



## WHY IS FIXING COAH SO HARD?

### A QUAGMIRE OF CONFLICTING INTERESTS, CONSTITUENCIES, GOALS & SOLUTIONS

In our country, struggles between the left and right wings of our political class have been hard fought. The Affordable Care Act is just one example of an issue on which two clearly defined sides fight tooth and nail. However, as difficult as a traditional left/right battle has become, this is mere child's play in comparison to the conflicts that arise in the context of "fixing" the Council on Affordable Housing (COAH). To some, COAH is a left-wing institution whose primary mission is the redistribution of wealth. Yet others assert that COAH is the main component of a right wing reform – a near libertarian effort – to curb the abuses of governmental power occurring at the municipal level in the misuse of the zoning power. It is both an intrusion of State administrative power into local affairs, and the well-beloved shield protecting local affairs from the courts. Simply, COAH has been many different things to many different factions and constituencies over time. It is no wonder that it is so hard to have a productive conversation about how to fix a thing, when the speakers do not share a common understanding of the problem that is to be solved; the role of government – and particularly State government – in solving it; or even a shared understanding of where we started and how we got to where we are today.

In the next three sections, I take a shot at explaining three entirely different perspectives on the nature of "the problem" that we face today with some observations on who in our society champions that perspective.

### THE PROBLEM *IS* COAH

First, the elimination of COAH is just a part of the overall effort by the Christie Administration to streamline State government. COAH and the State Planning Commission among other agencies and authorities are creatures of the mid-1980's. This was a period in which the State's political class was enamored with the idea that there could be "independent" points of State authority that could focus on a particular issue from a statewide perspective, but that could be buffered from direct political control – run by an appointed group with wide-ranging backgrounds and staffed with professionals not beholden to the political core of the Executive branch. A sitting governor could observe that some action by such a body is regrettable, but that s/he was not in a position to do anything about it. This approach did not last long and by the McGreevy administration, COAH had already been moved to DCA administratively and under McGreevy, the DCA Commissioner was made the Chair of COAH and its staff effectively under the

Commissioner's direct control. The incoming Christie administration made it clear from the beginning that it sought to eliminate all of the vestigial "in, but not of" bodies and that their elimination would be a cost savings and result in an increase in the efficiency of State government. In COAH's case, why keep all of the expensive structures of an "in, but not of" agency that is already functioning as if it were staff to a cabinet member? COAH was simply one of many inefficient uses of State resources that fell into this category for the incoming administration

Second, a clear argument can be made that COAH is a drag on the economy and our economic recovery. Its very existence requires towns to plan, and the legacy of the McGreevy/Bass-Levin policy of "growth share" required them to plan again, and plan yet again. And somewhere along the line, the focus on addressing suburban zoning that had been at the heart of Mount Laurel I and II had morphed into the imposition of setasides in urban redevelopment settings. During the Christie transition, the Mayor of Perth Amboy was heard to ask in many forums when did Perth Amboy engage in exclusionary zoning? Why do we need to be punished or corrected, to provide inclusionary housing in the one market-rate development to happen in the City in decades? Her questions were powerful and, for many, utterly unanswerable. The idea that COAH is the problem is a natural conclusion for urban mayors and the developers that are trying to redevelop and revitalize our cities and who have come to see setasides as a cost or tax that often is the back-breaking straw that stops promising revitalization efforts. In the suburban context, the legacy of the growth share approach was the adoption of municipal housing plans that were based on towns providing group homes, senior citizen developments and 100% affordable sites funded largely by exactions levied on non-residential development. Commercial, industrial and office developers had safely ignored Mount Laurel and COAH for two rounds, but now they were facing huge financial expectations by suburban towns seeking to fund their compliance without allowing any new market rate housing. Non-residential developers and urban developers and all of the elements of the economy whose needs they serve have come to see COAH as a financial drag and a key problem.

Third, the obvious "output" of COAH is a subsidized housing stock – it is inherently in the business of redistributing wealth and consumption. It is always unpopular with the right to take resources away from the successful agents-of-change and innovation and shifting that to consumption by others. That COAH by 2013 looks and acts like a public housing agency fits neatly within a traditional left-right debating point, and gains the support of many in the conservative right for its elimination.

Fourth, there are many "good planning" advocates that argue that COAH-related policies are irrelevant to current realities. Justice Hoens' dissent outlines the intellectual framework that supports this view. Mount Laurel is defined as a judicial response to the needs of a specific era that included two perspectives. First, it was fashionable social science in the 1970's to pursue racial justice through policies seeking the dispersion of the urban poor into the

suburbs, creating upward mobility, access to jobs, improved educational opportunities and social integration resulting from dispersion. But in 2013, it is not hard to find critics that point out that such dispersion would leave the worst-of-the-worst behind in a declining urban core and that a better policy is to invest in our cities to make them better places for all to live. The goal is to reverse “white flight” and bring a mixed race middle class back to our urban cores. Dispersion is cast in this argument as a detriment to the possibility of improving urban life and a hindrance to social progress. Second, Mount Laurel was a product of its age because it had to deal with the demographic reality of the Baby Boom generation coming of age and seeking homes in the suburbs. It is easy to find current commentators observing that the current generation of young people coming into the normal ages of household formation are delaying forming stable households and are much more focused on urban living. The planning literature is full of pundits proclaiming the “end of the suburbs” and other similarly titled articles and books proclaiming that a new world is unfolding. Third, it is said that environmental regulation has effectively ended suburban development anyway. In a bit of irony, under the Christie administration the DEP has adopted Wastewater Quality Management Plans that are so tightly drawn so as to be effectively the “Big Red Map” of the McGreevy administration that was opposed by a robust State Planning Commission and its staff. With State Planning effectively eviscerated in the Christie reforms, there was no institutional check. Unlike the State Plan, the WQMP are not subject to an impact assessment or a requirement that they include sufficient vacant developable land to accommodate reasonable growth and, as a result, they don’t. If the “frontier” has been effectively shut by a combination of DEP programs, the Highlands & Pinelands Commissions, and the State’s aggressive open space acquisitions of the past couple of decades, what is left to fight over anyway?

The result is an internally consistent argument that eliminating COAH gains savings and efficiency in State and local government, facilitates economic recovery in these hard times, helps unleash the revitalization of our cities, and is supported by modern perspectives in planning and good environmental stewardship. Politically, while this approach seems to start from a right-wing political perspective including commercial and urban developers, it includes big-city/urban interests who are rarely from the right, many environmentalists, some “good planning” advocates, and can always count on the support of exclusionary suburban municipal governments of either party.

## **THE PROBLEM IS THE COST OF HOUSING, RACIAL INJUSTICE & ACCESS TO JOBS**

The response of the traditional left is “not so fast”. The work of many authors continues to show racial segregation in our housing patterns; and that better education, access to jobs, and resulting improvement of life outcomes is largely driven by where one lives. Analysis of the household income generated by jobs that are being created in the suburbs continues to record that a large share of these jobs support household incomes that are low and moderate. How can it make sense to have people commute from the urban core to jobs in

the suburbs – doesn't that prove that things would be better if there were more housing near those jobs affordable to the people that are actually doing them? We continue to need a stock of housing in the suburbs to meet these needs and it is only fair that as land is used in New Jersey, that every economic segment gets to benefit proportionately. The majority of the arguments made from the left for the past 30 years, are still true.

In addition, the approach to affordable housing production in recent years has created an additional faction in support of this perspective. While racial justice and access to the benefits of suburban life were integral to the complaint filed in 1971 in Mount Laurel Township, the road from the remedy created in Mount Laurel II to a focus on a permanent housing stock took time to develop. When we were implementing the builders remedies of Mount Laurel II in the 1980's, there was no expectation that we were creating a permanent housing stock. The expectation was that a one-time capital subsidy was applied to the units to reduce the price, but that these units would return to market-rate status in the future (as a mortgage was paid off), creating a windfall for the happy lower income family that had won the opportunity to purchase a unit. The first major change came in 1993 when the Second Round of COAH was created and the decision was made to make the obligations cumulative. Until then, it was equally possible that the agency would decide that the obligation had been met by the creation of the unit and was then excused. The decision to treat the obligation as cumulative meant that a unit that had an expired restriction would be "lost" and had to be "replaced" – the idea of a permanent inventory of price-restricted housing was born. The second change came later in the decade through the adoption of the Uniform Housing Affordability Control (UHAC) regulations. The rough-and-ready approach to advertising, selection, qualification and other administrative requirements of the earlier era became codified and the experiences of long-time public housing administrators were incorporated into the regulations. Not only would there be a permanent housing stock, but there would be procedures and a cadre of housing professionals administering it. Next, the growth share model facilitated and cemented the shift away from inclusionary housing to 100% affordable developments. By the middle of Round III, COAH was the pinnacle agency over a suburban public housing program and that engine supported an industry of developers and administrators that worked closely with State and local governments in the production of 100% restricted development. This industry certainly supports the continued provision of 100% affordable developments.

The argument that "the problem" is racial injustice and a lack of affordable housing in the suburbs that is remediated by a new twist on public housing funded through zoning exactions, transfer taxes and tax credits; starts with an argument from the left based in racial justice and economic fairness, and now also includes the segment of the development industry specializing in this field, and the quiet support of many suburban employers that traditionally support candidates of the right.

## **THE PROBLEM IS A STRUCTURAL MISMATCH BETWEEN HOUSING DEMAND AND ZONING SUPPLY**

1971 was a busy year for opponents of local zoning of all varieties. While litigation against Mount Laurel Township was filed that attacked the use of zoning from the left – racial justice and economic discrimination – litigation had been filed elsewhere that was an attack from the right. Planners and land use lawyers were clearly spoiling for a fight – a chance to undo the legal framework that dubbed multifamily inherently blighting or a near-nuisance on single family neighborhoods.

Madison Township (now Old Bridge) had begun its transformation to a suburban bedroom community and refused to zone for multifamily housing, arguing that such housing belonged in cities and that its people had moved to the town to get away from that type of development (professional planners will hear echoes of the arguments made by Euclid, Ohio in the first Federal test-case on zoning). And it was in 1971 that Oakwood v. Madison was filed. In Pennsylvania, 1971 was the year that the application of Surrick for multifamily housing was denied by Upper Providence Township leading to the filing of a complaint that led to a Supreme Court decision in that state on the issue of the exclusion of multifamily housing – ending what critics at the time referred to as “architectural apartheid”.

Bedminster and Clinton had both worked hard to attract major corporate headquarters and research facilities, but wanted nothing to do with providing housing for the people that would work in those buildings with the exception of the CEOs! In modern planning parlance, they engaged in a ratable chase and ignored proper jobs:housing relationships. 1971 was the year that two large-landholding corporations engaged a planning firm in Philadelphia to prepare plans for mixed-use planned developments. Within a few years, Allan Deane v. Bedminster (that led to the development of The Hills) and Round Valley v. Clinton (that led to the development of Beaverbrook) were filed.

The complaints in all of these cases spoke of housing affordability, but not with the focus on the urban poor. The math in the complaints showed that for every additional \$1,000 in house cost, a large percentage of the middle class was being excluded from suburbia. Arguments were also rooted in broad demographics. Suburban development in the 1950's and 1960's had been about the urban diaspora/white flight of the war-fighting generation to emerging bedroom communities, but the need in the 1970's related to housing the Baby Boom, who were largely the children of the suburbs. Would the suburbs make room for its own grown children in their first decade of employment or ship them out and welcome them back a decade or more later when they could afford a larger-lot single-family home? And what of the war-fighting generation that was aging? When they chose to downsize from their home in the bedroom community would they find that they had to leave their town?

The trial court decision in Madison read from the perspective of today's politics seems like a libertarian scolding. Government was abusing its ability to regulate land use through zoning – intended to control nuisance issues, facilitate community development and protect values – by engaging in social engineering, using zoning to screen who could or could not live in a community. Interestingly, the “social engineering” label was first applied to local zoning by commentators of the era, not to COAH and efforts to overcome local zoning's artificial barriers.

The important point is that the argument was not that local governments embodied racist attitudes. The arguments were dispassionate analyses of the incentives facing local government and the structure of decision-making.

First, then as now local government was a financial enterprise seeking to keep the taxes it required its citizen-members to pay low. Attracting good rateables and avoiding bad ones was at the core of the enterprise. And soon, local governments learned that the primary goal is avoiding the presence of school-aged children in particular, and to seriously avoid kid-generating uses with lower assessed values (and in modern times avoiding uses that would allow inexpensive entry into the school district of special needs kids).

Second, the scale of the local governments mattered. The neighbors of a new development can universally be depended upon to object to change wherever such development happens in the country. Acronyms such as NIMBY (not in my backyard) and BANANNA (build absolutely nothing anywhere near anyone) have arisen from this general occurrence. But the relatively small geographic area and smaller populations of New Jersey's municipalities have the effect that this inherent opposition becomes a significant share of the voting public contained within the small municipal population. This discontent about change becomes NIMEY and NIMTOO (not in my election year or my term of office). Controversial projects are routinely dealt with favorably in states where large counties exercise land use authority – no one controversy puts an elected official's job at risk and a broader perspective on good community development can take root in the political class. With New Jersey's fragmented local governments, every election can swing on the recent fate of a major development proposal. This institutional structure severely limits and constrains the long-term outcome of our built environment.

So on one hand, we have developers studying demographics to understand household formation, the range of typical household sizes, the household incomes generated by the jobs being created; and then working with their professionals to develop architectural and land planning responses to provide shelter types that meet household needs and incomes. They respond to the dynamic needs of our growing society and its economic composition. And on the other hand, zoning is adopted by local governments as a tool in ratable chasing and enhancement and to appease those already in place by ensuring there won't be uncomfortable change. Not surprisingly, there is a chronic mismatch between the quantity

of housing and the variety of types that we objectively need to meet the needs of our society and the supply of entitlements offered by local government through zoning. The fact that New Jersey hemorrhages population every year (while vacancy rates do not rise) shows that we are engaged in a process akin to musical chairs in which more players are added each round than chairs, and the losers forced to exit. Without some “greater-than-local” perspective – a referee in the land use arena – we will consistently fail to meet the needs of our people and grow our economy.

But does this still matter if the “frontier is closed” anyway? It does. Joel Garreau authored a book in 1991 that spoke of “edge cities”. While the concept has been debated heatedly for decades, the core thought that the evolution of the original bedroom communities would be toward greater intensity and diversity stands today as a truism. The efforts to achieve transit-oriented development (TOD’s) in our already developed suburbs have proven instructive. The basic idea is that our rail stations and other nodes of public transportation are the right spots for significantly greater intensity of development. It combines efficient use of land, improved connectivity at lower cost (both individually and societally), a mix of uses, etc. Our State government through DOT and the State Planning Commission got behind the idea in a big way. Unfortunately, the results are embarrassing in comparison to what is occurring in Maryland and Virginia around Washington, DC and in the Toronto metro to pick two areas geographically, economically and climatologically similar to suburban NJ. To pick on one well-documented example, the level of development that West Windsor was ultimately willing to approve around what could be argued is the most critical station in the State is tepid and modest in the extreme. Simply put, what could be achieved around this critically important regional asset was decided upon by its neighbors – the voters of a small geographic fragment of our state, and the interests of the region and the State as whole be damned.

Further, as one looks deeper at the data driving the articles telling us the Echo Boom (or Gen Y or Millennials) wants to live in cities, the picture is more complex. Surveys of the original Baby Boomers produced similar responses, and much revitalization of our urban areas occurred in the late 1970’s and early 1980’s. Then they had kids – or at least many of them did – and they came home to the suburbs in huge numbers. Household formation today is being delayed as much by economic dislocation and uncertainty as anything else and indications are that there will be rush to form households in the not too distant future as many express a strong desire to have families – and they will have to balance their financial ability to do so against the biological clock. This generation is larger than the Baby Boom itself and will hit the housing market before the Boomers have moved on. They will undoubtedly demand a different suburb than that of their parents – more in keeping with the TOD/Edge City theme of greater intensity and diversity. The question is whether we will deliver – the matching of this demographic wave against the resistance of local zoning will matter a great deal in achieving our societal goals in the coming decade. Even if environmental regulation has “closed the frontier”, the critical point is that there is no “end

of time” or “build out”. Successive changes in demographics and economic structure will always alter the way we organize our land uses, and zoning will always be out of step. How we deal with this chronic mismatch is critical in our regional, national and international competitiveness.

This perspective starts as an argument from the right – that Mount Laurel II and COAH are a necessary check on the abuse of zoning powers and structural mis-incentives facing local government. Its proponents are suburban developers, the retail sector (who are glad for more customers), and suburban employers. But it also attracts many “good planning” groups and environmentalists that see intensification of the inner suburbs as part of a broader strategy to reduce development pressures on the more sensitive exurban areas and to create more efficient transportation networks. Further, to the extent that it seeks to provide greater variety and choice of housing, attracts the portion of the left still seeking dispersion and integration.

### **ONE SOLUTION TO BIND THEM ALL?**

Perspectives on COAH and the exact nature of “the problem” are nearly as numerous as the number of observers, but the three perspectives above organize the primary narratives into coherent “camps”. Each camp includes a piece of what is traditionally thought to be part of the normal left or right political coalitions. Elements of both political wings find themselves in agreement with elements of the other end of the political spectrum and opposed to their normal allies in the struggle to find solutions. Within developer and builder circles, there are clear cleavages between non-residential, urban, suburban and subsidized housing builders. Self-identified libertarians can come to violence arguing whether COAH is a solution for government abuse or its source. Urban interests are torn between doing what is good for a particular city and pursuing theories of racial justice. Getting to a solution or the “next” reform will require constructing a coalition that does not simply follow the normal cleavages in society, which is why it has been such a challenge.