

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MIDDLESEX COUNTY
DOCKET NO. MID-L-003878-15
APP. DIV. NO. _____

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

Place: Middlesex County Courthouse
56 Paterson Street
New Brunswick, NJ 08903

Date: February 19, 2016

BEFORE:

HONORABLE DOUGLAS K. WOLFSON, J.S.C.

TRANSCRIPT ORDERED BY:

DONALD J. SEARS, ESQ. (South Brunswick Township)

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- and -

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1 (Hearing commenced at 11:29 a.m.)
2 THE COURT: Okay. We're on the record in
3 South Brunswick's declaratory judgment action. It's
4 Docket L-3878-15.
5 This is essentially the return date of an
6 order to show cause initiated by the Court to
7 determine whether or not South Brunswick should be
8 stripped of the immunity orders that I've entered
9 previously granting them immunity from builder remedy
10 lawsuits based on bad faith or a determination by me
11 that they are determined to be non-compliant.
12 Can I have the appearances of counsel,
13 please?
14 MR. SEARS: Good morning, Your Honor.
15 Donald Sears, from South Brunswick Township.
16 MR. GORDON: Good morning, Your Honor. Adam
17 Gordon for defendant inter --
18 THE COURT: A little crowded over there,
19 Adam. Do you want to sit over there by Don?
20 UNIDENTIFIED MALE: Oh, I already tried that,
21 Judge.
22 MR. GORDON: I don't think so. No.
23 Defendant intervenor Fair Share Housing Center, Your
24 Honor.
25 MR. McPHERSON: Kenneth T. McPherson, Jr.

1 with Waters, McPherson, McNeill for intervenor South
2 Brunswick Center.
3 MR. KENT-SMITH: Henry Kent-Smith from Fox
4 Rothschild on behalf of intervenor Richardson Fresh
5 Properties and Princeton Orchard Associates.
6 MS. ELGART: And Irina Elgart with
7 (indiscernible).
8 MR. KENT-SMITH: Yes.
9 MR. KASUBA: Robert Kasuba from Bisgaier Hoff
10 on behalf of Avalon Bay Communities.
11 THE COURT: You're up.
12 MR. SEARS: Oh, I -- I'm -- I didn't know if
13 you wanted the appearances of Kevin and --
14 THE COURT: Anybody else going to address
15 the Court?
16 MR. WALSH: No, Your Honor.
17 UNIDENTIFIED MALE: No, Your Honor.
18 MR. SEARS: Thank you, Your Honor.
19 We have submitted voluminous argument to the
20 Court. I don't want to repeat everything that's in my
21 papers. We did submit something yesterday, late
22 yesterday, in reply to the various opposition papers
23 that were submitted. I'm sure Your Honor has read
24 that. I did deliver the hard copy, as I indicated,
25 yesterday. E-mailed it yesterday to everyone and

1 delivered the hard copy today. But I do want to
2 highlight a couple of things and address the issue of
3 bad faith, whether the township has acted in bad faith
4 or is deliberately determined to be --

5 THE COURT: Determined to be non-compliant --

6 MR. SEARS: -- non-compliant.

7 THE COURT: -- is the phrase.

8 MR. SEARS: Correct. Thank you.

9 In terms of bad faith, Your Honor, the
10 township has submitted four versions of a draft plan,
11 starting in November, in response to the Court's
12 specific directives on how to tailor the plan. So
13 we've done that without knowing our actual obligation
14 or the compliance mechanisms. And our obligation, as
15 far as we can tell, will be somewhere between 215 to
16 over 2,900 units. It's somewhere in that broad range.

17 So we've tried to submit plans that would
18 address what right now is our unknown obligation. And
19 with each successive version of the plan that was
20 submitted, we've added more units. The initial plan
21 in November started with 712 units. We are now
22 upwards of just above 1,200 units in the plan.

23 The Court directed us to meet with all the
24 objectors and we did that systematically and, as a
25 result of those meeting, we added three of the five

1 developer objectors into the plan. The Court directed
2 us to add some inclusionary developments, and we did
3 that. We now have eight inclusionary developments.
4 Up to eight inclusionary developments.

5 THE COURT: It's all senior citizen stuff,
6 and it's 33 percent set asides, and it's single family
7 houses for low and moderate? I mean, this is sort of
8 an unprecedented attempt to gain approval if
9 mechanisms that have been categorically rejected by
10 every judge in every town everywhere in New Jersey.

11 You have -- you violate the 25 percent cap
12 on seniors. The idea of doing a 33 percent set aside
13 on a single family that's limited to adult
14 communities, when there has been the Sarlo Bill that
15 says there's an over abundance to begin with of senior
16 citizen development, and you're asking to sort of --
17 sort of remarkable, actually -- not only is there a
18 statewide policy and recognition that there's an over
19 abundance of seniors, but you're asking me to modify
20 to 25 percent and let you do more.

21 And where do you get off about the one-third
22 set aside on a single family house? Who is going to
23 get a mortgage for a single family house to be low and
24 moderate that's a senior citizen -- limited to senior
25 citizens?

1 I mean, I don't see any of this as good
2 faith. I said -- I have written an opinion which is
3 out there that says there's a gap period. Four
4 versions later you're just starting to address the gap
5 period? Econsult's opinion -- report that doesn't
6 address the gap opinion, I told you the last time you
7 were here, to the extent you're going to rely upon
8 that, I'm going to deem that bad faith, because it, by
9 its own terms, eliminates a 16-year period which I,
10 and now apparently Judge Troncone, at least, have also
11 agreed, as well as -- I'm trying to think of everybody
12 else that has addressed the question, even though not
13 in writing -- agrees is there. So that report,
14 insofar as it relates to that issue, is worthless.
15 And I told you that.

16 So, and whether or not, at the end of the
17 day, some appellate or Supreme Court may determine
18 differently, you still have to comply with what I do
19 before you can appeal. You know that.

20 So, what's the problem, Don? I mean, why is
21 South Brunswick so different from everybody else? Old
22 Bridge is settling for over a thousand. Piscataway is
23 settling for over a thousand. Monroe is settling for
24 over a thousand. North Brunswick has a settlement
25 agreement almost in place. Dunellen, Cranbury and

1 Metuchen are virtually settled. Almost all the cases
2 are settling.

3 Everybody is in exactly the same position as
4 you, not knowing what the number is. I have given an
5 idea to all the parties and Fair Share has been going
6 along with this for a serious discount for those
7 persons who are willing to settle the cases so that I
8 don't have to make a determination as to how flawed or
9 unflawed either side's report is or is not going to
10 be. And I think I have a lot of flexibility, given
11 the Supreme Court's direction to me. And everybody is
12 in exactly the same position you are. Not one of them
13 is saying, well, I don't know what to do, because I
14 don't know what my number is.

15 You know what the number isn't and you've
16 made virtually no, you know, other than pulling teeth,
17 progress. I mean, inclusionary development with a 2.8
18 percent -- with a 2.8 density? I mean, COAH's minimum
19 is 6. So, am I to presume that a 2.8 unit per acre
20 density is good faith? A one-third set aside, when
21 the common parlance is 15 to 20 max? And that depends
22 on whether it's rental?

23 I mean, where am I going to glean good faith
24 from what South Brunswick has done here? What are my
25 alternatives? Everybody else is playing by the same

1 rules. South Brunswick seems to think that it can
2 play by its own rules.

3 MR. SEARS: Judge, respectfully, I don't
4 think that's the case. South Brunswick is attempting
5 to put together a good faith plan without knowing its
6 obligation.

7 THE COURT: You think 2.8 units to the acre
8 is a good faith plan based on what? COAH's minimum is
9 six.

10 MR. SEARS: But that's only as to the South
11 Brunswick Center property and that's --

12 THE COURT: I don't care if it's only one
13 property or two properties.

14 MR. SEARS: But that's packaged with a
15 significant amount of commercial, plus an open space
16 purchase. Which, at the end of the day, --

17 THE COURT: And limited to senior citizen.
18 And limited to single family senior citizen.

19 MR. SEARS: Which, in South Brunswick,
20 there's a market for. And all of that would be borne
21 out at a trial. Which we have not had yet. Toll
22 Brothers has developed in South Brunswick and wants to
23 do more. Lennar has developed in South Brunswick.
24 And Villagio Development. All of them do single
25 family age-restricted homes. And can't build enough.

1 So there is a market for that.

2 THE COURT: I don't have any showing nor
3 neither anecdotally or otherwise or that I can take
4 judicial notice of for being in the business for as
5 long as we've all been in this business that anybody
6 would come in and build 100 single family senior
7 citizen housing on a 300 development project, where
8 the other 200 are also single family. And whether or
9 not there's packaged commercial, the fact of the
10 matter is, if Toll or anybody was going to come in and
11 do that, they wouldn't do it. I don't know who else
12 would retain the commercial or whatever, but that's
13 not going to happen. You know that's not going to
14 happen.

15 MR. SEARS: It's hap -- but it's happening.
16 It's happening in other areas of the town.

17 THE COURT: A 2.8 units to the acre density
18 with 100 single family set aside for low and moderate
19 income seniors? Single family homes? Where are they
20 going to get their mortgages from?

21 MR. SEARS: At the end of the day, the
22 developer is just looking for the dollars in the
23 pocket. Is the development profitable for them? And
24 I think we have demonstrated that, at the end of the
25 day, South Brunswick --

1 THE COURT: It's not realistic.
 2 MR. SEARS: -- Center nets a 19 --
 3 THE COURT: What -- you're going to find 100 --
 4 MR. SEARS: -- over \$19 million dollar
 5 profit.
 6 THE COURT: You're going to find 100
 7 qualified people that are low and moderate to buy a
 8 single family house? In South Brunswick or anyplace
 9 else? And how do you get around the 25 percent cap?
 10 MR. SEARS: Well, I have had a motion since
 11 November asking for a waiver of the cap.
 12 THE COURT: You're not going to get the
 13 waiver. Nobody is going to get a waiver. There's an
 14 overabundance of senior citizen housing here in New
 15 Jersey. And everybody wants to do it, because of
 16 obviously they don't want to deal with the school
 17 children. But that's why it's a cap. There's no
 18 basis to extend that cap. I mean, not only --
 19 MR. SEARS: The senior --
 20 THE COURT: -- do we know that there's no
 21 short -- that there's a glut of that -- of those
 22 houses, but we have public policy backing this up. We
 23 have legislation in New Jersey that allowed for the
 24 conversion of these units away, because it was a
 25 recognition by the same legislature that passed the

1 Fair Housing Act that there's too many seniors. Too
 2 many people are trying to do this. So that's not
 3 going to happen.
 4 MR. SEARS: That legislation was temporary.
 5 It expired in 2011 and hasn't been renewed as far as I
 6 know. So --
 7 THE COURT: Right, but it's a recognition
 8 that there were too many of them. At the state level.
 9 MR. SEARS: At that time, I think it was a
 10 stop gap measure. And I have this in my papers, I
 11 don't want to repeat it, but it was a stop gap
 12 measure, because of the economic decline that happened
 13 in 2008. The Sarlo Bill was adopted in 2009 to
 14 address that what was perceived to be a temporary glut
 15 of age-restricted housing. And because COAH had
 16 initially adopted a 50 percent cap on senior housing,
 17 which then got converted to a 25 percent cap after the
 18 court ruled that 50 percent was 100 much. So the
 19 legislature responded. And it says it right in the
 20 Sarlo Bill. The legislation was in response to that,
 21 so that --
 22 THE COURT: You have relied upon --
 23 MR. SEARS: -- developers who got --
 24 THE COURT: -- more 100 percent inclusionary
 25 developments than anybody else, as far as I can tell,

1 in New Jersey. Certainly in Middlesex County. And
2 based upon the conversations that we have when we meet
3 as a group, nobody has the kind of requests before
4 them that I have from you to allow literally hundreds
5 and hundreds of units to be proposed for compliance
6 that are single entity units, basically. All 100
7 percent that depend upon tax credits, which maybe you
8 get one of these approved, maybe, but the idea that
9 you -- all these things that you're trying to put
10 together as 100 percent affordable as would be
11 approved? I mean, never.

12 I mean, and I told you that more than once.
13 And I think the special master -- let the record
14 reflect is here, although she didn't put her
15 appearance on the record -- has indicated to you on
16 more than one occasion in her expert opinion that this
17 is a pipe dream. You're never going to get all those
18 approved. And at best, if you want to have them as
19 alternates, I probably could go along with that, but
20 you certainly have to have some kind of alternative to
21 the extent that they don't get approved, because I
22 don't think anybody realistically thinks that they
23 could all be approved, and you're fighting with the
24 same -- for the same dollars and the same tax credits
25 for every other town that wants to have these kinds of

1 things. So --

2 MR. SEARS: And in re -- but if I may, Judge,
3 in response to the Court and the special master's
4 directions, we have reduced the number of 100 percent
5 developments that would rely on tax credits and
6 provided backup plans in case the 100 percent tax
7 credit funding does not come through.

8 Stanton was a perfect example. And, again,
9 just to respond to some of the opposition, that wasn't
10 our request to Stanton. Stanton voluntarily came
11 forward and made an alternate proposal saying, give us
12 the ability to apply for the tax credits, but if we
13 don't get funding, then we'll convert it to an
14 inclusionary development so that we'll have some
15 market rate units to fund the inclusionary aspect of
16 the development.

17 We've taken the RPM development out of the
18 plan and put it as a backup, as Your Honor had
19 suggested, and it remains as a backup.

20 THE COURT: They've agreed to a 41 percent
21 set aside?

22 MR. SEARS: Stanton suggested 41.7 set aside.

23 THE COURT: Only if they get the tax
24 credits; right? Or what if they --

25 MR. SEARS: No.

1 THE COURT: They're going to do a 41 percent
2 set aside inclusionary development with no subsidy?

3 MR. SEARS: That's his proposal.

4 THE COURT: Okay. Can't argue with that, if
5 that's what they propose.

6 MR. SEARS: That's their proposal.

7 Judge, in terms of the gap period, the
8 initial plans did cover the gap period. At that time,
9 it was called the unanswered prior obligation and it
10 was the 1999 to 2014 at that time, now 2015 period.
11 We covered all of that. It was always in the plan.
12 What the Court had trouble with was our prospective
13 plan, and so we concentrated on the prospective aspect
14 of our plan. The February 11th plan didn't have the
15 gap period, because, frankly and mistakenly, now in
16 hindsight in my mind, that wasn't an issue.

17 When the special master and I discussed it,
18 I realized that that needed to be shown in the chart,
19 so I revised the chart and that's what was submitted
20 to the Court yesterday that shows we're addressing
21 both the gap and the prospective obligations
22 consistent with Your Honor's October decision. So we
23 have covered the gap.

24 THE COURT: How many units are you proposing
25 that are being generated by 100 percent inclusionary

1 developments?

2 MR. SEARS: I'll have to look.

3 (Extended pause)

4 THE COURT: Do you know?

5 MS. NAZZARO-COFONE: No, but I think -- for
6 the record, Christine Cofone, special master -- I think
7 you have to also in that count include the Hovnanian
8 project. Because, even though that is not -- Hovnanian
9 is not an affordable housing developer, part of that
10 project includes a tax credit reliant development by
11 Ingerman, so I think you have to have that number in
12 that as well, because it's substantial.

13 We -- I continue to believe that the plan is
14 too heavily reliant on tax credit programs.

15 MR. SEARS: So, I have -- Judge, I have 300
16 senior. That's the Wilson Farm project, which Your
17 Honor allowed back in the plan. Hovnanian is 50 units
18 that would rely on tax credits. And --

19 THE COURT: Stanton?

20 MR. SEARS: Well, Stanton is the one that's
21 initially a tax credit, but, if not, if they don't get
22 tax credits, then they would convert to an inclusionary
23 development. So, if they're --

24 THE COURT: Right, but the number
25 differential is significant.

1 MR. SEARS: A hundred and twenty units.
 2 THE COURT: Versus --
 3 MR. SEARS: Well, the Stanton project is 120
 4 units. Either they'll all be funded via tax credits
 5 or it won't be funded by tax credits at all. So,
 6 depending on how you want to do it, it's either
 7 another 120 family units or zero family units in the
 8 tax credit world.
 9 So, and it's two different competitions.
 10 There's a senior competition and then there's the
 11 family competition. So, in the senior competition,
 12 really we're only talking about the Wilson Farm
 13 project. And in the family competition, we're only
 14 talking about the 50 Hovnanian-Ingerman project.
 15 That's significantly less than what we initially had
 16 in the November plan for tax credit, 100 percent
 17 affordable projects.
 18 MS. NAZZARO-COFONE: And then your backup
 19 site though is also a tax credit program.
 20 MR. SEARS: Well, I wasn't counting the
 21 backup site, because the Court is not counting the
 22 backup site. So, if we put the backup site back into
 23 the plan, then, yes, that would be another additional
 24 200 family units in the family competition.
 25 THE COURT: Anything else you want to add

1 before I hear from the --
 2 MR. SEARS: Just in --
 3 THE COURT: -- other side?
 4 MR. SEARS: -- in a broad brush fashion --
 5 again, I'll rely on the papers primarily -- but I
 6 would suggest to the Court that the objectors' main
 7 criticism of the township is that the township won't
 8 use their properties in the plan, the township won't
 9 use their properties to the extent that they would
 10 like in the plan.
 11 THE COURT: I won't entertain those
 12 arguments. So, if that's what they are relying upon,
 13 I won't hear them at all.
 14 MR. SEARS: Okay.
 15 THE COURT: Because, even -- unless I
 16 determine that you're --
 17 MR. SEARS: Right.
 18 THE COURT: -- determined to be non-
 19 compliant, there are no builder's remedies, you -- at
 20 the moment, you still have your immunity. And even if
 21 I were to allow builder remedies based upon a
 22 determination by me that you are determined to be non-
 23 compliant, it would be based upon mine and the special
 24 master's sense of what made the most sense from a
 25 planning standpoint, not first in.

1 So, I am not entertaining those arguments.
2 So, to the extent that you hear anybody say that,
3 you'll hear me cut that off.

4 MR. SEARS: Thank you, Your Honor.

5 And then, finally, I think the objectors'
6 main criticism is that the township simply won't
7 accept the Kinsey calculations to establish the firm
8 obligation and just accept that as a fact.

9 THE COURT: I don't get that from the
10 submissions that I have here. And nor have I
11 anecdotally and historically, since I have been doing
12 these cases, been accepting the Kinsey numbers as
13 sacrosanct. I've made it pretty clear. And the
14 settlements that have been, you know, articulated on
15 the record -- and one was actually advertised in the
16 paper today -- make it clear that that's not a number
17 that they're settling on. You know, those numbers
18 range -- I think you indicated in your page -- in your
19 papers I think on page 11, that the Kinsey numbers
20 were off -- you know, over-estimated or inflated the
21 statewide need by 113,000 units, which is 37 percent.
22 We're settling cases with discounts greater than 37
23 percent.

24 So it's not a function of having to know
25 what your number is, it's a function of any other kind

1 of case, knowing what your risks are and what your
2 costs of litigation are and what your down sides are,
3 and coming to an agreement that everybody in the world
4 that's involved in your cases can or mostly can agree
5 upon and be approving them as part of a judgment of
6 compliance, which does not require, necessarily, me to
7 say this is the precise methodology that I find to be
8 acceptable and constitutional.

9 I have the flexibility to make determinations
10 that parties can settle cases to evaluate their own
11 risks and protect themselves against a too good or too
12 bad result. And you're the only one that isn't doing
13 that, frankly. The only one. So, and I don't know
14 why that would be. And you're certainly entitled to
15 litigate your case to the fullest extent that you feel
16 appropriate. And if you don't like your result,
17 you're entitled to appeal after you implement under
18 Mount Laurel II.

19 I would hope it wouldn't come to that, but
20 the way that you're going, it's so inconsistent with
21 the way everybody else is going. By that dichotomy,
22 it almost bespeaks bad faith. I'm not making that
23 finding, but it certainly causes me significant
24 concern to understand why South Brunswick has been
25 acting and moving in a way that's just so different

1 from everybody else. Maybe there are good reasons,
2 but so far I haven't really been persuaded that there
3 are.

4 MR. SEARS: Judge, just one final --

5 THE COURT: Go ahead.

6 MR. SEARS: -- comment and then I'll sit
7 down. The Court has shared what the other towns are
8 doing and where they're settling at. And I know I
9 have spoken to some of my colleagues in the other
10 towns, and as I understand the settlements, they're
11 around 1,000, a little bit more than 1,000.

12 THE COURT: Depends on your town.

13 MR. SEARS: Right. South Brunswick's plan,
14 if you grant us senior waiver, it would be 1,271. If
15 you didn't grant the senior waiver, it would be 1,171.
16 So, it sounds like our plan is right in the same
17 ballpark as what the other towns are settling at. I
18 haven't been able --

19 THE COURT: Nobody has --

20 MR. SEARS: -- to get a response on how the
21 other --

22 THE COURT: Nobody has the kind of
23 inclusionary, 100 percent inclusionary that you do.
24 They have inclusionary developments that are 10 and 15
25 or 20 percent set asides. All of them. All of them.

1 Nobody has asked for a waiver of the 25 percent cap on
2 seniors. They are not overly reliant on the tax
3 credit issues. They don't have 30 percent set asides.
4 They don't have their senior citizens as single family
5 homes. I mean, there are a lot of reasons that you
6 stand apart from all of this. It's not just the
7 numbers. It's not an imaginary number, it's a
8 realistic number. It's an achievable number.

9 You know, back in the days when Judge Furman
10 was doing things, Madison Township, now Old Bridge,
11 zoned hundreds and hundreds of acres for inclusionary
12 development. All under water. Doesn't make it, the
13 fact that they got the number, doesn't mean it's
14 realistic. It's not a realistic opportunity. At
15 least it doesn't appear on the face of it to me at the
16 moment to present a realistic opportunity for those
17 numbers, despite the fact that you say that you're at
18 that number.

19 If it were true, based on the track record,
20 Fair Share certainly would have settled already with
21 you. Because they're settling at numbers that are
22 significantly lower than the Kinsey numbers. So,
23 because they're interested in getting shovels in the
24 ground, not litigating for the next five years.

25 MR. SEARS: Sure.

1 THE COURT: You can reserve your right to
2 continue. I'm not anxious to cut anybody off today.

3 MR. SEARS: Thank you.

4 THE COURT: Mr. Gordon?

5 MR. GORDON: Thank you, Your Honor.

6 As Your Honor has already pointed out, the
7 reason we're here today is because South Brunswick is
8 different. That, you know, in every other case, we
9 are either settled or very close to the finish line on
10 settlement and South Brunswick is not there. And I
11 agree with Your Honor just said. It's not just
12 because of an issue around numbers, although, I would
13 point out that South Brunswick starts at, already,
14 from -- and from our point of view, the -- Your Honor's
15 decision on age-restricted cap, because South Brunswick
16 started out with such large numbers, even bigger than
17 Monroe or Old Bridge or so on, you know, that decision
18 itself is a huge discount and is something like more
19 than half off of Kinsey's numbers from -- so, from our
20 perspective, you know, they're already gotten a
21 discount off of any reasonable number.

22 But, you know, but also all the issues that
23 Your Honor has already gone back and forth with Mr.
24 Sears about, and I won't belabor them, but, I mean, it
25 just sort of -- the whole plan or every variation of

1 the plan is like a paper house. You just sort of push
2 a little bit on one aspect of it and the whole
3 structure falls apart. If they can't do a 33 percent
4 set aside on single family homes, which I am also not
5 aware of any precedent, especially in a age-restricted
6 context to do, where I added up, in terms of the 100
7 percent affordable plans, you know, depending on how
8 you look at Hovnanian and Ingerman, but if you include
9 the backup site, I mean, you're somewhere in the
10 neighborhood, with the credits and bonuses that
11 they're seeking for these 100 percent sites, of -- if
12 you look at their 1,553 unit plan, I just added up 942
13 of those 1,553 units are reliant on tax credits and
14 that's a huge number.

15 I mean, it just -- and it just -- you know,
16 Wilson Farm, although it's possible one phase of it
17 might get tax credits, they already lost on the tax
18 credit competition. You know, this is a highly
19 competitive process and I -- you -- I certainly don't
20 think it's unlikely that South Brunswick will get some
21 funding, but, you know, to think that you could have a
22 plan of 1,553 units and 942 of those credits [sic] are
23 relying on winning tax credit competition? I just --
24 it's patently unrealistic.

25 So, you know, since there has already been so

1 much colloquy on these aspects of the plan, I won't
2 belabor them, but I really want to talk about, you
3 know, the type of trial that South Brunswick is
4 seeking, because that's really what we have the most
5 problems with. Certainly, we were open to negotiating
6 a settlement with South Brunswick, but it's their
7 right to not settle if they don't want to, but it's
8 not their right to have the kind of trial they're
9 asking this Court to hold.

10 They're asking this Court to hold a trial
11 that relitigates every issue besides these Mount Laurel
12 I on set aside, age-restricted, you know, methodology,
13 I mean, it's -- it's sort of ironic in the letter that
14 the township submitted yesterday, they pick up on
15 something and quote out of context a report from Dr.
16 Kinsey on February 11, 2016 that was submitted by one
17 of the other intervenors that we've submitted in other
18 counties. The -- and I believe we just submitted
19 yesterday generally in this county as well.

20 But, you know, basically, Dr. Kinsey
21 criticizes Econsult for trying to totally rewrite the
22 prior round methodology and basically says, if you
23 want to rewrite the prior round methodology, there's
24 lots of things that we would advocate in a policy
25 setting for rewriting prior round methodology in ways

1 that increase the need, but we don't think that it's
2 appropriate and we haven't done it.

3 But if we're going to -- if that's going to
4 be the type of trial that we're going to have, which
5 is not what the Supreme Court intended, then we'll be
6 ready to do it. And the township seizes on that and
7 says, see, South Brunswick -- see, Fair Share says
8 that there's lots of things that we should try on this
9 about changes to the methodology, but that's not what
10 we're saying. Right? And what we're saying is that
11 the Supreme Court said use the prior round
12 methodology, the courts are not administrative
13 agencies, we're not relitigating 40 years of history
14 here. We're implem -- we're quickly trying to
15 implement the prior round methodology with the most up
16 to date available data.

17 And South Brunswick is asking for a trial
18 that relitigates everything. That relitigates set
19 aside, you know, building type, density, age-restricted
20 cap, methodology --

21 THE COURT: Different issues for a different
22 day, Mr. Gordon. I don't -- you know, my trial is not
23 going to be any of those things, frankly. It's going
24 to be on their declaratory judgment. They're going to
25 present their plan and their idea of what their fair

1 share is and what that's based on, and I'll make a
2 determination based on that or other proofs as to
3 whether they've succeeded or not. That's it. So, you
4 know, whatever trial date I give, whether or not
5 there's a stripping of their immunity, it will be in
6 the next couple of months, I'll tell you that.

7 MR. GORDON: Well, that's -- I guess that's
8 the other point, is that I think that the other thing
9 that they want, in addition to a trial that's on
10 everything, is to have a trial without consequences.
11 They want to be able to come in and say, well, we
12 tentatively present one of these seven different
13 variations of the plan, but really we don't want to
14 really present them, we want to -- we want you to tell
15 us our number first and then we want another chance --

16 THE COURT: Yeah, well, that's not going to
17 happen.

18 MR. GORDON: -- regardless.

19 THE COURT: I've made that clear to
20 everybody, --

21 MR. GORDON: Yeah.

22 THE COURT: -- which is why all, frankly,
23 the cases are settling. It's their burden -- and I
24 believe at this point Mr. Sears and the town knows --

25 MR. GORDON: Mm-hmm.

1 THE COURT: -- to demonstrate to me what
2 they think their fair share is, why they think it is,
3 and how they have complied with that number. I will
4 accept it or reject it based upon the face of their
5 proofs or contrary proofs, if any are submitted.

6 MR. GORDON: Well, so -- so I --

7 THE COURT: That's the trial.

8 MR. GORDON: Yeah, and so that and -- and we
9 think that's appropriate and we think that, you know,
10 it -- we need to -- I mean, we don't know that the --
11 we don't believe that the town --

12 THE COURT: And, frankly, everybody else is
13 settling, because they're afraid of South Brunswick
14 actually going to trial. That's what's prompting
15 everybody to settle the case. They don't want their
16 number to be determined by South Brunswick's trial.

17 MR. GORDON: Well, and I did say, Your Honor,
18 that I think at this point, regardless of what's
19 happening on immunity, it's imperative that we
20 schedule that trial and we move on with this, because,
21 you know, the reality is, if we're not going to get
22 anywhere, this -- this -- and all the other towns are
23 moving on, South Brunswick needs to move on as well.

24 And I think the final thing I'll say is
25 there has to be -- the town has to be on notice that

1 there are consequences to this trial. It can't be --
2 it's not a trial that they get to come in and no
3 matter whether they've shown, you know, good faith,
4 bad faith, whatever plan they throw in, that they get
5 -- then get another chance and another chance and
6 another chance. You know, we suggested in our papers
7 that there needs to be the opt -- the potential for
8 the Court at the end of that trial, if it determines
9 the township is -- you know, has been acting in bad
10 faith to be non-compliant, to order specific relief at
11 the conclusion of the trial.

12 And I just think, you know, I think there
13 are strong arguments for shifting immunity today. I
14 think that -- you know, and I think that, if Your
15 Honor doesn't do that, there needs to be the, very
16 clearly, the potential that effectively that happens
17 if this path continues at trial and trial should be
18 scheduled soon.

19 Thank you.

20 THE COURT: Mr. McPherson, would you like to
21 be heard?

22 MR. MCPHERSON: Very briefly, Your Honor.

23 I'll first address the discussion about the
24 tax credit application. That sounded remarkable to me.
25 I'm not an expert. Our -- to my mind, those things

1 are usually a but for test, and to say that we'll take
2 100 percent tax credits if they'll give them to, but
3 we don't really need them, that doesn't sound like a
4 real plan to me. But, at any rate, I digress.

5 And I just wanted to add, I -- of course,
6 the town is entitled to make a record, and it has done
7 that very diligently, and I -- but, in terms of the
8 trial that we're talking about, I don't see what
9 witness the Court --

10 THE COURT: I'm not talking about the trial
11 today. Today is the question about whether and to
12 what extent I can conclude on the record that has been
13 established and the track record of South Brunswick,
14 in light of the comments of the special master and the
15 Court and the revision, that they should lose their
16 immunity, because they have proceeded in bad faith and
17 I have determined that they are determined to be
18 noncompliant. Do you have anything to add to that
19 issue?

20 MR. MCPHERSON: Yes, Your Honor. And on
21 that specific note, there is no genuinely contested
22 fact as to the inability to accept that as compliance,
23 what has been delivered to date. There's no witness
24 that could tell you that -- convince you properly to
25 accept a 33 percent set aside, to accept a 2 percent

1 [sic] per acre limit, to accept multiple --
 2 THE COURT: Two units.
 3 MR. McPHERSON: Two -- thank you.
 4 THE COURT: Two units per acre.
 5 MR. McPHERSON: To acc -- to --
 6 THE COURT: But I don't want you to just
 7 repeat the colloquy that I've already had with Mr.
 8 Sears to point those things out. Are there things
 9 other than what I've discussed with Mr. Sears on the
 10 record and that Mr. Gordon has raised that you would
 11 like to have included in the mix of those things that
 12 you want me to consider that I have not already heard?
 13 MR. McPHERSON: I would like the Court to
 14 also consider our prior submissions, in which we have
 15 presented pertinent discussion of the counsel and --
 16 THE COURT: I've read everything that you've
 17 submitted, Mr. McPherson, and --
 18 MR. McPHERSON: It reflects --
 19 THE COURT: -- believe it or not, I recall
 20 most of it.
 21 MR. McPHERSON: I'm sure the Court does. My
 22 point is simply that it reflects a philosophical
 23 difference on the part of the governing body --
 24 THE COURT: But that's how we got here --
 25 MR. McPHERSON: -- and explains --

1 THE COURT: -- here today.
 2 MR. McPHERSON: That explains. Thank you,
 3 Your Honor.
 4 THE COURT: Mr. Kent-Smith?
 5 MR. KENT-SMITH: Just one thing, Your Honor.
 6 I think the consequence of the finding of bad faith
 7 should permit the intervenors to submit a pleading in
 8 which the intervenors can put notice out to this
 9 township as to what the site-specific relief is that
 10 we will be seeking in the pleading.
 11 THE COURT: If the Court determines that the
 12 town is determined to be non-compliant, then -- and
 13 their immunity is stripped as a result of that, then
 14 builder remedy actions within the context of my first
 15 opinion would be permitted.
 16 MR. KENT-SMITH: Thank you.
 17 THE COURT: Mr. Kasuba?
 18 MR. KASUBA: Thank you, Your Honor. I'll be
 19 very brief. I know there was already extensive
 20 discussion on this issue.
 21 THE COURT: You can be brief or long, as
 22 long we don't repeat.
 23 MR. KASUBA: I don't believe I'll repeat
 24 anything that was said before.
 25 And I'll start with just a question as to,

1 you know, there has been lots of discussion of South
2 Brunswick being different. I think that one of the
3 questions that the Court should consider is that it is
4 now about 11 months since the Supreme Court's decision
5 of what's been referred to as Mount Laurel IV, and is
6 South Brunswick truly closer towards compliance now
7 than they were when that decision was written?

8 As I read their papers, I still don't know
9 what their plan is and, you know, there's alternatives,
10 there's alternatives within alternatives. I'm unclear
11 as to whether or not they are relying upon the
12 Econsult report or whether their real number is this
13 1,171 or 1,271. I'm not sure what their plan really
14 is. It seems like it's just keeping lots of balls up
15 in the air without actually being pinned down as to,
16 you know, a clear statement from the municipality of
17 this is what we think our number is and this is how we
18 propose to achieve it.

19 I don't even think they've done that. I
20 think that there still is a lot of discussion about
21 the Econsult numbers, --

22 THE COURT: Well, I agree --

23 MR. KENT-SMITH: -- about 215 --

24 THE COURT: -- they haven't done that, but I
25 haven't required that of anybody yet. That's what you

1 do at trial. Right now, and historically since the
2 end of July when we started this with all the filings,
3 and my initial opinion denying intervention and
4 granting immunity to the various towns, all I have
5 required of any of the towns, which they have all
6 complied with, is moving in the right direction,
7 showing me that they're acting in good faith,
8 satisfying myself and the special masters in the
9 various cases that they are making good faith efforts
10 towards compliance. And everybody has, except
11 potentially South Brunswick.

12 So, I didn't require them and would not hold
13 it against them that they haven't presented to you,
14 here is our plan, here is how we intend to do it. It
15 is a work in progress, it is a lot of moving parts,
16 and there is an ebb and a flow to this, but in South
17 Brunswick's case, the question is, has there been
18 enough flow and not too much ebb. So that's what
19 we're doing here today.

20 MR. KENT-SMITH: I understand, Your Honor.

21 The only other point that I did want to
22 briefly touch on was this issue of the non-residential
23 refund issue. I know that it's only nine credits, so
24 it's not a real significant part of it.

25 THE COURT: Their plan is not going to rise

1 or fall on the nine credits or the buy down, whether
2 that's capped at ten or whatever. I mean, those are --

3 MR. KENT-SMITH: I under --

4 THE COURT: -- those are things that, if the
5 case were settle-able, you know, we would look the
6 other way for or we would give it a nod and a -- you
7 know, and an acknowledgment, but it wouldn't change
8 the compliance issue.

9 The problems here relate to the things that
10 I have been addressing with Mr. Sears and whether and
11 to what extent I can be satisfied that they are, as I
12 described it, a pipe dream, which is just by almost
13 definition bad faith, or whether or not, you know,
14 there is some reason to believe that they could
15 actually achieve a number of units that includes
16 something other than these, whether it's 900 or 400 --
17 either number is too many -- these inclusion -- 100
18 percent inclusionary developments, because they don't
19 want, I guess what they're going to call, sprawl.
20 They don't want the units, they don't want the market
21 units, they don't want the school children, probably,
22 they don't want the influx of development.

23 My opinion provides for a phase in over
24 three ten-year cycles of those numbers that are in
25 excess of the 1,000 units. Three towns have already

1 settled at over 1,000 units. I don't understand, you
2 know, them to be claiming there's a radical
3 transformation in their towns. It could be that there
4 is one in South Brunswick that they could ask for some
5 modification of that phasic schedule or some
6 backloading of it. All those things are possible in
7 the settlement context, but if we have to go to trial,
8 I am bound by the opinions that I have written as to
9 what I think the law is, and until the Appellate or
10 Supreme Court concludes otherwise, that's the
11 Middlesex County rule. So that's where we go.

12 Anything else you want to add?

13 MR. KENT-SMITH: No. I just didn't want
14 Your Honor to be confused by their representation
15 about what Judge Jacobson did on that issue. And we
16 tried to clear that up with our submission to the
17 Court.

18 THE COURT: Yeah. Frankly, I am not clear
19 on what she did, but it only involved what -- a maximum
20 of nine or ten units, so --

21 MR. KENT-SMITH: In this context.

22 THE COURT: -- whether she's going to give
23 them nine or ten or give them something short of that,
24 and whether she made a finding that they're entitled
25 to something or she didn't, it's not significant

1 enough in the context of where we are with numbers
2 that are, you know, approaching or over 1,000 that are
3 going to make a difference.

4 MR. KENT-SMITH: I understand, Your Honor.
5 Thank you.

6 THE COURT: Ms. Cofone, you've heard the
7 conversations and colloquy between myself and the
8 attorneys. Are you able to give me some point of view
9 based upon what you've heard everybody indicate and
10 what the questions are that I've raised that would be
11 helpful to me?

12 MS. NAZZARO-COFONE: I am, yes. And I just
13 want to touch on -- there are two things. I know
14 they're not really germane and relevant to meeting the
15 numbers, but the write down/buy down and the non-
16 residential development fee.

17 I was actually judge's master in that case.

18 THE COURT: Judge Jacobson?

19 MS. NAZZARO-COFONE: Yes, Judge Jacobson's
20 master, so I don't believe that they will be entitled
21 to credits here. I don't think her number and her
22 issue in Hopewell was a matter of the number. I think
23 it was a matter of this is predicated on methodology
24 that has been invalidated, so I don't think that they
25 can take credit for that.

1 As far as the write down/buy down, I think
2 some -- I don't necessarily agree that they have done
3 the limited amount that Richardson is suggesting, I
4 think they --

5 THE COURT: Right, it's something else --

6 MS. NAZZARO-COFONE: -- may have done a
7 little bit --

8 THE COURT: -- said 21, --

9 MS. NAZZARO-COFONE: Yeah.

10 THE COURT: -- not 3 units; right?

11 MS. NAZZARO-COFONE: I think they have done
12 a little bit more than that. I personally don't have
13 a problem with that in the plan.

14 My problem still with this plan is that I
15 have a hard time getting to the fact, you know, we are
16 here and going through this exercise for the realistic
17 creation of affordable housing. If you don't choose --
18 and I've said this at other meetings as well. If you
19 don't choose the intervenor's site, that is absolutely
20 your obligation or your right to do that, but you
21 can't continue then on the path of choosing sites that
22 still rely on the tax credit program. And I think,
23 particularly when you do have options to meet your
24 need, ready, willing and able developers to do that, I
25 have a problem with that. I think the plan is still

1 too reliant on that.

2 I will speak a little bit to --

3 THE COURT: Or even other sites that are not
4 controlled --

5 MS. NAZZARO-COFONE: Correct, that's --

6 THE COURT: -- by the intervenors --

7 MS. NAZZARO-COFONE: Correct.

8 THE COURT: -- that you think are better
9 suited, from a planning standpoint, to have
10 inclusionary development.

11 MS. NAZZARO-COFONE: Right. That's what I
12 said. I said, you have no obligation to choose their
13 sites. What you do have an obligation to do is choose
14 sites that have a realistic opportunity to create
15 affordable housing. So, to continue the reliance on
16 the tax program I am not sure gets you there to that
17 realistic opportunity.

18 I did have an opportunity to review the SBC
19 proposal. You know, and I do applaud South Brunswick,
20 because I think that they are trying. I think that
21 they are trying. I think that this is a difficult
22 exercise and they are trying. I think the 33 percent
23 set aside is not acceptable.

24 Nor do I think 100 percent affordable sing --
25 100 affordable single family age-restricted homes is

1 reasonable. I don't know that I necessarily agree
2 with -- disagree with the township that there is a
3 market for age-restricted senior housing, but when
4 Toll Brothers, who is a luxury home builder, builds
5 age-restricted detached single family housing, they do
6 not do a third of it as affordable housing. And that
7 is a statement of fact. So, I don't think that the
8 plan as put forth with the 33 percent set aside for
9 age-restricted single family housing is realistic.

10 And, again, I applaud their creativity with
11 using the open space acquisition funds, but I don't
12 think that that plan and that is particularly
13 realistic, in light of the residential development
14 economy that we are in.

15 And, again, I still -- I don't think that
16 they -- we can conclude that there is no market for
17 age-restricted single family housing, because I
18 certainly have seen applicants --

19 THE COURT: No, I wasn't suggesting t here's
20 no market.

21 MS. NAZZARO-COFONE: Right.

22 THE COURT: But there's no reason to expand
23 it beyond the 25 percent, is there?

24 MS. NAZZARO-COFONE: There is not. And I --
25 nor do I know of any other instance where that has

1 been done. And, you know, we have participated in a
 2 number of re-zoning and use variances for age-
 3 restricted single family homes, just none of them
 4 would have that kind of set aside.

5 So, with that said, I think there are still
 6 some significant problems with this plan. I think
 7 that there are opportunities to fix it, but I don't
 8 think we're there yet with the plan as it's drafted.

9 THE COURT: Mr. Sears, you've heard the
 10 other attorneys, you've heard the special master, and
 11 you've heard my colloquy with them. Is there anything
 12 in addition that you want to bring to the Court's
 13 attention in conjunction with this application?

14 MR. SEARS: Nothing, Judge. I think our
 15 papers and our colloquy covers all the issues.

16 THE COURT: Okay.

17 MR. SEARS: Thank you.

18 THE COURT: I need a calendar.

19 THE CLERK: Sure, Judge.

20 THE COURT: Maybe you can just give me my
 21 phone.

22 THE CLERK: On your --

23 THE COURT: Oh, you have a hard -- no, no.
 24 The hard calendar is all right.

25 THE CLERK: Okay.

1 THE COURT: Today is the 18th; right? No.

2 THE CLERK: Today is the 19th.

3 THE COURT: Today is the 19th.

4 Okay. I'm satisfied that, over the course
 5 of August, September, October, November, December,
 6 January, almost seven months, that the progress that
 7 has been made by South Brunswick has been minuscule.
 8 And while I am mindful that the special master has
 9 indicated that they're trying, I'm satisfied that
 10 their attempts to try consistently rely upon those
 11 things which I've already indicated to them orally and
 12 in written opinions are inconsistent with my view of
 13 what should be required.

14 Accordingly, I'm satisfied that I should
 15 make a finding that they are determined to be
 16 noncompliant and I am going to strip them of their
 17 immunity.

18 However, I am going to stay that order until
 19 April 15th. That gives you two months of stay to get
 20 this plan in shape or resolve your differences with
 21 Fair Share and/or anybody else who you choose to do.

22 If, by the 15th, I don't have a plan that
 23 the special master and I conclude is a realistic plan,
 24 a trial ready plan, then I will -- then that order
 25 will dissolve and the builder remedy suits will be

1 permitted as of the following day or Monday.

2 If the plan is submitted, your trial on that
3 plan will be on -- I need a May calendar.

4 MS. NAZZARO-COFONE: I'm in Hawaii for two
5 weeks in May.

6 THE COURT: Where are you going?

7 MS. NAZZARO-COFONE: Hawaii. For two weeks.

8 THE COURT: For -- until when?

9 MS. NAZZARO-COFONE: May 13th until the 26th.

10 THE CLERK: Here, Judge.

11 THE COURT: May 2nd.

12 And we're scheduling a pretrial conference
13 for April 15th. Which was the day that the immunity
14 would expire in order to make a determination on that
15 date whether and to what extent the order will be
16 vacated or the stay extended.

17 I would encourage the township of South
18 Brunswick to take seriously the fact that I have taken
19 what I consider to be an extraordinary step here,
20 based upon my view that they have proceeded in a
21 manner so different and short of what I would have
22 come to expect based upon everybody else's conduct and
23 ability to proceed, that it has resulted in this
24 drastic order being entered, although it was stayed.

25 So, you may have dodged a bullet, Mr. Sears,

1 but not for long. So I hope I've made myself clear
2 and I hope the special master has made herself clear
3 as to the kinds of things that I would expect to see
4 between now and the end of the stay of this order.
5 And if you want any hope to avoid builder remedy
6 litigation, you better have a plan in place that you
7 think legitimately, realistically gets you to a number
8 that I will think is legit. And a way of getting
9 there, more importantly, that's realistic.

10 Any questions on the scope and extent of the
11 Court's order?

12 MR. SEARS: None, Your Honor.

13 THE COURT: Mr. Gordon, would you please
14 submit the form of order?

15 MR. GORDON: Yes, Your Honor.

16 (Extended pause)

17 MR. GORDON: You know, Your Honor, I do have
18 one question (indiscernible) with the court order. If
19 the -- and I may -- I -- you -- you may have stated
20 this and I'm -- I just may not have been clear upon it.

21 Will the trial proceed on May 2nd either way?

22 THE COURT: Well, --

23 MR. GORDON: If -- if -- would it -- would it
24 proceed --

25 THE COURT: -- if the case resolved, --

1 MR. GORDON: -- on the counterclaims? Well,
2 I --

3 THE COURT: -- it may not, and if it settles
4 far enough in advance that may be a compliance hearing
5 day, as opposed to a trial date. To the extent that
6 they submit a plan to me that either I accept or don't
7 accept in the terms of vacating this order or
8 extending the stay, the trial will proceed either with
9 builder remedy intervenors in the case or without them.

10 MR. GORDON: Okay.

11 THE COURT: I may sever or bifurcate the
12 issue of site suitability as to compliance and have
13 the compliance issue first and then builder remedies
14 after, because, as you may recall from my first
15 opinion, I consider builder remedies to be no longer
16 dictated or awarded based on who filed first, but on
17 what makes the most sense from a planning and
18 environmental standpoint. And that will be a decision
19 that will be a comparative analysis made by the
20 special master and the court based on submissions and
21 proofs that certainly the township could participate
22 in, but would be findings made by me as to a ranking
23 of the suitability in order to get to whatever number
24 I conclude is the number at that trial.

25 So that's the end date. So everybody knows

1 -- everybody else knows that there will be a trial at
2 some -- of some kind, unless South Brunswick settles,
3 on that date. So they'll know what their end date, in
4 terms of their negotiations with you. Although, based
5 on what I've been seeing so far, I don't expect there
6 will be anybody left in Middlesex County other than
7 South Brunswick by the time we get there.

8 MR. GORDON: Thank you, Your Honor.

9 THE COURT: Anything else?

10 MR. GORDON: No, Your Honor.

11 THE COURT: Okay. Thank you.

12 (Hearing concluded at 12:17 p.m.)
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CERTIFICATION

I, TERRY L. DeMARCO, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index Nos. from 11:29:50 to 12:17:07 is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings, as recorded.

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/s/ Terry L. DeMarco
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