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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.: A-003323-15T1

CIVIL ACTION

On 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 AMICUS CURIAE TOWNSHIP OF SOUTH BRUNSWICK

Of Counsel and on the Brief:

Donald J. Sears, Esq.

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PRELIMINARY STATEMENT

Since the New Jersey Supreme Court's ruling 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), municipalities have filed Declaratory Judgment actions in the Superior Court, seeking 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. One of the critical issues to be determined in all of these matters is whether and to what extent municipalities have an obligation to produce affordable housing for the period 1999 – 2015 (referred to as the "Gap Period"). Several trial courts have determined that such an obligation does exist and that municipalities must satisfy that obligation as part of their Third Round affordable housing plan.

Imposition of a Gap Period obligation, however, is contrary to the plain reading of the Fair Housing Act (FHA), the Legislative history accompanying amendments to the FHA and the Prior Round regulations of the Council on Affordable Housing (COAH). It is also contrary to the specific directive of the Supreme Court in Mount Laurel IV that municipalities not be punished as a result of COAH's failure to act.

Equally important, the trial courts have reached divergent decisions on application of the 1,000 unit cap as it relates to any Gap Period obligation. This has caused confusion as to the law, treated similarly situated municipalities differently based only upon their location within the State and results in unfair, disparate standards to be applied to municipalities in determining their fair share obligations for affordable housing. Such a haphazard approach to the determination of issues of constitutional dimension should not be permitted to stand.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The Township of South Brunswick (Township) received First Round (1987-1993) substantive certification from COAH on August 3, 1987 and Second Round (cumulative 1987-1999) 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 Mount Laurel IV, supra., that COAH is not capable of functioning as intended by the 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,

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

2015, the Middlesex County 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 also entered an Order granting an initial five-month period of immunity to the Township, 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 is whether and to what extent municipalities have an obligation to produce affordable housing for the period 1999 – 2015 (referred to as the "Gap Period"). This is the period of time that has elapsed since the Second Round ended in 1999. This is distinct from the Present (2015) and Prospective (2015-2025) periods of the Third Round. In July of 2015, FSHC did not separate the Gap Period from the Prospective Period, but rather combined them, creating what it called a Prospective Need Period of 1999-2025. At that time, FSHC asserted that the Township's 1999-2025 Prospective obligation was 2,968 units (SBa 3). By April 2016, however, FSHC had divided the Gap and Prospective Periods and asserted that the Township was responsible for a Gap obligation of 2,006 units and a Prospective obligation of 1,929 units (SBa 4). Adding an alleged 109 unit Present Need obligation, this results in an astounding total obligation (before caps) of 4,044 units for the Township's Third Round obligation.

On October 5, 2015, the Middlesex County trial court found 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)

[2] SBa – Refers to Appendix of Amicus South Brunswick Township.

(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 (Municipal Consortium) 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 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.

[3] Aa – Refers to Appendix of Appellant Barnegat Township.
[4] Refers to Transcript of Proceeding before the Middlesex County trial court dated February 19, 2016.

> 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 5-7). 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 8-10). The effective date of the ruling was stayed until April 15, 2016 (subsequently extended to May 2, 2016) to give the Township one last opportunity to present a plan that was satisfactory to the Middlesex County trial court.

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. The Townships of Millstone, Middletown, South Brunswick and Colts Neck all subsequently filed Motions for Leave to participate as Amicus Curiae, as did the Municipal Consortium. The New Jersey Builders' Association (NJBA) and FSHC both filed opposition.

On April 15, 2016, the Appellate Division granted Barnegat Township's Motion for Leave to Appeal as well as all Motions to participate as Amicus Curiae (Aa 2155-2160). FSHC sought emergent relief from these orders in the New Jersey Supreme Court, which denied its application but directed the Appellate Division to provide for oral argument on or before June 30, 2016 (Aa 2165-2166). Thereafter the Appellate Division issued an accelerated briefing schedule and calendared the matter for oral argument on June 6, 2016 (Aa 2167).

On April 27, 2016, the Ocean County court issued an Order staying all further proceedings in Declaratory Judgment actions venued in Ocean County pending a resolution of the Gap Period issues by the Appellate Division (Aa 2169-2170). The Monmouth County and Mercer County courts followed suit, staying all Declaratory Judgment matters in those counties pending disposition of the Gap Period issues on appeal (SBa 11-19). The Township sought a stay of the trial in its Declaratory Judgment action pending in Middlesex County, which was scheduled to begin on May 2, 2016 (SBa 20-21). That request was denied on April 20, 2016 (SBa 22-23). An emergent application to the Appellate Division seeking a stay of the May 2 trial date was also denied (SBa 24).

As a result, trial commenced in Middlesex County on May 2, subjecting the Township to litigation over its affordable housing obligations for the Prior Round (1987-1999), Gap Period (1999-2015), Present (2015) and Prospective (2015-2025) periods. Its temporary immunity from builder's remedy lawsuits was dissolved on that date as well. Trial has continued on May 3, 4, 5, 9, 10 and 11, and will resume on May 24, 2016 (Sears certif., para. 7-9).

LEGAL ARGUMENT

POINT I

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 Appellant Township of Barnegat dated May 13, 2016, as well as the arguments set forth in the briefs filed by Amici Townships of Millstone, Middletown and Colts Neck and the Municipal Consortium. 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

Appellant Barnegat Township's 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 and cogently arguing that no obligation arises from the Gap Period. The brief filed by Amicus Municipal Consortium also presents a convincing legal argument that shows that the Gap Period obligation imposed by the trial courts is contrary to the FHA and clear public policy. The Township incorporates herein and relies upon the arguments of both as to why there is no obligation arising from the Gap Period.

As further evidence of the Legislature's clear intent that a municipality's affordable housing obligation consists of only the Present and Prospective Need, and not a Gap Period obligation, the New Jersey Legislature has proposed for introduction Senate Bill S2254, which

clarifies the scope of affordable housing obligations (SBa 38-44). The explanatory statement to that bill makes abundantly clear the Legislature's intent:

> Although the "Fair Housing Act," P.L. 1985, c.222 (C.52:27D-301, et seq.), clearly states that the State Constitution's affordable housing obligation is comprised of the "present and prospective need" for affordable housing only, some courts have misunderstood the intent of the Legislature behind the "Fair Housing Act," and imposed a retroactive obligation for the so-called gap period. The purpose of this bill is to eliminate any possible misconception with respect to the Legislature's intent so to ensure that determinations of a municipality's fair share of affordable housing will be based upon the present and prospective need for affordable housing, as clearly set forth in the "Fair Housing Act," and that a fair share obligation will not include retrospective need that may have arisen during any "gap period" between housing cycles (SBa 42-43).

Thus, the Legislature has taken steps to clarify the issue and make clear that the FHA does not include a Gap Period obligation. Indeed, the explanatory statement goes on to state the Legislature's concerns over imposing a Gap Period obligation:

> While laudable, such a result is contrary to current law, which confines municipal fair share determinations to present and prospective need for affordable housing, and would impose an unrealistic and excessive burden upon the residential communities of our State. Requiring fair share obligations to include the need developed through a long regulatory gap period would result in an unreasonable burden, the resolution of which would force municipalities to allow rapid, unsettling changes to the physical and demographic nature of their communities. This bill eliminates any possible misconception of what the Legislature intended the fair share obligation to include so as to preclude the imposition of a fair share obligation based upon a concept of retrospective need during the gap period (SBa 44).

Without question, if the plain reading of the FHA were not clear enough, proposed Senate Bill S2254 lays to rest any doubt that a municipality's fair share obligation consists only of the Present and Prospective need. No Gap Period obligation is required or intended by the FHA. As such, this Court should find that there is no Gap Period obligation that must be satisfied.

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 subsumed within and addressed by the Present Need calculation, and should not be counted twice. In its report dated February 8, 2016, 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 should be calculated or imposed, since it has already been accounted for in the Present Need.

C. Imposition of a Gap Period Obligation is Unduly Punitive and Contrary to the Supreme Court's directive

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.

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.

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 violating the clear directive of the Supreme Court — 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). That punishment was intensified when the trial court stripped the Township of its immunity, forced a trial to include a Gap Period obligation and permitted builder's remedy suits to be filed. Before any further punitive measures are levied against the Township or any other municipality, given the clear language in the FHA and COAH regulations, this Court should find that there is no Gap Period obligation.

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. During the course of the Township's trial before the Middlesex County court, FSHC presented its expert, Dr. David Kinsey, who opined that the Township's Gap (1999-2015), Present (2015) and Prospective (2015-2025) Period obligations total 4,044 units (before application of any caps) (SBa 25). Assuming the 20% cap applies, this would reduce the obligation to 3,209 units. In a municipal plan that relies solely on inclusionary development to satisfy its obligation, the municipality would have to provide for ***16,045 new units of housing*** (assuming a presumptive 20% set-aside) over the next 10 years in order to produce 3,209 units of affordable housing.

Such a result would be crushing, and would clearly punish the municipality. The entire nature and character of the Township would be changed completely. 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 exponentially by 32,090 – 48,135 people. No town could possibly sustain such a drastic change in just 10 years, brought on by unfettered, unreasonable and uncontrolled growth. The "radical transformation of a municipality overnight" that the Supreme Court warned against in So. Burlington Cty. N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158, 219 (1983) (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.

Accordingly, this Court should find that there is no affordable housing obligation arising from the Gap Period. Even if there was such an obligation that accrued during the Gap Period, the Present Need analysis captures any Gap Period need that remains unfulfilled in the municipality. As such, the inclusion of an additional Gap Period obligation is unnecessary, and would result in the "double counting" of units. Inclusion of any additional Gap Period obligation is also punitive, resulting in the punishment of municipalities that the Supreme Court specifically directed against.

POINT II

APPLICATION OF THE 1,000 UNIT CAP LIMITATION MUST BE DONE CONSISTENTLY, IN ACCORDANCE WITH THE FHA

The Middlesex County trial court performed its analysis of the Gap Period obligation in the context of reviewing a motion for determination of 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 2,600 unit Third Round obligation (See Aa 42). It is clear that this was never intended.

A. History and Intent of the 1,000 Unit Cap

With the adoption of the First Round regulations, COAH implemented a 1,000 unit cap to prevent the "drastic alteration of the established pattern of development" in any municipality. On May 18, 1987, COAH introduced the concept of a 1,000 unit cap when it introduced an amendment to its First Round regulations, providing:

> SUBCHAPTER 7. DRASTIC ALTERATION OF THE ESTABLISHED PATTERN OF DEVELOPMENT
>
> 5:92-7.1. Drastic Alteration
> (b) After receiving the crediting provided in Subchapter 6, Credits, where a municipality's present and prospective fair share exceeds 1,000 low and moderate income housing units, the municipality may adjust its fair share to 1,000. See 19 N.J.R. 806(a).

On July 6, 1987, COAH adopted the 1,000 unit cap regulation. 19 N.J.R. 1431(a). This initial 1,000 unit cap clearly applied to both the Present and Prospective fair share of a municipality. N.J.A.C. 5:92-7.1.

The Appellate Division subsequently invalidated this portion of the First Round rules, finding that there was no authority in the FHA for COAH to adopt a blanket 1,000 unit cap for all municipalities. The Court also found that application of the 1,000 unit cap could lead to a disparity in the fair share obligation imposed on municipalities within the same region (ie - 1,000 unit cap town not meeting its true fair share when other towns are). Calton Homes v. Council on Affordable Housing, 244 N.J. Super. 438, 448, 453 (App. Div. 1990), certif. den. 127 N.J. 326 (1991).

In order to resolve the concerns raised by the Court in the Calton Homes decision, the Legislature amended the FHA, specifically permitting the 1,000 unit cap. Thus, the FHA was amended to read:

> 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. N.J.S.A. 52:27D-307(e).

When considering the adoption of this amendment to the FHA, the New Jersey Senate and Assembly both made abundantly clear the intent and purpose of the legislation in the Statements accompanying Senate Bill S858 and Assembly Bill A1489. Both indicated that:

> This bill relieves certain municipalities of the burden of addressing a fair share allocation of affordable housing that exceeds 1,000 units.
>
> Experience with the compliance mechanisms established by the "Fair Housing Act," P.L. 1985, c.222 (C. 52:27D-301, et seq.) demonstrates that the act places considerable planning and financial burdens upon municipalities and requires them to zone lands that will not result in the creation of additional affordable housing because the market cannot reasonably absorb all the housing needed to produce the additional affordable housing. The Council on Affordable Housing sought to avoid the imposition of onerous burdens on municipalities by adopting a regulation capping the fair share of each municipality at 1,000. The courts declared the regulation illegal because it imposed a cap that was not based upon the facts and circumstances of the municipality. This bill seeks to establish a cap directly related to the facts and circumstances of the municipality.
>
> Explanatory Statement to Senate Bill S858, introduced May 18, 1992 and adopted October 19, 1992; See also Explanatory Statement to Senate Bill S858 (Assembly Bill A1489), introduced November 23, 1992 and adopted December 14, 1992 (SBa 26-33).

Without question, the Legislature made the clear policy decision to limit a municipality's obligation to no more than 1,000 units. The only exception allowed by the Legislature was articulated in the FHA, which allowed for an obligation of more than 1,000 units only upon "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." N.J.S.A. 52:27D-307(e). Thus the Legislature fully addressed the concerns raised in Calton Homes by amending the FHA to specifically permit a 1,000 unit cap, but also create a means to review its application and require more than 1,000 units if it was found that a municipality could create a realistic opportunity for more units, based upon its

development history over the prior 10 years. In Re Application of the Township of Jackson, 350 N.J. Super. 369, 373-374 (App. Div. 2002).

This amendment also resolved the disparity problems identified in the Calton Homes case. Based upon the "facts and circumstances" of development over the prior 10 years, if it is found that a municipality **cannot** create a realistic opportunity for more than 1,000 units, it should not be required to do so in the first place. As such, the 1,000 unit cap merely reflects the reality of the circumstances within that municipality and adjusts the obligation to a realistic number. On the other hand, if the prior 10 year development history demonstrates that a municipality **can** create a realistic opportunity for more than 1,000 units, COAH (and now the court) can require it to do more – consistent with what the municipality is able to reasonably accommodate. In either case, the municipality will be required to do no more and no less than its fair share, based upon the amount of affordable housing that can realistically and reasonably be created within its borders.

After amendment of the FHA, the Second Round regulations were adopted by COAH on May 10, 1994. 26 N.J.R. 2301. In language that tracks the FHA almost verbatim, the 1,000 unit cap implemented in the Second Round regulations stated:

> 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. N.J.A.C. 5:93-14.1.

Thus, both the Legislature in the FHA, and COAH through its Second Round adopted regulatory scheme, recognized that no municipality can or should be required to provide for more than 1,000 low and moderate income units during the compliance period following the grant of substantive certification, unless a specific showing is made that it can accommodate such a large obligation. Under the regulations, that period of time was initially 6 years however this was subsequently amended to coincide with the adopted changes to the FHA, which established that period of time as 10 years (See Aa 35).

The Middlesex County trial court's interpretation that the 1,000 unit cap applies to consecutive 10 year periods is clearly contrary to its intent and plain meaning. The statute, its legislative history and the regulation granting municipalities a 1,000 unit cap all 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 made the policy decision 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.

Indeed, the 1,000 unit cap in the FHA and in the COAH regulations directly addresses the Supreme Court's concern in 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 Jackson, supra., at 372-373.

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 34-37). 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 municipality's cumulative obligation to 1,000 units, to be produced over the 10 year period ***after*** substantive certification is granted.

B. Application of the 1,000 Unit Cap

1) Period of Time Covered:

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. 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). FSHC's expert, Dr. Kinsey, agreed with this approach in July 2015, when he capped the Township's 2,968 cumulative 1999-2025 obligation at 1,000 units (See SBa 3). Contrary to this, however, the Middlesex County trial court radically departs from the FHA and applies three separate 10-year "cap periods," potentially resulting in a 2,600 unit cap (See Aa 42). This subjects municipalities in different counties to two very different standards for determining their affordable housing obligations. Such wide disparity is contrary to the FHA, which seeks to bring uniformity to establishing each municipality's affordable housing obligation. See N.J.S.A. 52:27D-307(a-c).

The two trial court opinions also differ dramatically as to how to deal with any excess obligation that is above the 1,000 unit 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). Nothing in the FHA requires the reallocation or deferral of the difference between the uncapped obligation and the obligation capped at 1,000 units. Although the Legislature has amended the FHA many times, it has never required the reallocation or deferral of this excess. Similarly, COAH's Second Round regulations call for neither deferral nor reallocation of any amount that exceeds the 1,000 unit cap.

Courts cannot "insert an 'additional qualification' into a clearly written statute when 'the Legislature pointedly omitted'" doing so. Fair Share Hous. Ctr., Inc., v. New Jersey State League of Municipalities, 207 N.J. 489, 502-03 (2011)(quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). Furthermore, COAH has never even ***proposed*** rules that call for the deferral or

reallocation of any amount above 1,000. In this regard, our laws call for great deference to an agency's interpretation of legislation it is charged with implementing. See Hills Dev. Co. v. Tp. of Bernards, 103 N.J. 1, 24 (1986)(Mount Laurel III)(wherein the Supreme Court discusses "**particularly strong deference** owed to the Legislature relative to **this extraordinary legislation**"). Simply put, there is no support in any statute or regulation to reallocate or defer the excess to some point beyond the 10 year compliance period. Such an interpretation defeats the entire purpose of the 1,000 unit cap and strips a municipality of any protection from uncontrolled growth that the cap was intended to provide. Since both the Legislature and COAH have never reallocated or deferred excess units above 1,000, it was error for the Middlesex County court to substitute its judgment for that of these bodies. This Court should take this opportunity to correct that error.

Without question, 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. 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***, and applied in successive ten year increments in an attempt to recapture prior years, but rather, it was clearly intended to begin on the date when substantive certification is ***granted***. The Middlesex County trial court's application of the 1,000 unit cap is not authorized by the Legislative or regulatory scheme. Thus, it is contrary to the FHA and without basis.

It is 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.

2) Credit for Affordable Housing Production During the Gap Period:

A second but equally important issue related to the 1,000 unit cap during the Gap Period deals with how credits for Third Round activity should be applied. In prior rounds, "COAH interpreted the 1,000 unit cap as applying to calculated, not pre-credited need." In Re Jackson, supra., at 374. According to COAH's Second Round regulations, "pre-credited need" is defined at N.J.A.C. 5:93-2.13 as the municipality's total need plus prior-cycle prospective need, plus demolitions, minus filtering, minus residential conversions, minus spontaneous rehabilitation. Once the "pre-credited need" is calculated, N.J.A.C. 5:93-2.17 describes how the "calculated need" is determined. Pursuant to this portion of the regulations, "calculated need" equals "pre-credited need" minus the reduction permitted for affordable housing activities undertaken as part of the Prior Rounds (as certified by COAH or court settlement plan), including a reduction for units zoned for or transferred, whether or not the units have been constructed. The reduction also includes rental bonuses. In addition, prior cycle credits and application of the twenty-percent cap rule (N.J.A.C. 5:93-2.15 and -2.16 respectively) are deducted from the "pre-credited need." The

resulting figure is the "calculated need." It is this "calculated need" that constitutes the municipality's "fair share number." See In Re Jackson, supra., at 375-376.

In arriving at this conclusion, both COAH and the court in In Re Jackson, supra., were analyzing application of credits based upon affordable housing activity that was done to address a Prior Round obligation. Thus, when calculating Jackson's fair share obligation, its cumulative twelve-year obligation was calculated, which was then reduced by activity that created housing as part of its First Round Plan. It was that activity that was deducted from the "pre-credited need" to arrive at the "calculated need."

In the Third Round, at least some municipalities (including South Brunswick) fully satisfied their Prior Round fair share obligation and then made significant strides toward satisfying the future, unknown Third Round obligation. COAH contemplated this very situation in its Second Round rules, providing that "a credit and/or a reduction in excess of the municipal pre-credited need shall be applied on a one for one basis or as a rental bonus credit against its future housing obligation." N.J.A.C. 5:93-3.1(f). As such, the Second Round regulations already require that housing activity in excess of a municipality's "pre-credited" (First and Second Round) need would be applied to reduce the municipality's future (Third Round, or "calculated") need. The trial courts have failed to apply the same process. In doing so, they have disregarded the clear and unambiguous language of N.J.S.A. 52:27D-307(e) as well as N.J.A.C. 5:93-14.1, and treated Third Round housing activity as Prior Round housing activity.

Treating housing activity completed in satisfaction of an as yet unknown Third Round obligation as Prior Round housing activity results in an unfair application of the 1,000 unit cap law. Municipalities that took the initiative and proactively created affordable housing toward an unknown Third Round obligation are being punished since they effectively lose these credits if

Third Round activity is lumped together with First and Second Round activity during the calculation process. The unfairness of this procedure becomes evident when it is realized that, pursuant to N.J.S.A. 52:27D-314, no municipality had any obligation whatsoever to implement any portion of its Third Round Plan until it received formal Substantive Certification from COAH. If the Township had done nothing, and had not produced any affordable housing units toward its Third Round obligation, the Township still would be eligible for application of the 1,000 unit cap, and its fair share obligation for the Third Round would be capped at 1,000 units. The Township, however, took its constitutional obligations seriously and made great strides toward satisfying its Third Round obligation by actually producing/approving units of affordable housing toward the Third Round. Deducting these Third Round credits from the "pre-credited need," rather than from the "calculated need," results in a loss of all of these efforts by the Township to satisfy its constitutional obligation. This is a travesty, and punishes a municipality that took significant steps to meet its constitutional obligation, despite the 16 year turmoil of COAH's inactivity and inability to function. It would truly punish a municipality for trying to fulfill its obligation, while a municipality that had done absolutely nothing, would be in the exact same position going forward.

The Supreme Court clearly instructed trial courts that they are not to "punish" municipalities, but rather seek ways in which "towns can demonstrate their constitutional compliance," Mt. Laurel IV, supra., at 31-32. Although First and Second Round housing activity should be deducted from a municipality's "pre-credited need" pursuant to the Second Round Rules, this Court should determine that housing activity that has occurred since 1999 should not be deducted from the "pre-credited need" but rather the "calculated need" (i.e., fair share obligation).

Therefore, the process that should be followed in applying the 1,000 unit cap in the unique circumstances municipalities find themselves in regarding the protracted Third Round is as follows:

DETERMINE FAIR SHARE

1) Calculate "pre-credited need" as per N.J.A.C. 5:93-2.13 (which includes all components of the fair share calculation, including Prior Round need from the First and Second Round, Gap (if this Court finds such an obligation exists), Present and Prospective need for the entire Third Round).
2) Subtract from the "pre-credited need" all reductions permitted by the Second Round Rules (including all units/credits produced/received by a municipality to address the First and Second Round (Prior Round) need).
3) The resulting number equals the "calculated need" pursuant to N.J.A.C. 5:93-2.17 (Third Round fair share).

1,000 UNIT CAP ANALYSIS

4) If the Third Round fair share amount is greater than 1,000 units, the municipality is entitled to the 1,000 unit cap pursuant to N.J.S.A. 52:27D-307(e) and N.J.A.C. 5:93-14.1. This results in a Third Round fair share obligation of 1,000 units.
5) If there is an objection by an interested party to application of the 1,000 unit cap, the trial court must hold an evidentiary hearing as to whether it is likely that the municipality, through its zoning powers and based upon the facts and circumstances of the affected municipality, could create a realistic opportunity for more than 1,000 units within the next ten-year period. This shall be determined by an analysis of how many residential Certificates of Occupancy (C.O.'s) were issued in the ten-year period immediately preceding the municipality's application for declaratory judgment.

If Less Than 5,000 C.O.'S

6) If it is determined by the court that the municipality issued less than 5,000 residential C.O.'s over the preceding ten years, by the plain language of the statute and regulation, the municipality cannot create a realistic opportunity for more than 1,000 units in the next ten years. As such, the 1,000 unit cap remains since, if there is no realistic opportunity for more than 1,000 units over the next ten years, the municipality should never have been required to do more in the first place. In this regard, the

1,000 unit cap merely reflects the reality of the "facts and circumstances" within that municipality and adjusts the obligation to a realistic number.

If More Than 5,000 C.O.'S

7) If the municipality has issued more than 5,000 residential C.O.'s in the preceding ten years, the municipality can create a realistic opportunity for more than 1,000 units in the next ten years. Under these circumstances, pursuant to the statute and regulation, a municipality that otherwise would have been subject to the 1,000 unit cap can be required to create more than 1,000 units over the next ten years, since there is a realistic opportunity to do so based upon the criteria set forth in the statute and regulation.

Determining Amount In Excess Of 1,000

8) In the event it is found that the municipality can create a realistic opportunity for more than 1,000 units over the next ten years, the court must then analyze the specific conditions within the municipality, performing an adjustment based upon the factors set forth in N.J.SA. 52:27D-307 (c) (2) as well as N.J.A.C. 5:93-4.1, et seq. Based upon this analysis, the court can exercise its discretion to require additional units, above the 1,000 unit cap, in order to reflect the realistic opportunity for housing within the municipality.

9) Whether the municipality remains subject to the 1,000 unit cap or is required to provide for more than 1,000 units, the court's analysis should be designed to determine the realistic opportunity for creating affordable housing within the individual municipality. This will result in both a realistic and reasonable fair share obligation.

SUBTRACT THIRD ROUND HOUSING ACTIVITY

10) Once the Third Round fair share obligation has been adjusted based upon the 1,000 unit cap analysis, activity that has been completed toward satisfying the municipality's Third Round obligation is deducted from the Third Round fair share obligation, resulting in a net remaining obligation for the remainder of the Third Round.

The above outlined procedure is consistent with the Court's holding in In Re Jackson, supra., in that it deducts "Prior Round" (First and Second Round) activity prior to application of the 1,000 unit cap; resolves the disparity and dilution concerns expressed in Calton Homes, supra.; is consistent with the requirements of N.J.S.A. 52:27D-307 and N.J.A.C. 5:93-14.1; and

successfully balances the competing interests of providing affordable housing without drastic alterations to a municipality.

Accordingly, if this Court should find that a Gap Period obligation exists that must be satisfied as part of a municipality's fair share obligation, the FHA requires that the 1,000 unit cap be applied over the entirety of the Gap (1999-2015), Present (2015) and Prospective (2015-2025) periods to limit a municipality's obligation to 1,000 units. Any other application would be clearly contrary to the plain reading and intent of the FHA. Moreover, any affordable housing produced since 1999 should be credited to the municipality after application of the 1,000 unit cap and not before application of the cap.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court 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 Prior 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. Finally, in either case, this Court should find that the appropriate application of the 1,000 unit cap requires that the Gap, Present and Prospective obligations be totaled and then capped at 1,000, and that any credits for affordable housing activity since 1999 be deducted after application of the 1,000 unit cap.

Respectfully Submitted,

TOWNSHIP OF SOUTH BRUNSWICK

Date: May 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

R3 Prospective Need by Municipality, 1999-2025 (prepared by FSHC, July 2015)

		County		Qualifying	Prospective Need	Prospective Need Obligation, 1999-2025	
1210	Metuchen Borough	Middlesex	3	0	582	582	Metuchen Borough
1211	Middlesex Borough	Middlesex	3	0	311	311	Middlesex Borough
1212	Milltown Borough	Middlesex	3	0	220	220	Milltown Borough
1213	Monroe Township	Middlesex	3	0	2,325	1,000	Monroe Township
1214	New Brunswick City	Middlesex	3	1	0	0	New Brunswick City
1215	North Brunswick Township	Middlesex	3	0	1,161	1,000	North Brunswick Township
1209	Old Bridge Township	Middlesex	3	0	2,143	1,000	Old Bridge Township
1216	Perth Amboy City	Middlesex	3	1	0	0	Perth Amboy City
1217	Piscataway Township	Middlesex	3	0	1,553	1,000	Piscataway Township
1218	Plainsboro Township	Middlesex	3	0	1,063	1,000	Plainsboro Township
1219	Sayreville Borough	Middlesex	3	0	1,309	1,000	Sayreville Borough
1220	South Amboy City	Middlesex	3	0	219	219	South Amboy City
1221	South Brunswick Township	Middlesex	3	0	2,968	1,000	South Brunswick Township
1222	South Plainfield Borough	Middlesex	3	0	896	896	South Plainfield Borough
1223	South River Borough	Middlesex	3	0	171	171	South River Borough
1224	Spotswood Borough	Middlesex	3	0	178	178	Spotswood Borough
1225	Woodbridge Township	Middlesex	3	0	1,012	1,000	Woodbridge Township
1801	Bedminster Township	Somerset	3	0	557	557	Bedminster Township
1802	Bernards Township	Somerset	3	0	1,413	1,000	Bernards Township
1803	Bernardsville Borough	Somerset	3	0	470	470	Bernardsville Borough
1804	Bound Brook Borough	Somerset	3	0	0	0	Bound Brook Borough
1805	Branchburg Township	Somerset	3	0	1,027	1,000	Branchburg Township
1806	Bridgewater Township	Somerset	3	0	3,068	1,000	Bridgewater Township
1807	Far Hills Borough	Somerset	3	0	73	73	Far Hills Borough
1808	Franklin Township	Somerset	3	0	2,728	1,000	Franklin Township
1809	Green Brook Township	Somerset	3	0	454	454	Green Brook Township
1810	Hillsborough Township	Somerset	3	0	2,357	1,000	Hillsborough Township
1811	Manville Borough	Somerset	3	0	82	82	Manville Borough
1812	Millstone Borough	Somerset	3	0	32	32	Millstone Borough
1813	Montgomery Township	Somerset	3	0	1,276	1,000	Montgomery Township
1814	North Plainfield Borough	Somerset	3	0	137	137	North Plainfield Borough
1815	Peapack-Gladstone Borough	Somerset	3	0	188	188	Peapack-Gladstone Borough
1816	Raritan Borough	Somerset	3	0	466	466	Raritan Borough
1817	Rocky Hill Borough	Somerset	3	0	46	46	Rocky Hill Borough
1818	Somerville Borough	Somerset	3	0	306	306	Somerville Borough
1819	South Bound Brook Borough	Somerset	3	0	58	58	South Bound Brook Borough
1820	Warren Township	Somerset	3	0	993	993	Warren Township
1821	Watchung Borough	Somerset	3	0	440	440	Watchung Borough
1101	East Windsor Township	Mercer	4	0	964	964	East Windsor Township
1102	Ewing Township	Mercer	4	0	487	487	Ewing Township
1103	Hamilton Township	Mercer	4	0	745	745	Hamilton Township
1104	Hightstown Borough	Mercer	4	0	142	142	Hightstown Borough
1105	Hopewell Borough	Mercer	4	0	155	155	Hopewell Borough
1106	Hopewell Township	Mercer	4	0	1,234	1,000	Hopewell Township
1107	Lawrence Township	Mercer	4	0	1,110	1,000	Lawrence Township
1108	Pennington Borough	Mercer	4	0	203	203	Pennington Borough
1114	Princeton	Mercer	4	0	1,163	1,000	Princeton
1111	Trenton City	Mercer	4	1	0	0	Trenton City
1112	Robbinsville Township	Mercer	4	0	1,041	1,000	Robbinsville Township
1113	West Windsor Township	Mercer	4	0	1,917	1,000	West Windsor Township
1330	Aberdeen Township	Monmouth	4	0	611	611	Aberdeen Township
1301	Allenhurst Borough	Monmouth	4	0	46	46	Allenhurst Borough
1302	Allentown Borough	Monmouth	4	0	138	138	Allentown Borough
1303	Asbury Park City	Monmouth	4	1	0	0	Asbury Park City
1304	Atlantic Highlands Borough	Monmouth	4	0	209	209	Atlantic Highlands Borough
1305	Avon-by-the-Sea Borough	Monmouth	4	0	173	173	Avon-by-the-Sea Borough
1306	Belmar Borough	Monmouth	4	0	247	247	Belmar Borough
1307	Bradley Beach Borough	Monmouth	4	0	110	110	Bradley Beach Borough
1308	Brielle Borough	Monmouth	4	0	369	369	Brielle Borough
1309	Colts Neck Township	Monmouth	4	0	549	549	Colts Neck Township
1310	Deal Borough	Monmouth	4	0	76	76	Deal Borough
1311	Eatontown Borough	Monmouth	4	0	834	834	Eatontown Borough
1312	Englishtown Borough	Monmouth	4	0	139	139	Englishtown Borough
1313	Fair Haven Borough	Monmouth	4	0	391	391	Fair Haven Borough
1314	Farmingdale Borough	Monmouth	4	0	48	48	Farmingdale Borough
1315	Freehold Borough	Monmouth	4	0	210	210	Freehold Borough

SBa 3

Cumulative Prospective Need by Municipality, 1999-2025 April 2016

Muni Code	Municipality	County	Region	Qualifying Urban Aid Municipality	Calculated Prospective Need, 1999-2015 (units)	Calculated Prospective Need, 2015-2025 (units)	Calculated Prospective Need, 1999-2025 (units)	Prospective Need 20 Percent Cap, 1999-2025	20 Percent Cap Applies?	Prospective Need Obligation, 1999-2025 (units) (after 20 percent cap but before application of 1,000 unit cap)	Municipality
1201	Carteret Borough	Middlesex	3	1	0	0	0	1,551	N	0	Carteret Borough
1202	Cranbury Township	Middlesex	3	0	449	499	948	265	Y	265	Cranbury Township
1203	Dunellen Borough	Middlesex	3	0	83	75	158	518	N	158	Dunellen Borough
1204	East Brunswick Township	Middlesex	3	0	1228	1065	2293	3,460	N	2,293	East Brunswick Township
1205	Edison Township	Middlesex	3	0	2526	2207	4733	7,017	N	4,733	Edison Township
1206	Helmetta Borough	Middlesex	3	0	32	38	70	178	N	70	Helmetta Borough
1207	Highland Park Borough	Middlesex	3	0	131	117	247	1,202	N	247	Highland Park Borough
1208	Jamesburg Borough	Middlesex	3	0	162	121	283	434	N	283	Jamesburg Borough
1210	Metuchen Borough	Middlesex	3	0	403	346	748	1,058	N	748	Metuchen Borough
1211	Middlesex Borough	Middlesex	3	0	206	177	383	995	N	383	Middlesex Borough
1212	Milltown Borough	Middlesex	3	0	155	143	298	521	N	298	Milltown Borough
1213	Monroe Township	Middlesex	3	0	522	843	1366	3,662	N	1,366	Monroe Township
1214	New Brunswick City	Middlesex	3	1	0	0	0	3,025	N	0	New Brunswick City
1215	North Brunswick Township	Middlesex	3	0	896	771	1666	2,938	N	1,666	North Brunswick Township
1209	Old Bridge Township	Middlesex	3	0	1547	1352	2899	4,787	N	2,899	Old Bridge Township
1216	Perth Amboy City	Middlesex	3	1	0	0	0	3,131	N	0	Perth Amboy City
1217	Piscataway Township	Middlesex	3	0	1188	1062	2251	3,561	N	2,251	Piscataway Township
1218	Plainsboro Township	Middlesex	3	0	591	597	1188	1,880	N	1,188	Plainsboro Township
1219	Sayreville Borough	Middlesex	3	0	1172	933	2105	3,246	N	2,105	Sayreville Borough
1220	South Amboy City	Middlesex	3	0	48	64	113	673	N	113	South Amboy City
1221	South Brunswick Township	Middlesex	3	0	2006	1929	3935	3,100	Y	3,100	South Brunswick Township
1222	South Plainfield Borough	Middlesex	3	0	511	464	975	1,604	N	975	South Plainfield Borough
1223	South River Borough	Middlesex	3	0	176	148	324	1,134	N	324	South River Borough
1224	Spotswood Borough	Middlesex	3	0	15	41	56	628	N	56	Spotswood Borough
1225	Woodbridge Township	Middlesex	3	1	0	0	0	7,017	N	0	Woodbridge Township
				Totals	14,046	12,992	27,038			25,520	

Note: 1,000 unit cap subject to statute, N.J.S.A. 52:27D-307(e), and analysis of existing credits

SBa 4

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 5

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%.

SBa 7

FAIR SHARE HOUSING CENTER
510 Park Boulevard
Cherry Hill, New Jersey 08002
P: 856-665-5444
F: 856-663-8182
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

SBa 8

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

SBa 9

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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PREPARED BY THE COURT

FILED
APR 29 2016
JAMIE S. PERRI, J.S.C.

FILED
APR 29 2016
DENNIS R. O'BRIEN, J.S.C.

IN THE MATTER OF THE DECLARATORY JUDGMENT ACTIONS FILED IN THE COUNTY OF MONMOUTH, STATE OF NEW JERSEY, PURSUANT TO In re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY

RECEIVED APR 29 2016

CIVIL ACTION
(Mount Laurel)

OMNIBUS ORDER #5 - CASE MANAGEMENT

The matters set forth below having come before the court on April 20, 2015, for a consolidated case management conference; and the court having heard the arguments of counsel regarding continuing case management in light of the granting of leave to appeal the decision of the Hon. Mark Troncone, J.S.C., dated February 18, 2016, regarding the "gap period;" and the parties having returned to court on April 28, 2016, for continuation of the case management conference; and the court having determined that the decision of the appellate court will be critical to the ability of the court's Special Regional Master to provide a cogent and comprehensive final report regarding methodology and allocation of the fair share obligations of the Monmouth County municipalities; and the court having further found that the interests of justice and judicial economy warrant deferring the submission of a final report by the court's Regional Special

SBa 11

Master, Richard Reading, and the scheduling of expert depositions until the parties have the benefit of the disposition of the "gap period" issue on appeal; and for the reasons set forth on the record on April 28, 2016, and for other good cause appearing;

IT IS on this 29th day of April, 2016 ORDERED as follows:

1. Any and all expert reports addressing methodology and apportionment of fair share obligations shall be submitted within 10 days of the date of this Order.

2. Upon final disposition of the pending appeal or any petition for Certification to the Supreme Court, the court shall immediately schedule a case management conference to establish dates for expert depositions, a pre-trial conference and trial. The parties are free to request the scheduling of status or case management conferences within this period in light of any developments that impact on the orderly disposition of these consolidated matters.

3. No dispositive motions regarding legal issues concerning the methodology and calculation of the

state, regional and municipal apportionment shall be filed without leave of court.

4. In the interim period, the parties shall continue to engage in mediation with their respective Special Masters according to the schedules that have been established. Any Special Master may request a status conference with the court and parties if he or she deems it appropriate to facilitate meaningful mediation.

5. Within 20 days of final disposition of the pending appeal or any petition for Certification to the Supreme Court, Special Regional Master Reading shall issue his final report regarding methodology and allocation for Monmouth County.

6. Any further comments or critiques regarding the final report shall be submitted within 20 days of receipt of Special Regional Master Reading's final report.

7. If Special Regional Master Reading desires, he may issue a supplement to his final report to address any additional issues within 10 days.

8. Presumptive immunity previously granted to any municipality is hereby extended pending further Order of the court.

9. A copy of this Order shall be served on all counsel of record and otherwise be made available to all interested parties as directed by the New Jersey Supreme Court in Mount Laurel IV within seven days of the date hereof.

As to the following matters:

In the Matter of the Township of Aberdeen
MON-L-2362-15
In the Matter of the Borough of Atlantic Highlands
MON-L-2520-15
In the Matter of the Borough of Eatontown
MON-L-2522-15
In the Matter of the Borough of Farmingdale
MON-L-5603-05
In the Matter of the Township of Howell
MON-L-2525-15
In the Matter of the Borough of Little Silver
MON-L-2527-15
In the Matter of the Township of Manalapan
MON-L-2518-15
In the Matter of the Borough of Manasquan
MON-L-2508-15
In the Matter of the Township of Middletown
MON-L-2539-15
In the Matter of the Borough of Monmouth Beach
MON-L-2538-15
In the Matter of the Township of Neptune
MON-L-2236-15
In the Matter of the Borough of Oceanport
MON-L-2528-15
In the Matter of the Borough of Red Bank
MON-L-2540-15
In the Matter of the Borough of Rumson
MON-L-2483-15
In the Matter of the Borough of Shrewsbury
MON-L-2235-15
In the Matter of the Borough of Spring Lake
MON-L-2537-15
In the Matter of the Borough of Tinton Falls

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In the Matter of the Township of Upper Freehold
MON-L-2536-15
In the Matter of the Township of Wall
MON-L-5604-05

JAMIE S. PERRI, J.S.C.

As to the following matters:

In the Matter of the Township of Colts Neck
MON-L-2234-15
In the Matter of the Township of Holmdel
MON-L-2523-15
In the Matter of the City of Long Branch
MON-L-2586-15
In the Matter of the Township of Ocean
MON-L-2531-15
In the Matter of the Township of Freehold
MON-L-6026-08
In the Matter of the Township of Millstone
MON-L-2501-15

DENNIS R. O'BRIEN, J.S.C.

SBa 15

Ronald H. Gordon, Esq. Decotis, Fitzpatrick & Cole Glenpointe Center West 500 Frank W. Burr Blvd. Teaneck, NJ 07666 201-928-0588	Jeffrey R. Surenian, Esq. Jeffrey R. Surenian & Associates, LLC Brielle Galleria 707 Union Avenue, Suite 301 Brielle, NJ 08730 732-612-3101
Dominick M. Manco, Esq. 35 Court Street Suite 2D Freehold, NJ 07728 732-358-7085	John A. Sarto, Esq. Giordano, Halleran & Ciesla 125 Half Mile Road Suite 300 Red Bank, NJ 07701 732-224-6599
Andrew Bayer, Esq. GluckWalrath LLP 428 River View Plaza Trenton, NJ 08611 609-278-3901	Irina B. Elgart, Esq. Fox Rothschild LLP PO Box 5231 Princeton, NJ 08543-5231 609-896-1469
Jeffrey Kantowitz, Esq. Law Office of Abe Rappaport 195 Route 46 West, Suite 6 Totowa, NJ 07512 973-785-4777	Richard Hoff, Esq. Bisgaier Hoff, LLC 25 Chestnut Street Suite 3 Haddonfield, NJ 08033 856-795-0312
Kevin D. Walsh, Esq. Fair Share Housing Center 510 Park Blvd. Cherry Hill, NJ 08002 856-663-8182	Brian Nelson, Esq. Archer & Greiner Riverview Plaza 10 Highway 35 Red Bank, NJ 07701 732-345-8420
Thomas F. Carroll, III, Esq., Hill Wallack 21 Roszel Road Princeton, NJ 08540 609-452-1888	Gene Anthony, Esq. 48 South Street Eatontown, NJ 07724 732-542-9024
Robert Beckelman, Esq. Greenbaum Rowe Smith & Davis Metro Corporate Campus One PO BOX 5600 Woodbridge, NJ 07095 732-549-1881	Michael B Steib, ESQ. 16 Cherry Tree Farm Road PO BOX 893 Middletown, NJ 07748 732-706-7334
Daniel J. O'Hern, Jr., Esq. Byrnes, O'Hern & Heugle 28 Leroy Place Red Bank, NJ 07701 732-219-7733	Martin Arbus, Esq. Arbus, Maybruch Goode 61 Village Court Hazlet, NJ 07730 732-888-0024

SBa 16

Richard B. Reading 759 State Road Princeton, NJ 08540 609-924-1628	Francis J. Banish, III, P.P., A.I.C.P. Banisch Associates, Inc. 111 Main Street Flemington, NJ 08822 908.782.7636
Philip B. Caton, P.P., A.I.C.P. Clarke, Caton, Hintz Station Place 100 Barrack Street Trenton, NJ 08608 609-883-4044 (fax)	Elizabeth P. McKenzie, P.P., A.I.C.P. 908-782-4056
Michael P. Bolan, PP, AICP PO Box 295 Pennington, NJ 08534	Edward Buzak, Esq. New Jersey State League of Municipalities The Buzak Law Group 150 River Road, Suite N4 Montville, NJ 07045 973-335-1145
Collins Vella & Casello 2317 Highway 34, Suite 1A Manasquan NJ 08736 732-751-1866	Jonathan G. Burnham, Esq. Hutt & Shimanowitz 459 Amboy Avenue PO Box 648 Woodbridge, NJ 07095 732-634-0718

SBa 17

PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

In the Matter of the Application of the Township of East Windsor

In the Matter of the Application of the Township of Lawrence

In the Matter of the Application of the Township of Robbinsville

In the Matter of the Application of the Municipality of Princeton

In the Matter of the Application of Ewing

In the Matter of the Application of the Township of Hopewell

In the Matter of West Windsor Township

In the Matter of the Application of the Township of Hamilton

Petitioners.

Civil Action
(Mt. Laurel)

ORDER GRANTING EXTENSION FOR EXPERT REPORTS SUBMITTED BY MUNICIPALITIES AND HOLDING PROCEEDINGS IN ABEYANCE

DOCKET NUMBERS:
MER-L-1522-15
MER-L-1538-15
MER-L-1547-15
MER-L-1550-15
MER-L-1556-15
MER-L-1557-15
MER-L-1561-15
MER-L-1573-15

THIS MATTER having come before the court by way of the Order Holding Proceedings in Abeyance Pending Clarification from the Appellate Division issued in the Ocean County consolidated Mt. Laurel litigation on April 27, 2016; and the court wishing to clarify the effect this order will have on the Mercer County consolidated Mt. Laurel litigation; and the court having also received a facsimile from special counsel to West Windsor and Hamilton Townships requesting additional time for the municipalities to submit responses to the supplemental expert reports provided by intervenors and interested parties; and for good cause shown:

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IT IS this 10th day of May, 2016, **HEREBY ORDERED** that:

1. The municipalities shall submit expert reports responding to the supplemental reports submitted by interested parties and intervenors by May 24, 2016.
2. In light of the April 27, 2016 Order issued in the Ocean County consolidated Mt. Laurel litigation, all other deadlines and proceedings not tied to mediation efforts are to be temporarily suspended.
3. Special Master Richard Reading may continue working on his Report, but the Report will not be issued in any form pending further order of the Court.
4. Nothing herein shall prevent any party from making applications to the court as they deem necessary.
5. The court encourages the parties to pursue settlement efforts in cooperation with the Special Masters.

Mary C. Jacobson, A.J.S.C.

Mary C. Jacobson, A.J.S.C.

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TOWNSHIP OF SOUTH BRUNSWICK

Municipal Building • P.O. Box 190 • Monmouth Junction, NJ 08852-0190

Phone
732-329-4000
TDD
732-329-2017
Fax
732-329-0627

Via Email and Regular Mail

April 20, 2016

Honorable Douglas K. Wolfson, J.S.C.
Superior Court of New Jersey
Middlesex County Courthouse
56 Paterson Street
P.O. Box 964
New Brunswick, NJ 08903-0964

Re: In the Matter of the Application of the Township of South Brunswick
Docket No. MID-L-3878-15
Our File No. L1347

Dear Judge Wolfson:

As the Court knows, this Court issued a written opinion on October 5, 2015, determining that a Gap Period obligation exists that must be satisfied by municipalities as part of their Third Round Plan. On February 18, 2016, the Hon. Mark A. Troncone, J.S.C., made a similar determination in Ocean County, also finding that a Gap Period obligation exists that must be satisfied by municipalities as part of their Third Round Plan. On March 9, 2016, Barnegat Township filed a Motion for Leave to Appeal from Judge Troncone's decision, arguing that it was error for the trial court to find that a Gap Period exists or that an additional obligation arises from the Gap Period that must be satisfied by municipalities as part of their Third Round plans. The Municipal Consortium (a coalition of 284 municipalities) and four individual municipalities (South Brunswick, Colts Neck, Millstone Township and Middletown Township) all filed Motions for Leave to participate as Amicus Curiae should leave be granted. The New Jersey Builders' Association and Fair Share Housing Center both filed opposition.

This letter is to advise the Court that on April 14, 2016, the Appellate Division issued an Order granting the Motion for Leave to Appeal (Exhibit A). As a result of this Appellate Division order, Judge Troncone issued an Order today staying all further proceedings in Declaratory Judgment actions venued in Ocean County pending a resolution of the Gap Period issues by the Appellate Division (Exhibit B).

Since it is clear that the Appellate Division will rule on the Gap Period issues currently before it, which may affirm, reverse or modify the Gap Period issues present in all Declaratory Judgment actions now pending, I respectfully request that the trial in this matter (currently scheduled for May 2, 2016) be stayed and/or adjourned until such time as the Appellate Division rules on the Gap Period issues. Awaiting a decision by the Appellate Division is most prudent, in light of the enormous amount of time and resources that will be expended by the parties and the Court in any trial.

If this Court stays and/or adjourns the trial, I also respectfully request that the Court also continue the temporary immunity granted to the Township for a like period of time. Since a stay and/or adjournment of the trial would be because of the pending action by the Appellate Division, and not because of any

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delay or unwillingness of the Township to proceed, a continuance of the temporary immunity would be appropriate.

I have included a form of order for the Court's consideration in this request.

Thank you for your considerations in this matter. If you have any questions or comments, please do not hesitate to contact me.

Respectfully submitted,

s/ Donald J. Sears

Donald J. Sears
Director of Law

DJS/lw

Cc: Christine Nazzaro-Cofone, PP, Special Master
Robert A. Kasuba, Esq., attorney for AVB
Henry Kent-Smith, Esq., attorney for Richardson
Kenneth D. McPherson, Jr., attorney for SBC
Kevin J. Moore, Esq., attorney for SG
Kevin Walsh, Esq., and Adam Gordon, Esq., attorneys for FSHC
Brett Tanzman, Esq., attorney for Windsor
Benjamin Bucca, Jr., Esq., attorney for SB Planning Board
On notice to all interested parties

Donald J. Sears, Esq.
Township of South Brunswick
540 Ridge Road
P.O. Box 190
Monmouth Junction, NJ 08852
Phone No.: (732) 329-4000

Attorney for Declaratory Plaintiff,
Township of South Brunswick

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-3878-15 CIVIL ACTION – *MOUNT LAUREL* ORDER STAYING TRIAL AND CONTINUING TEMPORARY IMMUNITY

THIS MATTER, having been opened to the Court by Donald J. Sears, Esq., attorney for Declaratory Plaintiff, Township of South Brunswick, by way of letter application, on notice to the Special Master Christine Nazzaro-Cofone, all parties of record, as well as all known interested parties, and the Court having considered the moving papers and the papers filed in opposition (if any), for the reasons set forth on the record and otherwise for good cause shown;

IT IS HEREBY ORDERED on this 20th day of April, 2016, that the trial in this matter, currently scheduled for May 2, 2016, shall be and is hereby stayed pending action by the Superior Court, Appellate Division, on its grant of a Motion for Leave to Appeal in the matter captioned In Re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean, bearing Appellate Division Docket No. AM-000407-15T1 (Motion No. M-005196-15);

AND IT IS FURTHER ORDERED that the Township's temporary immunity from "builder's

SBa 22

remedy" lawsuits shall be and is hereby continued pending further Order of this court;

AND IT IS FURTHER ORDERED that a copy of this Order shall be served upon the Special Master and all counsel of record within seven (7) days of the date hereof;

AND IT IS FURTHER ORDERED that a copy of this Order shall be available for inspection by any interested party.

DOUGLAS K. WOLFSON, J.S.C.

Opposition filed: ___ Yes ___ No

SBa 23

Superior Court of New Jersey
Appellate Division

Disposition on Application for Permission to File Emergent Motion

IN THE MATTER OF TP. OF SOUTH BRUNSWICK DECLARATORY JUDGMENT ACTION
Case Name: (MT. LAUREL)

Appellate Division Docket Number: (if available): _____

Trial Court or Agency Below: MIDDLESEX COUNTY

Trial Court or Agency Docket Number: MID-L-3878-15

DO NOT FILL IN THIS SECTION – FOR COURT USE ONLY

I. The application for leave to file an emergent motion on short notice is **Denied** for the following reasons:

☐ The application on its face does not concern a threat of irreparable injury, or a situation in which the interests of justice otherwise require adjudication on short notice. The applicant may file a motion with the Clerk's Office in the ordinary course.

☐ The threatened harm or event is not scheduled to occur prior to the time in which a motion could be filed in the Clerk's Office and decided by the court. If the applicant promptly files a motion with the Clerk's Office it shall be forwarded to a Panel for decision as soon as the opposition is filed.

☐ The applicant did not apply to the trial court or agency for a stay, and obtain a signed court order, agency decision or other evidence of the ruling before seeking a stay from the Appellate Division.

☒ The application concerns an order entered during trial or on the eve of trial as to which there is no prima facie showing that the proposed motion would satisfy the standards for granting leave to appeal.

☐ The timing of the application suggests that the emergency is self-generated, given that no good explanation has been offered for the delay in seeking appellate relief. Due to the delay, we cannot consider a short-notice motion within the time frame the applicant seeks, without depriving the other party of a reasonable time to submit opposition. And the magnitude of the threatened harm does not otherwise warrant adjudicating this matter on short notice despite the delay. If the applicant promptly files a motion with the Clerk's Office it shall be forwarded to a Panel for decision as soon as the opposition is filed.

☐ Other reasons:

The applicant is free to file a motion for leave to appeal which will be decided in the ordinary course of this court's motion practice.

JOSE L. FUENTES, P. J.A.D.

April 21, 2016
Date

5Ba 24

Third Round (1999-2025) Fair Share Low and Moderate Income Housing Obligation Calculation Summary, Township of South Brunswick, Middlesex County, New Jersey, April 2016		
PRESENT NEED, 2015 (affordable housing units)		
Calculated by FSHC following Prior Round methodology		109
PRIOR ROUND OBLIGATION, 1987-1999 (affordable housing units)		
Prior Round Obligation calculated by COAH		841
PROSPECTIVE NEED, 1999-2025 ("GAP PERIOD" AND 2015-2025) (affordable housing units)		
PHASE ONE: CALCULATE REGIONAL PROSPECTIVE NEED		
1	Identify the 'housing region"	COAH Housing Region 3 West Central: Hunterdon, Somerset, Middlesex
2	Determine the population projection period	1999-2025
3	Determine the regional population 2015 and project regional population 2025 (persons)	1,378,500
4	Identify and remove 2000 and 2014 "group quarters" population from total population	
5	Calculate 2000 and 2014 headship rates and project 2015 and 2025 headship rates	
6	Estimate 1999 low and moderate income households	170,101
7	Calculate 2015 low and moderate income households	184,462
8	Project 2025 low and moderate income households	204,857
9	Calculate and project the regional increase in low and moderate income households, 1999-2015 and 2015-2025	34,757
10	Pool and reallocate projected regional growth in low and moderate income households below age 65	18,102 (1999-2015 only)
11	Determine regional prospective need (units)	38,498
PHASE TWO: ALLOCATE MUNICIPAL PROSPECTIVE NEED		
12	Exempt Qualifying Urban (Municipal) Aid municipalities from housing need allocations	NA
13	Calculate the equalized nonresidential valuation (ratables) factor	0.086164517
14	Calculate the undeveloped land factor	0.101856321
15	Calculate the differences in household income factor	0.036042548
16	Calculate average allocation factor to distribute regional low and moderate income housing need by municipality	0.074687795
17	Calculate gross municipal prospective need municipality (units)	2,881
PHASE THREE: ADJUST FOR SECONDARY SOURCES OF DEMAND AND SUPPLY		
18	Estimate filtering affecting low and moderate income households (units)	-1,028
19	Estimate residential conversions affecting low and moderate income households (units)	52
20	Estimate demolitions affecting low and moderate income households (units)	78
21	Calculate prospective need by municipality (units)	3,935
22	Calculate the 20% cap and, if applicable, reduce prospective need (units)	3,100
23	Calculate the prospective need obligation (net) by municipality (units)	3,100
24	Calculate the 1,000 unit cap and, if applicable, reduce the net prospective need obligation	To be determined after verification of credits by the Court

Notes:

A For a description and explanation of each of the steps and data sources used to reach the determinations in this table, see "NEW JERSEY FAIR SHARE HOUSING OBLIGATIONS FOR 1999-2025 (THIRD ROUND) UNDER MOUNT LAUREL IV FOR MIDDLESEX COUNTY," dated April 21, 2016, prepared by David N. Kinsey, PhD, FAICP, PP, for and in collaboration with Fair Share Housing Center.

B For the data and calculations that are the source of the determinations in this table, see the Excel workbook with linked worksheets that provide the data, data sources, and calculations used to compute 2015 Present Need, 1987-1999 Prior Round obligations and 1999-2025 net Prospective Need allocations using the Prior Round methodology that is the Appendix to the Report identified above in Note A.

Prepared by David N. Kinsey, PhD, FAICP, PP, Kinsey & Hand, Princeton, NJ, April 27, 2016

SBa 25

52:27D-307

LEGISLATIVE HISTORY CHECKLIST
Compiled by the NJ State Law Library

(Fair Housing -- adjust fair housing obligations)

NJSA: 52:27D-307

LAWS OF: 1993 **CHAPTER:** 31

BILL NO: S858

SPONSOR(S) Kyrillos and others

DATE INTRODUCED: May 18, 1992

COMMITTEE: **ASSEMBLY:** Housing

SENATE: Community Affairs

AMENDED DURING PASSAGE: Yes

DATE OF PASSAGE: **ASSEMBLY:** December 14, 1992

SENATE: October 19, 1992

DATE OF APPROVAL: January 29, 1993

FOLLOWING STATEMENTS ARE ATTACHED IF AVAILABLE:

SPONSOR STATEMENT: Yes

COMMITTEE STATEMENT: **ASSEMBLY:** Yes

SENATE: Yes

FISCAL NOTE: No

VETO MESSAGE: No

MESSAGE ON SIGNING: Yes

FOLLOWING WERE PRINTED:

REPORTS: No

HEARINGS: Yes

974.90 New Jersey. Legislature. Gneeral Assembly. Housing Committee.
H842 Committee meeting on S858, held 11-23-92. Trenton, 1992.
1992g

See newspaper clipping - attached:
"Towns' obligation to provide low-income housing is eased." 1-30-93.
Philadelphia Inquirer.

KBG:pp

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[SECOND REPRINT]

SENATE, No. 858

STATE OF NEW JERSEY

INTRODUCED MAY 18, 1992

By Senators KYRILLOS, DORSEY, Corman, Inverso,
Dimon, Haines, Connors and Adler

AN ACT concerning municipal fair share obligations under the "Fair Housing Act," amending P.L.1985, c.222, and repealing section 23 of P.L.1985, c.222.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 7 of P.L.1985, c.222 (C.52:27D-307) is amended to read as follows:

7. It shall be the duty of the council, seven months after the confirmation of the last member initially appointed to the council, or January 1, 1986, whichever is earlier, and from time to time thereafter, to:

a. Determine housing regions of the State;

b. Estimate the present and prospective need for low and moderate income housing at the State and regional levels;

c. Adopt criteria and guidelines for:

(1) Municipal determination of its present and prospective fair share of the housing need in a given region. Municipal fair share shall be determined after crediting on a one-to-one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households;

(2) Municipal adjustment of the present and prospective fair share based upon available vacant and developable land, infrastructure considerations or environmental or historic preservation factors and adjustments shall be made whenever:

(a) The preservation of historically or important architecture and sites and their environs or environmentally sensitive lands may be jeopardized,

(b) The established pattern of development in the community would be drastically altered,

(c) Adequate land for recreational, conservation or agricultural and farmland preservation purposes would not be provided,

(d) Adequate open space would not be provided,

(e) The pattern of development is contrary to the planning designations in the State Development and Redevelopment Plan prepared pursuant to sections 1 through 12 of P.L.1985, c.398 (C.52:18A-196 et seq.),

(f) Vacant and developable land is not available in the

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.
Matter enclosed in superscript numerals has been adopted as follows:
1 Senate SCO committee amendments adopted October 1, 1992.
2 Senate floor amendments adopted October 15, 1992.

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municipality, and

(g) Adequate public facilities and infrastructure capacities are not available, or would result in costs prohibitive to the public if provided; and

(3) [Phasing of present and prospective fair share housing requirements pursuant to section 23 of this act] (Deleted by amendment, P.L. , c.) (now pending before the Legislature as this bill);

d. Provide population and household projections for the State and housing regions;

e. [May in its discretion, place a limit, based on a percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the council deems appropriate, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing] 2In its discretion, place a limit, based on a percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the council deems appropriate, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing.2 No 1[municipality shall be required to address within any given six year period a fair share beyond 50 percent of the fair share assigned by the council for that six year period, unless it is demonstrated, following objection by an interested party and an evidentiary hearing, that based upon the facts and circumstances of the affected municipality it is likely that the municipality through its zoning powers can create a realistic opportunity for more than 50 percent of its fair share within that six year period. In any event, no]1 municipality shall be required to address a fair share beyond 1000 units within 1[any given]1 six 1[year period] 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 1000 low and moderate income units within that six year period. 1[The facts and circumstances sufficient to require a municipality to provide a number of units greater than the number derived under these limitations would be proof that the municipality can create a realistic opportunity within that six year period for at least five times the number of units so derived, based upon the past residential building permit activity in the municipality.] 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 six-year period preceding the petition for substantive certification in connection with which the objection was filed.1

In carrying out the above duties, including, but not limited to, present and prospective need estimations the council shall give

SBa 28

appropriate weight to pertinent research studies, government reports, decisions of other branches of government, implementation of the State Development and Redevelopment Plan prepared pursuant to sections 1 through 12 of P.L.1985, c.398 and public comment. To assist the council, the State Planning Commission established under that act shall provide the council annually with economic growth, development and decline projections for each housing region for the next six years. The council shall develop procedures for periodically adjusting regional need based upon the low and moderate income housing that is provided in the region through any federal, State, municipal or private housing program.

(cf: P.L.1985, c.222, s.7)

2. Section 23 of P.L.1985, c.222 (C.52:27D-323) is repealed.

3. This act shall take effect immediately.

Provides for adjustment of municipal fair share obligations under the "Fair Housing Act."

SBa 29

STATEMENT

Experience with the compliance mechanisms established by the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-301 et seq.) demonstrates that the act places considerable planning and financial burdens upon municipalities and requires them to zone lands that will not result in the creation of additional affordable housing because the market cannot reasonably absorb all the housing needed to produce the additional affordable housing. The Council on Affordable Housing sought to avoid the imposition of onerous burdens on municipalities by adopting a regulation capping the fair share of each municipality at 1000. The courts declared the regulation illegal because it imposed a cap that was not based upon the facts and circumstances of the municipality. This bill seeks to establish a cap directly related to the facts and circumstances of the municipality. The legislation would also eliminate the potential for temporary taking claims under the phasing provisions of section 23 of P.L.1985, c.222 (C.52:27D-323) pursuant to which a municipality could zone a parcel for inclusionary development, but bar the owner from developing the parcel consistent with the inclusionary rezoning for some set period of time. That section of law is therefore repealed.

Provides for adjustment of municipal fair share obligations under the "Fair Housing Act."

SBa 30

ASSEMBLY HOUSING COMMITTEE

STATEMENT TO

[SECOND REPRINT]

SENATE, No. 858

STATE OF NEW JERSEY

DATED: NOVEMBER 23, 1992

The Assembly Housing Committee reports Senate Bill No. 858 [2R] favorably, without amendment.

This bill relieves certain municipalities of the burden of addressing a fair share allocation of affordable housing that exceeds 1,000 units.

Experience with the implementation of the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-301 et al.) demonstrates that the act places considerable planning and financial burdens upon municipalities and requires them to zone lands for affordable housing that will not produce such housing because the market can not reasonably absorb additional housing to the magnitude desired. The Council on Affordable Housing sought to avoid the imposition of onerous burdens on municipalities by adopting a regulation capping the fair share of each municipality at 1,000 units. The courts declared the regulation illegal because it imposed a cap that was not based upon the facts and circumstances of the municipality.

This bill requires only those municipalities in which it can be demonstrated that 1,000 low and moderate income housing units can be accommodated through zoning to address a fair share of that number. The bill specifies the facts and circumstances which shall determine the municipality's ability to absorb that number of units. Specifically, the facts and circumstances which shall determine a municipality's fair share shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential development in the six-year period preceding its petition for substantive certification of its housing element.

This bill would also repeal section 23 of the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-323), which allows municipalities to phase in their fair share obligations. In so doing, it is intended to eliminate the potential for temporary taking whereby a municipality could zone a parcel for inclusionary development, but bar the owner from developing the parcel consistent with the inclusionary rezoning for some set period of time.

SBa 31

SENATE COMMUNITY AFFAIRS COMMITTEE

STATEMENT TO

SENATE, No. 858

with Senate committee amendments

STATE OF NEW JERSEY

DATED: OCTOBER 1, 1992

The Senate Community Affairs Committee favorably reports Senate Bill No. 858 with Senate committee amendments.

Senate Bill No. 858, as amended by the committee, relieves certain municipalities of the burden of addressing a fair share of beyond 1,000 units.

Experience with the implementation of the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-301 et al.) demonstrates that the act places considerable planning and financial burdens upon municipalities and requires them to zone lands that will not result in the creation of additional affordable housing because the market cannot reasonably absorb all the housing needed to produce the additional affordable housing. The Council on Affordable Housing sought to avoid the imposition of onerous burdens on municipalities by adopting a regulation capping the fair share of each municipality at 1000. The courts declared the regulation illegal because it imposed a cap that was not based upon the facts and circumstances of the municipality.

This bill requires only those municipalities in which it can be demonstrated that 1,000 low and moderate income housing units can be accommodated through zoning to address a fair share of that number. The bill specifies the facts and circumstances which shall determine the municipality's ability to absorb that number of units. Specifically, the facts and circumstances which shall determine a municipality's fair share shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential development in the six-year period preceding the petition for substantive certification in connection with which the objection was filed.

This bill would also repeal section 23 of the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-323) which allows municipalities to phase in their fair share obligations. In so doing, it is intended to eliminate the potential for temporary taking whereby a municipality could zone a parcel for inclusionary development, but bar the owner from developing the parcel consistent with the inclusionary rezoning for some set period of time.

As originally introduced, this bill capped at 50 percent the proportion of a municipality's fair share which it would have to address within any given six-year period unless it was demonstrated that the municipality could create a realistic opportunity for that number of housing units. In addition, the committee amended the bill to clarify the facts and circumstances which shall determine the need for the municipality to address a fair share beyond 1,000 units.

SBa 32

OFFICE OF THE GOVERNOR
NEWS RELEASE

CN-001
Contact:

Jon Shure
Jo Glading
609/777-2600

TRENTON, N.J. 08625
Release:

Friday
Jan. 29, 1993

GOVERNOR SIGNS BILL PROVIDING FAIR SHARE ADJUSTMENT

Governor Jim Florio today signed legislation to ease municipal fair share obligations for affordable housing under the "Fair Housing Act."

The bill is aimed at easing financial and planning burdens imposed on municipalities through their affordable housing obligations. Original fair share calculations following the Mt. Laurel ruling were based on demands and expected growth which were ultimately not realized.

The bill signed today allows for the adjustment of a municipality's obligation It requires only those municipalities which can demonstrate that 1,000 low and moderate income housing units can be accommodated through zoning to address a fair share of that number.

The bill, S 858/A 1489, was sponsored by Senator Joe Kyrillos and John Dorsey, and Assemblymen Joe Azzolina and David Wolfe.

# # #

CHRISTINE TODD WHITMAN
Governor

State of New Jersey
COUNCIL ON AFFORDABLE HOUSING
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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.

SBa 34

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

SBa 35

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.

SBa 36

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

AN ACT concerning affordable housing obligations and amending P.L.1985, c.222.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 4 of P.L.1985, c.222 (C.52:27D-304) is amended to read as follows:

4. As used in this act:

a. "Council" means the Council on Affordable Housing established in this act, which shall have primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this State.

b. "Housing region" means a geographic area of not less than two nor more than four contiguous, whole counties which exhibit significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas as last defined by the United States Census Bureau prior to the effective date of P.L.1985, c.222 (C.52:27D-301 et al.).

c. "Low income housing" means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to 50% or less of the median gross household income for households of the same size within the housing region in which the housing is located.

d. "Moderate income housing" means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to more than 50% but less than 80% of the median gross household income for households of the same size within the housing region in which the housing is located.

e. "Resolution of participation" means a resolution adopted by a municipality in which the municipality chooses to prepare a fair share plan and housing element in accordance with this act.

f. "Inclusionary development" means a residential housing development in which a substantial percentage of the housing units are provided for a reasonable income range of low and moderate income households.

g. "Conversion" means the conversion of existing commercial, industrial, or residential structures for low and moderate income housing purposes where a substantial percentage of the housing units are provided for a reasonable income range of low and moderate income households.

h. "Development" means any development for which permission may be required pursuant to the "Municipal Land Use Law," P.L.1975, c.291 (C.40:55D-1 et seq.).

SBa 38

i. "Agency" means the New Jersey Housing and Mortgage Finance Agency established by P.L.1983, c.530 (C.55:14K-1 et seq.).

j. "Prospective need" means a projection of housing needs based on development and growth which is reasonably likely to occur in a region or a municipality, as the case may be, as a result of actual determination of public and private entities. In determining prospective need, consideration shall be given to approvals of development applications, real property transfers and economic projections prepared by the State Planning Commission established by sections 1 through 12 of P.L.1985, c.398 (C.52:18A-196 et seq.).

k. "Disabled person" means a person with a physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect, aging or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device.

l. "Adaptable" means constructed in compliance with the technical design standards of the barrier free subcode adopted by the Commissioner of Community Affairs pursuant to the "State Uniform Construction Code Act," P.L.1975, c.217 (C.52:27D-119 et seq.) and in accordance with the provisions of section 5 of P.L.2005, c.350 (C.52:27D-123.15).

m. "Very low income housing" means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to 30% or less of the median gross household income for households of the same size within the housing region in which the housing is located.

n. "Present need" means an estimate of the number of deficient housing units that are occupied by low and moderate income households within each municipality.

o. "Gap period" means the period between the expiration of an obligation for any given housing cycle and the date used to define the present need and the commencement date of the next 10-year prospective need period.

(cf: P.L.2008, c.46, s.5)

2. Section 7 of P.L.1985, c.222 (C.52:27D-307) is amended to read as follows:

7. It shall be the duty of the council, seven months after the confirmation of the last member initially appointed to the council, or January 1, 1986, whichever is earlier, and from time to time thereafter, to:

a. Determine housing regions of the State;

b. Estimate the present and prospective need for low and moderate income housing at the State and regional levels;

c. Adopt criteria and guidelines for:

(1) Municipal determination of its present and prospective fair share of the housing need in a given region which shall be computed for a 10-year period.

Municipal fair share shall be determined after crediting on a one-to-one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households. Municipal fair share shall be determined for a 10-year period and shall not include retrospective calculations of low and moderate income households created during gap periods for which low and moderate income households were not previously accounted for as either present or prospective need by the council. Notwithstanding any other law to the contrary, a municipality shall be entitled to a credit for a unit if it demonstrates that (a) the municipality issued a certificate of occupancy for the unit, which was either newly constructed or rehabilitated between April 1, 1980 and December 15, 1986; (b) a construction code official certifies, based upon a visual exterior survey, that the unit is in compliance with pertinent construction code standards with respect to structural elements, roofing, siding, doors and windows; (c) the household occupying the unit certifies in writing, under penalty of perjury, that it receives no greater income than that established pursuant to section 4 of P.L.1985, c.222 (C.52:27D-304) to qualify for moderate income housing; and (d) the unit for which credit is sought is affordable to low and moderate income households under the standards established by the council at the time of filing of the petition for substantive certification. It shall be sufficient if the certification required in subparagraph (c) is signed by one member of the household. A certification submitted pursuant to this paragraph shall be reviewable only by the council or its staff and shall not be a public record;

Nothing in P.L.1995, c.81 shall affect the validity of substantive certification granted by the council prior to November 21, 1994, or of a judgment of compliance entered by any court of competent jurisdiction prior to that date. Additionally, any municipality that received substantive certification or a judgment of compliance prior to November 21, 1994 and filed a motion prior to November 21, 1994 to amend substantive certification or a judgment of compliance for the purpose of obtaining credits, shall be entitled to a determination of its right to credits pursuant to the standards established by the Legislature prior to P.L.1995, c.81. Any municipality that filed a motion prior to November 21, 1994 for the purpose of obtaining credits, which motion was supported by the results of a completed survey performed pursuant to council rules,

shall be entitled to a determination of its right to credits pursuant to the standards established by the Legislature prior to P.L.1995, c.81;

(2) Municipal adjustment of the present and prospective fair share based upon available vacant and developable land, infrastructure considerations or environmental or historic preservation factors and adjustments shall be made whenever:

(a) The preservation of historically or important architecture and sites and their environs or environmentally sensitive lands may be jeopardized,

(b) The established pattern of development in the community would be drastically altered,

(c) Adequate land for recreational, conservation or agricultural and farmland preservation purposes would not be provided,

(d) Adequate open space would not be provided,

(e) The pattern of development is contrary to the planning designations in the State Development and Redevelopment Plan prepared pursuant to sections 1 through 12 of P.L.1985, c.398 (C.52:18A-196 et seq.),

(f) Vacant and developable land is not available in the municipality, and

(g) Adequate public facilities and infrastructure capacities are not available, or would result in costs prohibitive to the public if provided.

(3) (Deleted by amendment, P.L.1993, c.31).

d. Provide population and household projections for the State and housing regions;

e. In its discretion, place a limit, based on a percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the council deems appropriate, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing. 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] 10 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] 10-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] 10-year period preceding the petition for substantive certification in connection with which the objection was filed.

For the purpose of crediting low and moderate income housing units in order to arrive at a determination of present and prospective fair share, as set forth in paragraph (1) of subsection c. of this section, housing units comprised in a community residence for the developmentally disabled, as defined in section 2 of P.L.1977, c.448 (C.30:11B-2), shall be fully credited pursuant to rules promulgated or to be promulgated by the council, to the extent that the units are affordable to persons of low and moderate income and are available to the general public.

The council, with respect to any municipality seeking substantive certification, shall require that a minimum percentage of housing units in any residential development resulting from a zoning change made to a previously non-residentially-zoned property, where the change in zoning precedes or follows the application for residential development by no more than 24 months, be reserved for occupancy by low or moderate income households, which percentage shall be determined by the council based on economic feasibility with consideration for the proposed density of development.

In carrying out the above duties, including, but not limited to, present and prospective need estimations the council shall give appropriate weight to pertinent research studies, government reports, decisions of other branches of government, implementation of the State Development and Redevelopment Plan prepared pursuant to sections 1 through 12 of P.L.1985, c.398 (C.52:18A-196 et seq.) and public comment. To assist the council, the State Planning Commission established under that act shall provide the council annually with economic growth, development and decline projections for each housing region for the next [ten] 10 years. The council shall develop procedures for periodically adjusting regional need based upon the low and moderate income housing that is provided in the region through any federal, State, municipal or private housing program.

No housing unit subject to the provisions of section 5 of P.L.2005, c.350 (C.52:27D-123.15) and to the provisions of the barrier free subcode adopted by the Commissioner of Community Affairs pursuant to the "State Uniform Construction Code Act," P.L.1975, c.217 (C.52:27D-119 et seq.) shall be eligible for inclusion in the municipal fair share plan certified by the council unless the unit complies with the requirements set forth thereunder.
(cf: P.L.2008, c.46, s.6)

3. This act shall take effect immediately.

STATEMENT

Although the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-301 et seq.), clearly states that the State Constitution's affordable housing obligation is comprised of the "present and prospective need" for affordable housing only, some courts have misunderstood

the intent of the Legislature behind the "Fair Housing Act," and imposed a retroactive obligation for the so-called gap period. The purpose of this bill is to eliminate any possible misconception with respect to the Legislature's intent so to ensure that determinations of a municipality's fair share of affordable housing will be based upon the present and prospective need for affordable housing, as clearly set forth in the "Fair Housing Act," and that a fair share obligation will not include retrospective need that may have arisen during any "gap period" between housing cycles.

The New Jersey Supreme Court, through its rulings in South Burlington County NAACP v. Mount Laurel, 67 N.J. 151 (1975) and South Burlington County NAACP v. Mount Laurel, 92 N.J. 158 (1983), determined that every municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families.

By enacting the "Fair Housing Act," he Legislature accepted the Supreme Court's request that the Legislature occupy the field of affordable housing and defined the constitutional obligation to include the present and prospective needs for affordable housing only. The Legislature directed each municipality to comply with its constitutional obligation to address its obligations with respect to the present and prospective need by:

including in the housing element of its master plan a determination of the municipality's present and prospective fair share for low and moderate income housing and a determination of the municipality's capacity to accommodate its present and prospective housing needs, including its fair share for low and moderate income housing as the present and prospective need; and

adopting or revising land use and other relevant ordinances consistent with the provisions for low and moderate income housing in its housing element.

The courts and the Legislature of this State require municipalities to allow low and moderate income families a chance to find housing based upon the present need and the prospective need for affordable housing in each municipality and region of the State. This requirement has always been about planning and zoning; municipalities may not limit opportunities for affordable housing through exclusionary zoning.

Differences of opinion between the judicial and executive branches of government over how to calculate each municipality's "fair share" of affordable housing have resulted in a "gap period" of over 15 years, which is still going on, during which the State provided municipalities no clear guidelines on how to zone to satisfy their obligation to allow for a fair share of affordable housing. Now that the courts have assumed control over municipal compliance with affordable housing obligations, it is possible that municipalities may be obligated to allow for the production of

affordable housing based upon the speculated need for affordable housing which arose during the gap period.

While laudable, such a result is contrary to current law, which confines municipal fair share determinations to a present and prospective need for affordable housing, and would impose an unrealistic and excessive burden upon the residential communities of our State. Requiring fair share obligations to include the need developed through a long regulatory gap period would result in an unreasonable burden, the resolution of which would force municipalities to allow rapid, unsettling changes to the physical and demographic nature of their communities. This bill eliminates any possible misconception of what the Legislature intended the fair share obligation to include so as to preclude the imposition of a fair share obligation based upon a concept of retrospective need during the gap period.

Clarifies scope of affordable housing obligations.

SBa 44