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IN THE MATTER OF THE APPLICATION OF THE 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-003878-15 CIVIL ACTION – *MOUNT LAUREL*

BRIEF AND APPENDIX IN SUPPORT OF MOTION FOR EXTENSION OF THE TOWNSHIP'S TEMPORARY IMMUNITY (ON SHORT NOTICE) AND FOR A DETERMINATION OF THE METHODOLOGY TO BE USED TO DETERMINE PRESENT AND PROSPECTIVE NEED; DETERMINATION OF ACCEPTABLE COMPLIANCE STANDARDS AND MECHANISMS; AND WAIVER OF SENIOR CAP

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

As a result of the invalidation by the New Jersey Supreme Court of the Council on Affordable Housing (COAH) 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 of South Brunswick (Township) filed a Declaratory Judgment Action in compliance with the Court's direction in Mount Laurel IV. On July 31, 2015, the trial court entered various orders granting intervention to certain interested parties as well as Fair Share Housing Center (FSHC). On that same date, the court 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 (Exhibit A). 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.

Pursuant to a Case Management Order entered by the court on September 16, 2015, the

Township was directed to submit to the court, Special Master and all parties its Housing Element and Fair Share Plan (either adopted or in draft) by November 9, 2015 (Exhibit B). At the same time, leave to file a motion seeking to extend the temporary immunity granted to the Township beyond the December 2, 2015, deadline was granted by the court. Any such motion was to be filed no later than November 9, 2015, returnable on short notice on November 13, 2015. Id.

On October 2, 2015, the court entered a further Order requiring submission of a Plan Summary, utilizing the "Summary of Plan" sheets prepared on behalf of the court by certain Special Masters previously appointed by the court in related declaratory judgment actions (Exhibit C). The October 2, 2015, Order modified the previous requirement as to the form of Draft Plan to be submitted to the court, requiring that the Township make use of the "Summary of Plan" sheets to describe its preliminary Housing Element and Fair Share Plan. Said completed sheets were to be submitted to the Township's designated Special Master, with copies to all intervenors and interested parties no later than November 9, 2015. Completion of the Plan Summary in compliance with the October 2, 2015, Order was required as a prerequisite to any application for a further extension of immunity. All intervenors and interested parties were ordered to submit any objections or comments on the Plan Summary to the Special Master and the Township no later than November 25, 2015. Thereafter, the Special Master is required to review the submissions by the parties and provide the Township the opportunity to address any concerns that the Special Master may have with the proposed Plan. The Special Master is required to submit her report to the court on the Township's preliminary Plan no later than December 14, 2015. Id.

Concurrent with the filing of the Township's motion for extension of immunity, the Township has submitted its completed "Summary of Plan" sheets, describing its preliminary

Housing Element and Fair Share Plan, to the Special Master, intervenors and all interested parties in compliance with the court's October 2, 2015, Order (Exhibit D).

In order to finalize the Township's Housing Element and Fair Share Plan, the court must calculate the Township's present and prospective need, finally arriving at a definitive obligation to be assigned to the Township as its Third Round obligation. Until the court determines the Township's obligation in a definitive fashion, the Township's obligation will be speculative. Once the Township's obligation is determined, the court must advise what the acceptable compliance mechanisms are before a final Plan can be prepared.

LEGAL ARGUMENT

POINT I

THE TOWNSHIP'S MOTION FOR EXTENSION OF TEMPORARY IMMUNITY FROM MOUNT LAUREL "BUILDER'S REMEMDY" LAWSUITS SHOULD BE GRANTED

On July 31, 2015, this court 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 (Exhibit A). The court further ordered that, "upon further application of the Township and on notice to all interested parties, the Township could seek an extension of the initial immunity period past December 2, 2015, for such additional time as the court deems warranted and reasonable." Id.

Pursuant to a Case Management Order entered by the court on September 16, 2015, the Township was directed to submit to the court, Special Master and all parties its Housing Element and Fair Share Plan (either adopted or in draft) by November 9, 2015 (Exhibit B). At the same time, leave to file a motion seeking to extend the temporary immunity granted to the Township beyond the current December 2, 2015, deadline was granted by the court. Any such motion was to be filed no later than November 9, 2015, returnable on short notice on November 13, 2015. Id.

Although the Township has submitted its draft Housing Element and Fair Share Plan by November 9, 2015 (Exhibit D), so as to comply with the court's prior Order, at this point it clearly can only represent a "preliminary draft" of the ultimate Plan. Numerous questions remain before a final Plan can be prepared. In light of this, the period of immunity initially granted to the Township should be extended.

A) Review of the Township's draft preliminary Third Round Plan will not be completed by the Special Master until after expiration of immunity.

The court's October 2, 2015, Order (Exhibit C) allows intervenors and interested parties to comment on the preliminary draft Plan. These parties have until November 25, 2015, to submit such comments. Thereafter, the court has given the Special Master until December 14, 2015, to review and provide an assessment of the preliminary draft Plan. The Special Master's comments are not due until twelve days ***after*** the current expiration date of the Township's temporary immunity. It would be unduly prejudicial and unfair to the Township to allow the immunity protections to expire almost two weeks before the Special Master is expected to issue comments on the preliminary draft Plan.

While the Township is making efforts to satisfy its constitutional obligation to provide for its fair share of affordable housing and address any deficiencies raised by the Special Master, it should not at the same time be subject to the potential for numerous builder's remedy lawsuits by the intervenors and other interested parties. The submission of the preliminary draft Plan demonstrates the Township's good faith efforts to voluntarily comply with its constitutional obligation. As such, the immunity should be extended.

B) The court has not yet calculated the Township's present and prospective obligation.

In addition to receiving the Special Master's comments on the preliminary draft plan, the court must also calculate the Township's precise obligation for both the "gap period" as described by this court in its opinion of October 5, 2015, as well as the prospective obligation for the period 2015 – 2025. The court has been presented with various estimates of the Township's obligation through reports prepared by David Kinsey and Art Bernard on behalf of FSHC. A number of references have also been made to the report prepared by Robert Burchell for COAH that was published in 2014 along with the unadopted Third Round regulations.

This Court should not simply accept the calculations, conclusions and results set forth in any of these reports, especially in light of the criticisms of the Kinsey analysis set forth in the report by the Township's expert, Econsult Solutions, in its report dated September 24, 2015. To do so is especially egregious when it is clear from the Econsult report that the Kinsey methodology results in numerous instances of potentially inflated results. Indeed, just one of the criticisms (low and moderate income proportion of population) results in an over inflation of the actual need by 131,000 units, representing a full 37% over inflation of actual need. See page 4, "Summary of Methodological Issues", Review and Analysis of Report Prepared by David N. Kinsey, PhD Entitled: "New Jersey Low and Moderate Income Housing Obligations for 1999-2025", http://www.njslom.org/legislation/Econsult092815.pdf. (Econsult Evaluation Report).

Additionally, Richard Reading of Richard B. Reading Associates, Princeton, NJ has prepared a report at the request of the Hon. Mark A. Troncone, J.S.C., the designated Mount Laurel Judge for Ocean County, dated October 30, 2015 (Exhibit I). Mr. Reading has reviewed the Kinsey report as well as the Econsult and Nassau Capital reports prepared on behalf of the N.J. State League of Municipalities. In his report, Mr. Reading reaches the conclusion that the Statewide need is not 284,000± units or even 201,000± as determined by Kinsey, but rather is no more than 126,000± units, and very likely is much less (See Exhibit I, page 33).

Given the analysis performed by Econsult of the Kinsey methodology, and the criticisms contained in the Econsult Evaluation Report, as well as the Reading report, which seems to confirm those criticisms, this court should be hesitant to simply accept the conclusions expressed in the Kinsey report. On the contrary, this court must conduct a hearing to determine the appropriate methodology to be used to calculate the Township's actual obligation. Important to this process would be the second report being prepared by Econsult, which is expected to be

available by the end of 2015. This second report is expected to perform a detailed analysis of the statewide, regional and municipal obligation actually due once the errors in methodology from the Kinsey report are corrected (see further argument at Point II, infra).

Complicating this process is, of course, the unfortunate medical emergency suffered by Robert Burchell, the Township's initial expert for calculating statewide, regional and municipal obligations. The details of Dr. Burchell's retention, efforts to complete his work as well as efforts to retain a substitute expert (Econsult) are set forth with clarity in the opinion issued by the Hon. Thomas C. Miller, P.J.Cv., Somerset County, in his unpublished opinion dated October 21, 2015, in In Re Borough of Rocky Hill, Docket No. SOM-L-15 (Exhibit E). The lengthy summary is incorporated herein as if fully set forth. Of note in Judge Miller's factual findings are the following:

> 4. In reviewing the various submissions of the parties, it is apparent that there is a significant dispute in the "fair share" calculations advanced by the competing interests in this litigation. Proceeding to a plenary hearing on any of the Plaintiff's constitutional affordable housing obligations in advance of the demonstration of rational and reasonable criteria for calculating the affordable housing needs of the Plaintiffs will yield nothing but frustration.
>
> 9. Given Dr. Burchell's illness, the Court must recognize the reality that there will be a delay in the finalization of a rational and reasonable criteria for calculating the constitutional affordable housing needs of the Plaintiffs…
> (Exhibit E, page 7, quoting from unpublished opinion of the Hon. Nelson C. Johnson, J.S.C., In Re City of Absecon, Superior Court, Law Division, Atlantic and Cape May Counties, Docket No. ATL-L-2726-12, et seq., at page 4 (Exhibit F))

As Judge Miller found,

> In any other litigated matter before this court, the court would freely extend the time limits to allow a party to obtain a replacement expert and not be placed in a litigation disadvantage due to circumstances beyond its control by reason of losing its expert to a stroke. Certainly if similar circumstances affected the FSHC or any of the intervenors, the court would not require them to proceed in the manner that the FSHC and the intervenors have advocated for the municipalities in this case or other companion cases that are before the court. (Exhibit E, page 18).

In light of the clear delay in determining the Township's Third Round present and prospective obligation caused by the unfortunate stroke suffered by the Township's expert, the court should extend the period of immunity for sufficient time to allow the Township to receive Econsult's report and present same to the court, Special Master and all parties for consideration. Only then would it be appropriate to conduct a hearing to determine the methodology to be used to calculate the Township's actual obligation. As Judge Miller aptly put, the "court's emphasis is to produce a result which will fairly assess each municipality's constitutional obligations as well as a preparation, development and interpretation of a real plan that will produce real results for the parties that are really affected." (Exhibit E, page 17) (emphasis in original). Until such time as this court can "fairly assess" the Township's constitutional obligation as well as the "preparation, development and interpretation of" the Township's final plan, immunity from builder's remedy suits should be continued.

C) The court has not yet determined acceptable compliance standards and mechanisms.

Once the court determines the Township's actual obligation for the Third Round, the Court must then determine the acceptable compliance standards and mechanisms available to the Township to meet its obligation. The Supreme Court in Mount Laurel IV directed trial courts to make use of the procedures and compliance mechanisms set forth in the Second Round Rules, and such provisions of the Third Round Rules as were approved by Appellate Division and Supreme Court cases. Mount Laurel IV, at 41-46. These include numerous possible ways for the Township to provide for low and moderate income housing in South Brunswick. The acceptable compliance mechanisms suggested by the Supreme Court also include various credits and bonuses available to municipalities in preparing a Third Round Plan. This court should indicate which of these compliance mechanisms it will recognize (See Point III, infra.). In the

event deficiencies are found by the court in the Township's Plan, the Supreme Court in Mount Laurel IV indicated that the Township be given the opportunity to provide supplementation of the Plan while continuing to be protected from builder's remedy suits. Mount Laurel IV, supra., at 32.

As the Supreme Court in Mount Laurel IV made clear, trial courts are charged with the responsibility "to render an individualized assessment of the Town's Housing Element and Affordable Housing Plan based on the Court's determination of present and prospective regional need for affordable housing applicable to that municipality." Mount Laurel IV, supra., at 39. This "individualized assessment" of a municipality's constitutional compliance plan must "evaluate the extent of the obligation and the steps, if any, taken toward compliance with that obligation. In connection with that, the factors that may be relevant, in addition to assessing current conditions within the community, include whether a housing element has been adopted, any activity that has occurred in the town affecting need, and progress in satisfying past obligations." Id. at 38-39. In order for the court to perform the required "individualized assessment" of the Township's Housing Element and Fair Share Plan, and indeed before the Township can submit its final Third Round Plan, the various aspects of the process outlined above (and as further presented in the remainder of the within Brief) must be accomplished. Clearly, these steps, and the findings required of the trial court, will not be accomplished prior to December 2, 2015.

Since the Township has submitted in good faith its preliminary draft Third Round Plan in compliance with the court's prior Order, and in light of all of the above, the Township should be granted an extension of temporary immunity from Mount Laurel "builder's remedy" lawsuits until such time as the Township's Third Round obligation is firmly established and the Township

given a reasonable opportunity to address any deficiencies in its Plan.

As the Court in In Re City of Absecon, et. al, supra., made clear, efforts to expedite the process such that the necessary steps outlined above are compromised are unreasonable and inappropriate. Indeed, the court expressed it thusly:

> As a consequence of COAH's abject failure to perform its duties, and the unfortunate and untimely illness of Dr. Burchell, there presently do not exist rational and reasonable criteria for calculating the affordable housing needs of any of the [municipal] plaintiffs.
>
> Mr. [Kevin] Walsh's urgings are not grounded in reality. The task he urges upon the court is akin to being dropped in the middle of a dense forest on a cloudy day, without a compass and told, "find your way home." With a compass, one would have some comfort as to the direction to pursue; with the sun, one could plot a general course and hope for the best; with neither, one could walk in circles.
>
> Mr. Walsh's demands for this court to move with urgency read more like hastiness to the undersigned. His demand that the court review the plaintiff's fair share plans and calculate their affordable needs is not accompanied by a yardstick; his complaint of a "free pass" to the plaintiffs ignores the reality that plaintiffs spent tax dollars and public officials' time toward compliance with COAH, only to have their efforts ignored by COAH. This court refuses to punish plaintiffs for COAH's failings. (Exhibit F, at page 2).

Indeed, the Absecon Court emphatically stated that "the procedures for transitioning from a COAH-regulated process to one controlled by the courts, as contemplated in [Mount Laurel IV] will only operate efficiently upon this Court having assurance that there exists rational and reasonable criteria for calculating the constitutional affordable housing needs of the plaintiffs." Id. at page 5.

The futility of compelling the Township to adopt a final Third Round Plan, under the threat of builder's remedy lawsuits if immunity is not continued, was also clearly recognized by the Absecon court when it stated "absent a basis for calculating the 'fair share numbers,' the plaintiff municipalities do not have a target at which to aim in preparing their housing element

and fair share plan." Id. at 7. Forcing the Township to submit its final Plan, without the extension of immunity, will lead to hasty, ineffectual and ultimately inappropriate plans. This would never be in the best interests of the low and moderate income households seeking affordable housing. On the contrary, it would only result in further litigation and ultimately delay the production of housing. As the Absecon court observed:

> Finally, nearly 40 years ago, as a young lawyer, the undersigned was counseled by the Honorable George B. Francis, P.J.Ch., A.J.S. and J.A.D. (deceased) that: "There's nothing fast about justice. However long it takes, that's how long it takes." This Court will not engage in hasty conduct by pushing the twenty-four municipalities before the Court into efforts that are premature. We will do things correctly the first time—however long it takes—rather than on remand." Id. at page 8.

This court should likewise ensure that the procedures to be followed in establishing the Township's Third Round obligation, and acceptable compliance mechanisms, are firmly established before the Township is required to submit a final Third Round Plan. The Township should continue to be immune from builder's remedy suits during the time it takes to accomplish these important, necessary steps in the process. This is the only way to ensure that an appropriate, reasonable plan is prepared and ultimately approved. Since that clearly cannot occur prior to the expiration of immunity on December 2, 2015, it is respectfully requested that this court extend the temporary immunity granted to the Township.

POINT II

CALCULATING PRESENT AND PROSPECTIVE NEED

In Mount Laurel IV, supra., the Court, stated that the "parties should demonstrate to the court computations of housing need and municipal obligations based on [the First and Second Round] methodologies." Id. at 30. The obligation to be satisfied is the "fair share of the present and prospective regional need for low and moderate housing." Id. (quoting So. Burlington County N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158 (1983) (Mt. Laurel II). To address any prior obligations as well, the Court said that its opinion did "not eradicate the prior round obligations; municipalities are expected to fulfill those obligations. As such, prior unfulfilled housing obligations should be the starting point for a determination of a municipality's fair share responsibility." Mount Laurel IV, supra.

According to established law in New Jersey, affordable housing and fair share obligations consist of three components: present need, prospective need for the upcoming ten year period, and any unmet prior round obligation. New Jersey's courts have already concluded that "the second round affordable housing obligations established in 1993 should be used as the 'prior round' component of affordable housing obligations under the revised third round rules." In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 500 (App. Div. 2010).

In addition, this court has also imputed a fourth period, referred to as the 1999-2015 "gap period" obligation that must be satisfied in the manner set forth in the court's October 5, 2015, written opinion. It should be noted that no statute or surviving COAH regulation provides for the retrospective application of a "gap period" obligation, especially one that the municipality was never able to verify through the administrative system established to determine fair share obligations. The use of statistical information to quantify what might have been a present,

prospective, or prior obligation during the "gap period" had legally sustainable COAH third round rules been in effect, should not create an additional municipal "prior obligation" since no recapture provision exists in the First and Second Round Rules. Nevertheless, the court has already determined that the components of a municipality's Third Round Plan must satisfy its obligation for: (1) the present need (rehabilitation); (2) the prior round (1987-1999); (3) the "gap period" (1999-2015); and (4) the prospective need (2015-2025).

The question of how to calculate present and prospective need has been answered by the Supreme Court in Mount Laurel IV, wherein the Court repeatedly relied upon the terms "present need" and "prospective need," both terms of art which have been relied upon by the courts since So. Burlington County N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151, appeal dism. and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L.Ed.2d 28 (1975) (Mt. Laurel I) and later by the Legislature and COAH. As demonstrated below, the use of these terms and the methodology to define them over the past nearly 40-plus years since the Mount Laurel I trial court rendered its decision clearly establishes that any calculation of need must be based on a ten year period utilizing the most recent census.

A. The Courts Have Always Restricted A Review of Present Need and Prospective Need to a Period Based on the Most Recent Census.

Historically, the courts, COAH, and the professional planners working on their behalf have always looked to the most recent available data to develop present and prospective need. In 1972, the trial court whose decision eventually led to the Supreme Court's Mount Laurel I decision approved the plaintiff's request there for the municipality to:

> immediately undertake a study to identify: ·
>
> a. The existing sub-standard dwelling units in the township and the number of individuals and families, by income and size, who would be

displaced by an effective code-enforcement program;

b. The housing needs for persons of low and moderate income:

1. Residing in the township;

2. Presently employed by the municipality or in commercial and industrial uses in the township;

3. Expected or projected to be employed by the municipality or in commercial and industrial uses, the development of which can reasonably be anticipated in the township.
So. Burlington County N.A.A.C.P. v. Mount Laurel Twp., 119 N.J. Super. 164, 178 (Ch. Div. 1972) modified sub nom., Mount Laurel I, supra.

Shortly thereafter in 1974, the trial court in Oakwood at Madison, Inc., v. Madison Township, 128 N.J. Super. 438 (Law Div. 1974), modified, 72 N.J. 481 (1977), relied upon the 1970 census because, "[i]n determining the township's fair share of housing in all income ranges, the breakdown of population by yearly income according to the 1970 census is relevant." Id. at 442. Judge Serpentelli noted in AMG Realty v. Warren Township, 207 N.J. Super. 388 (Law Div. 1984), that the "term prospective need refers to household formation expected to occur between 1980 and 1990. Any need generated prior to 1980 and still existing constitutes present need." Id. at 403. These cases highlight the consistency of the courts in addressing the calculations of present and prospective need by looking solely at the then-current period based upon the most recent census data. This court should follow this well-established pattern and utilize the 2010 census data for determining present and prospective need.

It should be noted that Judge Serpentelli reviewed reports prepared for the Urban League of Greater New Brunswick v. Carteret (Docket No. MID-C-4122-73) line of litigation, and from the Center for Urban Policy Research at Rutgers University when deciding the AMG Realty matter. The former report was based upon meetings that included planners from across the state.

See Carla L. Lerman, Fair Share Report, Urban League of Greater New Brunswick v. Carteret et. al., March 7, 1984. Both reports addressed the common methodologies of the time, which reviewed the most recent census data to establish present and prospective need, to calculate present and prospective need in their respective matters. See AMG Realty, supra. at 388. Interestingly, the Urban League Report noted in 1984 that the most current census was relevant to create the most accurate calculation of need when it stated that "[i]n 1990, the decennial census will provide new data which will be more appropriate for an evaluation of the impact of the Mt. Laurel Doctrine and for further projections to the year 2000." Carla L. Lerman, Fair Share Report, Urban League of Greater New Brunswick v. Carteret et. al, March 7, 1984.

It is clear from the foregoing that the courts and planning experts have never sought to "recapture", or inflate present and prospective need obligations for an entire decade or longer in calculating a fair share obligation. Arguably, the first Mount Laurel trial court and the other early courts developing fair share obligations could have attempted to develop an obligation for each decade from 1947 when the most current New Jersey Constitution was adopted. This, however, would have been unreasonable. Instead, the most logical conclusion, and the one espoused by Judge Serpentelli in AMG Realty, is that any need generated prior to a census constitutes present need captured in the current census. Thus, the development of a present and prospective need with a 10 year compliance period is the only method approved by the pre-FHA courts, and should provide guidance for developing the method for calculating the present and prospective need in the instant matter.

B. COAH's Regulations Have Limited the Review of Present and Prospective Need to the Most Current Census.

The regulatory law on how time periods are established for present and prospective need

follows the same pattern established by the Mount Laurel line of cases by examining data from the most recent census. The First and Second Round methodologies adopted as regulations by COAH relied on the most recent census (1980 and 1990 respectively) to generate a municipality's present and prospective obligation. See e.g., N.J.A.C. 5:92-1.1 (defining "Census subregion"); N.J.A.C. 5:92-3.1 (citing 1980 New Jersey Public Use Sample from U.S. Census Bureau); N.J.A.C. 5:93-1.1 (defining "Census subregion"); N.J.A.C. 5:92-2.1(b) (stating that Exhibit 3 in Appendix A provides community data which is drawn from sources, including the 1990 census).

An early argument for expanding the window to include pre-current census data to analyze present and prospective need despite the hard limit being placed in COAH's First Round regulations was rejected by the Appellate Division during the early days of the doctrine:

> The COAH standard focused on the 1980 census and determined from 1980 forward how many low and moderate income families not then living in standard units required housing at that time in each of the communities in each region. It is true that the pre-1980 units would at some point become vacant through a variety of factors: death of the tenant, the ability of the tenant to afford more expensive housing, relocation of the tenant out of the municipality or region, or any other factor resulting in a vacancy. But since the situation is not static, competing factors remain in the housing market. For every dwelling vacated by death, another is filled by a newly formed family unit when a person, couple or family of low or moderate income first sets up housekeeping. For every unit vacated by a family moving from the municipality, another may move into the community. For every family whose affluence permits it to move to more expensive housing, another, because of reduced circumstances, will first fit the definition of low or moderate income and be seeking the vacated living unit. By excluding the pre-1980 units, COAH's model balanced these factors and just dealt with families housed in substandard housing or no housing at all; COAH then projected the growth of these figures and the need to have each municipality absorb its fair share of the required new housing. Twp. of Bernards v. State. Dept. of Community Affairs, 233 N.J. Super. 1, 11-12 (App. Div. 1989).

The Appellate Division resolved a similar challenge to a COAH regulation four years later when it upheld the regulation that credits could be provided to a municipality for affordable

units constructed between 1980 and 1986. See Non-Profit Affordable Housing Network of New Jersey v New Jersey Council on Affordable Housing, 265 N.J. Super. 475 (App. Div. 1993).

Moreover, COAH's summary attached to the proposed Second Round rules explains the logic behind relying upon the most current census for calculating present and prospective need. In connection with N.J.A.C. 5:93-2, COAH "reasoned that if municipalities are going to be responsible for estimates of substandard housing, those estimates should best reflect the best and most recent data available. Therefore, the estimates based on the 1990 census have replaced the estimates that resulted from the 1980 census." 25 N.J.R. 1119 (emphasis added). COAH expanded on this logic by noting that some of the surrogates used between the two data sets had been replaced with new ones. 25 N.J.R. 1119**.** Finally, COAH noted that even the most conservative past estimates of prospective need did not come to fruition, and that "it did not make sense for municipalities to be responsible for projected growth that did not occur." 25 N.J.R. 1120. The glaring reality presented by COAH's own language is that old data leads to faulty numbers, and that old data should be disregarded in favor of current data.

Additionally, the utilization of multiple data sets can lead to unnecessary errors in calculating present and prospective need. For example, Econsult has calculated that Dr. Kinsey has potentially double-counted 21,000 units through overlapping time periods in an effort to recapture the “gap period.” See Econsult Evaluation Report, Sec. 2.4. The Kinsey report may also overestimate the actual need for low and moderate income housing by 131,000 units due to errors in the calculation of the low and moderate income proportion of the population. See Econsult Evaluation Report, Sec. 2.2. Such an outcome is contrary to the FHA's goal of providing a realistic opportunity for the construction of the fair share of housing for lower and moderate income households.

The pattern utilized by the courts and COAH in establishing present and prospective need has been repeated consistently throughout the history of Mount Laurel litigation. This court should employ the process that has existed, and been approved, for nearly 45 years. Thus, all present and prospective need should be captured in the 2010 census, and calculated using previously adopted First and Second Round methodologies as directed by the Supreme Court.

POINT III

THE COURT MUST DETERMINE ACCEPTABLE COMPLIANCE MECHANISMS

The starting point for establishing acceptable compliance mechanisms should begin with the Second Round regulations (N.J.A.C. 5:93-1.1, et seq.), because (1) the Supreme Court invalidated the second iteration of the Third Round regulations that COAH had adopted in 2008, In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 215 N.J. 578, 618, 620 (2013); (2) COAH never adopted the regulations it proposed in 2014; (3) the Second Round regulations are still valid, (See 43 N.J.R. 1203(a) wherein COAH, in accordance with N.J.S.A. 52:14B–5.1b, extended COAH's substantive regulations for the Second Round until October 16, 2016); and most importantly (4) the Supreme Court in Mount Laurel IV directed trial courts to use the methodologies established in the First and Second Rounds. Mount Laurel IV, supra. at 41. Thus, trial courts should initially look to the Second Round regulations to establish the framework of compliance mechanisms.

In addition to the Second Round rules, the Supreme Court directed that Third Round standards upheld by the Appellate Division should also be used by trial judges to determine municipal compliance. Indeed, the Court in Mount Laurel IV specifically ruled that "many aspects of the two earlier versions of Third Round Rules were found valid by the appellate courts." Mount Laurel IV, supra. at 30.

Accordingly, COAH's Second Round Rules, as amended through May 2002 (N.J.A.C. 5:93 (Substantive) and N.J.A.C. 5:91 (Procedural)), should be used as the compliance standards for review of the Township's fair share plan, except when subsequent statutory amendments call for different treatment and as specifically indicated otherwise by guidance from the Supreme Court in Mount Laurel IV. The Uniform Housing Affordability Controls

("UHAC") contained at N.J.A.C. 5:80-26.1, et seq., should also apply.

Aside from this, it also makes eminently good planning sense to rely upon what is known to produce affordable housing. The regulations set forth in the Second Round rules have been in place for over 20 years. Developers, municipalities and housing advocates have relied on these standards as well as the New Jersey Housing and Mortgage Finance Agency's (HMFA) Uniform Housing Affordability Control (UHAC) to create affordable housing. The Second Round rules, N.J.A.C. 5:93-1 et seq., have been upheld by the courts, tested over time and have been an effective tool in producing affordable housing.

Given the Supreme Court's invalidation of the Third Round Rules in toto; its recognition that the rules dealing with fair share methodology and compliance are parts of an integrated whole and its mandate that the Second Round methodology rules be used; the experience that municipalities, developers, planners, and housing advocates have had with the Second Round Rules; and their efficacy all militate in favor of use of the Second Round compliance standards.

Second Round Compliance Mechanisms

Pursuant to the Second Round Rules, the following should be found to be valid and acceptable compliance mechanisms available to the Township in formulating its Third Round Plan:

A. 20 PERCENT CAP

The Second Round Regulations, at N.J.A.C. 5:93–2.16, state:

> (a) A cap of 20 percent of the estimated 1993 occupied housing stock (community capacity) cannot be exceeded by a municipality's need for new construction. The need for new construction is the pre-credited need minus the reductions, prior-cycle credits, and the rehabilitation components. This is based on the premise that if the affordable housing was provided as a 20–percent set-

> aside of inclusionary housing, and if the planned affordable housing was more than 20 percent of existing units, then the new affordable housing and accompanying market units would exceed the number of existing housing units in the community.
>
> (b) Community capacity is determined by multiplying the estimated 1993 occupied housing in the municipality (Appendix A, Exhibit 1, Column 4) by 0.20 and comparing this to the municipal need for new construction.
>
> 1. If the community capacity is larger than municipal need for new construction, the 20–percent cap is zero. This is the case for the present example.
>
> 2. If community capacity is smaller than municipal need for new construction, the difference between community capacity and the municipal need for new construction is subtracted from the latter to yield the 20–percent cap. The 20–percent cap is the difference between community capacity and the municipal need for new construction. Municipal need at this point equals pre-credited need minus the reduction, minus prior-cycle credits, minus the 20–percent cap.

The court should follow the standard that COAH established and that remains in effect today for application of the 20 percent cap. To follow the policy embodied in this regulation faithfully, it is necessary to pick a more recent date than the 1993 date COAH selected when it adopted the regulation in 1994. It is respectfully recommended that the court use the 2010 Census data to determine occupied housing stock (community capacity).

B. NO FAMILY RENTAL REQUIREMENT

The Second Round regulations did not impose a family rental requirement. Instead, those regulations created an incentive for municipalities to create family rentals by offering a two for one bonus under N.J.A.C. 5:93-5.15. That incentive proved to be very effective as evidenced by the plethora of municipalities (including South Brunswick) that designed plans with family rental components to secure the benefit of the incentive. The Supreme Court did not deem it necessary to take a position as to whether there should be a family rental requirement and if so how best to achieve that objective.

In light of the above, and the Supreme Court's recent direction for trial judges to avoid being policy makers in Mount Laurel matters, Mount Laurel IV, supra., at 40, this court should not engage in a debate as to the "best" way to address the need for family rental housing. Nor should the court rely upon the 2008 regulations the Supreme Court invalidated, or the 2014 regulations that COAH proposed, but never adopted. Instead, this court should follow the Second Round regulations on this issue, which are still in effect.

C. RENTAL BONUS CREDITS

Pursuant to the Second Round regulations, N.J.A.C. 5:93-5.15(d) treated rental bonus credits as follows:

> (d) The Council shall grant a rental bonus for rental units that are constructed and conform to the standards contained in N.J.A.C. 5:93–5.8(d) and 5.9(d) and 5:93–7. The Council may also grant the rental bonus prior to construction when it determines that the municipality has provided or received a firm commitment for the construction of rental units. A municipality may lose the benefit of the rental bonus granted in advance of the actual construction of the rental units if the municipality has not constructed the rental units within the time periods established as a condition of substantive certification; or granted preliminary or final approval for the construction of the rental units (where a developer agreed to construct the rental units). A municipality may also lose the benefit of a rental bonus if the preliminary or final approval is no longer valid or if the developer has abandoned the development.
>
> 1. A municipality shall receive two units (2.0) of credit for rental units available to the general public.
>
> 2. A municipality shall receive one and one-third (1.33) units of credit for age restricted rental units. However, no more than 50 percent of the rental obligation defined in (a) and (b) shall receive a bonus for age restricted rental units unless:
>
> i. The rental units have been constructed prior to the effective date of this rule;
>
> ii. The development has a valid preliminary or final approval from the municipality and the developer remains committed to building rental housing as of the effective date of this rule; or

iii. The time limit for constructing the rental units as per the conditions of substantive certification has not expired.

3. No rental bonus shall be granted for rental units in excess of the rental obligation defined in (a) and (b).

The Township should have the right to rely upon this Second Round regulation when formulating its Third Round Plan.

D. AGE-RESTRICTED HOUSING

Generally, COAH's Second Round regulations capped age-restricted housing at 25 percent of the new construction obligation. See N.J.A.C. 5:93-5.14. More specifically, COAH created specific categories of municipalities and articulated formulas for each category based upon the principle that there should be a 25 percent cap:

1. For municipalities that have received substantive certification or a judgment of repose and are not seeking a vacant land adjustment, COAH applied the following formula to determine the maximum number of age-restricted units a municipality could include in its plan: .25 (municipal precredited – prior cycle credits – credits pursuant to N.J.A.C. 5:93-3.4 – the impact of the 20 percent cap – the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93-14) – any age restricted units in addressing the 1987-1993 housing obligation.

2. For municipalities that received or are receiving a vacant land adjustment, COAH applied the following formula to determine the maximum number of age-restricted units a municipality could include in its plan: .25 (realistic development potential + rehabilitation component – credits pursuant to N.J.A.C. 5:93-3.4) – any age restricted units addressing the 1987-1993 housing obligation.

3. For municipalities that have never received substantive certification or a judgment of repose and are not seeking a vacant land adjustment, COAH applied the following formula to determine the maximum number of age-restricted units a municipality could include in its plan: .25 (municipal precredited need – prior cycle credits – credits pursuant to N.J.A.C. 5:93-3.4 – the impact of the 20 percent cap – the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93-14.)

These formulas could increase or decrease the total number of age-restricted units a municipality could use to address its obligations. Whether the "cap" should remain at 25% or be increased to something higher based on 2010 Census data is discussed at Point IV, infra.

E. VACANT LAND ADJUSTMENTS

For decades, COAH has preserved the right of a municipality with insufficient land to determine how to satisfy its obligations once its adjusted obligation – otherwise known as its "realistic development potential" or "RDP" -- has been determined. COAH set forth this policy in N.J.A.C. 5:93-4.2(g), which provides as follows:

> The municipality may address its RDP through any activity approved by the Council, pursuant to N.J.A.C. 5:93–5. The municipality need not incorporate into its housing element and fair share plan all sites used to calculate the RDP if the municipality can devise an acceptable means of addressing its RDP. The RDP shall not vary with the strategy and implementation techniques employed by the municipality.

Thus, if this court determines that the Township lacks sufficient land to meet its obligations, COAH policies have always preserved the right of the municipality to decide how it wishes to satisfy its adjusted obligation. Most importantly, once it satisfies its adjusted obligation and secured Plan approval by COAH or the court, the Township should be entitled to a high level of "finality" to its Plan.

Municipalities have made planning and fiscal decisions in reliance on this principle for many years, and continuing this practice is critical to enabling municipalities to balance the need to create a realistic opportunity for satisfaction of a specific number of affordable units with the need to generate affordable housing in a manner that the community finds most acceptable. This court should preserve COAH's past practice of allowing the Township to have full control over how it satisfies its adjusted obligation. Certainly, this court should not substitute its judgment for that of COAH, which established state policy on this issue long ago through the rule-making

process.

The right of a municipality to choose how to satisfy its adjusted obligation should not vary if the court determines a municipality's RDP before approving its affordable housing plan or if the court recalibrates the municipality's RDP as a result of a developed site becoming available for development after approving the Township's plan. Under both scenarios, the principles embodied in N.J.A.C. 5:93-4.2(g) should control, empowering the Township to make the choice as to how to satisfy the adjusted obligation. The FHA supports this approach. See N.J.S.A. 52:27D-311.a (providing that a municipality may address its affordable housing obligation "by means of any technique or combination of techniques which provide a realistic opportunity for the provision of the fair share.")

F. COMPLIANCE BONUS CREDITS

The Second Round Regulations treat Compliance Bonuses, under N.J.A.C. 5:93–3.6 "Reductions for substantial compliance," as follows:

> (a) A reduction of the 1987–1999 inclusionary component of the calculated need shall be granted according to the following schedule when the Council determines that a municipality has substantially complied with the terms of its substantive certification, and has actually created, within the municipality, or issued building permits for a substantial percentage of the new units that were part of the municipal 1987–1993 housing obligation within the period of substantive certification (as extended by a grant of interim substantive certification pursuant to N.J.A.C. 5:91–14.1(a)):
>
> | Percentage of Units Completed | Reduction |
> |---|---|
> | 90+ | 20 percent |
> | 80-89 | 10 percent |
> | 70-79 | 5 percent |
>
> This reduction shall be based solely on the percentage of new low and moderate income units constructed within the municipality that received substantive certification or were the recipients of building permits. The percentage of units completed shall be determined by dividing the number of new low and moderate income units actually constructed or receiving building permits within the municipality by the number of low and moderate income units designated for

construction within the municipality in the 1987–1993 fair share plan.

Example: If the municipal housing element and fair share plan that received substantive certification designated 100 units to be constructed in the municipality and another 75 units to be transferred to a receiving municipality via an RCA, the reduction shall be based on the percentage of the 100 units that were to be constructed within the municipality that received substantive certification.

(b) The reduction in (a) above shall only be applied to the inclusionary component of the 1987–1999 calculated need, as determined by the Council. This reduction shall be applied to the remaining inclusionary component after the Council has accepted all other reductions and credits (including any rental bonus).

Example: A municipality has a 1987–1999 precredited need of 200. It had a 1987–1993 inclusionary component of 100. All 100 new units were actually constructed or received building permits within the municipality. The reduction for substantial compliance is 20 percent. The remaining calculated need is 100. However, the rehabilitation component is 20, leaving an inclusionary component of 80. The 20 percent reduction is applied to the 80 remaining new units, leaving an inclusionary component of 64.

Neither the Supreme Court nor the Appellate Division overturned or otherwise addressed this regulation. Consequently, trial courts should utilize this standard in the Third Round. This would require the court to look to the Second Round period (1993-1999) and determine the percentage of the Township's Second Round completed units. The court would then have to reduce the Township's obligation by the percentage set forth above. For example, if ABC Town had a Second Round obligation of 100 units and has completed 90 or more of those units, its Third Round obligation should be reduced by 20 percent. Thus, if ABC Town had a Third Round obligation of 50 units, its obligation would be reduced by 10 units. Consistent with the FHA, this provision rewards municipalities for voluntary compliance and for the production of realistic opportunities for affordable housing.

G. SPECIAL NEEDS HOUSING CREDIT BY THE BEDROOM.

N.J.A.C. 5:93-5.8(b) indicates that the unit of credit for Special Needs housing (called

'alternative living arrangements' in the Second Round rules) "shall be by the bedroom." The same method of calculating credits for Special Needs housing was included in the Third Round rules at N.J.A.C. 5:97-6.10(b)1. This method of calculating units of credit for Special Needs housing should be applied by the court in evaluating the Township's Third Round plan.

H. WRITE-DOWN/BUY-DOWN (MARKET-TO-AFFORDABLE) PROGRAM.

N.J.A.C. 5:93-5.11 permits municipalities to meet a portion of their fair share obligation through a write-down/buy-down (market-to-affordable) program. The Second Round market to affordable program allows municipalities to purchase or subsidize existing units and sell them to low and moderate income households at affordable prices. N.J.A.C. 5:93-5.11(a)1 initially limits such programs to 10 units however the rule permits a municipality to request that up to 25 percent of its net inclusionary or new construction obligation be satisfied in this fashion. As part of the Third Round rules, COAH permitted the market-to-affordable program to include both for-sale and rental units. N.J.A.C. 5:97-6.9.

As part of its review of the Township's Third Round Petition, COAH already granted the Township a waiver of the limitation on market-to-affordable units, permitting the Township to produce up to 146 units of housing (both for-sale and rental) in this fashion. The Township has had significant success in producing affordable housing through its market-to-affordable program. It should be permitted to continue this success to the maximum extent allowed under the Second Round rules.

I. MUNICIPALLY SPONSORED/100% AFFORDABLE HOUSING.

N.J.A.C. 5:93-5.3 through -5.5 permit municipalities to meet a portion of their fair share obligation through municipally sponsored construction, with or without non-profit corporations. A municipally sponsored construction program shall address four major areas of concern: It shall

document that there is municipal control of the site(s); an administrative mechanism to construct the proposed housing; a funding plan and evidence of adequate funding capacity; and timetables for construction of the units. This was also included in the Third Round rules, as set forth below.

Third Round Compliance Mechanisms

The compliance standards not in the Second Round Rules, but approved by the Supreme Court or contained in changes to statutory law, are as follows:

A. NEW CONSTRUCTION CREDIT FOR THE EXTENSION OF EXPIRING CONTROLS.

In Mount Laurel IV, the Court gave as one of its "guidelines" (id. at 29) the extension of expiring controls for for-sale affordable units as was permitted by N.J.A.C. 5:94-4.16(a). Id. at 31. It cited the 2007 Appellate Division decision, In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1 (App. Div. 2007), upholding this COAH rule. In so doing, the Appellate Division, after noting that "a municipality receives a new construction credit by extending affordability controls on existing affordable housing," citing N.J.A.C. 5:94-4.16(a), held that the COAH rule was not arbitrary and capricious, noting that "[e]xtending affordability controls on existing housing prevents the loss of much needed affordable housing." Id. at 81, 84.

In response to that ruling, COAH adopted a new rule, N.J.A.C. 5:97-6.14(a), which permitted credit for all affordable units, both for-sale and rental, for which the controls were extended. The amended rule was not challenged when suit was brought to invalidate many of the rules in the second iteration of the Third Round Rules.

B. VERY LOW INCOME BONUS CREDIT

The Supreme Court addressed Very Low Income units in its decision in Mount Laurel IV. Specifically, the Court provided:

> The same [Appellate] panel also approved the allocation of a bonus credit to a municipality "for each unit that is affordable to the very poor, that is, a member of the general public earning thirty percent or less of the median income." [In re Adoption of N.J.A.C. 5:94 & 5:95, supra.] (citing N.J.A.C. 5:94–4.22). Mount Laurel IV, supra., at 32.

N.J.A.C. 5:94–4.22, the regulation the Supreme Court resuscitated, provides as follows: "Notwithstanding the provisions of N.J.A.C. 5:94-4.20(d), a municipality shall receive two units of credit for affordable units available to households of the general public earning 30 percent or less of median income by region."

In addition, this court must reject any assertion that the 13 percent Very Low Income requirement applies to the entire fair share, because such an interpretation violates well-established legal principles calling for prospective application of statutes. Specifically, "statutes generally should be given prospective application." James v. New Jersey Manufacturers Ins. Co., 216 N.J. 552, 563-65 (2014) (quoting In re D.C., 146 N.J. 31, 50 (1996)); see also Gibbons v. Gibbons, 86 N.J. 515, 522 (1981) ("It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair.") (quoting 2 Sutherland, Statutory Construction, § 41.02 at 247 (4th ed. 1973)). The preference for prospective application of new legislation "is based on our long-held notions of fairness and due process." James, supra, at 563.

Relevant to the various matters currently before this court, N.J.S.A. 52:27D-329.1 requires that "at least 13 percent of the housing units made available for occupancy by low-income and moderate income households will be reserved for occupancy by very low income households." Section 329.1 does not require half of the very low-income units to be family rental units; nor does it specify that the 13 percent requirement applies retroactively. Therefore, this court must presume that the 13 percent requirement applies prospectively to the Third Round obligation. There has been no demonstrated instance where the 13 percent requirement has been

imposed on a prior round obligation.

COAH did not address this requirement in the Second Round regulations it adopted in 1994 because the Legislature enacted the very low-income requirement in 2008 with the enactment of the Roberts Bill. Nor did COAH adopt regulations to implement the very low-income requirement established by the Roberts Bill.

The Court must impose the 13 percent requirement, because Section 329.1 of the FHA requires it to do so. However, imposing an additional requirement that some percentage of those units must be "family units" is not in the FHA. Courts cannot "insert an 'additional qualification' into a clearly written statute when 'the Legislature pointedly omitted' doing so." Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipalities, 207 N.J. Super. 489, 502-03 (2011). Therefore, this court cannot impose a "family-unit requirement" into the FHA.

C. REDEVELOPMENT BONUS CREDIT

In Mount Laurel IV, the Supreme Court upheld the use of Redevelopment Bonuses:

> [T]he Appellate Division approved the……."Redevelopment" bonuses contained in the second iteration of the Third Round Rules. 416 N.J. Super. at 495–97…… The "Redevelopment" bonus awarded "1.33 units of credit for each affordable housing unit addressing its growth share obligation ... that [wa]s included in a designated redevelopment area or rehabilitation area pursuant to the Local Redevelopment and Housing Law." N.J.A.C. 5:97–3.19. Id. at 31-32.

Since the Supreme Court specifically identified the Redevelopment bonus set forth in the Third Round regulations, trial courts should follow those standards set forth in N.J.A.C. 5:97-3.19. This regulation provides as follows:

N.J.A.C. 5:97-3.19 Redevelopment Bonus.

> (a) A municipality may receive 1.33 units of credit for each affordable housing unit addressing its growth share obligation that was or will be created and occupied in the municipality or received preliminary or final approval, after June 6, 1999, that is included in a designated redevelopment area or rehabilitation area pursuant to the Local Redevelopment and Housing

Law, N.J.S.A. 40A:12A-1, et seq., when:

1. The preliminary and/or final approval provides for a minimum set-aside of 15 percent of the total number of units in the development, unless the development meets the criteria of N.J.A.C. 5:97-3.15. In this case, the development shall have a minimum 20 percent affordable housing set-aside, to the extent economically feasible;
2. The affordable units are provided on-site;
3. At least 50 percent of the affordable units are family units; and
4. The development meets the redevelopment criteria pursuant to N.J.A.C. 5:97-6.6.

(b) If the affordable units have not been constructed as of the date of petition, the municipality shall submit evidence of a firm commitment for the construction of the units in conformance with N.J.A.C. 5:94-3.6(a)3ii.

D. MUNICIPALLY SPONSORED/100% AFFORDABLE HOUSING.

Continuing what was permitted in the Second Round rules at N.J.A.C. 5:93-5.3 through -5.5, the Third Round rules at N.J.A.C. 5:97-6.7 allows for municipally sponsored and 100 percent affordable developments. These developments include, but are not limited to:

1. Developments in which all units are available to low- and moderate-income households;
2. Units created through a municipal partnership with a non-profit or other affordable housing provider; and
3. Developments for which the municipality serves as the primary sponsor.

All such sites shall meet the site suitability criteria set forth in N.J.A.C. 5:97-3.13. The municipality or developer/sponsor must demonstrate that they have control or the ability to control the site(s). The construction schedule for the project(s) shall provide for construction to begin within two years of substantive certification or in accordance with the municipality's implementation schedule.

Since this rule is significantly similar to its counterpart in the Second Round rules, it should be approved by the court. This is especially true since the 100% affordable housing recognized in this rule will result in significantly more low and moderate income housing than would otherwise be achieved through inclusionary zoning.

Other Compliance Mechanisms

In addition, the following statutory provisions provide acceptable compliance mechanisms for use by municipalities:

A. FEDERAL LOW INCOME TAX CREDIT HOUSING.

Credit for a "housing unit financed in whole or in part through the allocation of federal Low-Income Housing Tax Credits," which is "eligible to be credited if the requirements of federal law pursuant to 26 U.S.C. § 42 have been met for that unit. In the event the federal requirements have been met, the provisions of the UHAC shall not be applied to inhibit or prevent the crediting of the housing unit against the municipal fair share obligation." See N.J.S.A. 45:22A-46.16, adopted July 2, 2009. This statutory provision expressly provides that such units are to be treated as "credits to be granted against the fair share obligation of any municipality" under the FHA.

B. CREDIT FOR NON-RESIDENTIAL DEVELOPMENT FEE REFUNDS.

Pursuant to the New Jersey Economic Stimulus Act of 2009 (Act), the collection of nonresidential development fees for affordable housing was suspended. N.J.S.A. 40:55D-8.6. Developers that paid nonresidential development fees after July 17, 2008, were entitled to claim a refund of “the difference between the monies committed prior to July 17, 2008, and monies paid on or after that date.” N.J.S.A. 40:55D-8.8a. Such claims were to be submitted to the municipality where the payment was made, or to the State if payment was made to the New Jersey Affordable Housing Trust Fund. Upon receipt of a legitimate claim, a municipality was required to reimburse the developer out of the municipal affordable housing trust fund. N.J.S.A. 40:55D-8.8c. A municipality that returned all or any portion of nonresidential development fees in accordance with the Act “shall be reimbursed from the funds available through the

appropriation made into the New Jersey Affordable Housing Trust Fund…..within 30 days of the municipality providing written notice to [COAH].” N.J.S.A. 40:55D-8.8e.

On March 23, 2010, the Township submitted a claim to COAH for reimbursement of funds it had refunded to nonresidential developers. Detailed information was provided to COAH, on the appropriate COAH forms, showing that the Township was entitled to a reimbursement of $703,792.00. No reimbursement was received from COAH. After several follow-up inquiries, COAH advised the Township on August 17, 2010, that it “was awaiting confirmation that money for refunds of NRDF [Non-Residential Development] fees are available. It may have been affected by the Governor’s Executive Order #14 to balance the remainder of the FY 2010 budget.” No further response was received from COAH.

On November 19, 2010, the Township again inquired as to when the reimbursement would be paid. In response, COAH stated:

> COAH is in receipt of your submission seeking reimbursement of NRDF funds. COAH acknowledges that South Brunswick Township is eligible for the requested refund pursuant to the NRDF requirements. However, at this time, COAH is awaiting confirmation that the necessary money for refunds of NRDF fees are available. If you have any questions, please do not hesitate to contact me.

In reply, the Township pointed out:

> N.J.S.A. 40:55D-8.8(e) indicates that an eligible municipality "shall be reimbursed from the funds available through the appropriation made into the New Jersey Affordable Housing Trust Fund pursuant to N.J.S.A. 52:27D-320.1 within 30 days of the municipality providing written notice to the Council on Affordable Housing." South Brunswick's written notice to COAH was March 23, 2010. Accordingly, the reimbursement is long overdue. (Exhibit G).

COAH has never responded to this and no reimbursement has ever been received, despite the clear directive contained in N.J.S.A. 40:55D-8.8e.

The court in In Re Hopewell, Docket No. MER-L-563-15 (Superior Court, Law Division, unpublished opinion dated August 31, 2015)(Exhibit H) found and declared that “no money for

reimbursement [of NRDF refunds] is currently available in the [New Jersey Affordable Housing Trust] Fund…" As a result, pursuant to N.J.S.A. 52:27D-311.3(b), the court found that Hopewell Township was "entitled to a credit" against its Third Round obligation. The number of credits to be granted was to be determined during the course of the Township's Declaratory Judgment Action (Exhibit H, paras. 2 and 4).

The failure of COAH to refund the amounts due to the Township for reimbursement of nonresidential development fees entitles the Township to a credit against its Third Round obligation in an amount equivalent to the number of units that could be produced for the amount due.

In addition to all of the above compliance mechanisms, municipalities should be permitted to craft compliance mechanisms for providing low- and moderate-income housing that are not expressly set forth in the Second Round Rules or the additional mechanisms provided by Supreme Court guidance or applicable statutory provisions. The mechanisms endorsed by the Court in Mount Laurel IV were described as "examples," with the instruction that "the courts should employ flexibility in assessing a town's compliance." Mount Laurel IV, supra. at 33. At the same time, the Court cautioned the trial courts "to avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules." Id. The emphasis on flexibility in crafting compliance mechanisms has long been part of Mt. Laurel doctrine. Indeed, Mt. Laurel II itself stated that "municipalities and trial courts are encouraged to create other devices and methods for meeting fair share obligations." Id. at 265-66. This court should, thus, be open to compliance mechanisms proposed by the Township that are not set forth above, so long as such mechanisms are not in conflict with them and are reasonably calculated to further the goal of meeting its fair share obligation.

POINT IV

THE COURT SHOULD GRANT A WAIVER OF THE 25% CAP ON SENIOR HOUSING

The Second Round regulations permit a municipality to satisfy up to 25% of its fair share obligation through age-restricted affordable housing. N.J.A.C. 5:93-5.14. A 25% maximum share for age-restricted affordable housing was also included in the First Round regulations, which were adopted on August 4, 1986. See N.J.A.C. 5:92-14.3. As such, the 25% cap on senior housing has remained unchanged for almost 30 years. During this time, the population has changed dramatically. "Baby Boomers," who were 20-30 years old at the time the 25% cap was established, and were just beginning to start new families, are now reaching age 65 in large numbers.

COAH attempted to address this shift in population and provide for the large demand for senior affordable housing when it proposed increasing the senior cap to 50% in the Third Round rules. See N.J.A.C. 5:94-4.19. Indeed, "COAH justified the increase for 50% on the basis that its methodology determined that approximately 61% of the low and moderate income households formed from 1999 to 2014 are elderly." In re Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing, 390 N.J. Super. 1 (App. Div. 2007) (citing to 36 N.J.R. 5780 (December 20, 2004)). Although the court ultimately ruled that a 50% cap for senior housing was too high, since it had "the potential to significantly reduce the availability of affordable housing for poor families with children," id., the court did observe that "[t]he 'Baby Boom' generation will be 65 or over in the next few years; and numerous households will fall within the definition of elderly low- and moderate-income." Id.

Since the court's 2007 decision, the demand for senior housing has only increased. According to the 2010 Census results, the number of persons over the age of 65 has increased

from approximately 26 million in 1980 (representing 8% of total U.S. population) to 40.3 million in 2010 (representing 13% of total U.S. population). See The Older Population: 2010, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau (November 2011), pages 2-3. In addition, the senior population is growing at a faster rate than the rest of the population. "Between 2000 and 2010, the total population increased by 9.7 per cent, from 281.4 million to 308.7 million. Growth over the decade was even faster for the population 65 years and over, which grew 15.1 percent." Id. at page 4. Significantly, the 2010 Census data shows that "[t]he 65 to 69 year old age group grew by 30.4 percent and increased from 9.5 million to 12.4 million. This age group represents the leading edge of the Baby Boom and is expected to grow more rapidly over the next decade as the first Baby Boomers start turning 65 in 2011." Id.

On a regional level, the Northeast (including New Jersey) "had the largest percentage of people 65 years and over (14.1 percent)" when compared to the rest of the country. Id. at page 8.

Looking at New Jersey alone, the number of people 65 years and over increased by 6.5% while the number of people 85 years and over increased by 32.1%. Id. at page 9. Of the 21 counties in the state, there were 9 (or 42.9%) where the percentage of the population 65 years and over exceeded that of the nation, and there were 16 (or 76.2%) where the percentage of the population 85 years and over exceeded that of the nation. Id. at page 15.

Since the Township will be implementing its Third Round Plan into 2025 and beyond, population trends going forward through the next ten years should also be considered. According to the 2010 Census, the 2009-2013 five-year demographic and housing estimates show that 15.5% of the population of residents within New Jersey was between ages 45 to 54. See U.S. Census Bureau, 2009-2013 5-Year American Community Survey. This number

represents the largest age group percentage over all age groups. The breakdown of demographic estimates actually "bubbles" within this age group (7.2% ages 40 to 44; 7.8% ages 45 to 49; 7.7% ages 50 to 54; 6.6% ages 55 to 59). Id. Within the County of Middlesex, the 45 to 64 age group is the largest percent of population over all other age groups, making up 26.3% of the population. U.S. Census Bureau, 2010 Census, 2010 Census Summary File 1, Tables P12 and P13. Within the next ten years, the vast majority of these individuals will be eligible for senior housing.

COAH's Second Round regulations include a waiver provision. Specifically, N.J.A.C. 5:93-15.1 provides as follows:

> (a) Any party may request a waiver from a specific requirement of the Council's rules at N.J.A.C. 5:91, 5:92 and 5:93 at any time. Such a waiver may be requested as part of a municipal petition, by motion in conformance with N.J.A.C. 5:91–12, or in such other form as the Council may determine, consistent with its procedural rules at N.J.A.C. 5:91.
>
> (b) The Council will grant waivers from specific provisions of its rules if it determines:
> 1. That such a waiver fosters the production of low and moderate income housing;
> 2. That such a waiver fosters the intent of, if not the letter of, its rules; or
> 3. Where the strict application of the rule would create an unnecessary hardship.

In the absence of a waiver, seniors will increasingly drive up the need for affordable housing, while the 25 percent cap will increasingly preclude municipalities from targeting the need where they find it. Thus, the case for a waiver will get increasingly stronger with time. In the 1990s, Barnegat Township and Wall Township (a) demonstrated to Judge Serpentelli that the anticipated influx of seniors into the Ocean-Monmouth region explained why COAH had assigned them such a large obligation and (b) sought waiver relief from the 25 percent cap to permit them to satisfy a higher percentage of their obligations with age-restricted housing. When faced with this circumstance, Judge Serpentelli granted their motions and permitted these municipalities to address the need where they found it. In the future, as in the past, a municipality

should be eligible for a waiver if it can demonstrate that seniors account for more than 25 percent of the need for lower income housing in the municipality's region. Under such circumstances, the municipality would merely be meeting the need for affordable housing where it found it.

At some point, it is hoped that the members of the COAH board will fulfill their oath of office or be compelled to do so. Until then, this court should use the waiver standard to add an appropriate measure of flexibility to a regulatory framework that is now over 30 years old and outdated. The Supreme Court clearly did not want to punish municipalities for COAH's failure to fulfill its responsibilities. In the absence of the waiver standards to provide flexibility, municipalities would suffer extreme prejudice by COAH's failure to keep its regulations current and reflective of present day realities.

Given the clear trend in the aging of the State's population, and the certainty that it will only continue to grow as Baby Boomers reach age 65, the percentage of senior affordable housing that the Township is permitted to produce should be increased beyond the historic 25% cap. Although the Appellate Division felt that COAH's proposed 50% cap was too high, given the clear increase in the demand for senior housing that will become a reality over the next ten years, the court should grant a waiver for the Township to include more than 25% of housing for seniors in its Third Round Plan.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the court:

1. Grant an extension of the temporary immunity from "builder's remedy" lawsuits previously granted to the Township;

2. Establish the methodology for calculating Present and Prospective Need, thereafter determining the Township's obligation;

3. Establish the acceptable Compliance Mechanisms available to the Township to meet its obligation;

4. Grant a waiver of the 25% senior cap; and

5. Such other relief as the court finds just and equitable.

Respectfully submitted,

TOWNSHIP OF SOUTH BRUNSWICK

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Donald J. Sears

Dated: November 6, 2015