Donald J. Sears, Esq.
Township of South Brunswick
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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.: CIVIL ACTION – *MOUNT LAUREL* CERTIFICATION OF DONALD J. SEARS, IN SUPPORT OF DECLARATORY JUDGMENT ACTION AND MOTION FOR TEMPORARY IMMUNITY FROM MOUNT LAUREL LAWSUITS

I, Donald J. Sears, of full age, do hereby certify as follows:

1. I am an attorney-at-law in the State of New Jersey, employed as the Director of Law for the Township of South Brunswick, the attorney for the Declaratory Plaintiff in the above-captioned matter, and have personal knowledge of the facts set forth in this certification.

2. This certification is made in support of the Township's Declaratory Judgment action, including the Township's Motion for Temporary Immunity, prepared pursuant to N.J.S.A. 52:27D-313 to address the N.J. Supreme Court's March 10, 2015 decision in In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015).

3. The documents included in South Brunswick's Appendix, attached to its Brief in support of the Motion for Temporary Immunity, are true and exact copies of documents on file in the Township of South Brunswick.

4. Attached hereto as Exhibit A is a true copy of the Transcript of Judge Serpentelli's rulings in the K. Hovnanian Shore Acquisitions v. Tp. of Berkeley, (Law Div.

August 31, 2001, Docket No. OCN-L-1120-01), wherein Judge Serpentelli dismissed Hovnanian's builder's remedy complaint pursuant to the doctrine of temporary immunity.

5. Attached hereto as Exhibit B is a true copy of the immunity order entered in the Berkeley Tp. matter on September 20, 2001.

6. Attached hereto as Exhibit C is a true copy of K. Hovnanian Shore Acquisitions v. Tp. of Berkeley, 2003 WL 23206281, (App. Div. Jul 01, 2003)(unpublished opinion).

7. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: July 1, 2015

By: _____
Donald J. Sears, Esq.

EXHIBIT A

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
CIVIL PART
DOCKET NO. OCN-L-1120-01

R. HOVNANIAN SHORE ACQUISITIONS, Plaintiff, vs. TOWNSHIP OF BERKELEY, MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF BERKELEY and THE PLANNING BOARD OF THE TOWNSHIP OF BERKELEY, Defendants.	TRANSCRIPT OF JUDGE'S DECISION

PLACE: OCEAN COUNTY JUSTICE COMPLEX
HOOPER AVENUE
TOMS RIVER, NEW JERSEY 08753

DATE: AUGUST 31, 2001

BEFORE:

HON. EUGENE D. SERPENTELLI, A.J.S.C.

TRANSCRIPT ORDERED BY:

THOMAS F. CARROLL, III, ESQ.

APPEARANCES:

THOMAS F. CARROLL, III, ESQ., (Hill Wallack), attorneys for the Plaintiff.

JEFFREY R. SURENIAN, ESQ., attorney for Mayor and Township Council of Berkeley Township.

EDWARD LISTON, JR., ESQ., attorney for the Berkeley Township Planning Board.

TRANSCRIBER: PEGGY A. MASTRODICASA
RECORDING OPERATOR: Joan Zuczek

P.A. MASTRO & ASSOCIATES
Certified Court Transcribers
1465 Cedarhurst Drive
Toms River, New Jersey 08753
732-270-4904

THE COURT: Okay. We've really, I think exhausted this matter and in some areas gone well beyond the limited scope of the application made by the Town, but I felt it was necessary to do that in order to ferret out what would be the impact of a holding here today that the immunity order should be applied against Hovnanian, how they would or would not be prejudiced by such a finding.

I'm not going to go back in history as to the -- at any length, at least, as to the history of how this whole immunity process developed. It did emanate out of the -- even prior to the Court's decision in J.W. Field. It was a matter discussed rather broadly with the people who are involved in the large number of cases in which I was involved, at least, as Mount Laurel Judge. It became evident at an early stage that there was, in fact, a feeding frenzy occurring in the Mount Laurel process. The frenzy was, to some extent, encouraged by the Mount Laurel decision. The Court saw the builders as a means of bringing about their ultimate goal. That is, to produce fair and -- a fair share housing response by municipalities.

The Field case was the first opportunity this Court had to address what was a developing problem in

the Mount Laurel area and what I saw as an impediment to compliance -- prompt compliance and prompt production of low and moderate income housing. The Field case is the best evidence of that and I think there are 11 plaintiffs in that case, each seeking a separate remedy. I know there were at least 11 lawyers; I can remember distinctly. And the case was becoming terribly convoluted. The fights were occurring as much between the plaintiffs as they were with the defendant, Franklin Township.

It was evident to me at the time that this was a classic example of what the Court had criticized in the Mount Laurel II decision in terms of the complexity, the time it took to resolve a Mount Laurel dispute. It also addressed some of the other issues which the Court discussed in Mount Laurel II in terms of giving the Town some flexibility to meet its Mount Laurel obligation, the potential that a town could be destroyed in its environment and by multiple builders' remedies by needing to comply with the Mount Laurel directive.

So, all of those policy considerations could have crystallized at the time of the Field case and as a result of other corollary litigation that was going at that time, the A.M.G. case that was occurring at

that time, the convening of a conference of planners in this courtroom that was described in the Bedminster decision that the Court made, there was some sense developing that we had to get a handle on balancing the right of builders and the need to have builders involved in Mount Laurel litigation against a town's willingness to voluntarily comply, do so expeditiously and still maintain some control over its zoning future in the development of its town.

And so out of that emanated a discussion that's contained in the Field case which is not the -- at the heart of what was involved in Field. In Field we were trying to decide what kind of priority these 11 builders would have in terms of who got the builder's remedies and what happened if the remedies exceeded the fair share of all of those sort of issues. But in that process, the Court identified the need to bring some balance to the whole process and discuss the concept of immunity.

I remain convinced today that the concept that emanated from that case and then was then refined is imminently sensible. It has served a purpose of -- I think a demonstrable purpose of eliminating a lot of the years of skirmishing that were involved in bringing the Court to the point of finding that a municipality

was not compliant and getting it into the compliance posture. And it has given the Court the ability to monitor and to expedite when it can. And I think in fairness Mr. Carroll has correctly pointed out that it's not always been successful, the movement along of the Mount Laurel litigation.

Now, there is no question in my mind that the so-called immunity doctrine is a novel principle in our jurisprudence. I can't think of another area of our law where a court enters an order which is, in effect, binding on people who are not subject or not party to the litigation and even enters it where there is not an adversarial litigation going on because this Court and others have entered immunity orders in a declaratory judgment posture where nobody is involved other than the Town coming saying that we're willing to admit we're non-compliant; we need some time to comply and we want to be protected while we're doing it. I do not know of any other area of the law which that sort of principle has ever been announced.

Now, having said that, it's my opinion that, in reading the Mount Laurel decision and subsequent pronouncement of our Court, that the Court expected the Trial Court Judges in Mount Laurel to, in effect, develop rules for the furtherance of that litigation

and the promotion of the expeditious handling of the litigation. I don't think one can read too much from subsequent Supreme Court opinions as to their implicit approval of the immunity doctrine. I think it's fair to say nobody -- no Court has ever expressly said that it's constitutionally appropriate or that it's in any way defective.

I think our Court has suggested, in the Fair Housing Act case, that the Mount Laurel Judges did develop procedures which it looked upon favorably to bring about the processing of Mount Laurel litigation. I believe that the Mount Laurel II gave the Court the authority to do those kind of things. In the words of the United States Supreme Court decision, they gave the Court the right to make a law to rule the world, the old proposition, can the island of Tobago make a law to rule the world. And it attempted to do so at one time and that was the subject of a United States Supreme Court decision, believe it or not. But the impact here is, as Mr. Carroll properly says to in some effect -- in some way, affect the rights of people who aren't even parties to the litigation or to affect them in advance of their right to file suit.

The question is that, assuming the Court has that authority, is whether that is an appropriate thing

to do in the Mount Laurel setting and I think, for the reasons that I've set forth in the Field opinion, for the reasons that I've suggested on the record today, I think it's entirely appropriate. The net impact today of holding that the immunity order should bar the builder's remedy suit at this time is little more than to say that Hovnanian can't, at this time, be assured that it's entitled to a builder's remedy.

Now, that may not be insignificant in terms of the cost of litigation, but the Hovnanian involvement here adds nothing to the process of bringing about finality of Berkeley Township's obligation for its present fair share number. Hovnanian is also not precluded from participating fully -- and this is why I really went down this road -- in attempting to demonstrate that there is not compliance by the proposed new credits and to take whatever other position it may wish to in the hearing that's going to be held.

Now, should the Court decide that Berkeley Township has not presented an appropriate plan to fill its gap, what will be the result? That -- I think that is an issue the Court's not ready to address. However, it's not unthinkable that Hovnanian or anyone else could come to this Court in a compliance setting and say that the plan is so out of whack, so unable to

satisfy the obligation, that they should be considered by the Court as an immediate workable solution to the fair share needs, and, in effect, do through the back door what it wanted to do through the front door. I wouldn't rule on that right now and it's -- it would be no part of my decision today, but it certainly leaves that possibility open to anyone who would want to engage in the compliance hearing.

I'm satisfied that the immunity order was entered in the same process that the Court's been following these years and I think it's fair to say because the Mount Laurel Judges were required by the Chief -- Former Chief Justice to consult regularly with regard to what was occurring in their regions. It's fair to say that this is not novel. It's been going on now for over 15 years. It's also fair to say, as I've acknowledged, that I don't believe it's ever been judicially determined as appropriate beyond the trial level. But I believe the process is appropriate and given the uniqueness, what I used to call the Alice-in-Wonderland nature, of the Mount Laurel litigation, we had to make rules as we went along to give meaning to the Supreme Court decision and the immunity process was part of that procedure.

So, I am going to hold that the immunity order

does preclude the builder's remedy suit at this time. I'm going to dismiss the action provided that Hovnanian be given specific notice, that is more than just the general notice that's going to be published, of the time and date of the hearing that the Township seeks to be set, and that Hovnanian be given adequate access to all of the information necessary for it to prepare for the compliance hearing.

I don't preclude the potential that Hovnanian, should it feel that it's not being adequately informed, that it will make application to the Court in that regard. That need not be a part of the order. The order will merely dismiss the complaint based upon the immunity order and, as a result thereof, the motion to compel depositions and sanctions will be denied at this time.

And Mr. Surenian, you can submit the order. Okay? Thank you. Have a good weekend.

(Proceedings concluded.)

CERTIFICATE

I, PEGGY A. MASTRODICASA, the assigned transcriber, do hereby certify the foregoing Transcript of Proceedings on Tape No. EDS-082-01, Index No. from 7192 to 7236, and Tape No. EDS-083-01, Index No. from 0001 to 0839, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

P.A. MASTRO & ASSOCIATES

BY: Peggy A. Mastrodicasa
PEGGY A. MASTRODICASA
A.O.C. NO. 102

DATED: September 7, 2001

EXHIBIT B

FILED

SEP 2 0 2001

JUDGE SERPENTELLI'S CHAMBERS

HILL WALLACK
202 Carnegie Center
Princeton, NJ 08543
(609) 924-0808
Attorneys for Plaintiff,
K. Hovnanian Shore Acquisitions, L.L.C.

K. HOVNANIAN SHORE ACQUISITIONS, L.L.C., Plaintiff, v. THE TOWNSHIP OF BERKELEY, in the County of Ocean, a Municipal Corporation of the State of New Jersey, THE MAYOR and TOWNSHIP COUNCIL OF THE TOWNSHIP OF BERKELEY, and THE PLANNING BOARD OF THE TOWNSHIP OF BERKELEY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION OCEAN COUNTY DOCKET NO. OCN-L-1120-01 CIVIL ACTION (MOUNT LAUREL II) **ORDER DISMISSING COMPLAINT**

THIS MATTER having been opened to the Court by Thomas F. Carroll, III, Esq., of the law firm of Hill Wallack, attorneys for plaintiff, on an application to compel the deposition of Daniel C. McSweeney, Jeffrey R. Surenian, Esq., of the law firm of Lomell Law Firm, Special Counsel for the Township of Berkeley, and Edward F. Liston, Jr., Esq., of the law firm of Edward F. Liston, PC, attorney for Planning Board of the Township of Berkeley, appearing; and the Township of Berkeley having also filed a motion seeking to reaffirm defendants' right to protection from builder's remedy suits and to dismiss plaintiff's suit accordingly; and the Court having considered the

pleadings filed in this matter and the arguments of counsel and good cause therefor appearing;

IT IS on this 20th day of September, 2001 ORDERED:

1. That the Complaint in this matter is hereby dismissed for the reasons set forth on the record.

2. That plaintiff's motion to compel discovery and for sanctions is hereby denied for the reasons set forth on the record.

3. That Berkeley is hereby directed to furnish counsel for K. Hovnanian Shore Acquisitions, L.L.C. with (a) notice of the date the Court schedules a compliance hearing in the matter encaptioned In the Matter of the Application of the Township of Berkeley, Docket No. L-2787-00 and (b) all information necessary for K. Hovnanian Shore Acquisitions, L.L.C. to prepare for the compliance hearing.

4. Copies of this Order shall be served upon all counsel within 5 days hereof.

Eugene D. Serpentelli

EUGENE D. SERPENTELLI, A.J.S.C.

EXHIBIT C

473-0635

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-594-01T1

K. HOVNANIAN SHORE ACQUISITIONS, L.L.C.,

Plaintiff-Appellant,

vs.

THE TOWNSHIP OF BERKELEY, in the County of Ocean, a Municipal Corporation, THE MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF BERKELEY, and THE PLANNING BOARD OF THE TOWNSHIP OF BERKELEY,

Defendants-Respondents.

Argued: November 6, 2002 - Decided: JUL 01 2003

Before Judges Cuff, Lefelt and Winkelstein.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, L-1120-01.

Thomas F. Carroll, III, argued the cause for appellant (Hill Wallack, attorneys; Mr. Carroll, on the brief).

Jeffrey R. Surenian argued the cause for respondents the Township of Berkeley and the Mayor and Township Council of the Township of Berkeley (Lomell Law Firm, attorneys; Mr. Surenian, of counsel and on the brief).

Edward F. Liston, Jr., attorney for respondent the Planning Board of the Township of Berkeley, relies on the brief filed by the Lomell Law Firm.

PER CURIAM

In this Mount Laurel[1] matter, we review an order dismissing plaintiff's complaint against a municipality. Resolution of this appeal requires us to consider the use of a temporary immunity order obtained through an ex parte application by the municipality.

Plaintiff, K. Hovnanian Shore Acquisitions, L.L.C. (plaintiff or Hovnanian), is the contract purchaser of approximately 800 acres in the Township of Berkeley (the Township), Ocean County. The Township is a sprawling municipality south and east of Toms River with frontage on the Atlantic Ocean, Barnegat Bay and the Toms River. It hosts several large state and county parks, including Island Beach State Park. Major portions of the Township lie within the Pinelands and Coastal Management Area.

The Township's housing stock includes mostly single-family homes of post-war ranch and Cape Cod styles, with newer subdivisions and retirement communities. The housing includes a significant number of units used as seasonal second homes. About 93% of the housing stock is owner-occupied, and the median value of the housing stock is approximately $103,000. The boom in retirement housing construction caused the population of the Township to triple between 1970 and 1980 and to increase by another 65% between 1980 and 1990. Residents over sixty-five years of age comprise

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[1]Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975), and Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II), 92 N.J. 158 (1983).

50.89% of the population.

In 1986 the Council on Affordable Housing (COAH) adopted its first set of substantive rules which included calculations of municipal affordable housing obligations for the "first cycle," 1987-93. COAH later promulgated another set of rules for the "second cycle," covering the cumulative period 1987-99. In re Petition for Substantive Certification, Township of Southampton, 338 N.J. Super. 103, 106 n.1 (App. Div.) (citing N.J.A.C. 5:93-2.1 and -2.20 and Appendix A thereto), certif. denied, 169 N.J. 610 (2001); N.J.A.C. 5:92. COAH assigned to the Township a first cycle fair share of 699 units.

In January 1988, when real estate developer Lifetime Homes of New Jersey, Inc. (Lifetime) was threatening to bring a builder's remedy suit if the Township did not accede to Lifetime's non-Mount Laurel demands, the Township filed a complaint for declaratory judgment, seeking an order barring any builder's remedy litigation for a reasonable period while the Township developed a compliance plan.

On January 28, 1988, Judge Serpentelli entered an order barring any builder's remedy to any party instituting suit against the Township for the ninety-day period during which the Township would prepare its compliance plan. The order added that if the Township proved it took all the necessary actions, it could obtain an order of compliance that would be valid and binding for six years.

In 1988, Lifetime and another real estate developer, Foxmoor Berkeley Associates (Foxmoor), each filed an action against the Township claiming that it had failed to meet its obligation to provide for its fair share of the regional need for housing for lower income persons pursuant to the Mount Laurel II decision. The Township reached settlements with Foxmoor and Lifetime in 1991. Soon thereafter, it renegotiated its settlement with Lifetime.

In June 1994, COAH adopted its regulations for the second housing cycle. COAH assigned the Township a second cycle cumulative fair share of 663 units of affordable housing.

On July 18, 1994, the Township Council adopted a "fair share plan" (the July 1994 plan). The July 1994 plan described an ongoing survey that had, as of that date, identified 400 existing low and moderate income households within the Township which were claimed as "credits without control." The July 1994 plan further provided for settlement agreements, permitting Foxmoor 135 dwelling units and Lifetime 935 dwelling units, yielding 15 and 100 affordable units, respectively. The 100 affordable units to be built by Lifetime would be constructed on lots owned by the municipality in the Manitou Park section of the Township.

On October 31, 1994, Judge Gibson entered a judgment of repose in the actions brought by Lifetime and Foxmoor. Among other things, the judgment granted the Township a six-year period of immunity from all Mount Laurel litigation and required the Township to fully implement the July 1994 plan. The July 1994 plan was held

to constitute "an appropriate means to fully satisfy the Township's Mount Laurel obligation" subject to six conditions, including one that required the Township to "provide adequate documentation for at least 27 credits without controls over and above the 276 already found acceptable" to Philip B. Caton, the court-appointed Master in the case.

Lifetime applied to the New Jersey Department of Environmental Protection (DEP) for wetlands approvals and permits. Eventually, it became clear that environmental constraints would preclude construction of any new affordable housing units. Instead of waiting to take any further action in the next COAH housing cycle, the Township undertook a second "credits without controls" survey to determine whether its affordable housing goals were being met.

Township representatives met with Caton in January 2000 to discuss the anticipated shortfall of affordable housing units due to environmental problems on Lifetime's tract and the proposed survey. Caton considered the approach reasonable, and the Township representatives worked with him to develop the survey documents.

At around that time, the Township's Planning Board denied Lifetime's application for approvals related to its largest market unit tract. After Lifetime failed to obtain court approval in an application to "essentially take over the processing of Lifetime's development applications and remove the Planning Board from the process," Lifetime sold its property to Ocean County for use as open space. Judge Gibson granted Lifetime's request to dismiss its

litigation with prejudice, but declined to entertain the Township's request for approval of its approach to undertake a second survey. By order entered on May 15, 2000, Judge Gibson provided that the judgment of repose continue in full force and effect. The order further provided:

> 3. Prior to the expiration of the current Judgment of Repose, the Township shall be free to file a new Housing Element and Fair Share Plan (hereinafter "affordable housing plan") with [COAH] and to either bring a declaratory relief action in court seeking the Court's approval of said affordable housing plan or petition COAH to approve said affordable housing plan.

In May 2000 the Township's Planning Board and Township Council adopted a new housing plan (the May 2000 plan). The only significant difference from the July 1994 plan was the inclusion of references to a 91-unit gap in the May 2000 plan caused by Lifetime's inability to deliver affordable housing units. The 91-unit figure recognized that the Township had four new creditworthy units provided by a nonprofit entity. The May 2000 plan stated that the 91-unit shortfall was expected to be more than satisfied through a second "credits without controls" survey, particularly because over 2500 units were identified that were not included in the first survey. Indeed, the May 2000 plan noted that "[a]ny credits over and above these 91 credits will be 'banked' for use against any future fair share quotes."

In June 2000, the Township's counsel wrote to Judge Serpentelli seeking a declaration that the Township had adequately

covered the gap in its Mount Laurel obligations and also seeking to obtain temporary immunity to extend its repose from the period between October 30, 2000, the date that the judgment of repose would expire, and COAH's enactment of third cycle regulations. That letter set forth the requirements of COAH's "interim procedure" rules, N.J.A.C. 5:91-14.3(a), that permitted a municipality to extend its second round substantive certification "for up to one year after the effective date of the adoption of the Council's third round methodology [and] rules." The interim procedure required that the municipality's governing board adopt a resolution that: (1) requested the extension; (2) committed to continuing to implement the certified second cycle plan; and (3) committed to addressing the municipality's third cycle obligations with a new housing element and plan (N.J.A.C. 5:91-14.3(a)).

Pursuant to Judge Serpentelli's guidance in response to that letter, the Township filed a complaint on August 29, 2000. In the Matter of the Application of the Township of Berkeley, a municipal corporation of the State of New Jersey, L-2878-00. In its complaint, the Township asked the court to: (1) take jurisdiction over its current housing plan; (2) determine whether the Township had adequately addressed the gap in its housing plan through the ongoing "credits without controls" survey; (3) determine the number of additional "credits without controls" that the Township can "bank" against future affordable housing obligations to the extent

the survey reveals more than 91 credits; (4) retain jurisdiction so that the court could grant any reasonable request to extend immunity beyond October 30, 2000, the final day of immunity under the judgment of repose; and (5) resolve any of the Township's other housing plan issues, including Foxmoor's proposal to enter into a 15-unit Regional Contribution Agreement. On October 27, 2000, the Township moved before Judge Serpentelli in the In re Berkeley action, on short notice, for temporary immunity to protect the Township from builder's remedy suits for the period through one year after COAH's new regulations covering the third housing cycle would take effect. The application was supported by Caton, the Special Master. On November 3, 2000, Judge Serpentelli entered an Order of Temporary Immunity, granting the immunity requested effective as of October 27, 2000.

On May 15, 2001, a consent order was entered amending the Foxmoor settlement. The Township agreed to accept $260,000, representing $20,000 per unit, as a contribution toward its trust fund, and agreed to take certain steps to devote some or all of those funds toward providing public water and sewer service for the Manitou Park section of the Township. On February 13, 2001, the Township Council passed a resolution to apply for and accept Homeownership Incentive Fund monies from the New Jersey Housing and Mortgage Finance Agency to enable Homes For All, Inc., to develop Township-owned land in the Manitou Park area by constructing units half of which would be moderate income units and the other half

market rate units. The resolution stated that the Township was committing 116 buildable lots for the project and $500,000 in "Mount Laurel funds," to be disbursed based upon completion levels of construction, and provision of water, sewer and recreation facilities.

Plaintiff filed its builder's remedy complaint on April 3, 2001. It alleged that the Township had not satisfied its Mount Laurel obligations as described in the October 1994 judgment of repose. Plaintiff also alleged that the Township's zoning ordinances failed to provide a realistic opportunity to achieve its affordable housing obligations and that its property was well-suited to meet those obligations. Plaintiff sought rezoning that would enable it to build 4800 dwelling units at a 6 unit per acre density with 960 of those units devoted to low and moderate income households.

In June and July 2001, plaintiff attempted to notice the deposition of the Township planner. The Township resisted discovery citing the temporary immunity order. Plaintiff moved to compel the deposition, and the Township moved to dismiss the complaint.

In his August 31, 2001 oral decision, Judge Serpentelli discussed the use of temporary immunity orders, noting that the device was first addressed in J.W. Field Co. v. Township of Franklin, 204 N.J. Super. 445 (Law. Div. 1985), and discussed favorably in Hills Dev. Co. v. Township of Bernards, 103 N.J. 1,

62-63 (1986). He observed that the device is novel but sensible because it allows a court to monitor and to expedite compliance. He further held that the temporary immunity order was appropriate in this case because the litigation initiated by Hovnanian would not contribute positively to the process "of bringing about finality of Berkeley Township's obligation for its present fair share number." He noted that Hovnanian could participate in the consideration of whether the Township's plan adequately addresses its affordable housing obligation and possibly achieve the same result as its builder's remedy action if the court determined that the Township plan is patently insufficient to meet its obligation. By order dated September 20, 2001, plaintiff's complaint was dismissed.

On appeal, plaintiff argues that its complaint was improperly dismissed because the temporary immunity order was entered without notice to it and without its participation, that the Township is not compliant with its Mount Laurel obligations, that the Township had failed to bring itself within COAH's jurisdiction, and the Township housing plan is so insufficient that the Township is not entitled to repose under COAH standards. The Township responds that Judge Serpentelli properly exercised the discretion reposed in him by the Supreme Court because the Township has clearly, unconditionally and formally committed itself to voluntarily comply with its affordable housing obligation.

In Mount Laurel II, the Court held that every New Jersey

municipality had a constitutional duty to provide "a realistic opportunity for the construction of its fair share of low and moderate income housing." Mount Laurel II, supra, 92 N.J. at 221. To aid in enforcement of the obligation, the Court held that developers who succeeded in Mount Laurel litigation and proposed "a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." Id. at 279-80. The "substantial amount of lower income housing," ibid., is known as a "mandatory set aside." Hills, supra, 103 N.J. at 31 n.4. In addition to the mandatory set aside amount, the builder's remedy would permit construction of upper or middle income housing so that the potential for profit provided builders with an incentive to enforce Mount Laurel obligations. Mount Laurel II, supra, 92 N.J. at 279 n.37. To be eligible for a builder's remedy, the developer must have attempted to obtain relief without litigation and must prove that the municipality's zoning ordinance required revision in order to meet the Mount Laurel obligation. Id. at 218, 278-81.

The New Jersey Fair Housing Act of 1985, N.J.S.A. 52:27D-301 to -329 (FHA), was enacted in response to the Mount Laurel cases. In the FHA, the Legislature declared "that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth

in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing." N.J.S.A. 52:27D-303.

The FHA created COAH. N.J.S.A. 52:27D-305. Among its duties, COAH is to determine the State's housing regions, estimate the present and prospective need for low and moderate income housing at the State and regional levels, and adopt criteria and guidelines for determining each municipality's fair share of the regional housing need. N.J.S.A. 52:27D-307. COAH promulgated its substantive rules to be used by municipalities to address their affordable housing obligations for the first and second cycles at N.J.A.C. 5:92 and 5:93.

The FHA establishes primarily an administrative structure but also provides an alternative judicial course for municipalities to address their affordable housing obligations. It also provides an option for a developer to challenge the sufficiency of the housing element in the administrative process. Initially mediation is utilized, and if mediation fails to resolve the challenge, the matter is referred to the Office of Administrative Law. N.J.S.A. 52:27D-315(c). In Hills, supra, the Court expressed its preference for COAH-resolution of Mount Laurel disputes. 103 N.J. at 52. See also Toll Bros., Inc. v. Township of W. Windsor, 173 N.J. 502, 563 (2002). COAH may also receive a complaint filed in the Superior Court upon a referral from the court. N.J.A.C. 5:91-2.1. The

matter will be subject to mediation and returned to Superior Court if mediation fails and issues of fact must be determined. N.J.S.A. 52:27D-315(c); Toll Bros., Inc. v. Township of W. Windsor, 334 N.J. Super. 77, 92-93 (App. Div. 2000), certif. denied, 168 N.J. 295 (2001).

A municipality which files a housing element with COAH may alternatively institute an action for a declaratory judgment granting it repose in the Superior Court. N.J.S.A. 52:27D-313(a). A judgment of repose is defined by COAH as "a judgment issued by the Superior Court approving a municipality's plan to satisfy its fair share obligation." N.J.A.C. 5:93-1.3.

COAH has conducted two cycles of housing-need review and assessment of fair share units. Third cycle numbers have not been issued. In the meantime, COAH's substantive rules for the second cycle remain effective, and COAH has adopted interim rules. See 31 N.J.R. 578(a); 31 N.J.R. 1479(a).

Before the enactment of the FHA, the Court sought to establish procedures to expedite and monitor litigation commenced to enforce a municipality's affordable housing obligation. In doing so, the Court signaled that it was willing to depart from established litigation models. At the beginning of its opinion in Mount Laurel II, Chief Justice Wilentz wrote:

> The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals.

> We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.
>
> [Mount Laurel II, supra, 92 N.J. at 199.]

The Court then announced that one of the purposes of its opinion was to encourage voluntary compliance. Id. at 214. To encourage voluntary compliance, the Chief Justice selected three judges to oversee all Mount Laurel litigation throughout the State. Id. at 214, 253-55.

The Court also announced a "modification of the role of res judicata" for Mount Laurel cases. Id. at 291-92. The Court recognized that "[j]udicial determinations of compliance with the fair share obligation or of invalidity are not binding under ordinary rules of res judicata since circumstances obviously change." Id. at 291. The Court found, however, that judgments of compliance with Mount Laurel obligations "should provide that measure of finality suggested in the Municipal Land Use Law, which requires the reexamination and amendment of land use regulations every six years." Ibid. Accordingly, the Court held that Mount Laurel compliance judgments

> shall have res judicata effect, despite changed circumstances, for a period of six years, the period to begin with the entry of the judgment by the trial court. In this way, municipalities can enjoy the repose that the res judicata doctrine intends, free of litigious interference with the normal planning process.
>
> [Id. at 291-92 (footnote omitted).]

The Court noted, however, that a municipality's "substantial

transformation" could trigger valid litigation before the expiration of six years. Id. at 292 n.44.

Even after the adoption of the FHA, the three specially designated judges handled all Mount Laurel actions until approximately 1987. Judge Serpentelli, one of the originally designated Mount Laurel judges, issued the temporary immunity order at issue in this case. It was he who first utilized this device in the J.W. Field matter in 1985. Although neither this court nor the Supreme Court has ever expressly reviewed this type of order, the Court did refer approvingly in Hills to the creative and effective management of Mount Laurel cases by the specially designated judges. Chief Justice Wilentz stated:

> We would be remiss in not recognizing the very substantial contributions that the Mount Laurel judges have made in the interest of the just resolution of Mount Laurel cases. Their innovative refinement of techniques for the process of litigation has given credibility to the implementation of the Mount Laurel doctrine. Measured against one criterion, the advancement of the public interest, their achievements were extraordinary.
>
> [Hills, supra, 103 N.J. at 64.]

Indeed, in its review of the procedural history in Hills, the Court mentioned an immunity order. Id. at 29-30.

The law governing the Mount Laurel obligation has not remained static. The FHA has been amended on sixteen occasions, most recently in 2001 with various amendments effective January 2002. The Court has also recently addressed various issues in a trilogy of cases: Bi-County Dev., Inc. v. Borough of High Bridge, 174 N.J.

301 (2002); Fair Share Housing Ctr., Inc. v. Township of Cherry Hill, 173 N.J. 393 (2002); Toll Bros., supra, 173 N.J. 502. Notably, neither the Court nor the Legislature has criticized, limited or removed the power to utilize creative litigation management techniques, such as the temporary immunity order. Indeed, in Toll Bros., supra, in the context of affirming the grant of a builder's remedy and recognizing the continued need for the builder's remedy, the Court emphasized that voluntary compliance is preferred, should be encouraged, and that a builder's remedy action should be considered a remedy of last resort. It said:

> When enacting the FHA, the Legislature provided "various alternatives to the use of the builder's remedy as a method of achieving fair share housing," including the COAH mediation and review process, which was "the State's preference for the resolution of existing and future disputes involving exclusionary zoning. . . ." N.J.S.A. 52:27D-303. In Hills, supra, 103 N.J. at 52, we expressed our support for COAH-resolution of Mount Laurel disputes, anticipating that the COAH process might more effectively foster the construction of affordable housing.
>
> [Toll Bros., supra, 173 N.J. at 563 (footnote omitted).]

We hesitate to interfere with the remedy utilized by Judge Serpentelli in this case. Voluntary compliance is certainly the preferred mode to fulfill a municipality's fair share housing obligation. We recognize plaintiff's concern that the immunity order may be used simply as a device to stall efforts to compile a reasonable and feasible plan to provide affordable housing and that the cornerstone of the Township's housing plan, "credits without

control," may be a ruse to avoid construction of additional affordable housing units. Nevertheless, the municipality is also entitled to construct a plan to meet its affordable housing obligation with timely information. The promulgation of the third round housing numbers by COAH should assist the finalization of the Township's plan. We have been advised that COAH anticipates publication of the third round numbers in late 2003.

In the interim, plaintiff also has the opportunity to participate in the shaping and evaluation of the Township's plan. The Special Master is prepared to report on the Township's audit of existing housing units which may serve as credits towards the Township's affordable housing obligation. Plaintiff may participate in that review. Plaintiff's participation and the record developed during this review may be utilized to evaluate not only the Township's compliance with its housing obligation but also the bona fides of its efforts. Under these circumstances, we decline to interfere with the use of a technique designed to foster voluntary compliance by a township to meet its acknowledged Mount Laurel obligations, and affirm the dismissal of plaintiff's complaint.

Affirmed.