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In re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean, Pursuant to the Supreme Court's Decision in In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: AM-000407-15T1

CIVIL ACTION

On Motion for Leave to Appeal from an Order of the Superior Court, Law Division, Ocean County

Sat Below:
Hon. Mark A. Troncone, J.S.C.
Hon. Marlene Lynch Ford, A.J.S.C.

BRIEF AND APPENDIX OF MOVANT TOWNSHIP OF SOUTH BRUNSWICK FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE, NUNC PRO TUNC

Of Counsel and on the Brief:

Donald J. Sears, Esq.

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TABLE OF CITATIONS

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The Township of South Brunswick (Township) received first round substantive certification from the Council of Affordable Housing (COAH) on August 3, 1987 and second round substantive certification from COAH on February 4, 1998, which was extended by COAH on January 7, 2004. The Township petitioned for third round substantive certification on December 16, 2005, under COAH's original third round rules and subsequently filed an amended third round petition for substantive certification on December 31, 2008. (Sears certif., para. 3-5).

As a result of the invalidation by the New Jersey Supreme Court of COAH's Third Round regulations in In Re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 215 N.J. 578 (2013), COAH was directed to adopt revised Third Round regulations. When it failed to do so, the Supreme Court determined in In Re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015) (Mount Laurel IV), that COAH is not capable of functioning as intended by the Fair Housing Act (FHA), and thus municipalities must submit to judicial review for a determination of their compliance with the constitutional obligation to provide for opportunities for the development of low and moderate income housing. Id. at 25-26. In this regard, municipalities were permitted to file a Declaratory Judgment Action seeking an Order for temporary immunity from "builder's remedy" lawsuits as well as entry of a Judgment of Compliance and Order of Repose, protecting them from such suits. Id. at 5.

On July 1, 2015, the Township filed a Declaratory Judgment Action in Middlesex County in compliance with the Court's direction in Mount Laurel IV. (Sears certif., para. 6). On July 31, 2015, the Middlesex County trial court entered various orders granting intervention to certain

[1] The Procedural History and Statement of Facts are combined for the convenience of the Court since they are inextricably intertwined.

interested parties as well as Fair Share Housing Center (FSHC). On that same date, the court also entered an Order granting an initial five-month period of immunity to the Township, nunc pro tunc, from the filing date of the complaint through and until December 2, 2015 (SBa 1-2)[2]. The court further ordered that, "upon further application of the Township and on notice to all interested parties, [the Township could seek to] extend the initial immunity period past December 2, 2015, for such additional time as the court deems warranted and reasonable." Id.

One of the critical issues to be determined in all pending Mount Laurel matters was whether and to what extent municipalities have an obligation to produce affordable housing for the period 1999 – 2015 (referred to as the "Gap Period"). On October 5, 2015, the Middlesex County trial court issued a written opinion, finding that "the accumulated need that developed during the Gap Period must be included as a component of a municipality's affordable housing obligation." In Re Monroe Township, ___ N.J. Super. ___ (Law Div. 2015) (decided October 5, 2015; approved for publication February 12, 2016) (Aa 29-45).[3] This ruling was made without the benefit of any expert reports or testimony, but rather on motion made by several parties for "a declaration that their respective fair share numbers should be capped at 1000 units in accordance with the [FHA] and with existing regulations of [COAH]." Id.

On December 30, 2015, Econsult Solutions, Inc., (Econsult) issued a report on behalf of a consortium of 284 New Jersey municipalities which, among other things, found that there was no Gap Period obligation (Aa 1153-1338). In a subsequent report dated February 8, 2016, that specifically addressed this issue, Econsult found that any affordable housing need that was not already met during the Gap Period would be captured in the calculation of the Present Need. (Aa 1552-1584). Thus, there is no housing need remaining from the Gap Period that has not already

[2] SBa – Refers to Appendix of Movant South Brunswick Township.
[3] Aa – Refers to Appendix of Movant Barnegat Township.

been addressed.

Despite this expert opinion, and without the benefit of any testimony whatsoever, the Middlesex County trial court maintained that a failure of any municipality to plan to meet the Gap Period obligation was deemed to be "acting in bad faith." Moreover, if any municipality even attempted to rely upon the expert opinion of Econsult, that in and of itself would be considered an act of bad faith. Such a municipality would be in jeopardy of having its temporary immunity revoked, subjecting it to builder's remedy lawsuits. (See T8-1 to 15).[4]

On February 18, 2016, the Ocean County trial court issued a written opinion on the existence of a Gap Period, finding that

> there exists a rational methodology to calculate and determine the affordable housing need which arose during the "gap period" of 1999 to 2015. The court finds municipalities are constitutionally mandated to address this obligation. This "gap period" need is to be calculated as a separate and discrete component of a municipality's fair share obligation. This component together with a municipality's unmet prior round obligations 1987 to 1999 and its present need and prospective need shall comprise its "fair share" affordable housing obligation for the third housing cycle. (Aa 3)

On the same day (February 18, 2016), the Township submitted a draft preliminary plan to the Middlesex County trial court. The plan presented two alternatives: (1) addressing the calculated obligation following the Econsult (no Gap Period) conclusions; and (2) addressing the calculated obligation that included a Gap Period (SBa 3-5). Although the Township's draft plan included a means to address any Gap Period obligation, the Middlesex County trial court determined that the Township had acted in "bad faith" and thereafter stripped the Township of temporary immunity (SBa 6-8). The effective date of the ruling was stayed for sixty (60) days to give the Township one last opportunity to present a plan that was satisfactory to the Middlesex County trial court.

[4] Refers to Transcript of Proceeding before the Middlesex County trial court dated February 19, 2016.

On March 9, 2016, Barnegat Township filed a Motion for Leave to Appeal from the February 18, 2016, order of the Ocean County trial court.

LEGAL ARGUMENT

POINT I

THE TOWNSHIP OF SOUTH BRUNSWICK SHOULD BE GRANTED LEAVE TO APPEAR AS AMICUS CURIAE, NUNC PRO TUNC

N. J. Court Rule 1:13-9 governs applications for leave to participate as amicus curiae. The rule states, in pertinent part, that

> (a) An application for leave to appear as amicus curiae in any court shall be made by motion in the cause stating with specificity the identity of the applicant, the issue intended to be addressed, the nature of the public interest therein and the nature of the applicant's special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.

The rule has been construed to establish "a liberal standard for permitting amicus appearances." Pfizer v. Director, Div. of Taxation, 23 N.J. Tax 421, 424 (Tax Ct. 2007). See also Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 17 (1976); In re State ex rel. Essex Cty., 427 N.J. Super. 1, 5 (Law Div. 2012).

A motion for leave to appear as amicus curiae in the Appellate Division "shall be accompanied by the proposed amicus curiae brief and shall be filed on or before the day when the last brief is due from any party." R. 1:13-9(c). The date the last brief was to be filed by any party in the instant matter was March 21, 2016. This motion for leave to participate as amicus curiae is filed within days of that date, and seeks leave to participate nunc pro tunc. Motions for leave to participate nunc pro tunc may be granted where an important public issue is presented, In Re Christie's Appointment, 436 N.J. Super. 575, 585 (App. Div. 2014); Gill v. Dept. of Banking, 404 N.J. Super. 1, 8 (App. Div. 2008), or in order to permit the appellate court to resolve all issues. Potomac Aviation v. Port Authority, 413 N.J. Super. 212, 222 (App. Div. 2010).

The Township has a strong interest in having its voice heard in the pending Motion for Leave to Appeal filed by Barnegat Township. The issue intended to be addressed on appeal – whether and to what extent municipalities must satisfy an affordable housing obligation attributable to the Gap Period --- is vitally important to determining the Township's constitutional obligation to provide for low and moderate income housing. If there is a Gap Period that must be addressed by the Township, the Township's obligation, as calculated by FSHC's expert, is over 3,000 affordable housing units (See Aa 822-865). On the other hand, if there is no Gap Period obligation, the Township's obligation, as calculated by Econsult, is 215 affordable housing units (See Aa 1153-1338). Clearly, this represents a huge difference in what the Township's obligation is for the Third Round and what it must do to comply with its constitutional obligation. Given that the standard set-aside for inclusionary developments is 20%, this means that the Township's Third Round Plan must provide for **either *1,075* total units of housing (if there is no Gap Period obligation)** or it must provide for **over *15,000* total units of housing (if there is a Gap Period obligation)**. The impact to the public by these vastly different scenarios cannot be overstated. Clearly the Township, its residents and the public in general that live, work and recreate in South Brunswick, all have a significant interest in the determination of the Gap Period issue. If a Gap Period obligation applies, this could irrevocably alter the character and quality of life in South Brunswick.

The Township has been involved in producing and managing affordable housing for 30 years. It received first round substantive certification from COAH on August 3, 1987 and second round substantive certification from COAH on February 4, 1998, which was extended by COAH on January 7, 2004. The Township petitioned for third round substantive certification on December 16, 2005, under COAH's original third round rules and subsequently filed an

amended third round petition for substantive certification on December 31, 2008. (Sears certif., para. 3-5). Its Declaratory Judgment action was timely filed on July 1, 2015, pursuant to the Supreme Court's direction in Mount Laurel IV. (Sears certif., para. 6). Counsel for the Township also participated extensively in the motions and arguments before the Middlesex County trial court on the Gap Period issues, and was characterized as the "lead counsel" for the municipalities in such proceedings (See SBa 10).

Aside from its technical compliance and expertise in affordable housing, the Township currently manages, monitors and/or maintains almost 700 affordable housing units as part of its ongoing, well established in-house affordable housing program. (Sears certif., para. 8). Its expertise in affordable housing was previously recognized by the Appellate Division when it was granted leave to intervene in In re Failure of the Council on Affordable Housing To Adopt Trust Fund Commitment Regulations, 440 N.J. Super 220 (App. Div. 2015), a decision from this Court which prohibited the State and COAH from seizing municipal trust fund money so that those funds would be available to municipalities for use in actually producing affordable housing.

Accordingly, this Court should grant leave to the Township of South Brunswick to appear as amicus curiae, nunc pro tunc. There is a clear public interest in determining whether and to what extent the Township must address any obligation arising from the Gap Period, especially given the significant impact such a determination will have upon not only the Township but virtually every municipality in New Jersey. The Township's interest in the outcome of this issue, its 30-year history of actually producing affordable housing, and its recognized expertise in the field, assure that its participation in this matter will assist in the resolution of this issue of great public importance. Its participation will not delay the proceedings or result in any undue prejudice to any of the litigants.

POINT II

THIS COURT SHOULD DETERMINE THAT THERE IS NO OBLIGATION ARISING FROM THE GAP PERIOD OR, IN THE ALTERNATIVE, THAT SUCH OBLIGATION HAS BEEN ADDRESSED IN THE PRESENT NEED CALCULATION

The Township supports and incorporates herein by reference the arguments set forth in the Brief filed by Plaintiff/Movant Township of Barnegat in support of its Motion for Leave to Appeal dated March 9, 2016. The arguments set forth therein are thorough and legally sound. They set forth in detail the concerns of not only Barnegat Township but also South Brunswick as well as every other municipality in the State of New Jersey. As a supplement to those arguments, the Township herein sets forth additional arguments which highlight the precarious position municipalities are in given the two trial level opinions rendered on the issue of the Gap Period.

A. No Obligation Arises from the Gap Period

The Barnegat Township brief sets forth in detail how the Ocean County trial court handled its consideration of the Gap Period issues, pointing out the flaws in the court's analysis. The Middlesex County trial court performed its analysis of the Gap Period obligation in the context of reviewing the applicability of the 1,000 unit cap in the Third Round. Contrary to the Ocean County trial court, which found that the 1,000 unit cap applied to the aggregate of the Gap, Present and Prospective periods (See Aa 3), the Middlesex County trial court found that the 1,000 unit cap applied to discrete, 10-year periods of time. Since, in the Middlesex County trial court's view, the Third Round period encompasses 26 years (1999 – 2025), this results in three (3) separate "cap" periods, which could subject a municipality to potentially a 3,000 unit Third Round obligation (See Aa 42). It is clear that this was never intended.

N.J.S.A. 52:27D-307(e) states, in pertinent part:

> No municipality shall be required to address a fair share of housing units affordable to households with a gross household income of less than 80% of the median gross household income beyond 1,000 units within ten years from the grant of substantive certification, unless it is demonstrated, following objection by an interested party and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within that ten-year period. For the purposes of this section, the facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units, as provided above, shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the ten-year period preceding the petition for substantive certification in connection with which the objection was filed.

The Second Round regulations adopted by COAH similarly state at N.J.A.C. 5:93-14.1:

> No municipality shall be required to address a fair share beyond 1,000 units within six years from the grant of substantive certification, unless it is demonstrated, following an objection and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within the six year period. The facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the six year period preceding the petition for substantive certification.

Thus, both the Legislature in the FHA, and COAH through its Second Round adopted regulatory scheme, recognized that no municipality can be required to provide for more than 1,000 low and moderate income units for a certain period of time following the grant of substantive certification. Under the regulations, that period of time was initially set at 6 years however this was amended to coincide with the subsequently adopted changes to the FHA, which established that period of time as 10 years (See Aa 35).

Both the statute and the regulation granting municipalities a 1,000 unit cap agree that the time period for applying the 1,000 unit cap is to be measured "from the grant of substantive

certification." N.J.S.A. 52:27D-307(e); N.J.A.C. 5:93-14.1. Clearly the Legislature and COAH contemplated that a municipality's approved, certified plan would be limited to no more than 1,000 units over the subsequent 10 year period. Implementing such a cap was designed to prevent the imposition of an unrealistic, unachievable and impractical obligation upon a municipality. (See Aa 101-606).

Indeed, the 1,000 unit cap in the FHA and in the COAH regulations was adopted in part to address the Supreme Court's concern in So. Burlington Cty. N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983) (Mt. Laurel II) that a judicially-imposed remedy to affordable housing could result in the "construction of lower income housing in such quantity as would radically transform the municipality overnight." Id. at 219. Since the Mt. Laurel doctrine was never intended to "sweep away all land use restrictions or leave our open spaces and natural resources prey to speculators," id., the Court encouraged the Legislature to adopt legislative remedies, which it did in the form of the FHA. See In Re Application of Township of Jackson, 350 N.J. Super. 369, 372-373 (App. Div. 2002).

During the course of considering the issue of the Gap Period and the applicability of the 1,000 unit cap, the Middlesex County trial court was presented with a letter dated December 13, 1999, from the then Executive Director of COAH, Shirley M. Bishop, to the Hon. Susan Bass Levin, Mayor of Cherry Hill Township at the time. In it, COAH explained its interpretation of the 1,000-unit limitation (SBa 12-15). As is clear from the letter, COAH's position was that the 1,000-unit cap "applies during the six-year ***delivery*** period for affordable housing subsequent to certification, not to the calculation period." (emphasis in original). The letter referred Mayor Bass Levin to an excerpt from COAH's expert report, which was attached to the letter. COAH's expert, Dr. Robert W. Burchell, consultant to COAH, explained that:

> The concept behind the 1,000-unit cap is that delivery of more than 1,000 units of combined present and prospective affordable housing need during a six-year period would be injurious to a community, radically changing its economic composition. It is intended that the 1,000-unit cap will apply during a six-year ***delivery period***, not a twelve-year calculation period. The current delivery period for all obligations is 1993 to 1999. During that period, regardless of the scale of numbers calculated, the maximum affordable housing need to be addressed in a community cannot exceed 1,000 units. (emphasis in original). Id.

Without question, the Legislature and COAH both intended to limit a municipal obligation to 1,000 units over the 10 year period ***after*** substantive certification is granted.

By recognizing a Gap Period, and requiring municipalities to satisfy a Gap Period obligation, both the Ocean County and Middlesex County trial courts have subjected municipalities to an obligation that covers not the next 10 years, but rather the next 10 years ***plus*** the prior 16 years, for a total of 26 years. Although the Ocean County trial court's opinion aggregates all obligations from the Gap, Present and Prospective periods, and then applies the 1,000 unit cap (See Aa 3) (a ruling which, at least in this respect, is consistent with the FHA), the Middlesex County trial court departs from the FHA and applies three separate 10-year "cap periods," potentially resulting in a 3,000 unit cap (See Aa 42).

The two trial court opinions also differ dramatically as to how the deal with any excess obligation that is above the cap. The Ocean County trial court would eliminate any excess obligation above the cap (See Aa 27), while the Middlesex County trial court does not eliminate the excess. Rather, the excess is carried forward into subsequent ten year periods (See Aa 43-44).

Thus, the Ocean County trial court and the Middlesex County trial court treat the Gap Period and application of the 1,000 unit cap very differently. Moreover, although the Middlesex County trial court establishes a "cap," the carry-forward provision of the court's decision takes the cap away. This is clearly contrary to the plain reading of the FHA and COAH's regulations,

which unambiguously state that municipalities are entitled to a cap of 1,000 total units for ten years, beginning on the date of substantive certification. The ten year calculation period was never intended to begin on the date the Third Round ***began***, in an attempt to recapture prior years, but rather, it was clearly intended to begin on the date when substantive certification is ***granted***. Factoring into the total obligation an amount for the Gap Period is not authorized by the Legislative or regulatory scheme. Thus, inclusion of an obligation for any such period is contrary to the FHA and without basis.

By recognizing a Gap Period and applying potentially a 3,000 unit cap for the Third Round, the trial courts are being unduly punitive, resulting in the punishment of municipalities, contrary to the clear direction of the N.J. Supreme Court. In Mt. Laurel IV, the N. J. Supreme Court emphasized that trial courts were to (1) follow the FHA processes "as closely as possible," and (2) provide municipalities "like treatment to that which was afforded by the FHA." Mt. Laurel IV, supra., at 6, 27. The Supreme Court's goal was "….to have [trial] courts provide a substitute for the substantive certification process that COAH would have provided for towns that had sought its protective jurisdiction." Id. at 23-24. Of paramount importance to the Supreme Court was that "the process established is not intended to punish the towns represented before this Court, or those that are not represented but which are also in a position of unfortunate uncertainty due to COAH's failure to maintain the viability of the administrative remedy." Id. at 31. Thus, in analyzing the issues presented for review, the trial courts were required to follow the FHA "as closely as possible," being ever mindful of the Supreme Court's desire not to "punish" municipalities but rather to seek ways in which "towns can demonstrate their constitutional compliance." Id. at 31-32. Contrary to this clear mandate, both the Ocean County and Middlesex

County trial courts have departed from the processes set forth in the FHA and created new obligations for municipalities that were never authorized or intended.

If the trial courts' determination that a Gap Period obligation exists is allowed to stand, this will be devastating to the Township and all similarly situated municipalities. In a municipal plan that relies solely on inclusionary development to satisfy its obligation, this would mean that the municipality would have to provide for ***15,000 new units of housing*** (assuming a presumptive 20% set-aside) over the next 10 years in order to produce 3,000 units of affordable housing. Such a result would be crushing, and would clearly punish the municipality. The entire nature and character of a municipality would be changed completely as these new homes were built. The impact to the infrastructure would be overwhelming and the strain on already scarce municipal resources would be too much to bear. Assuming a modest 2-3 people per household, the population of the municipality would increase by 30,000 – 45,000 people. No town could possibly sustain such a drastic change, brought on by unfettered, unreasonable and uncontrolled growth. The "radical transformation of a municipality overnight" that the Supreme Court warned against in Mt. Laurel II, and the very type of exploding growth that the Legislature and COAH sought to prevent, would become a reality. This court should not sanction such punishment upon municipalities or the citizens of this State.

It is also apparent that the Ocean County and Middlesex County trial courts have reached divergent, conflicting conclusions on application of the 1,000 unit cap to the Gap Period. This leads to confusing and unpredictable results for municipalities, dependent entirely upon where they happen to be located. This is completely contrary to one of the main purposes of the FHA, which was specifically intended to provide for "a comprehensive planning and implementation response to [the] constitutional obligation" for affordable housing. N.J.S.A. 52:27D-302(c). This

Court must address this confusing issue and resolve the conflicting opinions of these two trial level courts.

It is now well recognized that municipal efforts to obtain substantive certification over the last 16 years have been frustrated by COAH's inability and/or unwillingness to adopt valid Third Round regulations. As the Supreme Court in Mt. Laurel IV stated:

> COAH has had fifteen years to adopt Third Round Rules as it is required to do in accordance with its statutory mission. It has been under several orders of the Appellate Division and this Court directing it to adopt Third Round Rules using a known methodology by specific deadlines. It has not done so…….COAH is noncompliant with this Court's orders and underlying September 2013 decision. COAH has failed to respond (1) to the requirements of the last in the series of judicial orders entered against it and (2) to its statutory duties that directly affect the fulfillment of constitutional obligations. Mt. Laurel IV, supra., at 21.

Given the lack of valid Third Round regulations, resulting in the inability of most towns to obtain substantive certification from COAH through no fault of their own, it would truly be a punitive exercise to force municipalities to develop in 10 years' time what it is alleged they would have been required to do in 26 years, if only COAH had functioned as it was intended. This court should not visit the punishment rightly due COAH upon individual municipalities, many of which sought desperately to meet their constitutional obligation for the Third Round but were frustrated by COAH's failure to act.

By recognizing an obligation applicable to the Gap Period, and requiring municipalities to meet that obligation as part of the Third Round obligation, the trial courts in both Ocean and Middlesex Counties are doing just that—punishing municipalities for COAH's failures. Indeed, in the Township's case, the Middlesex County trial court made abundantly clear that the Township would be punished with a finding of bad faith if the Township even attempted to rely upon the Econsult conclusion that there was no Gap Period obligation (T8-1 to 15). Before any

further punitive measures are leveled against the Township or any other municipality, this Court should determine if in fact any such Gap Period obligation actually exists. Given the clear language in the FHA and COAH regulations, this Court should find that there is no Gap Period obligation.

B. If There is a Municipal Obligation that Arises from the Gap Period, that Obligation has been Addressed in the Present Need Calculation

Even if it can be said that there is an obligation that arises from the Gap Period, that obligation has been addressed in the Present Need calculation, and should not be counted twice. In its report dated February 8, 2016, submitted to the Ocean County trial court for consideration, Econsult made clear that:

> The premise of the [Econsult] analysis is that the object is to determine the Present Need and Prospective Need as accurately as possible. [Econsult]'s December 8th expert submission and *New Jersey Affordable Housing Need and Obligation* report set forth a consistent analysis as to why the calculation and addition of housing need emerging from the gap period to current affordable housing obligations is inappropriate. Those principles, stated simply, are as follows:
>
> - The Prospective Need period covers ten years, is forward-facing, and relates to affordable housing need attributable to likely development and growth;
> - Present Need represents all currently identifiable affordable housing need, and by design and by definition incorporates all prior population, household and housing characteristics;
> - Present Need and Prospective Need comprise all affordable housing need under the FHA framework. Therefore, no legally assigned obligation nor identifiable current affordable housing need arises from the gap period; and
> - Attempts to calculate housing "need" from that time period based on the retrospective application of a Prospective Need methodology do not accurately describe housing need as of today (Aa 1554).

In other words, Econsult logically concluded that any need that existed for the period 1999-2015 falls into one of two categories:

1) A low and moderate income household that needed affordable housing during the Gap Period, but has since obtained adequate housing, no longer represents a "need" that must be counted in the Third Round; or
2) A low and moderate income household that needed affordable housing during the Gap Period, and has still not obtained adequate housing, represents a portion of the Present Need component of the Third Round, and as such, is already counted in that category.

Accordingly, any Gap Period obligation that may have existed during 1999-2015, if it still remains unfulfilled today, is adequately accounted for and factored into the Present Need component of a municipality's Third Round obligation. As such, it should not also be counted as part of any Gap Period. Conversely, any Gap Period obligation that may have existed during 1999-2015, but has been satisfied as of today, should not be counted at all. As a result, no separate Gap Period obligation need be calculated or imposed, since it has already been accounted for in the Present Need.

CONCLUSION

For the foregoing reasons, this Court should grant leave to the Township of South Brunswick to participate in this matter as amicus curiae, nunc pro tunc; grant the motion for leave to appeal filed by Barnegat Township; and thereafter determine that there is no Gap Period obligation that must be satisfied by municipalities in the Third Round. Such a result is consistent with the plain meaning of the FHA and COAH's Second Round regulations, as well as the Legislative and Judicial intent behind implementation of the 1,000-unit cap. In the alternative, if this Court determines that there is an obligation that arises from the Gap Period, this Court should find that any such obligation that remains unsatisfied has been addressed in the Present Need calculation, and should not be counted twice.

Respectfully Submitted,

TOWNSHIP OF SOUTH BRUNSWICK

Date: March 23, 2016

By:_____
Donald J. Sears, Esq.

Superior Court of New Jersey
Middlesex County Courthouse
56 Paterson Street
New Brunswick, NJ 08903

IN THE MATTER OF THE APPLICATION OF TOWNSHIP OF SOUTH BRUNSWICK FOR A JUDGMENT OF COMPLIANCE AND REPOSE AND TEMPORARY IMMUNITY FROM MOUNT LAUREL LAWSUITS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – Middlesex County
Docket No. MID-L-3878-15

ORDER GRANTING INITIAL 5-MONTH PERIOD OF IMMUNITY

THIS MATTER having been opened to the court by Donald J. Sears, Esq., the Director of Law for the Township of South Brunswick, seeking the entry of an Order granting the Township an initial five-month period of immunity from Mt. Laurel lawsuits pending the court's assessment of the Township's compliance with its constitutional obligation to provide affordable housing, and the court having read the moving papers in support of the entry of such an Order and any opposition thereto, and having heard the arguments of counsel on the record on this date, and having determined that the Township has made good faith efforts to satisfy its constitutional housing obligation so as to warrant the grant of initial immunity, and the Special Master having provided support for such immunity, and for other good cause shown;

IT IS on this 31st day of July, 2015;

ORDERED that the Township's motion for an initial period of immunity from Mt. Laurel actions be and hereby is **GRANTED**; and it is further

ORDERED that the Township is hereby immune from any and all Mt. Laurel lawsuits for a period of five (5) months, *nunc pro tunc*, from the filing date of the Complaint through and until

December 2, 2015; and it is further

ORDERED that the court may, upon further application of the Township and on notice to all interested parties, extend the initial immunity period past December 2, 2015, for such additional time as the court deems warranted and reasonable; and it is further

ORDERED that a case management conference is hereby scheduled for **Thursday, September 10, 2015** at **2:00 PM**, with all parties and the Special Master in attendance, at which time the court shall set forth a case management schedule, which shall include a date by which the Township is to submit its Housing Element and Fair Share Plan; and it is further

ORDERED that this Order shall be served upon all interested parties and the Special Master within 7 days of the date hereof.

DOUGLAS K. WOLFSON, J.S.C.

OPPOSED

5Ba 2

TOWNSHIP OF SOUTH BRUNSWICK
DRAFT PRELIMINARY THIRD ROUND PLAN
(Amended February 18, 2016)

Credits Addressing 842-Unit Prior Round Obligation

South Brunswick's Prior Round Compliance Mechanisms	Prior Round
Prior Cycle Credits (4.1.80 – 12.15.86)	
Deans Apartments	40
Charleston Place I	54
Inclusionary Developments - completed	
Regal Point - affordable family sales	5
Monmouth Walk - affordable family sales	43
Nassau Square – affordable family sales	49
Summerfield - affordable family sales	70
Deans Pond Crossing - affordable family sales	20
Southridge/Southridge Woods - affordable family rentals	124
Buckingham Place – assisted living - affordable senior units	23
100% Affordable Developments - completed	
Woodhaven – affordable family rentals	80
Charleston Place II – affordable senior rentals	30
Oak Woods - affordable senior rentals	73
Alternative Living Arrangements - completed	
Wheeler Rd. Group Home (Dev. Resources/Delta Comm.)	3
Major Rd. Group Home (Dev. Resources/Delta Comm.)	3
CIL Woods	16
CIL Wynwood	7
Market-to-Affordable	
REACH – affordable family sales (of 18 completed)	15
Prior Round Rental Bonuses for completed units = 187	
Southridge/S. Woods - family rentals (124 units x 1.0)	124
Woodhaven family rentals (63 units x 1.0), bonus cap	63
Total	**842**

Maximum Prior Round Seniors = 219 (per N.J.A.C. 5:93-5.14(a)
.25((842 + 117) – 94 prior cycle credits - 0 rehab credits) = 219.50, round down
Minimum Prior Round Rentals = 187; (per N.J.A.C. 5:93-5.15(a))
.25((842 + 130) – 94 prior cycle credits - 130 rehab component) = 187

SBa 3

TOWNSHIP OF SOUTH BRUNSWICK
DRAFT PRELIMINARY THIRD ROUND PLAN
(Amended February 18, 2016)

Credits Addressing the Third Round Gap Period (1999-2015) and Prospective Need (2015-2025) Obligation

ALTERNATIVE #3

Assuming Use of the Kinsey Methodology/Obligation Calculated for South Brunswick, as modified by October 5, 2015, court decision*

South Brunswick's Third Round Compliance Mechanisms – "Gap Period" Obligation (1999-2015) = 533 units Prospective Need (2015-2025) = 1,000 units	Units	Bonuses	Total
Alternative Living Arrangements (all completed)			
Dungarvin group homes	12	12	24
Triple C group homes	6	6	12
Community Options group homes	14	14	28
ARC of Middlesex group homes	15	15	30
Alternative Living Arrangements (executed agreement)			
Dungarvin group homes	4	4	8
Write-Down/Buy-Down (Market to Affordable)			
REACH – inclusionary affordable family sales (6 completed)	32	0	32
REACH – inclusionary affordable family rentals	9	9	18
Extensions of Controls			
Woodhaven/Deans Apts – completed	40	0	40
Regal (5), Mon. Walk (43), Nassau Square (49) – inclus. sales	97	0	97
Wheeler Road Group Home	3	0	3
Major Road Group Home	3	0	3
Dungarvin (Cranston Road) Group Home	4	0	4
Charleston Place I & II - completed	84	0	84
Built, Proposed , Approved Units			
Sassman – inclusionary affordable family sale completed (5)	1	0	1
Menowitz (Cambridge Cross.) – court app'd, inclusionary family sale (85)	8	0	8
Wilson Farm –afford. senior/special needs rentals	280/20	20	320
Windsor Associates – inclusionary family rentals (72)	11	11	22
SB Center –100 inclusionary age restricted sales (300), capped	100	0	100
Carlyle Group – inclusionary family rentals (79)	10	10	20
Stanton Girard – family rentals	120	120	240
East Meadow Estates – inclusionary family sales (55)	6	0	6
Hovnanian/Ingerman – inclusionary family sales/rentals (231)	81	81	162
NRDF refund credits	9	0	9
TOTAL 1999-2025 WITHOUT BACK UP SITE	**969**	**302**	**1,271**

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TOWNSHIP OF SOUTH BRUNSWICK
DRAFT PRELIMINARY THIRD ROUND PLAN
(Amended February 18, 2016)

"Back Up" site			
RPM – family rentals/special needs rentals	185/15	82	282
TOTAL 1999-2025	**1,169**	**384**	**1,553**

Maximum Third Round Seniors = .303 (1,533) = 464**
Minimum Third Round Rentals = .25 (1,533) = 384

* In the event the Township's actual obligation is more or less than what is reflected above, the Township reserves the right to add or eliminate sites from the above so that it satisfies the actual obligation finally determined for South Brunswick.

** Requires that the court grant the Township's motion for a waiver of the Senior cap from 25% to 30.3%.

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FAIR SHARE HOUSING CENTER
510 Park Boulevard
Cherry Hill, New Jersey 08002
P: 856-665-5444
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Attorneys for Defendant-Intervenor
Fair Share Housing Center
By: Kevin D. Walsh, Esq. (030511999)
Adam M. Gordon, Esq. (033332006)

In the Matter of the Application of the Township of South Brunswick, County of Middlesex,

SUPERIOR COURT
Law Division
Middlesex County

DOCKET NO: MID-L-3878-15

CIVIL ACTION

ORDER

This matter having been brought before the Court on the Court's initiative for an Order to Show Cause regarding whether there should be an extension of temporary immunity from builder's remedy claims for Plaintiff Township of South Brunswick ("Township"); and appearances having been made by the Township, through its counsel, Donald J. Sears, Esq., and by Defendant-Intervenors Fair Share Housing Center, through its counsel, Adam M. Gordon, Esq., AvalonBay Communities, Inc., through its counsel Robert A. Kasuba, Esq., South Brunswick Center, LLC, through its counsel, Kenneth D. McPherson, Jr., Esq., and Richardson Fresh Ponds, LLC, and Princeton Orchards Associates, LLC through their

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Counsel, Henry L. Kent-Smith, Esq., with Special Master Christine Nazzaro-Cofone also appearing;

And the Court having considered all filed written submissions and having heard and considered the oral arguments of all counsel;

IT IS on this 9th day of March, 2016 ORDERED as follows:

1. The Court hereby revokes the Township's immunity from builder's remedy claims as set forth in the prior Orders of this Court. The Township is thus subject to builder's remedy claims in accordance with procedures described in the July 9, 2015 decision in In re Monroe Township, Docket No. MID-L-3365-15.

2. The Court stays the ~~filing of any builder's remedy claims pursuant to this order~~ effective date of this order until April 15, 2016.

3. In the interim time period before April 15, 2016, the Township is permitted to submit a revised plan for creating a realistic opportunity for addressing its fair share obligation in order to attempt to demonstrate to the Court by motion, which may be on short notice, on notice to all interested parties that this order should be reconsidered and immunity be reinstated.

4. A trial as to all aspects of the Township's fair share compliance is hereby scheduled for May 2, 2016 at 9:00 a.m. and shall continue day-to-day thereafter until completion. The trial shall include any builder's remedy claims that may be filed in accordance with this order, in addition to the Township's claims and opposition to the builder's remedy claims, based upon the plan

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submitted by the Township to the Court, in such order as the Court may determine. Alternatively, if the Township has demonstrated to the Court in accordance with paragraph 3 that immunity should be continued, the trial shall be on whether the plan submitted to the Court by the Township provides a realistic opportunity for satisfaction of its fair share obligation, and any opposition submitted to that plan, without consideration of any builder's remedy claims.

5. A pre-trial conference is scheduled for April 15, 2016 at 9:30 a.m; and

6. Counsel for FSHC shall forward a copy of this Order to all parties of record within five (5) days of receipt.

Hon. Douglas K. Wolfson, J.S.C.

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New Jersey Law Journal

Judge Rejects 1,000-Unit Cap on Affordable Housing Obligations

Michael Booth, New Jersey Law Journal

February 12, 2016

A New Jersey judge has ruled that a group of Middlesex County towns cannot have their affordable housing obligation capped at 1,000 units.

Superior Court Judge Douglas Wolfson, in a ruling issued Oct. 5 but published Feb. 12, said that while the Legislature may have allowed for that cap in a series of statutes, the cap was meant to apply for only a 10-year period.

Wolfson rejected the argument made by the group of eight towns that they should be allowed to avail themselves of the1,000-unit cap since the now-defunct state Council on Affordable Housing (COAH)—a state agency that was supposed to issue regulations for towns regarding their obligations to provide for low- and moderate-priced housing based on a series of 10-year "rounds"—failed to issue any rules since 1999.

Wolfson did, however, rule that the towns would be able to phase in their affordable housing obligations over a limited number of future cycles.

Wolfson said allowing a gradual phase-in would guarantee that the towns would not be "radically transformed" overnight, while still adhering to the spirit of their obligations.

For some towns, that obligation may be as high as 2,600 units, the judge said.

"I am satisfied that the accumulated need that developed during the gap period must be included as a component of a municipality's affordable housing obligation, but that allowing it to be phased in over this and future compliance cycles ...properly balances the laudatory public policies and constitutional interests promoted by, and embodied in, both the [Fair Housing Act] and the *Mount Laurel* decisions," Wolfson said.

The *Mount Laurel* rulings are a series of rulings by the state Supreme Court dating back to the 1980s that mandate that each municipality in New Jersey provide for low- and moderately priced housing for qualified residents and which prohibit exclusionary zoning ordinances.

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The Legislature enacted the Fair Housing Act and COAH in an effort to provide regulations to comply with those rulings.In 2002, the Legislature set the certification period at 10 years. COAH then issued a regulation that said "no municipality shall be required to plan for a projected growth share obligation beyond 1,000 units within 10 years from the grant of substantive certification..."

But COAH never adopted any regulations after 1999, and it has been up to designated judges to decide how to apply the 1,000-unit cap going forward, Wolfson said.

Wolfson said two "vastly disparate" interests had to be weighed in determining whether to apply the cap. First, he said, there must be assurances that towns meet their constitutional obligations and, second, "sensitivity to, and recognition of the reality that the imposition of a large or onerous municipal housing obligation in a relatively short time may well cause a 'sudden and radical transformation' in many municipalities."

The towns argued that they are statutorily entitled to have their caps set at 1,000 units.

The Cherry Hill-based Fair Share Housing Center, which advocates for the construction of low- and moderate-income housing, joined with several developers as intervenors and argued that the caps would have changed if COAH had adopted "rounds" of regulations in 1999 and 2009, and in 2019, as expected.

"Unquestionably, the Legislature intended the 1,000-unit cap to be applied to a single 10-year period," Wolfson said. "What the Legislature could not have foreseen was that COAH would cease to function, leaving the courts, literally, to fill the 15-year gap period from 1999 until today."

"I cannot abide the result urged by the municipalities," he said. "Not only is it abundantly clear that the Legislature never intended the cap period to extend beyond one single 10-year period, but a contrary interpretation would undoubtedly lead to an untenable and unconstitutional result."

While it is not the towns' fault that COAH failed to live up its obligations, "the well-documented failures of that agency neither relieved nor absolved these towns from fulfilling (or at least attempting to fulfill) their respective fair share responsibilities," Wolfson said. "Regrettably, these constitutional obligations have been accumulating for the past 16 years with little evidence of statewide compliance."

Last year, the Supreme Court stripped COAH of its authority because of its failure to issue affordable housing regulations and instead said designated judges around the state would determine each individual municipality's obligations.

The towns seeking to have the 1,000-unit cap apply are South Brunswick, Monroe, East Brunswick, Old Bridge, Plainsboro, Edison, South Plainfield and Sayreville.

The lead attorney for the towns was South Brunswick counsel Donald Sears. The township offices were closed Feb. 12 and he could not be reached. Michael Herbert, of Princeton's Herbert Van Ness Cayci & Goodell, said an appeal was being considered. He represents Plainsboro.

The lead attorney for the intervenors, Fair Share Executive Director Kevin Walsh, was away from his office and could not be reached.

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Contact the reporter at mbooth@alm.com.

SBa 11

CHRISTINE TODD WHITMAN
Governor

State of New Jersey
COUNCIL ON AFFORDABLE HOUSING
PO Box 813
TRENTON NJ 08625-0813
609-292-3000
FAX: 609-633-6056
TDD#: (609) 278-0175

JANE M. KENNY
Chairman
SHIRLEY M. BISHOP, P.P.
Executive Director

December 13, 1999

The Honorable Susan Bass Levin
Cherry Hill Township
820 Mercer Street
Cherry Hill, NJ 08002

Dear Mayor Levin,

The Council on Affordable Housing (COAH) has been asked to interpret **N.J.S.A.** 52: 27D-307e and **N.J.A.C.** 5:93-14 One Thousand Unit Limitation and explain how this regulation is to be interpreted. Upon careful review, it was determined that this regulation applies to Cherry Hill Township's second round precredited obligation of 1,851. Please see the attached "Explanation of the 1,000 Unit Cap" from Dr. Robert W. Burchell, consultant to COAH.

As you can see in Dr. Burchell's explanation, the 1,000 unit cap provision, which states that "No municipality shall be required to address a fair share beyond 1,000 units within six years from the grant of substantive certification..." applies during the six year delivery period for affordable housing subsequent to certification, not to the calculation period.

Simply, in a potentially eligible 1,000-unit cap municipality, a two-step process is involved. An initial step is concerned with whether Prior-Cycle Prospective Need is less than 1,000 minus Present Need. If less than 1,000 minus Present Need, Prior-Cycle Prospective Need is used as is. If greater than 1,000 minus Present Need, it is revised to the level of 1,000 minus Present Need.

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In the case of Cherry Hill, Prior Cycle Prospective Need is greater than 1,000 and Cherry Hill's Prior Cycle Prospective Need is revised to 806 (1,000-194).

In the second step, the Revised Prior Cycle Prospective Need is inserted into the cumulative methodology and results in Cherry Hill's Pre-Credited Need number being revised to 1,669.

All eligible credits and reductions are then subtracted from the revised Pre-Credited Need number of 1,669. If the remaining number is over 1,000, then Cherry Hills' obligation is capped at 1,000.

If you have any questions, you may call me at (609) 292-3000.

Sincerely,

Shirley Bishop

Shirley M. Bishop, P.P.
Executive Director

c: COAH Members
Susan Jacobucci, Esq.
Dr. Robert Burchell
Kate Butler, COAH planner
William Malloy, DAG

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EXPLANATION OF THE 1,000-UNIT CAP

The Components of Community Affordable Housing Need

A community's 1,000-unit limitation, or cap, includes both present and prospective need. Present need is the most recently identified deteriorated housing in a community (1993). Prospective need is composed of a combined estimate that includes a current-cycle prospective need (1993-1999) as well as a revised and recalculated prior-cycle prospective need (1987–1993). These three component-need estimates (present need plus two categories of prospective need) yield, respectively, the community's current rehabilitation and new construction obligations.

The Intent of the 1,000-Unit Cap

The concept behind the 1,000-unit cap is that delivery of more than 1,000 units of combined present and prospective affordable housing need during a six-year period would be injurious to a community, radically changing its economic composition. It is intended that the 1,000-unit cap will apply during a six-year *delivery period*, not a twelve-year calculation period. The current delivery period for all obligations is 1993 to 1999. During that period, regardless of the scale of numbers calculated, the maximum affordable housing need to be addressed in a community cannot exceed 1,000 units.

The Relationship of the Components of Need in the 1,000-Unit Cap

In order for a community not to have to address more than 1,000 units for the period 1993 to 1999, its carry-over prospective need must be linked in complementary fashion to current prospective need. This will ensure that both need components are regarded as constituents of need. Neither need component is more important than the other; both apply to, and must be delivered within, the most current delivery period. Therefore, for the inclusion of three components of need in the calculation, prior-cycle prospective need must be a number that is less than 1,000 minus present need.

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How Large Can Prior-Cycle Prospective Need Be?

In a 1,000-unit cap community, for the delivery period 1993–1999, prior-cycle prospective need must be adjusted to allow some component of current-cycle prospective need. Thus, prior-cycle prospective need has a defined ceiling. This is expressed mathematically as follows:

Prior-Cycle Prospective Need = A

Current-Cycle Prospective Need = B

Current-Cycle Present Need = C

(1) $A + B + C = 1{,}000$

(2) $B = 1{,}000 - (A + C)$

(3) If $B > 0$ then $(A + C) < 1{,}000$

(4) In a growth community B is always > 0

(5) So $A + C$ must be $< 1{,}000$

(6) C is fixed and equals U.S. Census-measured present need

(7) If statement 1 is true, only A and B can vary

(8) If statement 4 is true, A must be varied to accommodate a situation where $B > 0$

Thus, in any growth community that is potentially eligible for a 1,000-unit cap, the linkage between prior prospective (A) and current prospective (B) need is fluid and can sum only to a total of 1,000 units minus present need.

(9) $A + B = 1{,}000 - C$

(10) If current-cycle prospective need is zero in a 1,000-unit-cap community, the largest that prior-cycle prospective need can be is 1,000 minus present need.

(11) $A + (B = 0) = 1{,}000 - C$

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