VOLUME X

HOUSING DISCRIMINATION IN NEW JERSEY AND ITS POSSIBLE IMPACT ON DISCRIMINATION IN PUBLIC CONTRACTING

HISTORICAL RECORD OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN PUBLIC AND PRIVATE CONTRACTING IN NEW JERSEY

A Report Submitted to
NJ TRANSIT
and the
Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts

by
The Afro-American Studies Program
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EXECUTIVE SUMMARY

It is the purpose of this report to explore the relationship between housing discrimination and discrimination in public contracting. On the surface, these two phenomena are totally separate, but when more fully considered they can be seen to have a close, albeit subtle, connection.

Housing discrimination (assuming it to exist, and to have existed in the past, as will be discussed below) affects the ability of women and minorities to form businesses and to successfully compete for public contracts in at least three possible ways:[1]

1. Home ownership is the predominant method of capital formation for persons of relatively modest means. Small business people frequently mortgage their homes to the hilt to provide security for business loans, particularly in the crucial start-up years. By being disproportionately underrepresented in the homeowner class, women and minorities are disproportionately burdened in one important aspect of their quest for necessary business capital. Discrimination in the rental market aggravates this problem by requiring women and minorities to allocate a disproportionate share of their income to shelter, defeating their efforts to accumulate downpayment capital so that they can even attempt to compete in the (discriminatory) home ownership market.

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[1] The largest body of relevant data and analysis addresses the problems of African-Americans, and that will of necessity be the focus of this report. Where available and appropriate, parallel analysis and data will be suggested for Hispanic-Americans or for minorities generally. The specific housing problems of women are not addressed separately in this report. Since housing is normally sought by the household unit, female partners in male/female headed households experience whatever benefits or burdens the entire unit experiences. Even in this setting, however, it is likely that pervasive cultural norms will dictate that the male head of household take advantages first (such as the ability to pledge the family home to support establishment of a business). Of course, women of color experience doubly the possibility of discrimination.

There is also the well-recognized incidence of female headed households, which are more at risk of experiencing poverty, for instance. Preliminary 1990 Census data show a median income of $39,995 for all two-parent families with children, compared to $12,979 for female headed households with children. Within female-headed households, the figures are $14,864 for whites, $10,283 for African-Americans, and $9,525 for Hispanic-Americans. See Statistical Abstract of the United States, infra note 14, Table 732.

One small but positive benefit accruing to women from New Jersey's efforts to address housing discrimination is in Mount Laurel housing. The study noted in Part III of this report suggests that female-headed households (primarily white in this case) are a major category of occupants. See Lamar et al., infra note 75, at 1252. On the other hand, the study also notes that the aggregate amount of Mount Laurel housing produced is still quite small, so that one cannot validly conclude that this problem has been "solved."

2. Access to public education is determined by one's place of residence. The quality of education varies significantly from school district to school district, and the best quality education is most likely to be offered in those districts where housing discrimination is at its strongest. Those who are most poorly educated are those least well equipped to compete effectively in the job market and up the employment ladder from trainees to skilled workers and, eventually, owners of contracting businesses.

3. Similarly, place of residence heavily influences access to employment opportunities. We may assume that few people emerge full-blown from high school as contractors ready to compete for public jobs. A period of skill training and experience gathering is the normal first step. Even after establishment of a business, informal contacts within the local community are an important element of business-getting. The suburbanization of the economy, without a concomitant relaxation of suburban housing discrimination, deprives women and minorities of access to the most dynamic areas of the modern business scene.

Part I will explore the nature of these linkages between housing discrimination and access to capital, to education and to employment. Part II will then describe the pattern of discrimination in New Jersey, past and present, housing and otherwise. It will also describe efforts to combat housing discrimination, and will seek to explain why these efforts have been no more than partially successful. Part III will emphasize New Jersey's innovative Mount Laurel approach, but will demonstrate the limited utility of using race-neutral means to combat housing discrimination. This is important not only to show that housing discrimination continues to exist but also to suggest by analogy that race-neutral mechanisms may not be successful in combating other forms of discrimination either, such as that in public contracting.

PART I
HOW HOUSING DISCRIMINATION AFFECTS MINORITY CONTRACTING OPPORTUNITIES

A. Capital formation. Business depends upon capital. Undercapitalization is a prime cause of business failure. For most Americans, and particularly for low and middle income families, home ownership is the f capital accumulation.[2] This emphasis on home ownership is neither accidental nor simply the working of the invisible hand of our market economy. Governments, and particularly the federal government, have been deeply involved in the process of stimulating home ownership.

Since the Depression, and with accelerating speed after the end of the Second World War, the federal government essentially subsidized a policy of mass homeownership through the VHA and FHA mortgage guarantee programs. A striking example of the essential reliance on federal financing was recorded by William Levitt, President of Levitt and Sons, Inc., the legendary developer of the post-war Levittowns, including Levittown (now Willingboro), New Jersey. Testifying before the Housing Subcommittee of the Committee on Banking and Currency of the U.S. House of Representatives with respect to FHA financing, Mr. Levitt acknowledged baldly: "We are 100 percent dependent on Government. Whether this is right or wrong, it is a fact."[3] Levitt practiced overt racial discrimination in his developments until, in New Jersey at

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[2] Kain, J.F. and Quigley, J.M., Housing Markets and Racial Discrimination: A Microeconomic Analysis, 118 (1975).

[3] Quoted in Levitt & Sons, Inc. v. Division Against Discrimination, 31 N.J. 514, 523 (1960).

least, he was stopped by a state (not a federal) fair housing law.[4]

The FHA program was massively discriminatory during its most important years.[5] So was public housing and urban renewal, which took care to insure that minorities were kept to "their" areas. Federally assisted housing could not be built without the approval of the host municipality, effectively allowing the suburbs to veto the efforts of states, counties and private non-profit groups to promote integration.[6] Discriminatory location practices, having the effect of ghetto maintenance, were proven time and again, but it took years and years of litigation to measure even tiny amounts of remediation.[7] Redlining, practiced by heavily regulated federal and state banks, frustrated efforts to establish integrated communities by withholding financing.[8]

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[4] See Levitt & Sons, supra note 3.

[5] See generally Abrams, Forbidden Neighbors 229-243 (1955); FHA Underwriting Manual, Part III §1303(6)("Homogeneous development of property in a neighborhood tends to reduce mortgage risk."). Cf. Hearings before the U.S. Commission on Civil Rights, Housing, 2 vol., Feb., Apr., May and June, 1959.

[6] See Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 169 (1975)(Mount Laurel I) (township killed subsidized housing project in poor neighborhood by attaching onerous conditions to approval).

[7] See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976), involving public housing discrimination in Chicago. In 1982, the U.S. Court of Appeals for the Seventh Circuit, upholding a subsequent consent decree in the Gautreaux case, listed 16 prior published judicial decisions involving the same litigation. See 690 F.2d 616, 620 n.1 (1982). Several more decisions followed in 1983 and 1984. See 707 F.2d 265 (1983); 101 F.R.D. 704 (1984). For comparable litigation closer to home, involving Philadelphia, see Shannon v. HUD, 436 F.2d 809 (3d Cir., 1970).

[8] See Laufman v. Oakley Building and Loan Co., 408 F.Supp. 489 (S.D. Ohio, 1976); National State Bank v. Long, 630 F.2d 981 (3d Cir., 1980)(New Jersey antiredlining law). See generally Schwemm, Housing Discrimination: Law and Litigation, ch. 18 (1990); Dedman, "The Color of Money: Atlanta Blacks Losing in Home Loans Scramble," Atlanta Journal and Constitution, May 1, 1988 (banks five times more likely to lend to whites than blacks of the same income; study based on banks' Community Reinvestment Act reports).

Other programs were not overtly discriminatory but had discriminatory effects. Massive federal subsidies, through the Interstate Highway system and other roadbuilding programs, created the network of expressways and through roads that made the suburbs feasible. Both the federal government and the state governments contributed additional billions for improved water and sewer systems, and other infrastructure necessities. And to this day, both the federal and state governments provide continuing subsidies to home owners through the politically indestructible income tax deductions for home mortgage interest and local property taxes.[9] There can be little doubt that home ownership is the official public policy of the United States.

African-Americans, however, have not been a part of this policy initiative. In their study of housing discrimination in Saint Louis, Kain and Quigley concluded that "black households are substantially less likely to be homeowners or home purchasers than white households. . . . [W]e conclude that the much lower probabilities of home ownership and home purchase among black households are the result of systematic discrimination against black households in St. Louis' housing market."[10] Drawing on a national sample, Jackman and Jackman reached the same conclusion. In a study that was carefully controlled for socioeconomic variables that might affect home ownership, they found that

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[9] See Aaron, "Income Taxes and Housing," American Economic Review 60, no.5, 789-806 (Dec., 1970); Shelton, "The Costs of Renting Versus Owning a Home," Land Economics 44, no.1, 59-72 (Feb., 1968).

[10] Kain and Quigley, supra note 2, at 152-53.

71.3% of the whites in their sample were homeowners, compared to 41.2% of blacks.[11] Reynolds Farley put the point dramatically before the U.S. Commission on Civil Rights when he observed that the proportion of black households who were owners in 1980 (44%) was lower than the proportion of white households who owned their homes ninety years earlier, in 1890 (48%).[12]

In an effort to test the data from their Saint Louis study, Kain and Quigley compared actual African-American home ownership rates in eighteen SMSAs with the rate that would have been "expected" had African-Americans owned homes to the same extent as whites of comparable socioeconomic status. They found results virtually identical to those in Saint Louis. The Newark SMSA was one of those compared, thus furnishing a link between the national data, the Saint Louis data, and home ownership discrimination in New Jersey. In the Newark area, the actual home ownership rate was 25%, compared to an "expected" rate of 50% derived from whites of comparable status.[13] Thus, there is a sufficient convergence of results from these various studies to conclude that in New Jersey, as elsewhere, African-American home ownership rates, and hence their access to a significant form of capital, lag significantly behind those of

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[11] Jackman, M.R. and Jackman, R.W., Racial Inequalities in Home Ownership, Social Forces, vol. 58:4, pp.1221-1234, at 1226 (1980).

[12] Farley, The Residential Segregation of Blacks from Whites: Trends, Causes and Consequences, in Issues in Housing Discrimination, p.25 (U.S. Commission on Civil Rights, Nov. 12-13, 1985).

[13] Kain and Quigley, supra note 2, at 144-46.

whites.[14]

There is extensive discussion in the literature, however, of the possibility that this pattern of ownership is explained by factors other than race. It has been suggested, for instance, that the difference might be attributable to differences in "taste" for home ownership between whites and African-Americans. Although recognizing that "taste" is a difficult variable to isolate and measure, Kain and Quigley, reject the "taste" hypothesis, based on the lack of differences found in their studies for socioeconomic factors that might be regarded as surrogates for taste preferences.[15] Jackman and Jackman reach a similar conclusion, noting studies which indicate that African-Americans prefer integrated living and resist moving to integrated neighborhoods only out of distaste for the feared unpleasantness of being the first to test the color line.[16]

The significant underparticipation by African-Americans in home ownership, and the impact of that fact on their access to capital, is compounded by observed differentials in the value of homes owned by African-Americans. Even when the barriers to home

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[14] The 1987 American Housing Survey indicates that this pattern is not being ameliorated. In gross terms, without the sophisticated adjustments attempted by the studies noted above, 67% of all white American households owned their homes and 31% rented. For African-Americans, however, only 42% owned and for Hispanic-Americans, only 42% owned (for the Puerto Rican subcategory of Hispanic, the owned figure was 23.6). U.S. Dept. of Commerce, Statistical Abstract of the United States: 1991, Tables 43 and 45. The 1980 Census of Housing, at 32-7, found that 66.7% of whites owned, 35.9% of African-Americans, and 27.3% of Hispanic-Americans.

[15] See Kain and Quigley, supra note 2 at 138-44.

[16] Jackman and Jackman, supra note 11, at 1231, citing Pettigrew, Attitudes on Race and Housing: A Social-Psychological View, in Hawley and Rock, eds., Segregation in Residential Areas 21 (1973); and Farley, et al., Chocolate City, Vanilla Suburbs: Will the Trend Toward Racially Separate Communities Continue?, Social Science Research 7:319-44 (1978). Other explanations considered and rejected in the Kain and Jackman studies include effects of prior discrimination, permanent income differences, and differences in mobility patterns.

ownership are broken, African-Americans are likely to be confronted with higher prices for housing of comparable value. Jackman and Jackman concluded that the effect of racial discrimination on the probability of home ownership amounted to a difference of approximately $11,000 a year in earned income in 1980.[17]

Moreover, the differential exclusion from home ownership of necessity remits more African-American families to renter status. Kain and Quigley concluded that, all else equal, renting is as much as 30% more expensive than owning as a means of providing household shelter, in large part because of the tax incentives available under the Internal Revenue Code.[18] Not only does this divert income from capital formation (the down payment necessary to attempt purchase of a home, for instance) but it deprives the African-American household of a major hedge against inflation. Across the board, there can be little doubt that housing discrimination contributes to the low rate of African-American home ownership, that the failure to participate in this signal aspect of the American dream contributes significantly to the problems of wealth and capital that handicap minorities in business competition, and that government has played and continues to play a significant role in fostering these inequities.

B. Access to Education. The relationship between education and job skills will be

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[17] Jackman and Jackman, supra note 11, at 1230. This conclusion applies in all parts of the country except the eleven southern states of the confederacy. There, there was no significant difference in home values attributable to race. See also Courant, "Racial Prejudice in a Search Model of the Urban Housing Market," in Journal of Urban Economics 5, 329-345 (1978), which concludes that if some whites are unwilling to sell to blacks, competitive equilibria are sustainable in which blacks pay more for housing.

[18] Supra, note 2, at 148 and Appendix C.

addressed in other reports submitted to the Study Commission. In any event, it is sufficiently obvious that it can be assumed for our purpose here, which is to note the relationship between housing discrimination and access to the good quality education which encourages later success in life. That such a relationship exists, and that housing discrimination adversely affects the quality of education available to African-Americans and other minorities, would also seem quite obvious. School quality is a major determinant of most households' residential preferences; given the poor quality of most urban school systems, it is reasonable to assume that many minority households would prefer residence in other districts but for the combined effects of wealth and race discrimination.

The mechanism that links school quality and housing discrimination is local property taxation. Property-rich districts can provide good schools at relatively low tax rates. An influx of poor households (equated in the minds of many with minority households) threatens this comfortable arrangement. Modest houses do not generate large tax payments, while their children may bring (among other expensive needs) educational deficits that are costly to address.

These fears are not (from a strictly self-interested perspective) totally unfounded. Although the absolute number of whites exceeds non-whites in every income class, non-whites are disproportionately found below the poverty level and otherwise in the low and moderate income categories.[19] Even within a given income class, it has been observed

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[19] Massey and Eggers, "The Ecology of Inequality: Minorities and the Concentration of Poverty," American Journal of Sociology 95, no.5 (March 1990), 1153-88.

for years that African-Americans possess less wealth than whites at the same income level.[20] A possible explanation for this is the lower incidence of home ownership amongst African-Americans.[21] The special educational needs of children of all ethnic backgrounds raised in poor and ghettoized surroundings is also well recognized.[22]

The interlocking mechanisms of schools, taxes and housing discrimination are well understood by the New Jersey Supreme Court, which has commented on it in both the exclusionary zoning and school finance cases. In the first Mount Laurel decision, in 1975, for instance, Justice Hall wrote:

> [Exclusionary zoning] derives from New Jersey's tax structure, which has imposed on local real estate most of the cost of municipal and county government and of the primary and secondary education of the municipality's children.[23]

He also noted "the other end of the spectrum," core cities, where there had been

> a consequent critical erosion of the city tax base and inability to provide the amount and quality of those government services -- education, health, police, fire, housing and the like -- so necessary to the very existence of safe and decent city life.[24]

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[20] See, e.g., Terrell, "Wealth Accumulation of Black and White Families: The Empirical Evidence," Journal of Finance 26, no.2, p.364 (May, 1971).

[21] Kain and Quigley, supra note 2, at 149.

[22] See Abbott v. Burke, 119 N.J. 287, 369-75 (1990).

[23] Mount Laurel I, supra note 6, at 171.

[24] Id. at 173. The nexus between discrimination in housing and in schools has been noted in other cases as well. See United States v. Yonkers Board of Education, 624 F.Supp. 1276 (S.D.N.Y., 1985)(extensive recitation of facts linking housing and school discrimination in racially-divided city).

Similarly, in the second Mount Laurel case, in 1983, Chief Justice Wilentz noted that

> . . . while we are far from achieving tax equality among all the municipalities of the State, our present programs of State aid to education (financed through an income tax that was not in effect at the time of our decision in Mount Laurel I) are designed to reduce significantly the differential school tax burden between municipalities that accept residential development and those that do not.[25]

Sadly, Chief Justice Wilentz's prediction that school tax equity would stimulate a willingness on the part of suburban municipalities to accept low and moderate income housing has not been fulfilled. In Abbott v. Burke,[26] the Supreme Court revisited the school finance problem in 1990 and found pervasive disparities between the state's poorest and richest districts. These disparities, of course, also track the differences between the state's most white and non-white districts. Nor are these differences accidental. Even more than the heavy hand of government that can be seen in the discriminatory evolution of home ownership, schools, school taxes and exclusionary zoning are overwhelmingly public acts. We will return to this theme in the fuller discussion of the Mount Laurel cases below, but one example will suffice for now.

In the Abbott litigation, K-12 school districts were ranked by spending per pupil in the 1984-85 school year. There were 115 districts that spent more than the state average of $3,560 per pupil. These districts, in rank order, are shown in Appendix A. Almost three quarters of these districts (83 of 115) had more than 90% white enrollments.

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[25] Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 238 (1983)(Mount Laurel II).

[26] 119 N.J. 287 (1990).

Accepting, as the Supreme Court did in Abbott, that there is at least a gross correlation between per pupil spending and educational quality, we may describe these as the "better" school districts in the state.

Of these 115 better districts, only fifteen (13%) had voluntarily presented low and moderate income housing plans to the Council on Affordable Housing (COAH), the state agency charged with overseeing compliance with the constitutional mandate of Mount Laurel II. Another eighteen (16%) of these communities had also had their housing plans certified by COAH (14) or were pending certification (4), but only because they had been brought to account involuntarily through litigation. Indeed, of the fifteen "voluntary" districts before COAH, at least five (Cedar Grove, Chatham, Glen Ridge, Haddon Heights, Union) are known to have very small fair share obligations, so that they are exposed to very little risk of having low and moderate income housing actually built there, and another three (Bordentown, Somerville, Burlington City) are among the few districts which already have a significant minority presence in their schools.

These data are strongly suggestive of the connection in the minds of local public officials (and their constituents) between school quality and housing discrimination. They also suggest a powerful explanation for the low incidence of meaningful participation in the COAH process. Providing low and moderate income housing risks (in their minds) an influx of racial minorities and this, in turn, risks of the quality of "their" schools. Housing, schools and taxes are seemingly locked in a viciously unbreakable cycle.

C. Access to Employment. John F. Kain's provocative 1968 study[27] stimulated a substantial literature on the relationship between the suburbanization of the metropolitan economy and the condition of racial minorities. Kain suggested what has come to be called the "decentralization hypothesis," that with respect to blue-collar jobs, suburbanization has had an adverse effect on urban African-Americans. Three possible explanations of this phenomenon have been suggested: first, the expense of commuting from urban ghettos to low-paid suburban jobs; second, imperfect information about the availability of jobs in far-removed locations; and third, the existence of housing discrimination that made it difficult to minimize either of the first two problems.[28]

Subsequent studies have reported divergent results, and there is ground to question the assumptions and methodologies that have been used on both sides.[29] Recent work, however, tends to confirm the decentralization hypothesis. Ihlanfeldt and Sjoquist,[30] for instance, studied the effect of job decentralization on earnings of workers with a high school education or less, living in central cities, and concluded that there was a substantial negative impact. They also found that this adverse effect was approximately the same for white and African-American males, but concluded that the effect is more harmful to African-Americans:

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[27] Kain, "Housing Segregation, Negro Employment, and Metropolitan Decentralization," Quarterly Journal of Economics 82, no.2, pp.175-97 (May 1968).

[28] See Ihlanfeldt and Sjoquist, "The Impact of Job Decentralization on the Economic Welfare of Central City Blacks," Journal of Urban Economics 26, pp.110-130 (1989).

[29] Id. at 111; Galster, "Residential Segregation and Interracial Economic Disparities: A Simultaneous-Equations Approach," Journal of Urban Economics 21, pp.22-44 (1987), at 23-24.

[30] Supra note 28.

> This follows since blacks are concentrated in central cities, they are more frequently located in those urban areas where a larger percentage of low-skill jobs are located outside the central city, and the percentage of the black population with a high school education or less is much larger than it is for the white population. In addition, [the] residential mobility analysis suggests that the average white city worker is more likely than the average black worker to migrate to the suburbs in response to the loss in earnings from decentralization.[31]

Galster incorporates a housing discrimination factor directly into his simultaneous-equation econometric model and concludes that

> where African-Americans live -- i.e., how racially and economically isolated they are -- appears to affect substantially how likely they are to fall into poverty, both directly and through the impact of the location on the effectiveness of local schools in encouraging academic achievement and the attainment of credentials. . . . [T]his modeling effort implies that housing discrimination in both owner and rental sectors assumed a large role in shaping both interracial and intrarace, interclass residential contact in our largest metropolitan areas [including metropolitan New York] during 1980. In turn, such contacts appeared to affect economic opportunities in complex ways which, in turn, fed back to affect residential options once again. . . . [T]he findings suggest that aggressive public policy efforts both to effectively enforce fair housing laws and encourage the stable racial and economic integration of communities likely would provide sizable payoffs in the reduction of poverty among African-Americans.[32]

The question which has so occupied the scholars and theorists has seemed intuitively obvious to the New Jersey Supreme Court in both of the Mount Laurel decisions. In Mount Laurel I, Justice Hall observed that

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[31] Id. at 127.

[32] Galster, "Housing Discrimination and Urban Poverty of African-Americans," Journal of Housing Research 2, no.2, pp.87-122 (1991), at 113-14 (internal citations omitted).

> [o]ne incongruous result [of exclusionary zoning] is the picture of developing municipalities rendering it impossible for lower paid employees of industries they [the suburbs] have eagerly sought and welcomed with open arms (and in Mount Laurel's case even some of its own lower paid municipal employees) to live in the community where they work. . . . In a society which came to depend more and more on expensive individual motor vehicle transportation for all purposes, low income employees very frequently could not afford to reach outlying places of suitable employment and they certainly could not afford the permissible housing near such locations.[33]

Chief Justice Wilentz repeated these sentiments for the full court in Mount Laurel II.[34]

This housing-jobs nexus has been incorporated into all of the Mount Laurel methodologies that have been developed to identify housing need and to allocate resulting "fair share" obligations to individual municipalities. In AMG Realty Co. Warren Township, the major pronouncement on this subject, Judge Serpentelli adopted a complex approach, accepting a 30-minute "commutershed" theory as one part of defining housing regions and an allocation formula that placed heavy stress on the existence of employment opportunities within the community to which housing was to be assigned.[35] A similar approach was carried over in the methodology subsequently approved by the Council on Affordable Housing.[36]

Judicial, legislative and administrative fiats do not substitute for careful scholarly

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[33] Mount Laurel I, supra note 6, at 172-73.

[34] Mount Laurel II, supra note 25, at 210-11n.5, 256.

[35] 207 N.J. Super. 388, 414-20, 433-34, 440-41 (1984). See also Oakwood at Madison v. Township of Madison, 72 N.J. 481, 528 (1977); Burchell et al., Mount Laurel II: Challenge & Delivery of Low-Cost Housing 36-44 (1983).

[36] See N.J.A.C. 5:92-2.1 and Technical Appendix. The "commutershed" concept was abandoned, however, because the legislation establishing COAH had explicitly mandated a different approach. See N.J.S.A. 52:27D-304(b).

inquiry. However, they do reflect a considered policy judgment grounded in local conditions and a thorough local inquiry. Such judgments are clearly of the sort that the Croson court intended the states be able to make. In this instance, moreover, the Mount Laurel conclusions about the important link between jobs and non-discriminatory suburbs is consistent with the academic literature.

II

HOUSING DISCRIMINATION IN NEW JERSEY

A. Background. New Jersey has always been segregated.[37] New Jersey was the last northern state to abolish slavery (in 1804) and slave holding actually continued, because of a system of gradual emancipation, up to the time of the Civil War. In colonial times, New Jersey's slave code was regarded as the harshest of any of the northern colonies (with the possible exception of New York), featuring branding for theft and castration for sexual relations with a white woman. New Jersey was the only northern state that failed to ratify the Thirteenth, Fourteenth and Fifteenth Amendments. There were separate black public schools in some parts of South Jersey until the 1950s, and segregation in public accommodations was practiced in places until the 1960s. E. Frederic Morrow, an African-American who went on to become an official of the Eisenhower White House, used the vivid phrase "way down south up north" to characterize his experiences growing up in New Jersey in the early part of the twentieth century.[38] In the somewhat more measured words of an academician, Marion Thompson Wright, New Jersey's pioneer African-American historian, wrote in 1943 that "New Jersey is a state in which are found, so far as Negroes are concerned, practices

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[37] This description of historical practices draws heavily on Wright, Afro-Americans in New Jersey (N.J. Historical Commission, 1988).

[38] Id. at 14.

that many people believe to exist only in the southern area of the country."[39]

African-Americans have lived in New Jersey since its earliest days (albeit mostly in slavery in the colonial period and the early year of the republic), and New Jersey nurtured several important routes on the Underground Railroad.[40] The African-American population declined, in relative terms, during the late nineteenth century, particularly in north Jersey, which was viewed as more prejudiced and hostile to blacks than the southern part of the state. In south Jersey, a number of African-American settlements arose including, ironically, one in Mount Laurel township. It was the dispersal of this historic community in the 1960s by exclusionary devices that led African-American citizens of Mount Laurel to initiate the litigation that has come to exemplify the modern attempt to eradicate housing discrimination in New Jersey.[41]

There were two great waves of African-American population increase, however, stimulated by the First and Second World Wars. The high point of African-American population in the state's early history was 1800, when African-Americans accounted for 8% of the state's people. The percentage declined steadily thereafter, to a low of 3.3% in 1890. (This latter figure is somewhat misleading, however, because the overwhelming number of white European immigrants arriving in the late nineteenth century masks the fact that the absolute number of African-Americans migrating north during this period was

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[39] Id.

[40] Id. at 39-40.

[41] Id. at 39-44; Joseph, "A Community Remembers," in Blacks in New Jersey - 1983: Perspectives on Mount Laurel II, 4th Annual Report of the New Jersey Public Policy Research Institute, pp.51-67 (1983)(history of African-American settlement in Mount Laurel).

also increasing.) By the 1930 census, however, the percentage of African-Americans had increased to 5.2%, and then it took off: 5.5% in 1940, 6.6% in 1950, 8.5% in 1960, 10.7% in 1970 and 12.6% in 1980.[42] The 1990 Census counts 1.037 million African-Americans in New Jersey out of a total population of 7.73 million, 13.4% of the total.[43]

Hispanic-Americans have a more contemporary history in New Jersey. New Jersey is now second only to New York in the size of its Puerto Rican population, the figure more than doubling between 1960 (55,351-138,896) and then almost doubling again between 1970 and 1980 (138,896-243,540).[44] The total estimated Hispanic-American population of the state in 1990 is 740,000.[45]

While there is much discussion in the literature about the causes of residential segregation, there is absolutely no doubt that segregation exists, both for African-Americans[46] and for other minorities.[47] There is general agreement that the experience of African-Americans has not been, and will not be in the near future, the same as that of European immigrant groups, whose experience with severe discrimination diminished

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[42] Wright, supra note 37, at 16.

[43] Statistical Abstract of the United States, supra note 14, Table 27.

[44] Wagenheim, Puerto Ricans in the U.S., The Minority Rights Group, Report No. 58 (1983), Table 4.

[45] Statistical Abstract of the United States: 1991, supra note 14, Table 27.

[46] Huttman and Jones, American Suburbs: Desegregation and Resegregation, in Huttman, Blauw and Saltman, eds., Urban Housing Segregation of Minorities in Western Europe and the United States 344-354 (1991); Keating, Open Housing in Metropolitan Cleveland, id. 367-373. See also Courant, supra note 17 (in equilibrium, a housing market in which white discrimination is practiced may be racially segmented under a wide variety of conditions).

[47] Jones, The Puerto Rican in New Jersey 46 (1955); Wagenheim, supra note 44, at 11. See generally, Danielson, The Politics of Exclusion 22-26 (1976).

over time. The inexorable characteristic of skin color renews the badge of discrimination for each generation.[48]

The prognosis for Hispanic-Americans is less clear, the suggestion being that these groups may have a better chance of replicating the traditional American immigrant experience. There is a significant difference, however, that sets the Hispanic-American groups apart from the earlier immigrant families: the modern indifference in our society towards poverty. Hispanic-Americans, and particularly Puerto Ricans, are grindingly poor to a disproportionate degree.[49] Median family income for Hispanic-Americans in the northeast in 1989 was $22,627, compared to $25,391 for African-Americans and $40,990 for whites. Almost a quarter (23.3%) of these families had money income of less than $10,000, compared to 19.5% for African-Americans and 6.6% for whites. More than a quarter (27.6%) lived below the poverty line, compared to 21.4% for African-Americans and 6.5% for whites.[50] Once, America (and New Jersey) had a commitment to child welfare, to urban education, to meaningful financial assistance that helped the children of immigrants gain a foothold on the ladder of upward mobility. Today, much of that network is tattered, if it remains at all. The disproportionate poverty of Hispanic-Americans operates to exclude them from suburban housing markets, suburban schools and suburban jobs just as effectively, whether or not it is combined with overt

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[48] Hawley and Rock, eds., Segregation in Residential Areas 8 (1973).

[49] See Wagenheim, supra note 44, at 14, 16.

[50] Statistical Abstract of the United States: 1991, supra note 14, Tables 732, 733 and 752. All comparisons are for the northeast group of states (New England, New York, New Jersey and Pennsylvania).

discrimination based on ethnic heritage.

B. Efforts to Combat Discrimination. In Part III, we will turn to a closer examination of the Mount Laurel doctrine, which attempts to deal with problems of discrimination at the economic level. Before doing so, however, a brief survey of New Jersey's earlier efforts to eradicate discrimination, and particularly housing discrimination, is set forth here.

New Jersey began addressing discrimination problems immediately after the Second World War. A comprehensive statute against discrimination was enacted in 1945, but it applied only to employment matters.[51] The law prohibited discrimination on the basis of race, creed, color, national origin or ancestry. The right to employment without discrimination was recognized as a civil right, and the proscriptions of the law were cast rather broadly across labor unions and employment agencies as well as employers themselves. Cease and desist orders as well as back pay, reinstatement and unspecified other "affirmative action" was authorized. A Division Against Discrimination was created.

Two years later, in 1947, New Jersey's new Constitution became the first in the nation to explicitly prohibit segregation in the public schools and in the state militia:

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principle, race, color, ancestry or national origin.[52]

(The military provision is said to have been one of the catalysts that led President Truman to integrate the nation's armed forces a few years later.[53])

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[51] L. 1945, ch.169.

[52] N.J. Const., Art. I, ¶5 (1947).

[53] See Wright, supra note 37, at 70.

Two years later, in 1949, the Legislature expanded the jurisdiction of the Division Against Discrimination to include places of public accommodation.[54] Then, in 1950, it dealt with housing discrimination for the first time, amending various public housing laws to prohibit discrimination on the basis of the constitutional language.[55] The jurisdiction of the Division was left untouched, however, leaving enforcement of the new laws ambiguous at best. It is symbolic of the extreme political sensitivity of efforts to combat housing discrimination. Although the Legislature was able to deal in one sitting with discrimination in employment and then public accommodations, it still required almost two decades to put together a comprehensive approach to housing discrimination.

The Division Against Discrimination was finally given jurisdiction over housing by a 1954 amendment,[56] and in 1957 the law was further amended to expand the definition of "publicly assisted housing." As amended, the law covered not only direct public subsidies, but also "housing financed . . . by a loan . . . the repayment of which is guaranteed or insured by the Federal Government or any agency thereof."[57] This set the stage for the Supreme Court of New Jersey to enter the fray, with its landmark 1960 decision in Levitt & Sons, Inc. v. Division Against Discrimination.[58] Levitt's only contact with public financing was the FHA mortgage assistance provided independently to

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[54] L.1949, ch.11.

[55] L.1950, ch.105-112.

[56] L.1954, ch. 198.

[57] L.1957, ch. 66.

[58] Supra, note 3.

purchasers after the completion of the sale transaction and the company was frank about its desire to discriminate on the basis of race. In a sweeping decision, the Court stitched together the various legislative steps, read them generously in light of Article I, ¶5 of the 1947 Constitution, and held that Levitt was subject to the law. Although the Court claimed that it was not deciding the "outer limits" of the "publicly assisted" concept,[59] it left no doubt that a large segment of the housing market could be reached.

The Legislature then picked up the thread again, its courage perhaps reinforced by the Court's decision in Levitt. A year later, in 1961, it finally amended the Law Against Discrimination to reach private, as well as public, housing activity,[60] and five years later it reconstituted the Division as the Division on Civil Rights within the Department of the Attorney General.[61] Last, but not least for our purposes, the law was amended in 1970 to outlaw discrimination on the basis of gender or marital status.[62]

The Supreme Court also continued its sympathetic approach to the law, holding in 1969 that the Division could award compensatory damages, even though they were not explicitly authorized by the statutes.[63] It is important to appreciate this interplay between the Legislature and the Court. It is reasonably clear that the Court has been willing to lead on discrimination issues, pulling the Legislature perhaps faster than it would

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[59] Id. at 529.

[60] L.1961, ch. 106.

[61] L.1966, ch. 17.

[62] L.1970, ch. 80.

[63] Jackson v. Concord Company, 54 N.J. 113 (1969).

otherwise have been willing to advance. While this has had the advantage of creating a forward-looking body of law for New Jersey, the Court's involvement has also meant that on occasion the political consensus behind these reforms was somewhat weak. This becomes a crucial factor in the subsequent development of the Mount Laurel doctrine.

The New Jersey Division on Civil Rights has evolved into an effective mechanism for enforcement of our civil rights laws, demonstrating the utility of adding administrative remedies to those available through the courts. As just one example, the Division, working with the Administrative Process Project at Rutgers Law School in the period 1969-72, developed a novel Landlord Reporting Rule, designed to open suburban apartments to minorities by creating knowledge about racial disparities that would allow the agency to target its investigations and to remedy situations even in the absence of an individual complaint. The Rule, which was upheld by the New Jersey Supreme Court in 1972,[64] is a precursor of what has come to be an important tool in fighting housing discrimination nationwide.[65]

What went wrong? Despite New Jersey's flawed but nonetheless steady progress towards a filled-out law against discrimination, discrimination continued largely unabated, and continues to this day. The answer, unfortunately, is that for every step forward, there

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[64] See New Jersey Builders, Owners and Managers Association v. Blair, 60 N.J. 330 (1972). See generally, Blumrosen et al., Enforcing Equality in Housing and Employment Through State Civil rights Laws, ch. 3 (1972).

[65] The Supreme Court was also active in other ways. In DeSimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428 (1970), for instance, it interpreted New Jersey's complex zoning variance laws in a way that permitted a non-profit housing corporation to obtain a variance for a subsidized housing development in an all-white section of the City of Englewood. The Court was explicit in recognizing that the proposal would help to relieve racial segregation in the city's predominantly-black Fourth Ward.

was at least an equal step back. Mention has already been made of the shaky level of public support for the various legislative initiatives. Although such overt manifestations of discrimination as racially restrictive covenants were outlawed by the United States Supreme Court in 1948,[66] private attitudes die hard. Writing in the Rutgers Law Review in 1957, for instance, a critic of the 1957 New Jersey discrimination amendments described them as "a forceable integration statute, designed for the sole purpose of forcing people to live together who have no desire to live together."[67] The Division on Civil Rights is a small agency, and it is mostly able to tackle problems one individual at a time. This can be compared to the proverbial attempt to scoop up the ocean with a bucket. No mat ter how much one accomplishes, the problem itself seems to be an infinitely renewable resource.

But there were also more concrete backward steps. A theme which has consistently threaded through this discussion is the disproportionate poverty of racial and ethnic minorities in New Jersey. The laws against discrimination can fight overt discrimination, but they are not adapted to fighting the racially discriminatory effects of economic segregation. And economic discrimination, unfortunately, has been a major factor in modern New Jersey, particularly in the system of land use controls that directly

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[66] See Shelley v. Kraemer, 334 U.S. 1 (1948).

[67] Avins, Trade Regulations, 12 Rutgers L. Rev. 149, 155-56 (1957). The author goes on to suggest that "some day, for its own purposes, the minority itself may wish to discriminate," citing a line of Jewish will cases. He directs readers to "an account of racial tension resulting from integrated housing in Chicago," and he notes "the tremendous disturbances which have occurred in the past when Negroes have moved into formerly all white neighborhoods. Id. at 154 n.18, 158 and 158 nn.33, 34.

affects the availability of housing.

Stimulated by a long tradition of home rule and a new mandate in the 1947 Constitution to construe the powers of local government generously,[68] the New Jersey Supreme Court became the undisputed national leader in fashioning the post-war tools of exclusionary zoning by consistently upholding the power of municipalities to control their land use.[69] In what Professor Williams called "perhaps the most appalling example" of the genre, New Jersey approved a local zoning ordinance which placed more than 80% of one town in zones requiring minimum five-acre lots.[70] Other examples include cases upholding ordinances requiring exclusion of apartments,[71] minimum building sizes,[72] and the total exclusion of mobile homes.[73]

Summing all of this up, Professor Norman Williams, the intellectual parent of the case against exclusionary zoning, described what he called "the exclusionary tradition" in New Jersey:

> This rationale [for exclusionary zoning], developed in the 1950's and early 1960's, provided the intellectual basis upon which municipalities could practice and justify exclusionary zoning, and in effect encouraged them to do so. The rationale

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[68] N.J. Const., Art. IV, §7, ¶11 (1947).

[69] See Williams, American Land Planning Law §2.05 (1974).

[70] Id. at §38.20, citing Fisher v. Township of Bedminster, 11 N.J. 194 (1952). See also Williams, supra, §39.08.

[71] Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320 (1958).

[72] Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165 (1952); see Williams, supra, §§63.03-63.09. Professor Williams, who is critical, nonetheless characterizes Lionshead Lake as "one of the most important decisions in the history of American zoning . . . [and] perhaps the most controversial zoning decision in recent times." Id. at §63.03, pp.637-38.

[73] Vickers v. Gloucester Township, 37 N.J. 232 (1962). See Williams, supra, §66.06.

depended upon the following propositions:

> 1. The statutory (and constitutional) power to zone for the "general welfare" . . . [refers] to the welfare of each municipality as a separate unit. (Obviously a rather parochial view.)
>
> . . .
>
> 3. There is something called "balanced zoning" -- which, in practice, turns out to mean no more multiple dwellings.
>
> 4. "Fiscal zoning," to improve a municipality's position on tax ratables, is an appropriate goal for police-power action."[74]

The last of the cases noted previously, Vickers v. Gloucester Township, which involved exclusion of mobile homes, provoked a stunning dissent from Justice Frederick Hall of the New Jersey Supreme Court, who argued that land use controls must be exercised for the general welfare, not just the welfare of the local community. Additionally, it was Justice Hall's contention that the general welfare included making fair provision for the housing needs of those who could not afford large lots, or large houses, or conventional single family homes at all. Justice Hall's 1962 dissent, seen at the time as a marker for all that was wrong with New Jersey's housing jurisprudence, eventually matured into his opinion for a unanimous Supreme Court thirteen years later in the celebrated Mount Laurel I opinion, and it is to the Mount Laurel process that we now turn in Part III.

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[74] Williams, supra note 69, §66.05, at 5-6.

PART III

THE MOUNT LAUREL DOCTRINE

A. The Evolution of the Mount Laurel Doctrine.[75] The case which lent its name to the Mount Laurel doctrine was that of Mount Laurel Township, a rapidly growing rural-suburban township in Burlington County, seven miles from the outskirts of Camden. Starting in the 1960s it began to be apparent to some people that municipalities like Mount Laurel Township were using their zoning ordinances for improper purposes.[76] By zoning for large single-family houses on large lots and by excluding apartments, towns thought they could be assured of attracting only well-off families who would be substantial taxpayers. In effect, many towns used their zoning to build walls, successfully excluding low- and moderate-income people. In the early 1970's, housing activists began litigation against some of the exclusionary municipalities around the State. This led to the landmark Supreme Court decision in 1975, now known as Mount Laurel I, and marked the beginning of the evolution of the Mount Laurel doctrine. In Mount Laurel I, the New Jersey Supreme Court held that growing municipalities have an obligation to provide, through their land use policies and regulations, a realistic opportunity for meeting their fair

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[75] This summary is drawn from Lamar, Mallach and Payne, Mount Laurel At Work: Affordable Housing in New Jersey, 1983-1988, 41 Rutgers L. Rev. 1197, 1199-1205 (1989). It is repeated here in full for the convenience of the reader.

[76] See, e.g., Williams & Norman, Exclusionary Land Use Controls: The Case of Northeastern New Jersey, 22 Syracuse L. Rev. 475 (1971); Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 Stan. L. Rev. 767 (1969).

share of the regional need for low and moderate income housing.[77]

The doctrine is rooted in the New Jersey State Constitution, which establishes that the power to regulate the use of property must be used in accordance with "the general welfare". In New Jersey, as in most other states, part of the police power is delegated to the municipalities in the form of the power to zone, and with this transfer of power goes the obligation to protect "the general welfare".

Up to the early 1970s, as noted above, the definition of "the general welfare" in the realm of land use policy and regulations had been assumed to mean the welfare of those people who currently lived in a town, paid taxes, and cast the votes in local elections. Through its Mount Laurel I decision of 1975, the Supreme Court discarded this "home rule" interpretation of "general welfare." Instead, it defined "the general welfare" as applying to all residents of a municipality and its region, and it clearly described for all to understand the constitutional violations in certain common municipal land use practices.

In the years between 1975 and 1983, in spite of a number of housing suits, there was little change in municipal land use practices and little affordable housing built in the suburbs. The Supreme Court had erroneously assumed that municipalities would comply voluntarily with the constitutional mandate laid down in Mount Laurel I. The case involving Mount Laurel Township itself, for instance, came back to the Supreme Court because not one unit of affordable housing had been built in that township in the

[77]Mount Laurel I, supra note 6, at 174.

intervening eight years.[78] This time the court handed down a decision which attempted, in Chief Justice Wilentz's words, "to put some steel"[79] into the doctrine. The decision announced on January 20, 1983, while staunchly upholding Mount Laurel I, went way beyond it in its search for ways to strengthen the doctrine and make it work.

The opinion opened up new ground in several ways. In addition to reaffirming the Mount Laurel I doctrines on "regional general welfare" and "fair share", the opinion expanded the scope of the constitutional obligation to include all municipalities in the State, not just those experiencing growth.[80] Most importantly, the opinion spells out in detail how to fashion an effective remedy. While a wide range of choices is left open to towns in complying with the Mount Laurel obligation, the opinion is clear and firm that towns must, if necessary, go much further than simply removing obstacles to inexpensive housing. To get results, towns may have to take some affirmative steps to encourage the construction of low- and moderate-income housing, such as offering density bonuses to developers and requiring mandatory set-aside of a portion of the new units for lower income households.[81] To encourage litigation that would remedy exclusionary zoning, the Court offered a "builder's remedy" to successful developer-plaintiffs, who would gain

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[78] See generally Payne, Housing Rights and Remedies: A "Legislative" History of Mount Laurel II, 14 Seton Hall L. Rev. 889, 891-99 (1984).

[79] Mount Laurel II, supra note 25, at 200.

[80] Id. at 214-215. Every municipality must provide for its "indigenous" poor; municipalities in "growth areas" were required also to provide for a fair share of other regional needs for low- and moderate-income housing.

[81] Id. at 260-261.

a presumptive right to a building permit if their proposed development met Mount Laurel criteria.

Second, the Court stated that the size of a municipality's fair share obligation must be quantified precisely, but recognized that a calculation of fair share may result in widely differing allocations to different kinds of towns due to environmental conditions and so forth.[82]

Third, for municipalities which adopt acceptable housing programs and zoning ordinances, the Court offered six years of immunity from litigation through a judgment of "repose".[83]

In dealing with enforcement, the opinion was equally specific and innovative. In brief, the Court established that all Mount Laurel litigation would from then on be handled by three specially assigned judges. Moreover, the judges were encouraged to appoint special masters in order to help towns plan for the housing and make the necessary zoning changes.[84]

The three judges were well aware that a major problem they had to overcome was to determine a methodology for calculating the specific numerical size of each municipality's "fair share" obligation. After an extensive period of informal consultation with a group of twenty-two planners and a lengthy trial, a methodology was approved by the court in the Middlesex County and Warren Township cases. This came to be called

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[82] Id. at 215-216.

[83] Id. at 292.

[84] Id. at 281-284.

the "consensus methodology" or, later, the "AMG" methodology, after the case in which it was most fully explained, AMG Realty Co. v. Warren Township.[85] The methodology used readily available data (much of it census data) on housing conditions, population, jobs, median income for the area, and also took into consideration areas designated as growth areas in the 1980 State Development Guide Plan.

In the period from 1983 to 1986 there were over 100 new suits filed against some 70 municipalities by developers, in addition to others predating Mount Laurel II which had been brought by civic groups, the Public Advocate and a few developers.[86] As some of these suits moved towards completion under the more effective enforcement mechanisms of Mount Laurel II, the pressures on municipalities increased. A few municipalities complied voluntarily and a number of others reached court settlements.[87] Municipalities that were determined not to comply shifted their attention to the Legislature, where both proponents and opponents of affordable housing were seeking to advance legislative responses to Mount Laurel.

After intense negotiations, a compromise in the form of the Fair Housing Act of 1985 was signed by the Governor on July 3, 1985.[88] With this Act the State took on full

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[85] Supra, note 35.

[86] See Mallach, The Tortured Reality of Suburban Exclusion: Zoning, Economics and the Future of the Berenson Decision, 4 Pace Env. L. Rev. 37, 119 (1986).

[87] See Hills Development Co. v. Bernards Township, 103 N.J. 1, 64 (1986)(22 settled cases at time of decision).

[88] L.1985 ch.222, N.J.S.A. 52:27D-301 et seq. (West 1986). For a summary of the Act, see Franzese, Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat, 18 Seton Hall L. Rev. 30 (1988).

responsibility for the administration of the Mount Laurel doctrine. The Act established an administrative agency, the Council on Affordable Housing (COAH), to determine the "fair share" obligations of all the municipalities in the State and to set up a process of certification for municipalities which developed acceptable fair share plans. The municipal decision to participate in the COAH process was voluntary, but the incentive to participate was that once it had been certified by COAH, a municipality would be guaranteed protection from further exclusionary zoning suits for six years. In another provision the Act allowed towns to meet 50% of their fair share obligation by paying for the construction or rehabilitation of low- and moderate-income units in another municipality. These fair share transfers were called Regional Contribution Agreements (RCAs), and it was anticipated that in most if not all cases the transfers would be arranged between a suburban community and an older urban municipality in its region. The process was to be supervised by COAH.

A third provision provided some funding for affordable housing construction or rehabilitation. The Fair Housing Act included a new $15 million appropriation to the New Jersey Housing and Mortgage Finance Agency and $2 million in neighborhood preservation funds that were already in the governor's budget. Companion legislation dedicated an increase in the realty transfer tax, of $.75 per $500 for real estate valued in excess of $150,000, to the Neighborhood Preservation Revolving Fund at D.C.A.; so far this tax mechanism has generated about $20 million a year for D.C.A.'s Neighborhood Preservation Balanced Housing Program, although this source has diminished substantially with the housing recession of the early 1990s.

On February 20, 1986 the Supreme Court, in a unanimous decision in Hills Development Corp. v. Township of Bernards,[89] often referred to as Mount Laurel III, upheld the constitutionality of the Fair Housing Act in its entirety and ordered all pending Mount Laurel cases to be transferred to COAH. The Court said it was willing to give the new law the time and latitude to work, even if it meant some delays in individual projects in order to achieve wider results down the road. The Court warned that the promises of the new Fair Housing Act must be met and that if the Act achieved nothing but delay, the Court would be forced to step in again. The Supreme Court has considered several technical Mount Laurel issues since 1986, but it has not given any evidence that it sees a need to broadly revisit the Mount Laurel doctrine.[90]

In the spring and summer of 1986, COAH published its guidelines[91] which included:

* the definition of six housing regions in the State,
* an allocation formula to determine low- and moderate-income housing need within these regions,
* fair share housing obligations for each housing region and municipality, and

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[89] Supra note 87.

[90] In Urban League of Greater New Brunswick v. Borough of Carteret, 115 N.J. 536 (1989), the Court declined to award attorneys fees to a prevailing Mount Laurel party on a related Title VIII claim. In Van Dalen v. Washington Township, 120 N.J. 234 (1990), the Court deferred to COAH's choice of a methodology that arguably reduced the municipality's fair share. In Prowitz v. Ridgefield Park Village, 122 N.J. 199 (1991) the Court held that Mount Laurel units must be assessed for property tax purposes at their controlled prices, not higher market values. Most recently, in Alexander's Department Stores of New Jersey, Inc. v. Borough of Paramus, 125 N.J. 100 (1991), the Court allowed a neighbor's challenge to a rezoning that was crucial to Mount Laurel compliance to be heard in a separate Law Divison suit, rather than requiring that it proceed before COAH. See also text following note 102.

[91] N.J.A.C. 5:92-1 et seq.

* a "certification" process whereby municipalities can comply with the Act's requirements and insulate themselves from builder's remedy suits.

COAH used the Center for Urban Policy Research (CUPR) at Rutgers University as its consultant to define housing regions and develop a housing allocation formula. The housing regions coincide in large part with the Primary Metropolitan Statistical Areas (PMSA'S) used by federal agencies for statistics on population and income. The way the regions are defined plays a key role in the formula used to determine housing need.

The COAH methodology, although similar in concept to that of the consensus or AMG methodology used by the Courts, incorporates modifications and additional features that produced, in most cases, considerably lower fair share numbers.[92] The complex formula was used to determine affordable housing allocations for the six year period between 1987 and 1993. New figures will be calculated in 1993.

Within each region, present housing need is calculated by estimating from census data the amount of deficient housing stock and estimating the portion of such housing occupied by households with low- and moderate-incomes. To this is added an estimate of prospective housing need in the region, based on a projection of the number of new low- and moderate-income households expected to form by 1993. Each municipality is

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[92] For an explanation see Payne, Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies, 16 Real Estate Law Journal 20, 29-32 (1987). A particularly egregious feature is the choice of housing regions. Because of the legislative mandate to use small housing regions (2-4 counties), poor and minority-dominated urban centers, such as Jersey City, were placed in regions that had little growth potential, so that little Mount Laurel housing was in fact built. By contrast, rapidly growing parts of central Jersey were placed in regions that had very small urban populations, so that these communties ended up with relatively small fair shares, despite their capacity to provide a lot of housing. This arrangement is clearly discriminatory in effect, and probably in intent as well (although the latter is unprovable under current constitutional norms.

expected to make provisions for its own present housing need, except that municipalities whose percentage of existing need exceeds the regional average (mostly the cities in the urban core) are entitled to have this excess present need reallocated to other municipalities. The excess present need and all of the prospective need is allocated to the remaining municipalities in the region using a formula that measures each municipality's capacity to provide affordable housing, based on the municipality's growth area land, employment opportunities and income level relative to those of the region as a whole.

Besides receiving lower Fair Share numbers to start with, municipalities complying through COAH under the Fair Housing Act may transfer 50% of their allocation to another receiving municipality in their region through a Regional Contribution Agreement (RCA); court settlement municipalities did not have this option. Further, municipalities may also work with COAH to reduce their numbers based on the number of affordable units built or rehabilitated since 1980, shortages of vacant land, limited infrastructure and so forth, as they had previously done in court.

COAH began reviewing petitions for substantive certification in January, 1987, and issued its first ten certifications in May, 1987. As of September, 1991, 157 municipalities had petitioned and 124 had received substantive certification.[93] This is a participation rate of 28% and a certification rate of 22% of the state's 567 municipalities. Numbers can be deceiving, however. Of the 124 certified municipalities, 34 had fair share obligations of zero, making their participation meaningless. This reduces the effective certification

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[93] COAH, "Status of Municipalities," September 1991.

rate to 16% (90 of 567 municipalities). Moreover, another 35 municipalities had fair share obligation of fewer than 50 Mount Laurel units per community, an average of 22 units each, and a total obligation for all 35 towns of 787 units. The limited success of the COAH methodology in spurring voluntary participation is apparent.

B. The Alliance for Affordable Housing Study. In 1988, the Alliance for Affordable Housing conducted an extensive study of Mount Laurel compliance in 54 New Jersey municipalities that had experienced Mount Laurel activity. The study also examined ten completed Mount Laurel developments to construct a physical, economic and social profile of Mount Laurel housing and resulted in a report entitled "Affordable Housing in New Jersey: The Results of Mount Laurel II and the Fair Housing Act." The study was released by the Alliance, a private, non-profit housing coalition, in December 1988, and subsequently published in revised form in the Rutgers Law Review.[94]

The survey of 54 municipalities which have affordable housing plans discloses a total of 2,830 units completed as of 1988, either in set-aside developments or through other methods. An additional 11,133 units were under development, and some unknown portion of these should have come to completion since 1988. A further 8,740 units have been proposed in affordable housing plans submitted to COAH or the courts but have not yet reached the stage of specific development. Given the downturn in housing that occurred after the study was completed, it is unlikely that many of these units went forward as planned.

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[94] Lamar et al., supra note 75 at 1206-15.

Two distinct patterns of construction of affordable units have emerged. In the first pattern, there is a preferece for sale units in those set-aside developments built by the private sector. Age-restricted units are not a major component of set-aside developments. The dominance of this pattern, moreover, emphasizes the extent to which New Jersey's affordable housing policy is tied to prevailing economic forces, which have produced a robust housing market in the last decade but which has seen very diminished opportunity in the current climate of economic retrenchment.

The second pattern, housing built through other methods, usually by non-profits or the public sector, compensates for the imbalances in the first to some extent by providing more low-income units and more rentals. However, because of the availability of federal subsidies for senior citizen housing, age-restricted units tend to dominate this category, leaving younger low-income households seeking rental units with very few choices. In addition, the total number of units produced by these other methods is much less than the number produced in set-aside developments, so that the set-aside pattern tends to dominate the overall numbers.

Appendix B contains a more detailed breakdown of this information.

The study had limited demographic information about the occupants of the Mount Laurel housing, and its findings cannot be regarded as having scientific validity.[95] They are suggestive, however, and coincide with the impressions of many working in the field.

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[95] See Lamar et al., supra note 75, at 1249-50. The study also noted that the available information presented is based on the residents, or buyers, and not on the total pool of applicants. It is unclear whether the buyers are representative of the total pool of applicants, or whether the difficulties of becoming a homeowner - in particular the various hurdles that one must get over in order to obtain a mortgage - are disproportionately screening out particular populations in need.

Among the study's conclusions were the following:

- Mount Laurel residents are a mix of small and large households generally typical of the population as a whole, except that they contain a larger percentage of single individual households, and fewer two person households, than the population at large.

- Mount Laurel residents are young - the great majority of the households are headed by an individual aged 35 or less; the developments contained very few senior citizen households.

- The typical Mount Laurel household is a married-couple household, generally with children. Both single individuals and single parent households are moderately over-represented relative to the population as a whole.

- Hardly any Mount Laurel buyers owned their own home before buying their present unit; most were renters, but a substantial percentage, including some single parents with children, lived with their parents.

- Most residents of Mount Laurel units came either from the same municipality, or a nearby municipality 10 miles or less away. With a few exceptions, most developments contain only a modest percentage of buyers who came there from urban or inner city areas.

- The occupations of Mount Laurel residents vary widely, and are a mix of white collar, sales and clerical, blue collar, and service occupations roughly paralleling the labor force as a whole. Among the occupations, including the professional and managerial ones, few are likely to lead to dramatic economic advances in the future.

- Most Mount Laurel households live very near to where they work. It is likely that through buying these units many workers were able to move closer to their work, or become homeowners while remaining close to work.

- Most Mount Laurel developments are under-represented with respect to minority occupancy generally, and appear to be most severely under-represented with respect to African-American occupancy.

This last finding, the apparent underrepresentation of minorities, and particularly African-Americans, is the most troubling. Many of the studied developments had very small minority populations; at least three appeared to have no African-American residents at all and in others the percentage varied from 1% to 3%.

There is anecdotal evidence that the African-American population is highest in one Mount Laurel development located close to a major urban center (Trenton).[96] This suggests that the suburban strategy implicit in the Mount Laurel doctrine is fundamentally flawed, insofar as it leaps over the older suburbs and concentrates on the developing fringes of the state that may be perceived to be the least welcoming to minorities. In addition, the study found that the outreach efforts being made into minority and inner city areas by developers and others involved in the marketing of Mount Laurel units was inadequate. Most of the occupants in the developments studied had previously lived nearby. This puts a premium on word-of-mouth and other local forms of advertising. Since the communities involved are, in all likelihood, overwhelming white to start with, the predictable result is that the applicant pool is overwhelmingly white as well.

Moreover, the overwhelming majority of Mount Laurel units are offered for sale, rather than rent. Since minorities are likely, on the whole, to be relatively less well-off than others within the low- and moderate-income categories this would require substantial cash resources on the part of the would-be homebuyer. Further, this would significantly reduce the percentage of African-American and other minority households in the pool of potential buyers. Partial confirmation of this can be found in one of the studied developments (located a considerable distance from any minority population center). A 54-unit rental section had five African-American households, while in the rest of the development's 162 sales units, there was only one African-American household.

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[96] Lamar et al., supra note 77, at 1256.

C. Assessing the Mount Laurel Doctrine. How does the Mount Laurel process measure up in terms of the three factors we identified in Part I as relating to discrimination in public contracting?

Home ownership. Despite the predominance of sales units in the Mount Laurel housing built to date, the process is not likely to stimulate home ownership among minorities in meaningful ways. First, as mentioned, the financing hurdles associated with home ownership bear more heavily on minorities even when, as in the case of Mount Laurel housing, the home price is dramatically lower than the market would command. More importantly, however, the sales prices are controlled upon resale, so that the homeowner has very little equity appreciation. The usual formula allows recovery only of the downpayment (and possibly capital improvements), adjusted for inflation. Purchase of a Mount Laurel unit will not contribute realistically to capital formation for the would-be contractor. The most that can be said is that the opportunity to provide shelter at an appropriate percentage of household income may allow for some saving, which could help finance purchase of a non-Mount Laurel unit at a later date.

Education. The Mount Laurel process rates highly on this scale. By and large, the successful Mount Laurel developments have been in the "hottest" parts of the developing suburbs, broadly speaking in the band of central Jersey counties from Morris in the north and west through Somerset, Hunterdon, Middlesex, Monmouth and Ocean. These areas tend to have very good school systems (although many of the very best are concentrated in the older suburbs, where Mount Laurel has scarcely made a showing). By definition, families shopping for expensive homes (in developments that can absorb

the cost of the Mount Laurel set-asides) will not gravitate towards weak school districts and they tend to work on upgrading any weaknesses that they find after arriving. There can be little doubt that minority families, when they finally succeed in obtaining a Mount Laurel home in these areas, will benefit from superior educational opportunities, for their children if not for themselves.

Access to jobs. The Alliance study suggested that most of the Mount Laurel occupants did indeed live close to where they worked. As with education, this should redound to the benefit of minority households, but in this case to the adult workers in the household directly, rather than through the next generation. This is particularly so because, as the study found, Mount Laurel households tend to be young and presumably at the point in their careers where the opportunity to move up into self-employed status is still before most of them.

On balance, then, the Mount Laurel process is consistent with the rationale that has been explored here. Moving from theory to practice, however, minority households have little to show for all the effort and political controversy that has gone into establishing and implementing the Mount Laurel doctrine. The absolute number of Mount Laurel units built, while not insignificant, is but a small patch on a very large problem and, as the current recession shows, extremely sensitive to economic forces. And because minority households, although disproportionately poor, are nonetheless substantially outnumbered in absolute terms by poor white households (many of whom already live in the suburbs and have better information about the availability of Mount Laurel units), it is predictable that these minorities in need will be overlooked absent a vigorous outreach effort.

Offsetting even this modest potential for success in contributing to a diversification of the public contractor pool are two very significant negatives. First, as has been mentioned, the Mount Laurel doctrine has scarcely made a dent in the older suburbs, where schools, transportation and proximity to the support networks of the urban minority communities are maximized. The locational literature suggests that outwardly mobile African-Americans are most likely to settle in communities at the fringe of the urban ghettos, rather than leapfrogging to the communities farther out.[97]

The Mount Laurel process, as presently evolved, does not work very well in the older suburbs because inclusionary zoning has depended on developments that are enough in scale to easily absorb the costs of the below-market Mount Laurel units. In built-up areas, however, in-fill development is likely to be much smaller in scale, and the active developers are much less familiar with inclusionary techniques. Moreover, most older suburbs welcome in-fill redevelopment if it is carried out at a high enough economic level to promise benefits to the community. Compared to a more rural community, which may be trying to discourage development altogether, threat of a Mount Laurel suit is meaningless in these older suburbs, and the developers have no need to offer a money-losing form of development simply as a wedge to gain access. Finally, responding to the political demands of inner-ring suburban constituents, the Legislature has made it more difficult in the so-called Fanwood Act to assemble land for Mount Laurel projects in these

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[97] See, e.g., Rose, "The all-black town: Suburban prototype or rural slum?," in Hahn, ed., "People and Politics in Urban Society," Urban Affairs Annual Reviews (1972).

communities.[98]

The other major impediment to any possible success for the Mount Laurel process is the Regional Contribution Agreement (RCA) feature added by the Legislature in the Fair Housing Act of 1985. As noted earlier, communities with a Mount Laurel obligation can contract with other municipalities to transfer up to 50% of the number of units required, with appropriate financing, of course. Naturally, suburban districts are the "sending" districts and impoverished cities are the "receivers." Although much rhetoric has poured forth on the principle that RCAs "help" the cities by providing financing for needed housing, and this is undoubtedly true so far as it goes, there can be little doubt that the political motivation for RCAs is mostly discriminatory.

As of September, 1991,[99] twenty-nine RCAs had been approved, involving transfer of a total of 2910 units at a cost of $61 million, an average of approximately $21,000 per unit. Recipients included Newark, Jersey City, New Brunswick, Perth Amboy and Asbury Park, who together accounted for 18 of the 29 RCAs; the remainder were smaller cities, but in every case more distressed than their sending counterpart (Middletown to Long Branch, for instance). Some sending municipalities fund their RCAs by collecting development fees from developers of non-Mount Laurel projects within the community. Other have taken on long-term general obligation debt, surely a spectacular

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[98] See N.J.S.A. 52:27D-311.1 (Supp., 1991). Fanwood, a Union County suburb of Newark and Elizabeth, was required by COAH to permit demolition of several old structures controlled by developers willing to erect Mount Laurel housing. The Fanwood Act now prevents demolitions without municipal permission. Since little redevelopment is likely to take place without demolition, the older suburbs have an effective veto over whether low- and moderate-income housing will be produced. Cf. note 6 supra (municipal veto over federally-sibsidized housing).

[99] See COAH, "Status of Municipalities," September, 1991.

affirmation of some communities' commitment (and the commitment of their succeeding generations) to the value of exclusion!

The New Jersey Public Advocate, in a challenge to several individual RCAs, has marshalled impressive evidence of their discriminatory effect, in that they help to deny minorities the benefits of living in suburbs of their choice and perpetuate racial segregation of both cities and suburbs. There is a good case to be made that RCAs violate the Federal Fair Housing Act as well.[100] Nonetheless, RCAs have been sustained against facial challenge by the New Jersey Supreme Court,[101] and as applied by the Appellate Division.[102] In this latter case, Warren Township, the state Supreme Court recently denied review, thus reinforcing the observation made earlier that the Court does not wish to tackle any controversial aspect of the Mount Laurel doctrine at this time if it can avoid doing so.

The Mount Laurel message is therefore mixed. It is an approach that has powerful potential, but thus far has shown relatively little accomplishment, in terms of housing production for all segments of the poor community and especially for the minority poor. The energy poured into the Mount Laurel process certainly cannot be used to justify an argument that minorities are protected against the housing discrimination that diminishes their participation in the competition for public contracts. In terms of results, we are a

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[100] See Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 826 (2d Cir.), aff'd 488 U.S. 15 (1988)(per curiam).

[101] See Hills Development Co., supra note 87.

[102] In re Petition for Substantive Certification Filed by the Township of Warren, 247 N.J. Super. 146 (App.Div., 1991).

long way from that point. Even more broadly, the Mount Laurel experience suggests the limits of well-intentioned race-neutral remedies.

The Mount Laurel doctrine was conceived in race-neutral terms and it has been administered largely in that fashion. In theory, attention to low and moderate income housing should benefit minorities more than whites, since they have a disproportionate need for such housing. The reverse seems to be the case, and both the Fanwood Act and the RCAs remind us why. We are still a race-thinking society, and it is unlikely that we will overcome the scars of our racial past without race-conscious remedies in the future.

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VOLUME X

APPENDIX

HOUSING DISCRIMINATION IN NEW JERSEY AND ITS POSSIBLE IMPACT ON DISCRIMINATION IN PUBLIC CONTRACTING

HISTORICAL RECORD OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN PUBLIC AND PRIVATE CONTRACTING IN NEW JERSEY

A Report Submitted to
NJ TRANSIT
and the
Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts

by
The Afro-American Studies Program
University of Maryland at College Park

APPENDIX A

SCHOOL SPENDING/COAH CERTIFICATION COMPARISON

K-12 Districts Ranked by Current Expenditures per Weighted Pupil

1984-85

A. Districts Spending Above State Av. CE/wtd. Pupil ($3,560)

DFG	Districts	CE/wtd. pupil Amt.	Rank	Enrollment - Total Resident	No. Black	No. Hispanic
I	Morris	$5141	1	4,159	1,080	198
J	New Providence Boro	5021	2	1,645	14	23
H	Paramus	4975	3	3,479	19	42
J	Princeton	4913	4	2,331	293	51
H	Fairlawn Boro	4913	4	3,642	10	44
H	Mahwah	4852	6	1,738	43	15
H	Green Brook	4844	7	640	8	19
I	Teaneck	4804	8	4,681	1,692	274
J	Bernards Twp	4798	9	1,945	14	9
J	Millburn	4758	10	2,727	20	28
I	Bridgewater/Raritan	4749	11	5,685	61	40
I	Lawrence Twp	4693	12	2,267	312	22
J	Tenafly	4672	13	2,232	19	37
J	Kinnelon Boro	4657	14	1,314	1	12
G	New Milford Boro	4654	15	1,700	18	25
I	Cedar Grove	4651	16	1,348	9	17
J	Chatham Boro	4575	17	1,205	1	6
J	Glen Rock	4567	18	1,705	40	6
I	Scotch P./Fanwood	4555	19	4,087	519	28
H	Hasbrouck Hts. Boro	4540	20	1,215	13	25
I	Emerson Boro	4518	21	1,039	3	21
F	Ocean City	4503	22	1,580	218	11

G	Districts	CE/wtd pupil Amt.	Rank	Enrollment - - - - - - - - - - Total Resident	No. Black	No. Hispanic
	Hackensack	$4498	23	3,583	1,304	638
	Madison	4493	24	1,886	114	22
	Ridgewood Twp	4425	25	4,813	103	74
	Caldwell/W.Caldwell	4425	25	2,512	9	13
J	Montgomery Twp	4415	27	1,261	16	4
I	West Orange	4413	28	4,559	262	112
F	Ridgefield Boro	4406	29	1,220	15	44
H	Fort Lee	4402	30	2,551	47	141
I	Ramsey	4397	31	2,304	15	6
G.	Franklin Twp.	4384	32	4,233	1,755	135
J	Chatham Twp	4383	33	1,400	7	2
H	So. Brunswick	4382	34	3,090	174	42
J	Livingston	4381	35	4,360	25	30
I	Park Ridge Boro	4342	36	1,255	16	22
C	Dumont	4333	37	2,549	14	96
I	Cherry Hill	4329	38	11,014	343	117
J	Summit	4319	39	2,787	203	93
I	Verona	4317	40	1,775	20	11
G	Butler Boro	4315	41	1,135	2	5
I	Leonia	4309	42	1,048	36	72
I	Moorestown	4307	43	2,360	156	8
F	Woodbridge	4291	44	10,867	378	274
I	Cresskill	4290	45	1,166	5	13
A	Wildwood City	4278	46	610	230	38
H	Highland Park	4256	47	1,583	239	61
F	Hawthorne	4213	48	1,978	4	26

FG	Districts	CE/wtd pupil Amt.	Rank	Enrollment - Total Resident	No. Black	No. Hispanic
J	Ewing	$4201	49	3,597	973	46
J	Mountain Lakes	4200	50	1,029	2	9
E	Bordentown Area Reg	4172	51	1,515	189	9
F	Englewood	4171	52	3,113	1,725	369
C	Linden	4151	53	4.326	1,550	226
J	Glen Ridge	4145	54	1,323	35	17
G	Pompton Lakes	4136	55	1,544	5	15
G	So. Plainfield	4125	56	3,370	256	92
H	Metuchen	4123	57	1,792	141	42
G	Bergenfield	4119	58	3,396	80	198
F	WoodRidge Boro	4110	59	800	4	32
I	Cranford	4104	60	3,081	148	34
H	Waldwick	4104	60	1,630	6	28
I	Wayne	4081	62	6,633	36	58
G	Saddle Brook	4069	63	1,489	1	22
G	Somerville	4059	64	1,477	309	120
H	Peqannock Twp	4053	65	2,254	6	9
F	Secaucus	4045	66	1,658	7	27
I	So. Orange/Maplwd.	4028	67	5,032	790	121
G	Edison	4026	68	10,011	447	246
H	Westwood Reg	4017	69	2,644	139	32
G	Bogota	3990	70	1,119	14	53
G	Piscataway	3988	71	5,756	1,386	212
F	Old Bridge	3984	72	8,694	266	214
F	Willingboro	3976	73	7,667	4,447	249
I	Montclair	3969	74	5,430	2,361	103

DFG	Districts	CE/wtd. pupil Amt.	Rank	Enrollment - Total Resident	No. Black	No. Hispanic
G	Matawan-Aberdeen Reg	$3965	75	4,314	567	93
J	Westfield	3956	76	5,037	268	31
E	Pt Pleasant Beach	3955	77	750	11	15
D	Manville	3951	78	1,175	1	7
I	Boonton Town	3918	79	1,186	75	37
E	Dunnellen	3914	80	879	11	15
H	Cinnaminson	3910	81	2,348	169	11
G	Rutherford	3901	82	2,249	51	66
D	South River	3892	83	1,517	123	31
F	Hazlet	3875	84	3.590	26	50
J.	Bernardsville	3872	85	1,142	3	14
J	Holmdel	3856	86	2,086	4	23
H	Midland	3843	87	957	11	5
G	No. Plainfield	3812	88	2,410	61	176
G	Ridgefield Park	3810	89	1,323	12	94
E	Elmwood Park	3806	90	1,802	9	140
I	Hopewell Valley Reg	3785	91	2,368	46	15
C	Lodi	3785	91	2,433	52	183
H	E. Brunswick	3779	93	6,955	104	68
H	Parsippany/Troy Hills	3755	94	8,468	170	136
E	Spotswood	3752	95	1,217	8	10
-B	Burlington City	3749	96	1,464	624	20
G	Haddon Hts	3744	97	831	153	0
-B	New Brunswick	3735	98	4,634	2,659	1,180
F	Middlesex Boro	3702	99	1,958	59	17
	Nutley	3697	100	3,795	87	68

DFG	Districts	CE/wtd pupil Amt.	Rank	Enrollment - Total Resident	No. Black	No. Hispanic
F	Hamilton Twp	$3683	101	10,952	708	148
F	Union Twp	3676	102	6,212	816	104
F	Roselle Pk. Boro	3664	103	1,767	4	66
I	Sparta	3661	104	2,731	1	18
-A	Hoboken	3657	105	4,802	376	3,298
I	Randolph Twp	3647	106	3,798	81	42
F	Cliffside Park	3647	106	1,803	9	129
E	Lyndhurst	3640	108	1,957	6	29
C	No. Bergen Twp.	3588	109	4,942	40	1,430
H	E. Windsor Reg	3580	110	4,963	380	128
C	So. Amboy	3574	111	940	0	5
C	Lakewood Twp	3571	112	5,288	1,596	928
J	Haddonfield	3567	113	1,775	28	7
E	Rahway	3567	113	3,210	1,052	166
H	No. Brunswick	3563	115	3,403	203	63
B.	Districts below State Average CE/wtd. Pupil ($3,560)					
H	Ocean Twp	$3559	116	3,996	154	36
A	Middle Twp	3547	117	1,755	391	11
J	No. Arlington	3546	118	1,458	0	63
J	Roselle Boro	3535	119	2,359	1,347	163
	Bloomfield	3534	120	5,443	186	152
	Haddon Twp	3511	121	1,952	11	7
	Hillside Twp	3503	122	2,876	1,698	301
	Upper Freehold	3502	123	826	104	19
	Bound Brook	3492	124	1,473	30	115

DFG	Districts	CE/wtd. pupil Amt.	Rank	Enrollment - - - - - - - - - Total Resident	No. Black	No. Hispanic
C	Kearny	$3492	124	4,565	15	540
D	Florency Twp	3480	126	1,286	145	12
U-B	Long Branch City	3477	127	4,152	1,488	819
C	Glassboro	3462	128	2,050	628	40
H	Roxbury	3451	129	4,247	62	63
F	Wall Twp	3444	130	3,038	6	13
I	Hillsborough	3440	131	3,614	67	30
D	Pennsauken	3415	132	4,698	873	134
H	Mt. Olive	3412	133	3,850	67	43
U-B	Burlington Twp	3405	134	1,637	490	38
C	Jackson Twp	3404	135	4,925	164	138
U-A	West New York	3404	135	5,489	54	4,552
J	W.Windsor Pl Reg	3397	137	2,813	105	26
F	Jefferson Twp	3395	138	3,142	11	25
A	Penns G/Carney's Pt	3394	139	2,397	773	159
E	W. Milford	3385	140	4,850	91	36
I	Montville	3385	140	3,027	23	17
U-A	Asbury Park	3382	142	3,131	2,446	315
U-A	Pleasantville City	3380	143	2,316	1,802	180
D	Tom's River	3379	144	16,181	297	162
E	Audubon Boro	3377	145	1,197	3	4
B	Monroe Twp	3374	146	2,428	657	107
C	Carteret	3365	147	2,713	273	473
G	Hopatcong	3344	148	2,881	22	44
F	Sayreville	3344	148	4,022	38	61
C	Bayonne City	3341	150	6,621	608	697

DFG	Districts	CE/wtd pupil Amt.	Rank	Enrollment - - - - - - - - - Total Resident	No. Black	No. Hispanic
B	Keyport Boro	$3326	151	977	118	116
C	Neptune Twp	3323	152	4,255	2,430	179
C	Riverside	3316	153	931	30	10
J-A	Trenton	3306	154	14,767	9,728	2,491
H	Middletown	3294	155	10,390	179	108
C	Deptford	3293	156	3,712	595	18
C	Pennsville	3291	157	2,591	10	17
E	W. Deptford	3284	158	2,850	107	26
J-B	Orange	3276	159	4,172	3,561	322
D	Belleville	3261	160	4,362	109	314
E	Vernon	3239	161	4,226	11	48
F	Palisades Pk.	3236	162	1,466	4	64
U-A	Newark	3216	163	55,329	36,270	13,379
C	Weehawken	3211	164	1,493	21	342
E	Hackettstown	3209	165	1,565	16	32
E	Manasquan	3197	166	747	43	1
B	Hammonton	3168	167	1,924	28	277
U-A	Elizabeth	3159	168	15,276	4,850	6,140
A	Salem	3154	169	1,446	965	37
D	Woodbury	3149	170	1,532	452	6
F	Clifton	3148	171	7,189	80	277
C	Plainfield	3129	172	7,820	6,281	822
D	Point Pleasant Boro.	3125	173	2,771	11	22
F	Collingswood	3120	174	1,965	54	39
B	Manchester	3120	174	2,394	348	72
U-A	Jersey City	3116	176	31,686	13,923	10,146

DFG	Districts	CE/wtd pupil Amt.	Rank	Enrollment Total Resident	No. Black	No. Hispanic
U-A	Union City	$3100	177	7,593	113	6,285
D	Belvidere	3098	178	424	3	2
U-A	Atlantic City	3097	179	6,066	4,448	851
D	Dover	3096	180	2,089	210	1,031
U-B	Garfield	3080	181	2,493	48	152
G	Delran	3067	182	2,282	162	9
U-B	Harrison	2998	183	1,487	8	3
E	Woodstown	2974	184	1,103	222	16
D	Brick Twp.	2949	185	9,333	45	84
D	Palmyra	2940	186	1,137	210	12
B	Lacey	2936	187	3,141	13	5
A	Buena Regional	2917	188	2,003	394	370
E	Wallington Boro	2909	189	1,014	21	21
U-B	Phillipsburg	2900	190	2,719	64	43
U-B	Vineland	2884	191	9,867	1,453	3,200
G	Pittman Boro	2878	192	1,759	7	6
U-A	Perth Amboy	2874	193	6,320	669	4,241
U-A	East Orange	2860	194	12,519	11,875	209
C	Newton	2802	195	1,589	30	1
U-A	Keansburg	2788	196	1,662	12	49
B	Pittsgrove	2787	197	1,535	220	29
U-B	Irvington	2786	198	9,340	6,931	1,299
U-A	Camden City	2755	199	19,241	11,816	5,923
E	Maple Shade	2741	200	1,978	105	26
G	Washington Twp.	2698	201	6,533	239	48

DFG	Districts	CE/wtd pupil Amt.	Rank	Enrollment - Total Resident	No. Black	No. Hispanic
J-A	Passaic	$2677	202	9,156	2,218	5,154
A	Paulsboro	2674	203	1,152	474	23
B	Clayton Boro	2671	204	1,194	302	18
U-A	Bridgeton	2668	205	3,692	2,091	373
U-A	Gloucester City	2664	206	2,226	0	15
B	Egg Harbor Twp	2642	207	4,340	638	82
B	Monroe	2577	208	4,260	657	107
U-B	Pemberton	2555	209	7,619	2,162	549
U-A	Paterson	2551	210	24,865	11,689	9,678
U-B	Millville City	2516	211	4,751	692	429

Sources: D Proposed Replies, Appendix A; P-4, #1, #5 and #6.

Analysis Prepared by John M. Payne, Esq., June 12, 1989, by Comparing K-12 Rank List (CLa 44 - CLa 52) and COAH Information Release,

ANALYSIS OF TOP SPENDING DISTRICTS BY COAH PARTICIPATION STATUS (Rank indicated in parentheses)

CERTIFIED

Voluntary

- Cedar Grove (16)
- Chatham Boro (17)
- Hasbrouck Hts. Boro (20)
- Ramsey (31)
- Bordentown Area Reg. (51)
- Haddon Hts (97)
- Union Twp (102)

Court transferred or sued

- New Providence Boro (2)
- Paramus (3)
- Green Brook (7)
- Bernards Twp (9)
- Lawrence Twp (12)
- Kinnelon Boro (14)
- Franklin Twp. (32)
- South Brunswick (34)
- Moorestown (43)
- South Plainfield (56)
- Piscataway (71)
- Bernardsville (85)
- Holmdel (86)
- Randolph Twp (106)

CERTIFICATION PENDING

Voluntary

- Park Ridge Boro (36)
- Glen Ridge (54)
- Somerville (64)
- Boonton Town (79)
- North Plainfield (88)
- Burlington City (96)
- Sparta (104)
- Haddonfield (113)

Court transferred or sued

- Scotch Plains/Fanwood (19)
- Edison (68)
- Old Bridge (72)
- Parsippany/Troy Hills (94)

CERTIFICATION DENIED

- Cherry Hill (38)

PETITION FOR CERTIFICATION WITHDRAWN

- Millburn (10)
- Cinnaminson (81)

HOUSING ELEMENT FILED

Fairlawn Boro (4)
Teaneck (8)
West Orange (28)
Livingston (35)
Verona (40)
Highland Park (47)
Mountain Lakes (50)
Montclair (74)
Hamilton Twp (101)

APPENDIX B

MOUNT LAUREL HOUSING PRODUCTION, 1988

[Source: Lamar, et al., supra note 75, at 1210]

within a relatively short period of time.

Table I also demonstrates the extent to which set-aside development has become the dominant approach to meeting affordable

TABLE I. TOTAL NUMBER OF UNITS IN AFFORDABLE HOUSING ELEMENTS UNITS COMPLETED, UNDER DEVELOPMENT OR PROPOSED SET-ASIDE DEVELOPMENTS AND OTHER METHODS

*Total Included in Housing Elements**	*Number*	*Percent***
Set-aside Developments	16,849	74.2
Other Methods	5,854	25.8
Subtotal:	22,703	100.0
Regional Contribution Agreements	813	n/a
TOTAL	23,516	n/a
*Total Completed or Under Development**		
In Set-Aside Developments		
Completed	2,101	9.2
Under Construction	2,123	9.3
Approved	2,981	13.1
Pending	4,512	19.8
Total Set-Aside	11,717	51.6
Other Methods		
Completed	729	3.2
Under Construction	134	0.5
Approved	275	1.2
Pending	1,108	4.8
Total Other Methods	2,246	9.8
All Methods Combined		
Completed	2,830	12.5
Under Construction	2,257	9.9
Approved	3,256	14.3
Pending	5,620	24.7
TOTAL COMBINED	13,963	61.6
Total Proposed		
In Set-Aside Developments	5,132	22.6
Other Methods	3,608	15.8
TOTAL PROPOSED	8,740	38.4

*The questionnaire design reported only the total number of rehabilitated units included in affordable housing elements and does not permit allocation of these units between completed, under development, and proposed. Because of omissions in reporting, the total number of units accounted for in the allocation between completed, under development and proposed, is slightly less than the total number of units included in housing elements.

**All percents based on the total count of 22,703 units, which excludes the 813 units transferred under RCAs to other communities. Excluding them from the percentage calculations gives a more realistic picture of the housing strategies municipalities pursue within their own boundaries.