltry for a state as large and as progressive as California, the total may well reflect a process more dependent upon planning than implementation. (Calavita) While some tout California’s
experience as being at the national forefront of housing production through inclusionary zoning, only about a third of all the towns in the state have actually adopted such policies. ([http://www.calruralhousing.org/?q=inclusionary-housing-database](http://www.calruralhousing.org/?q=inclusionary-housing-database)) And of the 160 or so towns that do have an active inclusionary program, each is unique to its own jurisdiction. (Id) In California, there are no mandatory programs, no minimum inventory thresholds to achieve, only the general requirement imposed upon each municipality by the state to designate and zone:

> “sufficient vacant land for residential use…to meet housing needs for all income categories as identified in the housing element of the general plan.” (Cal. Gov’t Code §65913.1 et seq)

Relative to almost every demographic or economic statistic, it is impossible to compare California with any other state in the country. And yet both the volume and velocity of affordable housing production in California is surprisingly low, yielding an average annual rate of just 1,325 units. While this metric is obviously both simple and crude, the result does provide a useful snapshot.

Since its inception in 1974, the Moderately Priced Dwelling Unit (MPDU) program in Montgomery County, Maryland, has been the affordable housing gold standard in the country. (Mont. Co., MD Code §25A) Since the onset of the program, a total of 12,690 units of affordable housing have been created. (Anderson) But for a variety of reasons, most notably the expiration of the initial use and income restrictions, roughly 65 percent of the original inventory has been irretreivably lost by its conversion into market-rate housing. What remains are some 4,400 units in the control of non-profit or public housing ownership. (Id)
Florida is another example of a state with a long and progressive housing policy history, which is documented by a series of legislative actions aimed at addressing the dual concerns of future growth and housing affordability. First and foremost is the 1985 Growth Management Act, which requires each unit of Florida’s local government to develop a comprehensive plan complete with a housing element. (Ch. 163, Part II, F.S.). Second is the “State Housing Strategy Act,” which was enacted three years later in 1988. In what may be the most ambitious housing goal ever adopted by a state legislature, this statute was predicated upon the expectation that:

“[by] the year 2010, this state will ensure that decent and affordable housing is available to all of its residents.” Section 420.0003(2) Florida Statutes

Each of these two legislative efforts is supported by revenues generated from what is now the largest and most consistent funding source in the nation. Enacted in 1992, the William E. Sadowski Affordable Housing Act imposes a documentary stamp tax on every real estate transfer conducted within the state of Florida. These include all commercial as well as residential transactions. (Fla. Stat. Ann. §§ 420.907 et seq.) Once collected, these funds are then channeled through the State Housing Initiatives Partnership program (SHIP), which are then split 70/30 between local government and the state housing finance agency. Since its inception, the Sadowski Act has generated and disbursed more than $4 billion to help achieve the state’s affordable housing goals. (Hendrickson) But despite this abundance of resources, Florida still fell short of achieving its stated goal to “ensure that decent and affordable housing is available to all of its residents” by the year 2010. (Ross) While the impact of the Great Recession is partly responsible, the economic fallout served to exacerbate the impact of years of overbuilding and accumulating state budget deficits. In fact the fiscal health of Florida
has deteriorated to the point where every year since 2003 the legislature has raided the affordable housing trust fund to offset the loss of general revenues. By the end of the state’s 2010 fiscal year, a total of $780 million in Sadowski trust funds have been “reallocated” by the state. (Hendrickson) In 2009, the Florida legislature decided to formalize this process by imposing a permanent cap on the distribution of revenues generated annually by the documentary stamp tax in support of affordable housing. (http://www.flhousing.org/trust-fund-advocacy)

There are, of course, a number of other states that have made similar attempts at addressing their own unique challenges with respect to affordable housing. Some, like Rhode Island (RIGL §45-53) and Connecticut (CGS §8-30g), have enacted statutes based on the Massachusetts standard, with each establishing the same threshold requirement where at least 10 percent of a municipality’s housing stock must be occupied by income eligible households. While an appeal under the Connecticut law is subject to judicial oversight, Rhode Island, like Massachusetts, relies on an administrative process to mediate compliance. Both states, however, have had a rather anemic record of production. In the only published estimate to date, a 1997 survey by the Connecticut Housing Coalition counts a total of 586 units “approved through litigation” under the state’s 1989 housing appeals law. (CHC) In Rhode Island, despite two subsequent legislative revisions to its 1991 Low and Moderate Income Housing Act, the most recent unanimously passed in 2004 (RIGL § 286); there are currently only 5 out of a total of 39 communities that have met the 10 percent threshold requirement needed to achieve statutory compliance. (HWRI)
Although a rather late entry into the game, Illinois has also adopted an affordable housing appeals statute. (310 Ill. Comp. Stat. 67/1 et seq) Enacted in 2004, the Illinois Affordable Housing Planning and Appeal Act is also modeled after the Massachusetts program. (IDHA) However, full implementation of the new law did not begin until January 1, 2009, almost five years from the time it became law. While it’s obviously too early to determine the impact of this initiative, the fact that Illinois is the first “non-coastal” state to implement such a process is significant all by itself. (Salsich)

In a national conversation about affordable housing policy, the very celebrated growth management regimes of both Oregon and Washington can not be excluded. From purely a planning perspective, the multiple objectives embodied within each initiative to control and direct growth, lessen congestion and to preserve farmland and open space, have rightfully received a substantial amount of attention in the literature. No less commentary, however, has been devoted to the consequences, whether intended or not, on the apparent effects to both the supply and the price of housing under a growth management regime. (Nelson, Pendall, Downs)

When the state of Washington’s Growth Management Act (GMA) was enacted in 1990, the objective of the legislation was defined by a series of 13 goals. (Wash. Rev. Code § 36.70A) One of the goals was to “encourage the availability of affordable housing to all economic segments of the population…and to promote a variety of housing types. (§ 36.70A.020(4)) Unfortunately, it is within the subtle nuance to both encourage and promote where the great opportunity to do nothing exists. As mentioned, much of the scholarly attention has focused on whether the creation of growth boundaries has artificially constrained the supply of available and developable land, which in turn has
caused housing prices to rise faster and more exponentially as a result. What the research
to date has not addressed is exactly how much affordable housing is being built in the
state of Washington and where. Since the primary objective of Washington’s GMA is to
reduce sprawl and concentrate urban growth, much of the analysis has centered on the
impact to central cities, most notably, Seattle. Proponents of growth management contend
that embedded within the process is an increase in urban densities, allowing more
housing to be built in areas with an extant infrastructure sufficient to accommodate
regional housing demand. Opponents of this rationale suggest that urban infill does more
to displace than to house the poor, while reducing the overall number of affordable units
in the process. (Fischel)

Relative to the supply and price of housing, the identical debate has been argued
throughout the state of Oregon. As the precursor to Washington’s GMA, the growth
management process in Oregon has been in place since 1973. (Or. Rev. Stat. §§ 197.030)
But unlike Washington’s system, which relies upon volunteers to staff a series of regional
councils to serve as the local oversight mechanism, Oregon created the Land
Conservation and Development Commission (LCDC). As a statewide agency, the LCDC
enjoys broad and punitive enforcement powers, which include the ability to seek judicial
reinforcement to ensure local compliance with each of the 19 planning goals established
by its enabling legislation. (Pindell) However, it is Goal 14 that has captured the majority
of public and academic attention, as that objective created the infamous Urban Growth
Boundary (UGB).

While Oregon also relies on a series of regional authorities to oversee statewide
compliance, unlike Washington, these are elected bodies that report directly to the
LCDC. The largest, called Metro, manages the Portland UGB. In 2000, Metro adopted a Regional Affordable Housing Strategy that included a voluntary “fair share” process that “encourages” the production of affordable housing. (Id) Once again, a focus on the language in the statute raises doubts regarding the potential success of the Metro initiative. But language turns out to be the least of Oregon’s problems, as the state continues to reel under the effects of Measure 37. (Ballot Measure 37, ORS Chapter 197)

Measure 37 was a 2004 ballot initiative that sought to compensate landowners for the loss of any value suffered as a result of the state’s growth management policies. The “just compensation” ideal was the logic behind the proposal, which passed overwhelmingly and went into effect on December 2, 2004. (Steves) Chaos quickly followed, as the Measure allowed claims to be retroactive back to 1982 for landowners who could show proof of long-term ownership. (Id) The Measure also called for a “pay or waive” system, whereby all land use restrictions were waived if a community could not pay a landowner for the fair market value lost as a result of the restrictions imposed. (Sightline) A lawsuit was quickly filed in Circuit Court on January 14, 2005, which sought to overturn the Measure on constitutional grounds. (Steves) The court agreed with Plaintiffs arguments and stuck down the Measure as unconstitutional. This decision was in turn appealed to the State Supreme Court, which in February 2006 reversed the decision of the lower court and reinstated Measure 37. The Oregon State Legislature then mobilized another ballot initiative, Measure 49, to modify the provisions of Measure 37, which was put on the ballot in November 2007.

While Measure 49 passed by an overwhelming majority, by the time it became effective on December 6, 2007, more than 6,400 claims had been filed under Measure 37,
seeking billions of dollars in past damages. While no data exists, it is reasonable to assume that these events have had an adverse effect on the production of affordable housing in the state of Oregon. (http://daily.sightline.org/daily_score/series/this-land-measure-37s-impact-on-oregon/)

Across States

While there is great variation in housing programs across the United States, there are elements that are common to each. First and foremost is the fact that every state housing initiative is completely voluntary. There is not a single affordable housing program in this country that is mandatory. While the voluntary nature of any law may be a contradiction in term and logic, legal ambiguity is often leveraged to great advantage. No greater example exists than the Fair Housing Act, as the legal reality of the Mount Laurel process is that no municipality in the state of New Jersey is required by law to do anything, much less build affordable housing. That’s because Mount Laurel has never been a housing production program. Nor has Mount Laurel ever been endowed with a funding mechanism sufficient to subsidize housing on any scale. Plain and simple, the Mount Laurel doctrine and the New Jersey Fair Housing Act that followed has always been about zoning. It is about the municipal obligation to eliminate barriers in an effort to facilitate the supply of affordable housing in every New Jersey community.

Only the MPDU program in Maryland and some of the individual inclusionary programs in a number of California communities claim to be mandatory. But compliance in both states through the use of an inclusionary option is required only when projects reach a certain size. Although the MPDU program recently revised its threshold criteria down from developments with 50 or more units to projects in excess of 20 units (Ord.
No. 15-34, eff. 4/1/2005), an application to build one less unit than the upper limit requirement can provide an easy circumvention of the law. While the new lower program threshold in Maryland may be intended to recover some of the initial inventory lost through conversion into market-rate housing, it may also reflect the growing reality that many major metropolitan areas are simply running out of suitable and developable land. As this resource becomes more scarce and expensive in the process, a national re-thinking on zoning and density may emerge as an unintended but important consequence.

A second commonality among state housing programs is that each is going it alone. While the national Low Income Housing Tax Credit (LIHTC) program has produced an average of 1,450 projects and 108,000 units per year from 1995 thru 2007, the results are more a function of federal tax than housing policy. This is not meant to diminish the accomplishment or the importance of the program, but to instead highlight the continued involvement of the private sector to produce what is seen as a public good. As a last minute addition to the 1986 Tax Reform Act (H.R.3838), which severely reduced or eliminated many of the tax advantages realized through an investment in commercial and multi-family real estate, the LIHTC was created as an alternative inducement sufficient to retain the critical role that private capital plays in the housing market.

The gradual evolution of LIHTC into what is now the major supply-side program for the production of low and moderate-income housing is almost in direct proportion to the retreat by the U.S. Department of Housing and Urban Development (HUD) from the supply-side equation. While all of the original HUD production programs such as the 221(d)(3), (d)(4) and 236 no longer operate to provide both guarantees and interest rate
subsidies, they do serve as a current alternative to market-rate financing. Today, the only real market advantage that HUD provides is through the Federal Housing Administration (FHA), as loans approved by the agency carry the implicit guarantee of the federal government. Although valuable, both the origination and funding of an FHA insured loan is achieved through the private sector. That doesn’t make them any less valuable, it just doesn’t make them any less expensive. Somebody has to pay for the guarantee. All of which points to the fact that without additional and deep subsidies it is virtually impossible to reach households at the lowest end of the income distribution. And yet the most consistent criticism leveled at many state housing programs is that they don’t target the very poor.

Unfortunately, it can’t work both ways. Affordable housing sufficient to reach the very poor is both difficult and expensive to build. Government assistance at the local, state and federal level is absolutely necessary, and any one subsidy is totally insufficient to achieve and support the target population. This is especially true of the LIHTC program, which allows rent levels to be set at either 50% or 60% of median family income (MFI), regardless of the income of the individual tenant. Therefore, without additional subsidies, many households living below these thresholds wind up paying more than 30% of their income on housing. Moreover, every available and existing affordable housing resource is highly competitive and can take years to assemble.

Conversely, affordable housing that is built through the support of private market incentives is more efficient to produce. In New Jersey and elsewhere, these units are constructed as part of larger inclusionary projects, where an internal subsidy is generated by the increased profits realized through a bonus in allowable density. However, efficient
doesn’t translate into affordable, as most of these units are offered at prices or rent levels accessible only to households at or near the top of the eligibility threshold. Still, the process is responsible for producing thousands of units of affordable housing throughout the country. Conversely, the lack of any public funding has slowed the production of deeply subsidized affordable housing down to a trickle. In real estate, there are no tradeoffs between time and money.

Another real estate axiom is that almost all of the housing that gets built in the United States is produced by private developers. Whether the development entity is motivated by mission or by profit the process is identical. As a result, the location and therefore the distribution of affordable housing are almost entirely dependent upon market forces. In fact, most of the nation’s affordable housing is created only when a municipality confronts its statutory obligation by simply reacting to a specific development proposal. (Stonefield)

Still another shared attribute among state housing programs is that they all must operate on the local level to be successful. And in the immortal words of the late Tip O’Neill, “all politics is local.” While the grant of “home rule” varies from state to state, it is the independent authority given to local jurisdictions that is most often responsible for impeding the production of affordable housing. Although some states do provide an oversight mechanism to ensure that local plans meet state guidelines, few intervene, as most lack an effective enforcement mechanism. After all, these laws are all voluntary. Some states can and will threaten punitive measures, such as holding back specific funds or imposing moratoria on future building permits. But as a rule, it is the power of home rule that ultimately determines whether, where and when affordable housing gets built.
CHAPTER TWO: HOW STATE INITIATIVES WILL BE STUDIED:
THE NEW JERSEY CASES.

While home rule and the NIMBYISM it helps to spawn is still prevalent throughout the country, a noticeable shift in the public perception of affordable housing has emerged. This change can be traced back to around the middle of the last decade, which coincides with the time when the price of housing was accelerating towards its eventual apogee. As the crisis in affordability began to reach up into higher income groups, more and more households found themselves locked out of the housing market. Suddenly, concerns over the lack of “workforce” housing started to permeate the national housing discussion. Not surprisingly, these conversations were more frequent and urgent in tone among coastal cities and states, where the correlation between the high cost of housing and steady losses in population were becoming painfully obvious. While some states feigned concern to divert attention away from the more contentious and pressing issue of low and moderate-income housing, other states were moved to action.

For example, in 2006 the voters in California approved a $2.8 billion housing bond initiative (Proposition 1C) to replenish the nearly exhausted $2.1 billion in funding previously approved in 2002. (Proposition 46) In 2005 the Connecticut General Assembly approved the $100 million Trust Fund for Economic Growth and Opportunity, with the first disbursement of $10 million released just one year later. (CTSB 2001) By a 2:1 margin, voters in Rhode Island approved a 2006 ballot initiative that authorized the sale of $50 million in general obligation bonds to fund a program called “Building Homes Rhode Island.” (RIHW) In 2007, the governor of Massachusetts proposed a $1.1 billion housing bond to fund “An Act Financing the Production and Preservation of
Housing for Low and Moderate Income Residents.” The bill was then sent to the state legislature where it was approved and signed into law in May 2008. While not to the same scale, the Florida legislature authorized the sale of specialized license plates to “Support Homeownership For All” in support of housing programs throughout the state. By comparison, New Jersey has done nothing. In fact, New Jersey has done more than nothing; it has actually gone backwards.

While there are many explanations as to why the Mount Laurel process has now ground to a virtual halt, the lack of political leadership tops of the list. Remarkably, New Jersey has been led by four (4) different elected governors and three (3) interim or acting governors since January 2001. That equates to an average tenure of less than 1.5 years per governor! When the current governor was sworn into office on January 19, 2010, Chris Christie began his term by issuing fourteen (14) executive orders during his first twenty-three (23) days in office. It was Executive Order No. 12, however, that made good on a campaign promise (www.state.nj.us/infobank/circular/eocc12.pdf) to impose a ninety-day (90) suspension of New Jersey’s affordable housing process. Although an immediate appeal was filed and a stay issued by the Appellate Court that lifted the order, the battle rages on. Nearly one year to the day from assuming office, both the New Jersey State Legislature and State Senate have passed bills aimed at abolishing the New Jersey Council on Affordable Housing. (COAH) Created by the 1985 New Jersey Fair Housing Act, COAH has been the agency responsible for overseeing the implementation of the Mount Laurel process. Although the governor has vetoed the Senate version (S-1) of the bill, claiming it barely resembled the house version he initially supported, the eventual demise of COAH is all but guaranteed.
Unlike the current governor, his predecessor came into office in January 2006 bearing a campaign promise to either build or renovate 100,000 units of affordable housing in ten (10) years. But by the time John Corzine left office in 2010, no new funding or programs were created in an attempt to achieve his promised goal. Instead, wholesale changes to New Jersey’s Fair Housing Act were made under his watch; the most controversial eliminating a major funding mechanism responsible for the renovation and construction of over 10,000 units of affordable housing in the state’s most vulnerable urban neighborhoods. (RCA) In its place came a new schedule of surcharges and fees to be imposed on all new residential and commercial construction throughout the state. While development fees are commonplace, they are worthless as a funding source in the absence of a real estate market. Once the bubble burst, the governor was forced to issue a moratorium suspending the implementation of his new fee schedule. Meanwhile, a resolution was introduced into the General Assembly proposing to amend New Jersey’s state constitution for the purpose of rescinding the Mount Laurel obligation altogether. (AR-216) Since a change to the state’s constitution would require public approval, the effort to place the measure on the ballot in time for the 2009 general election fell short.

**Dueling Histories**

The history of the Fair Housing Act is replete with such showdowns. From the time the first Mount Laurel decision (67 N.J. 151) was rendered in 1975, to the current legislative attempts at repeal, New Jersey’s affordable housing process has been under constant attack. Although labeled as the ultimate political compromise (Haar), it has been the durability of the Fair Housing Act as a polarizing political force that stands out among all other state housing initiatives. But unlike most state programs, which are
typically challenged by either a development or municipal entity, the process in New Jersey has had to contend with an equally aggressive and venerable foe. Whether disputing the entire construct of the “fair share” methodology or the numbers generated by this calculation, the demand by housing advocates to achieve programmatic perfection has been equally responsible for any failure of the program. While the advocacy community in New Jersey would certainly deny such an accusation, claiming fierce defense of the process, “warts and all,” (Payne 2006) there is an extensive and written record of evidence to the contrary.

While the most rational among this group will concede that legislative mandates have been fulfilled, in New Jersey there is always a second standard applied that has never and will never meet expectations. Despite the fact that both the Mount Laurel doctrine and the Fair Housing Act focused exclusively on the plight of the poor, the issue of race has always lurked just beneath the surface of the debate. Driven by the reality that the original Mount Laurel plaintiffs were African American and represented by the NAACP, this obsession with race is more of an emotional artifact than fact. If nothing else, the legal genius of the Mount Laurel doctrine is best explained by the court’s decision to view the original plaintiffs as representative of a whole class of people who were victimized by the effects of exclusionary zoning. Not because they were Black, but because they were poor. Despite the legal, as opposed to the emotional reality of the law, race for many advocates will always serve as the ideological benchmark by which the true “success” of Mount Laurel will be forever measured.

By the yardstick of racial integration, Mount Laurel is perceived as an abject failure. This perception was strongly reinforced in a 1996 study by Seton Hall University
that attempted to compare the applicants for against the occupants of *Mount Laurel* housing. The hoped for result was to provide a demographic comparison between each of these two groups, measuring the relative success of the program’s beneficiaries as a function of both race and ethnicity. (Wish) While the study tried to generate primary data, for a variety of reasons those efforts failed.¹ By default, Seton Hall was forced to turn to a state agency for help, which at the time was in the earliest stages of developing an affordable housing data base. The purpose of the state’s enterprise was to help match the supply and demand for affordable housing by generating a pool of pre-screened and income-eligible households. Then, on a fee-per-unit basis, the data could be retrieved by both public (municipal) and private (builder) clients looking to market their available inventory of affordable units.

The construct of the data base was relatively simple, as it was organized into two files that segregated the applicant from the occupant pool of households. Once an applicant household was successfully placed into an affordable housing unit, that file was reclassified and transferred into the occupant data base. Again, the objective of the study was to compare the profile among each of the two groups to discern any appreciable differences between the pool of applicants and the ultimate beneficiaries of the program. The published results, which are cited frequently in the affordable housing literature, concluded that despite being well represented in both the applicant and occupant files, minority households fared poorly under the protocol established by the *Mount Laurel* doctrine. In part, this determination was based upon the location of the units occupied by minority households, which were concentrated in the state’s urban communities.

¹ I was a member of the original study group.
Although the Seton Hall study is one of the very few that has attempted to quantify the impact of *Mount Laurel*, both the effort and the results were seriously flawed. While the eventual size of the data base was large, the data was woefully incomplete. This was primarily a function of timing, as the start of the Seton Hall study and the initial configuration of the state’s data base were nearly simultaneous events. Consequently, the first published draft of the report determined that senior, white-female headed households living in age and income-restricted units dominated the *Mount Laurel* inventory.

This result forced a postponement of the research to allow the data base to become more populated. Once resumed, the occupied unit file had swelled to roughly 7,400 cases. But despite the size of the file, the number of cases with missing values was substantial. A fear of committing a violation under either the state or federal Fair Housing Acts was partly responsible, which left most of the questions relative to race and ethnicity of each household unanswered. In recognition of this problem, the New Jersey Department of Community Affairs petitioned the New Jersey State Attorney General’s office, which in 1992 issued a directive stating that the collection of data for the purpose of establishing eligibility under a sanctioned affordable housing program was both necessary and legal. While this administrative action would help to improve the quality of the data going forward, it could not solve the problems of the missing data already on file.

Another anomaly of the data was that a majority of the occupied units in the state’s data base were located in urban areas. This too was a function of the system, as a project that received any form of state subsidy was obligated by that funding to utilize the
state’s data base. Since most of the earliest state-sponsored projects were located in urban communities, the outcomes reflected this reality. It was the combination of missing values and an over representation of urban projects that led to the conclusion by Seton Hall University that *Mount Laurel* failed to deliver on its “promise of suburban integration.” (Wish)

Consideration was given to the idea of revisiting the Seton Hall report as the basis for this thesis, as an ability to return to the state data base after some fifteen years had a certain appeal. A perverse curiosity, if you will, to determine whether the critics were right or wrong. But beyond the quality of the data, which failed to capture even a small percentage of the thousands of suburban units constructed in New Jersey through the use of inclusionary zoning, the original hypothesis of the Seton Hall study was flawed. To measure an outcome that was never intended by either case law or statute is not worthy of replication. Perhaps the only real value of the Seton Hall report was the confirmation provided that all of the applicants and occupants in the state’s data base were income-eligible under the definitions established by the New Jersey Fair Housing Act. Somehow this fact is never revealed whenever the conclusions of the Seton Hall report are referenced by other housing commentators. While removing the original bias may well have served a legitimate academic purpose, the overall contribution to the affordable housing literature would be of limited value.

While the data collection process in New Jersey might be superior to the efforts in most states, the statistical bar is not set that high. In fact, beyond the numerical estimates on the numbers of units physically constructed, no state compiles summary statistics on the characteristics of the occupant households served by their respective housing
programs. Consequently, any attempt to evaluate programmatic impact both within and across states would be frustrated by the lack of data. This also explains why most of the published studies on housing impact are more local in scope, utilizing individual project surveys or direct municipal contact to generate the data sufficient for analysis. (Krefetz) But this level of effort is very labor intensive and therefore impractical to scale-up to a larger unit of analysis. For housing scholars, the historical lack of comparable statewide data on a national scale has been a constant source of frustration. (Id)

Unfortunately, it wouldn’t take a very sophisticated analysis to summarize the current state of affordable housing in this country. What it would take is some context, as recent events have drastically changed the national housing dynamic. But any attempt to try and incorporate the impact of the current economic crisis into an evaluation of locally produced affordable housing would be foolhardy. How we got here is already the subject of intense investigation and is beyond the scope of this thesis. Where we end up is still unforeseen. But context is still essential. That is why the objective of this research will be to evaluate the production of affordable housing on a state-by-state basis before the bull-run in the real estate market turned into a full-fledged stampede. It will look to evaluate the production results of high-cost and supply-constrained housing states before they started to turn “frothy.” It will seek to determine within the context of each of the fifty-states whether programs like *Mount Laurel* in New Jersey, or Chapter 40B in Massachusetts, or other state initiatives has had a material effect on the supply of affordable housing.
Methodology

To accomplish this goal, a state-by-state evaluation will be conducted. But in the absence of any consistent and reliable data at the state level, a comparative analysis on a national scale will be constructed through the use of the decennial census. More specifically, the Public Use Micro Data Sample (PUMS) will be utilized, which has been the primary resource employed to calculate the *Mount Laurel* obligation in New Jersey.

However, like all census information, PUMS data can be characterized as messy. This is expected given the “self reporting” nature of the data collection process, which often produce data that have missing values and extreme outliers that are often far from expressing normal distribution. For the purpose of this thesis, data that appears to be unreliable will be deleted from the analyses. Despite these anomalies, PUMS represents the most robust dataset to estimate state level statistics with very small error. In addition, the mining of a large dataset like PUMS provides the best opportunity for discovering, within a subset of the data, some relationship or pattern that is oftentimes masked when the data is collapsed for broad comparative purposes. While most responses to Census questions are coded as categorical variables, where the number of possible responses (categories) could be in the hundreds, other variables measure economic quantities that are far from normal distribution. To compensate, and when appropriate, the PUMS variables used for this analysis will be collapsed to aggregate the responses.

The rationale for using PUMS becomes even more obvious when reviewing the list of variables available within the dataset, as each file contains two record types: the housing unit record and the person record. Data contained within the person record provides the requisite household-level information necessary to construct a standardized
housing cost to income ratio (HCIR) model. As established by HUD, the components must include a measure of household income, housing costs and crowding. The income statistic is measured at the household level (HINC), which in the aggregate produces a statewide distribution from which the median is calculated. Controlling the median statistic by the ≤80 percent threshold establishes the income eligible population. Through the use of the PUMS variable PERSONS, the median income statistic is controlled by the size of the household, which allows the income eligibility standard to be adjusted according to current HUD conventions. The process proceeds by further controlling the income eligible population by the corresponding level of housing costs.

Segregated by tenure to distinguish renter from owner-occupied households, the former will be determined through the PUMS variable GRENT, while the latter is expressed by the variable SMOCAPI. Defined as the amount of gross rent paid per month, GRENT will be transformed from a monthly into an annual value. If the proportion of rent paid exceeds 30 percent of total household income, the unit will be classified as “cost burdened.” While SMOCAPI will serve to operate in the same manner, the construct of the variable is quite different. Specifically, “selected monthly owner costs as a percentage of household income” incorporates the combined monthly expenses of all debt service, including home equity loans, property taxes and insurance. Since the value produced is already expressed as a percentage of total household income, the incidence of cost burden among owner-occupied households is more easily captured.

The final component of the standard HCIR application involves a measure of the physical adequacy of the occupied housing unit. To quantify this dimension, the use of the PUMS variables PERSONS and ROOMS are utilized. While the former has been
defined above, the later corresponds to the number of rooms contained within each housing unit. When the ratio of these two variables, PERSONS/ROOMS, exceeds 1.10 persons per room per household, by HUD convention the housing unit is considered crowded. In combination, the controlled attributes of income, housing costs and crowding will produce the true income-eligible population. When applied across states, the result will establish the overall demand parameter contained within each unit (states) of analysis.

The second record contained within each household file in the PUMS database relates to the characteristics of the individual housing unit. Present within these files are two variables that when combined generates a reasonable proxy for the supply parameter. The first supply variable is produced by the census question that asks to identify the year the household moved into the structure (YRMOVED), while the second results from the respondents answer to the year that the structure was built (YRBUILT). By controlling for both of these variables it is possible to match when a household moved into to a unit that was constructed within a specified period of time. When these functions are combined and controlled by the income-eligible population, it is then possible to identify only those income-eligible households that moved into newly constructed housing units. For the purposes of this research, the definition of “newly constructed” will correspond to the ten year interval that defines the decennial census period.

An early design for this study assumed that the 2000 PUMS would prove sufficient to conduct this research. But when that rationalization was applied to the question of whether a relationship between progressive state housing policies and the production of affordable housing exists, it became obvious that a second point of
reference was necessary. This deduction was fueled by the fact that most progressive state housing policies (New Jersey, California, Massachusetts, Maryland and Florida) went into full force and effect before 1990. Therefore, absent a second point of reference and the ability to measure the true impact of such policies would be severely compromised. In response, the decision was made to expand the analysis to incorporate data from the 1990 PUMS.

By establishing two distinct data points, the ability to measure the rate of affordable housing production over time can be achieved. To accomplish this objective, the output generated by the PUMS data will be used to construct a series of new variables for the purpose of comparative analysis. The first new variable will establish the total supply of all new and occupied housing units produced in each state and will be labeled TUNITNEW. When controlled by the income-eligible population (\( \leq 80\% \) median income), the variable TIEUNITS is produced, which represents the total number of new housing units occupied by income-eligible households. When the TIEUNITS variable is controlled by the duel measures of housing cost and crowding, the total net number of affordable housing units produced by each state is revealed. This variable is labeled TOTNETAF.

The three new variables of TUNITNEW, TIEUNITS and TOTNETAF will be then be used in combination to generate two (2) additional variables, each expressed as simple ratios. As the product of the total number of net new affordable units divided by the total number of new housing units (TOTNETAF/TUNITNEW), Ratio #1 will represent an absolute measure of the supply of affordable housing produced by each state.
Conversely, Ratio #2 will identify the total number of net new affordable housing units occupied by the income-eligible households (TOTNETAF/ TIEUNITS).

The Mount Laurel Model

The results generated by Ratio #1 and Ratio #2 will serve as the dependent variables in a series of regression models that will utilize a total of roughly twelve (12) independent variables. They are as follows:

- Median House Value
- Median Household Income
- Median Gross Rent
- Median Household Size
- Percent of New Households by State (as a function of the total number of all households)
- Percent of Total Single Family Housing Units
- Percent of the Total Population that is Elderly
- Percent of the Total Population that is Below the Poverty Level
- Percent of the Total Population that is Employed by Occupation (Professional vs. Workforce)
- Average Number of Automobiles Per Household
- Average Commute to Work (in minutes)
- Population Density Per Square Mile

While the majority of the variables selected have been culled directly from the PUMS data base, all have been chosen to closely approximate the parameters used to calculate the Mount Laurel obligation in New Jersey. The decision to mimic this process was based on the fact that it was the most rigorous methodology employed anywhere in the country; attempting within the process to quantify the supply necessary to satisfy the past, current and future demand for affordable housing. The use of the past tense was deliberate.

It is, however, the final inclusive variable that will serve to address the central question of this thesis, which is whether the implementation of progressive housing
policies has had any effect on the production of affordable housing. In the attempt to
discover such a relationship, a dummy variable will be constructed to serve as a surrogate
for the presence of any specialized state and local housing initiatives. Beyond the Low
Income Housing Tax Credit (LIHTC) program, which is active and operational in every
state in the country, the objective was to identify any specialized initiatives that would
serve to distinguish the public policy efforts of one state from the next. These would
include: (1) significant pieces of legislation that were enacted prior to the year 2000, such
as the Fair Housing Act in New Jersey (1985) or Chapter 40B in Massachusetts (1969);
(2) the existence of a state, or (3) county or local housing trust funds and the annual
average revenues generated by these resources; (4) the promotion, whether mandated or
voluntary in the use of inclusionary zoning (IZ) ordinances, and; (5) a state tax credit
program to help supplement the equity generated by the federal LIHTC program.

In rank order, each state’s “score” will reflect the total number of public policy
indicators in effect at the time of the 2000 census. Represented by the variable
PROGSTAT, the resulting score of each case will range in value from the most (5)
progressive to the least (0) progressive housing states. Ultimately, the results generated
by the regression models will determine the power and influence of the PROSTAT
variable, which will serve to test the following hypothesis:

**Research Question**

While the simple quantification of the number of affordable housing units
produced is an incomplete measure of success, it is typically the only statistic available in
most progressive housing states. It will be the object of this analysis to identify the
magnitude of affordable housing produced within each state. Through the use of both the
1990 and 2000 PUMS, the objective is to find any evidence of a difference in the production of affordable housing among states with progressive housing policies versus those states without dedicated public initiatives.
CHAPTER THREE: THE MOUNT LAUREL DECISIONS
THE MORE GENERAL MOUNT LAUREL I

While there is very little debate that the Mount Laurel legacy began as an appeal for social justice, the legal record provides equal and convincing evidence that the landmark decisions and the law that followed focused exclusively on the plight of the poor, regardless of their color. And yet despite the historical reality of the law, the affordable housing debate in New Jersey has always been divided. Unable or perhaps unwilling to separate the issue of race from the original and principled intent of Mount Laurel. In this chapter, events leading up to the New Jersey State Supreme Court’s initial landmark decision are explored. A period marked by several legal antecedents that served to confuse more than inform, but which ultimately established the legal foundation for the constitutional mandate to follow. Given the complexity of the issues involved, this may have been unavoidable process, as the broad expanse of the court’s decision was predicated on the following principle:

“Plaintiffs represent the minority group poor (black and Hispanic) seeking such quarters. But they are not the only category of persons barred from so many municipalities by reason of restrictive land use regulations. We have reference to young and elderly couples, single persons and large, growing families not in the poverty class, but who still cannot afford the only kinds of housing realistically permitted in most places—relatively high-priced, single-family detached dwellings on sizeable lots and, in some municipalities, expensive apartments. We will, therefore, consider the case from the wider viewpoint that the effect of Mount Laurel’s land use regulation has been to prevent various categories of persons from living in the township because of the limited extent of their income and resources.” Mount Laurel I, 67 NJ 159

Despite arguments to the contrary, the legal objective of the court became clear when it provided “standing” for the poor who lived in developing communities like Mount Laurel, and then extended that status to those poor “nonresidents” who only aspired to live in such places. (67 NJ 159 fn #3) The judicial resolve to distinguish the
difference between racial and economic discrimination was guided by practicality as well as by law, for the court understood that any ruling based solely on the issue of race would have invited immediate appeal from the federal judiciary. (Haar 19) Once the broader precedent was established, the court was unanimous in its finding that Mount Laurel Township “through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing.” (67 NJ 170) The court went even further by acknowledging that “this pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality.” (Id 171) To eliminate this practice and remedy its impact, the court concluded that “every municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing.” (Id 174)

The establishment of a precedent beyond race to prove discrimination also served to insulate the court’s decision from legislative attack. (Kirp, Haar) By declaring Mount Laurel’s exclusion of whole classes of people as an unconstitutional use of the police power, the court was assured that any legislative challenge would have to be waged on constitutional rather than statutory grounds. (Haar 23) This was apparently a risk that the court was willing to take, knowing that an amendment to the state’s constitution would be a lengthy and a politically unlikely process since it would require a majority referendum on a statewide ballot to succeed. (Id, 19) Either way, this judicial strategy has proven highly effective for it has never been legally challenged at any level.

History and precedent aside, the undertone of race has always lurked inside the ideological heart of the *Mount Laurel* debate. Despite repeated arguments to the contrary,
the law has always and remains specifically focused on the rights of the poor, regardless of their race or ethnicity.

THE PRELUDE TO MOUNT LAUREL I:

Throughout most of the past century, New Jersey has grappled with the need to “delicately balance the home-rule rights of municipalities—personified in local zoning—with the necessity to provide low and moderate-income housing.” (Burchell, 1984) This is evidenced as far back as the end of the first term of then Governor A. Harry Moore, who in 1927 declared his most significant legislative achievement to be the passage of a constitutional amendment allowing municipalities to zone. (Karcher) Governor Moore had in fact proposed a number of other amendments that had also made their way onto the ballot that year, but the zoning amendment was the only one to pass. (Id) Over the ensuing decades, multiple legislative attempts at land use reform were tried and failed, including a 1969 bill supported by former Governor Richard Hughes that would have required local land use regulations to reflect the “need for various types of housing for all economic and social groups in their municipality and the surrounding region.” (Listokin, 1976) To ensure compliance, this bill would have compelled municipalities to justify any land use regulations having an exclusionary impact on any economic, social or religious group. (Id) However, once the bill was introduced into the legislative process, it received “practically no support and, in fact, was never scheduled for hearings.” (Id)

Following up on the ideas advanced by his predecessor, Governor William Cahill also took up the mantle of land use reform. Prescient in his message, the governor stressed that change was not only long overdue, but that in the absence of legislative action the courts were certain to step in, possibly mandating radical land use changes.
In two very significant attempts to elevate housing policy to the top of the legislative agenda, Governor Cahill documented the “perversion” of exclusionary zoning and warned that New Jersey could not “afford the luxury of continuing the status quo.” Equally predictive, the Governor warned that the system was failing because it was not meeting the needs of all of the people, and “absent corrective measures to ensure the maintenance of controls in hands of local officials… local zoning and planning will be non-existent.” Roughly two years later the Governor repeated his warning in a similar address that fell on still deaf legislative ears.

Unyielding in defeat, multiple reform efforts aimed at creating regional allocation plans for the equitable distribution of housing were proposed during the early 1970s. But these, like their earlier antecedents, received no legislative or public support. At the time, one land-use scholar predicted that “this situation may change in the near future as a result of Mount Laurel.”

MOUNT LAUREL I (1975)

True to Governor Cahill’s earlier admonition that the lack of legislative initiative would lead to judicial intervention, the New Jersey Supreme Court stepped in to take up the issue of exclusionary zoning. And while the political fallout from the earlier but failed attempts at land use reform still resonated throughout the state, their ideological impact on the eventual opinion of the court was significant. This is evidenced by the quote that begins this chapter, which establishes economic and not racial

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2 In Mount Laurel I the Supreme Court emphasized Governor Cahill’s characterization of the housing situation in New Jersey as a “crises,” citing in both the majority and consenting opinions the governor’s two special messages to the Legislature: A Blueprint for Housing in New Jersey (1970) and New Horizons in Housing (1972).
discrimination as the basis for the New Jersey Supreme Court’s landmark decision. A legal opinion, unlike any other in the annals of land-use law, which was launched by the following declaration:

“This case attacks the system of land use regulations by defendant Township of Mount Laurel on the ground that low and moderate income families are thereby unlawfully excluded from the municipality.” (67 NJ 157)

An accompanying footnote was supplied to establish the definitional limits of the terms described, equating “low income” to those persons or families eligible for occupancy in public housing or “receiving rent supplement subsidies.” (67 NJ 158 fn 2) The characteristics of moderate income families were described as “similar” but distinguished by the eligibilities associated with “so-called Section 235 or 236 or like subsidies.” (Id) While the semantic differences were both minute and somewhat confusing, the court tied each term to an equivalent dollar amount. The values used were taken from an earlier 1974 lower court decision in Madison (128 NJ Super 438), which established an income limit of $7,000 to reflect “low income,” while “moderate income” was defined within the annual income range of $10,000 and $12,000. (Id) These values were derived from the 1972 median income in New Jersey of $11,600, revised upward by the court in the Madison case to reflect the median statistics published for the Newark area in 1974. (72 NJ 515 fn 25) While specific in terms of quantifying eligibility, the court went even further by establishing a qualitative measure for those denied housing opportunities by virtue of their incomes.

Expanding once again upon the concepts established previously by the Madison decision, Mount Laurel I declared that all such persons affected and prevented by the land use regulations from living in the township “because of the limited extent of their
incomes and resources” were considered plaintiffs to the case. (67 NJ 159) This was a broad and expansive qualification that included not only existing township residents, but former residents as well. In addition, those “nonresidents living in central city substandard housing in the region” were also incorporated into the equation. Ultimately, the scope of this definition (159 fn 3) was destined to be the subject of endless legal and social interpretation.

By giving equal status to the present, former and non-residents of the township, the court’s intent was to ensure [that] “both categories of nonresident individuals likewise have standing.” (Id) Once achieved the addition of the urban poor into the “fair share” and “regional” calculus of low and moderate-income housing was now guaranteed. This decision may explain why the court found it unnecessary to elevate the legal status of the “three organizations representing the housing and other interests of racial minorities” in this case, which included the NAACP. (Id) Perhaps it was judicial recognition that the urban poor were a population already dominated by racial minorities, making the need to further elevate their status a legal redundancy. Or perhaps it was just another way for the court to reinforce its policy objective to prove economic and not racial discrimination on the part of Mount Laurel Township.

Beyond this single reference, the racial composition of the plaintiffs was never again identified in the majority opinion.3 Even when the court referenced the original site plan application filed in 1968 by the Springfield Action Council, the organization supported by the federal Community Action Program and comprised almost entirely by

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3 In Mount Laurel I, Judge Pashman notes in his consenting opinion that “[I]n addition, exclusionary zoning practices are also often motivated by fear of and prejudices against other social, economic and racial groups.” 67 NJ 196.
the all black membership of Jacob’s Chapel in the Springfield section of Mount Laurel (Kirp 4), it did so in very nondescript terms:

“In 1968 a private non-profit association sought to build subsidized, multi-family housing in the Springfield section with funds to be granted by a higher level governmental agency. Advance municipal approval of the project was required. The Township Committee responded with a purportedly approving resolution, which found a need for “moderate” income housing in the area, but went on to specify that such housing must be constructed subject to all zoning, planning, building and other applicable ordinances and codes. This meant single-family detached dwellings on 20,000 square foot lots. (Fear was also expressed that such housing would attract low income families from outside the township.) Needless to say, such requirements killed realistic housing for this group of low and moderate income families.” (67 NJ 169-170)

Low and moderate income families are how the court characterized this very specific group of poor, black plaintiffs that were denied the opportunity to build their project. Not because of their race, but because of zoning. “The legal question before us,” the court declared, “is whether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate housing.” (67 NJ 173) The court then went on to say that no municipality, by virtue of their land use regulations, can “foreclose the opportunity of the classes of people mentioned for low and moderate income housing.” (Id 174)

The fact that “Mount Laurel I creates the baseline obligation for regional need, an economic or class-base requirement and not a race–based requirement” seems clear4. (Payne, 1999) What was less clear, however, was how best to construct this baseline obligation. Given the lack of specificity, the reaction that followed the Mount Laurel I decision was not characterized by compliance, but by endless municipal attempts to delay its full implementation. Some of the blame falls squarely on the shoulders of the court, as

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4 Speaking at the Western New England School of Law on December 10, 1999, John Payne opened his remarks on the history of Mount Laurel with this statement as background. In the published version that followed, this statement was omitted.
the failure to provide specific definitional guidelines left the responsibility to calculate the appropriate “fair share” of the “regional” need to each individual municipality. (Mallach 1975) Contrary to the court’s expectation, no immediate consensus emerged. What followed instead was more confusion and legal obfuscation that ultimately forced the issue back into the courts. Surprisingly, what eventually materialized was not definitional precision, but total ambiguity, as the court appeared to completely reverse itself from the directional clarity it tried to establish in *Mount Laurel I*.

**LEAST COST HOUSING**

What transpired over the next two years to cause the court to “beat a retreat from the position it had enunciated in *Mount Laurel I*” is not entirely clear. (Haar 33) Although one commentator observed that it was as though the “court fled from the boldness of Mount Laurel...as if the tribunal had second thoughts.” (Kirp 89) Whatever the reasoning, it was apparent from the 1977 decision in *Oakwood at Madison, Inc. v. Township of Madison* that the court was not only willing to revisit the principle issues raised by *Mount Laurel I*, it was also ready to change them. Apparently swayed at oral arguments by “the effect on the issues herein of our intervening decision in *Mount Laurel,”* reinforced by the “considered supplemental briefs and materials” submitted in advance, the subsequent conclusions reached in *Madison* were drastically different than those established earlier under *Mount Laurel I*. (72 NJ 492)

*Oakwood at Madison* was one of two plaintiff developers that filed a lawsuit in superior court to challenge the validity of the zoning ordinance adopted by the Township of Madison in September 1970. (128 NJ Super 438) Both parties appealed the lower court’s ruling, but it was “because of the importance of this case” that the New Jersey
Supreme Court certified the appeals of the plaintiff developer “pending unheard in the Appellate Division.” (72 NJ 491) Oral arguments were scheduled for January 8, 1974, arranged jointly with the appeals pending in the case involving Mount Laurel Township. (Id 492) But on the day of the hearing the court was informed that Madison Township had adopted a major amendment to their zoning ordinance. This prompted the “astonished” judges to send the case back down to the lower court for a new trial. (Kirp 78) Less than two years later Madison was back in front of the New Jersey Supreme Court, only this time the case would be heard. (Id 492)

While the court agreed with the lower court’s opinion that the revisions to Madison’s ordinance “made more land available for multi-family development,” there was equal agreement that “the municipality still was not satisfying its obligation to “provide its fair share of the housing needs of its region,” particularly in relation to the low-income and moderate-income population.” (Id 493) The court’s opinion was based upon a careful dissection of the amended ordinance that exposed the inadequacies of its revisions, revealing how the new regulations amounted to little more than municipal land use manipulation. To document its findings, the court calculated how the prescribed bedroom ratios of the prior ordinance (80% one bedroom, 20% two bedroom) would remain virtually unchanged by the proposed methodology predicated upon a maximum Floor Area Ratio (FAR) computation. (Id 506) Once the profit expectations of private developers were factored into the equation, driven by the need to maximize yield at the highest densities possible, the court concluded that the new standard would do little to encourage the construction of larger units to accommodate poor families. Compounding the court’s concern was the recognition that Madison Township, like Mount Laurel
before it, relied too heavily on the use of Planned Unit Developments (PUDs) to satisfy its obligation with respect to low and moderate-income housing. A reliance that the court believed to be “illusory,” based upon the evidence produced to date. (Id 507)

The inadequacy of the new ordinance was made all the more obvious by the court’s detailed account of the physical attributes of the community, which described Madison Township as the “archetypal developing municipality within the contemplation of the Mount Laurel specifications.” (Id 501) In fact, the court’s land use analysis was so thorough that it demonstrated how the new ordinance was insufficient to satisfy the township’s own calculation of its present need, which in turn failed to address “the prospective continuing need in the foreseeable period.” (Id 507) The conclusion of the court, therefore, was that both the process and results were flawed, stating its belief that “the anatomy of these failures is apparent.” (Id 515)

What was not so apparent, however, was how best to cure these municipal deficiencies. For as certain as the court was at recognizing exclusionary intent, it was now less certain on how best to remedy its impact. Hesitant perhaps in response to the lack of real progress made since Mount Laurel I, the court expressed the uncertainty of its role to correct the allocation failures of the private housing market through the application of strict judicial standards. Expressed rhetorically, the court asked whether it was truly “incumbent upon the courts, pursuant to Mount Laurel, to demarcate a pertinent region and to fix a specific number of lower-cost housing units as the “fair share” of the regional need?” (Id 497) Noting that the trial court “did not specify” but merely “described” the conditions relevant to the township, the answer to the court’s own question was a resounding no. A decision reached in part by an already abundant Mount
Laurel record replete with “methods and techniques for estimating a municipality’s fair share of a regional housing need,” and further influenced by the fact that “the breadth of approach by the experts...is so great and the pertinent economic and sociological considerations so diverse as to preclude judicial dictation or acceptance of any one solution as authoritative.” (Id 498-499) All of which led to the judicial conclusion that “numerical housing goals are not realistically translatable into specific substantive changes in a zoning ordinance.” (Id 498-499)

Reinforcing this conclusion was the *amicus* brief filed by the New Jersey Public Advocate, who also recognized the difficulty of the private market to build lower income housing within a regulatory environment devoid of public or legislative assistance. (Id 512-513) As an alternative it was argued that adjustments to zoning regulations should be required to produced “least cost” housing, “consistent with minimum standards of health and safety which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share.” (Id) The suggestion raised by the Public Advocate was an option embraced by the court in response to the argument raised by the defendant municipality that low and moderate-income housing could not be created through zoning alone and that an acceptable alternative recourse was needed to construct the necessary housing. Another part of that alternative was found in the supplemental brief filed by Madison Township when it proposed that the process of “filtering” would “augment the total supply of available housing in such a manner as will indirectly provide additional and better housing for the insufficiently and inadequately housed of the region’s lower income population.” (Id 512; 514 fn 22) Convinced that it had found the
appropriate solution, the court determined that “nothing less than zoning for least cost housing will… satisfy the mandate of Mount Laurel.” (Id 513)

While the court was certain that the extensive Mount Laurel record made the “substance” of a zoning ordinance readily apparent, allowing for the clear recognition and subsequent removal of exclusionary intent, it was equally convinced that any “bona fide” efforts to eliminate or minimize “cost-generating requirements” were equally recognizable and therefore encouraged. (Id 499) It was then decided that the combined enforcement of these two obvious land use factors would represent the “best promise” for the production of “lower cost housing [over] any of the complex and controversial allocation “models” now coming into vogue.” (Id) In his concurring opinion, Justice Schreiber stated [that] “this is undoubtedly a very great improvement,” for he saw it as satisfying the objective of making the affordable housing process easier by eliminating the municipal need “to devise specific formulae for estimating precise fair share of the lower income housing needs of a specifically demarcated region.” (Id 625)

While the court “hoped” that the new approaches outlined by their opinion in Madison would now “move the State” toward the objective established by Mount Laurel, (Id 500) the impact of their decision was to have just the opposite effect. The eventual consequence was more or less predicted by Justice Pashman, who disagreed with the majority’s lack of specificity in its ruling. Pashman claimed that without standards it was impossible to arrive at any “meaningful estimate of the region’s housing needs or the defendant’s “fair share.” Going even further, Pashman stated that he would have ordered the trial court to “actually identify the region which includes the defendant municipality; determine the housing need for that region and then fix the number of low and moderate
cost dwelling units which shall constitute the municipality’s fair share of the regional housing need.” (Id 592-593) Conceding to the majority that this “approximation need not be mathematically precise or rely exclusively upon any one particular formula or technique,” Pashman remained steadfast in his belief that some level of standard was absolutely necessary. Otherwise, he claimed, “[T]he failure to clarify ambiguities and to formulate guidelines for effective judicial review serves to strip the principles laid down in Mt. Laurel of all practical effect.” (Id 563)

In the end, Madison offered nothing in the way of definitional clarity. It never defined the poor, calculated their numbers nor determined their location. There was only passing reference to the percentage of low and moderate-income households that existed in the township at the time of the 1970 census and the lower court’s ruling on maintaining that percentage as a minimum threshold to be achieved by the new zoning ordinance, but nothing more. Instead, the fair share regional approach was replaced with a rather subjective reading of the “substance” of a zoning ordinance and the “bona fide” efforts to administrate proper land use regulation. What’s more, and again, it made such efforts voluntary, “relying upon good faith effort, despite the fact that, for understandable if not laudable reasons, any such effort has thus far been conspicuous by its almost total absence.” (Id 62
CHAPTER FOUR: THE MOUNT LAUREL DECISIONS

THE FORMULAIC MOUNT LAUREL II

The lack of affordable housing progress that followed the Madison decision could be attributable to “the court’s own hesitation in ordering effective remedies for exclusionary zoning, [which] suggests a lack of commitment to the intent and spirit of the principles which we unanimously announced in Mt. Laurel.” (72 NJ 618) Fueling this perception was the considerable amount of time that had elapsed between decisions, a consequence of “accepted judicial ethos of caution that was taken for indecisiveness.” (Haar 31) Compounding this ambiguity was the lack of political support for Mount Laurel, as each time the judiciary appealed to the legislature to seize control of the issue, its invitation went unanswered.5 Regardless of circumstance, the court recognized the “widespread non-compliance with the constitutional mandate of our original opinion” and set out to reestablish and reinforce the intent of Mount Laurel. (92 NJ 199)

Just as the Madison case seemed to signal a judicial retreat from the battle against exclusionary zoning, Mount Laurel II was an unmistakable return to the fight. While acknowledging but never apologizing for the ambiguity caused by Madison, the court now fully realized that it stood “virtually alone in this field,” as the hopeful expectation of legislative intervention never materialized. (Id 213) While expressing empathy for “the enormous difficulty of achieving a political consensus,” especially given the “social and economic controversy that surrounds this matter,” the court also realized that the lack of

5 In both Mount Laurel I and Madison, the court agreed that such matters were better handled legislatively, actively encouraging the State to insert itself into the process. These invitations went unanswered. “We pointed out, not once, but on numerous occasions, that the problem is better addressed by others.” (92 NJ 250)
political support was encouraging even greater levels of municipal resistance. (Id 212)

Determined by this pervasive lack of compliance to finally “put some steel” (Id 200) into its doctrine, the response of the court was both clear and powerful.

The court seized the opportunity to revisit *Mount Laurel* out of “necessity” for it realized that while some progress had been made, it was “far from where we had hoped to be and nowhere near where we should be with regard to the administration of the doctrine in our courts.” (Id 201) The remedy for eliminating the “long delays of interminable appellate review” came in the form of a three-judge tribunal, created solely for the purposes of hearing every exclusionary lawsuit filed throughout the state. Once impaneled, the court proceeded to divide the state into three separate geographic regions, assigning one judge to hear and decide all *Mount Laurel* cases within their designated jurisdiction. Over time there was an expectation that these three justices would evolve into three-land use experts, acquiring the skills necessary to synthesize a collective set of experiences down to a constant set of legal standards. Only then, the court believed, would “a consistent pattern of regions emerge” (id 216) For consistency was now key in the determinations of regional housing needs, as well as in the allocations of fair share to municipalities within the region. For the court was now certain that “along with consistency will come the predictability needed to give full effect to the *Mount Laurel* doctrine.” (Id)

In support of its new case management strategy the court declared that a “numberless” resolution to the *Mount Laurel* issue would no longer suffice. That “proof” of a municipality’s fair share will be calculated in terms of the number of units needed immediately, as well as the number needed in the future. (Id 214-216) That the sum of
this calculation would include both low and moderate-income housing in proportions that reflect both the regional and indigenous needs of the poor. That the simple elimination of cost producing requirements was no longer sufficient to satisfy municipal obligations and that the production of “least cost” housing would only serve as an acceptable alternative if, and only if, there was no other reasonable option. Instead, government devices such as a builder’s remedy that were earlier declared “rare” exceptions in Madison now became “the centerpiece of the relaunched judicial effort to open the suburbs.” (Kirp 90) By affirming the builder’s remedy, “thereby marrying public interests with private profit,” the court was determined to transform “the abstract judicial principles of Mount Laurel I into workable instruments of social change.” (Haar 51) Once fully articulated, it was now a matter of deciding for whom that change would benefit.

The court’s new found ability to fashion more exact judicial relief was made possible by “means not available to us when we established the “developing municipality” remedial doctrine.” (Id 236) Many of these new and very significant considerations were found in the New Jersey State Development Guide Plan (SDGP), the product of “sound public policy relating to comprehensive planning.” (Id) The SDGP, “which plays an important part in our decision today,” (Id 213), represented “the conscious determination of the State, through the executive and legislative branches, on how best to plan its future.” (Id 215) Created to help preserve the quality of life in New Jersey, the SDGP sought to define the acceptable limits of future growth by assessing the physical and economic assets of the state. (N.J.S.A. 13:1B-15.52) The results of that inventory were incorporated into a development suitability map that delineated the preferred locations of all future “growth areas” throughout the state. The value of this
singular map was enormous, as it allowed the court to simplify the very abstract process of defining a “developing municipality” by requiring every municipality containing state-designated “growth areas” to have a Mount Laurel obligation. By accepting the state’s process of delineating “where this development should occur,” the court declared that the statewide application of “zoning in accordance with regional considerations” was now a firm legislative mandate.

Equally critical in the development of an objective Mount Laurel methodology were the national standards published by the federal Section 8 housing program. In a rather extensive footnote, the court highlighted the federal guidelines for defining low and moderate income and then adapted those standards to fit the income requirements created for the purposes of Mount Laurel. (Id 221, fn #8)) While the court’s “phraseology” was slightly different from the federal definitions the results were the same. “Moderate-income families” were defined as those earning between 50 and 80 percent of the median income of the area, which was analogous to the federal definition of “lower income families.” Low-income for the purposes of Mount Laurel was defined as those families falling below the 50 percent median threshold, which represented “very low income” families according to the federal criteria. While the court’s income designations were more liberal, it chose to stay with the more conservative definition of housing cost affordability. Expressed as a percentage of family income to housing costs, the court decided to maintain the previous benchmark of 25 percent over the new federally adjusted level of 30 percent of income to housing costs.

The court’s decision not to adopt the higher federal standard for cost-burdened families was predicated on the significant median house price inflation that had occurred
between 1970 and 1980. This statistic revealed that only one in twenty New Jersey families could afford to buy the 1982 median priced home. (Id 212 fn 6) The depth of the housing affordability problem was documented in a 1978 Housing Allocation Report (HAR) from the New Jersey Department of Community Affairs (DCA). The HAR estimated the total number of low-income households in New Jersey at 800,000, which at the time represented 39.4 percent of all New Jersey households. (Id 222 fn. 8) By utilizing the 1970 census to generate its baseline calculation, the state assumed that as a percentage of all households the number of poor families in New Jersey would remain constant. In absolute terms, this meant a proportionate increase in the number of poor families as the population increased over time. If, as was also projected the size of the average New Jersey household would continue to shrink, then it was likely that the estimate would be even larger than anticipated. (Id)

By blending the land use strategy of the state with the income guidelines established by federal housing policy, the court was convinced that a determination of the municipal fair share of a regional obligation “solely on an objective basis” was now possible. (Id 221) Beginning with the “growth areas” map produced by the SDGP, the court declared that every “developing municipality” could now be properly identified; a designation that carried the additional responsibility of satisfying “prospective” as well as “indigenous” housing need. Calculated separately, the size and depth of each component could now be determined by utilizing the income eligibility standards promulgated by the federal government. Customized to reflect the regional differences in national economic conditions, the data specific to New Jersey was available through the two regional offices of the US Department of Housing and Urban Development (HUD) located in the cities of
Camden and Newark. Adjusted annually for both inflation and household size, local accessibility to the federally adjusted income standards provided an incontrovertible source of information critical to the consistent application of a fair share formula.

In addition to income, the indigenous need calculation was also to include the current municipal inventory of all dilapidated and uninhabitable housing units. When combined with the current number of income-eligible households, total present or indigenous need was defined. By adding the prospective needs of the future poor, based upon income and population projections, the overall affordable housing need for each municipality could be determined. Before combining these two components to produce a total municipal need calculation, numerical adjustments in response to any disproportionate local conditions were deemed essential to completing the fair share process. Only then, declared the court, could the projection of need include the “value” judgments necessary to make each municipality’s “fair share” obligation truly fair. (Id 258)

This was especially true in the mostly poor and urban communities throughout the state, where a disproportionate percentage of the existing housing stock was unfit for occupancy. Both the need and the responsibility to replace these units were declared a shared obligation among all developing municipalities across the same housing region. The exact distribution of this excess present need was again to become a function of a value judgment, determined as much by the municipal actions of the past as by the emerging growth patterns of the future. For example, it was reasonable to assume that those suburban municipalities predicting small increases in population despite “substantial developable land” might be benefiting from the consequences of past
exclusionary zoning practices. (Id) Not to compensate for such an obvious evasion of past responsibility would be wrong in the eyes of the court, as harmful as applying too great a fair share burden that might adversely affect the population projection of that municipality. (Id) This same logic and process held true for the calculation and distribution of prospective need, where future population projections were to be examined within the context of past land use practices. Likewise, the result of such an analysis would serve to guide the equitable allocation of future housing need across established housing regions.

While the court recognized that it would be much “simpler” to calculate a municipality’s fair share by determining its own probable future population (or some variant thereof), it also recognized that such a method would not be consistent with the constitutional obligation. (Id 257) Therefore, the incorporation of regional adjustments to compensate for local land use abuses made the municipal construction of a fair share formula more equitable. In particular, formulas that would “accord substantial weight to employment opportunities in the municipality, especially new employment accompanied by substantial ratables,” were especially “favored” by the court. (Id 256) Conversely, formulas that attempted to tie prospective need to the present proportion of lower income residents to the total municipal population were discouraged. Once the appropriate regional adjustments were incorporated into the fair share formula, total present need could be combined with total future need to yield a total municipal need. In the aggregate, every municipal obligation would then be accrued to generate the total and statewide need for affordable housing.
Once the allocation process was complete and the individual municipal obligation established, only then was it possible to evaluate whether existing zoning and land use regulations made the opportunity for municipal fair share compliance “realistic.” If they did, then the obligation was satisfied; if they didn’t, they didn’t. What constituted a “realistic” opportunity was now a matter of “whether there is in fact a likelihood—to the extent economic conditions allow—that the lower income housing will actually be constructed.” (Id 222) Simply demonstrating a good faith effort, something the court encouraged in both *Mount Laurel I* and *Madison*, was no longer sufficient. Instead, the presentation of “real proof” would now be required in any case where a plaintiff alleges non-compliance of a municipality’s fair share of the regional need against a defendant’s claim of satisfaction. (Id) For the court clearly recognized, “based upon the past eight years of experience with *Mount Laurel*” that “until the regions of New Jersey, their present and prospective lower income housing needs, and the allocation of those needs among all of the municipalities of the state charged with the *Mount Laurel* obligation are determined, uncertainty will prevail, and the weakness of the constitutional doctrine will continue.” (Id 252-253)

Perhaps it took those eight years of futility to compel the court to express “some humility” over its previous failure to adequately define fair share. (Id 251) Recognizing that in spite of their good intentions, “Madison has led to little but a sigh of relief from those who oppose *Mount Laurel,*” the court was more intent than ever to finally remedy the situation. (Id 252) While noble in their admission of failure, the court was also quick to express its continued frustration over the persistent lack of executive or legislative action in this matter. Given the leadership vacuum created by the absence of political
commitment, the court was left with no other option but to assume control of the *Mount Laurel* process. In response, the legal mechanism designed to streamline the fair share process was set into motion. The court, believing that “enforcement to be effective will require firm judicial management,” proceeded to turn the entire process over to three *Mount Laurel* judges. (Id 252)

Despite the conviction that “the restriction of *Mount Laurel* litigation to three judges should simplify and perhaps, in time, substantially eliminate the issues of “region” and “regional need,” (Id 253) the court offered little else in the way of definitional guidance. This new found confidence seemed to contradict the most consistent judicial belief that “the determination of region was more important in achieving the goals of *Mount Laurel* than the fair share allocation itself.” (72 NJ 541) Obviously, the court was convinced that a restricted process of trial and error represented the best and ultimate methodology for prescribing the exact definitional limits of a region. The expectation being that as each of the three judges grew more adept in handling *Mount Laurel* litigation, “a regional pattern for the area for which he or she is responsible will emerge, and ultimately, a regional pattern for the entire state will be established.” (Id 254) The court’s anticipation was that over time the “ultimate outcome...in most cases shall be a determination by the court of a precise region, a precise regional present and prospective need, and a precise determination of the present and prospective need that the municipality is obliged to design its ordinance to meet.” (Id 257) With no further judicial guidance with respect to the issues of region and regional need provided, the court was ready to turn the process over to the experts, “including the experts appointed by the trial courts pursuant to our opinion” to finally resolve the issues of fair share. (Id)
WARREN:

At no time in the history of *Mount Laurel* was there a greater assemblage of “experts” than in the case of AMG Realty Co. v. Warren Township. (207 NJ Super 388) As the first post-*Mount Laurel II* litigation to be fully tried, the *Warren* decision attempted to settle all of the unresolved fair share issues in one sweeping legal opinion. Presided over by superior court judge Eugene Serpentelli, one of the three *Mount Laurel* justices chosen by the New Jersey Supreme Court, the focus of Serpentelli’s effort was to “start the process of developing a method of fair share allocation and eliminating the confusion surrounding the issue.” (Id 393) While ambitious, there seemed to be no other option, as the pressure to find an acceptable methodology began to swell in response to the growing number of *Mount Laurel* lawsuits now piling up in the courts. A year after *Mount Laurel II* affirmed the use of the “builder’s remedy,” there were 61 cases pending in the courts; all but 2 were filed by developers. One year later that number nearly doubled to 125, as the flood of developer inspired legal activity threatened to quickly overwhelm the nascent judicial case-management system. (Kirp 104) As a result and to his credit, Judge Serpentelli responded quickly to the challenge of transforming theory into practice, knowing that “until practical meaning was attached to the concept of fair share, no construction of suburban affordable housing could proceed.” (Haar 56)

The initial *Warren* case was very straightforward, as the municipality sought to successfully defend the charges of exclusionary zoning brought against it by a developer plaintiff represented by the AMG Realty Company. Shortly after the trial began, both parties engaged in settlement negotiations to try and forge a mutually acceptable determination of a municipal fair share, along with the subsequent ordinance revisions
necessary to ensure municipal compliance. (207 NJ Super 394) As a first step, counsel for each of the parties authorized their respective planning experts to discuss an appropriate methodology for identifying Warren’s fair share. Each expert in turn was encouraged to engage and consult with other recognized authorities in the field prior to submitting their individual reports to the court. This included the recently released report from the Center for Urban Policy Research (CUPR) at Rutgers University entitled “Mount Laurel II—Challenge and Delivery of Low-Cost Housing.” (Id 395) Once the collaboration process was complete, “there evolved from the efforts of the experts a document which has become known as the “Warren Report.” (Id) Both the content and the process by which the report was completed was significant. In addition to delivering a mutually-agreed upon fair share number for Warren, the scope of the report also attempted “to resolve the other issues involved in the case including builder’s remedies.” (Id) An agreement on the fair-share number for Warren by both the plaintiff and defendant sent the court into temporary adjournment, as the proposed “settlement” required the formal approval of Warren Township.

During the trial’s hiatus, “the Warren Report quickly became a topic of discussion in many case management conferences conducted by the court,” including the largest case pending on Judge Serpentelli’s docket. (Id) In the matter of the Urban League of Greater New Brunswick v. Borough of Carteret, a request to attempt a similar consensus approach was made by counsel in this case. While initially reluctant, since there were eight plaintiffs and seven defendants joined in this suit, Serpentelli agreed to the request. Perhaps “seeking guidance as much as the legitimacy that would derive from professional
consensus,” (Haar 57) nearly two-dozen experts were authorized by their respective attorneys to participate in this collective fair share exercise.

In a move that circumvented normal legal convention, the judge arranged for a pre-trial conference without lawyers. Instead, Serpentelli convened the delegation of planners under the leadership of Carla L. Lerman, the court appointed expert in the Urban League case. (207 NJ Super 396) Quickly realizing, however, that “the planning community could debate for years over equally reasonable alternatives,” the judge decided to sequester the planners in an attempt to “hammer out a consensus formula for prescribing regional fair share.” (Haar 57) What emerged after a series of preliminary drafts was a final report that “established a method of fair share allocation not only applicable to the seven defendants in the Urban League litigation,” but also, in the view of the planners, “to any other municipality in the state.” (207 NJ Super 396)

The application of this new “consensus methodology” was quickly put to the test, as Serpentelli was informed during the Urban League process that a settlement in the Warren case could not be reached. Once the trial was resumed the calculation of Warren’s fair share obligation was established by the use of the new “consensus methodology.” For Serpentelli, this provided the legal opportunity for the court “to test, in a truly adversarial setting, the value of the accord reached in Urban League.” (Id)

The written opinion in the Warren decision resembled a tightly structured “user’s manual” for the precise calculation of a municipal fair share obligation. But it had to. Given the almost desperate need to eliminate the confusion surrounding the issue of fair share, the court was compelled to provide a level of detail necessary to “enable any municipality affected by the methodology to understand the mechanics of it so that it can
precisely identify its own obligation.” (Id 394) Otherwise, there would be no standard by which to measure municipal compliance, and therefore the ultimate goal of Mount Laurel—the actual construction of low and moderate-income housing—would never be realized. (Id 393)

From the outset of his decision, Judge Serpentelli set forth both the tone and the urgency of his findings by declaring that Warren Township had a fair share obligation of 946 dwelling units for the decade of 1980-1990; that the township’s land use ordinances were not sufficient to provide a realistic opportunity to satisfy this level of obligation; and that as a result, plaintiffs were entitled to a builder’s remedy. (Id) What followed next was a detailed explanation of the fair share methodology employed to support his findings. By his own admission the judge described the process as both tedious and necessary since “the bottom line to all those involved in the litigation is the number generated.” (Id 450)

By breaking the formula down into its constituent parts, Judge Serpentelli was able to focus his definitional attention on each of the variables that comprised the fair share methodology. Beginning first and foremost with the concept of region, the judge walks the reader through the unique lexicon of fair share, providing the “consensus” definition and the accompanying data source for each of the relevant terms. Those definitions are then transformed into their respective numerical values, expressed as an equation to produce a total fair share calculation. For Warren Township, the numerical outcome generated by the “consensus methodology” produced a total fair share obligation of 946 units of affordable housing. For the town, this was deemed to be excessive; to the judge, the “pivotal question [was] not whether the number was too high or low, but whether the methodology that produces the number is reasonable.” (Id 453)
In order to achieve reasonableness, Judge Serpentelli insisted that the fair share methodology possess three keystone ingredients: reliable data, as few assumptions as possible, and an internal system of checks and balances. (Id) While it was in the judge’s opinion that all three of these principles were embodied in the Urban League Report (ULR), his unconditional support generated criticism among those who believed that his opinion in Warren merely “rubber stamps the Urban League approach.” (Id 453) In response, the judge encouraged all who would offer a better alternative to come forth, to either improve upon the methodology or to replace it with something better. (Id) Five months after the Warren decision, the Center for Urban Policy Research (CUPR) at Rutgers University responded to Serpentelli’s challenge and released a report entitled: Response to the Warren Report: Reshaping Mount Laurel II Implementation. The quick reaction and publication of the Rutgers report was in response to what was perceived as a violation of the judge’s own criteria for a “reasonable” methodology, believing that the data used in support of the underlying assumptions of the Urban League Report were both flawed and unreliable.

WARREN AND THE URBAN LEAGUE REPORT (SERPENTELLI) VERSUS THE RUTGERS REPORT (SKILLMAN)

While the numerical differences between the Urban League Report (ULR) and the Rutgers Report (RR) were often times slight in terms of outcomes, the methodological differences were substantial. Nowhere was this more evident than in the determination of what constituted a region. While the ULR advocated two separate regional declinations for the calculation of a municipal fair share, the RR created and fixed a total of six regions for the same purposes. The disparity in approach was as philosophical as it was
practical, with one created from the “consensus” of the experts engaged in the day-to-day combat of *Mount Laurel*; while the other was crafted from some of the best housing scholars in the nation. The degree of divergence, however, was not limited in scale over the geographic limits of a region, but instead filtered all the way down to the classification of a single housing unit.

**Region:** The ULR believed that “each municipality should have a present need region and a prospective need region” in order to calculate fair share. (Id 399) The formation of a present need region was to be based upon a fixed area defined by county lines, but large enough to carefully disburse the high levels of need in the urban areas to those less dense and emerging suburban communities. The outcome of this approach resulted in the configuration of four separate present need regions, which included an eleven-county super region that encompassed most of northern, central and western New Jersey. (Id)

Conversely, the prospective need region was predicated on a modified “commutershed” approach, which appears to recognize the court’s historical preference to spatially link housing markets with commuting patterns. The judicial consistency of recognizing “commutation” dates all the way back to *Mount Laurel I* and Judge Pashman’s concurring opinion, (67 NJ 215, fn 16) which proved to be highly influential at both the trial and the higher court’s decisions in *Madison* and beyond. (72 NJ 537) However, the commutershed calculation of the ULR was rather cumbersome, as the prospective need region was to be measured by the area traversed over a 30-minute drive traveling 30 miles per hour from a municipality’s “functional center.” While there were a number of different ways to define the origination point of the journey, different speeds
for different road conditions were also introduced into the equation. Multiple options produced multiple results, which led the court to decide that the entire area of a county would be included in any municipality’s prospective need region should the 30-minute drive extend the commutershed into any point within a contiguous county. (207 NJ Super 400) As a result, the center of each municipality became the center of its own region, which in the aggregate produced a total of 567 regions across the state of New Jersey. The pure logistics of managing such a process and the multiplicity of outcomes it would produce apparently failed to concern the court. In fact, Judge Serpentelli viewed the possibility for overlapping boundaries as a way to actually reduce regional conflict, since the “prospective need region typically represents the largest portion of the municipality’s fair share.” (Id 415) Furthermore, the judge understood that the construction of a prospective need region was an ephemeral artifact of the ULR fair share process; one that would literally “disappear” once the allocation was developed (Id)

By comparison, the RR strongly disagreed with both the logic and the need to bifurcate the fair share methodology into separate regional calculations, believing that such a process actually circumvented the Mount Laurel II recommendations for the definition and purpose of a region. (Burchell 84 at 7) Instead, the RR delineated six stable and fixed regions for both present and prospective need, challenging the ULR on both of its assumptions relative to commutation and the reallocation of need from urban to suburban communities.

The foundation of the RR rebuttal centered on one of the major keystones of Judge Serpentelli’s test for reasonableness: reliable data. In contrast to the ULR, which used extrapolated data from a 1978 report published for the entire Tri-State metropolitan
region, the RR utilized the Public Use Sample from the Summary Tape File (STF) of the US Census. (Id 19) The Public Use Sample is a 5 percent random sample of all households that provides a finer level of informational detail across a wider array of socioeconomic indicators. By qualifying the research investigation to only those households earning 80 percent of median income or less, the RR was able to extract the Mount Laurel population from the general population of New Jersey. Once identified, the relevant household characteristics specific to this population were captured, which for the Public Use Sample included both the time traveled to and from work and the origin and destination of the worktrip. (Id 46)

The commutation information provided by the 1980 Census was critical to the regional solutions developed by the RR, as the national data revealed an average (mean) distance to work of approximately 12 miles, with an average travel time of 24 minutes. The data for New Jersey was nearly identical at 12 miles and 25 minutes respectively, which represented a slight decline from the 1970 decennial census. (Id 39) This reduction in both travel time and distance was said to reflect the growing suburban migration of employment out from the urban centers of New Jersey, a phenomena supported by the strong job-residence linkage recorded by the Public Use Sample. (Id) This relationship became even more pronounced when the specific commutation profiles of the eligible Mount Laurel population were examined, which revealed that over 88 percent of workers in Mount Laurel households lived and worked in the same RR specified region. (Id 8)

This statistical correlation supports the regional strategy of the RR to join geographic areas together that are linked by the cross commutation from place of residence to place of work. In contrast to the random “commutershed” approach
advocated by the ULR, the RR insisted that it was the dynamic of the “journey-to-work” factor that drove the national state-of-the-art in housing market research. Citing a “widespread consensus” within the land use literature, the RR argued that it was the “node” of the major employment center around which the commutation area is drawn and not the functional center of a community where the residential settlement will take place. (Id 13) Besides conforming to national planning convention, this approach to housing market analysis appeared to favor the consistent direction of the court, which had indicated its “general approval” of the lower court’s definition of a region in Madison to include “the housing market area of which the subject municipality is a part, and from which the prospective population of the municipality would substantially be drawn, in the absence of exclusionary zoning.” (92 NJ 256) Through its use of census data, the RR was able to demonstrate how the overwhelming share of New Jersey residents both lived and worked within each of the six geographic regions specified by their methodology.

In addition, the geographic configurations proposed by the RR seemed to satisfy another of the court’s principal objectives of achieving balance, “such that one region was not significantly poorer or more urban than another nor were there to be noticeable differences in either housing types or housing quality.” (Haar 219, fn5) Once again, it was the 1980 census data that was critical to the result achieved, as the RR utilized the Public Use Sample to develop its proposed regional strategy. By comparison, the 11-county super region created by the ULR did not appear to meet the same judicial standard, a consequence justified at the time by the overwhelming present housing needs that existed within New Jersey’s cities. While urban housing conditions did constitute the majority of
present need requirements, the data failed to support both the outcome and the assumptions behind the ULR proposal.

Specifically, the ULR assumed that all present need would be satisfied via new construction, and further that the majority of that need would be physically separated from place of employment. Conversely, the RR argued that rehabilitation of the currently deficient housing stock would satisfy at least a portion of the present need, thereby lessening the necessity for reallocation. Moreover, census data revealed that close to 50 percent of present Mount Laurel need was permanently out of the labor force, either through age or disability, and therefore not likely to move. (Burchell 84 at 10) Furthermore, the 1980 census data also disclosed that “a large share of central city residents work in the city.” (Id) In addition to the overwhelming statistical support for its position, the RR utilized state land use maps to confirm the capacity for each of the six proposed regions to physically absorb their individual present housing needs.

If by no other assessment than the court’s own “three keystone” test for establishing a “reasonable” fair share strategy, it should have been clear that the RR presented a superior methodology over the ULR. First, meeting the “reliable data” criteria was accomplished by the use of the Public Use Sample, as this source minimized the need to make “as few assumptions as possible.” Second, the 1980 Census was reorganized into smaller more “regional” configurations called Primary Metropolitan Statistical Areas (PMSAs). This change in the way census data was organized and presented provided the RR with the definitive “internal system of checks and balances.” As the first state in the country to have all of its geographic area in one type of metropolitan designation or another, New Jersey became the “first metropolitan state.”
Previous to the 1980 Census, the data specific to New Jersey was divided between two large Consolidated Metropolitan Statistical Areas (CMSAs), which geographically and statistically separated the state between north and south. Prior to 1980, data collection and interpretation was truly a matter of extrapolation, requiring information to be segregated out at both the municipal and county level in order to aggregate it back again to construct a specific regional or state profile. This was as tedious a process as it was imprecise, for the information specific to New Jersey was often subsumed by the overwhelming data influences of both New York and Philadelphia, respectively.

Thankfully, this mind-numbing exercise became obsolete when the 1980 Census introduced the PMSA as a geographical unit of measurement. This change in both the organization and presentation of data on a national level was significant for several reasons. First and foremost was the fact that both the US Department of Housing and Urban Development (HUD) and the Department of Labor (DOL) recognized the PMSA as housing and labor market areas, respectively. Equally important, especially for New Jersey, was that there was almost an exact geographical correspondence between the PSMA “regions” configured by the US Census and the Mount Laurel regions designated by the RR. This was not coincidence, as the conceptual approach employed by the Census to assemble and define PMSA regions was based upon the journey-to-work relationship and the regional linkages created as a result. (Id 61) Therefore, by establishing Mount Laurel housing regions that correspond to the most current forms of national data presentation, the RR methodology appeared to better ensure the future reliability and durability of the Mount Laurel process.
CURRENT OR PRESENT NEED: As different as the two processes were for constituting a region, the contrast between the RR and the ULR for calculating present and prospective housing need were equally disparate. Much of the difference is once again focused on the data source, as the RR utilizes the Public Use Sample to identify the income-eligible Mount Laurel population living in substandard housing units. This was a rigorous exercise that was accomplished by examining each record on the census tapes and qualifying only those households that met the HUD Section 8 low and moderate-income guidelines. Once identified, income eligibility was adjusted according to the size of the household, allowing larger families to earn beyond the maximum thresholds while reducing the amounts earned by smaller households. Once these adjustments were made, the physical condition of the housing occupied by the Mount Laurel eligible population was then evaluated.

To approximate the physical condition of the nation’s housing stock, a full range of indicators were established by the 1980 Census to signal potentially deteriorated housing. These variables included everything from the age and physical condition of the unit to the adequacy of the space allocated for each member of the household. At a minimum, the RR established that income-eligible housing units possess at least two of these characteristics to be classified as deficient, with the exception of all housing units built prior to 1940. Citing data presented by the 1981 American Housing Survey, it was determined that the relationship between the number of housing units lost from the available national inventory and the age of the structure was “reasonably correlated.” (Id 33) When this variable was applied to New Jersey, it was discovered that close to 90 percent of the housing occupied by the housing-deficient Mount Laurel population had
been constructed prior to 1940. (Id 112) Given these results, the RR established that all income-eligible units built prior to 1940 required the presence of only one other structural characteristic to be classified as deficient. For those units built after 1940, a minimum of two surrogates plus income was needed to signal housing deficiency. (Id 28)

The qualification of income defines one of the many differences between the two competing methodologies. While the RR controlled its analysis using the published Section 8 income guidelines, the ULR chose not to delimit their analysis to income eligible households. Instead, the ULR chose to apply their standards of housing deficiency across the entire inventory of New Jersey’s housing stock. In addition, the RR chose to evaluate physical condition by the full range of housing indicators established by the US Census, whereas the ULR chose to utilize only three of the federal indices. Furthermore, the RR required the presence of multiple surrogates to indicate deficiency, whereas the ULR required only one surrogate. (Haar 61)

From a numerical perspective, the total statewide differences between these two calculations were not large, especially once the ULR outcome was adjusted according to defined Section 8 guidelines. But the methodological differences were significant, as the limited and somewhat subjective use of surrogates created considerable geographic variation across regions. (Burchell 84 at 34)

**FUTURE OR PROSPECTIVE NEED**: In many ways, future or prospective need was easiest to calculate, but no less controversial. The RR relied upon the Demographic Cohort Model, a state-of-the-art convention used throughout the planning literature that mathematically survives the population into the future. As each age cohort is projected through the next cycle of life, fluctuating in number as the natural
consequences of fertility and mortality are factored into the equation, a final calculation is made to incorporate the historical impact of migration on the population. When complete, total population estimates are then converted into households via the application of “headship” rates, since it is the formation of new households that drives the demand for housing. (Hughes 87)

By contrast, the ULR believed that the methodology employed by the RR produced too low a population projection and chose instead to blend two projection models together. By combining aspects of the Demographic Cohort Model (used exclusively by the RR) with the more aggressive Economic Demographic Model, the population estimate generated by the ULR was indeed higher. In fact, the ULR estimate came closer to the actual population projections published by the state. (Burchell 84 at 40) But once again it was not the numerical degree of separation that provided the real substantive difference between the two competing methodologies, as the disparity in outcome was not nearly as great a quantitative issue as it was qualitative.

The need to establish a rational planning process to generate equitable Mount Laurel solutions was obvious. Otherwise, satisfaction of the constitutional obligation was impossible. The whole purpose of Mount Laurel II was to eliminate the ambiguity responsible for inaction, to provide the specificity necessary to encourage compliance by identifying the municipal fair share of the present and prospective regional need for low and moderate-income housing. To Judge Serpentelli’s credit, the methodology that evolved into the ULR was a rigorous exercise in consensus planning. Unfortunately, the hybridized use of many national planning standards produced numerical results that were hard to rationalize. From the dual configuration of present and prospective need regions,
employing an unconventional commutershed approach for one and a blending of population models for another, to the subjective selection of federal criteria to determine housing quality, the ULR was perhaps too specialized for its own good. While debatable among the planning and legal elite, the ability to translate the esoteric details of such a complicated process down to the municipal level would require specialized training. Since no formalized agency was created for such a purpose, the procedural burden for calculating fair share fell to the now select group of planning experts under the jurisdiction of the three specialized Mount Laurel judges.

But even among the judges there was considerable debate about the specifics of the process, as each called into question the many procedural differences between the two competing methodologies. While characterized as the “only serious intellectual rival to the ULR,” (Haar 61) the RR provided more than just a clear methodological alternative. It correctly challenged many of the underlying assumptions supporting the ULR process. Swayed by the logic of the RR, Judge Serpentelli modified and lowered the percentage of present need units occupied by low-income households. Judge Skillman, however, one of the other three Mount Laurel judges, rejected the calculation altogether. While Skillman accepted the RR methodology for determining present need he chose instead to utilize the ULR process for distributing that need. (Id) Even among judges, consensus is often difficult to achieve, especially when theory attempts to be placed into practice.

**Numbers:** While Judge Serpentelli was correctly focused on methodology, the ultimate objective of the process was to generate an estimate of the state’s total affordable housing need. The ULR estimated a total of 243,000 units of affordable housing over the ten-year period from 1980-1990, or roughly 24,000 units a year. (Haar 102) The RR
calculated a total present and prospective need of 194,000 units over the same ten-year period. (Burchell 84 at 53) Numbers that when averaged represent a difference of about 5,000-unit/year. While the numerical differences may appear small, the variation in logic behind the numbers was large. Although the RR produced a total need number that was significant, that number was then divided in half. This was necessary, according to the RR, to reflect the various market mechanisms at work in the normal housing supply chain. These included the net impact of conversions, rehabilitations and filtering, all of which are recognized conventions both in theory and in practice. Through these secondary market sources, the RR estimated that roughly 89,000 units of affordable housing would become available during the ten year period of the study. (Id 55) In contrast, the ULR was only estimating the number of new housing units necessary to satisfy total statewide need.

The RR argued that to rely solely on new construction to fulfill the Mount Laurel mandate was impractical for two reasons. First, there was no historical record of the state’s capacity to build such a large inventory. When applying the 20 percent inclusionary factor associated with a builder’s remedy, the ULR estimate would require in excess of 900,000 market-rate units to produce roughly 240,000 units of affordable housing. The combination of which is in excess of 1 million housing units. Second, the RR argued that the construction of new units to satisfy total need would be accomplished at great dislocation to existing low and moderate-income population. (Id 57) The question the RR raised at the time is one that continues to divide the Mount Laurel debate to this day: “Is this magnitude of household moves and social engineering practicable or
desirable, as opposed to allowing at least a portion of that need to be met by rehabilitation and other forms of reuse? (Id)

In the end, and despite Judge Serpentelli’s opinion that it’s not “whether the numbers are too high or low, but whether the methodology that produces the numbers is reasonable,” (207 NJ Super 453) it’s all about the numbers. It always has been, and it always will be, at least in New Jersey.
CHAPTER FIVE: AFTER MOUNT LAUREL—THE FAIR HOUSING ACT

“While provision for the actual construction of that housing [low and moderate-income housing] by municipalities is not required, they are encouraged but not mandated to expend their own resources to help provide low and moderate-income housing.” N.J.S.A. 52:27D-301 et seq.

If a law only encourages but doesn’t mandate, is it really a law, or just a goal? When no statutory compliance is required, is enforcement possible? If an administrative body is established to monitor the voluntary requirements of such a law, what standards are applied to effectively measure the impact of the legislation?

Far from facetious, the questions raised accurately reflect the historical ambiguity associated with the Fair Housing Act (FHA). (N.J.S.A. 52:27D-301 et seq.) Controversial since its enactment in 1985, the FHA has been the source of constant confusion, the victim, many claim, of the inherent contradiction embodied within a voluntary law. And yet the reality of the law has only served to add to the uncertainty, as compliance is necessary to secure immunity from its potential consequences. Otherwise, municipalities run the risk of being exposed to private market forces that are legally and financially empowered to produce affordable housing as a desired public good. Failure to act becomes an open invitation to fight, with a history of court-ordered solutions that almost never favor the defending municipality. In fact, the record is so one-sided that a website devoted to identifying the communities that remain recalcitrant and potentially vulnerable to litigation was created by a prominent New Jersey law firm. (www.njlanduselaw.com)

Developed as much to attract potential clients and profits than as an information resource, it is the nature of this enterprise that explains much of the public contempt for the Fair Housing Act.
Ironically, it is the legal and financial nexus with the private sector that ensures the effectiveness of the Fair Housing Act. Conversely, the FHA is loathed for the very same reason, as the use of private sector incentives to ensure legal compliance has served to foster strong municipal resentment. Like moths to a flame, developers are drawn by the potential windfalls realized from expedited zoning approvals at increased levels of density. The partnerships forged between lawyers representing builders determined to bring “poor people” into suburban communities is regarded as an unholy trinity.

Sometimes the potential legal threat has worked to strengthen municipal resolve, rallying public opinion against the invading forces. At other times the legal obligation is persuasive, as the inevitability of the outcome motivates municipal compliance. Either way, strong feelings are generated that often distort the intended purpose of the legislation. Once engendered, these emotions remain deeply embedded within the collective municipal psyche. It is this passion that serves to underscore the volatile history of the Fair Housing Act.

**The Three Mount Laurel Judges**

While each of the three Mount Laurel judges scrambled to fashion their own consistent fair share strategy, the backlog of builder remedy lawsuits began to pile up. By “marrying public interest to private profit,” (Haar at 44) the court granted expedited approval to any builder’s project that successfully challenged a town’s zoning ordinance as exclusionary. This process also ignited a development “feeding frenzy.” (Payne 92) The court held that “where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder’s remedy should be granted.” (92 NJ 279) While this ruling stood in stark contrast to the court’s
original thinking, expressed in its earlier decision in *Madison* that such drastic action against a municipality would be “rare,” it was now justified on the basis of “experience…[that] demonstrated to us that builder’s remedies must be made more readily available to achieve compliance with *Mount Laurel.*” (Id)

By definition, the court established the minimum threshold of “substantial” at 20 percent of the total number of housing units proposed. Consideration to the overall size of the builder’s project and what proportion of the defendant municipality’s “fair share” would be satisfied by the project was to be included as part of the final determination. (Id 279, fn 37) The only exception to the grant of a builder’s remedy would occur when “the plaintiff’s proposed project [was] clearly contrary to sound land use planning.” (Id 280)

In addition to the prospect of expedited project approvals, the builder’s remedy provided for a density bonus as well. An increase in zoning allowed a greater number of housing units to be built, which in theory would produce greater profits. Absent this “inducement” the court reasoned that no builder would take advantage of the opportunity. The increased density was justified to generate the multiplier necessary to make the 20 percent threshold feasible. (Id 261) Project approvals and therefore financial projections were then predicated on a 4:1 yield ratio. This meant that 4 market rate units could be built for every affordable unit constructed. Once again theory proposed that an increase in the number of market-rate units would generate the excess profits sufficient to offset the revenues lost when affordable units were sold at below the market rate. Apparently the theory translated so well into practice that some 70 lawsuits were filed in the two years following the 1983 *Mount Laurel II* decision. (Wish 38)
The second incentive created by the court was relatively straightforward: volunteer to comply and receive six years of immunity from the builder’s remedy. But in order to receive this “judgment of repose,” the court warned that municipal change must be substantive, something beyond “meaningless amendments to zoning or other documents.” (92 NJ 260) Specifically, the court was looking for municipal initiatives beyond “the inclination of developers to help the poor;” something tangible that would make it “realistically possible for lower income housing to be built.” (Id 261) The absence of “affirmative inducements to make the opportunity real” would in turn make the grant of immunity unlikely. (Id) Likewise, those who chose not to participate and be subject to a whole series of judicial remedies. These penalties ranged from nullifying all existing zoning to imposing a moratorium on the issuance of any building or development permits. Municipal noncompliance had now become a much more serious matter, and the consequences much more punitive. (Id 280)

On the flip side of the compliance coin the court attempted to build in several safeguards against possible abuse of the doctrine. Not to be tolerated was the use of the builder’s remedy as a potential “bargaining chip” to coerce municipal approval for projects that contained no affordable housing. Conversely, the court also recognized the need to adjust the timing of some builder’s remedy projects so as not to overwhelm those communities faced with a significant fair share obligation. But in spite of the court’s attempt to predict and address potential problems, the public reaction to the second Mount Laurel decision was intense. When former Governor Tom Kean characterized the Mount Laurel II ruling as “communistic,” his voice reverberated throughout the state and the statehouse. (Kirp 111) Fueled largely by the builder’s remedy and the pace of
development that was taking place at the time, a showdown between all three branches of state government became inevitable. The political priority to diffuse the impact of the builders remedy was clear, for it was seen as the most drastic application of the Mount Laurel doctrine. (Haar 93) On the other hand, housing advocates were looking to preserve the builders remedy as a central element to any proposed legislative compromise. (Kirp 120) After a contentious and protracted debate, the New Jersey Fair Housing Act (FHA) was enacted into law on July 2, 1985. (P.L. 1985, C.222)

Almost immediately the FHA engendered a nearly reciprocal public response, as the new law placed an immediate moratorium on the builder’s remedy, transferred all lawsuits out of the courts and into a new administrative body and established a controversial funding mechanism that would allow for the transfer of up to 50 percent of a municipality’s “fair share” obligation. All of which prompted even more lawsuits.

The Fair Housing Act

It may be impossible to put politics aside whenever the discussion turns to Mount Laurel, but the emotional level of the debate has typically obscured the law. Since its inception in 1985, the Fair Housing Act (FHA) has been the legal framework under which the state’s affordable housing policy has operated. A self described “statutory scheme…which satisfies the constitutional obligation enunciated by the [New Jersey] Supreme Court,” (NJSA 52:27D-303) the Fair Housing Act was created to reinforce the constitutional need to accommodate the poor; the existing as well as the future poor. Guided in its enforcement by the state’s planning objectives embedded within the SDGP, the Fair Housing Act was constructed on the basis of land use regulation established in
accordance with regional consideration and sound planning concepts. This was achieved by the near simultaneous revisions being made to the SDGP through the State Planning Act of 1985, (N.J.S.A. 52:18A-196 et seq) which in combination served to enforce the judicial conviction that “housing for low and moderate-income persons requires sound planning to prevent sprawl and to promote suitable uses of land.” (Id-18h)

To accomplish its statutory objective, the process of developing policies and procedures was shifted away from the judiciary and onto the state. Along with this obligation came the responsibility to properly define the terms “region” and “fair share,” all within the construct of a methodology that would precisely calculate each municipal obligation. Equally important was the need to achieve “the State’s preference for the resolution of existing and future disputes involving exclusionary zoning…and to provide various alternatives to the use of the builder’s remedy as a method of achieving fair share housing.” (52:27D-303)

At its core, the Fair Housing Act was indeed the legislative version of the judicial mandate, up to and including the voluntary nature of the law. Just like the Mount Laurel rulings themselves, nothing in the Fair Housing Act requires legal compliance. Instead, only the practical means by which to “encourage” the provision of low and moderate-income housing is warranted. Although many similarities relative to intent and purpose were drawn from the legal record, significant policy and procedural differences emerged in the legislative transition from the courts to the state house.

It is hard to gauge which was the more controversial aspect of the Fair Housing Act, the transference of all exclusionary zoning cases out of the courts and into the newly established Council On Affordable Housing (COAH), or, the creation of the Regional
Contribution Agreement (RCA). Both have engendered significant comment in the literature and each has had a profound effect on the historical perception of Mount Laurel. While the moral and ethical issues that surrounded the creation and use of Regional Contribution Agreements dominated the ideological debate, the immediate legal battles were centered on the legislative decision to transfer all “builder remedy” cases out of the courts and into COAH.

The constitutional challenge that followed brought together the strangest of legal bedfellows, as private developers joined public interest attorneys and affordable housing advocates in their collective attempt to repeal the FHA. Builders feared delay and the time value of money; whereas housing advocates feared the loss of social reform from years of hard fought legal victories; while municipalities feared an even greater loss of control. In the end, the New Jersey Supreme Court upheld the constitutionality of the Fair Housing Act in a case that was immediately dubbed Mount Laurel III.

**The Fair Housing Act Acknowledged—The Decision in Mount Laurel III**

Decided on February 20, 1986, the court declared in *The Hills Development Co. vs. Bernards Township* that the FHA represented the legislative “response” it had “always wanted and sought. (103 NJ 1) “[T]his Act,” the court proclaimed, “represents an unprecedented willingness by the Governor and the Legislature to face the Mount Laurel issue after unprecedented decisions by this Court.” (Id 23) Some called it judicial retreat. Others saw it as politically expedient. Regardless of the perception, the Fair Housing Act was now the law.
It was the court’s opinion in *Hills*, which it defends as consistent throughout each of its previous *Mount Laurel* decisions, that the earlier compliance methods adopted were “simply a judicial remedy to redress a constitutional injury.” (92 NJ 237) To the court, “[A]chievement of the constitutional goal, rather than the method of relief selected to achieve it, was the constitutional requirement.” (Id) Proceeding on the same judicial premise, the court upheld the legislatively imposed moratorium on builder’s remedies to give the newly created Council On Affordable Housing the time allocated under the FHA to organize and adopt its rules and regulations. If insufficient, then the deadline would be extended “to allow municipalities the time to file their housing element and fair share ordinance with the Council without the risk of a Mount Laurel lawsuit.” (103 NJ 39) If adequate, then “that outside period would become that much shorter.” (Id) Either way, the court argued that the time allocated by the new COAH process “could be considerably shorter than the time for *Mount Laurel* litigation, which seems to require at least one-and-a-half to two years’ time for conclusion.” (Id) This accommodation of time and patience was seen as an unmistakable signal that the court was ready and willing to defer, “not only to the Legislature, as we do today, but also to the Council, when that body begins to act, at least until “clear and convincing evidence” leads us to a different course.” (Id 46)

**The New Lay of the Land—Implementing the Fair Housing Act**

The successful creation and adoption of a fair share ordinance and the subsequent filing and approval of a housing element with COAH would reward a municipality with “substantive certification.” This was the judicial equivalent of a “judgment of repose.” Each of these new terms and their respective requirements were conceptually framed by
the new law, which would eventually become more fully developed and incorporated into the official rules and regulations of COAH. Once promulgated, municipal compliance and subsequent COAH certification would not only provide legal immunity from “builder’s remedy” lawsuits, it would also confer access to the new funding sources established by the Fair Housing Act.

While the Act was seeded with an $18 million appropriation from the General Fund of the State, it was the long-term funding mechanism established within the Neighborhood Preservation Program that secured a more permanent funding source to support the COAH process. (N.J.S.A.52:27D-320) Known today as the “Balanced Housing Fund,” the Neighborhood Preservation Nonlapsing Revolving Fund was created by companion legislation pursuant to the Fair Housing Act. (2000-2001 COAH Handbook) This critical resource is funded entirely by capturing a percentage of the realty transfer tax that is levied against each residential property transfer recorded throughout the state. From the time of its inception to the end of the 2000 fiscal year, the Balance Housing Program generated approximately $340 million. (McDowell) This equates to an average annual contribution of nearly $23 million over the first fifteen years of the program. Given that the dollar volume captured in any given year is dependent upon the general health of the real estate market, annual funding levels provide a reliable barometer on the state of the state’s economy. This is accurately documented by the annual receipts reported, which over the immediate past decade have fluctuated from $38.8 million in FY00 to $109.3 million in FY06 to $46.4 million in FY09. (Id) Just like the builder’s remedy, tying the production fortunes of New Jersey’s affordable housing
program to the vagaries of the marketplace has always been a source of deep concern and criticism.

In addition to the resources available via the Balanced Housing Fund, the ability to negotiate a Regional Contribution Agreement (RCA) was another benefit conferred by COAH certification. Simply stated, an RCA allows any municipality (typically suburban) to transfer up to one-half of its fair share obligation to another municipality (typically urban) located within the same geographic region at a negotiated price per unit. While the creation of this unique funding mechanism was established by a scant couple of paragraphs in the Fair Housing Act, it received even less attention by the court in the Hills case. Devoting just a single paragraph to the issue, the court fully sanctioned the “legislative intent [of RCAs] to encourage the construction, conversion, or rehabilitation of housing in urban areas.” (103 NJ 38) Consistent, the court argued, with section 2.g. of the Act that affirmed the “vital” importance of urban areas to the state and the need to provide a geographical balance of housing for the “free mobility of citizens.” (N.J.S.A. 52:27D-302(g)) This rather simple but sweeping endorsement stood in stark contrast to the court of public opinion, as the advocacy community decried the RCA as an anathema that subverted Mount Laurel’s true intent of providing suburban housing opportunities for the state’s urban poor. (Anglin, Selig) Despite the intense opposition, which remains steadfast to this day, there is also a strong consensus that the RCA represented the “political glue” that held the Fair Housing Act together. (Haar 113)

The immediate and sustained reaction to the RCA controversy appears to have followed four distinctively ideological paths. First, was the legality of the concept, which was repeatedly challenged, albeit never successfully. The court’s belief in the honest
intent of the legislature and in COAH’s ability to fairly interpret and implement the law kept it safely insulated from attack. (Haar 233 fn 78) Second, but deeply embedded within the legal debate, was that access denied to suburban housing eliminated the opportunity to access better schools, better jobs and an overall improved quality of life, thereby circumventing the issue of social equity. Third, was the reverse claim that social engineering of any kind was bad and that the benefits predicted by Mount Laurel would never inure to the urban poor. Fourth, and somewhat aligned with the third, was predicated upon economic theory and the benefits of efficient market allocation. In this relatively academic view, affordable housing was seen as a commodity to be bought, sold and taxed like any other, which argued that the successful production of affordable housing was dependent upon the market’s natural desire for equilibrium, matching demand with available supply. (Hughes)

This last argument was based upon the reasoning that the “fair share” concept was comprised of two numerical components, an indigenous need and a reallocated regional need. This was a clear indication to some that the intent of the court was to redistribute low and moderate-income households more evenly across the state. (Id) Equally apparent, however, was the potential impact RCAs would have on reducing the judicial mandate for economic desegregation, as each unit of obligation transferred was one less unit available to reduce the concentration of urban poverty. (Selig 10) While agreeing that the RCA model as originally constructed was flawed, there was a belief that RCAs would provide more “redistributive income than would have occurred in the original Mount Laurel game,” since “RCAs gave property rights to disfavored areas and allowed them to extract wealth from privileged areas.” (Hughes)
Concerned that the original configuration of the state into housing regions produced multiple “receivers” that provided a competitive advantage for “senders” to negotiate a lower price per unit transferred, some chose to view the RCA more as a tax. (Id) This argument advances the notion that the price of the RCA should really represent “a willingness to pay to exclude” and should, therefore, represent an amount closer to the actual cost of producing the housing. (Id) In this way, the true social costs of public services, transportation and education would be added to the physical costs of construction to produce a fair and more equitable transfer of funds. (Id)

Initially, the RCA process did suffer from the effects of multiple sender competition. In response, COAH amended its rules in 1992 to establish a minimum transfer cost of $20,000 per unit, which were revised twice more in 2000 and 2006 to $25,000 and $35,000 per unit, respectively. In total, the mechanism of the RCA has generated roughly $216 million to produce a total of 10,400 units of affordable housing. (http://www.state.nj.us/dca/affiliates/coah/reports/) While impressive, the RCA has not achieved what it was ultimately capable of producing, as years of endless attacks grounded in the accusation that it was simply a “form of bribery” (Haar) devised to contravene the intent of Mount Laurel eventually took its toll.

As an administrative agency organized to fulfill the basic objective of the Fair Housing Act, COAH’s mission “to encourage municipalities to make affordable housing judgments and choices based on sound land use planning principles,” (2001 COAH Annual Report) stood in stark contrast to the indictments that were immediately levied against the agency. In fact initial reaction to COAH was so hostile that it prompted former Chief Justice Wilentz to admonish:
“those who assumed it would not work, or construe its provisions so that it cannot work, and attribute both to the legislation and to the Council a mission, nowhere expressed in the Act, of sabotaging the Mount Laurel doctrine.” (103 NJ 21)

While there has never been any evidence to suggest outright sabotage, public contempt for COAH has never waned.
CHAPTER SIX: THE ESTABLISHMENT OF THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING (COAH)

It is hard to imagine a more maligned public agency than the New Jersey Council on Affordable Housing (COAH). Created in 1985 by the Fair Housing Act to assume the administrative function of the courts, from its inception COAH has been the object of intense vilification. While at times self-inflicted, COAH is an agency that everyone loves to hate. If as suggested the Mount Laurel doctrine suffered from a deliberate refusal by the chief justice to take his case to the people, to convince the public of the legitimacy of his point of view, (Haar 47) then COAH is guilty of the same offense. Nowhere was this more evident than in the very publications produced by the agency. Although designed to guide its users through the process to achieve compliance, “Getting Through the Maze” was probably not the right title to choose for its official handbook. Instead of a campaign that stresses the ease of municipal compliance, COAH adopted the Alice in Wonderland analogy to describe the process of substantive certification. Complete with a cartoon, the advise to “begin at the beginning,” the king said gravely, “and go till you come to the end; then stop” was the recommended course of action. (2000-2001 COAH Handbook)

To reinforce a public perception that your rules and regulations are too confusing, simply invited the kind of criticism that has always plagued this beleaguered agency. Although now discontinued, this unique public relations approach continued to grace the cover of the official COAH handbook for many years. While an obvious attempt to recognize the complexity of the process, providing assurance at the outset that both patience and empathy await those who play by the rules, the message was counterproductive.
New Methodology—The Rutgers Report (RR)

With only slight modification, the ULR process survived as the prevailing methodology during the three years of litigation that led up to the formation of COAH. (Haar 102) Once organized, COAH ultimately turned to the authors of the RR to develop its official rules and regulations. Employing the methodology produced in 1983 for the New Jersey League of Municipalities, the Center for Urban Policy Research (CUPR) at Rutgers University recalculated statewide need based upon then current 1987 data. These results determined that the initial 1983 population projections were overly aggressive, generating original estimates of prospective need that were vastly overstated. Once corrected, estimates of total statewide need fell nearly 25 percent from 186,000 units to 145,000 units of affordable housing. While substantial, original estimates were based upon ten-year projections, whereas now the FHA required COAH to determine unmet need every six years. Despite the reduction, affordable housing production would have to average more than 24,000 units per year to satisfy the calculated deficit.

In the aggregate, total statewide need is the sum of individual municipal obligations. Calculated according to the supply and demand formulas that qualified the Mount Laurel eligible population by income, household size and the physical adequacy of the existing housing stock, these results were then adjusted further according to the present and prospective need components of the formula. With the requirement that each municipality develop a housing plan sufficient to meet numerical and therefore its constitutional obligation, local responsibilities to satisfy the housing needs of the poor were now in place. By adopting the regional configurations originally proposed by the RR, COAH established the infrastructure necessary to carry out its legislative mandate.
The First Cycle: The six-year period from 1987 to 1993 encapsulated one of the most extreme housing cycles in the history of New Jersey. In 1987 the state issued more than 51,000 residential building permits. By 1993 that total plunged in half to slightly more than 25,000 permits. (www.wnjpin.state.nj.us) In between, New Jersey experienced the lowest levels of building permit activity since the end of World War II, as less than 15,000 permits were issued statewide in 1991. (Hughes 1990) The steady and precipitous decline in building activity had a huge and predictable impact on the production of affordable housing. Since the initial supply of Mount Laurel housing was a by-product of the builder’s remedy, these “inclusionary” developments were responsible for delivering the bulk of the affordable housing inventory. As the overall market slid into a deep recession, all housing production came to a grinding halt. And while the housing market began its eventual recovery, total housing production for the decade achieved the lowest levels recorded in nearly half a century. (Id)

Consequently, the last half of the first six-year COAH cycle did little to expand the affordable housing inventory. As housing production slowed to a trickle, so too did the number of builder’s remedy lawsuits. While this hiatus alleviated a lot of the pressure on the courts, it also provided municipal governments with the time necessary to engage in more thoughtful planning. Since it was now a requirement of the Fair Housing Act to prepare and incorporate a housing element into each municipal master plan, many communities chose to seize control of their own housing destinies. This was especially true among the more affluent towns, as their status as prime real estate locations made them more vulnerable to “attack.” While statutory compliance with the FHA was purely voluntary, the benefits conferred were becoming more obvious. The recognition that
approval of a housing element by COAH provided six-years of immunity from builder’s remedy lawsuits made municipal participation both practical and prudent.

**The Second Cycle:** On top of the protections afforded by the FHA, the second round of numbers promulgated by COAH provided additional motivation for municipal compliance. Published in 1993, the new six-year estimate of total statewide housing need for the period 1993-1999 was recalculated at 86,000 units; a 41 percent reduction from the previous cycle. This number was once again a product of superior data, as the accuracy of the 1990 census modified the previous extrapolations from the 1987 population projections. This “mid-period” (1990) correction to prior 1987-1993 projections had the most significant impact on prospective need calculations, reducing previous estimates by 48 percent. (26 NJR 2348)

In addition to more accurate population information, the 1990 census also provided more reliable and current information on housing deficiency. While prior, unmet prospective need was carried forward to reflect the lack of housing activity of the previous cycle, revised data on the secondary sources of housing supply served to offset the effect of accumulated neglect. This result was produced by the process of “filtering,” which assumes that a percentage of the housing requirements of lower income groups can be satisfied by additions to the supply of higher-cost housing. Using data from the American Housing Survey (AHS), the CUPR constructed and applied a multiplier to the non-deteriorated portion of New Jersey’s housing stock, which produced an estimate of the total number of units expected to filter down the chain of housing supply. In total, this calculation predicted that more than 20,000 units of housing would be filtered down into the statewide inventory of affordable housing. (26 NJR 2349)
While additional sources of housing supply were also identified, such as the conversion of larger residential structures into smaller, individual dwelling units, the nearly equal numbers of units lost to demolition offset the impact of these potential contributions. It was, however, the early and initial compliance with the Fair Housing Act that produced the most sizable impact on the municipal obligation. By recognizing the production efforts of communities both before and subsequent to the establishment of COAH, which included the results produced via court settlements, the reward for early compliance was significant. (N.J.A.C. 5:92-3) By awarding a one-for-one credit reduction for each unit created, zoned or transferred since April 1, 1980, total statewide need was reduced by more than 31,000 units. (26 N.J.R. 2350) As a result, many towns such as Cranbury, which was at the heart of the Urban League case, saw their total need requirements reduced by more than two thirds. (Haar 111) Princeton had a similar experience. (Kirp 160)

Naturally, intense criticism accompanied the second consecutive reduction in statewide housing need. Convinced that both COAH and Rutgers served as willing accomplices to an obvious political strategy designed to appease municipal leaders and suburban voters, housing advocates were outraged. (Kirp 161) The argument advanced was how could the need for affordable housing diminish while the affordability gap grew wider? Citing an estimate by the NJ Department of Community Affairs that well over 600,000 New Jersey households were [presently] paying more than 30 percent of their incomes on housing, one cynical explanation was that the COAH calculations only tallied decrepit homes and not poor people—buildings and not pocketbooks. (Kirp 162)
That the true dimensions of the affordable housing problem have been consistently understated is a constant accusation leveled at COAH. These charges were often made in the form of multiple legal challenges, which repeatedly failed due to the accuracy and thoroughness of the methodology employed. (26 NJR 2342) Despite the legal validation of the COAH process, the logic of the complaint has always defied the reality on the ground. Even those who have been tempered by the state’s limited capacity to produce housing, the recognition that “we can’t produce…245,000, or 100,000 houses, in six years or even, I’m afraid to say, in sixteen or possibly even sixty,” (Payne 92) failed to moderate the extreme positions of the argument. This disappointment is reinforced by the fact that a total of 520,000 building permits were issued in New Jersey from 1985-2001; a sum insufficient to satisfy the total projected “cost burdened” population of nearly 600,000 households. But in addition to being highly impractical, the cost-burdened calculation is also irresponsible, as it fails to differentiate between those truly at risk and those that make a deliberate choice in housing lifestyle.

By contrast, this critical distinction is central to the COAH calculation, as it first qualifies the income-eligible Mount Laurel population through the use of the Public Use Microdata Sample (PUMS). Once segregated, only those eligible households either (a) living in substandard housing or (b) likely to grow over the projection period are included in the official statewide estimates of total affordable housing need.

The Results

Regardless of the method of calculation, criticisms of the COAH process have been constant. Public contempt is often focused on the methodology as too cumbersome
and arcane to be effective. But despite these accusations, the results produced through the first two housing cycles were impressive by any comparative standard. Beginning with the first published estimates of total statewide need by COAH, initial research attention was focused more on the logistics of implementation than on the initial numbers of units produced. Specifically, it was the efficiencies of the two principal instruments of production created by the Fair Housing Act—inclusionary developments with a negotiated percentage of “set aside” units and Regional Contribution Agreements (RCAs), which were examined within the context of their potential impact. In combination with several new funding sources, including an appropriation to the New Jersey Housing & Mortgage Finance Agency (NJHMFA) and the establishment of the Balanced Housing Fund, it appeared that the infrastructure necessary to achieve the numerical goals of Mount Laurel were put into place. (N.J.S.A. 52:27D-301 et seq.)

Unlike much of the initial commentary published on Mount Laurel, where the legal, economic, political and social implications of the process were couched within its conceptual framework, the ability to evaluate the real productivity of the Fair Housing Act would require years of actual housing production experience to accomplish.

To the surprise of many, the impact of the Fair Housing Act was almost immediate, with the numbers of new affordable housing units created being hailed as “extraordinary.” (Payne) Fueled by the end of a prolonged recession that unleashed years of pent-up housing demand, the market quickly grabbed hold of the incentives provided by the Fair Housing Act and leveraged them to produce near record levels of new housing. More specifically, it was the enticement of the “builder’s remedy” that generated results so unexpected that it prompted one housing advocate to declare, [that]
“the decade of Mount Laurel II has accomplished an impressive record of housing production.” (Payne 1992) This enthusiasm was supported by a 1988 study that identified a total of 22,703 units of affordable housing scheduled for production within 54 of New Jersey’s 567 municipalities. (Lamar 14) While a majority of these units were either proposed (38.5 percent) or pending approval (24.7 percent), almost 75 percent of the anticipated totals were a part of inclusionary developments. (Id) Created either through a negotiated court settlement initiated by a builders remedy lawsuit, or voluntarily through municipal compliance with COAH, this level of anticipated affordable housing production was unprecedented. These results appeared even more impressive when measured against the 1,700 federally subsidized units built in New Jersey during the same three year (1985-1988) time period. (Id)

Looming quietly beneath the euphoria, however, were a number of immediate concerns. First and foremost was the almost total reliance upon the private market to produce affordable housing. The apprehension to which New Jersey’s affordable housing policy was tied to prevailing economic forces was well founded, as the robust housing market of the mid 1980s came to a screeching halt by the beginning of the next decade. As both the state and the nation began to slide deep into recession, housing production in New Jersey plummeted. As measured by the total number of building permits issued, residential building activity went from 57,353 units in 1986 to 14,856 units in 1991; a 75 percent decline in five years. In fact, the building permit activity recorded in 1991 was the lowest in the state since the Second World War. And while the nation began its slow and inevitable climb out of recession, the housing market in New Jersey continued to struggle. Rising slowly from its nadir in 1991, annual statewide housing production levels
began to recede again by the middle of the decade before experiencing another modest increase to close out the final years of the 20th Century. While the new millennium was ushered in on the economic winds of a robust stock market, New Jersey’s housing market has never been able to return to its pre-recession production levels of the 1980s.

The interruption caused by the severe downturn in the housing market had multiple impacts on the production of affordable housing in New Jersey. First, the build-up of unsold inventory created an oversupply of housing units that required years to absorb, especially within the large condominium and apartment projects that dominated the earliest inclusionary developments. Of the 55,027 residential building permits issued in 1985, 15,811 or nearly 30 percent were for multi-family units. In 1991, the number of multi-family residential building permits declined 88 percent to 1,987 units, which represented just 13 percent of the 14,856 permits issued in that year. The grim economic reality at the time was captured succinctly in an editorial published by the state’s largest newspaper, which contained the following observation:

There has been a dismal housing market in New Jersey for several years now, and there has been comparatively little housing of any kind built. The Mt. Laurel decision has run into a hard fact of economic life-builders won’t build when the market is weak and the chance of making a satisfactory profit is slender. (Newark Star Ledger: Mt. Laurel Aftermath, 11/22/92)

Second, as the overhang of inventory was being sold off, typically at significant discounts, the number of new applications for large inclusionary developments fell precipitously. The cessation in building activity provided many municipalities with the opportunity to stop and rethink their planning options. A welcomed reprieve from the haphazard land use consequences achieved through planning by litigation. Those that chose to participate in the COAH process, adjusting housing elements within their
municipal master plans to address fair share obligations, gained immunity from the threat of litigation. The increase in the overall levels of municipal compliance combined with the collapse in the real estate market to cause a significant decline in the production of affordable housing.

Unlike the earlier enthusiasm expressed by the initial successes of the builder’s remedy, the cessation of the only real mechanism capable of mass-producing affordable housing was seen as both ironic and devastating. In terms of absolute numbers, the impact on the production of affordable housing was obvious, as there was no other private or publicly funded program that could match the output potential of the builder’s remedy. It was, however, the apparent contradiction between “remedy” and “reward” that proved difficult for some to reconcile. For many, this was explained as the inevitable consequence of the court’s fateful endorsement of the Fair Housing Act, a decision predicted by most critics to signal the beginning of the end of *Mount Laurel*. The ultimate demise, however, was forecast to come by the hands of the Council On Affordable Housing (COAH). Now the epicenter of statewide housing policy, the ability to neutralize the builder’s remedy only served to support the contention that COAH was the accomplice of municipalities, created to neuter affordable housing as a political issue. (Kirp 154)

These allegations were reinforced by the constant accusations of municipal bias, attacking the whole affordable housing process as nothing more than a political sham. From the calculation and assignment of fair-share obligations to the review and approval of housing elements, COAH was accused of facilitating compliance at the expense of housing. This was especially true with regards to Regional Contribution Agreements
(RCAs), which were seen as the ultimate fraud. Contempt for the concept of transferring suburban obligations to urban communities was universal among housing advocates. But the condemnation seemed to grow louder as the production of suburban housing declined further. Without the significant contribution of the builder’s remedy to balance the equation, the utilization of suburban dollars to create urban housing generated an even greater social outcry. The volume of criticism, however, became barely audible over the din of economic recession, as the collapse of the overall real estate market came to dominate the public policy debate.

Statistics as of June 2001 and published by the Council On Affordable Housing (COAH) identified a total of 60,731 units authorized in compliance with the Fair Housing Act. (COAH 2001 Annual Report) Nearly half of this total was achieved through the construction of 28,855 new units of affordable housing. An additional 13,231 units representing 22 percent of the total were both zoned and approved for development. Municipally sponsored rehabilitation programs generated an additional 11,249 units, or roughly 18 percent of the COAH total. The remaining balance was comprised of 7,396 units transferred via Regional Contribution Agreements (RCAs).

Viewed another way, approximately 24,000 new units of affordable housing were built during the period 1990-2000. An almost equal number were rehabilitated or secured by zoning. While a total of 50,000 units would represent 20 percent of all building permits issued over the same decade, the number of new units constructed is equivalent to just 10 percent of the total. When compared to the production benchmarks established by the initial fair share methodologies, total Mount Laurel production was less than half of the demand estimated by either the Urban League (ULR) or Rutgers (RR) reports. In
fact, the 60,731 units certified by COAH as of 2001 represent just 42 percent of the 145,000 units of total statewide need originally calculated in 1987 by that agency. Six years later and compensating for new and better data published by the 1990 Census, COAH revised its calculation to establish a new statewide objective of 86,000 units. When measured against this revised benchmark, 70 percent of the total Mount Laurel obligation would have been satisfied.

But while some focus on the numbers as being either too high or too low, others look at the “color” of the numbers. The claim that COAH has failed to address the underlying racial premise of Mount Laurel has also been unrelenting. Among housing advocates, this indictment has been building from the first “impressionistic” (Lamar 63) observations published by the earliest research to the ultimate denunciation that Mount Laurel has had “little effect on ameliorating the pattern of racial residential segregation.” (Wish 76)

While the subject of race within the context of New Jersey’s affordable housing delivery system has always generated considerable controversy, initial analyses specific to Mount Laurel were scattered across a wide spectrum of public policy issues. Given that there will always be those who believe “Mount Laurel is not concerned only with housing but is also supposed to undo segregation,” (Kirp 164) this is not surprising. The reality, however, is quite different, as there is not a single reference contained within any of the Mount Laurel decisions, or within the Fair Housing Act, that calls for any part of the solution to readdress the spatial distribution of housing by the racial composition of the household.
It is against the backdrop of multiple expectations that *Mount Laurel* is often measured unfairly. Those searching for justice usually find none, either numerically or socially, while those originally threatened by *Mount Laurel* admit that they have softened their original hard line, moderated by the reality of a process that had become both manageable and routine. (Schmierer) For a time there was even a lull in the debate, a signal that perhaps the worst had passed, but it was short-lived. As the housing market started to climb its way out of recession, both the production and the price of housing began to rise; slowly at first and then precipitously. By the mid-2000s New Jersey found itself in the middle of one of the hottest housing markets in the country. It wasn’t long before the inevitable advance of development started to push its way into the more rural areas of the state. Once it did, the outcry was both loud and powerful. Since history always has a way of repeating itself, the reaction was also typical. What was causing this rapid consumption of farmland, the loss of New Jersey’s rural character? To many it was the accused ally of developers and the sworn enemy of open space: *Mount Laurel*.

The bitter and adversarial reaction to *Mount Laurel* will always remain tied to the potential onslaught that builders and their remedies represent. Like “deer in the headlights,” many communities refuse to see past the worst-case scenario, believing instead that no other options exist. (Payne 92) The fact that municipalities do not have to zone land for inclusionary housing unless they are sued or chose to do so is somehow lost on the masses. Perhaps it’s the manifestation of such places as The Hills in Bedminster that helps to perpetuate both the fear and the myth. This mountain turned housing development will forever symbolize the absolute power behind the *Mount Laurel II* decision. However, such extreme examples like The Hills are rare, for the majority of
inclusionary developments are indistinguishable from any other residential subdivision that dominates the New Jersey landscape. Perhaps that’s the real problem, as the development that takes place in New Jersey is so uniformly bad that it requires either an explanation or a scapegoat. In either case, Mount Laurel usually serves both purposes.

**Boom to Bust**

It didn’t take long for the impact of Mount Laurel to vacillate between the free-market enthusiasm generated by the court’s 1983 decision in Mount Laurel II, with all of the power and potential of the builder’s remedy, to the disappointment of the political compromise imposed by the 1985 Fair Housing Act. Between the moratoriums placed upon the builder’s remedy, the creation and subsequent transfer of court cases to COAH, and the establishment of Regional Contribution Agreements (RCAs), the Fair Housing Act was considered a misnomer by most housing advocates. Once passed, it immediately engendered an inevitable sense of outrage, fueled by the expectation that a process once implemented by the court and managed by three dedicated, committed and impartial judges was now being handed over to a state-run agency created by politicians and governed by political appointees. Even a lawsuit aimed at declaring the legislation unconstitutional was unsuccessful, which in the end only served to reinforce the mission and mandate of COAH. (103 NJ 1)

Empowered to quantify the extent of the statewide need for affordable housing, COAH set out to standardize the implementation of a fair and equitable process. Rules and regulations were established to guide the development of affordable housing, designed to be carried out on a regional basis in concert with the State Plan. To better
facilitate a greater dialogue among communities committed to fulfilling their fair-share obligations, Regional Contribution Agreements were established as a tool to help achieve programmatic success. To ensure the economic feasibility of the transaction, the RCA process was mediated by COAH but ultimately approved by the state’s housing and mortgage finance agency. It was, even to an experienced observer, a very complex process. Although still very much in its infancy and attempting to become more efficient over time, it was a process nonetheless. While difficult to achieve under the best of circumstances, in the path of COAH’s progress stood an economic recession that produced near-depression levels of housing production. In fact, New Jersey’s recovery from the 1988-1992 recession was the slowest of any economic recovery since World War II, constraining the growth of housing buying power. (Hughes 1994) This in turn forced the issue of affordable housing back down and nearly off the political priority of public policy objectives.

Under Fire

When the economic winds of change finally started to reverse their course, the real estate market in New Jersey seemed poised for another rebound. Market conditions were similar to the mid-1980s, where lower long-term interest rates combined with pent-up demand to unleash the peak production performance of that decade. But while the number of building permits issued in 1986 exceeded 57,000, the peak year recorded in the 1990s barely managed half that total. Actually, 1999 was the peak year of the last decade of the 20th Century, registering just 31,946 building permits. While unexpected,
this experience was consistent with the housing history of New Jersey, where each
decade’s peak production failed to match the scale of its predecessor. (Hughes 1996)

The production of housing in New Jersey has been on a roller coaster ride for the
past 55 years. (Id) In 1950, the peak year since records have been kept, more than 72,000
building permits were issued. In 2000, with a healthy economy, record low interest rates
and full employment, less than 35,000 permits were issued. In fact, the decade that closed
the millennium averaged less than 24,000 building permits a year. This performance was
second only to the period from 1940-1949, which was the lowest production period in the
state’s history; a time when the country was recovering from the Great Depression while
engaged in World War.

The expectations going forward remain modest for New Jersey, as the factors that
affect the price and supply of housing become even more constrained. The most obvious
is the cost and availability of suitable land. As the most densely populated state in the
nation, land is at a premium. Another artifact of New Jersey’s development history is that
each successive surge in housing production is characterized by further decentralization
from the state’s many urban centers. (Id) As development spreads, land is consumed,
traffic increases and the quality of life deteriorates. This is sprawl. But despite the story
told by the numbers of building permits issued, development in New Jersey was
perceived to be out of control and reining it in had become a political priority. In
response, commissions were formed, legislation proposed, and the resources marshaled to
stop the impending threat from further advance. More a witch hunt than a process
intended to improve the system, both the objective and the consensus were clear: kill the
head and the body will die. Eliminate Mount Laurel in order to put an end to sprawl.
Nothing Changes

Nowhere was this charade more evident than on April 10, 2001, when a legislative task force created to study the Fair Housing Act and the State Planning Act assembled publicly for the first time. The purpose of the meeting was to hear testimony from “diverse groups, municipalities as well as citizens concerning the goals and actual implementation of the two acts.” (Meeting Notice, 3/30/01) Early into the proceedings, it became obvious that neither the public nor the members of the task force had firm grip on the municipal obligations established under the Fair Housing Act, the specific role of COAH, and the very unique relationship between the Fair Housing Act and the State Planning Act. Whether this public forum was representative of the general lack of knowledge is impossible to determine, although the evidence provided on this particular day was compelling.

To document the considerable disconnect between perception and knowledge, several of the questions raised at this meeting will be revisited. For illustrative purposes, a hypothetical New Jersey municipality with an assigned “fair share” obligation of 151 units of affordable housing will be utilized. This number was chosen as it represents the average municipal fair share obligation when the total statewide affordable housing need of 86,000 units is divided among New Jersey’s 566 municipalities.

First and foremost was the issue of cost associated with COAH compliance, particularly among the smaller and more rural communities in the state. The common argument being that most municipal budgets preclude the ability to hire expensive professionals without substantial fiscal impact, forcing a tax increase to satisfy the requirement. But in reality any cost is simply incremental, as the obligations imposed
under the 1985 Fair Housing Act work in conjunction with those already established under New Jersey’s Municipal Land Use Law (NJMLUL). (N.J.S.A. 40:55D-1) Enacted in 1975, the NJMLUL governs the creation and subsequent revision of municipal master plans every six years. This responsibility was only slightly expanded by the Fair Housing Act to include a housing element as part of an overall master plan. (C. 40:55D-28b-3) By incorporating one municipal requirement into the other, each conducted simultaneously, whatever additional costs associated with the development of the housing element are easily subsumed into the overall cost of the master plan. The end result is very little fiscal impact on the municipality.

By identical definition that is cross-referenced in both the FHA and the MLUL, a housing element must contain the demographic and socioeconomic characteristics unique to each municipality, matching current conditions with an inventory of existing housing stock to determine “present” housing needs. Extrapolating these conditions into the future provides an estimate of “prospective” need, and if the municipality is located in a state designated “growth area,” than its “prospective” housing needs are adjusted further to include a percentage of the region’s “fair share.” Having COAH tie its statewide “fair share” calculations to the six-year revision cycle required by Municipal Land Use Law assures that municipal adjustments to the housing plan element of the master plan are both coordinated and cost effective. (N.J.S.A 52:27D-310, as an addendum to C. 40:55D-1.) While subsequent legislative action amended COAH rules to extend the term of municipal compliance from six to ten years, these new requirements applied only to the beginning of the third COAH cycle. (P.L. 2001, c.435) The issue of compliance,
however, remains unchanged, and therefore the argument relative to cost and coordination still applies.

The Fair Housing Act also facilitated the revisions necessary to coordinate the planning and zoning process to assure municipal “fair share” compliance. By amending the section governing the power to zone within the Municipal Land Use Law, planning board adoption of both the land use plan element and the housing plan element of a master plan became prerequisite to any changes or amendments to the zoning ordinance. (C.40:55D-28) Therefore, once adoption by the planning board was achieved, only those zoning changes “consistent…or designed to effectuate such plan elements, can then be adopted.” (C.40:55D-62(s)) As a result, the process allowed a municipality to make a “determination of the total residential zoning necessary to assure that the municipal fair share is achieved.” (N.J.S.A.52:27D-311.a.(2)) Once determined, the entire hypothetical obligation of 151 units of affordable housing could be integrated into the land use plan element, legally described and situated by zoning ordinance and incorporated into the housing element plan. Once accomplished, the housing element plan is then submitted to COAH for compliance review and approval. If judged complete, the municipality received a grant of “substantive certification” by COAH. Obligation satisfied, at very little incremental cost, if any, to the municipality. No construction, no development, no municipal expense, just zoning appropriate to provide for the realistic opportunity to create 151 units of affordable housing. Exactly what the law requires.

Certification by COAH has its benefits beyond the immunity it provides from potential lawsuits. It also grants eligibility for state funding and the approval to generate local revenues as well. The issues of cost raised by the public-at-large included how a
municipality could participate in the affordable housing process without raising taxes. How, as the Fair Housing Act suggests, can a municipality be “encouraged…to expend its own resources to help provide low and moderate income housing” without raising taxes? (52:27D-302(h)) This line of questioning was directed specifically at the funds needed to generate a Regional Contribution Agreement (RCA), or to engage in a housing rehabilitation program.

The answers to both questions were provided in 1990 when the New Jersey Supreme Court found in *Holmdel Builders Association v. Holmdel Township* that mandatory development fees were both statutorily and constitutional permissible. (121 NJ 550) As of August 2000, approximately 10 years from the date of the *Holmdel* case, a total of 112 municipalities had raised in excess of $91 million in development fees. These in turn created an average affordable housing trust fund of roughly $812,500 per municipality. (COAH 2000 Annual Report)

Placed into trust accounts and restricted in their use consistent with the regulations promulgated by both the Fair Housing Act and COAH, the funds generated by development fees are available to help satisfy municipal fair share obligations. While any spending plan must first receive COAH approval, these funds are fungible and can be used to negotiate RCA’s, to build new affordable units or to rehabilitate existing housing. Although restricted by an administrative cap, trust fund revenues can also be used to pay professionals for the development of a housing plan element in pursuit of substantive certification.

Development fees are typically generated at the time of site plan approval for any residential or non-residential building project and paid in full at the time a certificate of
occupancy is issued. Fees associated with building permits, levied against both new
construction as well as renovation projects, generate additional trust fund revenues. At
the time of the legislative task force hearing, a listing of every New Jersey community
with an affordable housing trust fund could be found in the COAH annual report. With
municipal balances ranging between $0.00 to over $12 million, these revenues were
generated entirely without impact or consequence to municipal property tax rates. As of
June, 2010, the total amount of revenue collected was in excess of $500 million.
(http://www.state.nj.us/dca/affiliates/coah/reports/) In addition to development fees, those
towns that receive substantive certification are also eligible to access every state and
federal funding program available.

To its credit, COAH tried to become very user friendly, adopting rules and
regulations aimed at making municipal compliance easier and more accommodating.
Some have argued that COAH was too accommodating, offering a virtual smorgasbord of
options aimed at reducing municipal obligations. One long-time advocate likes to make
the analogy between COAH and a discount supermarket chain that offers “double coupon
Wednesdays.” (Payne 1999) Yet, this same advocate is quick to point out that there
remains entirely too much emphasis on inclusionary zoning and the 4:1 ratio of market to
affordable units attached to this particular option. (Id) While COAH has been aggressive
at offering multiple alternatives to achieve municipal compliance, it is perhaps both the
threat and the reality of the “builder’s remedy” that continues to overwhelm public
perception. Newspaper accounts at the time confirm that the public mindset had changed
very little since 1985, as the Mount Laurel obligation was still characterized in terms of
“a powerful weapon that has changed the New Jersey landscape.” (Star Ledger 4/24/01)
Currently, any town seeking the protection offered by substantive certification has fourteen (14) different alternatives to an inclusionary zoning solution. By example, our hypothetical town with zoning now in place to satisfy its 151-unit obligation could implement its affordable housing strategy in a number of different ways. The first option could utilize the “double coupon” bonus and designate a single parcel of land to accommodate a family rental project of 75 units. If unrestricted in its use and dedicated to income eligible households, a 75-unit family rental project generates twice the COAH credit to completely satisfy a 151-unit obligation. Other options that carry “coupon bonuses” are group homes for the mentally or physically disabled that are credited by the number of bedrooms, which may qualify for a two-for-one credit. The adaptive reuse of existing structures can also generate a bonus by converting an old school or factory into affordable units.

By utilizing the revenue sources identified above, a Regional Contribution Agreement could be negotiated with another town in the same region for up to one half of the obligation, or 75 units. At the then current transfer rate of $25,000/ unit, the transaction would have cost $1,875,000. An RCA in combination with approved zoning, new construction, rehabilitation or any one of a number of options, could all be utilized to craft a valid affordable housing strategy under COAH regulations. There is, and there never has been any need to rely solely upon the remedy of inclusionary zoning to satisfy a municipal fair share obligation. In fact, the legislative intent of the Fair Housing Act was to “provide various alternatives to the use of the builder’s remedy as a method of achieving fair share housing.” (52:27D-303) Given how contentious and expensive
inclusionary developments are as a solution, it’s hard to understand why the multiple options available to achieve municipal compliance were never fully utilized.

While the COAH process is less than perfect, its imperfections have always been exaggerated. The outcries emanating from the more rural towns throughout the state are mere echoes from the past, as almost every community that lies in the inevitable path of development reacts angrily to the threat it eventually confronts. The irony, however, is that these are the very same towns that the court identified more than thirty-five years ago to be more proactive, “towns… like Mount Laurel, [that] have substantially shed rural characteristics and have undergone great population increase…or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth.” (67 NJ 160)

Once presented with a development proposal, the first and most typical municipal reaction is to fight. But absent substantive certification and every town is at a distinct disadvantage, for its adversary is armed with a “builder’s remedy” and ready to do battle. Absent the protections afforded by the COAH process, the town is left to the mercy of the courts to decide its development fate. While settlements are often negotiated, the outcome is rarely seen as a fair compromise. Court actions usually result in the creation of an inclusionary development that can overwhelm most rural communities. Municipal anger turns towards COAH, which is often viewed as an accomplice to the process. The resentment often intensifies as more development follows the initial event, leading to the perception that it was the COAH key that unlocked the floodgates of uncontrolled growth.

This perception, while not new, is as prevalent today as any other time in COAH’s history. While the public debate shifted from the age-old argument of the
burden that affordable housing brings to the cost of municipal services such as schools, to the examination of COAH’s role in the creation and spread of suburban sprawl, it has always been easier and more politically expedient to point an accusatory finger of blame then to advance real solutions to a problem. Sprawl is a by-product of haphazard and unplanned growth, not the intended outcome of a statewide policy to encourage the creation of affordable housing. If sprawl and its destructive environmental effects is the real target of the legislature in New Jersey, than it should confront the real cause of this condition, which is home rule. The dynamics of separation and division caused by the unique geopolitical configuration of New Jersey is responsible for the system that produces bad planning and land use decisions, not affordable housing. (Karcher 193) This reality was clearly understood by the court in 1975 when it recognized that “almost everyone acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base.” (67 NJ 171) In fact, the calculation and allocation of fair share is predicated on rational regional planning, linking affordable housing to population growth, jobs and transportation. By utilizing the overlay of the State Development and Redevelopment Plan to coordinate metropolitan housing policy, the model in New Jersey should become the planning standard throughout the country. Instead, it is the planning exception.

In proceedings before COAH, one of the Public Advocates for the State had argued that “Mount Laurel is not concerned only with housing but is also supposed to undo segregation.” “Mount Laurel,” he would maintain, “is about race.” (Kirp 164) While impossible to confirm, it is also impossible to discount race as a motivating factor behind the many attempts to discredit and eliminate the Mount Laurel doctrine. This
impression was reinforced at the 2001 annual New Jersey Legislative Correspondents Dinner by the “performance” given of then acting Governor Donald DiFrancesco. In true “Bulworth” fashion, the fictitious political candidate played by the actor Warren Beatty, the acting Governor revealed what is perhaps the unspoken but dominant public sentiment through effective political satire when he “rapped” the following lyrics:

And if we give to rich, white folks
a shot of some truth serum,
they say they want more open space
so poor folk can’t live near ‘em.
(Trenton Times, 5/21/01)

Perhaps, as one scholar has noted, Mount Laurel is progressing to the point where class will actually preempt race, forcing a new confrontation that deals with the reality of class divisions in the United States. (Haar 192) Whatever future awaits the Mount Laurel doctrine and COAH, any evaluation must be made on the basis of the mandate articulated by the Fair Housing Act. On this standard it would be hard to argue that the system in place and the agency responsible for its implementation have not performed as intended. Yet in the final analysis, the real question is how can the performance of COAH or any agency be judged on the basis of a law and a process that is completely voluntary? The simple answer is it can’t.
CHAPTER SEVEN: COAH’S EARLY DAYS
(LATE 1980’S—EARLY 1990S)

“Like few other judicial decisions, Mount Laurel ignited powerful feelings. At church socials and backyard barbecues, at beach resorts and drinks at the nineteenth hole as well, even to say “Mount Laurel” was to start an argument. To some people it was shorthand for justice, while to others it stood for judicial busy bodying that threatened a hard-earned way of life.” (Kirp 61)

At about the time the Council On Affordable Housing (COAH) was adjusting its initial calculations downward to accommodate the second round of municipal fair share obligations, revised to better reflect the accuracy of the data provided by the 1990 census, researchers from two prominent universities were well into their respective investigations for the publications they were undertaking. Although recorded from the distance of academics not directly involved in the process, the outcome of their efforts produced two of the most significant books ever written on the subject of Mount Laurel. While there was already a rich history upon which to draw from, the events of the early 1990s would serve to add even more context to a complex and controversial subject.

COAH and Florio

As required by law, COAH is responsible for recalculating the statewide need for affordable housing every six (6) years. A time frame established by the 1985 Fair Housing Act to coincide with the master plan requirements of New Jersey’s Municipal Land Use Law. Initial results were published in 1987, just two years after the enactment of the legislation and the subsequent creation of COAH, which calculated the state’s total affordable housing deficit at 145,000 units. Once released, both the number and the methodology were immediately attacked as flawed, criticized for having produced both a
process and an outcome that was deficient. The public response was typically expressed through the media, with editorials covering the full spectrum of reaction. In academic circles, the response was no less passionate or diverse. Prominent law journals provided both analysis and opinion on the court decisions and the precedents established, while published commentary on the socio-economic implications was equally abundant. But when the second-round of affordable housing obligations was published in 1993, a new wave of reaction was unleashed.

Revised to accommodate the accuracy of the data from the newly released 1990 Census, total statewide need was reduced almost in half to 86,000 units. The magnitude of the reduction was matched by the intensity of the reaction, as the size of the decrease sent shockwaves throughout the affordable housing community. Reinforced by the timing of several published reports that had estimated total affordable housing production to date at roughly 15,000 units, (Burchell 92, Fitzpatrick, Star Ledger 92) the charge that the math didn’t add up appeared to be a reasonable indictment. Given such a modest increase in supply it seemed hard to justify such a substantial decrease in demand. Given the then current state of the state’s economy, which in the early 1990s continued to lag the rest of the nation in terms of recovery, (Hughes 94) there was merit to the argument. Although detailed explanations were provided to account for the reductions, they fell on deaf ears. The only value that appeared to be served by these new calculations was a reaffirmation by those who believed in COAH’s complicity to facilitate a municipally biased process. Then in a manner of unprecedented timing, the court decided to step back into the political fray by weighing in on the constitutionality of a specific COAH regulation. The
outcome of the court’s 1993 decision would serve to reinforce COAH’s already poor public perception. (132 NJ 1)

By reversing a lower court’s ruling that allowed up to 50 percent of a Mount Laurel obligation to be satisfied by a preference to those households already living or working within a municipality, the court declared one of COAH’s more popular regulations to be invalid. The court held that the specific regulation contravened the fair share ideal, which mandated a local satisfaction to the regional housing needs of the poor. The court would also charge that such preferences would favor white rather than minority households. The municipal counter-claim argued that such preferences addressed the needs of those households with an existing connection to the community, and at the very least would help increase local support and acceptance of the Mount Laurel obligation. (Haar 122) That argument proved unpersuasive, and the court maintained that COAH’s “occupancy preference does not further the statutory goals of the FHA.” (132 NJ 39)

For many, the court’s decision simply affirmed the widely held suspicion that housing preferences were already institutionalized within the design and implementation of Mount Laurel. This became a common and frequent criticism that was based solely on anecdotal evidence. The implication being that single white female heads of households dominated the early occupants of Mount Laurel housing. (Lamar) While this may have been true in fact, one of the very real deficiencies of Mount Laurel was the omission by the court and the legislature to provide both the mandate and the funding necessary to qualify, monitor and then track the results of the process. In hindsight, this responsibility should have been COAH’s, whose initial charge to develop and oversee the methodology should have also included the broader mandate of tracking statewide progress. This could
have been accomplished by establishing field offices in each of the six COAH designated housing regions, complete with the funding sufficient to ensure the success of the effort. Instead, implementation became both local and voluntary, challenging each municipality to satisfy its new legislative mandate within the capacity of its existing resources.

Unfortunately, the extant infrastructure of municipal government proved to be an inefficient model for the implementation of an initiative as complex as *Mount Laurel*. While overall programmatic responsibility was typically assigned to a planning, zoning or construction code official, these professional functions were generally performed out of the office and in the field. In the absence of more trained personnel, a departmental secretary was often designated to assume the lead administrative role. While some municipalities would hire part-time employees or independent contractors to handle the additional duties now imposed, the lack of overall qualification was still an issue. By default, the initial responsibility to ensure compliance with *Mount Laurel* was left to an unqualified municipal labor force.

The lack of both resources and expertise forced many municipalities to seek administrative alternatives to the new and arcane world of affordable housing. Eligibility guidelines, income qualification, and deed restrictions were but a few of the novel concepts confronted by an untrained workforce. Out of necessity, many communities negotiated the responsibility for programmatic compliance back to the developer, often as a precondition to overall development approval. While this arrangement proved to be more cost effective, the social outcomes generated were simply a by-product of the process. Given the development priorities of profit over policy, it was the time value of money that exerted the greatest influence over the initial composition of the “qualified”
Mount Laurel population. Since the majority of the initial Mount Laurel inventory was comprised of “for sale” units, a function of both developer preference and public policy, the qualification process became even more selective. Motivated in part by the ideal that home ownership was good for both the poor and the community, the numbers of affordable rental units constructed was negligible by comparison. Reinforcing the preference for home ownership was the lack of any legal or statutory obligation to create some form of a public housing authority. In the absence of such a mechanism, the ability to efficiently administer a municipal affordable housing program would prove impossible.

A determination of eligibility would rely almost entirely upon the size and income of the applicant household. With one and two-bedroom units dominating the early Mount Laurel inventory, household size was an easy determinant. Consequently, one and two person households dominated the earliest occupant profiles. Similarly, income was a function of verification. How much money was earned was important only to the extent that total household income met the threshold of eligibility. Even more important than income was credit. If an applicant was income-eligible but failed to qualify, the amount of income was irrelevant. Since a functioning secondary mortgage market for affordable housing wasn’t yet in place, every loan was underwritten to the exacting credit standards of a conventional loan. Also missing at the time were government sponsored programs to help bridge the financing gap or to provide proper credit rehabilitation and counseling. Success, therefore, was only achieved if a buyer was income eligible, had the cash for the down payment and closing costs, a good credit rating and a steady job. Race and ethnicity was never a part of the qualification process. Perhaps that’s why the anecdotal evidence
suggesting the early dominance of single white female head of households wasn’t as much intentional as it was a by-product of the conventional mortgage process at play.

**COAH and Whitman**

On the heels of the court’s April 1993 decision in *Warren*, a new administration was getting ready to settle into the state house in Trenton. A moderate Republican in the style and political temperament of her mentor and former Governor Tom Kean, Christine Todd Whitman narrowly defeated the incumbent Democratic governor in a race that captured national attention. While Whitman’s slim victory in the fall of 1993 appeared to be won on the strength of a burgeoning suburban electorate, her ultimate success was secured by the lack of Democratic support from within its traditional urban base. Voter turnout in the state’s major cities was very light by historical measures, especially for an incumbent Democratic Governor. Initially, this result only seemed to reflect the depth of negative public sentiment that surrounded the single four-year term of James Florio. But the nation’s attention quickly shifted from the political significance of Whitman’s victory to the revelations by her campaign advisor as to how her victory was secured. Ed Rollins, a prominent national strategist for the Republican Party, had acknowledged the use of “walk around money” to secure his client’s victory. This election-day tactic, which has a long and notorious history in New Jersey, targets mostly poor, minority residents in urban communities to cast their ballots in exchange for cash. Given the demographic, this tactic was usually reserved for Democratic candidates. This time around, however, the money was used to encourage these same folks to stay at home. Disclosed somewhat flippantly in the days following the election, Rollins’ disclosure ignited a firestorm of racial and
political controversy. (CJR 94) While the new governor quickly dismissed both the allegations and her high profile consultant, the political fallout was substantial. In its wake, the new governor quickly established an urban priority to her public policy agenda.

The explosive charges of racial bribery for political gain seemed to reinvigorate the discussion of race in New Jersey. The political fallout from the election helped to refocus the state’s attention on the disparate living conditions between rich and poor, black and white, urban and suburban. Already outraged over the second-round reductions by COAH, housing advocates were poised to seize the political moment. Strengthened by the mandate of the Warren decision, which not only eliminated housing preferences for local residents but also reinforced the regional goals of the doctrine, a renewed and more vigorous examination of Mount Laurel’s impact was about to begin. Only this time the emphasis would focus less on production and more on ideology, looking past the process to more closely examine its apparent beneficiaries.

COAH’S Reviews—Kirp

Exactly ten years after the passage of the 1985 Fair Housing Act, the first historical account of Mount Laurel was published. Written from the distance of academics not directly involved in the process, Our Town is an often moving but mostly critical account of the Mount Laurel experience. Detailing the journey from its most humble beginnings inside a small, African-American Episcopalian church to the legislative compromises negotiated inside the power chambers of the New Jersey State Legislature, Our Town is a roller coaster of a critique that frequently vacillates between celebration and contempt.
Well researched, written and entertaining, the most determined aspect of the book is its desire to elevate the social and legal significance of *Mount Laurel* to the same landmark status as *Brown v. Board of Education* and *Woe v. Wade*. This objective is central to the book’s fundamental premise that “[T]he story of Mount Laurel…implicates race as well as class.” (Kirp 5) It is the overwhelming conviction of this argument that tends to dominate the pages of *Our Town*, which is reinforced by the author’s persistence to assign the civil rights stature of Rosa Parks to Ethel Lawrence. As an original plaintiff and African-American resident of Mount Laurel Township, the story of Ethel Lawrence is one of stamina and courage. Having stayed the legal course for more than twenty-years before her death in 1994, the fact that both she and *Mount Laurel* failed to achieve such status seems to frustrate the authors. This in turn produces both contempt and a general cynicism about the potential of people to embrace social reform, which is equally pervasive throughout the book. (Atlas 97)

This frustration emanates from a real lack of understanding of how social and civil rights movements are built. Rosa Parks never sued anyone, and yet her incredible act of bravery helped to mobilize tens of thousands of African Americans to participate in the bus boycott in Montgomery, Alabama. (Id) The concessions won from Montgomery’s white business and political establishment were victories that belonged to the people, not the lawyers. (Id) This important and critical lesson of the American civil rights movement, which proved that organized social movements, not courts, bring about dramatic social reform, is completely absent from the commentary. This omission is unfortunate given that the case of *Mount Laurel* perhaps best illustrates how a failure to
connect the noble purposes of affordable housing with the concerns of average citizens destined this fight to be waged by a very tiny political base. (Haar)

Timing is also critical to this particular analysis, as the book fails to incorporate the depth of New Jersey’s economic free-fall into its overall evaluation. As noted earlier, the recession of the early 1990s was so severe, the job and wage losses so significant, that any further threat, whether real or perceived, to the economic security of working and middle class New Jerseyans was met with an intense hostility. As residents of California, the economy’s impact on these early and critical years of Mount Laurel may have been lost on the authors. However, closer to home the reality was best expressed by former New Jersey Senator Bill Bradley, who offered the following insight on the back cover of Our Town.

“In Mount Laurel, New Jersey, our dream of a racially harmonious society came up against the fears of suburban families at a time of shrinking economic expectations.”

To its credit, the very real fears suggested by Senator Bradley were vividly exposed in Our Town. By juxtaposing the rise and fall of Camden, New Jersey, the second poorest city in the United States, with the developing suburbanization of Mount Laurel Township, Our Town records how both institutional and individual racism have been responsible for steering generations of minority households into segregated neighborhoods. What the book fails to do, however, is offer either a solution or a sense of hope for the time, patience and planning required to improving the conditions generated by these long-standing practices. While the political and economic climate of the early 1990s may have precluded the ability to forecast such an optimistic future, looking back from today’s vantage point reveals a yet unrealized history of measurable success.
Like the rest of the nation, grassroots organizations in New Jersey have matured into more efficient vehicles for social change. Better equipped with an arsenal of public and private programs, many of these community-based groups can now provide low and moderate-income households with better access to markets and capital. This wasn’t the case during the early years of Mount Laurel, as the real power embodied within the 1975 Home Mortgage Disclosure Act (HMDA) and the 1977 Community Reinvestment Act (CRA) had yet to be leveraged. Although slowly at first, the combined impact of these two legislative initiatives began to accelerate under the increased pressure applied from the advocacy community. These efforts were often supported through effective media campaigns, which helped to force lenders into expanding both their presence and their products in low-income and minority communities. By experimenting with more creative and lenient underwriting standards, these new tools were aided by a stronger economy to drive low-income mortgage lending to new and unforeseen heights. (Belsky 02)

Greater standardization within the lending industry has helped to significantly increase the supply and flow of capital into traditionally underserved areas. Facilitated by the 1992 Federal Housing Enterprises Financial Safety and Soundness Act, this legislation imposed a national commitment to provide greater access to mortgage credit. The responsibility to achieve this mandate was placed on the then HUD regulated Government Sponsored Enterprises (GSEs) of Fannie Mae and Freddie Mac. This Congressional directive significantly increased the percentage of business the GSEs were required to devote to very specific affordable housing goals. While the initial mandate that 40 percent of the loans purchased by the GSEs must be for families with incomes no greater than the area median income (AMI), the goal was subsequently raised to at least
50 percent of the total annual number of dwelling units financed. (www.hud.gov) Today, with both Fannie and Freddie in conservatorship under the Federal Housing Finance Agency (FHFA), the future of the GSEs is uncertain. If as predicted and these agencies are eventually phased out, leaving the private capital markets to fill the void, then the gains realized in the cost and availability of credit to low and moderate-income households may soon be lost.

However, prior to the onset of the Great Recession, highly standardized loan products and underwriting procedures helped to reduce the costs of originations while providing the uniformity of process necessary to generate more consistent and reliable consumer information. (Listokin 00) The efficiencies realized had multiple and positive effects, as lower costs promoted greater levels of affordability. This was especially critical to the low-income household whose eligibility was often contingent upon the slightest of margins.

While access to credit for the low-income borrower improved dramatically, higher loan-to-value ratios, higher debt burden limits, and little to no cash reserves were additional changes incorporated into the underwriting standards of both Fannie Mae and Freddie Mac. In combination, these modifications worked to completely transform the housing finance system. (Id) Additionally, the obligations of the banking industry to abide by the lending requirements imposed by the Community Reinvestment Act made the decision to adopt the underwriting criteria established by the GSEs an easy one. By originating home loans on GSE approved forms facilitated the sale of the loan back to the GSEs. In turn the GSEs would issue Mortgage Backed Securities (MBS) to replenish its capital by packaging and pledging the loans as collateral. In retrospect, the process began
to feed on itself to the point of collapse. Fueled by the desire to fulfill congressional mandates, the GSEs became lax in their oversight, approving and then buying loans that never should have been originated. However improbable, the transformation within the housing finance system was remarkable, evolving from an industry wary with fair lending and community reinvestment oversight to one that became intensely engaged in competition for new markets. (Id) Exactly what shape the market takes next is yet to be seen.

A return to the practices of the last decade of the 20th Century would be a good starting point. As measured from 1993 to 2000 the number of home purchase loans to low-income families surged by 79 percent. (Belsky 02) Minorities in particular were well served, as loans to African American home buyers soared 89 percent, loans to Hispanic buyers rose by 138 percent, while loans to Whites grew by only 25 percent. (Id) While impressive, the overall rate of minority homeownership still lagged behind those of Whites, as 74 percent of non-Hispanic whites owned their own homes, while just 47 percent of African Americans and 46 percent of Hispanics were homeowners. (JCHC 00) While the gap was still significant, it was considerably smaller than it was just a decade earlier. However, in the post-subprime meltdown of today, the overall rates of homeownership have changed little from the levels recorded in 2000. As of 4Q2010, the rate among Hispanics is 46.8 percent, 44.8 percent among African Americans and 74.2 percent among Whites. With the exception of the experience for African Americans, the homeownership rates for both Hispanic and Whites remained virtually the same. While the overall homeownership rate in the United States, which stood at 67.1 percent in 2000, is now at 66.5 percent. (http://www.census.gov/hhes/www/housing/hvs/hvs.html)
As detailed above, the innovations in affordable housing lending along with the economic expansion of the 1990s helped to raise homeownership rates among minority populations to historic levels. How this information, if available at the time, would have influenced the narrative produced by the authors of *Our Town* is impossible to predict. Given that the book frequently expresses bitter disappointment over its own perception of the failure of *Mount Laurel* to live up to its full potential, it is reasonable to assume that the authors would not have been swayed.

“They story in New Jersey might well have turned out differently, for the state was poised on the brink of a future in which communities would be committed to the principle of fair shares for the well off and the poor alike. But then the justices and the politicians—critically, Governor Thomas Kean and Chief Justice Wilentz—drew back from that bold new conception of the commonweal.” (Kirp 173)
CHAPTER EIGHT: CRITIQUES OF COAH

COAH AND THE SETON HALL STUDY

While *Our Town* is a completely descriptive analysis of *Mount Laurel*, with not a single table of data in support of the narrative, it served as the almost perfect primer for a more “quantitative” study that was to follow. Conducted by the Seton Hall University Center for Public Service, “The Impact of the Mt. Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants” picked up in tone where *Our Town* had left off. By utilizing what at the time was a brand new but very incomplete state data set for its analysis, the conclusions drawn where highly critical. While the initial premise of the report appeared to be relatively straightforward, the objective of the research was stated as follows:

“[But] one cannot measure the impact of the Mount Laurel judicial decisions and the Fair Housing Act without understanding the history and underlying goals and objectives of these decisions, and, with these goals and objectives in mind, analyzing not only the number of units that have been built, but also the demographic characteristics of both the applicants for and the occupants who live in these units.” (Wish 7)

What the report makes clear from the outset is that the “one” being referenced was not a metaphor for a generalized observation, but was instead representative of a singular point of view. This was revealed by the rather startling disclosure that the goals to be addressed were neither those of the judges or the legislature, but the “goals which many participants and observers who were sympathetic to the Mt. Laurel decisions and the Fair Housing Act would acknowledge as being at the core of the judicial decisions and the legislation.” (Wish 10) Success, therefore, within the context of this study, would be measured by the progress made in satisfying three very specific goals. While the first two were fairly reasonable interpretations of the judicial and legislative intent to provide
more and better suburban housing opportunities for low and moderate-income households, the third was simply fantasy. To believe, as the third goal states, that through *Mount Laurel* it was possible “to ameliorate racial and ethnic residential segregation by enabling Blacks and Latinos to move from the heavily minority urban areas to white suburbs,” (Id) is to also believe in the tooth fairy. While the report does seek to qualify “the extent to which these three goals have been achieved” as an “incomplete” measure of success, this condition further undermines the credibility of the study.

Given the history of one of the project’s co-authors, the emphasis on race was not unexpected. As a former public advocate attorney, Stephen Eisdorfer was lead counsel for a majority of the anti-exclusionary lawsuits that were filed on behalf of public-interest clients in New Jersey. Singled out and celebrated as one of the true protagonists in the story of *Mount Laurel*, Eisdorfer was elevated to near hero’s status in the book *Our Town*. Released just prior to the publication of the Seton Hall report, *Our Town* trumpets how Eisdorfer’s relentless barrage of lawsuits was matched only by his constant presence before COAH. Eisdorfer’s persistence in “delivering the identical message in each of his appearances before the council” (Kirp 164) does speak to his commitment to the issue. But what Eisdorfer kept saying, “in a redundancy that approached tedium,” was that “Mount Laurel is about race.” (Id) Therefore, it would not be unreasonable to suggest that Eisdorfer and his colleagues used the Seton Hall study as an attempt to substantiate a deeply held conviction.

Initially designed to capture a variety of data sources, those designs had to be abandoned. While there has always been a dearth of information specific to *Mount Laurel*, exacerbated by the lack of statewide coordination, data collection for this
particular project was an especially difficult task. Despite the promise of confidentiality from Seton Hall University, the request to provide sensitive demographic information was almost always rejected. This response was due in part to a natural suspicion regarding any request for information related to *Mount Laurel*, but it was also due in large part to the reputation of Eisdorfer, as many of these same municipalities had long and expensive memories of lawsuits initiated by the Public Advocate. The idea that they would now agree to cooperate in a study to measure their progress under *Mount Laurel* was almost too perverse. While most declined to participate, it really didn’t matter, as almost every municipality was incapable of supplying data that was never collected. In those rare instances where assistance was provided, the quality of the data was usually worthless.

While data deficiency was typically a function of poor record keeping, especially at the municipal level, it was also a consequence of the tremendous legal ambiguity that existed at the time. The uncertainty surrounding the potential civil rights violations associated with seeking information specific to the race and ethnicity of any person has always been problematic in the real estate industry. This dilemma became even more acute following the passage of the Fair Housing Act, as the notoriety surrounding *Mount Laurel* propelled the issue of racial discrimination to the political forefront in New Jersey. This may help to explain why so little demographic information was captured in those early programmatic years. The fact that only the size and the income of the household mattered within the calculus of eligibility might also explain why so little information

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6 I was hired by Seton Hall University to participate in the study. I terminated my participation when the intent of the analysis became obvious.
was collected. Therefore, a response to the questions relative to race, national origin and ethnicity were almost never recorded because the questions were never asked.

Supporting this assumption were the multiple blank spaces that appeared on the housing and mortgage applications on file throughout the state. Whether this information was in the possession of private or non-profit developers, sponsoring municipalities or state housing agencies, blank spaces to unanswered questions was the norm. In fact, the practice of non-disclosure was so prevalent and the resulting loss of data so significant that it prompted the state to seek a clarification from the New Jersey Attorney General’s office. What followed was a 1992 Executive Order that clarified the distinction between data captured to establish eligibility under state and federal housing programs versus data used to intentionally discriminate. While the impact of this action was immediate, helping to improve the quality and quantity of information generated, the years of missing data were forever lost. As a result, we will ever know much more about the earliest occupants of Mount Laurel housing except that they were all income-eligible by definition.

This is the key finding of the Seton Hall study, which demonstrates conclusively that all of the households contained within the state’s data base were by definition income eligible. Yet the significance of this result is constantly overwhelmed by the study’s primary focus on race. If the intent of this investigation were to determine the impact of the Fair Housing Act on the ability to “ameliorate” economic segregation, it would have been declared an unqualified success. Instead, the results are only significant by the attention paid to the color and location of the income-eligible population served by the Mount Laurel process. By this standard, the report concludes that “thus far,” Mount Laurel has had “little effect on ameliorating the pattern of racial residential segregation.”
The fact that Mount Laurel through the Fair Housing Act was never set up to achieve such an objective is conspicuously absent in this study. The qualification of the conclusion, however, which suggests that the passage of time may help to improve these statistical results, may have been a discrete apology for the quality of the data upon which these conclusions were drawn.

The effects of missing data are significant in the Seton Hall analysis. This is a reflection of both the quality and the timing of information collected by the New Jersey Affordable Housing Management Service (AHMS), a former state agency that was once located within the New Jersey Department of Community Affairs (DCA). The primary function of AHMS was to facilitate the process of affordable housing by matching the available supply of affordable housing with a fully qualified pool of income-eligible applicants. Although a statewide agency, consistent with the infrastructure established by COAH, AHMS operated on a regional basis to serve as both a clearinghouse and a conduit for the applicant information it collected. Then, on a fee per unit basis, both municipal and developer clients would contract with AHMS to access the data. Contrary to the Seton Hall report, AHMS didn’t “manage” affordable housing. It simply served a data processing function. For the Seton Hall report to state that AHMS was somehow capable of controlling the geographic placement of applicants into designated locations was simply an erroneous statement. AHMS simply provided choices for the exercise of individual preferences, as the entire process was self-selecting.

When the AHMS data was turned over to Seton Hall in March 1996, the database contained approximately 43,500 cases. The two main files consisted of 36,000 applicant households and roughly 7,500 occupant households. The data was then segregated into a
number of different variables, which included the race, ethnicity, household size, age of the householder, income and previous residence. The variables were then cross-tabulated and the results displayed in sixty-two separate tables. Most of the information generated would serve to support the principal objective of the research, which was to determine the success achieved by the minority urban poor to secure affordable housing in suburban communities. In this study, “minorities” were households that designated themselves to be either Black or Latino on the AHMS application. These were then combined with the White designated households to generate the variable “ethnicity.” All “other” values were either collapsed or discarded. Once created, ethnicity was then cross-tabulated with every other variable in the dataset to produce a profile of household characteristics for each racial cohort. The outcomes produced reflected the problems associated with disclosure, as 2,444 or roughly one-third of the 7,487 total cases in the AHMS occupant data file had missing values for the ethnicity variable.

The problem of missing values grew worse when ethnicity was combined with the current and previous address of the occupant household. In the attempt to measure geographic mobility, state designated community codes were used to establish the location of each of New Jersey’s 566 municipalities. Referred throughout the state as a “commucode,” this four-digit number is a construct of two values, where the first two digits correspond to one of the twenty-one counties in New Jersey while the second two digits identify a specific municipality within the same county. In theory, an occupant household should have two commucodes attached to its file. The first to correspond with the address listed on its AHMS application and the second to identify the location of the new residence secured through the AHMS process. Once each address was transformed
into its respective commucode, the mobility of the household was revealed. This was accomplished using criteria established by the New Jersey Department of Community Affairs (DCA), which at the time classified 52 of the state’s 566 municipalities as urban communities. By setting up a simple yes/no scenario, any commucode that matched one of these 52 locations was designated as “urban,” with the remaining 514 municipalities classified as “suburban.” While the actual miles traveled to secure new housing wasn’t possible to calculate, that information was irrelevant to the objective of the study. What mattered most was the ability to determine whether an applicant from an “urban” community had successfully secured new housing in a “suburban” location.

While the construct of the analysis was valid, it was the data that once again proved suspect. As a matter of record, New Jersey is the most densely populated and urbanized state in the nation. Given this fact, it is almost impossible to support the validity of a classification system that designates less than 10 percent of the state’s 566 municipalities as urban communities. Although never challenged by the Seton Hall report, the list generated was an amalgam of two different sources. The primary source was culled from the towns designated by DCA as Urban Aid communities, which was then expanded to include the towns ranked highest on a Municipal Distress Index (MDI). While the establishment of the former is often the function of politics, a necessary prerequisite for a variety of state funding sources, the latter is a more thorough calculation. The MDI is published by the New Jersey Office of Management and Budget and is based on a series of eight social and economic indicators. Although a development ranking that corresponds to one of five different “urban levels” is assigned to each municipality, this density gradient is for information purposes only and does not affect
the MDI calculation. (1996 MDI) All of which suggests the need for a better index, especially for New Jersey where the number of outer-ring urban communities classified as suburban simply defies the description.

The deficiency of the state’s municipal classification system was compounded by the quality of the AHMS data. The extent of the data problem was exposed by the mobility analysis, as the number of cases with missing variables was significant. When the occupant files were cross-tabulated by the ethnicity of the household, roughly 4,800 cases dropped out of the analysis. The loss of data would continue with each successive cross-tabulation, as each of the variables was disaggregated by the sex, age, income and tenure of the household. Although the final results led to the declaration that “thus far” Mount Laurel had failed to meet its objective,” this conclusion was based on a total record of 182 households. Although representing less than 2 percent of the total occupant file, this was the number of households that had moved from an urban to a suburban location. While clearly an under representation of the population, this conclusion was really based on the number of cases with a complete data file. Despite the quality of the data, the analysis revealed that of those households that migrated from urban to suburban locations, 121 or 66 percent were white households. While this meant that 36 percent of the total was comprised of minority households, this relative success was offset by the reverse migration of 30 minority households that moved from a previously suburban to a new urban location. This observation led to the unfortunate accusations that the implementation of Mount Laurel promoted the resegregation of New Jersey’s cities. This perception was reinforced further by the total distribution of occupant households, which revealed that almost all of the white households in the AHMS database ended up living in
suburban housing units, whereas only 5 percent of Black households relocated to suburban housing.

Why this occurs is never explored in any detail, except to suggest that differences in personal wealth and credit histories may explain the impediments faced by minority households in seeking suburban housing. (Wish 59) However, no attempt is made to explain the motivation behind the household decision to relocate. A minority household that chooses urban home ownership over existing rental housing in a suburban ring community is not a failure of the process but an absolute expression of individual choice. Similarly, white applicants often trade affordable housing opportunities within their own communities for those further away, exercising a different choice within the same process. The end result is a household distribution that has produced a higher representation of relocated whites in suburban locations.

It is in retrospect that the results observed and the conclusions drawn by the Seton Hall report were typical of the national experience at the time. The changes described earlier in this chapter, where the effects of a more aggressive national housing policy, had yet to be realized. Although this may explain some of the results observed, the quality of the AHMS data explains a lot. By its own account the Seton Hall report was “the largest and most comprehensive so far.” (Wish 75) But its failure to explain the limitations and therefore the outcomes generated by the AHMS data did little to move the Mount Laurel debate forward. Perhaps that’s why the report concludes by stating “a need for case studies…to understand the process by which individuals choose to apply for housing and how they come to either obtain such housing or fail to obtain such housing.” (Id) Although a case study may have been beyond the scope of the Seton Hall report, current
research at the time was building an impressive body of knowledge towards a better understanding of the social and economic impacts of neighborhood migration. While the report does reference a number of published studies that address the multiple consequences of racial segregation, it fails to recognize the important work of scholars like William Julius Wilson, whose seminal work in *The Truly Disadvantaged* redefined the cause and effects of concentrated poverty. And while an analysis of the studies published on this subject is beyond the scope of this thesis, the research advanced by Wilson and others that elevates the explanatory importance of economic segregation is absolutely central to the *Mount Laurel* doctrine.

Despite its clearly stated intent to produce a more quantitative rather than qualitative report, the Seton Hall project went beyond its objective “to answer a number of important empirical questions” (Id 1) by framing both the study and its result within the context of race. Although the body of research on the implications of race in housing is extraordinary, its relevance is secondary to both the judicial and legislative mandate of *Mount Laurel*. To suggest otherwise implies either a lack of knowledge or an unwillingness to accept facts. While the former is an accusation that does not apply to the authors of the Seton Hall report, the latter is debatable.

In the years surrounding the Seton Hall report, housing policy at the state level had turned almost exclusively urban. A consequence of the racial and political aftermath of the 1993 election of Christine Todd Whitman, a number of new and aggressive housing initiatives were quick to emerge. In 1994 the Urban Coordinating Council (UCC) was created to provide the highest priority of statewide funding and an unprecedented level of interdepartmental cooperation to assist New Jersey’s most distressed urban
communities. Programs like “Too Good, But It’s True” were produced to provide heavily discounted “urban mortgages” to families seeking homeownership opportunities within a UCC district. (2001 HMFA Annual Report) The Urban Homeownership Recovery Program (UHORP) was another heavily funded campaign designed to encourage more mixed-income, for sale housing opportunities in urban communities. By June 2000, 52 developments were approved in 19 urban centers creating a pipeline of 1,551 units. (Id) Even the highly competitive Low Income Housing Tax Credit (LIHTC) program was affected, as bonus points were awarded to those applications seeking to develop projects in urban areas. Even more bonus points were awarded for those LIHTC projects proposed within certain poverty designated census tracts. All of these initiatives and more became available at precisely the same time that New Jersey was experiencing a huge influx of new immigrant households. While no causal proof exists, this conjunction of resources and immigrants does coincide with the first real population gains recorded by many of New Jersey’s urban communities. Documented by the 2000 Census, this result not only reversed a negative population trend that persisted for decades, it helped to fuel an impressive urban renaissance throughout the state.

**Jargowsky and Wilson**

It is within the immediate wake of the Seton Hall report that the next wave of important research emerges. More national in scope, these efforts provide a better context for the AHMS data by demonstrating how profoundly linked poor neighborhoods are to metropolitan labor markets, housing markets and social networks. Moreover, these findings serve to validate the judicial premise of *Mount Laurel* by elevating the role that
economic segregation plays in the creation and growth of poverty neighborhoods. Principal among these efforts is the work of Paul A. Jargowsky, whose 1997 book Poverty and Place had an immediate impact on the community development literature. In what William Julius Wilson describes as “the first work to provide a comprehensive analysis of changes in neighborhood poverty nationwide,” (Jargowsky vii) Jargowsky exposes the complexity of the problem as a symptom of broader metropolitan processes. These processes, which focus primarily on income generation, center on the structural changes within the economy that adversely and disproportionately, affect low-income and low-skilled minorities. A deconcentration in employment results in a spatial mismatch that leads to a further decline in the demand for low-skilled labor. This ultimately results in a slowing or negative growth in real wages. This sequence of events has drawn considerable attention in the literature, more so over the last decade, with a general consensus in support of Jargowsky’s findings. (Katz) One major point of departure centers on Wilson’s controversial thesis of “neighborhood sorting,” which attributes the flight of higher income African Americans from the inner city to an increase in economic segregation. This theory has been challenged on the premise that it is “racial segregation and not economic segregation that has played a major role in the recent growth of ghetto poverty.” (Id ix)

However, it is the rigor of Jargowsky’s empirical analysis that ultimately confirms Wilson’s position, which emphasizes how “an undue focus on the poorest neighborhoods…can deflect attention from the broader structural aspects of poverty.” (Id 4) Using census tracts as proxies for neighborhoods, Jargowsky calculates the index of dissimilarity between non-Hispanic whites and Blacks throughout the United States. His
analysis reveals an actual decline in racial segregation between 1970 and 1990, while poverty at the neighborhood level increased over the same period. Jargowsky states that what best explains this result is the economic segregation that exists within a minority group, not just Blacks, but “the degree to which minorities are residually segregated from whites and from each other by income.” (Id 193) This was identical to Wilson’s point, made a decade earlier when he first examined the national experience of poverty and Black poverty in particular, before scaling his analysis down to a single case study of the Chicago metropolitan area.

With data collected from 1970 to 1980, Wilson was able to show how the factors associated with increases in social dislocation are complex and cannot be reduced to the easy explanation of racism or racial discrimination. While neither denying or discounting the impact of discrimination, Wilson argues that the problems associated with the urban poor have been “due far more to a complex web of other factors that include shifts in the American economy…that have exacerbated other social problems in the inner city (Wilson 62) Furthermore, Wilson refuses to elevate the explanatory importance of the more politically conservative “culture of poverty thesis,” emphasizing instead “the evolution of ghetto social conditions in the context of the changes in a metropolitan area’s opportunity structure.” (Jargowsky 189) For Wilson, the solution lies in “macroeconomic policy to generate a tight labor market and economic growth,” in combination with more targeted social services strategies. (Wilson 18) Simply stated, Wilson’s view is that the “underclass culture is primarily an effect of economic transformation and social isolation, rather than a major sustaining force of neighborhood poverty.” (Id)
Jargowsky completely agrees, and he uses the strength of his analysis to prove that neighborhood poverty is not primarily the product of “the people who live there” or the “ghetto culture,” but is in fact a condition determined by the economic opportunities at the metropolitan level. (Jargowsky 193) For Jargowsky, it is now a matter of turning attention to the important conceptual issues that need to be resolved, which is whether the poverty discussion is about race and ethnicity or whether it’s about class? (Id 7) Believing that the cycle of abandonment and decay “seems immune to policy interventions or private initiatives,” Jargowsky advocates for the pursuit of public policies that “raise incomes, reduce inequality and unite rather than divide our society.” (Id 212) This call to action is nearly identical to that of Wilson’s, who ten years earlier argued for “a comprehensive program that combines employment policies with social welfare policies and that features universal as opposed to race-or group-specific strategies.” (Wilson 163) For both of these scholars it is simply a matter of the political will necessary to advance a public policy agenda that will “find a new and viable structure for metropolitan areas…a larger urban community rather than an agglomeration of separate and antagonistic places. (Jargowsky 213) Jargowsky warns that “the alternative is to continue blundering down the futile path of letting our cities become hollow shells.” (Id 212)

Is it possible that the critical nexus between city and suburb established by Wilson and Jargowsky was the bridge that the court envisioned in Mount Laurel? Was the court’s 1983 mandate that sought regional solutions to local problems, using the State Development and Redevelopment Plan (SDRP) as its guide, simply the precursor to the current metropolitan planning paradigm? While the answer may be a matter of opinion,
the impasse that has lasted for more than thirty years has grown tired and unproductive. The time has arrived for better and more creative planning solutions.

The irony of course is that in 1983 the court’s *Mount Laurel II* decision made no less than thirty-six separate references to the critical and coordinating function of planning in the affordable housing process. (Payne 2003 37a) Convinced that the two were not mutually exclusive, the court attempted to fashion a solution that would provide for the obligation demanded by the state’s constitution without compromise to the state’s future quality of life. In fact, the court declared, “The Constitution of the State of New Jersey does not require bad planning. It does not require suburban spread.” (92 N.J. 239)

To have anticipated the consequences of the “wasteful extension of roads and needless construction of sewer and water facilities for the out migration of people from the cities and suburbs” was remarkably prescient. (Id) And yet despite the court’s admonition, nothing was done on the executive or legislative level to avoid what has now become New Jersey’s reality.

Given the legacy of home rule, it is doubtful whether a true metropolitan strategy will ever be embraced in New Jersey. But the political pressures that are now in play may finally force a new planning direction, as the impact of sprawl on the quality of life is no longer just a distant warning. Not just in New Jersey, but nationally, where the current boundaries of decline have stretched well beyond our cities and into the older suburbs. While the constant push of development pulls more people further out and away, these boundaries grow more disproportionate. No longer determined by the mere physical space that separates old from new, these distances are now measured by the disparity in the quality of people’s lives. In what has now become an all too familiar pattern of
development, “today’s winners become tomorrow’s losers” in a land use game that has simply played itself out. (Rusk 1999, 305)

**Enter Haar—The Harvard Law Professor**

Understanding these differences better than most is Harvard law professor Charles Haar, whose 1996 book *Suburbs Under Siege* is dedicated entirely to the *Mount Laurel* phenomenon. Published at almost the exact same time as the Seton Hall report and just months after the 1995 release of *Our Town*, Haar argues forcefully for the courts as the vehicles to achieve economic and social justice. Like Kirp before him, Haar insists that the *Mount Laurel* decisions “must be understood as among the most significant judicial opinions of our time.” (Haar 10) Unlike Kirp, however, Haar’s point of view is tempered by the clear recognition that “while still too soon to be equivalent in stature, the *Mount Laurel* decisions are on a par with *Brown v. Board of Education*.” (Id) This subtle distinction provides the best example of the not-so-subtle differences between the two critiques. If Kirp’s commentary has the constant undertone of profound disappointment, Haar’s is much more practical. Perhaps more a reflection of experience than temperament, Haar’s distinguished career as a land use scholar may have engendered the kind of patience necessary to appreciate the slow and incremental process of change. Maybe that’s why Haar is convinced that “the Mount Laurel Doctrine has had an effect—not readily susceptible to measurement but no less real—on individuals, whether inspiring them to act idealistically or persuading them to reexamine their attitudes towards integration in housing and land use.” (Haar 131) While the long-view of history
will ultimately decide *Mount Laurel’s* rightful place in the national judicial record, Haar’s passion for the law is undeniable and infectious.

In fact, Haar’s critics have argued that his uncompromising belief in the ability of the judicial system to redress societal wrongdoing is too unrealistic. (Atlas) But Haar claims that the *Mount Laurel* cases must be considered within the context of a broader trend, where “courts are drawn more and more into the reorganization of public institutions that are failing in their designated missions.” (Haar 9) When the democratic system is unable to act, Haar insists that judges “must step in to repair abuse of mandate and systemic flouting of legal norms.” (Id) In *Mount Laurel*, Haar believes that the courts, “though trial and error,” were able to structure a process with “remarkable effectiveness.” (Id 10)

For Haar, the irony of *Mount Laurel* is that the law is what made it possible to engage in exclusionary conduct in the first place. By allowing such zoning devices as minimum lot and room sizes and setback requirements to legally keep out “undesirables,” the law was the “major player” in the pattern of segregation and discrimination. To Haar, it was the sharp reversal of this doctrine that offended the tenets of standard legal culture. (Id 136) To have those tenets challenged on the “basis of an equal sharing of the burdens of metropolitan existence and equal access to the suburban lifestyle” is what made *Mount Laurel* so poignant for Haar. (Id 9) Haar then goes on to describe, “in the kind of detail only a zoning lawyer could love,” (Atlas) the court’s prescription for righting these legal wrongs in the attempt to get affordable housing built.

Unlike Kirp’s reaction to the political and social implications of the court’s decisions, Haar’s legal focus was much sharper and expansive. Haar takes a
chronological journey across the court’s decisions, not just the major landmark rulings but all of the relevant cases as well. Haar is convinced that the *Mount Laurel* cases, “in their remedial phases…are a fine argument for institutional reform through judicial intervention.” (Haar 137) Haar was especially enamored by the builder’s remedy, as “the most powerful mechanism available to enforce compliance with the Mount Laurel Doctrine.” (Id 112) In addition, Haar also celebrates the Fair Housing Act and COAH as yet two more examples of the many reforms that were inspired by the court. Once again Haar’s opinion is in sharp contrast to Kirp’s characterization of the Fair Housing Act as “the classic political compromise,” (Kirp 120) which of course it was. While the nature of any successful legislative process is compromise, what matters in the end is how much is won and lost. Although Kirp does recognize that “the Fair Housing Act codifies the constitutional concept of fair share,” and calls it a “remarkable accomplishment,” he also believes that this legislation “tells the story of how an isolated court was forced to admit defeat.” (Kirp 147) Haar, on the other hand, acknowledges that:

“The legislature’s resolution through the FHA represents a balancing of interest groups that in the end tipped the scales towards municipalities. Courts, bound to uphold lofty constitutional principals even at the expense of disruptive local changes, would probably have reached a different point along the spectrum of accommodation to political pressure.” (Haar 110)

Defeat is a relative term. With an acknowledged “bow to the political realities,” the court understood the value of compromise. (103 NJ 1) So did Haar, who uses the above quote from the 1986 decision in *Hills* to underscore the fact that both the New Jersey Supreme Court and the Fair Housing Act “deal with one of the most difficult constitutional, legal and social issues of our day.” (Id 205)
Ultimately, Haar’s more liberal leanings surfaced during his discussion of the one remedy that he disliked, the Regional Contribution Agreement (RCA). But despite his reservations, Haar still recognizes the *quid pro quo* of the RCA as “the political glue that holds the Fair Housing Act together.” (Id 113) Haar understands how the absence of such a mechanism may have precluded the legislature from enacting any statute in support of the production of low and moderate-income housing in suburban areas. (Id) Haar goes even further by calling the RCA “a legislative safety valve” and that without such a concession “the entire ship of low-income housing production would sink.” (Id 114) Haar acknowledges that “RCAs allow a move in the right direction after all, just at a slower, more politically realistic pace.” (Id)

While Haar’s defense of the RCA may be a singular voice in the cacophony of reaction, there is an undeniable lament behind his veneer of practicality. While Haar acknowledges the RCA as “a key divergence between legislative and judicial aspirations for Mount Laurel reform,” he also admits that the RCA is responsible for “shifting the rationale away from the broad goal of ending geographic segregation surrounding inner-city minorities and toward the raw provision of low-income housing.” (Id) As a result, Haar believes that “RCAs evoke a disheartening picture of the have-nots continuing to distance themselves from the have-nots through their collective willingness to pay a form of ransom through taxes, as a way to maintain the value of their homes by allowing lower-income housing to be built elsewhere.” (Id 114) It is on this point where Haar, Kirp, and Wish converge in their collective belief that RCAs represent a subversion of the true spirit of *Mount Laurel*. As a programmatic option, Haar agrees that the RCA frustrates “the more significant underpinning of Mount Laurel: the aim of unlocking New
Jersey’s inner cities.” (Id 115) By claiming that the RCA became a “counterproductive form of bribery, a hollow and hypocritical device that embodies the true cynicism of the New Jersey legislature acting on behalf of suburban constituents,” (Id) Haar’s frustration boarders on contempt. Despite these misgivings, in the end Haar still believes that “the RCA ended up as the jewel in the crown of the legislative counterreformation.” (Id 114)

Despite Haar’s less than sanguine endorsement of the RCA, even he didn’t understand how the process really works. In fact, I have failed to find a single commentator who has correctly explained the RCA formula. It is not, as popularly characterized, a process that simply allows suburban communities to sell back up to 50 percent of their own indigenous housing needs. It is instead a mechanism designed to send back to the cities a portion of suburban-received urban housing need in the form of suburban dollars. It is a process, singularly unique to Mount Laurel, whereby the city gets to dictate the terms of the agreement, free to negotiate and accept the highest bid from any suburban community within its designated housing region. It is a process that has generated more than $280 million to create more than 10,000 units of affordable housing in urban communities. Although impressive, the attacks against RCAs are almost always isolated and never within the context of the total achievement. Taken as a whole, the 10,000 RCA units represent just 15 percent of the 61,000 units that have been authorized statewide as a result of Mount Laurel. But beyond the logic of the math, which has failed to temper the argument, the most critical and overlooked factor in the RCA equation is eligibility. Simply stated, without a housing plan approved by its own community and certified by the state, the Fair Housing Act prohibits participation in the RCA process. No community can “bribe” another with cash until it satisfies its own fair share obligation.
Whether omitted by design or ignorance, this fact is often missing in a debate where the constant focus on the number of units transferred has always diminished the achievement of the total process.

While this lack of balance has been historically consistent, perhaps any further attempts to judge the relative merits of *Mount Laurel* should be couched within Haar’s advice. Instead of condemnation, Haar counsels patience, knowing instinctively that “there simply has not been enough time for social learning to occur, for new standards of social acceptability to form, or for corrective policies to coalesce.” (Haar 191) Although many may argue that the process isn’t working any better today than it did more than a decade ago, the fact remains that *Mount Laurel* will always be a work in progress.

**John Payne—The Thorn in the Side**

The majority of the published literature on *Mount Laurel* has been generated by the legal community. Both Kirp and Haar are lawyers and their books represent the only major, non-technical publications dedicated entirely to the subject of *Mount Laurel*. Aside from these two efforts, most of the legal commentary has been in the form of articles published by university law reviews throughout the United States. While the primary legal focus has centered on both constitutional and land use law, the social, economic and political implications of the *Mount Laurel* decisions have also received considerable attention. The most prolific within this genre of legal scholarship has been Rutgers University law professor John Payne.

By his own characterization, Payne classifies himself as “a day-to-day Mount Laurel player at the grassroots level.” (MLR 96) While it is hard to measure Payne’s
contribution on the day-to-day practice of *Mount Laurel*, his overall contribution to the published debate has been considerable. Involved as both counsel and advocate, Payne has been historically consistent in his ability to meter out both criticism and praise. He will easily acknowledge the *Mount Laurel* doctrine as “one of the most important social initiatives of our time,” while constantly trying to draw attention to what he believes are its major flaws. (Id) But despite his many attempts at influencing public policy, Payne has never been engaged by any administration in New Jersey, Democrat or Republican, to participate directly in the *Mount Laurel* process.

While having no lawyer’s role in either of the first two *Mount Laurel* cases, Payne’s 1983 participation as co-counsel to the *Urban League* case provided him with the opportunity “to have a hand in the litigation which resulted in the fair share formula.” (Stoffer 92) Four years removed from the Urban League experience and the implementation that followed, Payne published his seminal work on *Mount Laurel*: *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*. (RELJ 87) It is here that Payne first expresses his deep frustration over what he perceives as a wholly inadequate and failed process. To his credit, Payne goes beyond mere criticism to propose a complete transformation of the entire system. While both his critique and suggestions had merit, they would find no other audience except for the advocate and the academic. Undaunted, Payne would continue his campaign for change over the next fifteen years, refining and repeating his analysis in a series of published articles and lectures. Although his message never seemed to travel beyond a handful of university law reviews, Payne would continue preaching his brand of public policy reform.
The foundations for Payne’s criticisms were grounded on the premise that the court’s reliance on a formulaic solution to affordable housing was a complete disaster. Ironically, it was Payne’s use of the initial court-generated consensus formula that served to make his arguments. By using Cranbury Township as his illustration, Payne asks how a rural farming community with a 1980 Census population of less than 800 households could be assigned an affordable housing obligation of 816 units. The facts are that it couldn’t, which is why the consensus formula was never adopted by COAH. While the state chose to use the alternative methodology created by the Rutgers Report, Payne never adjusted his argument to reflect the COAH generated numbers. Nevertheless, his basic point remained unchanged, which was how the initial formulaic result made it impossible to rationally explain or discuss the fair share process. (RELJ 87) For Payne, the fact that the fair share formula “was expressed as a court rule” also doomed it to failure since “the public never accepted the legitimacy of the courts’ involvement in the housing development process.” (Id 28) Payne’s observation on all three counts is absolutely correct.

While Payne believes that the legitimacy issue was resolved with the creation of COAH, he never let that deter his criticism for the agency and its methods. For as quick as Payne was to recognize COAH’s impact on the restoration of public confidence, he was even quicker to condemn the agency for being blatantly political. Despite his own recognition that COAH is by “legislative prescription a determinedly political body,” Payne’s constant expressions of both shock and disappointment by the agency’s attempts at municipal compromise are surprising. (Id 29) This was best illustrated by the numerical differences between the original fair share formula, which Payne had a “hand”
in creating, and the “competing methodology known as the Rutgers Report,” which was utilized by COAH. While Payne accused both methodologies of “relying on fictions” to “clearly serve predispositions about how the cases should come out,” the nearly 100,000 unit difference between the two calculations served to support Payne’s point. Resigned to the fact that “[Y]ou can never remove the fair-share estimate from its political determinants,” Payne’s contempt for the process became even more acute when COAH’s second round of fair share calculations produced another sizable reduction. (Kirp 160) This time, however, in what would become a recurring theme of complicity, Payne admonishes both COAH and his own colleagues for the disappointing result.

“That COAH could manipulate the numbers as easily as it did—with the assistance, I’m sorry to say, of the [Rutgers] Center for Urban Policy Research—suggests that the methodology is…so squishy that it doesn’t guarantee objectivity.” (Id)

Regardless of the numbers produced, Payne clearly understood that the inability to physically meet the state’s affordable housing obligation made the whole numerical argument moot. Citing a 1985 summary table of building permits issued over the past twenty-five years by the New Jersey Department of Labor, Payne would argue that from the vantage point of 1987, an average of 42,000 permits per year represented the total production capacity of the system. Payne recognizes that “[E]ven on the unrealistic assumption that most of these permits could have included a 20 percent Mount Laurel set-aside,” the building industry could be expected to supply no more than 8,400 affordable housing units per year or slightly more than 50,000 units over the six-year fair share period. (RELJ 27) Payne then positions the result within the context of the Urban League fair share calculation that would have attempted to distribute in excess of 245,000 units over the same six-year period. (Id) History would reveal that the permit numbers
never got any better and in fact they got progressively worse. It is at this point that Payne reinvigorates his argument for a change in methodology, first introduced in 1987 and now outlined for a second time in a 1992 lecture entitled, "The Mount Laurel Decade." (Stoffer 92)

There are a number of reasons why Payne believes that reliance on a system that “can’t produce...245,000, or 100,000 houses, in six years or even, I’m afraid to say, in sixteen years or possibly sixty” is foolhardy. (Id 5) First is his belief that “we have allowed ourselves to be sucked into pretending that we are solving a problem that is in fact unsolvable over the short term.” (Id 6) For Payne, the builder’s remedy and its 20 percent set-aside had quickly proved to be a double-edged affordable housing sword, as the units it did produced came nowhere close to fulfilling the potential that existed during the housing boom of the mid 1980s. Second, Payne viewed the sole implementation of the Mount Laurel doctrine via the builder’s remedy as an administrative disaster. Crippled by the public’s reaction to the threat imposed, the simple math was enough to derail the entire process. When each municipality did its own calculation, multiplying its fair share number by the 4:1 formula, the public reaction was predictable. The law suits that followed simply overwhelmed the courts, many taking years before they were finally resolved. Third, the bottom fell out of the real estate market, which exposed the other great weakness of the builder’s remedy.

What recalcitrant towns were not able to accomplish by legally stalling through countersuits, the market was able to achieve all by itself. The precipitous decline in building activity brought about by the severe recession of the early 1990s had caused the primary vehicle for the production of affordable housing to come to a grinding halt. For
Payne, these wild swings between programmatic feast and famine reinforced all of his original criticisms, which he states were “born of frustration…that one of the few truly innovative social ideas of our time—market-subsidized lower-income housing—should come so quickly and so completely to the point of extinction because of an inadequate forum for implementation.” (RELJ 28)

But despite its stumble out of the administrative gate, the builder’s remedy was still responsible for producing a record number of affordable housing units. The significance of the result was not lost on Payne when in 1992 he acknowledged that “the decade of Mount Laurel II has accomplished an impressive record of housing production.” (Stoffer) However, Payne’s observation is one of a qualified success, as he argues that the results achieved were accomplished “on the basis of a not fully articulated constitutional theory and with a methodology that has unfortunately violated tenets both of good planning and good politics.” (Id) Convinced that “a tremendous opportunity is being lost, and that the formula-driven fair share approach seems incapable of doing much about it,” (Id) Payne is quick to return to the alternative methodology that he first introduced in 1987. The option espoused was a concept Payne called the “alternative fair share.” (RELJ)

**Payne’s Idea of Growth Share Replacing Fair Share**

The idea behind alternative fair share is one that has evolved into the present day concept of “growth share.” Simply stated, growth share would require each municipality to dedicate a proportion of its own growth to affordable housing. This would include not just residential, but all other forms of permitted commercial, industrial, and retail
development. To Payne, the political advantages alone made this option vastly superior, as it would have eliminated the need for a formula-based confrontation since each town’s fair share would become self-defining. In essence, “a municipality’s “fair share” is a fair proportion of whatever development it chooses to allow.” (Id) Beyond politics, Payne also believed that the tangible results of growth share would also be greater, as the obligation to produce affordable housing would extend to every urban as well as suburban community in the state. To this point Payne was especially passionate, as he viewed the lack of fair share participation by “our older, fully developed suburbs nearest our big cities,” as one of the great casualties of the current process. To Payne, “these older suburbs are exactly where we should be looking for effective solutions to the urban component of our affordable housing crisis,” since “urban dwellers do not seek these suburban units out in large numbers.” (Id) And while Payne believes that the “Regional Contribution Agreement mechanism has at least made a start at improving the housing circumstances for those who, for whatever reason, remain bound to the cities,” he argues that the inequity merely reflects the inherent bias of a system where “the rules emphasize the availability of vacant land and totally ignore redevelopment possibilities.” (Id 8)

For Payne, this bias is manifest in the municipal over reliance on the builder’s remedy to fulfill fair share obligations. Whether real or perceived, Payne argues that “the builder’s remedy became the be-all and end-all of the compliance process, so much so that inclusionary zoning is now welded permanently into the fair share rules of the Council On Affordable Housing.” (MLR 4) Furthermore, it is Payne’s belief that a system driven by the economic self-interest of private builder-litigants runs contrary to the greater public interest, which in turn serves to undercut the perceived legitimacy of
the entire process. (Id 15) Unlike Haar who points to the builder’s remedy as “the grand strategy for achieving social reform,” (Haar 146) Payne argues that the overall results achieved have come at a very significant price. Measured not just by the insufficient numbers of affordable units produced but by the opportunity costs that have been lost. Payne’s overall calculation includes the political, economic, social, and environmental fallout caused by both the use and the threat of the builder’s remedy. And while the magnitude of the difference between the impact and the perception of the builder’s remedy may vary significantly, for Payne the solution to the problem has always remained the same.

Nearly ten years after the publication of *Rethinking Fair Share*, Payne recast his prescription for change in a 1996 article published in the Michigan Law Review. (MLR 96) While the primary purpose of the piece was to provide a critique for Haar’s 1995 book, *Suburbs Under Siege*, Payne fulfills the objective of the assignment by highlighting his differences of opinion in an effort to emphasize his alternative strategies. But unlike prior published works that focused mainly on the promotion of the growth share alternative, Payne takes this opportunity to draw a sharp distinction between himself and Haar on two very critical and fundamental aspects of the doctrine. These differences, which Payne believes are interrelated, “may explain why these [Mount Laurel] cases have not sparked a land-use revolution.” (Id 1) Specifically, it is Payne’s contention that Haar “overvalues the importance of co-opting the private sector as a key element in the success of the Mount Laurel process,” and that Haar “overstates the legitimacy of the New Jersey Supreme Court’s intervention into land-use policymaking.” (Id) Although now directed at Haar, these are the same charges Payne has leveled against *Mount Laurel*
since its inception. To prove his point, Payne once again returns to the example of Cranbury Township.

In Cranbury Township, Payne recounts how a single lawsuit initiated by a public-interest group just prior to the court’s decision in *Mount Laurel II*, turned into a legal feeding frenzy once that decision established the builder’s remedy. By the time the legal dust had settled, the Fair Housing Act was enacted and Cranbury’s case was transferred from the court to COAH. Under COAH’s jurisdiction, Cranbury’s fair share obligation was reduced from 816 to 153 units. (Id 6) While the municipality was the clear winner in these proceedings, from Payne’s point of view the legal chaos that erupted in Cranbury exposed a compliance process that he labeled both seriously flawed and unproductive. Fueled by the intense competition for the potential profit to be realized, Payne regards the rush to litigation as both typical and symptomatic of a system motivated purely by private interests. On the other hand, the experience helped to crystallize Payne’s vision of what could have been accomplished given the unique and multiple roles that were played by the original public-interest litigant. For Payne, this distinction between the private and public interest in the prosecution of municipal compliance became the new centerpiece in his campaign for methodological change.

Given the lack of success in promoting the growth share alternative, Payne decides to shift his focus back to the builder’s remedy. While more strategic than compromise, Payne realizes at the time that the builder’s remedy is the only compliance game in town. Getting back into the game, or more specifically, restoring the public interest as a major player in the contest, became Payne’s new public policy objective. Since the NAACP, a public interest group, initiated both of the original *Mount Laurel*
cases, Payne believes that the court’s full embrace of the builder’s remedy is what ultimately drove “the public-interest bar out of the Mount Laurel area. (Id 7) It seems only fitting, therefore, that Payne, on behalf of a number of public interest clients, would now petition the court in an effort to “question whether the builder’s remedy is achieving its intended goals” and to offer ways of “reformulating” the process. (Amicus 1)

Fortunate by both timing and circumstance, Payne is able to take advantage of the court’s startling decision to revisit the builder’s remedy when it certifies the appeal on behalf of West Windsor Township, a defendant municipality in a builder’s remedy lawsuit that was first filed in 1993 by Toll Brothers, one of the nation’s largest homebuilding companies. Writing under the auspices of the Rutgers Environmental Law Clinic, Payne’s amicus curiae brief filed on October 2, 2001 sets out “not to advocate for one side of the other” but to “identify and analyze how the implementation of the Mount Laurel doctrine has, in some cases, strayed from the constitutionally-based goals of Mount Laurel II.” (Id)

Drawing “extensively on the practical experience of the past eighteen years to sketch a portrait of Mount Laurel compliance,” (Id 60) the picture that Payne paints is a composite of the historical arguments that have come to define his own advocacy. Broken down into three main “points,” Payne stresses the multiple consequences suffered by the over reliance on the builder’s remedy, and then provides his own specific remedy for each. Beginning with the most fundamental aspect of the Mount Laurel doctrine, Payne asserts that the exclusive use of the builder’s remedy fails to ensure the mandate of a “realistic opportunity,” especially for those households with incomes below 40 percent of median. Payne cites a multitude of factors for this condition, but is especially critical of
the automatic denial of state subsidies for inclusionary projects. Perceived as “double
dipping” by the state, Payne argues that such additional subsidies should be encouraged
in an attempt to serve the lowest income families possible. Payne ties this criticism into
the fact that the majority of affordable units created by inclusionary developments are
offered for sale by the sponsoring developer, which by default results “in moderate
income housing and housing that is sold or rented at the high end of the low income
range.” (Id 10) Payne’s answer to expanding the range of affordability is to provide a
different incentive structure to the remedy, allowing builders to build more if they
commit to serving a broader array of the beneficiary class. If they can’t, then their awards
should be limited in proportion to the population they intend to serve. Such a solution,
according to Payne, would come closest to restoring the court’s initial vision of
rewarding the private interest when serving the greatest public good. Payne argues that
nothing has even come close to achieving the court’s original objective and in fact claims
that just the opposite has occurred. For Payne, the problem is obvious and easily resolved
once a viable alternative to the profit motivation is established.

For Payne that alternative is found within those groups that serve the public
interest, such as non-profit developers and community-based organizations who view the
goals of Mount Laurel as “a challenge, not a barrier.” (Id 16) Motivated by their mission,
Payne insists that the need to elevate the role of the public interest is paramount, not just
to function as the countervailing force that it once was, but to serve as the major actor in
the state’s obligation to produce affordable housing. As the centerpiece of his proposal,
the confidence that Payne places in the capacity of the public interest is evident, believing
that no other option exists that can restore legitimacy, equity and efficiency back into the
Mount Laurel process. To make his case, Payne takes each of the issues certified by the court in the builder’s remedy lawsuit between West Windsor and Toll Brothers and reverses the role and motivation of the private interest with the public interest. By his comparison of potential outcomes, Payne argues for a complete transformation of the Mount Laurel doctrine.

While the expectation that the end results achieved would be vastly superior, both in terms of perception and reality, the predictions are based upon an ability to limit each municipality’s exposure to a single builder’s remedy plaintiff. The preference of course is to further limit that exposure to a single public interest litigant, who in turn would also serve as a special master to mediate any other claims against the municipality. In this way, Payne is convinced that both the focus and the outcome would be better directed to serve the diverse racial and economic needs of the poor. In addition, Payne also contends that since most non-profit entities have multiple motivations and expertise to service the public good, the process would also generate land use and environmental planning solutions that would be vastly superior to their profit-motivated counterparts. It is the sum of these processes that Payne predicts will produce an even greater practical result, which is the likely reduction in the overall political opposition to Mount Laurel.

While the cynic may be inclined to view a proposal that suggests the potential for more housing, better planning and less hostility as Pollyannaish, for Payne it was both rational and familiar. In fact, Payne’s entire proposal to the court was nothing less than a complete compendium of ideas and opinions that have evolved over the course of his career. Beyond the mere stamina of his position, Payne’s presentation was an impressive attempt to convince the court that an over reliance on the private market has distorted the
Mount Laurel doctrine to the point where it requires desperate remediation. And while for Payne the message isn’t new, it was no less urgent than it was nearly fifteen years earlier in the aftermath of Cranbury Township.

In an equally impressive summation, Payne cleverly introduces the court to the concept of growth share as the mechanism necessary to achieve methodological change. Politely “seeking the court’s indulgence,” Payne suggests that many of the “issues that are presented by this case, would be ameliorated had the growth share approach been in force and used.” (Id 61 emp.org) While the court had no interest in straying from its intended purpose of deciding the ultimate fate of the builder’s remedy, it now appears that the rationale of Payne’s proposal at least made an impression. While the court expressed “no opinion” on a growth share approach, (173 NJ 502), the court of public opinion was already starting to embrace the idea. Today, the growth share concept and other attendant changes are being incorporated into the state’s fair share methodology. But instead of celebrating, Payne has joined a number of other “public-interest” groups to legally challenge the state’s implementation. This is the legacy of John Payne.

A Confused David Rusk

What Payne and others have discovered in their attempts at social justice is “what would best solve America’s urban problems is also the hardest policy to achieve politically.” (Rusk 328) This observation is the overwhelming conclusion from David Rusk in his book, Inside Game, Outside Game. Drawn from a lifetime of public and private experience in urban affairs, Rusk’s 1999 publication sought to advance regional solutions or “outside game” policies to reverse the spread of sprawl and the decline of
central cities. Conversely, Rusk is highly critical of the repeated and failed attempts at addressing urban problems by strictly playing the “inside game,” where policies and programs are focused solely within the boundaries of affected cities and or neighborhoods. For Rusk, and for many contemporary land-use scholars, “bad communities defeat good programs,” (Id 121) as “the hopelessness and despair in many poor neighborhoods is a symptom of broader metropolitan processes” (Jargowsky 212)

As a remedy, Rusk prescribes a new set of “rules of the game” for places like New Jersey where both research and reality have proved that “the more fragmented the government unit the more segregated the society.” (Rusk 6) The same is true throughout the Northeast and Midwest, where individual municipalities surround older cities to effectively create a wall of segregation between suburban and urban communities. For solutions, Rusk draws upon his experience as the mayor of Albuquerque, New Mexico to illustrate how the expansive growth of sun-belt cities has been achieved by the annexation of “many suburban-type subdivisions…found within the city limits,” or through city-county consolidations. (Id 4) The ability to expand political boundaries is a characteristic of what Rusk describes as “elastic” cities, which provides the best defense “against suburban sprawl by capturing a substantial share of new development.” (Id) The converse is an “inelastic” city, unable to expand in order to capture its market share of new development. Rusk claims that inelasticity has caused “more and more city neighborhoods to become warehouses for the region’s poor, particularly blacks and Hispanics,” as the middle-class fled along with “retail stores, offices and factories to their new homes in the suburbs.” (Id 5)
For Rusk, the effects of his theory are clear, as “the social and economic profile of entire metro areas could be characterized to a large extent by the relative elasticity of their central city.” (Id) Like Jargowsky, Rusk employs the dissimilarity index to measure the degree of segregation across metropolitan areas, which reveals how segregated “inelastic” central cities are compared to “elastic” metropolitan cities. Rusk is quick to admit, however, that there is “a regional bias in the data,” as “most elastic regions are found in the South and West.” (Id) But for Rusk the geographic distribution of elasticity is not as significant as the land-use policy lessons that are learned by the regional organization of local governance. Although Rusk does acknowledge that the application of these lessons within “local government boundaries that are cast in concrete from Maine through Pennsylvania” will prove difficult at best. (Id 10) Success, if possible, will depend entirely upon an ability to duplicate the qualities of highly elastic cities without formally changing local government structures. (Id) If not, then such initiatives will never work in places like New Jersey, where the League of Municipalities is on record as willing to listen to different land-use options to control sprawl, as long as what’s proposed “preserves home rule.” (NSL 3/14/03) But Albuquerque and unincorporated Bernalillo County in New Mexico are very different from places like Newark, New Jersey and its surrounding suburbs. In fact, there is no unincorporated land in New Jersey to make old industrial cities like Newark “elastic.” The idea, therefore, that it’s even possible to apply the same strategy to New Jersey boarders on the absurd.

Although Rusk makes no mention of Mount Laurel in his entire book, and only several passing references to New Jersey, it is the basis of his argument that is relevant to the debate. Believing that America’s urban problems are shaped by sprawl and race,
Rusk joins the list of *Mount Laurel* detractors whenever he speaks to a New Jersey audience. Highly complementary at first, Rusk is always quick to acknowledge the many landmark initiatives that have distinguished New Jersey’s history in land-use policy. In addition to the *Mount Laurel* decisions that prompted the enactment of the 1985 Fair Housing Act and the subsequent creation of COAH, Rusk is also quick to cite the New Jersey State Plan that was adopted in 1992 and strengthened in 1998 by a “truly impressive commitment of $1 billion to purchase open space.” (October 02) Rusk says that “on its face,” and “compared to its neighbors, New York and Pennsylvania, which have nothing approaching these statewide initiatives, New Jersey looks outstanding.” (Id) Consequently, Rusk gives New Jersey high marks for “talking a good game,” but then proceeds to answer his own rhetorical question when he asks, “But are you winning?” (Id)

By examining these initiatives within their national context, it is Rusk’s opinion that New Jersey isn’t fairing very well at all. In fact, Rusk believes that “the Mount Laurel goal is in conflict with the race and class reality that exists in New Jersey.” (Id) In support of his claim, Rusk cites the results of his research that ranks New Jersey’s public schools as the most economically and the fifth most racially segregated in the country. (Id) The correlation for Rusk is that “housing policy is school policy,” and therefore these results would indicate that New Jersey is failing miserably in both policy arenas. For Rusk, these outcomes reflect the inability of New Jersey to truly play an “outside game” strategy, where the programs in effect are not enforced by the objectives of the policies in

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7 I have been in the audience on two separate occasions to hear Rusk speak. The first was in October 1999 when he addressed the New Jersey Governor’s Housing Conference in Atlantic City; the second in October 2002 at Rutgers University in New Brunswick, New Jersey. The references cited in this chapter are from a combination of hand-outs and hand written notes.
place. A consequence, Rusk believes, of the voluntary and non-binding nature of the State Plan and the Fair Housing Act, which in his opinion have only served to frustrate the goals of the New Jersey State Supreme Court. (Id) In order to correct and reverse these deficiencies, Rusk prescribes three “outside game” strategies:

- To combat suburban sprawl and urban abandonment, adopt strong regional growth management policies.
- To reverse growing economic segregation, carry out aggressive regional “fair share” low and moderate-income policies; and,
- To offset growing fiscal disparities, institute regional tax base sharing. (Id)

According to Rusk, you cannot win the inside game without controlling the outside game, and there is a better chance of organizing “a broad coalition of common interests around growth management than around the other two strategies.” (Rusk 330)

As a model for New Jersey, Rusk cites the experience of Oregon as a state that has imposed strong land-use goals and standards for local governments. The Oregon strategy requires each of its 36 counties to adopt a comprehensive, anti-sprawl land use plan. These plans are formulated around the requirement that every one of Oregon’s 240 municipalities establish urban growth boundaries that must sharply divide urban from rural areas. According to Rusk, “Oregon’s anti-sprawl strategy is based largely on reining back the inside as it moves outward.” (Id) Through its $1 billion land acquisition fund, Rusk believes that New Jersey made a good start at trying to control sprawl by buying up the outside and directing new growth back inside. (October 02) Either way, Rusk sees “fighting urban sprawl through regional growth management laws as the issue that can
move men’s souls.” (Rusk 330) So far, no such conversion has taken place in New Jersey.

Relative to his second outside strategy, Rusk cites the Seton Hall report as proof that New Jersey needs to “talk about real fair share housing as opposed to the illusion of fair share housing.” (October 02 emp. org) By comparison, Rusk champions the Moderately Priced Dwelling Unit (MPDU) ordinance enacted in 1973 by Montgomery County, Maryland as the nation’s best example of a regional fair share housing strategy. Self described as “its most constant publicist,” (Rusk 328) Rusk points to the fact that Montgomery County has produced an almost equal number of affordable housing units (40,000) compared to the total productivity achieved under Mount Laurel. At the outset of what is essentially a “growth-share” concept, Montgomery County required all proposed subdivisions containing 50 dwelling units or more to restrict 15 percent of the total project to low and moderate-income households. One of the key provisions of the MPDU requirement is that one-third of the total number of affordable units created must be offered for sale to the county’s public housing agency. As a right of first refusal, this stipulation assures the integration of the lowest income households into each new development. If similarly structured, Rusk contends that Mount Laurel would have been able to increase New Jersey’s production of affordable housing by at least 50 percent. (Id) Rusk is still puzzled as to why similar ordinances have not been embraced around the country. (Id) This same argument was used by John Payne in his amicus brief before the court in the Toll Brothers case. Like Payne and Wish before him, Rusk believes that the answer lies in “widely held public fears” over race and income, which “cause good people to shrink from taking decisive action.” (Id)
Rusk’s final outside game strategy is one that he favors least, which is to institute regional tax base revenue sharing. It’s not that Rusk dislikes the concept as much as he believes it has “a negligible impact on slowing suburban sprawl—and no impact on dispersing the concentration of poverty.” (Rusk 329) Rusk draws his opinion from the legislative process spearheaded by Myron Orfield in Minnesota, which led to the creation of the Twin Cities Fiscal Disparities Fund. (Id 239) According to Rusk, this law requires:

“[a]ll taxing jurisdictions in a seven-county area, including 186 cities, villages and townships, 48 school districts, and about 60 other taxing authorities, to contribute 40 percent of the increase in the assessed value of commercial-industrial property into a common pool.” (Id 240)

While Rusk believes that Orfield’s efforts have produced “the most important regional reform model in the nation,” he also believes that just giving the “inside game” more money isn’t sufficient to solving regional problems. (Id 248) Instead, Rusk is of the opinion that moving poor people into neighborhoods of opportunity is far more important than moving more money into poor neighborhoods. (Id 328)

In the final analysis, Rusk’s prescription for success was the original intent of Mount Laurel. Although its relative success is still debatable, its “rules of the game” changing, Rusk understands that “[f]ighting for widespread adoption of genuine mixed-income housing policies is tilting at windmills.” (Id) Ever the optimist, Rusk believes that “[T]he next decade’s battle must be fought in the statehouses.” (Rusk 325) In New Jersey, the battle is now well into its fourth decade.
CHAPTER NINE: FROM THE FHA TO MOUNT LAUREL IV

This chapter looks at a series of events as significant as any in the history of Mount Laurel and the Fair Housing Act, as it describes the almost successful attempt to overturn the law on the basis that the obligation to produce affordable housing was threatening the quality of life in New Jersey by precipitating “sprawl.” What a Republican-controlled legislature couldn’t achieve was almost accomplished by a newly elected Democratic governor. In between, the State Supreme Court stepped in to hear a builder’s remedy case that was being defended by a municipality on the grounds that approval would unleash the ravages of sprawl.


On November 29, 2001, the Speaker of the New Jersey State Assembly entered the press conference to receive the recommendations of the Assembly Task Force on Fair Housing. Nearly fifteen minutes late, he apologized, revealing that the new traffic patterns around the state’s capital had caused his unfortunate delay. Then, with his tongue planted firmly in his cheek, the Speaker quickly absolved any role that affordable housing may have played in his delayed arrival. While an obvious attempt to inject humor into the proceedings, the line generated a polite, almost nervous response. Given what had already transpired within the first fifteen minutes of the press conference, one wasn’t sure if this was in fact a joke or a brilliantly staged entrance. From the findings of the Assembly Task Force, it was hard to tell.

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8 I was in attendance
Charged with the responsibility to “study the degree of success in achieving the goals of the Fair Housing Act and the State Planning Act,” the task force report offered no such analysis. While the question seemed simple enough, no attempt at an answer was provided. Perhaps there wasn’t enough time authorized within the legislative life of the task force to derive a result? Or perhaps it was simply a matter of not liking the answer.

While success is relative, there’s no question that the Fair Housing Act (FHA) has helped New Jersey produce more privately built affordable housing than any other state in the nation. Enacted into law in 1985, the number of new affordable housing units authorized as a result of the FHA has most recently been estimated at around 70,000. (Kinsey) At the time of the task force’s investigation the number was roughly 50,000 units. Although significant, both results represent roughly 10 percent of all the residential building permits authorized statewide from 1985 to 2000 and again from 1985 to 2005, respectively. This observation is not meant to slight the accomplishment, but rather to help frame the debate.

At issue was the conviction that the obligation to produce affordable housing in New Jersey resulted in the unintended consequence of sprawl. The fact that roughly one-third of the total Mount Laurel inventory was created through the rehabilitation and conversion of existing housing stock was never revealed by the task force. These included some 11,000 units of “suburban” housing already occupied by low and moderate-income households, which were rehabilitated and brought up to code. Likewise, another 8,700 units were located in the state’s urban areas and rehabilitated through the use of a Regional Contribution Agreement (RCA). The RCA process, often misunderstood and condemned, was a mechanism designed to partially satisfy the
excessive need for urban housing that was assigned to suburban communities as a function of the regional fair-share formula. At a negotiated price per unit, up to 50 percent of the reallocated suburban obligation could be transferred back into urban communities in the form of a lump-sum payment. Coordinated at the state level to ensure the feasibility of the transaction, a majority of the RCA funds have been used to transform existing and often derelict housing stock into more modern and livable units. The ability to facilitate regional solutions to local housing needs is an innovation unique to the Fair Housing Act.

Despite generating total revenues in excess of $216 million to create some 10,500 units of affordable housing, in 2008 the RCA was abolished by legislation. (A-500) In language banning RCAs, a portion of A-500 states that: “The Legislature finds that the use of regional contribution agreements, which permits municipalities to transfer a certain portion of their fair share housing obligation outside of the municipal borders, should no longer be utilized as a mechanism for the creation of affordable housing by the council.” The passage of Assembly Bill A-500 was the culmination of a five year effort by a faith-based organization, which mobilized religious and business communities to support the abolition of the RCA on moral grounds. The charge, which has existed since the inception of the RCA, was that the process subverted the premise of Mount Laurel by promoting the continued segregation between New Jersey’s urban and suburban communities. Conversely, but no less subtle, the accusation proffered by the Task Force was that the system which configures New Jersey into six separate housing regions was responsible for promoting sprawl by “lumping together urban, suburban and rural counties.” (ATF 2001)
The allegation prompted the call to eliminate Regional Contribution Agreements, convinced that the RCA only raised the cost of rural and suburban housing by imposing fees on the builders who turn farmland into subdivisions. The solution proposed was straightforward; simply deny these same builders the opportunity to sue any municipality that failed to comply with the Fair Housing Act. What one (RCA) had to do with the other (builders remedy) was never clear, but it does epitomize the logic that permeated the report. Although the stated goal of the task force was to “ensure that municipalities regain control over land use while accommodating reasonable affordable housing obligations,” (Id) it appeared that the real goal was an attempt to reclaim absolute municipal sovereignty.

It is testament to the forces behind the Task Force that they were able to manipulate public opinion as completely as they did. To be able to correlate the provision of a modest amount of affordable housing with the cause and effects of sprawl was impressive. But it was also completely erroneous, as the best way to ensure municipal control over local land use was to comply with the Fair Housing Act. Through the creation and approval of a bona fide housing plan, which can include more than a dozen different land-use compliance alternatives at no municipal cost, immunity is granted from builder lawsuits. Once approved, a municipality can then do virtually anything it wants to its local land use controls, including down zoning to increase lot sizes. Why such a straightforward method of compliance has met such historical resistance is unknown. When that question was posed to a member of the task force, who as the mayor of a small, rural municipality strongly advocated for the elimination of the builder’s right to
sue, his answer was both defensive and conflicted. Claiming that builders were perched on his municipal boarders ready to invade, he admitted that his own town was not compliant with the law. A subsequent check with the Council On Affordable Housing (COAH) revealed that contrary to the mayor’s statement his community was under the jurisdiction of COAH as a result of a court ordered settlement. Regardless of the mayor’s intent, he was convinced that the imminent threat of sprawl hinged on the obligation to produce a few units of housing to accommodate the poor.

Fortunately, most rational people are smart enough to see past the political smoke screen to the root of the real problem. Affordable housing doesn’t cause sprawl, municipalities making independent decisions regarding zoning and land use causes sprawl. Factor in the incredible competition for nonresidential uses in a property tax state like New Jersey and the real problem becomes even more obvious. This fact was revealed just two days before the release of the task force report when the appeal of the lawsuit filed by Toll Brothers against West Windsor Township came before the New Jersey State Supreme Court. At the heart of the municipality’s defense was sprawl, and more specifically, whether Mount Laurel with its attendant builder’s remedy was the cause. Looking to overturn the lower court’s decision that allowed Toll the right to build a substantial housing project, the municipality was arguing that the inclusion of about 175 units of affordable housing within a proposed development of 1,165 mostly large, single-family houses would unleash the ravages of sprawl and threaten the quality of life within the community.

Throughout the three and one half hour hearing on the morning of November 27, 2001, the justices were attempting to reconcile the logic presented by a town where the

9 I was in attendance and asked the question.
number of large and mostly expensive single-family homes had more than doubled over
the past decade. A community defined by the large phalanx of office buildings and
shopping malls that lined both sides of the Route 1 corridor, a major north/south highway
that literally slices through the Township. The municipality’s attempt to justify its actions
was at times, absurd. Smiling, somewhat incredulously, the Chief Justice stated, “You
can’t say the development of low and moderate-income housing caused suburban
sprawl.”10 But unlike the eventual comments of the Assembly Speaker, the Chief Justice
wasn’t joking.

The fact that public officials distort the reality of *Mount Laurel* is neither new nor
novel. In fact, sprawl was just the latest ploy in a long tradition of political exaggerations
that have predicted economic, environmental and social catastrophe as a consequence of
*Mount Laurel*. While the exploitation of an issue for political gain is as old as politics
itself, it is the durability of *Mount Laurel* as a polarizing political force that makes it
somewhat unique. Whereas some issues like abortion and gun control have become the
political litmus tests for candidates who seek national office, in New Jersey, *Mount
Laurel* has helped to shape—and in some cases decide—many local and statewide
elections. From the 1983 proclamation by then Governor Tom Kean that the decision
rendered in *Mount Laurel II* was “communistic,” to Bret Schundler’s 2001 gubernatorial
campaign pledge to overturn *Mount Laurel* by statewide referendum, the constant assault
on *Mount Laurel* inflicted by generations of political adversaries has extracted a heavy
toll. The fact that the *Mount Laurel* process has survived at all is nothing short of
remarkable. But survival doesn’t necessarily translate into success.

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10 Comments recorded from personal notes taken while attending oral arguments on November 27, 2001.
Reversal of Fortune

The court’s announcement in May 2001 that it had certified the appeal of Toll Brothers in its case against West Windsor Township came at a dubious time in the history of Mount Laurel. Brent Schundler was about to win the Republican primary for governor and the Assembly Task Force was about to convene its second and final hearing on June 19, 2001. Widespread speculation ensued as a result of the court’s intent to limit the appeal to three specific issues, including whether Toll was entitled to a builder’s remedy. Municipal officials cheered the announcement, hoping that the decision would signal the court’s willingness to either modify or eliminate what had become anathema to the sovereignty of home rule. Advocates interpreted the decision differently, hoping that a judicial reexamination would in fact strengthen the doctrine, setting it back on track to meet its original objective of social justice. Both sides then lined up to state their respective cases, supported by the submission of five amicus curiae briefs. The anticipation that was building was palpable, as many of the players involved realized that “[T]he rules are about to change because they have to change…we are at a unique moment” (John Payne in the Trenton Times 11/28/01)

The fact that the court invited a number of interested third parties to submit amicus briefs on either side of the builder’s remedy issue heightened public speculation. It was after all, the first time in almost a decade that the state’s highest court would revisit Mount Laurel. Not since its 1993 decision that struck down affordable housing preferences as unconstitutional (131 NJ 1) had the court stepped back into the affordable housing process. But since that decision, only one justice in seven remained on the court. The rest had either died or retired, with each of their successors appointed by the former
Republican governor, Christine Todd Whitman. It was hard to imagine that the court would agree to hear this case in 2001 if its members didn’t harbor different views than that of their predecessors in 1975 and 1983. (Packet 6/1/01)

The presentation of oral arguments made for great theater.\textsuperscript{11} West Windsor’s case was weak and unconvincing; whereas the plaintiff articulated facts and was only slightly more effective. The most compelling arguments were those presented by the amicus, as each was grounded within the spectrum of emotion that has come to define the legacy of \textit{Mount Laurel}. All sides stuck to their familiar themes. The NJ League of Municipalities characterized the builder’s remedy as “a means to an end,” claiming that “the development community knows how to play that card.” (Oral arguments) Whereas the NJ Builders Association argued, “as messy as it may be, the builder’s remedy is the only enforcement mechanism in \textit{Mount Laurel}.” (Id) Municipalities continued to blame the social, economic and physical consequences of suburban sprawl on \textit{Mount Laurel}. While developers were somewhat more restrained, seeking only consistency in the rules of engagement. But it was around the fringes of the extreme that the real heart and soul of the debate was centered.

Perched high on the middle-ground of social justice stood the NAACP, the civil rights organization that had initiated the first two \textit{Mount Laurel} lawsuits in 1975 and again in 1983. And just as before the lead attorney representing the NAACP was Peter O’Connor. In his usual, passionate style, O’Connor claimed that “not one of our clients earning less than 45 percent of the median income has reaped the benefits of this process,” blaming the lack of “any municipal or developer provision to assist those families that earn below the 45 percent level” as the reason why. (Id) Given the nature of

\textsuperscript{11} I was in attendance.
the organization he was representing, the fact that O’Connor chose to define both his clients and the limitations of the law within economic rather than racial terms was surprising. Whether this was a deliberate matter of style or simple deference to the law was not really clear. Whatever his reasons, they were short lived, as the issue of race soon became the focus of O’Connor’s arguments. By declaring that it was the actual administration of the law that was responsible for “shifting the court’s vision of affordable housing opportunities for the inner-city poor, predominantly racial minorities, to one of regional affordable housing for only the moderate-income class of *Mount Laurel* beneficiaries,” (NAACP 2) O’Connor was implicating both the FHA and COAH in his condemnation. By placing the blame on “New Jersey’s administration of an affordable housing system that contravenes *Mount Laurel,*” O’Connor claimed “that the poor have been regulated out of the benefits of *Mount Laurel,* destined to remain in New Jersey’s ghettoes.” (Id 3)

Overall, the intent of the *amicus* filed by the NAACP had two overriding objectives. The first was to demonstrate its support for the lower court’s decision to grant a builder’s remedy to Toll, believing that the developer had fully met every test established by the *Mount Laurel II* decision. But the second goal went beyond the issues certified to one that strongly advocated the need “to rehabilitate the *Mount Laurel* doctrine.” (Id 6) By urging the court to now seize the opportunity “to preserve and advance the constitutional rights of low and moderate-income New Jerseyans, a group that disproportionately includes racial minorities who live in economically and racially segregated ghettoes throughout this state’s cities,” O’Connor’s tone was one of urgency. (Id 7) By citing a long but futile experience “before State boards that regulate affordable
housing, such as the NJHMFA and COAH, to urge these bodies to use their funds to deconcentrate poverty and racial segregation,” O’Connor hoped to prove his point. But his line of attack had an all too familiar ring, reminiscent of the initial allegations waged in 1985 and directed against the Fair Housing Act. That attack led to the 1986 rebuke by then Chief Justice Wilentz, when in the \textit{Hills} case he admonished “those who assume it [Fair Housing Act] would not work, or construe its provisions so that it cannot work, and attribute both to the legislation and the Council a mission, nowhere expressed in the Act, of sabotaging the \textit{Mount Laurel} doctrine.” (103 NJ 21) Fifteen years and almost 50,000 affordable housing units later, the NAACP was trying to assert that nothing short of a conspiracy had been perpetrated against the poor when it argued:

“In allegiance to substantial municipal and popular resistance, \textit{Mount Laurel} was weakened by the Legislature in the Fair Housing Act’s creation of the regional contribution agreement concept. Those same forces have caused \textit{Mount Laurel} to be neutralized by COAH and the state agencies that fund affordable housing. With limited exceptions, Mount Laurel has become a tool for maintaining racial and economic segregation in urban New Jersey.” (NAACP 54)

That \textit{Mount Laurel} has never really affected social change, or worse, has only served to exacerbate racial conditions in the state is the most damaging of all the charges leveled against the affordable housing process. In support of its claim the NAACP referenced several sources that included the 1996 Seton Hall report, which was called “a comprehensive study of who occupies suburban \textit{Mount Laurel} housing.” (Id 53) But the most damaging evidence presented was an admission by the State itself, which recognized that:

“New Jersey continues to exhibit a segregated housing pattern. Two out of three African/American and Hispanic households live in only 25 municipalities, and 60 percent of all African/American and Hispanic households live in cities where they constitute a
majority of the population. In contrast, there are over 300 municipalities with virtually no minority population.” (2001 New Jersey State Development and Redevelopment Plan 60)

The charge that the enforcement of *Mount Laurel* has not helped the truly poor, has not provided a way out of the ghetto and therefore has not achieved the goals set forth by the doctrine was beginning to resonate in public policy circles. But the call for deeper subsidies to help the very poor could end up serving competing purposes. From the perspective of the NAACP, any opportunity to keep the debate focused on its constituency was smart and effective advocacy. But the idea of channeling a larger percentage of scarce resources was also not lost on the Assembly task force, which would incorporate the same recommendation into its final report. But if the goal of the activist was to serve the very poor, the motivation behind the task force was more suspect. Since affordable housing resources are finite, logic would dictate that more is less. The more dollars it takes to provide deeper subsidies for the very poor, the fewer number of units to serve the poor would be built.

Regardless of motivation, both recommendations would fail to translate into public policy. Faced with the very real prospect that new legislation was about to be rammed through the New Jersey General Assembly, a law that would have all but eviscerated the Fair Housing Act, something unexpected happened. After nearly three hours of testimony by every major housing constituency in the state, all in complete opposition to the legislation being presented, the Chairman of the Assembly Housing Subcommittee called the matter to a vote. The room became suddenly quiet, filled with the nervous energy generated by the expectation of impending bad news.\textsuperscript{12} For this just wasn’t any vote, but a vote by a Republican controlled subcommittee on a Republican

\textsuperscript{12} I was in attendance.
sponsored bill destined for a Republican controlled lame-duck session of the General Assembly. If passed, the bill would only require the signature of the lame-duck Republican Acting Governor to become law. Given history and the circumstances, these were pretty bad odds. But instead of the inevitable, the outcome of the vote taken on December 6, 2001 was stunning.

The fact that the Chairman of the Housing Subcommittee voted against the bill was an unexpected but welcomed result. If nothing else, the Chairman’s actions reversed the long tradition of Republican-generated antagonism toward Mount Laurel, an action that either signaled a new political reality or merely the unavoidable recognition of a truly bad piece of legislation. Caught in between partisan allegiances and fiduciary responsibility, the Chairman repeated his genuine concern over the lack of time remaining in the legislative session to adequately address the many and complex issues that were raised by the proposed legislation. By casting his deciding vote, Assembly Bill A-3994 died a well deserved death.

Eight months after the legislative defeat, a decision in the Toll Brothers case was reached. True to its word, the court limited its opinion to the three questions that it had certified. On each, the court concluded that the lower court had ruled correctly and affirmed Toll’s right to a builder’s remedy. While a clear victory for Toll, it was in turn a complete and unequivocal exoneration of the Mount Laurel doctrine. By rejecting all of the arguments presented by the defendant municipality, the court put every New Jersey municipality on notice that the constitutional obligation was still valid and enforceable. In the strongest terms possible, the court declared that what held true in Mount Laurel I was still the law of the land. That no municipality “by a system of land use regulation, [can]
make it physically and economically impossible to provide low and moderate-income housing.” (67 NJ 173) That the mechanism of the builders remedy devised by Mount Laurel II was essential, for “[W]ithout the inducement of such a remedy there was little reason for a private developer to challenge a municipality’s zoning ordinances.” (173 NJ 51) That although “COAH’s review process is extensive and probing,” (Id 85) [W]hen a municipality like West Windsor does not avail itself of the COAH process and protections, that municipality remains vulnerable to a Mount Laurel challenge.” (Id 89)

That given the municipal participation rate with COAH, which at the time of the trial was “roughly fifty-two percent,” the court declared “[T]hat statistic and this case demonstrate a continued need for the builders remedy.” (Id 85)

In addition to West Windsor Township, the court also dealt a blow to the various interest groups that were invited to join the proceedings. While the court valued and often utilized the information supplied by the various parties, it chose not to consider the additional arguments presented. “In this vein,” the court declared, “it is important to point out what we are not deciding today.” (Id 86 emp org) Since the issues raised by the various amicus were “myriad” and not part of the record of the appeal, the court believed “the record to be inadequate for review and disposition of those issues.” (Id) But in the end the most important issue, the legitimacy of the Mount Laurel doctrine, had been put to rest.

**The Aftermath—Enter McGreevey**

The silence that followed the court’s August 1, 2002 decision in Toll was deafening. While immediate media accounts quoted the various winners and losers in the
case, the outcome was so absolute, so unequivocal that there was nothing left to say. In the days and weeks that followed it appeared that all had come to accept the totality of the court’s decision. All that is, with one very notable exception.

James McGreevey’s gubernatorial victory in the November 2001 general election helped to usher in a political transition in New Jersey. After eight years of Republican control, the overall results of the election gave McGreevey a majority of his own party to work with in the General Assembly, while the State Senate became an evenly divided legislative body. While Democratic administrations in New Jersey have been the historic ally of affordable housing, as the former mayor of Woodbridge Township, McGreevey’s political history was marked by a complete contempt for Mount Laurel. In 1999, following a protracted legal fight, the fair share obligation of Woodbridge Township was reduced from 1,351 units to 53 units of affordable housing. In response, Mayor McGreevey complained that the result was still too high. “The reduction is appreciable,” McGreevey said, “nonetheless the township continues to object.” (HNT 2/20/1999) So when Governor McGreevey’s reaction to the Toll decision was voiced with equal disdain, it came as no surprise.

“In many cases,” McGreevey said, “the developer literally institutes litigation to coerce a municipality to accept wrong, ill-suited development. After a developer ravages a municipality, he then develops a moral purpose, is imbued by the Holy Spirit, and argues that affordable housing is needed.” (NSL 8/2/2002)

What impact the Toll decision had on the policy directions of the new governor is not known. But McGreevey was a skilled and cunning politician, having spent most of his adult life preparing for high political office. His ability to seize an issue for political gain was second-to-none; a skill he would display as soon as he was sworn into office. Perhaps sensing an electorate desperate for change, tired of the status quo and frustrated
by judicial mandates, McGreevey responded with a call to arms to combat what he
described as “our greatest threat.” (NSL 1/15/03)

Sprawl was the political hot-button of the day and McGreevey moved quickly to
make the issue his own. Just one week after being sworn into office, McGreevey all but
eliminated the Office of State Planning. Although protected by statute, nearly the entire
staff of this agency charged with the responsibility of implementing the State
Development and Redevelopment Plan was fired. One week later and by Executive Order
the Governor created the Smart Growth Policy Council as an administrative alternative.
Designed to incorporate the State Plan into virtually all state spending and regulatory
decisions, the Council was comprised of the heads from each of the key departments in
state government. To ensure compliance with this new policy directive, an impact
statement became a prerequisite to every proposed action seeking state approval and
funding. To ensure accountability, a senior policy advisor in the Governor’s office was
appointed to chair the Council.

Clearly unprecedented, McGreevey’s actions generated a strong reaction across
every conceivable constituency. While eventually applauded, the execution of his
decision caused real damage to the reputation of the newly installed Governor.
Characterized as both clumsy and amateurish, it was the kind of “mistake” that
McGreevey himself recognized and apologized for nearly one-year later in his first State
of the State address. (www.state.nj.us/sos2003) Although repentant, McGreevey was no
less determined to push his agenda forward. Standing before the entire state, McGreevey
would proclaim that everything from auto insurance, education and property taxes “are
not separate and distinct problems—they are the result of a chain reaction set off by
uncontrolled development.” (Id) By once again declaring sprawl to be “the greatest threat to our quality of life,” (Id) McGreevey had placed his political future squarely on the issue that resonated loudest among New Jersey voters.

McGreevey’s attempt to capitalize on a wave of public sentiment that he saw building over two consecutive campaigns for governor was both a shrewd and risky calculation. And true to his political nature, McGreevey pledged to defeat sprawl by fighting the very same “special interests” that heavily supported both his candidacy and election—real estate developers. To demonstrate his resolve, McGreevey immediately placed a temporary moratorium on all new construction in three of the fastest growing counties in the state. In addition, special protection was granted to 15 streams and reservoirs to stop any new development from occurring along their banks. (NY Times 1/2/03) This was, however, just the beginning, as new rules and regulations were promised to fulfill the Governor’s pledge “to get [the state] out of the business of subsidizing sprawl.” (SOS 03)

McGreevey’s determination to “finally end the cycle of unchecked development” was motivated by his resolve to channel that development back into the state’s urban centers and older suburbs. (Id) To encourage support for his plan, the Governor’s proposal promised swift regulatory approvals and dedicated funding sources for qualified projects. (Id) In effect, what the Governor had proposed was the implementation of the State Plan, which had been celebrated nationally while ignored locally. (Downs) But timing is everything in politics and it appeared that time had finally caught up to the logic behind the State Plan. Couched in terms of the battle to be waged, McGreevey declared
“[W]e must do this right, we must do this smart, we must do this together, and we must do it now.” (SOS 03)

Although the physical march of suburbanization can be traced back over decades to its initial source at the urban core, public attention was clearly fixated at the leading edge of the trend. Coalesced around the “threat” imposed, the calls for changes in land-use policy began to resonate in the early 1990s, slowly building towards a political consensus for alternative growth strategies. Promoted under the interchangeable banners of “smart growth” or “growth management,” the concepts are based upon a more regional approach to development, attempting to reverse the flow of future growth away from the suburban edge and back towards the urban center. In New Jersey, the first real signs of a political shift in land-use policy surfaced when former Governor Christine Todd Whitman announced a $1 billion open space preservation bond act in her 1998 inaugural address. (Rusk) Earmarked to buy one million acres, the Governor declared, “We must do more to encourage intelligent, responsible growth for New Jersey’s future, especially in our cities.” (NY Times 3/17/00) Now it was Whitman’s successor who was advocating more than just “encouragement,” as McGreevey announced “[W]e must have a mechanism to plan and control regional growth.” (SOS 03)

In an obvious attempt to keep the process as simple as possible, the mechanism chosen was a single color-coded map. Created to guide all future development throughout the state, the visual simplicity of such a map made it the perfect prop for large civic presentations. Once unveiled, the “big map” as it was called, traveled around the state. But instead of being showcased by the Office of State Planning, it was the New Jersey Department of Environmental Protection (NJDEPA) that ran the show. This change in
departmental responsibility was significant from both a political as well as from a policy perspective, as McGreevey chose to frame the debate within the context of natural resource preservation rather than another state planning mandate. It is also possible that this shift in strategy was motivated by the severe drought in 2002, where the imposition of water restrictions made the Governor’s case against overdevelopment more real and persuasive. (NSL 12/10/02) And while being accused of going too fast too soon, (NY Times 3/2/03) McGreevey’s ability to quickly leverage the memory of personal hardship and inconvenience caused by the drought was just another example of his political acumen. By moving forward with just four simple colors to physically map the growth boundaries for each municipality, the battle lines were literally drawn between support and opposition to the governor’s anti-sprawl strategy.

The irony of McGreevey’s tactics, however, was that they embodied the process used twenty years earlier by the New Jersey Supreme Court to structure the *Mount Laurel* doctrine. Guided in 1983 by “a concept map which shows spatially where growth should be discouraged, encouraged or delayed,” the court’s decision “imposes the Mount Laurel obligation only in those areas designated as ‘growth areas’ by the SDGP…and only in these areas.” (92 NJ 226-236) Once again it had appeared that public policy was catching up to judicial foresight, as the attempt to redefine these same “growth” areas were being made throughout the state. Once accomplished, McGreevey pledged that “we will have one State map that we will live by and not one dollar of taxpayer money will be spent to subsidize sprawl anymore.” (SOS 03)

Unfortunately for McGreevey, taxpayer money was already in short supply, as the budget deficit he inherited from the previous administration was unprecedented. But
despite the fiscal challenges presented, McGreevey would follow in the policy footsteps of his predecessor by calling for the continued state purchase of open space. Although the state’s economy was vastly different in 2003 than it was in 1999, the motivation behind the policy and the politics was exactly the same. By asking the state Treasurer “to reform the open space bonding process to stretch our open space dollars without increasing debt,” McGreevey committed to the annual goal of preserving an additional 20,000 acres of farmland. (Id) Although a far cry from Whitman’s pledge of $1 billion to purchase one million acres, which had already been accomplished, the spending priorities of each administration were driven more by politics than by good policy.

Although the concentration of resources at the leading edge of the problem may help to interrupt or redirect the growth of sprawl, it fails to address the real problems at its source. To create any opportunity for success, similar sums of money would need to be raised to underwrite the massive urban restoration necessary to achieve the intended results of a ‘smart growth’ strategy. It will never be enough to simply want to direct growth back to the urban core when the core has been rotting away from decades of neglect and abandonment. Despite the fact that the physical infrastructure in New Jersey’s cities is sufficient to accommodate the most optimistic urban-growth scenario, it was the condition of the social infrastructure that required the most attention and resources.

As a former mayor of a designated urban-aid community, McGreevey should have understood how the physical process of development is relatively easy and inexpensive compared to hard cost of building people’s lives. To be successful, the scale of urban revitalization must be more intimate, starting block-by-block and house-by-
house in an effort to develop stable and healthy neighborhoods. And while Whitman did pour a considerable sum of state housing dollars into urban communities, it would take an even greater commitment of public resources to build the kind of schools, jobs, and security necessary to attract and sustain real economic growth back into New Jersey’s cities. Absent the financial, and more importantly, the political capital necessary to accomplish these goals and any efforts to reverse the direction of growth are destined to fail.

These are the hard lessons taught by a national experience that has been revealed through contemporary research on metropolitan land-use patterns, where the physical, economic and social isolation between urban and suburban communities explains most of the differences in the quality of people’s lives. Although McGreevey professed that “[I]f we are going to truly control development, we must look for regional solutions,” (Id) control is merely a single variable in the overall policy equation. Instead, it will take a near regional revolution to cure the conditions found throughout our inner cities and their contiguous ring of older declining suburbs. Unfortunately, the physical and economic conditions found in most of New Jersey’s urban communities are the result of the policies and politics of home rule. On this point McGreevey was correct when he recognized that the “consequences of development don’t end at the boarder of one town.” (Id) Unfortunately, the same doesn’t hold true for politics.

McGreevey’s attempt to conquer sprawl ended when he resigned his governorship in 2004. Plagued by personal scandal, when McGreevey left the state house his ‘big map’ went with him. An acting governor was put in place that chose to focus his attention on the fiscal condition of the state. When a new governor was elected in 2005, also a
Democrat, both his campaign and inaugural speech were devoid of any specific housing policy objectives. (NSL 1/26/06) One possible explanation might have been due to the fact that the Council on Affordable Housing was once again embroiled in controversy.

**From Fair Share to Growth Share**

The Fair Housing Act mandates that the calculation to establish the state’s affordable housing obligation must be revised every six years. When the First Round was promulgated in 1987, data from the 1980 U.S. Census were utilized to calculate the initial requirements. As a result of the age of the data, significance revisions were made and incorporated six years later into the Second Round of numbers, which were constructed using the 1990 U.S. Census and released in 1993. When the time came to generate the Third Round obligation in 1999, COAH decided that it would wait for the release of the 2000 U.S. Census data before proceeding. When the last of the 2000 Census data became available sometime around August 2003, the Third Round results were released in October 2003. After more than one (1) year of considerable public debate, on December 20, 2004, COAH adopted the rules and regulations governing the implementation of the Third Round obligation. (N.J.A.C. 5-94) On the very same day a lawsuit was filed to challenge both the validity of the process and the numbers produced.

Although the reaction had now become routine, the response this time around was somewhat different. By establishing a statewide total obligation of less than 53,000 units, the advocacy community was up-in-arms. That was expected. However, in the period between 1998 and 2003, COAH and its consultants had engaged various stakeholders for the purpose of developing a new structure to the methodology. In the attempt to become
more user friendly, the goal was to produce a methodology that was conceptually simple without sacrificing the rigor and statistical validity of the procedures used in the First and Second Rounds. What was to emerge was the concept of “growth share.” While long advocated by the likes of John Payne, the Rutgers University Law Professor and others as the methodological answer to achieving a true “fair share” of affordable housing, it was the devil in the details that caused all hell to break loose.

Public comment leading up to the release of the new methodology was mostly positive. Municipalities cheered the idea that the process was moving away from what was essentially a housing allocation system, where regional deficiencies from other communities were combined with individual municipal estimates of future or prospective need to generate the total obligation. Instead, the growth share concept predicated the delivery of affordable housing in proportion to the actual growth experienced within each town. The ratios established called for one (1) affordable unit for every ten (10) new market rate units created. In addition, and for the first time, the production of affordable housing was also tied to the development of new commercial real estate facilities, requiring one (1) new unit of affordable housing for every thirty (30) new jobs created.

Beyond the new methodology were the new rules that allowed up to fifty (50) percent of the municipal obligation to be achieved through the creation of age-restricted (55+) housing for seniors, while another fifty (50) percent could be satisfied via a transfer through a Regional Contribution Agreement (RCA). In addition, the new rules would allow municipalities to force developers to build affordable housing without financial incentive, such as an increase in allowable density, while also establishing “in-lieu” fees, but neglected to provide a guarantee as to when or where the units would be built. These
and a host of other issues formed the basis of the lawsuit filed, which was decided on January 25, 2007. (390 N.J. Super. 1) In its decision, the New Jersey Superior Court, Appellate Division affirmed in part, reversed in part, and remanded portions of the rules back to COAH for revision. In response, changes were made to the ratios, which increased the obligation from one affordable unit for every ten market-rate units to one in eight, and from one unit for every 30 jobs to one unit for every 25 jobs, while the threshold of senior units was decreased from fifty (50) percent to twenty-five (25) percent of the total obligation. Still, the effort wasn’t nearly enough to satisfy the critics. In one interview, John Payne stated that “they’ve taken all the worst features of the old system and grafted them onto growth share.” (Chambers)

Now desperate, COAH decided to hire new consultants in search of different answers. At a cost of roughly $2 million, (Skillman) COAH got more than it bargained for, as the analysis produced a new statewide obligation of almost 116,000 units of affordable housing. (Econsult) Ironically, it was just the year before when the Governor finally announced an affordable housing initiative, pledging the construction and rehabilitation of 100,000 units over a ten (10) year period. (NJGHC 9/26/06) As expected, the new numbers were immediately condemned by the New Jersey State League of Municipalities, which had been the most powerful proponent for the change to a growth share methodology. But the radical difference in the number of units proposed was only part of the municipal outrage, as many towns were proactive in their obligations to conform to the original growth share numbers, drafting new ordinances while updating master plans and housing elements. Nevertheless, when COAH proposed and adopted
new rules effective June 2, 2008, with amendments effective October 20, 2008, as N.J.A.C. 5:96 and N.J.A.C. 5-97, respectively, these too became the subject of litigation.

In total, twenty-two (22) separate appeals were filed, which were argued before the Appellate Division of the Superior Court of New Jersey on December 1, 2009. When the court finally rendered a decision on October 8, 2010, it once again found COAH’s effort to be severely lacking and invalidated substantial portions of the rules. In particular, the court held that the growth share concept as presented was still deficient and therefore invalid as a methodology to calculate the fair share obligation. The court’s reasoning, which it articulated in its 2007 opinion, was that COAH lacked sufficient data on vacant and developable land throughout the State to assure its assumptions relative to future growth. While COAH’s new consultant did provide such an analysis, which Appellants argued as flawed and erroneous, the sufficiency of the data was immaterial to what the court perceived as the overriding structural defect to the proposed rules. By once again referencing its earlier decision in the first appeal, the court stated that municipal avoidance of the Mount Laurel obligation was still preserved under the new rules.

Any growth share approach must place some check on municipal discretion. The rules, as they currently exist, permit municipalities with substantial amounts of vacant developable land and access to job opportunities in nearby municipalities to adopt master plans and zoning ordinances that allow for little growth, and thereby a small fair share obligation…if municipalities with substantial amounts of vacant land and access to infrastructure can decide for themselves whether and how much to grow, it is highly likely that housing opportunity will fall far short of the identified need. Therefore, the current growth share approach violates both the Mount Laurel doctrine and the FHA. (390 N.J. Super at 55-56)

Since the revised version of COAH’s growth share methodology suffered from the same basic deficiencies as the original version, the court ordered COAH to once again adopt revised rules. However, noting that more than a decade has passed since the expiration of the Second Round rules, the court determined that “at this point, we do not
believe it would be appropriate to allow COAH to adopt yet another methodology.” As a result, the court ordered COAH to adopt Third Round rules that “incorporate a methodology similar to the methodology set forth in the first and second round rules, which were approved by the courts in most respects.” (Skillman) Moreover, the court reasons that a return “to such a previously-approved methodology” is necessary to prevent “further delay,” coupled by “our doubts whether any growth share methodology would be valid under existing law.” (Id)

Although suspect of the constitutionality of the growth share concept, the lower court’s opinion recognizes the limits of its own authority. While believing “[I]t may be that the time has arrived for reconsideration of the part of the Mount Laurel II that appears to militate against the use of any growth share methodology,” the concession that “this court has no authority to undertake such reconsideration; we are bound by the decisions of our Supreme Court,” appears to invite the next legal challenge. In fact, COAH, together with a number of original appellants have since petitioned the New Jersey Supreme Court to intervene, setting up what many observers believe will be Mount Laurel IV.
This chapter looks at the dearth of information that exists specific to the demographic characteristics of the households that occupy affordable housing. By examining the origins of a national housing cost to income ratio (HCIR), the methodology behind some of the more common and well-known indices is provided. These in turn are used to explain the construct of the model presented in Chapter Eleven.

“Systematic data on CPs (Comprehensive Permits) applied for, decisions of local zoning boards on CP applications, and housing units built through the CP process is, unfortunately, not collected by any state agency.” (Krefetz)

Although specific to the affordable housing process in Massachusetts, the above statement is also true for every other state in the country. While many jurisdictions do provide simple estimates on the numbers of affordable units produced by their respective housing programs, “systematic” data is virtually non-existent. The ability, therefore, to discern the characteristics of the households that benefit from the housing policies initiated at either the state or local level is nearly impossible to generate. There are, however, two qualified exceptions.

The first is the Multiple Price Dwelling Unit (MPDU) program in Montgomery County, Maryland, which since its inception in 1974 has collected and tabulated data at the household level. (Anderson) But both the process and the database generated have been limited to the characteristics of the households that occupy the for-sale units created
by the MPDU program. As a result, the sizable rental inventory and the tenant population that has been served by this initiative are excluded from the county’s database. (Id)

The second exception occurs in New Jersey, where in 1992 the Affordable Housing Management Service (AHMS) was created for the purpose of generating a statewide pool of income-eligible applicants. Organized under the auspices of the New Jersey Department of Community Affairs, the rationale behind this enterprise was to ensure that housing produced through the obligations imposed by the Mount Laurel doctrine would be occupied by households qualified under that program. To help guarantee compliance, a sponsor benefiting from any form of state funding was in turn required to utilize the services of this state-run agency. On a fee-per-unit basis, AHMS would generate a list of pre-qualified applicants located within the same state-designated “region” as the sponsor’s affordable housing project. In theory, the ability to draw from this eligible pool would increase the probability of programmatic compliance. In practice, the outcome was an unqualified success, as it was the information from AHMS that served as the primary data source for the often cited 1996 report on Mount Laurel by Seton Hall University. (Wish) While critical of the relative “success” achieved by minority households to obtain affordable housing located outside of central cities, the Seton Hall report was clear in its findings that every applicant and occupant household in the AHMS database was income-qualified under the guidelines established by New Jersey’s Fair Housing Act. (N.J.S.A 52:27D-310)

14 To ensure the requirements imposed by the 1985 New Jersey Fair Housing Act to implement a “regional” fair share strategy, the New Jersey Council On Affordable Housing (COAH) divided the state into six (6) separate affordable housing “regions,” which geographically govern the conduct of all transactions associated with the Mount Laurel obligation.
In 2005, AHMS was transformed into a new program called Affordable Housing Services (AHS) and was moved out of the New Jersey Department of Community Affairs (NJDCA) and into the New Jersey Housing and Mortgage Finance Agency (NJHMFA). No longer a single clearinghouse to generate a statewide roster of income-eligible applicants, AHS is now just one of several “approved affordable housing administrative agents” charged with overseeing compliance with the rules and regulations promulgated by the New Jersey Council On Affordable Housing (COAH). However, the responsibility for oversight no longer includes the formalized process of data collection and input, nor has this task been transferred to another state agency. (Bafaloukos) As a result, the statewide database created to track household level information on the participants and beneficiaries of New Jersey’s affordable housing process has not been operational since 2005. (http://www.state.nj.us/dca/hmfa/biz/gov/njhas)

Whatever their current and relative value, the efforts of Montgomery County, Maryland and New Jersey represent the only large-scale attempts to track programmatic outcomes beyond simple rates of housing production. Simply stated, there is not another county or state in the country that collects household-level data on the units created through their respective affordable housing programs. And until recently, this was the case with respect to every Federal housing program as well.

It is only as a result of the Housing and Economic Recovery Act (HERA) of 2008 (H.R. 3221) that the U.S. Department of Housing and Urban Development (HUD) has been charged with developing a methodology to collect data on the households that occupy low-income housing tax credit (LIHTC) units. While HUD is responsible for establishing the data standards and definitions, it is the individual LIHTC allocating
agencies that are responsible for the collection of the data, which must be sent back to HUD on no less than an annual basis. After multiple iterations involving national public comment, a final tenant data collection form was issued by HUD on June 18, 2010. While the data collection process is now just beginning, this effort does not extend to any affordable housing created outside of the LIHTC program. As a result, any units produced through state and local housing programs such as inclusionary zoning will be omitted from this national database.

It is in the absence of “systematic” data specific to the social outcomes produced by any state or local housing program that makes a comparative analysis nearly impossible to construct. And while it might be feasible to somehow retrieve and or to accurately mine decades of historical housing data, such an enterprise would be impractical if not impossible to undertake. But as an issue of national consequence the social outcomes generated by such programs only seem to matter in the state of New Jersey, where the near total obsession with the racial composition of the targeted Mount Laurel population has come at the expense of overall housing production. And while the issue of social justice is theoretically embedded within every federal, state, and local housing program, it is the income of the household that has always served as the primary eligibility threshold for establishing housing assistance in the United States.

While some form of an income standard for housing assistance can be traced back to the earliest days of public housing in this country, (Listokin) it was the Housing and Urban Development Act of 1969 that first specified that public housing rent could be no more than 25 percent of a tenant’s adjusted income. (Stone) Five years later this benchmark became the national standard of housing affordability under Section 8 of the
Housing and Community Development Act of 1974. (Public Law 93-383) Further, eligibility under Section 8 was restricted to those with “lower income,” which was defined as households with incomes under 80 percent of the area’s median income adjusted for family size. (Listokin) In 1981, concerns over growing obligations on the Federal budget caused Congress to pass the Omnibus Budget Reconciliation Act, which increased the rent ceiling to 30 percent of tenant income. (Mitchell) While subsequent legislation has established a broader array of preferences for housing assistance, targeting “worst case needs” as defined by income and the physical condition of the occupied structure, the current national eligibility standard remains fixed at a housing cost-to-income ratio (HCIR) of 30 percent.

The fact that the same system is still intact today, more than three decades after the implementation of the Section 8 program, has engendered considerable scholarly debate. The most consistent criticism of the HCIR approach is that it is too broad, resulting in undercounting while glossing over difficult decisions about how to define and measure affordability. (JCHS) Many of the arguments suggest that an ideal standard should emerge from a more iterative process, first by applying an economic affordability standard and then refining that measure by controlling for other exogenous factors such as location, habitability and neighborhood quality. (Stone) Because housing is seen as a heterogeneous commodity, comprised of a series of disparate attributes that are not easily separated, some economists claim to be “wary, even uncomfortable, with the rhetoric of affordability.” (Quigley) Still others have argued that affordability is “not a characteristic of housing—it is a relationship between housing and people. (Stone) While this issue will be addressed in more detail in the next chapter, the fact that the literature is replete with
alternative methodologies suggests that the time to rethink this standard may be close at hand.

But the establishment of an affordability standard is also an inherently political act, as the outcome governs how and where scarce housing resources are allocated. As a result, the simplicity of the concept and the calculation must be easy to understand. (JCHS) But in an era dominated by unprecedented budget deficits at every level of government, any change to this construct is certain to provoke rigorous political and public policy debate.

**Measuring Affordable Housing Production**

While the current standard may be overly simplistic, the HCIR does express a relationship by which the extent and distribution of problems associated with affordability can be measured. (Stone) It is the utility of this straightforward but descriptive statistic to calculate change or relative differences that has established the HCIR approach as the normative standard for housing policy in this country. (Pelletiere) But for the purposes of this research, which seeks to determine whether state housing policies have a measurable impact on the production of affordable housing, an analysis beyond the calculation of the HCIR standard is required. While sufficient to measure the relative demand for affordable housing within each state, this baseline of information would fail to provide any context relative to the supply of affordable housing that has been produced in response.

Moreover, there are already a number of national organizations that in one form or another publish a series of indices that attempt to measure housing affordability. In
most cases these are simply a derivation of the HCIR standard. A prime example is the Housing Affordability Index (HAI), which is published quarterly by the National Association of Realtors (NAR). Derived by measuring median family income as a function of median house value, an HAI value of 100 indicates that a household earns the exact amount of income necessary to afford the median priced home. Values above 100 indicate higher degrees of affordability, whereas values below this benchmark represent declining levels of affordability. Frequently cited by the media, the great utility of the HAI is in its ease of calculation and general application, as data on housing costs and incomes are available at the state, county and local levels. Nevertheless, the function of the HAI is limited in its application to the cost of acquiring single-family, detached housing.

Conversely, the most cited reference on the costs associated with the nation’s inventory of rental housing is a report by the National Low Income Housing Coalition (NLIHC). Published annually, Out of Reach calculates the number of hours that a household earning the minimum hourly wage must work in order to afford the average two-bedroom rental unit. (http://www.nlihc.org/oor/) In addition to providing a national snapshot on affordability, the report uses a variety of data sources to evaluate the relationship between housing costs and wages (income) for every state and county in the country. For each jurisdiction the report utilizes the “generally accepted affordability standard of paying no more than 30% of income for housing costs.” It proceeds by calculating the amount of income needed, adjusted for household size, to rent a unit at the HUD published Fair Market Rent (FMR). Distilled down from these calculations is the
hourly wage a worker must earn to afford the FMR for a two-bedroom unit. The end result is what the NLIHC calls “the Housing Wage.”

As its name implies, the mission of the National Low Income Housing Coalition is focused on those households that occupy the lowest end of the income distribution. By definition, this population earns less than 30 percent of median family income, which corresponds to the official HUD designation of Extremely Low Income (ELI). But while shining a bright and necessary light on those most in need of housing assistance, Out of Reach typically provides very little narrative on the rest of the rental market. If it did, the results would reveal a less dire situation, as modest income gains produce significant improvements in affordability. Specifically, the “housing wage” gap closes substantially as tenant income moves from 30 percent to 50 percent of median, while coming close to par at 80 percent of median income. Nevertheless, Out of Reach is an important national publication, as it provides an annual snapshot on the relationship between rent (housing costs) and income across the United States.

One final example of a national housing index that also attracts widespread attention is appropriate. But unlike both the HAI and Out of Reach, which are based upon the HCIR standard, the S&P/Case-Shiller Home Price Index (CSHPI) measures house values by tracing repeat sales of the same single family home (www.homeprice.standardandpoors.com) Behind the methodology is the process of taking published sales data and then “pairing” the current transaction with the last recorded sales price on the same house. By holding both the quality and size of the home constant, the index measures the relative change in value. Each sale is then allocated to one of three “price tiers—low, medium and high,” which in turn are weighted according
to the location of the transaction under analysis. Measured monthly, the CSHPI is conducted within a total of twenty (20) major Metropolitan Statistical Areas (MSAs). These individual metro values are then aggregated to form two national indices; the first is comprised of 10 MSAs, while the second includes all 20 MSAs. In addition to the monthly CSHPI, the Case-Shiller U.S. National Home Price Index is calculated and published every quarter. Aside from the difference in time intervals, the national index also uses a much larger unit of analysis, as it is a composite of the aggregate change in house prices across each of the nine (9) federally defined regional census divisions.

As a relative measure of the average change in house prices across the United States, the absolute value of the composite indices “requires setting the base periods for weights and the aggregate values of single-family housing stock for those periods.” These base periods have been set through the use the 1990 and 2000 decennial U.S. Census, as this data source “currently provides the only reliable counts on single-family housing units for metro areas.” Adjustments to the weighting process are made so that the composite index equals 100.0 for the first month and year (i.e. January 1990 and January 2000) of the base period. From this base point forward, the index reveals the relative strength or weakness of the U.S. housing market. For example, the July 2007 index was measured at 198.72, indicating that the aggregate value of the single-family housing market in the U.S. had nearly doubled since January 2000. In July 2010, the national composite index stood at 148.91. Although roughly 50 percent higher than the 2000 benchmark, over the three-year span from 2007 to 2010 the national single-family housing market had lost 25 percent of its total value. (http://www2.standardandpoors.com/spf/pdf/index/SPCSMethodologyWeb.pdf)
CHAPTER ELEVEN: A MODEL TO EVALUATE AFFORDABLE HOUSING PRODUCTION IN STATE MANDATED VERSUS MARKET-BASED STATES

Each of the aforementioned indices is designed to measure a specific dimension of the national housing market. As a gauge of relative affordability, the HAI uses a simple HCIR to evaluate the cost of buying a single-family home. To track the aggregate value of the single-family market, the CSHP calculates the price variance realized through repeat sales of the same unit. Together, both indices provide a valuable longitudinal record of the single-family housing market. Equally important is the process formulated by the NLIHC, which uses a sliding HCIR scale to highlight the range of affordability associated with the nation’s supply of rental housing.

While the principal function of the HCIR is to express some relationship between the cost of housing and household income, there is not an absolute construct among any of the published models. This is not meant to minimize the utility of any one process, but rather to highlight the fact that the outcomes produced are often used to meet very specific objectives. As previously argued, the application of a HCIR without controlling for the size of the household generates a result that is a distortion of the true dimension of the income-eligible population. Likewise, the relationship between the size of the household and the size of the occupied housing unit is an equally critical component of the demand equation. This dynamic, which is expressed by a ratio measuring the number of persons per room, determines whether the occupied unit is “crowded” by HUD standards. It is the aspect of crowding that is often omitted from most HCIR models.
Why such great variability exists in the application of the HCIR is hard to explain, as the methodology has been in place for more than three (3) decades. Established by HUD and documented throughout the planning literature, this prescribed formula is fairly straightforward. It begins with an initial benchmark to establish income-eligibility, which is predicated upon a 4-person household earning up to 80 percent of median income. This criterion is then adjusted by the size of the household; increasing the cap on income by 8 percent for each person above the 4-person threshold, while decreasing the income limit by 10 percent for each person below the 4-person standard. Once again, it is only when the proper adjustments to income in relation to household size are made that the current housing cost to income ratio (HCIR) of 30 percent is applied. By HUD standards, when the HCIR exceeds the 30 percent threshold the household is officially classified as “cost-burdened.”

The third criterion in the HUD mandated process relates to the living conditions within the occupied housing unit. More specifically, “crowding” serves as an important proxy for affordability, which addresses the physical adequacy of the occupied unit. Defined by HUD as having no more than 1.1 persons per room, the attribute of crowding is typically absent from most HCIR models. While this omission might be excused given the current quality of the nation’s housing stock, crowding is still a critical component of the demand equation. While affordability is the broadest measure of housing stock sufficiency, based upon the 30 percent of income standard, physical adequacy serves to extend the concept of affordability. (PDR) In strict keeping with the HUD standard, all three criteria of income, cost-burden and crowding will be utilized in the course of this
research to determine the rates of affordable housing production in each of the fifty states.

Although not officially mandated, HUD income standards are typically adopted and applied to establish eligibility under many state and local housing assistance programs. While some methodologies are more robust than others, many if not all use the HUD published Section 8 guidelines as a definitive baseline. Updated annually and calculated for every county in the country, the federal Section 8 limits are a product of household income and size. Under HUD protocol, there are three (3) classifications that define the income-eligible population: Low-Income (LI), which corresponds to households earning more than 50 percent but less than 80 percent of median income; Very Low-Income (VLI), which is set between 30 percent and 50 percent of median income; and Extremely Low-Income (ELI), which represents a household earning less than 30 percent of median. When calibrated by household size, the full range of income-eligibility under the Section 8 program is produced.

Despite this high level of segmentation, it is the upper limit (80 percent of median) of the defined Low-Income threshold under Section 8 that is typically used to establish eligibility under most state and local housing assistance programs. An exception occurs whenever certain federal sources of funding are involved, most notably the Low Income Housing Tax Credit (LIHTC) and HOME Investment programs. While the use of these resources carries a much higher standard of participation, typically restricting eligibility to VLI households (<50% median), compliance under these programs is also subject to federal oversight. Conversely, state housing initiatives are the products of a more indigenous political process, where local priorities often exert great influence over
programmatic design and execution. However, beyond the idiosyncratic is the near universal application of the 80 percent of median standard to establish eligibility. Therefore, I’ve chosen to use this threshold as the baseline to construct a national HCIR model.

For the purposes of this research, and true to the conventions established by HUD, the 80 percent of median income standard will be controlled for household size. Once accomplished, the normative HCIR standard of 30 percent will be applied. This procedure will in turn generate the percentage of the income-eligible population that is “cost burdened,” which is defined by HUD as households that pay more than 30 percent of their income for housing. The final step in the eligibility process will be to identify those households living in crowded conditions, defined by HUD as no more than 1.1 persons per room. Once complete, the model will be applied to each of the 50-states and the District of Columbia, as the intended result is to produce a more true depiction of the demand for affordable housing across the United States.

However, since the objective of this research is to determine the impact of state housing policies and programs on the production of affordable housing, a measure of the supply response in relation to the level of demand must also be accomplished. While state and federal sources do monitor the number of building permits issued, these are presented as whole numbers, segregated only by building type (single and multi-family) and total valuation. While useful within the context of overall housing production, this information is insufficient relative to quantifying the supply of affordable housing. What is needed is an ability to determine what percentage of the total supply of housing is occupied by the income-eligible population. Only then can the supply mechanism be evaluated in relation
to the overall demand for affordable housing. Unfortunately, there is not a single published data source that provides this level of detailed information.

Given the dearth of data, particularly at the state and local level, most of the published housing research has been generated through the use of the U.S. Decennial Census and its various progeny. These include the American Housing Survey (AHS), which was first published in 1975 and is conducted specifically for HUD by the Bureau of the Census. ([http://www.census.gov/hhes/www/housing/ahs/ahs.html](http://www.census.gov/hhes/www/housing/ahs/ahs.html)) With a national sample size of 55,000 households, the AHS is a biennial survey that is designed to track the same housing units year after year. In 1996, the American Community Survey (ACS) was created with the intent to reengineer the decennial census, calculating and producing population and housing information every year instead of every ten years. While full implementation did not take place until 2003, today the ACS tracks some 3 million households annually. ([http://www.census.gov/acs/www/](http://www.census.gov/acs/www/))

However, in an effort to conduct a state-by-state analysis, the data source of choice is the U.S. Decennial Census, and more specifically, the Public Use Microdata Sample (PUMS). The rationale for using PUMS becomes obvious when reviewing the list of variables available within the dataset, as each file contains two record types: the housing unit record and the person record. Data contained within the person record provides the requisite household-level information on income, housing costs and crowding necessary to construct the HCIR model. When applied across states, the result will establish the overall demand parameter contained within each unit (states) of analysis. Whereas the housing record contains two variables that when combined will generate a reasonable proxy for the supply parameter.
The first supply variable is produced by the census question that asks to identify the year the household moved into the structure, while the second results from the respondents answer to the year that the structure was built. By controlling for both of these variables it is possible to match when a household moved into to a unit that was constructed within a specified period of time. By controlling for the income and size of the household, it is then possible to identify only those income-eligible households that moved into newly constructed units. For the purposes of this research, the definition of “newly constructed” will correspond to the ten year interval that defines the decennial census periods.

Original expectations assumed that the use of the 2000 PUMS would alone prove sufficient to conduct this research, as the data generated could be easily captured. But like the Case-Shiller Home Price Index (CSHPI), the need for two controlling data points became increasingly obvious. Driven by the premise of the hypothesis, which seeks to discover whether there is any relationship between progressive state housing policies and the production of affordable housing, a second point of reference proved absolutely necessary. In response, the decision was made to expand the analysis to incorporate the data from the 1990 PUMS. This decision was reinforced by the fact that most progressive state housing policies (New Jersey, California, Massachusetts, Maryland and Florida) went into full force and effect before 1990. Therefore, absent a second point of reference and the ability to measure the true impact of such policies would be severely compromised.

By establishing two distinct data points, the ability to measure the rate of change in relation to both the supply and demand of affordable housing production can be
achieved. Beyond a comparative analysis, a series of regression models will also be constructed that will incorporate a dummy variable to serve as a surrogate for the presence of progressive state housing policies. The results produced will form the basis of the policy discussion that will follow in the concluding chapter.

**Input Data—The Use of the PUMS**

Public Use Microdata Sample (PUMS) files contain records representing 5 percent and 1 percent samples of the occupied and vacant housing units in the United States, and the characteristics of the people living in the occupied units. ([www.census.gov/pums](http://www.census.gov/pums)) While both sample sizes are comprised of geographic units called Public Use Microdata Areas (PUMAs), the 1 percent sample (1 in 1,000) consists of a variety of metropolitan/non-metropolitan areas and can sometimes overlap into contiguous states. Conversely, the 5-percent sample (5 in 1,000) identifies every state and each PUMA is based primarily on contiguous counties. As a result, none of the PUMAs in the 5 percent sample crosses over state lines.

By definition, each PUMA must contain a minimum population of 100,000 persons. However, Census 2000 expanded the geography of the 5 percent state file by creating the Super-PUMA region, which encompasses a minimum population of 400,000 persons. But in order to maintain historical compatibility, particularly with the 1980 and 1990 PUMS, the 5 percent state files in Census 2000 maintain the 100,000 person PUMA regions while also showing the corresponding Super-PUMA codes. Allowing both the 1990 and 2000 PUMS data sets to be matched for comparative purposes assures a higher degree of accuracy. ([http://www.ciesin.org/datasets/pums/pums-home.html](http://www.ciesin.org/datasets/pums/pums-home.html)),
It is the mining of a large dataset like PUMS that provides the best opportunity for discovering, within a subset of the data, some relationship or pattern that is oftentimes masked when the data is collapsed for broad comparative purposes. But like all census information, PUMS data can be characterized as messy. This is to be expected given the “self reporting” nature of the data collection process, which will produce data that have missing values and extreme outliers that are often far from expressing normal distribution. For the purpose of this thesis, data that appears to be unreliable will be deleted from the analyses.

Despite these anomalies, PUMS represents the most robust dataset to estimate state level statistics with very small error. However, adjustments will be necessary, as most Census questions are coded as categorical variables where the number of possible responses (categories) could be in the hundreds. Other variables measure economic quantities that are far from normal distribution. To compensate, many of the variables used for this analysis will be collapsed to aggregate the responses. For example, the variable for Household/Family Type (HHT) contains seven (7) categories describing both family and non-family households. Given that the type of household is not critical to the overall analysis, a nominal scale variable will be constructed to simply identify whether the housing unit is vacant (0) or occupied (1).

Similarly, the economic variable for property value (VALUE) contains twenty-four (24) intervals of value. The scale begins at (01) and corresponds to the lowest property values of less than $10,000, and ends at (24) to represent housing that is valued at $1 million or more. However, in order to produce a more normal distribution upon which a statewide median house value can be calculated, the midpoint value for each
range will be established and assigned the corresponding interval. For example, response #13 represents a house value between $90,000 and $99,999, which will be assigned a value of $95,000. Likewise, response #20 identifies a house value between $300,000 and $399,999, which will be assigned a value of $350,000, and so on.
CHAPTER TWELVE: BUILDING THE MODEL—SELECTION OF VARIABLES

In addition to demonstrating how certain variables will be transformed, the aforementioned example also illustrates just how “messy” census data can be. Since the survey respondent is actually providing the estimate of value, it is very likely that the values assigned are either over or under estimates of true market value. While twenty-four (24) very specific intervals of value are provided to help minimize error, the ultimate selection is in response to the following question on the census long-form:

*What is the value of this property; that is, how much do you think this house and lot, apartment, or mobile home and lot would sell for it were for sale?*

Since the same questionnaire is utilized throughout the country, it can be assumed that the error is consistent across all states. In addition, house values for only those households that report moving into their units within the most recent ten-year time period will be measured. This may also serve to aid in the accuracy of the responses, since a more recent knowledge of the housing market would assume a better estimate of perceived value.

Exactly when the unit became occupied by the respondent is a critical factor in the design of the model. Given the research objective, which is to determine whether progressive housing policies have a measurable impact on the supply of affordable housing, the actual supply must be calculated. To achieve this goal, the population that claims to have moved between the periods 1980-1990 and 1990-2000 must first be isolated. This function is achieved through the PUMS variable (YRMOVED), where the first three (3) out of a total of six (6) possible responses encompass each of the ten-year census intervals under analysis. However, identifying the universe of households that
moved within these time parameters is only half of the equation, as it is equally critical to
determine the age of the newly occupied unit as well. Only then can the most recent
“supply” of “new” housing be established.

Once again, the self-reported nature of the data is confronted, as the survey
question that seeks to determine the age of the structure simply asks: *About when was this
building first built?* Coded as the PUMS variable (YRBUILT), the respondent is given
nine (9) possible choices, where the first three combine to capture the ten years between
each census interval. While the probability that someone moving into a “new” unit would
know the exact age of the structure can assume to be relatively low, the fact that the
question is the same across the country also assumes a consistent error across states. By
constructing a cross-tabulation of the PUMS variables (YRBUILT) and (YRMOVED),
the total household population that moved into a new housing unit within every state
during each census interval can be determined.

While this result will represent the total supply of all new and occupied housing
units, the research objective is to determine what percentage of the total supply of new
housing is occupied by income-eligible households. In order to achieve this result, the
HUD conventions previously described must be employed. Specifically, the PUMS
variable for household total income (HINC) will be used to calculate the median
household income by state. Here is where the 5 percent PUMS sample is truly effective,
as the Super PUMA region contains a minimum of 400,000 households, compared to the
PUMA, which is comprised of a minimum of 100,000 households. Given that income and
affordability are so highly correlated, the larger sample size will help to minimize the
level of expected variability. By example, there are 21 counties and 15 Super-PUMAs in
New Jersey. Therefore, by calculating the (HINC) statistic through the use of the Super-PUMA, the tremendous regional variation that exists within New Jersey, as well as within most states, would be more precisely captured.

Once the (HINC) statistic is generated and a statewide median calculated, the HUD standards required to determine the true income-eligible population will be applied. To restate the criteria, initial eligibility is predicated upon a 4-person household earning up to 80 percent of median income. This benchmark is then adjusted by the size of the household; increasing the cap on income by 8 percent for each person above the 4-person threshold, while decreasing the income limit by 10 percent for each person below the 4-person standard. To perform this procedure and calculate a result, the following operation is employed utilizing PUMS data:

\[
\text{If } \text{persons} \leq 4 \text{ and } \text{hinc} < m_4(1-\text{(4-persons)}*0.1) \text{ then } \text{einc} = 1; \\
\text{If } \text{persons} > 4 \text{ and } \text{hinc} < m_4(1+(\text{persons}-4)*0.08) \text{ then } \text{einc} = 1; 
\]

Where (PERSONS) is the PUMS variable that identifies the number of persons per occupied housing unit; \(M_4\) represents 80 percent of the statewide median income for a four (4) person household; and (EINC) is the result that identifies the total number of new housing units occupied by income eligible households.

The process proceeds by controlling the (EINC) statistic with the corresponding level of housing costs, which will be achieved by applying the HUD standard HCIR of 30 percent. Households that exceed this benchmark will be classified as “cost-burdened.” Once accomplished, the final iteration in the eligibility process addresses the physical adequacy of the occupied housing unit, where the presence of crowding is used to complete the qualification process. To identify the condition of crowding requires the use of the PUMS variables PERSONS and ROOMS, which measures the total number of
persons and rooms in each occupied unit, respectively. When the ratio of these two variables (PERSONS/ROOMS) exceeds the HUD standard of 1.10 persons per room per household, the unit is deemed crowded. In total, the attributes of income, housing costs and crowding will combine to produce the true income-eligible population of households that occupy housing that by convention is defined as affordable.

Given that the issue of affordability is most often segregated by tenure, the eligibility profile will be separated into renter and owner-occupied households. For income-eligible renter households, the PUMS variable that defines gross rent as a percentage of income (GRAPI) will be applied. If as a percentage of income the gross rent is less than or equal to 30 percent of adjusted household income, the unit will be classified as affordable. For owner-occupied units the PUMS variable for selected monthly owner costs as a percentage of household income (SMOCAPI) produces the analogous result. Therefore, owner-occupied households with a SMOCAPI value of 30 percent or less will be classified as affordable.

The output generated will be captured to produce a series of new variables for the purpose of comparative analysis. The first new variable will be labeled TUNITNEW to represent the total number of new and occupied housing units produced by each state during the specified census period. This result is achieved by controlling all renter and owner-occupied respondents for both the YRBUILT and YRMoved variables. The second new variable is created by controlling the TUNITNEW value for household income by applying the 80 percent of median income standard, adjusted by household size. This procedure reveals the total number of new housing units that are occupied by income-eligible households and is labeled TIEUNITS. However, to discern the true
income-eligible population, further refinement is necessary to control for both the cost of housing and the presence of crowding. The first function is accomplished by controlling for the PUMS variables SMOCAPI and GRAPI, respectively; whereas the presence of crowding is achieved through the application of the crowding (PERSONS/ROOMS) formula. The outcome produced is a measure of the total net number of new housing units occupied by income-eligible households and is labeled TOTNETAF. As the final result of this iterative process, the TOTNETAF variable represents the actual “supply” of affordable housing produced by each state during the two data points under analysis.

In combination, the three new variables of TUNITNEW, TIEUNITS and TOTNETAF will be used to generate two (2) additional variables; each expressed as simple ratios. As the product of the total number of net new affordable housing units divided by the total number of new housing units (TOTNETAF/TUNITNEW), Ratio #1 will represent an absolute measure of the supply of affordable housing produced by each state. Conversely, Ratio #2 will identify the total number of net new affordable housing units as a percentage of the total number of new housing units occupied by income-eligible households (TOTNETAF/TIEUNITS). In effect, Ratio #2 will provide an indication of success among the income-eligible population (TIEUNITS), relative to the fully qualified household population.

**Ranking the States**

The results generated by Ratio #1 and Ratio #2 will be displayed for both the 1990 and 2000 censuses. Those states with the highest success ratios will represent the most productive in terms of affordable housing, followed in descending order by the least productive affordable housing states. This ability to assess the ratio scores from one
The census period to the next will provide an opportunity to measure the absolute progress or retreat in affordable housing production for each state. In addition, both Ratio #1 and Ratio #2 will serve as the dependent variables in a series of regression models that will utilize roughly thirteen independent or predictor variables, which are as follows:

- Median House Value
- Median Household Income
- Median Gross Rent
- Median Household Size
- Percent of New Households by State (as a function of the total number of all households)
- Percent of Total Single Family Housing Units
- Percent of the Total Population that is Elderly
- Percent of the Total Population that is Below the Poverty Level
- Percent of the Total Population that is Employed by Occupation (Professional vs. Workforce)
- Average Number of Automobiles Per Household
- Average Commute to Work (in minutes)
- Population Density Per Square Mile

With the exception of the poverty and population density statistics, which are published as single values by the census at the state level, the balance of the variables selected are all contained within the PUMS data base. In addition, only the PUMS employment variable (OCCSOCS) required restructuring, as each PUMS record identifies the occupation of the head of household through the use of the Standard Occupational Classification (SOC) system. Given the hundreds of different SOC codes, the need to aggregate all of the responses into a smaller and more generalized list of categories was necessary. As a result, a total of eight (8) different employment classifications were created to capture “work that is performed for pay or for profit.”

(http://www.bls.gov/soc/socguide.htm) They are as follows:

1. Management, Business and Financial
2. Professional and Related
3. Sales and Office Occupations
4. Construction, Extraction and Maintenance  
5. Production, Transportation and Materials Moving  
6. Farming, Fishing and Forestry  
7. Military  
8. Service Occupations

While the ability to discern the composition of the workforce in each state was deemed to be an essential component to the model, how best to consolidate and group the multiple employment categories was not an arbitrary process. It was instead based upon the classification system utilized in the construction of the Mount Laurel methodology. In fact all of the variables selected for inclusion into the regression model are either the same or analogous to the parameters used to calculate the Mount Laurel obligation. While the level of detail and analysis employed in New Jersey won’t be duplicated for all fifty (50) states, each of the variables identified above can serve as reasonable proxies to help explain the variance across states, as well as to determine the most significant predictors of affordability by state. However, still missing from the equation is whether the policies enacted in New Jersey, as well as in other progressive housing states, have had a measurable impact on the production of affordable housing.

Insight into the question of whether progressive housing policies have played a role in the outcomes produced will require an ability to measure the qualitative effect of such policies. In an effort to achieve this result, it will first be necessary to identify the various program and policy initiatives established by each state. In regression analysis, the creation of a dummy variable is typically used to generate such a discrete outcome. But public policy, especially on the state level, is a very idiosyncratic process. As such, the introduction of a simple nominal (0,1) variable would prove insufficient to account for the significant differences in housing policy and programs across states. For this is not
a question of either or, but a matter of degree. While some states have a long and impressive track record, other states have done little or nothing to encourage the supply of affordable housing. Situated somewhere in between both extremes are the majority of states, which in varying degrees have made some attempt at addressing the issue of affordability. Given this disparity, the need to determine the relative difference in housing policies across all fifty-one (51) cases (states) becomes an essential part of the analysis.

Through the use of a variety of data sources, the majority of which were accessed via the Internet, it was possible to conduct an extensive search of the programs and policies unique to each state. Over the course of this investigation, numerous personal contacts were made via email and telephone to seek further explanation or confirmation of the information collected. While the goal of the exercise was to identify specific initiatives, it was equally important to gain knowledge of the political origins of the policies in play, as a long and proactive history of progressive programs would *a priori* correspond to increased levels of housing production. So beyond the Low Income Housing Tax Credit (LIHTC) program, which is active and operational in every state in the country, the objective was to identify any specialized initiatives that would serve to distinguish the public policy efforts of one state from the next. These would include: (1) significant pieces of legislation that were enacted prior to the year 2000, such as the Fair Housing Act in New Jersey (1985) or Chapter 40B in Massachusetts (1969); (2) the existence of a state, or (3) county or local housing trust funds and the annual average revenues generated by these resources; (4) the promotion, whether mandated or voluntary in the use of inclusionary zoning (IZ) ordinances, and; (5) a state tax credit program to help supplement the equity generated by the federal LIHTC program.
In rank order, each state’s “score” will reflect the total number of public policy indicators in effect at the time of the 2000 census. While a perfect score of 5.0 would designate the most progressive affordable housing agenda, only the states of California and Oregon would achieve this distinction. The list of states with a score of 4.0 is only slightly longer, but includes Maryland, Massachusetts, New Jersey, Connecticut, Florida and Washington. Represented by the variable PROGSTAT, the resulting score of each case will range in value from the most (5) progressive to the least (0) progressive housing states. The complete results produced by this state-by-state analysis are presented at the end of this chapter.
CHAPTER THIRTEEN: MEASURING AFFORDABLE HOUSING PRODUCTION: STATE MANDATED VERSUS MARKET-BASED STATES

While the simple quantification of the number of affordable housing units produced is an incomplete measure of success, it is typically the only statistic available at the state level. In lieu of the vacuum of information that exists, this research seeks to measure the magnitude of the supply of affordable housing produced within each of the fifty states. Through a combination of data sources, but ostensibly through the data published by both the 1990 and 2000 PUMS, this chapter seeks to determine whether there is any measurable difference in the production of affordable housing among states with a progressive housing policy agenda versus states with limited or no dedicated public initiatives.

The Results

The values generated by each success ratio will serve to gauge the levels of affordable housing produced at the individual state level. As the product of the net number of new and occupied affordable housing units (TOTNETAF) divided by the total number of all new and occupied housing units (TUNITNEW), Ratio #1 represents an absolute measure of the supply of affordable housing. More succinctly, Ratio #1 represents the percentage of all the new and occupied housing created over the corresponding decade that are occupied by households that meet all three (3) eligibility criteria. Conversely, Ratio #2 represents a more relative measure, as it serves to identify the total number of net new affordable housing units as a percentage of the total number of new housing units occupied by income-eligible households (TOTNETAF/TIEUNITS). In effect, Ratio #2 will provide an indication of success among the fully-qualified
population in each state (income, cost burden and crowding), relative to those income-eligible households that actually obtained affordable housing.

While the complete results for each of the fifty-one (51) cases will be published at the end of this chapter, for the purposes of discussion, the tables that follow will be limited to the ten (10) least and most productive affordable housing states. In this way, more attention can be focused on tracking the progress or retreat by each case (state) from one census period to the next.

The analysis starts by reviewing the success ratios produced utilizing data from the 1990 PUMS, beginning with the ten (10) least productive affordable housing states, which are presented below.

Table 13.1. Ratio #1: Least Productive Housing States (1990)

<table>
<thead>
<tr>
<th>RANK</th>
<th>STATE</th>
<th>TUNITNEW</th>
<th>TIEUNITS</th>
<th>TOTNETAF</th>
<th>RATIO #1</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>MD</td>
<td>367,736</td>
<td>78,043</td>
<td>55,462</td>
<td>0.1508</td>
</tr>
<tr>
<td>2</td>
<td>FL</td>
<td>1,708,841</td>
<td>453,216</td>
<td>294,696</td>
<td>0.1725</td>
</tr>
<tr>
<td>3</td>
<td>VT</td>
<td>40,266</td>
<td>11,474</td>
<td>7,132</td>
<td>0.1771</td>
</tr>
<tr>
<td>4</td>
<td>NH</td>
<td>107,291</td>
<td>29,119</td>
<td>19,155</td>
<td>0.1785</td>
</tr>
<tr>
<td>5</td>
<td>HI</td>
<td>69,317</td>
<td>20,701</td>
<td>12,778</td>
<td>0.1843</td>
</tr>
<tr>
<td>6</td>
<td>NM</td>
<td>142,920</td>
<td>44,031</td>
<td>26,391</td>
<td>0.1847</td>
</tr>
<tr>
<td>7</td>
<td>GA</td>
<td>739,032</td>
<td>198,337</td>
<td>138,529</td>
<td>0.1874</td>
</tr>
<tr>
<td>8</td>
<td>VA</td>
<td>580,572</td>
<td>149,562</td>
<td>109,020</td>
<td>0.1878</td>
</tr>
<tr>
<td>9</td>
<td>CA</td>
<td>2,222,770</td>
<td>661,418</td>
<td>418,210</td>
<td>0.1881</td>
</tr>
<tr>
<td>10</td>
<td>NJ</td>
<td>391,183</td>
<td>108,556</td>
<td>73,611</td>
<td>0.1882</td>
</tr>
</tbody>
</table>


Ranked first as the least productive affordable housing state is Maryland, where roughly 15 percent of all new and occupied housing units produced (TUNITNEW) met all three (3) eligibility criteria (TOTNETAF). This result can be viewed as either surprising, given the early and initial success of the Multiple Price Dwelling Unit
(MPDU) program, or as evidence to substantiate the implementation of this 1974 landmark initiative. The fact that the MPDU program is only operational in a single (Montgomery) county in the state may also help to explain Maryland’s overall ranking. While the same observations may be just as valid for California and New Jersey, the outcomes produced by both of these states are more impressive. In fact, if every state in the nation was able to generate nearly 20 percent of its total housing production as affordable housing, the country would be currently engaged in an entirely different public policy debate.

Florida’s position as the second least affordable housing state is also somewhat unexpected, although the timing of this result corresponds with the passage of the 1989 Sadowski Act and the establishment of what is today the largest affordable housing trust fund in the nation. Although least productive in terms of affordable housing, the sheer volume of units produced in Florida reflects the attraction of the state as a Mecca for retirement and vacation homes. The same is also true for California. In addition, the development of Atlanta as the center for the new and emerging Sunbelt economy might help to explain Georgia’s lofty position on the list of least affordable states. Meanwhile, Virginia and Maryland, both of which surround our nation’s capital, each provide an easy commute and suburban lifestyle for those who work in Washington, D.C. On the other hand, places like Vermont and New Hampshire have always been considered rural and intellectual outposts for the urban elite in the Northeast; whereas Hawaii is literally and figuratively an outlier. In total, seven out of the ten (70 percent) states classified as the least productive in terms of affordable housing production are located on the east coast of the United States.
Conversely, Table 12.2 lists the ten (10) most productive affordable housing states for the period 1980-1990. The results of which are presented below.

### Table 13.2. Ratio #1: Most Productive Housing States (1990)

<table>
<thead>
<tr>
<th>RANK</th>
<th>STATE</th>
<th>TUNITNEW</th>
<th>TIEUNITS</th>
<th>TOTNETAF</th>
<th>RATIO #1</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>DC</td>
<td>12,414</td>
<td>5,143</td>
<td>4,231</td>
<td>0.3408</td>
</tr>
<tr>
<td>2</td>
<td>RI</td>
<td>55,218</td>
<td>19,658</td>
<td>15,623</td>
<td>0.2829</td>
</tr>
<tr>
<td>3</td>
<td>IA</td>
<td>103,605</td>
<td>34,839</td>
<td>28,922</td>
<td>0.2792</td>
</tr>
<tr>
<td>4</td>
<td>WV</td>
<td>117,799</td>
<td>43,037</td>
<td>32,041</td>
<td>0.2720</td>
</tr>
<tr>
<td>5</td>
<td>ND</td>
<td>39,990</td>
<td>13,080</td>
<td>10,425</td>
<td>0.2607</td>
</tr>
<tr>
<td>6</td>
<td>KY</td>
<td>258,391</td>
<td>90,023</td>
<td>66,123</td>
<td>0.2559</td>
</tr>
<tr>
<td>7</td>
<td>WI</td>
<td>248,904</td>
<td>80,484</td>
<td>63,573</td>
<td>0.2554</td>
</tr>
<tr>
<td>8</td>
<td>NY</td>
<td>569,561</td>
<td>196,272</td>
<td>142,018</td>
<td>0.2493</td>
</tr>
<tr>
<td>9</td>
<td>SD</td>
<td>37,780</td>
<td>12,269</td>
<td>9,360</td>
<td>0.2478</td>
</tr>
<tr>
<td>10</td>
<td>MI</td>
<td>437,451</td>
<td>141,217</td>
<td>105,860</td>
<td>0.2420</td>
</tr>
</tbody>
</table>


As the nation’s capital, the fact that Washington D.C. tops the list as the most productive in terms of affordable housing is not that surprising. While obviously not a state, historically, many who work in D.C. don’t actually live inside the city. This is especially true for white-collar workers who often make the conscious choice to commute from either Virginia or Maryland. Instead, D.C. is home to many blue-collar and lower-wage employees. The fact that 34 percent of the overall supply of new housing in D.C. is occupied by affordable households reinforces the status of this city as an affordable place to live.

The majority of the list, however, is populated by states that are located in the Midwest and the Great Plains. These include Iowa, Wisconsin, Michigan, and North and South Dakota. By the nature of their geography and employment base, these states have always been relatively affordable places to live. But it’s also possible that these results
may reflect the impact on housing and market conditions caused by a deteriorating “rust belt” economy. While in the South, Kentucky and West Virginia are rural and affordable.

The time period under analysis is an important consideration when reviewing these results, as market conditions can change rather dramatically from one decade to the next. The presence of New York and Rhode Island are prime examples, as current perceptions would defy their rank among the most productive affordable housing states. However, beyond the confines of Manhattan, New York is a large and affordable state. A fact that remains true to this day. While the affordable housing conditions in Rhode Island may serve as pretext for the real estate renaissance it would eventually experience, fueled in large measure when the state became a relatively inexpensive housing alternative within reasonable commuting distance to the Boston metropolitan area.

By contrast, Ratio #2 is designed to measure the total number of units occupied by income-eligible households (TIEUNITS) that meet all three (TOTNETAF) eligibility criteria. Table 12.3 below presents the output generated by this tabulation.

### Table 13.3. Ratio #2: Least Productive Housing States (1990)

<table>
<thead>
<tr>
<th>RANK</th>
<th>STATE</th>
<th>TUNITNEW</th>
<th>TIEUNITS</th>
<th>TOTNETAF</th>
<th>RATIO#2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>NM</td>
<td>142,920</td>
<td>44,031</td>
<td>26,391</td>
<td>0.5994</td>
</tr>
<tr>
<td>2</td>
<td>MS</td>
<td>207,279</td>
<td>75,030</td>
<td>45,222</td>
<td>0.6027</td>
</tr>
<tr>
<td>3</td>
<td>HI</td>
<td>69,317</td>
<td>20,701</td>
<td>12,788</td>
<td>0.6177</td>
</tr>
<tr>
<td>4</td>
<td>VT</td>
<td>40,266</td>
<td>11,474</td>
<td>7,132</td>
<td>0.6216</td>
</tr>
<tr>
<td>5</td>
<td>CA</td>
<td>2,222,770</td>
<td>661,418</td>
<td>418,210</td>
<td>0.6323</td>
</tr>
<tr>
<td>6</td>
<td>LA</td>
<td>313,842</td>
<td>101,244</td>
<td>64,704</td>
<td>0.6391</td>
</tr>
<tr>
<td>7</td>
<td>FL</td>
<td>1,708,841</td>
<td>453,216</td>
<td>294,696</td>
<td>0.6502</td>
</tr>
<tr>
<td>8</td>
<td>NH</td>
<td>107,291</td>
<td>29,119</td>
<td>19,155</td>
<td>0.6578</td>
</tr>
<tr>
<td>9</td>
<td>AK</td>
<td>67,085</td>
<td>20,175</td>
<td>13,363</td>
<td>0.6624</td>
</tr>
<tr>
<td>10</td>
<td>AR</td>
<td>208,378</td>
<td>67,415</td>
<td>44,697</td>
<td>0.6630</td>
</tr>
</tbody>
</table>

When comparing these results with Table 12.1, there are six (6) states that carry over the distinction of being the least productive. These are Florida, Vermont, Hawaii, New Hampshire, New Mexico and California. While this may serve to reinforce a perception that these states are expensive places to live, they are now joined by the ranks of four (4) states that occupy the opposite end of the perception spectrum. At first glance the inclusion of Mississippi, Louisiana, Alaska and Arkansas may seem incongruous, but it is the function of Ratio #2 to reveal the success achieved among the fully-qualified population in each state (income, cost burden and crowding), relative to the total number of units occupied by income-eligible households. Therefore, this outcome is not a surprise but instead exposes the prevalence of crowding and cost burden among the income-eligible population in these states. This result is confirmed by the data, which have been segregated into each of the three eligibility components to account for the singular and combined effects of these conditions on the total supply of affordable housing. Full data runs for each state are displayed at the end of this chapter.

The value of the TUNITNEW variable is an equally important observation when attempting to interpret these results, as overall housing production in states like Hawaii, Vermont and Alaska is relatively modest. As a result, any variation caused by the conditions of crowding or cost burden within these states will have a larger effect relative to the absolute numbers of affordable housing produced.

Conversely, the states that dropped out from the ranks of the least productive produced an average of more than 500,000 new and occupied housing units over the decade. These include Maryland, Georgia, Virginia and New Jersey. While this shift could be the result of a higher and better quality of housing stock, or an indication of the
relative levels of affordability extant during the time period under analysis, the degree of improvement varies considerably. Specifically, New Jersey moved up just two spots from the 10\textsuperscript{th} to the 12\textsuperscript{th} position in the overall rankings, while Virginia went from the 8\textsuperscript{th} least affordable housing state to 30\textsuperscript{th} overall.

As defined by Ratio #2, Table 12.4 below identifies the most productive affordable housing states. Again, when compared to the output generated by Table 12.2, a total of five (5) states have maintained their top ten standing. These are the District of Columbia (DC), Rhode Island, Iowa, North Dakota and Wisconsin, which are now joined by Ohio, Nebraska, Indiana, Kansas and Illinois.

Table 13.4. Ratio #2: Most Productive Housing States (1990)

<table>
<thead>
<tr>
<th>RANK</th>
<th>STATE</th>
<th>TUNITNEW</th>
<th>TLIUNITS</th>
<th>TOTNETAF</th>
<th>RATIO#2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>IA</td>
<td>103,605</td>
<td>34,839</td>
<td>28,922</td>
<td>0.8302</td>
</tr>
<tr>
<td>2</td>
<td>NE</td>
<td>75,844</td>
<td>21,635</td>
<td>17,874</td>
<td>0.8262</td>
</tr>
<tr>
<td>3</td>
<td>DC</td>
<td>12,414</td>
<td>5,143</td>
<td>4,231</td>
<td>0.8227</td>
</tr>
<tr>
<td>4</td>
<td>ND</td>
<td>39,990</td>
<td>13,080</td>
<td>10,425</td>
<td>0.7970</td>
</tr>
<tr>
<td>5</td>
<td>OH</td>
<td>478,963</td>
<td>143,003</td>
<td>113,892</td>
<td>0.7964</td>
</tr>
<tr>
<td>6</td>
<td>RI</td>
<td>55,218</td>
<td>19,658</td>
<td>15,623</td>
<td>0.7947</td>
</tr>
<tr>
<td>7</td>
<td>IN</td>
<td>292,288</td>
<td>85,341</td>
<td>67,463</td>
<td>0.7905</td>
</tr>
<tr>
<td>8</td>
<td>WI</td>
<td>248,904</td>
<td>80,484</td>
<td>63,573</td>
<td>0.7899</td>
</tr>
<tr>
<td>9</td>
<td>KS</td>
<td>160,106</td>
<td>44,870</td>
<td>34,704</td>
<td>0.7734</td>
</tr>
<tr>
<td>10</td>
<td>IL</td>
<td>483,045</td>
<td>138,594</td>
<td>106,875</td>
<td>0.7711</td>
</tr>
</tbody>
</table>


That 80 percent of the states on this list are located in either the Midwest or Great Plains comes as no surprise, as this part of the country has historically provided an abundance of affordable housing. This fact is documented by the high ratio scores, where more than three-quarters of the total number of units occupied by income-eligible households meet all three eligibility criteria.
How the results compare from one decade to the next will be revealed by the tables that follow, which will list the ten least and most productive housing states as calculated by the 2000 PUMS data. However, while comparing success ratios, special attention will also be paid to the TUNITNEW variable in an effort to monitor total housing production from one data point to the next. This additional focus is important for several reasons. First is the fact that the nation experienced several extreme boom and bust cycles during each of the two decades under analysis. These events raise the question of whether such dislocations in supply are evident by the data, and if so, to what overall effect?

Second, since the PUMS data relies on the current occupant to provide an estimate of the age of the occupied unit, a comparison of the TUNITNEW statistic against individual state permit data will be conducted. While there is always a time lag between permit and occupancy, the intent is to identify the significance of any variance between these two data sources. (http://www.census.gov/const/www/permitsindex.html)

Meanwhile, answers to some of these questions can already be found in the table below.

### Table 13.5. Ratio #1: Least Productive Housing States (2000)

<table>
<thead>
<tr>
<th>RANK</th>
<th>STATE</th>
<th>TUNITNEW</th>
<th>TLIUNITS</th>
<th>TOTNETAF</th>
<th>RATIO#1</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>CA</td>
<td>1,471,440</td>
<td>433,764</td>
<td>103,149</td>
<td>0.0701</td>
</tr>
<tr>
<td>2</td>
<td>NV</td>
<td>313,433</td>
<td>88,353</td>
<td>23,390</td>
<td>0.0746</td>
</tr>
<tr>
<td>3</td>
<td>CO</td>
<td>353,633</td>
<td>89,364</td>
<td>26,499</td>
<td>0.0749</td>
</tr>
<tr>
<td>4</td>
<td>AZ</td>
<td>537,304</td>
<td>144,408</td>
<td>46,072</td>
<td>0.0857</td>
</tr>
<tr>
<td>5</td>
<td>NJ</td>
<td>319,831</td>
<td>89,861</td>
<td>27,934</td>
<td>0.0873</td>
</tr>
<tr>
<td>6</td>
<td>MA</td>
<td>201,488</td>
<td>53,698</td>
<td>17,707</td>
<td>0.0879</td>
</tr>
<tr>
<td>7</td>
<td>FL</td>
<td>1,422,620</td>
<td>398,439</td>
<td>129,228</td>
<td>0.0908</td>
</tr>
<tr>
<td>8</td>
<td>UT</td>
<td>176,406</td>
<td>51,408</td>
<td>16,139</td>
<td>0.0915</td>
</tr>
<tr>
<td>9</td>
<td>WA</td>
<td>486,084</td>
<td>148,731</td>
<td>44,861</td>
<td>0.0923</td>
</tr>
<tr>
<td>10</td>
<td>CT</td>
<td>113,059</td>
<td>30,025</td>
<td>10,437</td>
<td>0.0923</td>
</tr>
</tbody>
</table>

As calculated by Ratio #1 (TOTNETAF/TUNITNEW), only 7 percent of the total number of new and occupied housing units in the state of California are occupied by households that meet all three income eligibility criteria. While this result is less than half of the value realized in 1990, all of the production metrics in California experienced real decline. Overall, the total number of new and occupied housing units (TUNITNEW) was reduced by more than 750,000 units. The magnitude of this decrease, which represents roughly one-third of the total output recorded in 1990, clearly trickles down to exert an equally significant effect on affordable housing production. As part of first principals, simple economics predicts an increase in price whenever demand outstrips supply. By extension, tight supply in the face of high demand forces compromise, which in housing means paying more for less.

This effect is clearly evident in California, as well as in each of the remaining states that populate Table 12.5. These include New Jersey, Massachusetts, Connecticut, Florida and Washington, which in addition to California are all states that have a legislative or judicial history of progressive housing policy. Likewise, each of these states are “coastal” states, where the ability to live on or near the water is an expensive luxury. Conversely, the balance of the list is comprised of Arizona, Nevada, Colorado and Utah, “land-locked” states that grew throughout the 1990s as popular destinations for both recreation and retirement. However, each of these states is also devoid of any formal obligation to produce affordable housing, which may help to explain their standing as the least productive.

Noteworthy by its absence is the state of Maryland, which dropped from its previous position as the least productive affordable housing state to the rank of 15th
overall. Similarly, Georgia (12), Vermont (14), New Hampshire (17) and Virginia (19) all improved but remained within the first quintile, while New Mexico (22) and Hawaii (30) achieved slightly better results. However, such progress is relative, as the proportional difference between the least and most productive housing states is dependent upon several factors. Key among these is the total volume of housing produced, as the average ten-year output for the least productive states is roughly 540,000 units of new housing. By comparison, the most productive housing states, which are identified in the table below, averaged just 153,000 units of new housing over the decade.

Table 13.6. Ratio #1: Most Productive Housing States (2000)

<table>
<thead>
<tr>
<th>RANK</th>
<th>STATE</th>
<th>TUNITNEW</th>
<th>TLIUNITS</th>
<th>TOTNETA</th>
<th>RATIO#1</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>WV</td>
<td>116,150</td>
<td>39,641</td>
<td>17,957</td>
<td>0.1546</td>
</tr>
<tr>
<td>2</td>
<td>WY</td>
<td>26,242</td>
<td>8,068</td>
<td>3,857</td>
<td>0.1470</td>
</tr>
<tr>
<td>3</td>
<td>DC</td>
<td>6,299</td>
<td>2,460</td>
<td>922</td>
<td>0.1464</td>
</tr>
<tr>
<td>4</td>
<td>AL</td>
<td>401,491</td>
<td>129,721</td>
<td>56,046</td>
<td>0.1396</td>
</tr>
<tr>
<td>5</td>
<td>ME</td>
<td>75,305</td>
<td>23,411</td>
<td>10,359</td>
<td>0.1376</td>
</tr>
<tr>
<td>6</td>
<td>LA</td>
<td>246,787</td>
<td>76,076</td>
<td>33,110</td>
<td>0.1342</td>
</tr>
<tr>
<td>7</td>
<td>SD</td>
<td>47,962</td>
<td>14,787</td>
<td>6,434</td>
<td>0.1341</td>
</tr>
<tr>
<td>8</td>
<td>AK</td>
<td>37,843</td>
<td>13,992</td>
<td>5,061</td>
<td>0.1337</td>
</tr>
<tr>
<td>9</td>
<td>KY</td>
<td>339,538</td>
<td>106,479</td>
<td>45,373</td>
<td>0.1336</td>
</tr>
<tr>
<td>10</td>
<td>AR</td>
<td>235,458</td>
<td>74,465</td>
<td>30,734</td>
<td>0.1305</td>
</tr>
</tbody>
</table>


By simple observation, the composition of the table above suggests a strong relationship between the supply of affordable housing and geography. With the exception of Washington D.C., a majority of these states can accurately be described as rural with low population densities. Although dispersed from Alaska (8) to Maine (5), it is the presence of West Virginia (1), Alabama (4), Louisiana (6), Kentucky (9) and Arkansas (10) that provides a decidedly southern aspect to these results. Whereas the Great Plains
states of Wyoming (2) and South Dakota (7) complete the list of the top-ten most productive housing states.

In addition, there is another simple but equally valid observation to be made, which is that the overall results generated by Ratio #1 are not that impressive. Given its demographic profile, the fact that a state like West Virginia would top the list as the most productive was a reasonable expectation. The fact that this distinction was achieved with roughly 15 percent of the total number of new and occupied units meeting all three eligibility criteria was not as predictable. While this result may belie common perception, it does serve to underscore how difficult it is to produce affordable housing, regardless of geography.

In an effort to emphasize this last point, the table below once again presents the most productive housing states, but this time as defined by the results generated by Ratio #2. In this iteration, Missouri, Delaware and Michigan replace Arkansas, Alaska and Washington, DC. Otherwise, the composition of the inventory from Ratio #1 to Ratio #2 remains unchanged.

<table>
<thead>
<tr>
<th>RANK</th>
<th>STATE</th>
<th>TUNITNEW</th>
<th>TLIUNITS</th>
<th>TOTNETAF</th>
<th>RATIO#2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>WY</td>
<td>26,242</td>
<td>8,068</td>
<td>3,857</td>
<td>0.4781</td>
</tr>
<tr>
<td>2</td>
<td>WV</td>
<td>116,150</td>
<td>39,641</td>
<td>17,957</td>
<td>0.4530</td>
</tr>
<tr>
<td>3</td>
<td>MO</td>
<td>376,343</td>
<td>104,998</td>
<td>46,676</td>
<td>0.4445</td>
</tr>
<tr>
<td>4</td>
<td>ME</td>
<td>75,305</td>
<td>23,411</td>
<td>10,359</td>
<td>0.4425</td>
</tr>
<tr>
<td>5</td>
<td>DE</td>
<td>63,024</td>
<td>18,363</td>
<td>8,021</td>
<td>0.4368</td>
</tr>
<tr>
<td>6</td>
<td>LA</td>
<td>246,787</td>
<td>76,076</td>
<td>33,110</td>
<td>0.4352</td>
</tr>
<tr>
<td>7</td>
<td>SD</td>
<td>47,962</td>
<td>14,787</td>
<td>6,434</td>
<td>0.4351</td>
</tr>
<tr>
<td>8</td>
<td>AL</td>
<td>401,491</td>
<td>129,721</td>
<td>56,046</td>
<td>0.4321</td>
</tr>
<tr>
<td>9</td>
<td>KY</td>
<td>339,538</td>
<td>106,479</td>
<td>45,373</td>
<td>0.4261</td>
</tr>
<tr>
<td>10</td>
<td>MI</td>
<td>549,407</td>
<td>156,650</td>
<td>66,675</td>
<td>0.4256</td>
</tr>
</tbody>
</table>

At the risk of redundancy, the purpose of Ratio #2 is to identify the proportion of units occupied by income-eligible households (<80% of median income) that meet all three eligibility criteria. The fact that the results of this residual value fail to exceed 50 percent in any one state is a measure of both the impact and prevalence of cost burden and to a lesser extent, crowding throughout the United States.

Predictably, the combined effects of cost burden and crowding are even more acute among the least productive affordable housing states, which are identified in the table below.


<table>
<thead>
<tr>
<th>RANK</th>
<th>STATE</th>
<th>TUNITNEW</th>
<th>TLIUNITS</th>
<th>TOTNETAF</th>
<th>RATIO#2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>CA</td>
<td>1,471,440</td>
<td>433,764</td>
<td>103,149</td>
<td>0.2378</td>
</tr>
<tr>
<td>2</td>
<td>NV</td>
<td>313,433</td>
<td>88,353</td>
<td>23,390</td>
<td>0.2647</td>
</tr>
<tr>
<td>3</td>
<td>CO</td>
<td>353,633</td>
<td>89,364</td>
<td>26,499</td>
<td>0.2965</td>
</tr>
<tr>
<td>4</td>
<td>WA</td>
<td>486,084</td>
<td>148,731</td>
<td>44,861</td>
<td>0.3016</td>
</tr>
<tr>
<td>5</td>
<td>OR</td>
<td>282,820</td>
<td>91,437</td>
<td>28,066</td>
<td>0.3069</td>
</tr>
<tr>
<td>6</td>
<td>NJ</td>
<td>319,831</td>
<td>89,861</td>
<td>27,934</td>
<td>0.3109</td>
</tr>
<tr>
<td>7</td>
<td>UT</td>
<td>176,406</td>
<td>51,408</td>
<td>16,139</td>
<td>0.3139</td>
</tr>
<tr>
<td>8</td>
<td>NY</td>
<td>470,404</td>
<td>160,635</td>
<td>50,846</td>
<td>0.3165</td>
</tr>
<tr>
<td>9</td>
<td>AZ</td>
<td>537,304</td>
<td>144,408</td>
<td>46,072</td>
<td>0.3190</td>
</tr>
<tr>
<td>10</td>
<td>FL</td>
<td>1,422,620</td>
<td>398,439</td>
<td>129,228</td>
<td>0.3243</td>
</tr>
</tbody>
</table>


Once again, there is very little difference in the overall composition of these rankings, as 80 percent of the states classified as least productive by Ratio #1 have also been captured by the product of Ratio #2. The only difference is that Massachusetts and Connecticut have now been replaced by Oregon and New York.

While California tops the list as the least productive affordable housing state, it ranks second in the nation in total housing production. Only Texas (1,525,812) produced more new and occupied housing units according to the 2000 PUMS data. However, given
the self-reported nature of census data, a check of the TUNITNEW statistic against published state permit data is warranted. The purpose of this exercise is to determine the extent and significance of any variance that may exist between these two data sources. The outcome of this investigation is provided in the table below, which compares the least productive housing states, as defined by Ratio #2, against published state permit data.

Table 13.9. Production Variance Among Least Productive Housing States (2000)

<table>
<thead>
<tr>
<th>RANK</th>
<th>STATE</th>
<th>2000 PUMS</th>
<th>2000 PERMITS</th>
<th>DELTA</th>
<th>PERCENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>CA</td>
<td>1,471,440</td>
<td>1,095,822</td>
<td>375,618</td>
<td>0.3428</td>
</tr>
<tr>
<td>2</td>
<td>NV</td>
<td>313,433</td>
<td>292,219</td>
<td>21,214</td>
<td>0.0726</td>
</tr>
<tr>
<td>3</td>
<td>CO</td>
<td>353,633</td>
<td>339,873</td>
<td>13,760</td>
<td>0.0405</td>
</tr>
<tr>
<td>4</td>
<td>WA</td>
<td>486,084</td>
<td>413,842</td>
<td>72,242</td>
<td>0.1746</td>
</tr>
<tr>
<td>5</td>
<td>OR</td>
<td>282,820</td>
<td>230,949</td>
<td>51,871</td>
<td>0.2246</td>
</tr>
<tr>
<td>6</td>
<td>NJ</td>
<td>319,831</td>
<td>239,061</td>
<td>80,770</td>
<td>0.3379</td>
</tr>
<tr>
<td>7</td>
<td>UT</td>
<td>176,406</td>
<td>169,919</td>
<td>6,487</td>
<td>0.0382</td>
</tr>
<tr>
<td>8</td>
<td>NY</td>
<td>470,404</td>
<td>329,968</td>
<td>140,436</td>
<td>0.4256</td>
</tr>
<tr>
<td>9</td>
<td>AZ</td>
<td>537,304</td>
<td>462,062</td>
<td>75,242</td>
<td>0.1628</td>
</tr>
<tr>
<td>10</td>
<td>FL</td>
<td>1,422,620</td>
<td>1,262,620</td>
<td>160,000</td>
<td>0.1267</td>
</tr>
</tbody>
</table>

Source: [http://www.census.gov/const/www/permitsindex.html](http://www.census.gov/const/www/permitsindex.html)

Evidence that a variance exists between these two data sources comes as no surprise. It is, however, the range of the variance across states that was unexpected. On average, the PUMS estimates are nearly 20 percent higher than the total numbers of state permits issued. In absolute terms, this equates to an average overestimation of some 100,000 units per state over the ten-year period of analysis, or roughly 10,000 units per year per state. In addition, there appears to be no correlation relative to the size of the variance and the total volume of housing produced. This observation is reinforced by the significant difference in variance between California and Florida, which are the second and third highest housing producing states in the country. By comparison, total housing
production in Oregon was roughly one fifth of the total output realized in Florida, but the variance in Oregon is nearly twice as large as the measured difference in Florida.

Why a variance exists may be explained by the time lag that often exists between when a building permit is issued and a certificate of occupancy is achieved. However, the exact length of time in between these two events varies considerably and is dependent upon many factors. Some of these would include the type of unit being constructed, single family versus multi-family, as well as delays due to weather or a change in economic conditions. Whatever the related cause, delays are an inevitable part of the building process and impossible to measure on a national scale. In addition, the timing of the census is another factor, as the data collection process overlaps in the year between the end of the last decade and the beginning of the next. By comparison, national permit data is presented as an annual summary for each state. Therefore, the totals presented in Table 12.9 reflect the number of permits issued from 1990 through 1999, inclusive.

As demonstrated, the idiosyncratic nature of the PUMS data is simply an artifact of the census process. However, the uniformity of the methodology employed assumes a consistency of error across the United States. As a result, there is a strong confidence in the accuracy of both the process and the results produced to determine the least and most productive affordable housing states in the nation.

Given the unique design and objective of this study, there is limited opportunity to compare the results herein with other published research. The only other report that comes close is Out of Reach (OOR), which is produced by the National Low Income Housing Coalition (NLIHC). Published annually since 1998, this report also ranks affordability by state. (http://www.nlihc.org/oor/oor2009/) However, the rankings
generated are based upon a comparison of the Fair Market Rent (FMR) of a two-bedroom unit against the “housing wage” necessary to afford this level of housing. Although predicated upon published data from HUD, which computes the FMR for each county in every state, the housing wage is essentially a hypothetical benchmark.

Location-adjusted Fair Market Rents are calculated using gross rent data at the 40th percentile from the 2000 Census. (http://www.huduser.org/portal/datasets/fmr.html) This data is then adjusted forward using regional and local values of the Consumer Price Index (CPI) to approximate a median distribution. As a composite of the shelter rent plus the cost of tenant paid utilities, the FMR attempts to be both “high enough to permit a selection of units and neighborhoods and low enough to serve as many low-income families as possible.” (Id) Utilized to establish the payment standard for every federally subsidized housing program, the location-adjusted FMR is the benchmark employed by the NLIHC. By applying a HCIR of 30 percent to the location adjusted FMR, the NLIHC produces the basis for the calculation of the housing wage.

Despite the obvious differences in methodologies, there are distinct similarities between the outcomes produced by this study and the annual rankings published by the Out of Reach report. These results have been displayed below to provide a side by side comparison of the ten least and most productive affordable housing states. However, since Out of Reach was first published in 1998, only the 2000 results will be presented for comparative purposes.
Table 13.10. A Comparison of Least Productive (PUMS) and Least Affordable (OOR) Housing States. (2000)

<table>
<thead>
<tr>
<th>RANK</th>
<th>2000 PUMS</th>
<th>2000 OOR</th>
<th>HOUSING WAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>CA</td>
<td>NJ</td>
<td>$16.88</td>
</tr>
<tr>
<td>2</td>
<td>NV</td>
<td>DC</td>
<td>$16.60</td>
</tr>
<tr>
<td>3</td>
<td>CO</td>
<td>HI</td>
<td>$16.52</td>
</tr>
<tr>
<td>4</td>
<td>WA</td>
<td>MA</td>
<td>$16.43</td>
</tr>
<tr>
<td>5</td>
<td>OR</td>
<td>NY</td>
<td>$16.04</td>
</tr>
<tr>
<td>6</td>
<td>NJ</td>
<td>CT</td>
<td>$15.67</td>
</tr>
<tr>
<td>7</td>
<td>UT</td>
<td>CA</td>
<td>$15.22</td>
</tr>
<tr>
<td>8</td>
<td>NY</td>
<td>AK</td>
<td>$15.18</td>
</tr>
<tr>
<td>9</td>
<td>AZ</td>
<td>NH</td>
<td>$14.15</td>
</tr>
<tr>
<td>10</td>
<td>FL</td>
<td>MD</td>
<td>$13.42</td>
</tr>
</tbody>
</table>

Source: (http://www.nlihc.org/oor/oor2000/table9.shtm)

While just three (3) states are common to both sets of rankings, six (6) states are all within the next quintile of results produced by the Out of Reach report. The last remaining state common to both sets of outcomes is Nevada, which is ranked by OOR as the 21st most expensive housing state. Conversely, the table below provides a comparison of the most productive and affordable housing states, where a total of five (5) states are common to each result. Wyoming and South Dakota are ranked 13th and 15th, respectively, followed by the states of Maine (24), Michigan (28) and Delaware (33).

Table 13.11. A Comparison of Most Productive (PUMS) and Affordable (OOR) Housing States. (2000)

<table>
<thead>
<tr>
<th>RANK</th>
<th>2000 PUMS</th>
<th>2000 OOR</th>
<th>HOUSING WAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>WY</td>
<td>WV</td>
<td>$8.12</td>
</tr>
<tr>
<td>2</td>
<td>WV</td>
<td>MS</td>
<td>$8.17</td>
</tr>
<tr>
<td>3</td>
<td>MO</td>
<td>AR</td>
<td>$8.27</td>
</tr>
<tr>
<td>4</td>
<td>ME</td>
<td>AL</td>
<td>$8.61</td>
</tr>
<tr>
<td>5</td>
<td>DE</td>
<td>OK</td>
<td>$8.62</td>
</tr>
<tr>
<td>6</td>
<td>LA</td>
<td>KY</td>
<td>$8.65</td>
</tr>
<tr>
<td>7</td>
<td>SD</td>
<td>ND</td>
<td>$8.98</td>
</tr>
<tr>
<td>8</td>
<td>AL</td>
<td>LA</td>
<td>$9.03</td>
</tr>
<tr>
<td>9</td>
<td>KY</td>
<td>MO</td>
<td>$9.03</td>
</tr>
</tbody>
</table>
While obvious parallels can be drawn, recognizing similar patterns in the outcomes produced simply confirms how the interaction of cost and income combine to exert a very real effect on housing affordability. Despite major differences in the design and methodology employed, this result is clearly evident in both studies. However, where Out of Reach attempts to highlight the difficulty faced by low-income and minimum wage earners trying to find decent and affordable housing, it does so within a single snapshot in time. While valuable, the results are more a reflection of annual market conditions than real market activity. By contrast, this study takes a more longitudinal approach, evaluating cost, income and crowding data among all new and occupied housing units over a ten-year period of analysis.

The fact that both sets of rankings independently track many of the same states provides little more than a confirmation of the relationship between income, cost and affordability. What these findings fail to reveal is the presence and effect of any equally significant factors associated with the outcomes produced. While low population densities were a consistent observation among most productive affordable housing states, does this amount to coincidence or a strong relationship? Is the opposite true among least productive housing states? Why are states that historically attract a high percentage of retirees also among the least productive? Perhaps most importantly, are there policies in place at the state and local levels that contribute to the rankings achieved? The ability to answer these and other questions requires further analysis, which will be accomplished through the use of regression analysis.
CHAPTER FOURTEEN: A DEEPER VIEW—THE EFFECT OF STATE MANDATES

As stated in the previous chapter, both Ratio #1 and Ratio #2 will serve as the dependent variables in a series of regression models that will utilize a total of thirteen (13) independent variables. While the majority of the variables selected have been culled directly from the PUMS data base, all have been chosen to closely approximate the parameters used to calculate the Mount Laurel obligation in New Jersey. The decision to mimic this process was twofold, as it was without question the most rigorous methodology employed anywhere in the country; attempting within the process to quantify the supply necessary to satisfy the past, current and future demand for affordable housing. Given the observations detected from the overall results produced by the ratio calculations, where states that are less densely populated or are identified by lower levels of income appear to exert an obvious effect on both production and affordability, a statistic measuring each of these values will be incorporated into the regression analysis. Published as single values by the census at the state level, the variable PCTBPOVT will represent the percentage of each state’s population below the poverty rate. Whereas the variable POPDENS will correspond to the overall population density per state as measured by the number of persons per square mile.

It is, however, the final inclusive exercise that will serve to address the central question of this research, which is whether the presence of progressive state and local housing policies has any effect on the production of affordable housing. As previously described, this variable was constructed to identify any specialized initiatives that would serve to distinguish the public policy efforts of one state from the next. In total, five (5)
criteria were selected and each state’s “score” was calculated to reflect the total number of public policy indicators in effect at the time of the 2000 census. Although elusive, a perfect score of “5” was the highest value achieved and represents the states with the most progressive affordable housing policies. The numerical results of the analysis progresses in ascending order from the lowest value of “0,” which represents states with no affordable housing initiatives, to the highest value of “5.” The resulting “score” of each state is in turn represented by the variable PROGSTAT (Progressive State). The complete results produced by this state-by-state analysis are presented in matrix form at the end of this chapter. In total, the variables to be utilized in the initial regression analysis are as follows:

**Table 14.1. Regression Variables (2000)**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>VALUEMED</td>
<td>Median House Value Cost</td>
<td></td>
</tr>
<tr>
<td>GRENTMED</td>
<td>Median Gross Rent Cost</td>
<td></td>
</tr>
<tr>
<td>MEDHHINC</td>
<td>Median HH Income Demand</td>
<td></td>
</tr>
<tr>
<td>MEDHHSIZ</td>
<td>Median HH Size Demand</td>
<td></td>
</tr>
<tr>
<td>PCTNEWWHH</td>
<td>Pct. New HH's/Tot. HH's Demand</td>
<td></td>
</tr>
<tr>
<td>PCTBPOVT</td>
<td>Pct. POP Below Poverty Demand</td>
<td></td>
</tr>
<tr>
<td>PCTELD65</td>
<td>Pct. POP Elderly (&gt;65) Demand</td>
<td></td>
</tr>
<tr>
<td>PCTEMPLP*</td>
<td>Pct. Pop Employed Professional</td>
<td>Demand</td>
</tr>
<tr>
<td>PCTSINGF</td>
<td>Pct. Single Family of all Units</td>
<td>Supply</td>
</tr>
<tr>
<td>AVECOMTW</td>
<td>Ave. Commute To Work (Minutes)</td>
<td>Sprawl</td>
</tr>
<tr>
<td>AVEAUTOS</td>
<td>Ave. Number of Autos (per HH)</td>
<td>Sprawl</td>
</tr>
<tr>
<td>POPDENSEM</td>
<td>Pop. Density Per Sq. Mile</td>
<td>Sprawl</td>
</tr>
<tr>
<td>PROGSTAT</td>
<td>Progressive Housing States Policy</td>
<td>Policy</td>
</tr>
</tbody>
</table>

* The residual value of this variable represents the “workforce” population employed within each state.

**Results**

The following tables reveal the results from a series of regression models associated with the two (2) ratios produced from the 2000 PUMS dataset. The first model
is a full run of all thirteen (13) variables applied against the results calculated by Ratio #1 for each of the 51 cases (states). As the product of the total net number of affordable units (income eligible, affordable, non-crowded) divided by the total number of new housing units created within the period of analysis (1990-2000), Ratio #1 represents an absolute measure of the supply of affordable housing produced by each state (TOTNETAF/TUNITNEW).


<table>
<thead>
<tr>
<th>Source</th>
<th>DF</th>
<th>Sum of Squares</th>
<th>Mean Square</th>
<th>F Value</th>
<th>Pr &gt; F</th>
</tr>
</thead>
<tbody>
<tr>
<td>Model</td>
<td>13</td>
<td>0.01251</td>
<td>0.00096232</td>
<td>5.49</td>
<td>&lt;.0001</td>
</tr>
<tr>
<td>Error</td>
<td>37</td>
<td>0.00648</td>
<td>0.00017526</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corrected Total</td>
<td>50</td>
<td>0.01899</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Root MSE 0.01324 R-Square 0.6586
Dependent Mean 0.11165 Adj R-Sq 0.5387
Coef Var 11.85657

| Variable       | DF | Parameter Estimate | Standard Error   | t Value | Pr > |t| |
|----------------|----|--------------------|------------------|---------|------|---|
| Intercept      | 1  | 0.37044            | 0.09698          | 3.82    | 0.0005 |
| PCTBPOVT       | 1  | -0.00055273        | 0.00139          | -0.40   | 0.6939 |
| POPDENSMM      | 1  | 0.000000212        | 0.00000320       | 0.66    | 0.5118 |
| PCTSINGF       | 1  | 0.05202            | 0.05792          | 0.90    | 0.3750 |
| AVEAUTOS       | 1  | -0.04924           | 0.03284          | -1.50   | 0.1423 |
| MEDHHSIZ       | 1  | -0.00587           | 0.02147          | -0.27   | 0.7860 |
| PCTNEWHH       | 1  | -0.04501           | 0.05217          | -0.86   | 0.3939 |
| MEDHHINC       | 1  | 1.384781E-7        | 0.00000103       | 0.13    | 0.8941 |
| GRENTMED       | 1  | -0.00010323        | 0.00008061       | -1.28   | 0.2083 |
| VALUEMED       | 1  | 3.236787E-8        | 1.537289E-7      | 0.21    | 0.8344 |
| PCTEMPLP       | 1  | -0.00109           | 0.00085879       | -1.27   | 0.2112 |
| AVECOMTW       | 1  | -0.00134           | 0.00139          | -0.97   | 0.3400 |
| PCTELD65       | 1  | -0.21720           | 0.14527          | -1.50   | 0.1434 |
| PROGSTAT       | 1  | -0.00364           | 0.00224          | -1.62   | 0.1127 |

While the predictive power of Model #1 generates an R-Square of 0.6586, the significance of the relationships between the independent variables and Ratio #1
(dependent variable) appear to be relatively weak. One probable explanation is due to the inter-correlation between the independent variables. Moreover, in a model with just 51 cases (states), the presence of any outliers can have a significant affect on the results produced. In an effort to detect for the presence of any potential outliers, as well as to check the validity of the data, an examination of the summary statistics is necessary.

### Table 14.3. Summary Statistics (2000)

<table>
<thead>
<tr>
<th>Variable</th>
<th>DF</th>
<th>Mean</th>
<th>Standard Dev.</th>
<th>Sum</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ratio #1</td>
<td>51</td>
<td>0.11165</td>
<td>0.01949</td>
<td>5.69438</td>
<td>0.07010</td>
<td>0.15460</td>
</tr>
<tr>
<td>Ratio #2</td>
<td>51</td>
<td>0.37562</td>
<td>0.05222</td>
<td>19.15652</td>
<td>0.23780</td>
<td>0.47806</td>
</tr>
<tr>
<td>PCTBPOVT</td>
<td>51</td>
<td>10.86667</td>
<td>2.95267</td>
<td>554.20000</td>
<td>4.50000</td>
<td>17.50000</td>
</tr>
<tr>
<td>POPDENSM</td>
<td>51</td>
<td>361.01569</td>
<td>1303</td>
<td>18412</td>
<td>1.10000</td>
<td>9317</td>
</tr>
<tr>
<td>PCTSINGF</td>
<td>51</td>
<td>0.68171</td>
<td>0.06937</td>
<td>34.76734</td>
<td>0.40702</td>
<td>0.77129</td>
</tr>
<tr>
<td>AVEAUTOS</td>
<td>51</td>
<td>1.73242</td>
<td>0.18379</td>
<td>88.35350</td>
<td>0.88298</td>
<td>2.01948</td>
</tr>
<tr>
<td>MEDHHSIZ</td>
<td>51</td>
<td>2.54894</td>
<td>0.14489</td>
<td>129.99595</td>
<td>2.14873</td>
<td>3.11790</td>
</tr>
<tr>
<td>PCTNEWHH</td>
<td>51</td>
<td>0.17627</td>
<td>0.06703</td>
<td>8.98974</td>
<td>0.02537</td>
<td>0.41711</td>
</tr>
<tr>
<td>MEDHHINC</td>
<td>51</td>
<td>48997</td>
<td>6989</td>
<td>2498840</td>
<td>36500</td>
<td>65100</td>
</tr>
<tr>
<td>GRENTMED</td>
<td>51</td>
<td>561.96078</td>
<td>99.54636</td>
<td>28660</td>
<td>400.000</td>
<td>775.0000</td>
</tr>
<tr>
<td>VALUEMED</td>
<td>51</td>
<td>112647</td>
<td>36696</td>
<td>5744975</td>
<td>65000</td>
<td>225000</td>
</tr>
<tr>
<td>PCTEMPLP</td>
<td>51</td>
<td>15.52040</td>
<td>2.34601</td>
<td>791.54065</td>
<td>10.04749</td>
<td>21.66055</td>
</tr>
<tr>
<td>AVECOMTW</td>
<td>51</td>
<td>15.52040</td>
<td>2.34601</td>
<td>791.54065</td>
<td>10.04749</td>
<td>21.66055</td>
</tr>
<tr>
<td>PCTELD65</td>
<td>51</td>
<td>0.12330</td>
<td>0.01818</td>
<td>6.28841</td>
<td>0.05667</td>
<td>0.17625</td>
</tr>
<tr>
<td>PROGSTAT</td>
<td>51</td>
<td>2.94118</td>
<td>1.31775</td>
<td>150.00000</td>
<td>0.00000</td>
<td>5.00000</td>
</tr>
</tbody>
</table>

By convention, an outlier within a model containing fewer than 80 observations is any value that is more than 3.5 standard deviations from the mean. From Table 13.3 above, three (3) potential outliers were identified. The first two, Alaska and Washington, D.C., represent opposite ends of the distribution relative to the variable POPDENSM, which has a mean value of 361 persons/square/mile. By contrast, Alaska’s population density is 1.1 persons/ square/mile; whereas Washington D.C. has a population density of 9,316.9 persons/square/mile. While each of these values conforms to the definition of an
outlier, they are in fact simply skewed values of the total dimension of the actual
distribution of the POPDENS statistic. The third potential outlier is found in the case of
Hawaii, which produces a median house value (VALUEMED) of $225,000. While
slightly skewed, when compared to the mean of the median national house value of
$112,647, this value is also both reasonable and acceptable within the applied limits of
the definition of an outlier.

Given the result generated by the initial regression model, two additional
variables were constructed and added to the analysis. The first is labeled PCTEMPLW to
represent the total “workforce” population contained within each case (state), which is
simply the residual value of the variable PCTEMPLP. In combination, the “professional”
(PCTEMPLP) and “workforce” (PCTEMPLW) variables comprise the total population
employed within each state. The second new variable is labeled DENS RANK, which
represents the “rank” order of the population density of each case (state). As an ordinal
variable, DENS RANK produces a range of values from 1.0 to 51.0, which represents the
least to the most densely populated states, respectively.

In the attempt to improve the explanatory power of subsequent models, an
examination to determine the strength of the relationships among all of the variables is
required. This process is achieved through the use of the correlation procedure, which
pairs the variables to generate the Pearson Correlation Coefficient statistic together with
their associated probabilities. The output reveals values within the range of 0.3 to 0.5 to
be moderately correlated but statistically significant. Whereas coefficient values of 0.5 or
greater represent both a strong correlation and statistical significance. The results
produced also verify the expectation that income, whether represented as the degree of
wealth, the amount of rent paid or house value would all be highly correlated. Given the total number of variables involved, the results of this analysis have been partitioned into two separate tables, which are presented below.

**Table 14.4a. Pearson Correlation Coefficients: N=51**

<table>
<thead>
<tr>
<th></th>
<th>RATIO 1</th>
<th>RATIO 2</th>
<th>POPSENSM</th>
<th>MEDHHSIZ</th>
<th>PCTBPOVT</th>
<th>DENSRANK</th>
</tr>
</thead>
<tbody>
<tr>
<td>RATIO 1</td>
<td>1.00000</td>
<td>0.84577</td>
<td>0.18861</td>
<td>-0.43373</td>
<td>0.29682</td>
<td>0.21403</td>
</tr>
<tr>
<td></td>
<td>&lt;.0001</td>
<td>&lt;.0001</td>
<td>0.1850</td>
<td>0.0015</td>
<td>0.0344</td>
<td>0.1315</td>
</tr>
<tr>
<td>RATIO 2</td>
<td>0.84577</td>
<td>1.00000</td>
<td>-0.04633</td>
<td>-0.49545</td>
<td>0.04284</td>
<td>0.15438</td>
</tr>
<tr>
<td></td>
<td>&lt;.0001</td>
<td>&lt;.0001</td>
<td>0.7468</td>
<td>0.0002</td>
<td>0.7653</td>
<td>0.2794</td>
</tr>
<tr>
<td>POPDENS</td>
<td>0.18861</td>
<td>0.1850</td>
<td>1.00000</td>
<td>-0.38364</td>
<td>0.15842</td>
<td>-0.37714</td>
</tr>
<tr>
<td></td>
<td>0.1850</td>
<td>0.7468</td>
<td>0.0055</td>
<td>0.0015</td>
<td>0.2669</td>
<td>0.0064</td>
</tr>
<tr>
<td>MEDHHSIZ</td>
<td>-0.43373</td>
<td>-0.49545</td>
<td>-0.38364</td>
<td>1.00000</td>
<td>-0.12446</td>
<td>0.07304</td>
</tr>
<tr>
<td></td>
<td>0.0015</td>
<td>0.0002</td>
<td>0.0055</td>
<td>&lt;.0001</td>
<td>0.3842</td>
<td>0.6105</td>
</tr>
<tr>
<td>PCTBPOVT</td>
<td>0.29682</td>
<td>0.04284</td>
<td>0.15842</td>
<td>-0.12446</td>
<td>1.00000</td>
<td>0.12152</td>
</tr>
<tr>
<td></td>
<td>0.344</td>
<td>0.7653</td>
<td>0.3842</td>
<td>0.0002</td>
<td>0.12152</td>
<td>0.3956</td>
</tr>
<tr>
<td>DENSRANK</td>
<td>0.21403</td>
<td>0.15438</td>
<td>-0.37714</td>
<td>0.7304</td>
<td>0.12152</td>
<td>1.0000</td>
</tr>
<tr>
<td></td>
<td>0.1315</td>
<td>0.2794</td>
<td>0.0064</td>
<td>0.6105</td>
<td>0.3956</td>
<td></td>
</tr>
<tr>
<td>PROGSTAT</td>
<td>-0.49428</td>
<td>-0.50628</td>
<td>0.20389</td>
<td>0.10907</td>
<td>-0.19430</td>
<td>-0.57887</td>
</tr>
<tr>
<td></td>
<td>0.0002</td>
<td>0.0002</td>
<td>0.1513</td>
<td>0.4461</td>
<td>0.1719</td>
<td>&lt;.0001</td>
</tr>
<tr>
<td>GREN</td>
<td>-0.66341</td>
<td>-0.75032</td>
<td>0.14679</td>
<td>0.45627</td>
<td>-0.42141</td>
<td>-0.46134</td>
</tr>
<tr>
<td></td>
<td>&lt;.0001</td>
<td>&lt;.0001</td>
<td>0.3040</td>
<td>0.0008</td>
<td>0.0021</td>
<td>0.0007</td>
</tr>
<tr>
<td>MEDHHINC</td>
<td>-0.51817</td>
<td>-0.39806</td>
<td>0.06538</td>
<td>0.27869</td>
<td>-0.74464</td>
<td>-0.47254</td>
</tr>
<tr>
<td></td>
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<td>&lt;.0001</td>
<td>0.6485</td>
<td>0.0477</td>
<td>&lt;.0001</td>
<td></td>
</tr>
<tr>
<td>PCTELD65</td>
<td>0.18041</td>
<td>0.29075</td>
<td>0.6716</td>
<td>-0.53191</td>
<td>0.06439</td>
<td>-0.26929</td>
</tr>
<tr>
<td></td>
<td>0.2052</td>
<td>0.0385</td>
<td>0.6396</td>
<td>&lt;.0001</td>
<td>0.6535</td>
<td>0.0560</td>
</tr>
<tr>
<td>AVECOMTW</td>
<td>-0.45365</td>
<td>-0.42431</td>
<td>0.19702</td>
<td>0.28880</td>
<td>-0.17189</td>
<td>-0.70485</td>
</tr>
<tr>
<td></td>
<td>0.0008</td>
<td>0.0019</td>
<td>0.1658</td>
<td>0.0398</td>
<td>0.2278</td>
<td>&lt;.0001</td>
</tr>
<tr>
<td>PCTNEWHH</td>
<td>-0.20599</td>
<td>-0.21883</td>
<td>-0.39568</td>
<td>0.31321</td>
<td>0.11686</td>
<td>0.38959</td>
</tr>
<tr>
<td></td>
<td>0.1470</td>
<td>0.1229</td>
<td>0.0041</td>
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<td>0.0052</td>
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<td>0.0052</td>
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Table 14.4b. Pearson Correlation Coefficients: N=51
Prob > |r| under H0: Rho=0

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<th>PROG</th>
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<th>GREN</th>
<th>T M ED</th>
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<th>PCTNEW HH</th>
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<td>RATIO 1</td>
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<tr>
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<td>0.4264</td>
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<tr>
<td>PCTEMPL L</td>
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<td>0.52585</td>
<td>-0.20190</td>
<td></td>
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</tbody>
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Clearly, there is a high degree of collinearity among the predictor or independent variables. As a result, the ability to assign any degree of causation would be ill advised, as both the presence and therefore the influence of collinearity must be taken into account. Nevertheless, many of the relationships that do exist are worth noting, as the data supports both the a priori assumptions and the reality associated with the production of affordable housing.
Relative to income, it is both the direction and the strength of the relationships that are central to the analysis. An examination of the variable MEDHHINC reveals that the direction of the relationship between the two dependent variables (Ratio #1, Ratio #2) and median household income is negative. Therefore, as median income increases the “success” ratios decrease and vice versa. This is an indication that the more affluent states produce less affordable housing while the less affluent states are more productive. This result is supported by the correlation between income and house value, which exhibits a strong positive relationship. The interpretation, therefore, is that states with higher median incomes will also have higher median house values. Related to both the median income and house value statistics is the average commute to work (AVECOMTW), which are all positively correlated. These relationships suggest that longer commuting distances are associated with states that have both higher median incomes and house values. Further evidence of this relationship is provided by the correlation between the average commuting distance to work and the two success ratios, which are negative. Combined, higher median incomes, higher median house values and longer commuting distances are characteristics of states with lower levels of affordable housing production.

The variable that measures median gross rent (GRENTMED) dominates the analysis, as it is correlated with every other variable except two: population density per square mile (POPDENSM) and the percentage of new housing units as a total of all housing units (PCTNEWHH). While the fundamental relationship between the amount of rent paid and affordability is well established, given the degree of collinearity, it is impossible to discern the overall affect that “wealth” plays in the values produced.
Although negatively correlated between the two success ratios, an indication that as median gross rent increases the value of the ratios decreases, the sign between median family income and gross rent is positive. This is turn indicates that as median income increases the median gross rent also increases. Therefore, it is both possible and likely that embedded within this relationship is the effect that consumer choice has on the result. More income would imply greater discretion over the range and cost of housing to be consumed. There is, however, no ability to capture either the individual or collective household decision that freely chooses to allocate more than 30 percent of income to housing costs.

Given the overwhelming influence of income on the analysis, attention is turned to the variable PROGSTAT, which represents the scale of public policy initiatives associated with each case (state). Produced from a range of values from 0 to 5, where the highest “score” represents the states with the most progressive housing policies, the relationships with each of the income values of GRENTMED, MEDHHINC and VALUEMED is positive. Therefore, the states with the most progressive public policy initiatives are also the states with the highest incomes and housing costs. Likewise, the variable AVECOMTW is positively correlated with the PROGSTAT variable, so progressive housing states are also associated with having longer commute times. This is consistent with the relationship between PROGSTAT and the variable DENS RANK, which is negative. As an ordinal variable, the rank order of the least densely populated to the most densely populated state ranges in value from 1 to 51, respectively. Since the relationship is negative, the higher the DENS RANK value, which is indicative of a densely populated state, the less progressive the state’s housing policies.
Equally significant is the relationship between PROGSTAT and the two employment variables, as PCTEMPLP generates a positive correlation, whereas the direction of the coefficient for the PCTEMPLW variable is negative. Therefore, states where a higher percentage of the employment base is engaged in “professional” occupations are also states with more progressive housing policies. Conversely, those states with a significant “workforce” employment base are more lacking in terms of progressive housing policy.

It is, however, the relationship between progressive housing states and the two success ratios that may prove to be the most interesting. While both the coefficients and the associated probabilities are nearly identical in size, each of the two ratios is negatively correlated with the PROGSTAT variable. The obvious explanation being that the most progressive housing states in the nation are also the least productive in terms of affordable housing. Although technically correct, such a limited interpretation fails to recognize all of the intercorrelations just described, as it is equally obvious that a host of factors all combine to exert enormous upward pressure on the local supply of affordable housing.

The next step in the analysis is to perform a series of model selection procedures to eliminate any variables that fail to exhibit a strong explanatory relationship with the two dependent variables. The first is an adjustable R-Square methodology, which is an iterative process that seeks to identify the model with the largest R-Square for each number of variables considered. The best result produced selected AVEAUTOS, MEDHHSIZ, MEDHHINC, GRENTMED, AVECOMTW and PROGSTAT for inclusion into the following model, which generated an R-Square value of 0.7899.
Table 14.5. Adjusted R-Square Procedure: Dependent Variable—Ratio #1 (2000)

| Variable    | DF | Parameter Estimate | Standard Error | t Value | Pr > |t| |
|-------------|----|--------------------|----------------|---------|------|---|
| Intercept   | 1  | 0.25755            | 0.03412        | 7.55    | <.0001 |    |
| AVEAUTOS    | 1  | -0.01677           | 0.01351        | -1.24   | 0.2216 |    |
| MEDHHSIZ    | 1  | -0.01980           | 0.01404        | -1.41   | 0.1661 |    |
| MEDHHINC    | 1  | 5.671645E-7        | 3.785901E-7    | 1.50    | 0.1418 |    |
| GRENTMED    | 1  | -0.00022489        | 0.00003226     | -6.97   | <.0001 |    |
| AVECOMTW    | 1  | 0.00229            | 0.0009273      | 2.31    | 0.0261 |    |
| PROGSTAT    | 1  | -0.00210           | 0.00154        | -1.36   | 0.1816 |    |

Once again the powerful influence of GRENTMED is revealed, as it is the most statistically significant variable in the analysis. It is, however, the direction of the correlation that defines the relationship between gross median rent and Ratio #1, which is negative. Therefore, the higher the GRENTMED value the lower the value of Ratio #1. But the model also depicts a positive relationship between AVECOMTW and Ratio #1, which is a reversal of the sign established by the correlation procedure. While an apparent contradiction, given the strong positive correlations among GRENTMED, MEDHHINC, AVECOMTW and PROGSTAT, it is best not to consider the coefficients in the regression model on an individual basis, but collectively. This stipulation is reinforced by the high R-Square value of 0.7899, which explains most of the variability associated with Ratio #1.

In the attempt to construct the best model possible, as opposed to simply conducting a series of model-testing procedures, a Stepwise regression is performed for the purpose of comparison. Unlike the Adjusted R-Square function, variables in the Stepwise procedure are added one at a time based upon the value of the F statistic. After a variable is added the Stepwise method looks at all the variables already included in the
model and deletes any variable that does not produce a statistically significant F value. Only after this check is performed and the necessary deletions are accomplished can another variable be added to the model. The Stepwise process ends when none of the variables outside the model has an F value that is statistically significant.

When applied to the dependent or response variable Ratio #1, the Stepwise procedure selected the following variables: MEDHHSIZ, GRENTMED and AVECOMTW, which generates an R-Square of 0.7725. The statistics are presented in the table below.


<table>
<thead>
<tr>
<th>Variable</th>
<th>Parameter Estimate</th>
<th>Standard Error</th>
<th>Type II SS</th>
<th>F Value</th>
<th>Pr &gt; F</th>
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<tbody>
<tr>
<td>Intercept</td>
<td>0.25201</td>
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<td>0.00695</td>
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<td>-0.02749</td>
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<td>0.00043930</td>
<td>4.95</td>
<td>0.0313</td>
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<tr>
<td>GRENTMED</td>
<td>-0.00020609</td>
<td>0.00002263</td>
<td>0.00736</td>
<td>82.96</td>
<td>&lt;.0001</td>
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<tr>
<td>AVECOMTW</td>
<td>0.00273</td>
<td>0.00087986</td>
<td>0.00085456</td>
<td>9.63</td>
<td>0.0033</td>
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</table>

Since the R-Square value generated by the Stepwise procedure (0.7725) is very close to the value produced by the Adjusted R-Square method (0.7899), there is a high degree of confidence in the explanatory values achieved. Common to both is the strong effect and direction of the GRENTMED variable, which verifies the relationship between the cost of housing and affordability. Similarly, the sign change from negative to positive for the variable AVECOMTW is also an outcome common to each model. Given the high degree of correlation between the variables GRENTMED and AVECOMTW, it is reasonable to assume that most of the variability in the model is explained by GRENTMED. As a complement to GRENTMED, the presence and affect of
AVECOMTW reverses the sign of the correlation. In addition, the inclusion of the variable MEDHHSIZ is notable, as any mention of household size has been missing up to this point in the analysis.

Statistically, the output for all 51 cases (states) reveals a very tight clustering around the mean of the median for household size. As presented in Table 1.14, with a mean of 2.55 persons/household, the range of median values runs from a minimum 2.15 persons/household (Washington, D.C.) to 3.12 persons/household (Utah). In both the Adjusted R-Square and Stepwise procedures, the direction of the relationship between MEDHHSIZ and the dependent variable is negative. Therefore, as household size increases the value of Ratio #1 decreases. This relationship would appear to reinforce one of the most intractable problems associated with the production of affordable housing, which is the lack of units sufficient in both size and cost to meet the needs of larger low and moderate-income households.

Throughout the national affordable housing discussion, some variant of the value of Ratio #1 is often the primary focus of the policy debate. This is understandable, as the relative ease of calculation provides an outcome that is also easily understood. The most typical is a production benchmark achieved by dividing the total number of housing units by the number of units occupied by income-eligible households. As highlighted earlier in this chapter, this and other more simplistic approaches are often utilized in the calculation of several national affordability indexes. Conversely, by incorporating the combined effects of cost-burden and crowding into the calculation, the value of Ratio #1 addresses the historical convention that defines household eligibility. As a result, the outcomes generated by Ratio #1 are often a small fraction of the total number of housing units
produced, especially in high-cost housing states. Alternatively, Ratio #2 drills down even further into the production equation by calculating the number of net affordable units as a percentage of the total number of units occupied by income-eligible households (TOTNETAF/ TIEUNITS). While the criteria specific to both terms has already been explained, Ratio #2 was constructed to provide a more relative measure of success compared to the absolute dimension of affordable housing production that is quantified by Ratio #1. The real question is which of the two success ratios is a better predictor of affordable housing across states.

Given the earlier tests performed between the Adjusted R-Square and Stepwise procedures, which produced similar results that served to confirm the explanatory value of the Ratio #1 model, only the Adjusted R-Square procedure will be performed on Ratio #2. Displayed in the table below are the results of this analysis.


| Variable       | DF | Parameter Estimate | Standard Error | t Value | Pr > |t| |
|----------------|----|--------------------|----------------|---------|-------|---|
| Intercept      | 1  | 0.63342            | 0.07813        | 8.11    | <.0001|
| MEDHHSIZ       | 1  | -0.08350           | 0.03087        | -2.70   | 0.0099|
| MEDHHINC       | 1  | 0.00000532         | 8.88897E-7     | 5.99    | <.0001|
| GRENTMED       | 1  | -0.00061109        | 0.00009011     | -6.78   | <.0001|
| VALUEMED       | 1  | -5.4616E-7         | 2.2916E-7      | -2.38   | 0.0219|
| AVECOMTW       | 1  | 0.00740            | 0.00219        | 3.38    | 0.0016|
| PROGSTAT       | 1  | -0.00691           | 0.00341        | -2.03   | 0.0493|

While the output generated by the Adjusted R-Square procedure has produced nearly identical results for each of the ratio models, there are notable differences. The first is the inclusion of VALUEMED, which was excluded from the Ratio #1 model despite its strong negative correlation with each of the dependent variables. Conversely,
the strength and direction of the relationship established by the Ratio #2 model remains intact, as the slope of VALUEMED is negative. This result indicates that higher median house values are associated with lower values of Ratio #2.

In addition, the Ratio #2 model reveals that the slope of MEDHHINC once again turns positive, a reversal of the sign produced by the correlation table. As before, the dominance of GRENDEM is revealed, which exerts a powerful influence over the entire analysis. In fact the strength and direction of the relationship between GRENDEM and MEDHHINC is second only to the value of the correlation between GRENDEM and VALUEMED. Why one variable retains the direction of the correlation (VALUEMED) while the other becomes reversed (MEDHHINC) may be a function of their respective relationship with each of the dependent variables. By comparison there is a strong negative correlation between VALUEMED and Ratio #2, whereas the MEDHHINC and Ratio #2 relationship produces a negative but moderate correlation. However, and at the risk of overstatement, the coefficients associated with each model must be evaluated by their collective impact and not individually.

Although there is very little difference relative to the variable composition among the two ratio models generated by the Adjusted R-Square methodology, there is a real distinction in explanatory value. By generating an R-Square of 0.8536, most of the variability associated with Ratio #2 is explained. While an R-Square of 0.7899 produced by the Ratio #1 model is also quite good, the predictive power of the Ratio #2 model is clearly superior.

Perhaps the most interesting result is the inclusion of the PROGSTAT variable into each of the models produced. When reviewed separately, the correlation between
PROGSTAT and the two dependent variables is negative, with nearly identical coefficient values. The fact that this relationship is unchanged by either model suggests one of two findings. The first posits the obvious, which is that the most progressive housing states are also the least productive affordable housing states. The second suggests that the overall impact of the PROGSTAT variable is not nearly as large or significant as anticipated. Otherwise, a change in the direction of the relationship would warrant further investigative study to determine what data was responsible to cause such a transformation. Nevertheless, the overall results of this research clearly reveals that exogenous market conditions associated with both high-cost and high income housing states exert tremendous pressure on the ability to produce affordable housing. Equally clear, however, is the fact that despite the best efforts put forth by progressive housing states, the policies enacted have been no match to counteract these market forces. The real question, which is unanswerable by this research, is what would the production numbers look like in the absence of these policy initiatives? An even more relevant question might be whether it is wise for individual states to continue efforts to try and build their way out of their respective affordable housing problems? Or should states look to dedicate scarce public resources to help make privately-built housing more affordable? While these and other questions will be addressed in the next chapter, given the results of this research, there is a clear difference in the production of affordable housing between states with progressive housing policies versus states without such policies. In response, these findings suggest that a change in national housing policy to reflect the reality on the ground is both warranted and long overdue.
CHAPTER FIFTEEN: CONCLUSIONS—IMPLICATIONS OF THE FINDINGS

“The standard of limiting housing costs to 30 percent of a tenant’s income is no longer an absolute; the percentage now falls within a sliding scale that is higher at the upper end of ability to pay and lower and the bottom end.” (Burchell, 1990)

To be fair, Burchell’s 1990 observation was made within the context of applying other forms of money assistance to what is now the federal Housing Choice Voucher Program (HCVP), which includes the discretionary right of every recipient to dedicate more than 30 percent of total household income to the overall cost of housing. But as we begin the second decade of the new millennium, housing policy throughout the United States is still predicated upon this 1974 standard. If nothing else, the results of this research strongly suggest that this benchmark has become obsolete.

Regardless of the level of productivity achieved, what this study makes clear is that every state struggles under the terms imposed by the national affordability standard. This is certainly evident in progressive and high cost housing states like California and New Jersey, where long and storied histories of public interventions seem to belie the net results produced. But this appears to be equally apparent within states identified as the most productive, as their levels of production are not overly impressive. Despite no discernable process other than being a relatively inexpensive place to live, West Virginia was the most productive affordable housing state according to the 2000 PUMS. And yet only 15 percent of the total numbers of units produced over a ten-year period in West Virginia were qualified as truly affordable. It would appear, therefore, that common to each outcome is the effect realized by limiting the total amount of income that can be dedicated to the overall cost of housing. In high-cost housing states, the amount of income needed to truly make housing affordable is typically well above the median.
statistic. While earning the median level of income in low-cost housing states is often equal to or greater than the cost associated with market-rate housing.

Although many factors contribute to the high cost of housing, most are either regulatory (zoning, land-use, building codes) or confiscatory (taxes, fees) in nature. In combination, these attributes manifest to severely limit the supply of housing in general and affordable housing in particular. Evidence of this effect was provided in the previous chapter where in some cases the TUNITNEW variable was reduced by hundreds of thousands of units from one data point to the next. Consequently, even if demand was held constant over the entire period of analysis, the resultant shortfall in supply would exert a strong upward pressure on the price and therefore the overall cost of housing. While the most current data exhibits somewhat of a rebound relative to production, the resultant increase in the supply of housing appears not to have had a material effect on the overall cost of housing. Listed below is the permit data for the ten (10) least productive housing states as determined by the 2000 PUMS.

Table 15.1. Change in State Permit Data: (1980-2009)

<table>
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<td>2,059,113</td>
<td>1,095,822</td>
<td>-963,291</td>
<td>-47%</td>
<td>1,424,570</td>
<td>328,748</td>
<td>23%</td>
</tr>
<tr>
<td>NV</td>
<td>165,914</td>
<td>292,219</td>
<td>126,305</td>
<td>76%</td>
<td>327,297</td>
<td>35,078</td>
<td>11%</td>
</tr>
<tr>
<td>CO</td>
<td>292,695</td>
<td>339,873</td>
<td>47,178</td>
<td>16%</td>
<td>385,583</td>
<td>45,710</td>
<td>12%</td>
</tr>
<tr>
<td>WA</td>
<td>336,139</td>
<td>413,842</td>
<td>77,703</td>
<td>23%</td>
<td>406,828</td>
<td>-7,014</td>
<td>-2%</td>
</tr>
<tr>
<td>OR</td>
<td>127,500</td>
<td>230,949</td>
<td>103,449</td>
<td>81%</td>
<td>213,172</td>
<td>-17,777</td>
<td>-8%</td>
</tr>
<tr>
<td>NJ</td>
<td>379,051</td>
<td>239,061</td>
<td>-139,990</td>
<td>-37%</td>
<td>291,297</td>
<td>52,236</td>
<td>18%</td>
</tr>
<tr>
<td>UT</td>
<td>111,354</td>
<td>169,919</td>
<td>58,565</td>
<td>53%</td>
<td>197,495</td>
<td>27,576</td>
<td>14%</td>
</tr>
<tr>
<td>NY</td>
<td>446,107</td>
<td>329,968</td>
<td>-116,139</td>
<td>-26%</td>
<td>482,372</td>
<td>152,404</td>
<td>32%</td>
</tr>
<tr>
<td>AZ</td>
<td>480,144</td>
<td>462,062</td>
<td>-18,082</td>
<td>-4%</td>
<td>602,064</td>
<td>140,002</td>
<td>23%</td>
</tr>
<tr>
<td>FL</td>
<td>1,730,579</td>
<td>1,262,620</td>
<td>-467,959</td>
<td>-27%</td>
<td>1,666,605</td>
<td>403,985</td>
<td>24%</td>
</tr>
</tbody>
</table>

Source: [http://www.census.gov/const/www/permitsindex.html](http://www.census.gov/const/www/permitsindex.html)
It is interesting that all but the “growth management states” of Washington and Oregon experienced an increase in their overall volume of permits issued from the most recent data period (2000-2009) to the previous (1990-1999), while California and New Jersey were the only states that failed to meet or exceed the levels of production achieved from the high watermark established during the 1980 decade. As a consequence, the cost of housing continues to escalate due to the lack of supply, which is evidenced by the most recent *Out of Reach* report published by the National Low Income Housing Coalition.

For 2010, the results are as follows:

### Table 15.2. States Ranked By Two-Bedroom Housing Wage (2010)

<table>
<thead>
<tr>
<th>Rank</th>
<th>State</th>
<th>Housing Wage</th>
<th>Rank</th>
<th>State</th>
<th>Housing Wage</th>
</tr>
</thead>
<tbody>
<tr>
<td>51</td>
<td>HI</td>
<td>$30.96</td>
<td>1</td>
<td>ND</td>
<td>$11.24</td>
</tr>
<tr>
<td>50</td>
<td>DC</td>
<td>$28.73</td>
<td>2</td>
<td>WV</td>
<td>$11.47</td>
</tr>
<tr>
<td>49</td>
<td>CA</td>
<td>$25.52</td>
<td>3</td>
<td>AR</td>
<td>$11.50</td>
</tr>
<tr>
<td>48</td>
<td>MD</td>
<td>$24.43</td>
<td>4</td>
<td>SD</td>
<td>$11.69</td>
</tr>
<tr>
<td>47</td>
<td>NJ</td>
<td>$24.32</td>
<td>5</td>
<td>KY</td>
<td>$12.19</td>
</tr>
<tr>
<td>46</td>
<td>NY</td>
<td>$23.87</td>
<td>6</td>
<td>IA</td>
<td>$12.25</td>
</tr>
<tr>
<td>45</td>
<td>MA</td>
<td>$23.37</td>
<td>7</td>
<td>OK</td>
<td>$12.30</td>
</tr>
<tr>
<td>44</td>
<td>CT</td>
<td>$23.00</td>
<td>8</td>
<td>MT</td>
<td>$12.36</td>
</tr>
<tr>
<td>43</td>
<td>AK</td>
<td>$20.36</td>
<td>9</td>
<td>AL</td>
<td>$12.59</td>
</tr>
<tr>
<td>42</td>
<td>FL</td>
<td>$20.29</td>
<td>10</td>
<td>MI</td>
<td>$12.74</td>
</tr>
</tbody>
</table>

Source: Out of Reach 2010. ([http://www.nlihc.org/oor/oor2010](http://www.nlihc.org/oor/oor2010))

When compared to Tables 13.10 and 13.11 respectively, there is very little change in the composition of the least and most affordable housing states. In fact, nine out of the ten least affordable states in 2000 still occupy a position among the ten (10) least affordable housing states in 2010. Aside from jockeying for position, where Hawaii has now supplanted New Jersey for the top spot, the only other difference is that Florida has now moved up from its previous rank as the seventeenth (17th) most expensive state to
number ten in the rankings, thereby dropping New Hampshire down one grade to the number eleven (11) position. For all of its progressive legislative and funding efforts, Florida’s lack of affordability is surprising. But over the last half-century, Florida has seen more growth and experienced more changes in its development patterns than any other state in the nation. (Ingram)

Likewise, the same dynamic has held true for the most affordable housing states, as eight out of ten states identified in 2000 have retained their status in the 2010 rankings. The only anomaly is Louisiana, which has gone from the eighth most affordable to the twenty-sixth (26) most affordable housing state. While the significant loss of housing caused by Hurricane Katrina can’t be dismissed, neither can the concomitant loss in the state’s population. The fact that Louisiana is one of ten (10) states that lost at least one congressional seat following the release of the 2010 Census may serve to reinforce the impact of Katrina. (http://2010.census.gov/2010census/data/apportionment-data.php)

Also leaving the top ten most affordable housing states is Missouri, which now ranks fifteenth (15th). Taking the place of Missouri and Louisiana is South Dakota (4) and Montana (8). However, more significant than the rankings is the actual housing wage, which reveals that the spread between the top ten most affordable housing states is $1.50 per hour or slightly less than 12 percent. Conversely, the wage difference between the top ten least affordable housing states is almost 35 percent at $10.67 per hour. Although the differences are quite large in nominal terms, the percentage increases from 2000 to 2010 are relatively comparable. For instance, New Jersey is ranked as the fifth most expensive housing state in 2010, requiring a minimum hourly wage of $24.32 to afford the average monthly Fair Market Rent (FMR) of $1,264 for a two-bedroom apartment. In 2000, New
Jersey was ranked first in the nation as the most expensive place to live, when the average FMR for a two-bedroom unit was $878 per month and required a minimum housing wage of $16.88 per hour. While the cost of housing increased by 44 percent over the decade, the housing wage increased by 55 percent.

By comparison, the fifth most affordable state in 2010 was Kentucky, which generated a housing wage of $12.19 per hour necessary to afford the average monthly FMR of $634 for a two-bedroom apartment. This translates to an annual income of roughly $25,000 to achieve affordability. In Kentucky, the 2010 average Area Median Income (AMI) is $53,000, which means that a household earning less than 50 percent of AMI can achieve affordability. Similarly, a household in New Jersey needs to earn about $50,500 to be able to afford the average FMR for a two-bedroom unit, which represents roughly 41 percent of the average 2010 Area Median Income of $86,300 in New Jersey. (http://www.huduser.org/portal/datasets/il/il10/State_Incomelimits_Report.pdf)

While it’s clear that the same barriers to entry are not nearly as prevalent in states like North Dakota and West Virginia, the housing cost to income ratio exerts an equally pernicious effect. And while the cost of housing among the most productive housing states may be on the lower end of the distribution, the same is also true for household income. As a result, the incidence of cost burden runs disproportionately high among the occupant households in these states. In turn, this dynamic creates a public policy conundrum that has been persistent since before the Housing Act of 1949 articulated the national goal of providing “a decent home and suitable living environment for every American family.” (P.L. 81-171) At issue is how best to allocate scarce housing resources, especially during times of budget deficits and fiscal constraint. Today this
debate rages anew, as the fallout from the most severe economic downturn since the Great Depression has thrown the current U.S. housing market into a virtual freefall.

Despite broad discussion among housing scholars and analysts alike, no real consensus has ever been established on how best to allocate scarce housing resources. In 1990, while Burchell was theorizing about a sliding income scale to determine housing eligibility, the very first issue of the national publication Housing Policy Debate was asking the question, “Which Housing Policy is Best?” In the lead article, William Apgar from the Joint Center for Housing Studies at Harvard University more or less argued in favor of intervening on the supply side of the equation, citing more benefits and greater efficiencies than those generated by demand-side subsidies. Apgar makes this argument in response to the outcomes produced by a number of then published studies, which were conducted “at a time when rental housing markets were depressed.” (Apgar 1990) In varying degrees, this research concluded that demand-side subsidies would inflate the cost of rental housing, exacerbating the financial hardship among the non-subsidized poor, while also accelerating the process of disinvestment by facilitating the evacuation of poor neighborhoods. By advocating for an increase in the supply of privately-built, low-cost housing, Apgar suggests that these “externalities” can be avoided. Secondarily, Apgar recommends that supply-side subsidies be targeted to upgrade the condition of physically inadequate housing units for the dual purpose of improving and preserving the existing stock of affordable housing. However, Apgar realizes that there is not a single remedy and concludes by calling for “programmatic discretion” in an effort to pick and choose the best remedies to serve all of the poor. (Id)
In rebuttal, John Weicher, then of the US Department of Housing and Urban Development, cites many factors to oppose Apgar’s assertions. Chief among these was data supporting an improving housing stock, which was represented by a decrease in the incidence of overcrowding and a relatively high and consistent national vacancy rate. Each of these indices is used by Weicher to declare that Apgar’s focus is misdirected, arguing instead that attention needs to be paid to the economic conditions of the occupants of the housing stock and not the stock itself. In short, Weicher insists that the existing supply is not being “lost,” as Apgar claims, only more expensive, as rents increased faster than incomes to burden the extant occupants. What these families need, Weicher concludes, is rental (income) assistance and not another place to live. (Weicher 1990)

While Weicher’s opinion is reinforced by the second comment to Apgar’s article, which was provided by Raymond Struyk, then of the Urban Institute, all three commentators agreed that a balance of demand and supply-side subsidies were needed to produce an effective national housing policy. Likewise, there was equal agreement that national policy should be implemented at the local level, allowing local actors to control both the programs and the resources necessary to address market conditions unique to each jurisdiction. While specific recommendations on how best to achieve this outcome were never revealed, it was shortly after the publication of this debate that Congress enacted the National Affordable Housing Act of 1990. (42 U.S.C. 12703 et seq) This legislation, which is more commonly referred to as the Cranston-Gonzalez Act, established a number of new federal subsidy programs. Among these were the HOPWA (Housing Opportunities for Persons with AIDS), HOPE (Homeownership and
Opportunity for People Everywhere), and the HOME Partnership programs. While each of these new programs was designed to reach heretofore underserved populations, this legislation also established an entirely new mechanism for accessing all of the programs funded through the US Department of Housing and Urban Development (HUD). Specifically, § 12705 of the National Affordable Housing Act imposed the requirement that every jurisdiction seeking federal funds must first file a five-year Comprehensive Housing Affordability Strategy (CHAS), which in turn must be approved by HUD. In essence, the CHAS embodies the process promoted by Apgar, Weicher and Struyk, although neither this process nor the legislation that created it was ever mentioned during the entire debate. A simple consequence, perhaps, of the overlap in timing that occurred between the respective publication dates.

Based upon the “significant characteristics of the jurisdiction’s housing market,” the CHAS specified the development of fifteen (15) separate strategies. (Title I, Sec. 105) Among these is the requirement to document how federal funds will be used to leverage state and local resources to achieve targeted outcomes for specific populations. Through the use of specialized data sets from the 1990 Census, this provision called for a detailed description of how all federal, state and local programs would work in concert to realize stated goals. Most importantly was the overriding condition that the CHAS process be both open and subject to public comment. In theory, the net result was designed to achieve the kind of “programmatic discretion” that was being advocated by Apgar and others.

By extension, the requirement to leverage resources also sought to ensure greater inter-agency cooperation at all levels of government. In addition to the new programs
created by this legislation, the mandate to achieve “programmatic integration” was applied to all housing programs targeted to receive federal funds, such as CDBG (Community Development Block Grant) and public housing. Of particular note, however, was how the nascent Low Income Housing Tax Credit (LIHTC) program was singled out as a separate strategy “to coordinate [the Low-Income Tax Credit] with the development of housing, including public housing that is affordable to very low-income and low-income families.” (§ 12705, #12)

That such specific attention was given to the LIHTC program probably didn’t draw much attention at the time, which was perhaps due the fact that the program was operating under the Sunset provisions of its own enabling legislation. (PL 99-514) A last minute addition to the Tax Reform Act of 1986 (Cummings), it wasn’t until the Omnibus Budget Reconciliation Act of 1993 that the LIHTC program was made a permanent part of the United States Tax Code. (PL 103-66) Initially created to help maintain a level of investor interest in the provision of affordable housing, the attraction of providing a dollar-for-dollar reduction in a taxpayer’s federal income tax, as opposed to a reduction in taxable income, has made the LIHTC the largest housing production program in the nation. (HUD) According to the most recent data from HUD, an average of 1,574 projects and 117,000 units were placed into service annually from 1995 to 2007. (http://www.huduser.org/portal/datasets/lihtc.html)

Although administered by the U.S. Treasury, the Low Income Housing Tax Credit (LIHTC) program is managed by each state’s housing finance agency. While a few large cities such as Chicago and New York receive individual allocations, each jurisdiction is governed by a Qualified Application Process (QAP). Like the CHAS, the development of
the QAP is subject to an open and public process that is designed to reflect the priorities and market conditions unique to each state. But despite these procedures and its impressive record of production, the LIHTC program has not been able to avoid its share of controversy. While most of the published literature tends to focus on the cost of the program, debating both the benefits and efficiencies of subsidizing housing units rather than households, a more inflamed debate has also emerged.

At issue is whether the LIHTC program promotes both racial and economic segregation by favoring projects located in high poverty neighborhoods. (Freeman, Pfeiffer) This accusation was at the core of a 2003 lawsuit filed against the New Jersey Housing and Mortgage Finance Agency (NJHMFA), which claimed that the state’s QAP was discriminatory in both its intent and execution. (Fair Share) This complaint was predicated on an analysis of the projects that received an allocation of tax credits, the results of which were used to support the assertion that the QAP in New Jersey was promoting “apartheid” by favoring urban projects over the development of low-income housing in the state’s suburban communities. (Neuwirth) In addition to evoking federal fair housing law, this suit was also grounded on the principal that the state’s housing priorities, as articulated by the QAP, contravened both the spirit and the law emanating from the Mount Laurel doctrine. While these arguments proved unpersuasive and the lawsuit was dismissed, on appeal, the charges were again rejected on the basis that the “mission of the HMFA is to help finance low-income housing, not to promote racial integration.” (Carter)

Similar arguments had been made earlier in connection with a 2002 lawsuit filed against the Connecticut Housing Finance Authority (CHFA). Although specific to the
Asylum Hill neighborhood in the city of Hartford, the complaint argued that the decisions of the CHFA to allocate LIHTC into poor and highly segregated communities “have contributed to school overcrowding, school segregation and lower home ownership rates.” (Asylum Hill NRZ v. King) While this lawsuit was also dismissed and subsequently appealed, the state Supreme Court in Connecticut affirmed the lower court’s ruling on “mostly procedural grounds.” (Condon) Despite these adverse decisions, the argument of tying the locations of projects that receive LIHTC allocations with school performance and segregation is gaining national traction.

In a 2009 study conducted by The Civil Rights Project out of the University of California at Los Angeles (UCLA), the physical distance between a “family” LIHTC unit and the nearest high school was measured. By controlling for unit size, the objective was to examine the quality of the neighborhoods receiving family units and the educational opportunities available to the children housed in those units. Based upon the LIHTC projects located in Southern California and placed into service between 2000 and 2005, the results determined the average family unit was located in a high poverty, predominately Latino neighborhood. On average, the closest public high school was found to be 84 percent minority and 57 percent free and reduced lunch eligible, as compared to the average high school with a 74 percent minority and 45 percent free and reduced lunch enrollment. (Pfeiffer)

A third lawsuit filed in 2008 against the Texas Department of Housing and Community Affairs (TDHCA) also alleges racial segregation by the Agency’s administration of the Low Income Housing Tax Credit Program in Dallas and other large urban areas (ICP, Inc. v. TDHCD) Although this case has yet to go to trial, a
memorandum opinion issued by the U.S. District Court on September 28, 2010 denied a
to have the case dismissed. Should the non-profit Plaintiff eventually prevail, the decision could have national repercussions. Whether more legal challenges are to follow remains to be seen. However, these matters collectively serve to demonstrate that despite an absolute level of local control, characterized by both the CHAS and QAP, the largest housing production program in the nation is not immune to controversy. This is not to suggest that the criticisms are not valid, as many are, but to simply point out that effective housing policy is difficult to implement at any level. Nevertheless, now is the time to address these issues, as deep and long recessions provide an excellent opportunity to fix bad public policy.

Relative to the LIHTC process, there are a number of policy recommendations that run throughout the literature, each posited as a specific prescription to help cure what ails the program. The most consistent has been the call to give HUD more control, citing this agency’s overarching mandate to not only abide by but to enforce all federal fair housing laws. (Orfield, Pfeiffer) While LIHTC is not exempt from any civil rights legislation, to date it has been the location of these projects in largely low-income neighborhoods with high rates of minority populations that has motivated legal action. While the case law settled to date has failed to prove a deliberate attempt to segregate, these efforts have served to expose the program to greater levels of public scrutiny. Unlike the HUD budget, which is subject to an annual appropriation process, the LIHTC program is operated through the U.S. tax system. Indexed to inflation, each state annually receives its proportional distribution of tax credits, which are allocated on a per capita basis. Criticisms that this process lacks both the oversight and transparency necessary to
properly evaluate the program’s performance have steadily increased, claiming that LIHTC provides more benefit to private market developers at the expense of meeting the overall housing needs of low and moderate-income households. (Orfield)

Today these concerns have been largely mitigated by the enactment of H.R. 3221, the Housing and Economic Recovery Act of 2008. (HERA) By infusing the housing market in general and the LIHTC program specifically with a variety of new subsidy programs, each administered by HUD, the level of public oversight called for is now achieved by this legislation. In addition, HERA also requires each LIHTC allocating agency to collect and transmit data on the occupant households within every LIHTC project directly to HUD. This information includes but is not limited to race, ethnicity, income, household size, disability status, etc. The outcomes generated by this process will serve to better inform the development of each state’s QAP, while also assisting those that seek to ensure a better spatial distribution of future LIHTC projects.

Beyond HERA, calls for additional changes to the rules and regulations governing LIHTC have persisted almost since the start of the program. (Nelson) At the center of the debate are two principal issues. The first argues that the incentives built into the program lead naturally to the overdevelopment of projects in largely poor and segregated communities. These accusations are predominately based upon the “bonus” of additional tax credits awarded to projects located within either a Qualified Census Tract (QCT), or a Difficult to Develop Area (DDA). The former is defined where more than half the households have incomes below 60 percent of the area median income; whereas the latter designation is typically assigned to mostly high-cost metropolitan areas that pose a significant barrier to entry level housing. (Fed. Register) Critical that these incentives
only serve to exacerbate the concentration of poverty in neighborhoods that are already
predominately poor, the alternative suggests that a bonus system should instead reward
the development of LIHTC projects in low-poverty, suburban communities. (PRRAC)
Conversely, defenders of the bonus policy claim that these resources are necessary to aid
in the revitalization of existing low-income communities, which are typically capital
starved and deteriorating. This counter-claim, which has been raised as a defense in each
of the LIHTC lawsuits filed to date, is premised on the argument that the equity generated
by the sale of the tax credits has successfully primed the urban redevelopment engine.
While both sides of this argument are equally valid, critics hope that a larger HUD
presence, coupled with the information to be gathered by the new data collection
requirement, will immediately produce better programmatic results. (Pfeiffer)

Suffice to say that for every case made against LIHTC there is an equally
compelling defense. Initial criticisms of the program as inefficient (Nelson), too
expensive (Stegman), and arcane (Cummings) have been tempered by the most recent
research. One study reveals a better and more equitable distribution between suburban
and urban LIHTC projects (McClure), while another demonstrates how the increased
competition for the limited supply of tax credits has caused the price of the credit to
consistently rise over the life of the program. (Khadduri) In turn, a higher price per credit
generates more equity per project, which reduces both the need for additional levels of
subsidy and the amount of debt required to achieve project feasibility. (Freeman) As a
result, greater economic efficiencies have been measured, particularly within major
metropolitan markets. (Deng)
Unfortunately, most of the gains in programmatic performance have been lost due to the recent collapse in the capital markets. Investor retreat in the wake of the Great Recession was severe, highlighted by the loss of the two largest LIHTC investors when Fannie Mae and Freddie Mac were both placed under federal conservatorship. At the same time, the other major class of LIHTC investors was also withdrawing from the market, as many of the nation’s largest banks were facing the very real prospect of default.

In the investor vacuum that followed, the price per tax credit plummeted some 30 percent, dropping from an average pre-collapse price of $0.90 to $0.95 to roughly $0.65 to $0.72 for $1.00 of tax credit. (Kaplan) As a consequence, hundreds of LIHTC projects with full approvals and an allocation of tax credits were forced to sit idle. Even if an investor could be found, the price of the credits caused a significant and unanticipated shortfall in the amount of equity needed to achieve project feasibility. While some projects that had already broken ground saw their investor partners walk away, preferring to book a quick loss rather than face the prospects of a long-term and compounding liability. Others were forced to renegotiate the original agreed upon price of the credits downward, while also having to provide additional economic concessions and guarantees in an effort to help salvage as much of the investors yield as possible.

For the handful of investors that remained somewhat active, the majority were motivated by the continued obligations under the Community Reinvestment Act (CRA). In a market almost devoid of any competition, these investors could literally pick and choose among the best projects in the country. For the most part these developments were located in major metropolitan areas, which from a risk analysis are a more preferred
investment while still satisfying CRA requirements. As a consequence, the majority of the nation’s LIHTC pipeline remained clogged and in desperate need of a new source of capital. In response, the federal government stepped in to fill the shortfall by providing billions in new subsidies through the American Recovery and Reinvestment Act of 2009 (ARRA).

Commonly referred to as the stimulus bill, a tax credit assistance program (TCAP) was established within the U.S. Treasury, which allowed every allocating agency to sell back a majority of either unused or unsold credits in exchange for a capital grant. At an exchange rate of $0.85 for $1.00 of tax credit, the TCAP program helped to clear the pipeline of its backlog. In addition to TCAP, the stimulus bill carried additional subsidies targeted to help close any remaining funding gaps. Given the objective of the legislation to support “shovel-ready” projects, ARRA proved to be a godsend to the LIHTC industry. But now that most of the funds have been expended, facilitating the production of thousands of affordable housing units in the process, going forward the program is still faced with many of the same challenges. While investors are now coming back into the market, they are being lured by the prospect of higher yields produced by the still depressed price of the tax credit. If the price of the credit fails to rebound, the resultant funding gap will now be much more difficult to close. At the same time, the concentration of LIHTC activity remains primarily fixed on CRA-related investments located in major metropolitan areas. In the long run, this does not bode well for the rest of the country, which remains capital starved. In response, a whole range of different incentive structures are now being discussed among different advocacy groups, which
will seek to expand the pool of current investors to service those states where it is difficult to attract LIHTC funding.

While not even the most hardened detractors have ever predicted the demise of the LIHTC program (Stone), there appears to be enough political and market momentum to force some major programmatic changes. Beyond HERA and the HUD oversight that this legislation now provides, it is the QCT and DDA incentive structure that appear ripe to change. But beyond the arguments of whether these existing incentives exacerbate segregation and poverty, the most consistent and controversial issue confronting the LIHTC program has been the rental structure of the program itself. This perceived shortcoming is a function of the rules that govern LIHTC, where the minimum level for household eligibility is set between 50 and 60 percent of area median income. As a result, LIHTC rents are “capped” at these specific income levels, which vary from state to state. Consequently, projects located in high-cost/high income areas can establish rent levels that often exceed the standard HCIR of 30 percent of gross household income. Unlike the Section 8 program, which provides a subsidy equal to the difference between Fair Market Rent (FMR) and 30 percent of gross household income, the LIHTC program operates on a fixed and flat rental rate. As a consequence, extremely low-income households that choose to rent a LIHTC unit will invariably become cost-burdened in the process. This conundrum has been the central thesis of a number of housing scholars (Nelson, Khadduri), who like Weicher have argued that the poor don’t need a new place to live, only the additional resources necessary to drive housing costs down to more affordable levels. While this argument has been taking place for more than twenty years, public policy remains unchanged. As we begin the second decade of the new millennium, still
stunted by the effects of the Great Recession, it is time to both craft and implement a
more efficient and equitable way to allocate scarce housing resources.

Towards a New Methodology

On the basis of pure observation, it would appear that the preponderance of the
literature is in favor of intervening on the demand rather than on the supply side of the
housing equation. Supporting this ascertain are the results generated by this research,
which clearly demonstrate that income, and the lack thereof, is the driving force behind
the national affordability problem. While such a finding is hardly newsworthy, it is the
combination of factors that lead to this conclusion which need to be addressed.

First and foremost is the housing cost to income ratio (HCIR), which is a static
metric that fails to incorporate a number of relevant attributes into the affordability
standard. As noted above, geography is a critical but missing component in the equation,
as the identical standard applied to both New Jersey and Kentucky produces a vastly
different eligibility dynamic. This is the same problem that plagues the national poverty
statistic, which has remained unchanged from the official version adopted in 1969.
(http://www.ocpp.org/poverty/how.htm) The only difference is that now the poverty
statistic is undergoing a radical updating by adding non-cash transfers such as housing
subsidies, the Earned Income Tax Credit (EITC) and free and reduced price school
lunches to the measure, while deducting for the economic impact of taxes, child care and
work related expenses. While the results produced by the new methodology won’t be
released until the fall of 2011, once published they will only serve “as an alternative lens
to understand poverty and measure the effects of anti-poverty policies.
Despite the limitation, the new supplemental poverty measure is a statistical step in the right direction.

Then, as now, the poverty standard was predicated on the Census Bureau's definition of income—before-tax money income—which will continue as the definitive statistical measure going forward. (Id) Moreover, the original poverty standard was established on the basis that a household spends roughly one third of its income on housing, another third on food and the remaining third on other necessities. This is the foundation upon which the current HCIR has evolved. Once accepted, these broad divisions have survived nearly half a century and have since served to establish eligibility under a host of government programs. However, under the new supplemental methodology for determining the level and extent of poverty, the eligibility thresholds proposed will be adjusted to distinguish between renters, owners with a mortgage and owners without a mortgage. (Id) In addition, the new formula will seek to account for the differences that exist across geographic locations by applying a cost-of-housing index to the housing portion of the threshold. Critics of this process contend that:

“adjusting for housing cost differences would likely result in many of the most economically disadvantaged states—mostly in Appalachia and the South—having poverty thresholds and rates that are lower than other considerably richer states, and the United States as a whole. (Fremstad)

To avert this from happening, it is suggested that “the best way to account for the impact of these differences…is to measure housing, food and other forms of economic hardship directly, rather than relying only on an income proxy.” (Id) This is roughly the same thesis proffered by Stone in his 1993 seminal book, *Shelter Poverty*, in which he argues “the illogic of the conventional wisdom that there is some percentage of income
that every household reasonably can be expected to pay for shelter without hardship.” (Stone 313) While Stone’s approach doesn’t “reveal a more extensive housing affordability problem than the conventional approach,” he does “suggest a different distribution of the problem.” (Id) More specifically, Stone’s proposal for a more just and accurate measure of housing affordability is predicated upon the priority of establishing a minimum household standard to provide for non-shelter necessities. By first establishing the basic needs of a household, which would be adjusted according to household size, Stone submits that whatever income remains should establish the housing cost payment standard. Stone is particularly passionate over the plight of larger households with children, which is why he suggests a sliding scale of benefits that is skewed to this demographic. In Stone’s opinion, the problem of housing affordability is “much more concentrated among lower-income and large households and relatively less severe among middle-income and small households.” (Id, emp. org.)

A slightly different twist on Stone’s theory is provided by Kutty, who looks at housing costs among household at the margins of affordability to introduce the concept of “housing-induced poverty.” (Kutty 05) By analysis, Kutty concludes that the official poverty rate in 1999 would have been 2.9 percentage points higher by including those households that fell into poverty after paying up to 30 percent of their income for housing. (Id) For Kutty, a sensible housing policy would target subsidies to those unable to pay for the non-housing bundle of necessities that remain beyond the cost of housing. This is essentially the reverse of Stone, but each advocates that a minimum standard of living should be incorporated into the housing affordability calculus, where the ultimate formula reflects a sliding scale of housing cost burdens based upon the level of income,
household size and household type. However, Kutty goes further by examining the incidence of housing-induced poverty across geographic regions. By recognizing that “housing costs faced by low-income households vary dramatically across the United States,” Kutty’s analysis reveals that “households in near-poverty were most vulnerable to falling into housing-induced poverty in the Northeast and in the West.” (Id) Moreover, Kutty suggests the following:

Other things being equal, households that live in inexpensive locations will consume more housing and thus have higher levels of well-being than households that live in expensive location and face the same degree of housing-induced poverty. However, if expensive locations have better amenities (such as cultural offerings, financial services, and cheap public transportation), then the well-being of households at these locations could be higher despite their consuming less housing.” (Id)

The concept of an amenity-based housing standard has been gaining traction, “especially in high-cost, supply-constrained coastal cities such as Boston.” (Fisher, et. al). This reality is behind a 2007 report produced by the Center for Real Estate at the Massachusetts Institute of Technology (MIT), which ranks 141 towns in the greater Boston metropolitan area based upon a new measure of “area affordability.” (Id) By establishing an index to account for job accessibility, school quality and safety, the object is to determine whether housing at prices/rents that are unaffordable by convention may in turn be deemed affordable once the strong presence of one or more of these attributes is factored into the equation. By controlling for households that earn between 50 and 80 percent of the area median income, the study finds that “town-level amenities leads to major adjustments in our affordability measure.” (Id)

While the ability to scale such an effort up to the national level would be a prohibitive task, the concept of “relative affordability” is one that should be incorporated into the HCIR standard. Even though certain price adjustments are built-in to many
government housing programs, these are almost always in the form of an increase in the payment standard or debt ceiling in response to high-cost housing areas. But the greater utility of an amenity-based housing price index would best be achieved at the state and local levels, where both knowledge and flexibility can be incorporated into the process. In this way, access to better schools and jobs can then be capitalized into the rental/house price structure, which in turn would generate a higher affordability index with a corresponding increase in the HCIR. (Id) Conversely, towns with poorer quality schools, less security and greater distances from employment centers would realize an appropriate decease in their respective rankings.

How Much Is Enough Affordable Housing?

A 2009 study published by the Lincoln Land Institute examines the impact of smart growth policies on eight (8) different states across the country.\(^{14}\) In addition to evaluating outcomes related to growth patterns, environmental quality and transportation, the study assesses the impact of such policies on the production of affordable housing. In summary, the findings presented offered the following conclusion:

New Jersey provides an exception to the generally poor showing of the smart growth states. Its statewide housing program, the progeny of several supreme court decisions, clearly propelled the production of affordable housing, including the expansion of rental units. During the period from 1990 to 2000, New Jersey added more than 24,000 units of new construction and rehabilitated units under the affordable housing program overseen by the Council on Affordable Housing. While New Jersey’s housing costs were high, its renter cost burden increased less during the 1990s than in the other smart growth states.” (Ingram, et. al.)

While I am sure there are many within the affordable housing community in New Jersey that would take exception to the conclusion drawn, in principle, I accept this

\(^{14}\) The eight states are: Florida, Maryland, New Jersey, Oregon, Colorado, Indiana, Texas and Virginia.
finding. If nothing else, the evidence provided by my research supports the premise that
the most densely populated state with the highest property tax burden and the second
highest per capita income with one of the highest median house values in the nation has
achieved a remarkable record of affordable housing. When all of the legal and political
challenges are layered on top of this perspective, the accomplishment is even more
impressive.

However, if we take the numbers of units produced and compare them to the
collective obligations generated across three decades by the fair share methodology, an
opportunity for criticism is presented. Alternatively, we can look at the production
number quoted above in the Lincoln Land Institutes study, which states “[D]uring the
period from 1990 to 2000, New Jersey added more than 24,000 units of new construction
and rehabilitated units under the affordable housing program overseen by the Council on
Affordable Housing.” By comparing this output to the permit data presented at the
beginning of this chapter in Table 15.1., we see that the state of New Jersey issued
239,061 building permits during roughly the same time period. The simple math reveals
that 10 percent of the housing produced in New Jersey from 1990 to 2000 was affordable
housing. While the states of Massachusetts, Rhode Island and Connecticut impose an
obligation requiring that 10 percent of the housing stock in each of their respective
communities must be occupied by income-eligible households, no state has been able to
satisfy this requirement. In fact, of the 351 cities and towns in Massachusetts, only 51 are
in compliance with the mandatory 10 percent set-aside. (http://chapa.org/?q=chapter40B)

Still, this is not good enough for New Jersey, where the advocacy community has
always demanded more when more is impractical. Partial blame for this inability to
accept the reality of the states’ production mechanism rests with the New Jersey State Supreme Court. More specifically, it was a mere footnote among the pages of one of the most comprehensive and profound judicial decisions in the history of state jurisprudence, which simply attempted to define the meaning of the word “substantial,” that is responsible for the expectation that turned advocates into adversaries.

It was within the context of deciding how much affordable housing should be produced through the grant of a builder’s remedy that the court “held” that the amount should be “substantial.” (92 N.J. 158) In an effort to provide definitional clarity, the court was rhetorical when attempting to answer its own question in the following way:

What is “substantial” in a particular case will be for the trial court to decide. The court should consider such factors as the size of the plaintiff’s proposed project, the percentage of the project to be devoted to lower income housing (20 percent appears to us to a reasonable minimum), what proportion of the defendant’s municipality’s fair share allocation would be provided by the project, and the extent to which the remaining housing in the project can be categorized as “least cost.” The balance of the project will presumably include middle and upper income housing. Economically, integrated housing may be better for all concerned in various ways. Furthermore, the middle and upper income units may be necessary to render the project profitable. If builder’s remedies cannot be profitable, the incentive for builders to enforce Mount Laurel is lost.” (Id. fn. 37, emp. mine)

So what would it take to achieve an output where 20 percent of the housing stock in New Jersey was affordable to income-eligible households? To derive an answer, the value of Ratio #1 in 2000 was modified by pushing the HCIR above the 30 percent threshold and through a series of iterations until the new result was achieved. Once complete, a HCIR of 60 percent was required to accomplish an affordable housing production rate of 20 percent in the state of New Jersey.

To determine the same impact on the rest of the nation, the same HCIR of 60 percent was applied to each of the remaining 50 cases (states). Surprisingly, increasing
the HCIR to 60 percent across all states produces the near identical result; equalizing the national output to achieve an overall affordable housing production rate of 20 percent. The results of this exercise are presented below.

Table 15.3. Ratio of the Ratio at a HCIR of 60 Percent

<table>
<thead>
<tr>
<th>State</th>
<th>Ratio @ 30%</th>
<th>1 Ratio @ 60%</th>
<th>1 Ratio / Ratio</th>
<th>State</th>
<th>Ratio @ 30%</th>
<th>#1 Ratio @ 60%</th>
<th>1 Ratio / Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>WY</td>
<td>0.147</td>
<td>0.230</td>
<td>1.567</td>
<td>NE</td>
<td>0.109</td>
<td>0.201</td>
<td>1.840</td>
</tr>
<tr>
<td>WV</td>
<td>0.155</td>
<td>0.254</td>
<td>1.646</td>
<td>IA</td>
<td>0.119</td>
<td>0.223</td>
<td>1.866</td>
</tr>
<tr>
<td>LA</td>
<td>0.134</td>
<td>0.221</td>
<td>1.651</td>
<td>PA</td>
<td>0.105</td>
<td>0.197</td>
<td>1.872</td>
</tr>
<tr>
<td>AL</td>
<td>0.140</td>
<td>0.234</td>
<td>1.674</td>
<td>MN</td>
<td>0.114</td>
<td>0.214</td>
<td>1.887</td>
</tr>
<tr>
<td>SD</td>
<td>0.134</td>
<td>0.227</td>
<td>1.690</td>
<td>NM</td>
<td>0.107</td>
<td>0.202</td>
<td>1.892</td>
</tr>
<tr>
<td>DC</td>
<td>0.146</td>
<td>0.250</td>
<td>1.709</td>
<td>ID</td>
<td>0.106</td>
<td>0.202</td>
<td>1.902</td>
</tr>
<tr>
<td>MO</td>
<td>0.124</td>
<td>0.215</td>
<td>1.732</td>
<td>TX</td>
<td>0.098</td>
<td>0.188</td>
<td>1.928</td>
</tr>
<tr>
<td>OK</td>
<td>0.119</td>
<td>0.206</td>
<td>1.735</td>
<td>NC</td>
<td>0.111</td>
<td>0.215</td>
<td>1.943</td>
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<tr>
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<td>0.134</td>
<td>0.234</td>
<td>1.748</td>
<td>NH</td>
<td>0.100</td>
<td>0.195</td>
<td>1.958</td>
</tr>
<tr>
<td>MS</td>
<td>0.128</td>
<td>0.225</td>
<td>1.756</td>
<td>NY</td>
<td>0.108</td>
<td>0.214</td>
<td>1.976</td>
</tr>
<tr>
<td>DE</td>
<td>0.127</td>
<td>0.224</td>
<td>1.761</td>
<td>CT</td>
<td>0.092</td>
<td>0.185</td>
<td>2.002</td>
</tr>
<tr>
<td>ME</td>
<td>0.138</td>
<td>0.243</td>
<td>1.768</td>
<td>IL</td>
<td>0.095</td>
<td>0.191</td>
<td>2.003</td>
</tr>
<tr>
<td>AR</td>
<td>0.131</td>
<td>0.231</td>
<td>1.769</td>
<td>VA</td>
<td>0.103</td>
<td>0.207</td>
<td>2.009</td>
</tr>
<tr>
<td>HI</td>
<td>0.119</td>
<td>0.211</td>
<td>1.774</td>
<td>FL</td>
<td>0.091</td>
<td>0.183</td>
<td>2.016</td>
</tr>
<tr>
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<td>0.121</td>
<td>0.216</td>
<td>1.784</td>
<td>AZ</td>
<td>0.086</td>
<td>0.175</td>
<td>2.044</td>
</tr>
<tr>
<td>MI</td>
<td>0.121</td>
<td>0.217</td>
<td>1.785</td>
<td>GA</td>
<td>0.096</td>
<td>0.197</td>
<td>2.045</td>
</tr>
<tr>
<td>AK</td>
<td>0.134</td>
<td>0.241</td>
<td>1.801</td>
<td>MA</td>
<td>0.088</td>
<td>0.180</td>
<td>2.045</td>
</tr>
<tr>
<td>RI</td>
<td>0.102</td>
<td>0.185</td>
<td>1.809</td>
<td>VT</td>
<td>0.098</td>
<td>0.200</td>
<td>2.047</td>
</tr>
<tr>
<td>SC</td>
<td>0.121</td>
<td>0.220</td>
<td>1.815</td>
<td>OR</td>
<td>0.099</td>
<td>0.210</td>
<td>2.116</td>
</tr>
<tr>
<td>MT</td>
<td>0.118</td>
<td>0.216</td>
<td>1.827</td>
<td>NJ</td>
<td>0.087</td>
<td>0.190</td>
<td>2.176</td>
</tr>
<tr>
<td>ND</td>
<td>0.121</td>
<td>0.221</td>
<td>1.827</td>
<td>MA</td>
<td>0.092</td>
<td>0.201</td>
<td>2.183</td>
</tr>
<tr>
<td>TN</td>
<td>0.120</td>
<td>0.219</td>
<td>1.828</td>
<td>CA</td>
<td>0.070</td>
<td>0.156</td>
<td>2.226</td>
</tr>
<tr>
<td>IN</td>
<td>0.115</td>
<td>0.210</td>
<td>1.831</td>
<td>CO</td>
<td>0.075</td>
<td>0.167</td>
<td>2.233</td>
</tr>
<tr>
<td>WI</td>
<td>0.120</td>
<td>0.219</td>
<td>1.832</td>
<td>UT</td>
<td>0.091</td>
<td>0.205</td>
<td>2.241</td>
</tr>
<tr>
<td>OH</td>
<td>0.113</td>
<td>0.208</td>
<td>1.840</td>
<td>MD</td>
<td>0.088</td>
<td>0.199</td>
<td>2.263</td>
</tr>
<tr>
<td>NV</td>
<td>0.075</td>
<td>0.184</td>
<td>2.463</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


Of equal interest is the fact that by essentially doubling the HCIR from 30 to 60 percent, a majority of the nation, or roughly two-thirds of the cases (states), experience an increase of less than 100 percent in total housing production. This may serve to support Kutty’s theory that most households live on the margins of affordability. In contrast, the
states that more than doubled their production output (outlined in the box), are also the same ones identified as the most progressive, most-expensive and least productive housing states. These results support the realization that high-cost and high-income states distort the limits of the standard definition of affordability, where households earning 80 percent of the AMI and spending in excess of 30 percent of their income on housing are classified as “cost burdened.” It is within these high-cost, high-income housing states where an affordability index similar to the MIT model would have the most utility. As an illustration, there are three (3) counties in New Jersey where the FY 2010 area median income has been measured at $102,000.15 At 80 percent of median income and 30 percent of housing costs, households in these locations can afford a gross monthly rent of $2,040 ($102,000* .8* .3/12). On average, the HUD established FMRs for the same locations is $1,409 per month. Alternatively, the principal and interest on a single-family home priced at $375,000, assuming a 10 percent down payment, 6 percent annual interest rate and a 30-year term, is calculated at $2,013 per month.

In Kentucky, there are six (6) counties where the area median income for FY 2010 is $69,500, which is the highest recorded in the state.16 Clearly, any attempt to compare the corresponding rent levels and housing costs in Kentucky to a place like New Jersey would serve no useful purpose. However, the huge disparity that exists between these two states is not the exception, but rather the rule among high and low-cost housing states. Therefore, the only question that remains is which is better? Is living in a high-cost housing state with presumably better schools, jobs and other cultural amenities worth the financial sacrifice? Or does living in a low-cost housing state provide the better financial

15 These are Hunterdon, Middlesex and Somerset Counties. ([http://www.huduser.org/portal/datasets/il/index_il2010.html](http://www.huduser.org/portal/datasets/il/index il2010.html))
16 These are Boone, Bracken, Campbell, Gullatin, Kenton and Pendleton Counties.
alternative? Framed in a more direct way, should the priority of a national housing policy seek to lift up poor households in poor states or should more resources be directed to ensure a minimum standard of living in high-cost housing states? Given the probability of continued and draconian budget cuts in the face of historic federal, state and local budget deficits, a new housing allocation formula must be devised as both a matter of good public policy and reality.

So for whom should scarce housing resources be allocated? The new supplemental poverty measure provides a good place to start, as it will now revise the “reference” family to include all household units with two children, replacing the original standard that was composed of two adults with two children. (Garner) This will better reflect the vast changes that have taken place in household composition, particularly among lower-income households. Further, the adjustments noted above to account for the differences in household tenure will be used to adjust the thresholds of eligibility. The decision to distinguish between renters, owners with a mortgage and owners without a mortgage was made in response to 2010 Census data, which revealed that “a significant number of low-income families own a home without a mortgage and therefore have quite low shelter expense requirements.” (Fremstad) Similarly, Kutty found in her research that “{A}ccording to tables prepared by the U.S. Bureau of the Census, 92 percent of elderly homeowners in poverty in 1999 owned their homes free and clear.” (Kutty, fn. 29)

It is, however, the decision to utilize the 33rd percentile rather than the median income statistic to establish the new threshold of eligibility that makes the supplemental poverty measure a model for a new housing affordability standard. Given that this new threshold corresponds almost exactly to the HUD definition of Extremely Low Income
(ELI), households earning less than 33 percent of the median income statistic should be the first subsidy priority established under a new national housing policy. Relative to the issue of subsidies, I fall squarely into the demand-side camp, confident that my research supports the logic of supplementing incomes and not housing units. While there will always be exceptions to this rule, most notably group homes, special needs populations, etc., the national rental vacancy rate currently stands at 9.4 percent, which is down from 11.1 percent in 3Q09. (http://www.census.gov/hhes/www/housing/hvs/rates/index.html)

While the impact of the Great Recession has wreaked havoc on the housing market, the fact that the national rental vacancy rate is so high is surprising. Given the fallout from the subprime crisis, a smaller national vacancy rate would have been expected, as displaced single-family households were forced to seek alternative housing arrangements. While doubling and tripling-up may account for some of this result, overall there appears to be an abundant supply of housing.

Whether the existing supply of rental housing is affordable or not is another question. The current rental vacancy rate in Connecticut is 11.6 percent. In Florida its 13.8 percent, while in Kentucky the rental vacancy rate is 11.1 percent. (Id) To repeat a quote from earlier in this chapter, “Those (low-income) families need rental assistance, not another place to live.” (Weicher) In the face of the current and ample supply of housing, the logic seems sound, until you try to pay for it. While expanding the current Section 8 voucher program should be a priority, funding for this and many HUD programs are already under great political stress and likely to face continued pressures in the future. In the meantime, long waiting lists for the Section 8 voucher program already exist, while many administrative agencies have stopped taking applications altogether.
Given the current state of the economy, it would be foolhardy to call for either new or expanded housing programs, which is why it may be time to rethink how best to utilize existing resources. Consistent with the federal requirements imposed by the Comprehensive Housing Affordability Strategy (CHAS), states could be obligated to consolidate their resources to better leverage federal dollars. While this may be analogous to getting blood out of a stone, at this point in time the public welfare takes precedence.

For example, Florida’s current rental housing vacancy rate is 13.8 percent, which is the second highest in the nation. Likewise, Florida’s current homeowner vacancy rate is 4.2 percent, again the second highest in the nation. From 2000 to 2009, Florida’s realty transfer tax generated a total of $2.78 billion for housing related programs; an average of $278 million a year. (Hendrickson) The immediate use of these dollars to supplement the Section 8 program would help to absorb some of Florida’s excess inventory. This in turn would help accelerate the pace of the housing recovery in the state, which is going to take many years to achieve.

Since most states already have some form of housing trust fund in place, the same process could be duplicated throughout the country. Recognizing that the annual levels of funding achieved would be subject to the vagaries of the market-place, a stateside voucher bank could be established to better manage the cyclicality of the funding stream. In addition, sufficient dollars would have to be committed in order to guarantee the solvency of the program. For this reason, short-term but renewable voucher contracts would be appropriate.

For states like New Jersey, which is currently experiencing a statewide rental vacancy rate of 8.1 percent, the situation isn’t nearly as critical. But New Jersey also has
a realty transfer tax mechanism that is captured to fund the state’s Balanced Housing Program. While not on the same scale as Florida, the program’s revenue history is still very impressive, generating a total of $681 million from 2000 to 2009. (McDowell) At an average of $68.1 million per year, these revenues could be used to fund 10,000 vouchers annually for Extremely Low Income households living in the three counties with the highest median incomes in the state. But unless and until the federal government declares some form of housing Marshall Law, it’s hard to envision any state giving up its housing sovereignty.

Besides, New Jersey is already under a self-imposed state of Mount Laurel Law, which has all but locked-down the state’s affordable housing process for more than a decade. How and when the situation gets resolved is anybody’s guess, but as of this writing the New Jersey State Supreme Court has been petitioned by the Council on Affordable Housing to determine the constitutionality of its proposed Growth Share formula. Whether the court decides that after more than a quarter century of legal battles it’s time to change a process that has polarized an entire state remains to be seen. Perhaps the court will be swayed by the kind of data presented in Table 15.1 above, which in summary reveals that since 1980 the state has issued a total of 909,409 residential building permits. No doubt the court will compare this output to the most recent estimates that suggest some 70,000 units of affordable housing have been produced as a result of Mount Laurel. (Kinsey) And if it does, I’m sure the court will come to the obvious conclusion that an affordable housing production rate of 7.7 percent is not “significant” by anyone’s definition.
Maybe the court will be swayed by the outcome of the Lincoln Land Institute study, which lauded New Jersey as “an exception to the generally poor showing of the smart growth states.” (Ingram) If so, then the court can take pride in the fact that New Jersey’s “statewide housing program, the progeny of several supreme court decisions, clearly propelled the production of affordable housing, including the expansion of rental units.” (Id) Perhaps the court would then focus its attention on the period from 1990 to 2000 when “New Jersey added more than 24,000 units of new construction and rehabilitated units under the affordable housing program overseen by the Council on Affordable Housing” (Id) and realize that this was the best Mount Laurel decade. If the court then puts this result into context and discovers that the 24,000 units of affordable housing represents 10 percent of the total number of building permits issued by the state during the same period, then maybe the court will finally be in a position to answer its own question. What is “substantial?”

Although highly speculative, I believe the court will realize that like Rhode Island, Connecticut, Massachusetts and Maryland, a 10 percent affordable housing threshold is both reasonable and achievable. In so doing, I also believe that the court will uphold the constitutionality of the growth share methodology, as it will realize that the simplicity of the process will yield greater results and acceptance. But I also believe that the court will vigorously defend the Mount Laurel doctrine and the obligation for every municipality to produce its fair share of affordable housing. In so doing, I look for the court to reinforce the mechanism of inclusionary zoning, mandating every project over a certain minimum size to dedicate 10 percent of the total number of units to accommodate income-eligible households. Whether the court will choose to redefine the limits of
eligibility is unknown. What is known, however, is that this process will likely take years to complete. In the meantime, markets will change and nothing will get done. To quote Yogi Berra, one of New Jersey’s most famous resident philosopher’s: “It’s déjà vu all over again.”
# APPENDIX ONE: PRODUCTION RESULTS FOR 1990 PUMS

<table>
<thead>
<tr>
<th>STATE</th>
<th>TUNITNEW</th>
<th>TIEUNITS</th>
<th>TOTNETH</th>
<th>RATIO 1</th>
<th>RATIO 2</th>
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APPENDIX ONE: PRODUCTION RESULTS FOR 1990 PUMS (Continued)

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APPENDIX TWO: PRODUCTION RESULTS FOR 2000 PUMS

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## APPENDIX THREE: REGRESSION VARIABLES (2000 PUMS)

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