

**NOT FOR PUBLICATION WITHOUT THE APPROVAL  
OF THE COMMITTEE ON OPINIONS**

IN THE MATTER OF THE APPLICATION : SUPERIOR COURT OF NEW JERSEY  
OF THE TOWNSHIP OF SOUTH BRUNSWICK: LAW DIVISION, MIDDLESEX COUNTY  
FOR A JUDGMENT OF COMPLIANCE : DOCKET NO. L-3878-15  
AND REPOSE AND TEMPORARY IMMUNITY :  
FROM MOUNT LAUREL LAWSUITS : **OPINION**

Decided on July 21, 2016

Donald J. Sears and Benjamin Bucca for the Township of South Brunswick.

Kevin D. Walsh and Adam Gordon for Intervenor Fair Share Housing Center, Inc.

Kenneth D. McPherson, Jr. for Intervenor South Brunswick Center, LLC (Waters, McPherson, McNeill, PC).

Robert A. Kasuba for Intervenor Avalon Bay Communities, Inc. (Bisgaier Hoff).

Henry L. Kent-Smith and Irina B. Elgart for Intervenor Richardson Fresh Ponds, LLC and Princeton Orchard Associates, LLC (Fox Rothschild LLP).

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WOLFSON, J.S.C.

I. INTRODUCTION

Following the decision of the New Jersey Supreme Court in In re Adoption of N.J.A.C. 5:96 & 5:97 by the N.J. Council on Affordable Housing, 221 N.J. 1 (2015), (hereinafter "Mount Laurel IV"), the adjudication of a municipality's obligation to create, through its land use regulations, a realistic opportunity for producing its fair share of the region's need for affordable housing, was removed from the Council on Affordable Housing ("COAH") and returned to the judiciary. Accordingly, each of the designated Mount Laurel trial judges was tasked with determining in a given case, whether the particular municipality's housing element and fair share plan complied with the requirements of Mount Laurel.<sup>1</sup>

Recognizing that some municipalities had embraced the prior COAH processes in good faith, but were stymied by that agency's inability to function, the Supreme Court set forth procedures by which municipalities that either received substantive certification from COAH, or had filed resolutions of

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<sup>1</sup> See Southern Burlington County NAACP v. Twp. of Mount Laurel, 67 N.J. 1 (1972) (hereinafter "Mount Laurel I"); Southern Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983) (hereinafter "Mount Laurel II"); see also Hills Dev. Co. v. Bernards, 103 N.J. 1 (1986) (hereinafter "Mount Laurel III").

participation prior to the judicial invalidation of the COAH's third round methodology, could seek a judicial declaration that their respective land use regulations satisfied the constitutional imperative. In so doing, the Court afforded those towns a reasonable opportunity to demonstrate constitutional compliance without the specter of a "builder's remedy" action hanging over them like a "sword of Damocles." See e.g., Mount Laurel IV, supra, 221 N.J. at 3, 5-6, 23-24.

The clear intent of the Supreme Court was to develop a process that tracked, insofar as practical, the Fair Housing Act, N.J.S.A. 52:27D-301(2) to -329, ("FHA" or the "Act"), so as to "facilitate a return to a system of coordinated administrative and court actions", but it added a cautionary note that it did not intend the courts to become a "replacement agency for COAH". Mount Laurel IV, supra, 221 N.J. at 29. Instead, the Court identified specific guidelines, summarized below, which it gleaned from judicially approved COAH practices, to assist the various Mount Laurel judges in their tasks:

(1) Previous methodologies employed in the First and Second Round Rules should be used to establish present and prospective statewide and reasonable affordable housing need. The parties should demonstrate to the court computations of housing need and municipal obligations based on those methodologies;

(2) Many aspects of the two earlier versions of Third Round Rules were found valid by the Appellate Courts. In upholding those rules, those courts highlighted COAH's discretion in the rule-making process. Judges may "confidently use" similar discretion when assessing a town's plan, if persuaded that the techniques proposed by a town, would promote for that municipality and region, the constitutional goal of creating a realistic opportunity for producing its fair share of the present and prospective need for low and moderate income housing;

(3) Prior round (pre 2015) obligations were preserved and are not to be ignored or eradicated. As such, municipalities must fulfill those obligations, and that prior unmet need is to be used as the starting point for the court's determination of a municipality's fair share responsibility. Mount Laurel IV, supra, 221 N.J. at 30; see also In re Adoption of Hous. Element, 444 N.J. Super. 163, 173 (Law Div. 2015) (hereinafter "In re Monroe") (any interpretation of FHA and COAH regulations that ignores the prior round unmet need would be contrary to the Constitution and the Legislature's overarching intent to produce affordable housing).

(4) A list of "approved actions", drawn from earlier Appellate Division decisions may be "confidently" used and

relied upon by the Mount Laurel designated judges in adjudicating the constitutionality of a town's housing element and fair share plan; and

(5) "[F]lexibility" should be used, as needed, to "secure, whenever possible prompt voluntary compliance from municipalities", but judges should "avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules." Mount Laurel IV, supra, 221 N.J. at 33.

In response to the Supreme Court's invitation in Mount Laurel IV, supra, the Township of South Brunswick (the "Township" or "South Brunswick") filed this declaratory action on July 1, 2015, seeking an affirmative declaration that its housing element and fair share plan created a realistic opportunity for producing its fair share of the region's need for low and moderate affordable housing.<sup>2</sup>

## **II. BACKGROUND AND PROCEDURAL HISTORY**

In fulfilling my responsibility to adjudicate the Township's constitutional compliance, I appointed (without

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<sup>2</sup> Several other declaratory actions are pending in Middlesex County, but they all have settled "in principle", and are currently participating in various stages of "Fairness Hearings", a necessary prerequisite to obtaining their respective Judgments of Compliance. See East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996); Morris County Fair Hous. Council v. Booton Township, 197 N.J. Super. 359 (Law Div. 1984).

opposition from any party) Ms. Christine A. Cofone-Nazzaro, a licensed professional planner and holder of a Masters Degree from the Edward J. Bloustein School of Planning and Public Policy at Rutgers University, with substantial public and private sector experience in complex land use, affordable housing and litigation matters, to serve as a Special Master in this litigation (the "Special Master"), empowering her to function both as a liaison between the parties during the conciliation and mediation processes, and also to provide the Court with independent insights on the substantive components of Township's housing element and fair share plan. See Mount Laurel IV, supra, 221 N.J. at 23-24; see Mount Laurel II, supra, 92 N.J. at 283 (special masters to be "liberally used" to provide expertise and assistance to the parties as "a negotiator, a mediator, and a catalyst").

To adjudicate the constitutionality of the Township's proposed land use regulations, three foundational issues needed to be addressed:

First: whether Fair Share Housing Center ("FSHC"), an entity dedicated to protecting the constitutional rights of low and moderate income persons, would be permitted to intervene. Given the Supreme Court's conclusion that FHC should be treated as an interested party, see Mount Laurel IV, supra, 221 N.J. at

26, 28, and was specifically entitled to notice of all applications for declaratory relief, id. at 29, (all initial and succeeding applications for declaratory relief in Mount Laurel matters "will be on notice to Fair Share Housing Center"), its intervention was permitted;

Second: whether private sector intervenors (e.g. builders/developers) would be permitted to intervene and, if so, the extent of their participation. In this regard, because the Supreme Court was unequivocal in its mandate that all declaratory judgment actions were to be brought on notice to interested parties, with an opportunity for them to be heard, Mount Laurel IV, supra, 221 N.J. at 35, and since I could discern no legitimate basis upon which to deny interested parties the opportunity to intervene,<sup>3</sup> their intervention was permitted as well, although their participation was limited to addressing whether the Township had satisfied its constitutional obligations. As such, any claims that a "better" and/or "more suitable" site (owned or controlled by an intervenor) was, or

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<sup>3</sup> The following entities were permitted to intervene as well: AvalonBay Communities, Inc. ("Avalon Bay"), Richardson Fresh Ponds, LLC ("Richardson Fresh Ponds") and Princeton Orchards Associates, LLC ("Princeton Orchards"), South Brunswick Center, LLC ("South Brunswick Center"), Windsor Associates ("Windsor") and Stanton Girard, LLC ("Stanton Girard").

may be more suitable, was specifically excluded from consideration;

Third: whether South Brunswick, as a "participating" municipality, was entitled to interim immunity from exclusionary zoning/builders' remedy actions while its land use regulations were being evaluated by the Court. As directed by the Supreme Court, municipalities that enjoyed "participating" status were entitled to request an initial five-month period of immunity for submitting a housing element and fair share plan, during which time exclusionary zoning actions seeking builder's remedy were precluded. See Mount Laurel IV, supra, 221 N.J. at 27-28. In determining whether to grant immunity, I was directed to "evaluate the extent of the obligation and the steps, if any, taken toward compliance with that obligation," including such relevant factors as "whether a housing element has been adopted, any activity that has occurred in the town affecting need, and progress in satisfying past obligations." Id. at 28

Based upon my preliminary review of the parties' written submissions, as well as a positive recommendation from the Special Master, I determined that South Brunswick had demonstrated sufficient good faith in satisfying its constitutional obligations to justify awarding it an initial 5 month period of immunity, during which time it was to continue

its efforts to prepare and adopt a constitutionally compliant housing element and fair share plan.

Thereafter, regular case management conferences ("CMC") were conducted in order to encourage an open dialogue between the parties, the Special Master and the Court, and to ensure that the Township's plans were properly progressing. In October 2015, I directed South Brunswick to submit a "Summary of Plan for Total Fair Share Obligation," requiring the Township to complete a prepared form which identified and calculated: (1) the Township's remaining rehabilitation share (if any); (2) its prior round obligation (or, surplus); and (3) its Third Round obligation. The Township complied.

In November 2015, the parties returned to court, at which time a revised iteration of the Township's fair share plan was reviewed and discussed. Although "slight" incremental improvements had been made, neither the Special Master nor I were satisfied with the "revised" plan because it still relied too heavily on 100% affordable projects, proposed insufficient new inclusionary developments and included too many "senior" units. Accordingly, I directed the Township to "meet and confer" with the Special Master and all interested parties, and to submit to them an amended proposal which addressed these deficiencies. In order to facilitate these revisions, I

extended the Township's immunity from builder remedy suits for an additional 6 weeks until January 13, 2016, the date of the next CMC.

Notwithstanding this additional time, the Township's plan showed little or no improvement. Many of the plan's component parts continued to rely on projects that were unrealistic or impractical. Others, however, were facially inconsistent with, or squarely contrary to valid COAH regulations and/or judicial precedent, an approach to compliance that was more suggestive of bad faith than of good faith.

For example, despite warnings and specific criticism from the Special Master, the Township continued its excessive reliance on municipally sponsored 100% affordable housing projects. Because these developments face fierce competition for a limited supply of 4% government tax credits, such developments are highly speculative, and even under the best of circumstances, could not realistically yield 3 or 4 projects in a single town within the compliance period.

Nonetheless, and notwithstanding the reservations of the Special Master and the objections of the intervenors, I extended, once again, the Township's immunity to February 19, 2015. But in doing so, I directed the Township to "show cause" on that date why I should not conclude that the Township was

"determined to be non-compliant". See Mount Laurel IV, supra, 221 N.J. at 33 (where "prompt voluntary compliance" cannot be accomplished with good faith effort and reasonable speed, the court may conclude that the town is "determined to be non-compliant" and revoke its immunity); and see id. at 26 (designated Mount Laurel judges entrusted "to assiduously assess whether immunity, once granted, should be withdrawn if a particular town abuses the process"); see also id. at 33,35-36.

On the return date of the order to show cause, however, its plan was still woefully deficient. Initially, the Township insisted that it could not provide a compliant plan because it did not know its actual fair share obligation. The argument is unavailing. The Township's plan was not deficient merely because it did not provide for a specific number of affordable units. Instead, its plan was deficient because its component parts were unrealistic, illusory and contrary to COAH regulations and judicial precedents, and as such, did not realistically address even the Fair Share number originally calculated by its own expert consultant.

For example, its housing element and fair share plan continued to rely upon multiple 100% affordable housing projects, requiring it to compete with every other New Jersey municipality for the limited number of tax credits available (through the U.S. Department of Housing and Urban Development

("HUD") Low-Income Housing Tax Credit program). And, while it is certainly possible that South Brunswick could secure tax credits for one (or possibly even two) of these projects, it seemed disingenuous to proffer a plan that assumes that it would successfully compete for and obtain sufficient credits to make those projects viable and realistic.

Next, despite an oversupply of senior citizen housing in New Jersey generally, see N.J.S.A. 45:22A-46.3(e), (h) (age-restricted housing market is over-supplied), South Brunswick's plan included excessive reliance on age-restricted units, in direct violation of the 25% limitation embodied in N.J.A.C. 5:93-5.14.

Tellingly, even after I denied the Township's request for a waiver of the 25% cap, the Township continued to pursue a plan that violated the 25% cap on age-restricted units. See In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 75 (App. Div. 2007) (declaring the "expansion of the age-restricted cap from twenty-five percent to fifty percent in N.J.A.C. 5:94-4.19" to be invalid, and that "the prior age-restricted cap of twenty-five percent should remain in place pending further agency action").

Similarly inappropriate was the Township's rather remarkable attempt to propose an inclusionary development that was not comprised of traditional, multi-family units, but

rather, included only age-restricted single family, detached homes. Even more astonishing was the Township's insistence on a thirty-three percent (33%) set aside for low and moderate income units, instead of the 15-20% set-asides typically sanctioned and traditionally accepted by both COAH and the courts.

Equally problematic was a separate inclusionary development which was limited to a gross density of only 2.8 units per acre. Given the internal subsidies needed to justify the economics of inclusionary developments generally, and the minimum densities typically demanded and approved by COAH and the courts (six or more units/acre), this proposal too, was, at best, ill-conceived and at worst, suggestive of bad faith.

Regrettably, in light of these and other deficiencies and the Township's concomitant refusal to remedy and/or remove the plan's obvious flaws, I was constrained to conclude that South Brunswick was not proceeding in good faith, and was "determined to be non-compliant". See Mount Laurel IV, supra, 221 N.J. at 72-73. Despite a span of seven months, and several extensions of its immunity, South Brunswick's progress had been "minuscule" at best. Its insistence in relying upon, and including in its plan, mechanisms that were demonstrably inadequate, impractical and legally invalid, was, within the framework of Mount Laurel IV, supra, entirely unacceptable.

Based on those findings South Brunswick's immunity from exclusionary zoning/builders remedy actions was revoked. See Mount Laurel IV, supra, 221 N.J. at 26, 33, 35-36 (while the goal is "to secure, whenever possible, prompt voluntary compliance", if that goal cannot be accomplished, with good faith effort and reasonable speed, and the town "abuses the process" then "immunity, once granted, should be withdrawn", and exclusionary zoning actions seeking a builder's remedy, permitted to proceed).

However, even after the Township's consistent and willful pattern of recalcitrance, I afforded it one final opportunity to voluntarily comply (despite the parties' vociferous objections), by "staying" the effective date of my order until April 15, 2016, giving the Township an additional 2 months to demonstrate its good faith, which it could accomplish by:

(1) revising its plan to comply with valid COAH regulations; (2) reducing its reliance on 100% affordable tax credit projects; and (3) including in its plan, legitimate, multi-family inclusionary developments with traditionally acceptable densities and set-asides.

In an effort to further facilitate the Township's compliance, I extended, sua sponte, the "stay" of my order revoking immunity until May 2, 2016, the scheduled trial date. Regrettably, that accommodation, too, proved unavailing and,

consistent with its own terms, the stay ultimately expired. In response to its loss of immunity, South Brunswick requested a stay of the trial, and a reinstatement (and extension) of its immunity protection until an interlocutory appeal was decided. That application was denied. Thereafter, the Township sought leave to file an emergent appeal with the Appellate Division, to obtain "[a] Stay of all proceedings in the Law Division until such time as the Appellate Division considers and disposes of all issues raised on the pending appeal.... If a stay is granted, the Township also seeks an order continuing its temporary immunity from builder's remedy lawsuits." That request for emergent relief was denied by the Appellate Division on May 2, 2016, removing any impediment to the trial, the merits of which are addressed below.

### **III. THE MERITS OF THE TOWNSHIP'S DECLARATORY JUDGMENT ACTION**

With the consent of the parties, the trial was bifurcated into two discrete phases: (1) a determination of the proper methodology to be used in calculating South Brunswick's fair share obligation, and in conjunction therewith, a calculation of the Township's actual fair share number; and, (2) how to best achieve a constitutionally compliant housing element and fair share plan, in light of the Township having lost its immunity from builder remedy lawsuits due to its "abuse" of the process and its persistent reliance on mechanisms that were demonstrably

impractical and contrary to COAH regulations and judicial precedent.

The trial of the first phase spanned eight days, during which the parties addressed the appropriate methodology to be followed in calculating South Brunswick's fair share obligation. At the conclusion of the testimony, I reserved decision and requested written summations and proposed findings of fact and conclusions of law to assist in crafting a fair share methodology that was both faithful to and followed, to the extent practical, those methodologies and guiding principles previously adopted by COAH, and sanctioned by the Supreme Court, among which include:

- (1) Since prior round obligations are not eradicated, "prior unfulfilled housing obligations should be the starting point for a determination of a municipality's fair share responsibility."
- (2) While reallocation of excess present need is not required, it is also not prohibited.
- (3) A municipality may claim bonus credits to satisfy its affordable housing obligation, including, but not limited to, construction credits, N.J.A.C. 5:94-4.16(a), and credits for units to be occupied by very low income persons, N.J.A.C. 5:94-4.22.
- (4) In addition, a municipality may also be awarded 1.33 units of credit for "Smart Growth" (units located near a transit hub) and "Redevelopment" bonus (units located in a redevelopment or rehabilitation zone).
- (5) Cost-burdened poor may be excluded from the present or rehabilitation share calculation.
- (6) Since the United States Census data has changed, in order to identify substandard housing, courts may use the three indicators adopted by COAH in

the Third Round Rules, not the seven indicators used in previous rounds.

Mount Laurel IV, supra, 221 N.J. at 30-33.

To the extent that data sources relied on by COAH were no longer available, the designated trial courts were directed to use "reliable" substitute data, while making as few "assumptions" as possible, in order to achieve a reasonable methodology that is not result oriented, but rather is designed to achieve actual construction of low and moderate income housing units. In doing so, Judge Serpentelli's opinion in AMG Realty Co. v. Twp. of Warren, 207 N.J. Super. 388 (Law Div. 1984), is instructive:

The pivotal question is not whether the numbers are too high or low, but whether the methodology that produces the numbers is reasonable. Any reasonable methodology must have as its keystone three ingredients: reliable data, as few assumptions as possible, and an internal system of checks and balances. Reliable data refers to the best source available for the information needed and the rejection of data which is suspect. The need to make as few assumptions as possible refers to the desirability of avoiding subjectivity and avoiding any data which requires excessive mathematical extrapolation. An internal system of checks and balances refers to the effort to include all important concepts while not allowing any concept to have a disproportionate impact.

Id. at 453; see Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 577 (2002).

Based on my evaluation of the credibility and persuasiveness of the competing experts, and the entirety of the evidence comprising the record, I have, for reasons which follow, adopted and embraced a fair share methodology that I believe is faithful to the Supreme Court's clear and unequivocal mandate. Consistent with that methodology, South Brunswick's pre-credited and uncapped fair share of the region's "prospective" need obligation is 1,533 units, a "gross" figure that will likely be adjusted downward based on a number of COAH approved regulations and devices, including: (1) the Township's entitlement to credits (including bonus credits) which shall be addressed in the manner authorized by COAH and upheld by the Supreme Court in Mount Laurel IV, supra, 221 N.J. at 31-32, and by the Appellate Division in In re Application of Township of Jackson, 350 N.J. Super, 369, 374-77; and (2) the applicability of regulatory "caps", (a) limiting a municipality's fair share to 1000 units for any given 10 year compliance cycle, see N.J.S.A. 52:27D-307(e); and/or (b) limiting a municipality's fair share obligation to no more than 20% of the total housing stock of the municipality, see N.J.A.C. 5:93-2.16. The specific eligibility for, and application of these adjustments, as well as whether any phasing-in of low and moderate income units is warranted so as to avoid a "radical transformation", will be addressed as part of the compliance phase of this trial.

**A. Experts**

The formulation of an accepted methodology for calculating a municipality's affordable housing obligation is, for all intents and purposes, an exercise that requires me to draw upon the expertise of various experts who, in this case, offered a wide range of backgrounds and experiences in relevant areas including: planning, zoning, affordable housing, COAH regulations, economic modeling as well as population and household projections. In this regard, the parties' four experts offered their detailed expert opinions on the appropriate components and extrapolations needed to craft a methodology which adheres, as closely as possible, to the directive of the Supreme Court in Mount Laurel IV, supra. Their backgrounds, experiences, and qualifications are briefly summarized below.

**1. Dr. Peter Angelides - Offered by the Township of South Brunswick**

A University of Pennsylvania graduate in Urban Studies, with Masters degrees in City Planning, Dr. Angelides earned his Ph.D. in Economics, with a concentration in the fields of Industrial Organization and Financial Economics, from the University of Minnesota. His background included significant experience in economic modeling and providing economic, financial and strategic advice to both private and public

entities on economic development, transportation, real estate and public policy.

While he briefly assisted COAH in preparing a portion of the second iteration of the Third Round Rules, he testified that he did "not get into great depth on Round 1 and Round 2 prior to this case," and that he was unfamiliar with the mechanisms of compliance used by municipalities to achieve their fair share of the region's need for affordable housing. Because he "could not recall" whether he had actually read any of the foundational decisions that formed the bases of the Mount Laurel doctrine, had never participated as a consultant or served as an expert in Mount Laurel litigation, and had never published any scholarly articles on the Mount Laurel doctrine, FSHC objected to his being permitted to opine on Mount Laurel issues - especially as to the appropriate methodologies for calculating statewide and regional need. That objection was overruled.

**2. Dr. David Kinsey - Offered by FSHC.**

A Princeton University graduate with a Masters in Public Affairs and Urban Planning, a Ph.D. in Public and International Affairs, and a licensed professional planner in the State of New Jersey, Dr. Kinsey's work experience included being the Director of the Division of Coastal Resources at the New Jersey Department of Environmental Protection ("DEP") where he was

tasked with addressing affordable housing issues as part of his oversight responsibilities under CAFRA (Coastal Area Facility Review Act). His work in the private sector as a planning consultant specifically included formulating methodologies, compliance mechanisms, and drafting fair share plans for municipalities, and advising private developers and public interest entities on affordable housing issues. Following a two hour voir dire of his credentials, the Township objected to his being offered as an expert, but, as with Dr. Angelides, this objection was overruled as well.

**3. Mr. Art Bernard - Offered by Richardson Fresh Ponds and Princeton Orchard Associates.**

Holder of a Masters of City and Regional Planning from Rutgers University, and a licensed professional planner in the State of New Jersey, Mr. Bernard's work experience included a stint as Deputy Director, and later as Executive Director of COAH, where he participated in the development, drafting and implementation of the First and Second Round Rules. After leaving COAH (in 1994) Mr. Bernard served as a planning and affordable housing consultant to twenty-four municipalities, served as a court appointed special master on five occasions, and has consulted for private developer clients as well. His qualifications were accepted, and he too, was permitted to offer opinion testimony on affordable housing and fair share issues as

well as the genesis and evolution of COAH's First and Second Round Rules.

**4. Mr. Daniel McCue - Offered by FSHC.**

Mr. McCue earned his degree from Williams College (mathematics), and later obtained a Master's in Urban Planning from the Harvard University Graduate School of Design, with a concentration in housing. He currently serves as a senior research associate at the Harvard University Joint Center for Housing Studies, publisher of the "State of the Nation's Housing" report, a nationally recognized publication which includes demographic analyses of housing, headship rates and household projections, with the latter two subjects being primarily authored by Mr. McCue. He too, was accepted as an expert in housing demography, household formations, and headship rates.

**B. The Component Parts of the Fair Share Methodology**

The Township's affordable housing obligation is comprised of three primary components: (1) unmet need, if any, from the prior round;<sup>4</sup> (2) present need; and (3) Third Round prospective need from July 1, 2015 to June 30, 2025. Each component, along

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<sup>4</sup> Based on the proofs and documentation submitted, I am satisfied that the Township fully satisfied its prior round obligation of 841 units, and as such, no further discussion is required.

with its corresponding steps, will be separately addressed below.

1. **Present Need**

While the FHA does not explicitly define present need, COAH has consistently defined it as the existing number of deficient housing units within a municipality. See N.J.A.C. 5:92-1.3 (First Round); N.J.A.C. 5:93-1.3 (Second Round). To calculate present need, the first step is to identify the surrogate measures of deficiencies. In its prior round rules, COAH used seven surrogates from the U.S. Census Bureau to measure deficient housing. However, since the Census Bureau no longer publishes that dataset, other surrogates were required to be used. In accordance with the Third Round Rules, both Drs. Kinsey and Angelides utilized the following three surrogates: (1) housing that is over fifty years old and overcrowded; (2) lacks complete plumbing; or (3) lacks a complete kitchen.

Because there may be an overlap between units that were deficient in more than one of the surrogates, those units with multiple deficiencies needed to be identified and accounted for in order to arrive at an estimate of all unique deficient units in the State. Both Drs. Kinsey and Angelides estimated the amount of deficient units that were occupied by low and moderate income household by county, in order to calculate present need.

However, while Dr. Kinsey adhered strictly to both prior round methodologies and used COAH's published income limits, Dr. Angelides devised his own approach to arrive at the percentage of low and moderate income households. Not only does this approach differ from that utilized by COAH, but the income limits he used were inconsistent with the Uniform Housing Affordability Controls ("UHAC"), see N.J.A.C. 5:80-26.1 to - 26.26, adopted by the New Jersey Housing and Mortgage Finance Agency ("HMFA").<sup>5</sup>

In addition to this significant departure from COAH's published income limits, Dr. Angelides was also forced to concede that he used "incompatible datasets," which necessarily corrupted his present need calculation:

MR. GORDON: Those income thresholds are based on the 2014 data, correct, Dr. Angelides?

DR. ANGELIDES: Yes.

MR. GORDON: So, this is an error, correct?

[PAUSE IN PROCEEDING]

DR. ANGELIDES: If I am remembering correctly, that's -- that's what we did. It is a mismatch between the income limit data, and then the income limit period, the data period that we're doing. So -- and I'll have to refresh myself to see whether we adjusted the limits back to 2011. I can't recall at this time whether we did or not.

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<sup>5</sup> Dr. Angelides' proprietary definition of low and moderate income persons is also inconsistent with the UHAC regulations and COAH income limit grid, a matter more fully addressed in the section on prospective need, infra, at p. 34.

MR. GORDON: But if -- if you didn't, it would be an error, correct?

DR. ANGELIDES: Probably. If we didn't check to see what the effect is, but yeah.

MR. GORDON: And why would it be an error?

DR. ANGELIDES: Well, we were trying to use data that was compatible.

MR. GORDON: So, data --

DR. ANGELIDES: But I -- I -- now that you brought my attention to it, we'll look into it.

MR. GORDON: Ok, so based on what you know -- if -- if that -- move on to the next line please. If that's, in fact, an error, would that change the calculation in the right most column of that slide?

DR. ANGELIDES: Potentially. Yes.

MR. GORDON: Would it change South Brunswick's present need?

DR. ANGELIDES: The same answer.

THE COURT: Yes, it would?

DR. ANGELIDES: It could, yes. I -- I don't know until I do the math how much -- whether it would change or not, but it could certainly.

MR. GORDON: So, at this point, you can't necessarily represent that the calculation in the -- in that right most column is correct to the court?

DR. ANGELIDES: Well, now that you point out an issue, I have to go and investigate.

MR. GORDON: Okay.

THE COURT: So, the answer to the question is?

DR. ANGELIDES: No.

[5/3/16T 171:17-173:11].

Because his method of establishing the percentage of deficient units occupied by low and moderate income households

is, admittedly, fundamentally flawed, and because of his inexplicable usage of incompatible datasets, I am satisfied that Dr. Kinsey's use of the COAH income limits is the appropriate data source.

Next, since there is no data available for 2015, both experts were required to utilize data completed two years earlier, in order to create an annualized "trend line" that could be used to extrapolate an estimate of present need as of 2015. In undertaking this task, however, Dr. Angelides relied on the 2009-2013 American Community Survey ("ACS") Public Use Microdata Sample ("PUMS") data from the Census Bureau to create his trend line, while Dr. Kinsey used the 2010-2014 ACS PUMS data. Absent any articulated reason for using a less current dataset, Dr. Kinsey's reliance on the 2010-2014 ACS PUMS data seems the sounder choice.

Moreover, the experts also disagreed over how to calculate an "old and overcrowded" unit, a critical factor in extrapolating present need data to 2015. Dr. Angelides used a "rolling" cut-off date (or, a sliding scale), in creating the pool of "old" units - e.g. those built more than fifty years ago. To create his annualized trend line, he compared deficient housing units as of 2000 (units built prior to 1950 are considered old) to deficient housing units as of 2011 (units

built prior to 1960 are considered old). The net effect of using this approach is an increase in present need; it also results in a decrease in prospective need. In contrast, Dr. Kinsey simply assumed a housing unit to be "old" if it was constructed prior to 1965, compared deficient housing units as of 2000 to deficient housing units as of 2012, and then plotted the trends over time to calculate whether the housing stock experienced more or less deterioration.

Dr. Angelides was critical of Dr. Kinsey's use of a static cut-off datum. In his view, doing so increased the pool of "old" houses by including an additional five years of housing stock. Nonetheless, COAH also used a specific cut-off date in its prior round methodologies. According to Dr. Kinsey, Dr. Angelides' use of a rolling cut-off date results in an anomaly, because the pool of homes that is being measured constantly changes during the projection period. Mr. Bernard was similarly critical of Dr. Angelides' approach, and viewed it to be less accurate as well, since it did not compare "apples to apples." As he explained:

Based on 2000 census versus 2010 -- 2000 census versus 2010 census or 2012 ACS. And, in order to make that comparison, you really have to look at the same pool of housing. And Dr. Kinsey does that. He -- he looks at all of the housing that was built before 1965 for both 2000 and 2012. Dr. Angelides doesn't do that. Dr. Angelides looks at a much smaller pool in 2000 than in 2010 or 2012, a pool that's 580,000 units smaller, as

I understand it, and not surprisingly found that there were more overcrowded people in this expanded housing pool. And to me that's a meaningless comparison -- that Dr. Angelides' trend line is relatively meaningless and Dr. Kinsey's trend line is meaningful.

[5/11/16T 239:7-21].

While both methods are predicated on certain assumptions, Dr. Kinsey's specific cut-off date is clearly more consistent with COAH's prior round methodologies. As noted by both Dr. Kinsey and Mr. Bernard, a rolling cut-off date unnecessarily expands the universe of housing units surveyed, and inappropriately inflates the number of units being projected as "old and overcrowded."

Accordingly, I am satisfied that Dr. Kinsey's methodology to calculate present need, relies on the best available data, and as such, his calculation that the Township's present need is at least 109 units, is accepted by me.<sup>6</sup>

However, this calculation of present need may be subject to modification. After the trial, but before this Opinion was completed, the Appellate Division decided In re Declaratory Judgment Actions Filed by Various Municipalities, County of

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<sup>6</sup> Both Dr. Kinsey and Dr. Angelides declined to reallocate the present regional need, as was required by the prior round rules. See N.J.A.C. 5:92-5.4 (First Round); N.J.A.C. 5:93-2.4(a) (Second Round). However, COAH eliminated the calculation and distribution of reallocated present need in its Third Round Rules, a modification which was specifically upheld by the Supreme Court. See Mount Laurel IV, supra, 221 N.J. at 30-31.

Ocean, Pursuant to the Supreme Court's Decision in In re Adoption of N.J.S.A. 5:96, 221 N.J. 1 (2015), \_\_\_ N.J. Super. \_\_\_ (App. Div. 2016) (hereinafter the "Ocean County Appeal"), which articulated the manner in which "present need" should be addressed in a municipality's fair share plan. Id., slip op. at 40-41.

Finding that the "core principles" of Mount Laurel, as codified by the FHA and articulated by the Supreme Court in Mount Laurel IV, supra, do not authorize "a retrospective new 'separate and discrete' affordable housing gap-period obligation," Ocean County Appeal, supra, slip op. at 50, the court rejected the inclusion of a "separate and discrete" gap period component as part of a municipality's prospective fair share obligation. Emphasizing that its holding "does not ignore housing need that arose in the gap period," id., slip op. at 51, the Appellate Division went on to state that the calculation of a municipality's "present need" obligation, however, should "encompass low- and moderate-income households formed during the gap period in need of affordable housing," id., slip op. at 53, and that calculating the "scope" of the present need "should be dictated by identifiable housing need characteristics" as determined by the designated Mount Laurel judge "when examining the evidence presented." Id., slip op. at 51.

Such evidence may include, for example, whether households that formed during the gap period should be added to, or subtracted from, the affordable need calculation due to changes in income or loss of jobs, changes in household size, or relocation out of state, as well as any other factors relevant to making a "new calculation of present need." Id. slip op. at 51.

Accordingly, whether and to what extent South Brunswick's present need obligation will increase beyond the 109 units, remains an open issue, which will be addressed at a future evidentiary hearing.

**2. Prospective Need**

There are three main components in determining prospective need, each of which requires multiple steps: (1) the calculation of a regional prospective need, an eleven step process; (2) an allocation of municipal prospective need, a six step analysis; and (3) an adjustment for secondary sources of demand and supply, which requires seven additional steps. Each of the three components, as well as the twenty-four corresponding steps, respectively, are addressed below.

**a. Calculate Regional Prospective Need**

To calculate regional prospective need, the following eleven (11) steps must be completed:

- (a) Identify the housing region;
- (b) Determine the population calculation and projection periods;
- (c) Determine regional population 2015 and project regional population 2025;
- (d) Identify and remove "group quarters" residents from calculations of the total population
- (e) Calculate and project headship rates;
- (f) Estimate 1999 low and moderate income households by region;
- (g) Calculate 2015 low and moderate income households by region;
- (h) Project 2025 low and moderate income households by region;
- (i) Calculate and project the regional increases in low and moderate income households;
- (j) Pool and reallocate calculated changes in regional distribution of low and moderate income households below age 65; and
- (k) Determine regional prospective need.

These steps will each be addressed below.

**i. Identify the Housing Region**

In both the First and Second Rounds, Middlesex County was located in Region 3, which consists of Hunterdon, Somerset and Middlesex counties. See N.J.S.A. 52:27D-304(b) (defining "housing region" as "a geographic area of not less than two, nor

more than four contiguous, whole counties which exhibit significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas" as defined by the United States Census Bureau prior to the enactment of the FHA). While Dr. Kinsey did not examine the appropriateness of the regions, choosing instead to accept COAH's determinations in this regard, Dr. Angelides examined the degree of economic integration in the region, but found no reason to deviate from the COAH designation. Accordingly, South Brunswick is properly located in Region 3.

**ii. Determine the Population Calculation and Projection Periods**

Prospective need consists of the affordable housing need that will be generated from 2015 until 2025.<sup>7</sup> Thus, the appropriate population calculation period runs from 2015 to 2025.

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<sup>7</sup> Because the Appellate Division rejected as unauthorized, the inclusion of a "separate and discrete" component of the fair share analysis that "looks back" from 2015 to 1999 (the "gap period"), the extent of any such obligation and/or the method for calculating it are neither addressed nor included as an element of South Brunswick's fair share of the region's prospective affordable housing need.

**iii. Determine Regional Population 2015 and Project Regional Population 2025**

While the experts agree that the determination of prospective need is dependent upon projecting population growth by county and age cohort, they disagree about which dataset, or combination of datasets, should be used to do so. According to Mr. Bernard, COAH chose to use the Historic Migration model in the First Round, but because the estimates proved to be too high, it proposed to "average" the Historic Migration model and the Economic Demographics model in its Second Round methodology, an easy task since both models projected populations by county and age cohort.<sup>8</sup>

Consistent with the Second Round Rules, Dr. Angelides also averaged the projections of both models (published by the New Jersey Department of Labor and Workforce Development (the "NJDLWD")), reasoning, as did COAH, that averaging has historically proven to be a better predictor of actual growth because both models have, on occasion, overstated future

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<sup>8</sup> In hindsight, the estimates from that model also proved to be higher than the actual growth figures. Accordingly, as part of its Second Round methodology, COAH further adjusted the projected population growth through the use of a proprietary model from the Center for Urban Policy Research at Rutgers. Unfortunately, that proprietary model is no longer available.

populations, and since the Historic Migration model projections tended to be more conservative.

By way of contrast, Dr. Kinsey relied solely on the Economic Demographics model (consistent with COAH's First Round Rules). In addition to having the most up-to-date available data, he testified that he chose that model because the Historic Migration model no longer projected populations on the basis of county and age cohorts, but rather, provided only statewide data. Given that disparity in source data, he opined that the two models could not be averaged because it required one to make too many assumptions, which in his view, generated unreliable results. According to Dr. Kinsey, Dr. Angelides was required to mathematically calculate 168 different data points in an effort to achieve the same data accuracy at the county and age cohort level as the Economic Demographics model.

In response, Dr. Angelides points out that Dr. Kinsey's calculations ignore the Second Round methodology in favor of the (now abandoned) First Round. And, since the Economic Demographic model consistently overstates projected growth, Dr. Kinsey's approach unfairly inflates the Township's affordable housing obligation by artificially increasing the pool of potential low and moderate income households.

Mr. Bernard weighed in on this issue as well, testifying that the Economic Demographic model is the "preferred model" by NJDLWD, and that to correlate the two datasets, Dr. Angelides was required to make too many assumptions, rendering his data projections unreliable. According to Mr. Bernard, one such flaw was the assumption that the Historical Migration model data would distribute population around the State in the same fashion as the Economic Demographic model, which, according to the NJDLWD, was not true. 5/24/16T 154-155.

Regrettably, strict adherence to either the First or Second Round methodologies is impossible, especially since the Historical Migration model no longer projects population based by county and age cohort. While it is true that both models require certain assumptions (which have, admittedly, resulted in past overstatements of population growth), my task is to fashion a reasonable methodology that contains "as few assumptions as possible." AMG Realty Co. v. Twp. of Warren, supra, 207 N.J. at 453 (Law. Div. 1984). Given the extent to which Dr. Angelides' methodology is dependent on a multitude of assumptions and 168 separate calculations to reproduce population data at the county and age cohort level, I decline to use his approach.

Dr. Kinsey and Mr. Bernard both offered credible reasons to reject Dr. Angelides' approach, especially since the Economic

Demographic model is the NJDLWD's "preferred model."

Accordingly, since the Economic Demographics model is the only model that projects household growth by county and age cohort, and requires the fewest assumptions in projecting households from 2015 to 2025, I accept that deviation from COAH's Second Round methodology as necessary and appropriate.

**iv. Identify and Remove "Group Quarters" Residents from Calculations of the Total Population**

Neither Dr. Kinsey nor Dr. Angelides included persons living in group quarters, such as correctional facilities, nursing homes, and other similar facilities, as per the prior round rules, even though the inclusion of residents of certain types of group quarters in the fair share allocation could, according to Dr. Kinsey, lead to a more accurate reflection of need. Nonetheless, since neither the experts, nor COAH included persons living in group quarters, I have not included such a calculation either.

**v. Calculate and Project "Headship Rates"**

"Headship rates" reflect the percentage of population growth that will result in new households being formed among each age group. Stated differently, a headship rate measures the probability that a person in a specific age cohort will form a household. While headship rates will vary based on social,

economic and demographic factors, certain age cohorts are statistically more likely to form households. In its First Round methodology, COAH relied on a "flat" projection of the headship rates, thus assuming that headship rates would remain constant over time. In the Second Round iteration, however, COAH assumed that headship rates would decline, so it estimated headship rates "by age group and county in New Jersey in 1990 and extended into the future at one-half rate the rate of change observed from 1980 and 1990." 26 N.J.R. 2347 (June 6, 1994).

Dr. Angelides initially used raw, unadjusted 2014 ACS data, and ultimately embraced the approach recommended by Dr. Kinsey and Mr. McCue, a leading expert on projecting household growth. Absent any disagreement among the experts, the baseline headship rates used by Dr. Kinsey, will be used in calculating headship rates by county and age cohort.

Despite their consensus on how to calculate headship rates as of 2015, Drs. Kinsey and Angelides have suggested vastly different methods for projecting headship rate growth from 2015 to 2025. While Dr. Angelides has altered his approach numerous times (including once after the start of trial), his present calculation uses the adjusted 2014 ACS headship rate, instead of the decennial Censuses, as a baseline. He then projects that trend forward, making a downward adjustment of one half the rate

of change by county and age cohort from the decennial Censuses, purportedly to account for his assumption that headship rates will steadily decline from 2015 to 2025, based on his observation that headship rates decline within each age cohort, except for persons over the age of eighty-five.

Mr. McCue's testimony offered several pointed criticisms of the assumption that headship rates will decline over the next ten years. His conclusion, that New Jersey should expect to see higher annual household growth, was, in my view, more supportable, due to such factors as: (1) increased immigration levels; (2) increased building permit activity; and (3) the general economic recovery. He also criticized Dr. Angelides' failure to account for the recession in his suggested trend line, which had the predictable effect of projecting a lower household formation rate.

Mr. McCue also noted that Dr. Angelides' approach was inconsistent with COAH's Second Round methodology, which relied on data from the two most recent decennial censuses, not the ACS dataset, a fact conceded by Dr. Angelides, and which resulted in a decrease in household projections, and a corresponding decrease in prospective need:

MR. GORDON: Did you deviate from what the prior round methodology did as to the headship rate -- the headship rate yesterday?

\* \* \*

DR. ANGELIDES: Well, the prior round methodology did not make use of the American Community Survey.

MR. GORDON: So, yes?

DR. ANGELIDES: So, yes.

\* \* \*

MR. GORDON: Would it have been -- would it have been technically possible to do -- to the prior -- the second round methodology for the headship rate used data from the two most recent decennial [censuses], correct?

DR. ANGELIDES: Yes.

MR. GORDON: Are the same data today available for the two most recent decennial [censuses]?

DR. ANGELIDES: Yes.

MR. GORDON: Would it be possible to replicate exactly what the prior round methodology did using data from the two most recent decennial [censuses]?

DR. ANGELIDES: Yes.

MR. GORDON: And if you had done that, would the need have been higher or lower than the need that you have?

DR. ANGELIDES: I don't recall doing the calculation, but I think higher.

MR. GORDON: The need would have been higher. So, that the -- the methodology you used decreased relative to that calculation?

DR. ANGELIDES: Yes.

[5/3/16T 139:25-141:4].

According to Dr. Kinsey, Dr. Angelides' use of different data and different assumptions produced approximately "ten thousand fewer units." 5/5/16 169:6-8.

Using a different approach to calculate headship rates from 2015 to 2025, Mr. McCue first assumed that the existing household formation rate would remain flat, which projected an increase of 204,675 households over the next ten years. He then projected household growth, based on the historic trends between decennial Censuses, which predicted an increase of 251,251 households during that same period. Dr. Kinsey suggested a more conservative approach, e.g. using a flat rate of household formation, which yielded a lower household formation projection.

Mr. Bernard agreed with Dr. Kinsey's approach, testifying that his projections were consistent with various publications of well-respected persons in the field of demographics, such as Mr. Andrew Paciorek of the U.S. Federal Reserve and Mr. Arthur Cresce of the Census Bureau. As recounted by Mr. Bernard:

[L]ike Mr. McCue said, that we have been below trend for a number of years and that they expect headship rates to pick up, at least over the next five years, and probably continue, as I recall one of the author's reports, until the Baby Boomers start to die off at the end of -- the end of this projection cycle, which I don't like to hear about --

\* \* \*

But in any rate, they -- they all -- the -- the --- the information from all of those reports makes me conclude that Dr. Kinsey's choice to take those 2014 headship rates that are adjusted based on the 2 census[es] -- 2010 census and draw a straight line through the projection period is a conservative way to calculate the -- to project households in the state."

[5/11/16T 248:10-249:3].

Thus, Mr. Bernard urged acceptance of Dr. Kinsey's methodology, as an accurate, yet conservative way of calculating headship rates. Id. at 249:4-6. I agree.

In the first instance, Dr. Angelides' methodology neither accounted for, nor even acknowledged, New Jersey's recession in his trend line, and ignored evidence strongly suggesting that New Jersey will experience an increase in household growth over the next decade. Next, he needlessly deviated from COAH's Second Round methodology by using the less reliable 2014 ACS data as a baseline for his trend, instead of using the readily available decennial census data, which choice admittedly caused a decrease in household projections.

In point of fact, Dr. Angelides' choices consistently operated to drive down prospective need. For example, while he followed the Second Round methodology, and assumed that headship rates would decline over the period from 2015 to 2025 (thereby decreasing prospective need), he then deviated from that methodology by using the 2014 ACS data to further decrease the prospective need. Dr. Angelides' apparent willingness to diverge from COAH's methodologies so long as it decreases the Township's affordable housing obligation, seems to reflect a pattern of "result oriented" design that occurs with too much frequency to be entirely coincidental.

While neither Dr. Kinsey nor Dr. Angelides could precisely replicate the exact slope or data source used in the prior round methodologies, Dr. Kinsey at least accounted for New Jersey's recession and its probable future economic growth, utilizing a conservative, flat rate, as used by COAH in the First Round. That approach, buttressed by the highly persuasive testimony of Messrs. McCue, a distinguished expert in the field of housing demography, household formation and headship rates, and Bernard, the former Executive Director of COAH, amply demonstrate that Dr. Kinsey's methodology is reasonable, relies on fewer assumptions, and is more consistent with prior round methodologies.

**vi. Establishing Low and Moderate Income Limits<sup>9</sup>**

Because the establishment of low and moderate income limits is the cornerstone for any fair share calculation, the next step is to estimate the proportion of those projected households that actually qualify as low and moderate income households.

The FHA defines low and moderate income housing as follows:

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<sup>9</sup> For the sake of convenience, this section will actually address three separate steps, as drawn from the experts' methodologies:

- (1) calculate 2015 low and moderate income households by region;
- (2) project 2025 low and moderate income households by region; and
- (3) calculate and project the regional increases in low and moderate income households.

"Low income housing" means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to 50% or less of the median gross household income for households of the same size within the housing region in which the housing is located. N.J.S.A. 52:27D-304(c).

"Moderate income housing" means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to more than 50% but less than 80% of the median gross household income for households of the same size within the housing region in which the housing is located. N.J.S.A. 52:27D-304(d).

Although the FHA, by its express terms, permits "other recognized standards" to be used to calculate income limits, according to its former Executive Director, Mr. Bernard, COAH followed the regional income limits published by HUD, along with the PUMS data, to calculate the number of low and moderate income households. 5/11/16T 249:7-25.

Dr. Kinsey likewise utilized COAH's regional income limits to perform the following steps:

- (1) calculate low and moderate income households as of 2015; and
- (2) project low and moderate income households to 2025 at the county and age group level.

He then relied upon the PUMS data for each of 168 cells of county and age group information, using the 2014 ACS PUMS data (the most recent data available) to make his 2025 projection.

Dr. Angelides, however, devised a different, unique approach to calculate the appropriate income limits for low and moderate income households. In his opinion, COAH's calculation of median income did not comport with the mathematical definition of "median," and as such, did not provide accurate results. Instead, he explained that COAH prepared grids based on information from HUD for every year to determine the number of low and moderate income households. Using HUD's calculated median income for every county based on a four-person family, COAH averaged the median income for each Region, and then, using a methodology developed by HUD, derived the "weighted" average of the median income for a range of household sizes, ranging from one-person households to those occupied by eight or more persons.

Using the ACS data, Dr. Angelides concluded that 73% of one-person households would actually exceed the median income as defined by COAH, as would 38.5% of four-person households, a mathematical anomaly, since the median income should be close to 50% for each household size. Likewise, Dr. Angelides also analyzed the ACS data to determine how many households would qualify as low and moderate households, i.e. earning 80% of

median income or less, and concluded that 63% of one-person households would qualify as low and moderate, while only 29% of four-person households would qualify as eligible, when mathematically, these numbers should be approximately 40% (80% of 50%).

Mr. Bernard expressed discomfort with Dr. Angelides' methodology, especially, since using his method of calculating the median income drastically reduced the statewide housing obligation in two distinct ways:

On the front end, because his -- because we have so many small households in the State and his -- his own income limit for one-person households is so much lower than HUD's, that reduces the housing obligation quite a bit at the front end. On the back end where we don't have so many larger household, three and four-person -- four-person households, five-person households, his income limits are somewhat higher. Because his limits are higher, his -- he -- and he uses those to project that more households -- that there's more filtering going on, because these -- his households with the higher incomes, four person and five person, can afford more of a house in his filtering model, so it makes for significant reductions on the front end in coming up with the -- the regional need and also at the back end in terms of filtering.

[5/24/16 T 251:18-252:10].

Specifically, Mr. Bernard cautioned that Dr. Angelides methodology created "a huge disconnect between those households that are included in the need and those households that can actually qualify or afford the affordable housing", 5/11/16T

250:1-251:17, which was both inconsistent with the prior round methodologies, and violated the FHA.

Dr. Angelides confirmed as much, and acknowledged that his use of ACS data to determine median income was a divergence from COAH's prior round methodology, 5/2/16T 116:9-122:13; 127:18-128:8, admitting further that using the prior round methodologies as to income qualification, would have increased the need obligation:

MR. GORDON: Okay. Let's move on to the calculation of median income that you discussed yesterday using the -- using the -- not using the HUD and COAH --

DR. ANGELIDES: Okay.

MR. GORDON: Did you deviate from what the prior round methodology did as to calculation of the --

DR. ANGELIDES: Most definitely.

MR. GORDON: Would it be technically possible to do what the -- the prior round methodology did with -- with the same data sources?

DR. ANGELIDES: Yes.

MR. GORDON: If you had replicated what the prior round methodology did, would the need have been higher or lower than the need that --

DR. ANGELIDES: Higher.

\* \* \*

MR. GORDON: So -- so, the deviation that you made from the prior round methodology in this area lowered the Fair Share obligation compared to the prior round methodology?

DR. ANGELIDES: Lower compared to what I -- what it would have been had we had used the prior round methodology, yes, that's correct.

\* \* \*

MR. GORDON: .... So, you had calculated low and moderate income households by household size as opposed to by age --

DR. ANGELIDES: That's correct.

MR. GORDON: And was that a deviation from the prior round methodology?

DR. ANGELIDES: Yes.

MR. GORDON: Is it technically possible to calculate the number of low and moderate income households by age -- and the way that the prior round did that?

DR. ANGELIDES: Yes. Well, yes, once you have the number of households in, yes, or the number of household needs, age -- yes.

\* \* \*

MR. GORDON: Does -- does the methodology that you use, calculation by household size, instead of by age -- does that result in a decrease in the prospective need?

DR. ANGELIDES: So, I'm going to tentatively say yes. And -- and keep in mind that the calculations -- there are a couple of calculations that have gone together. And I -- I can't say for certain which one, but the two of them together, the answer is yes.

[5/3/16T 141:5-143:22].

In point of fact, Dr. Angelides later conceded that his deviation from COAH's prior round methodologies, resulted in a decrease of prospective need by "thousands" of units:

MR. GORDON: Well, do you -- do you know what the -- what the -- if you -- if you just used -- if you kept everything else in your report the same and relied on COAH's income-limit methodology instead of your own, do you have any idea what the impact would be?

DR. ANGELIDES: I don't.

MR. GORDON: Would it increase prospective need to use -- use COAH's income limits for -- as opposed to -- to use the prior round methodology for income limits.

DR. ANGELIDES: Yeah, in this case it would, yes.

MR. GORDON: Are we talking about 100, a thousand, tens of thousands?

DR. ANGELIDES: I can't recall specifically, but my -- my sense is hundreds of thous -- I'm sorry, tens of thousands, not --

MR. GORDON: Tens of --

DR. ANGELIDES: -- hundreds.

MR. GORDON: -- thousands, so this is -- this is a very significant impact?

\* \* \*

MR. GORDON: Okay. So nobody's used this approach before for qualifying for affordable housing in the country you stated, so --

DR. ANGELIDES: Not to my knowledge.

MR. GORDON: So, because it's never been used before, what -- how do we know that this approach is reliable?

DR. ANGELIDES: What do you mean by, "Reliable"?

MR. GORDON: Are you familiar with -- are you familiar with what the term, "Reliability," means in an expert opinion context in litigation?

DR. ANGELIDES: Oh, how do you know that it's right in some sense? I mean, it's just pulled from the data. It's a very straightforward calculation, easily reproducible by anybody skilled in the field.

MR. GORDON: If it's so straightforward, why has no one ever done it before?

DR. ANGELIDES: I don't know that they haven't ever done it before; I'm just not aware of it.

MR. GORDON: You're just not aware -- aware of anyone ever having done it before. So you're asking this Court -- to your knowledge this would be the first time a Court has ever anywhere in the country accepted this methodology as a methodology for qualifying who

is low to moderate income for any affordable housing purpose.

DR. ANGELIDES: Yes.

[5/3/16T 217:22-220:2].

Dr. Angelides' testimony appeared less than forthcoming in other ways as well. For example, his reproduction of the COAH grid in his presentation, and his analysis of data, omitted pertinent information about the COAH income limits, which was included in the actual grid:

MR. GORDON: This is the full [2014 income limits] chart that COAH used. It's the official regulatory document. May I approach?

[COAH chart marked DF-11 for identification]

THE COURT: So what's the difference? The footnotes?

MR. GORDON: The footnotes. And the footnotes are rather important. Have you ever seen this full document before, Dr. Angelides?

DR. ANGELIDES: Yes, I have.

MR. GORDON: Why did you choose to exclude the footnotes in your presentation?

DR. ANGELIDES: The footnotes and the columns to the right just to make it more legible. It's hard to see as it is.

[5/24/16T 183:4-19-192:5-15].

In his redacted version of the COAH income limits, Dr. Angelides excised the following information: (1) that COAH calculated its income limits in accordance with the UHAC regulations, and (2) the rationale for applying a "hold harmless" standard to the 2014 limits (e.g. that the 2014 income limits

deliberately over-included the number of low and moderate households in order to protect certain households that had previously qualified in 2013). 5/24/16T 183:20-186-15. While Dr. Kinsey's methodology corrected for the "hold harmless" standard, Dr. Angelides did not take it into account, resulting in yet another reduction in the number of low and moderate income qualifiers. 5/24/16T 190:18-191:10.

Here, Dr. Angelides' untried, untested and (heretofore) unused method to calculate the income limits for low and moderate income household percentages, would, if accepted, decrease South Brunswick's prospective need by thousands of units. Whether or not it was designed specifically to achieve such a purpose, Dr. Angelides' approach deserves little consideration here, as it is inconsistent with both prior round methodologies, violates the FHA, and does not adhere to the UHAC or HUD income limits.

On the other hand, Dr. Kinsey's use of the COAH income limits and the UHAC regulations is both reliable and consistent with prior round methodologies. His data was drawn from the most recent HUD data available (2015), while adjusting the 2014 ACS PUMS data (using HUD's official Consumer Price Index inflation factor from 2014 to 2015 to insure against improperly

over-counting low and moderate income households) to account for differences between 2014 ACS PUMS data and 2015 income limits.

Accordingly, because Dr. Kinsey's approach faithfully follows COAH's prior round methodologies for determining income limits for low and moderate income households, it is, in my view, more intellectually honest and will therefore be included in crafting an appropriate and legally defensible fair share methodology.

**vii. Pool and Reallocate Calculated Changes in Regional Distribution of Low and Moderate Income Households Below Age 65**

Even though COAH's Second Round methodology included a provision for reallocating prospective need, neither Dr. Kinsey nor Dr. Angelides did so. Dr. Kinsey thought such a reallocation of prospective need was inappropriate because, in Region 3, the share of low and moderate income households over the age of sixty-five is projected to increase from 2015 to 2025, while the share of those under the age of thirty-five is projected to decrease. His rationale for excluding the reallocation factor follows:

DR. KINSEY: ... COAH made the choice to reallocate some of the growth and population of seniors using the standard cutoff of age sixty five to those regions where the younger component of the population, those sixty five and presumed to be workers than in the over

sixty five age category, had growth. COAH did that analysis.

\* \* \*

But in the reallocation analysis, what COAH did is used the same job survey factor to compare the regional share of jobs based on ratable -- by municipality compare it to the regional share. And found that compared to other regions, region three was one where the below thirty five population had increased, below thirty five, low and moderate income population had increased.

\* \* \*

So, in this region, the reallocation process increased, in effect, the allocation of low and moderate income households.

THE COURT: This is what COAH did?

DR. KINSEY: This is what COAH did in the second round....

\* \* \*

For the next period, for the ten year period of 2015 and '25, that didn't happen. In fact, there was a decrease in about 17 percent in the share of low and moderate income households below sixty five over the next period, which I show in Slide 32.

[5/9/16T 30:4-32:13].

That trend was also confirmed by Mr. McCue who testified that younger families will comprise the vast majority of demand for affordable housing from 2015 to 2025 in the State, and that persons over the age of sixty-five are "aging in place," which negatively impacts the ability of those younger families to access these homes.

I am therefore satisfied that the best available data does not support a reallocation of prospective need between regions,

despite COAH's use of that factor. Accordingly, that factor will be excluded from South Brunswick's calculations.

**viii. The Final Calculation of Regional Prospective Need (2015 - 2025)**

This next step is a culmination of the first ten calculations needed to project the regional prospective need for the period from 2015 through 2025, which then must be allocated to each municipality in the region, and thereafter adjusted to take into account secondary sources of demand and supply.

As projected by Dr. Angelides, the statewide need from 2015 to 2025 is only 35,048 newly constructed units. Dr. Kinsey, on the other hand, projects a statewide need amount of nearly four times (4x) more, or 138,471 units. Dr. Angelides' projection correlates to a regional need of 8,780 low and moderate income households, while Dr. Kinsey's, on the other hand, correlates to 20,396 new households.

Based upon my individual assessment of Dr. Angelides' many deviations from COAH's approved methodology, his use of demonstrably unreliable data sources, and his utilization of too many assumptions, I have rejected Dr. Angelides' methodology as it relates to his original prospective need calculation. In contrast, I find Dr. Kinsey more faithfully followed COAH's protocols and processes and found his testimony to be credible

and forthright. Accordingly, I accept his calculations of the regional prospective need from 2015 to 2025.

**b. Allocating Municipal Prospective Need**

Once regional prospective need has been calculated, the second component of the fair share methodology must be addressed. That methodology is comprised of the following six steps:

- (a) Exempt qualifying urban aid municipalities from the housing need allocations;
- (b) Calculate the equalized non-residential valuation (ratables) factors;
- (c) Calculate the undeveloped land factor;
- (d) Calculate the differences in household income factor;
- (e) Calculate the average allocation factor to distribute low and moderate income housing need by municipality; and
- (f) Calculate gross prospective need.

In its First Round methodology, COAH used four factors to allocate the regional prospective need at the municipal level. In the Second Round, however, COAH only utilized three factors: (1) non-residential ratables; (2) undeveloped land; and (3) household income differences. To determine the appropriate allocation, the regional prospective need is multiplied by the average of those three factors.

**i. Exempt Qualifying Urban Aid Municipalities from the Housing  
Need Obligation**

In both its First and Second Round methodologies, COAH declined to allocate any prospective need obligation to the designated Urban Aid Municipalities. However, while Dr. Kinsey adhered to COAH's practice in this regard, Dr. Angelides did not, opting instead to allocate prospective need to several Urban Aid Municipalities in the State, including New Brunswick, through secondary sources, i.e. demolitions, conversions and filtering, a deviation lacking any rational basis, and therefore, inappropriate.<sup>10</sup>

**ii. Calculate the Equalized Non-Residential Valuation  
(Ratables) Factors**

In its First Round methodology, COAH utilized a number of allocation factors, including: (1) the current covered employment, and (2) the change in that covered employment. Using those factors generated an anomaly, identified by COAH as

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<sup>10</sup> While Drs. Kinsey and Angelides agree that Carteret, New Brunswick, Perth Amboy are qualified Urban Aid Municipalities, they disagreed as to whether Woodbridge meets the requisite criteria. However, given my decision to exempt Urban Aid Municipalities from any allocation, I have declined to address its status in this regard, especially since Woodbridge is not a party to this case, and because the practical effect on South Brunswick's ultimate fair share number calculation is de minimis.

the "zip code problem," that occurs when a business' place of employment (the building) is physically located in one municipality, but the business' mailing address and/or zip code correlates to a different municipality. As a consequence, the municipality where the building physically sits might not receive credit for job (and job growth), which can skew the allocation factor. 5/24/16T 17:14-20:8.

South Brunswick presents a perfect case in point. Numerous jobs are physically being performed within its borders, but many of the businesses generating those jobs have mailing addresses and zip codes in a different municipality, such as Monroe and Princeton. 5/9/16T 47-52. Because of the "zip code problem," COAH altered its methodology, and chose in the Second Round to rely instead on non-residential ratables as a "surrogate" for employment.

Dr. Kinsey explained why this was particularly appropriate for South Brunswick:

MR. GORDON: How is this [zip code problem] relevant to South Brunswick specifically?

DR. KINSEY: This is relevant, because of the pattern of zip codes that the Post Office has established throughout the State, and particularly in South Brunswick, where there are a variety of zip codes. And there are certainly a variety of types of jobs all around Exit 8A [of the New Jersey Turnpike], parts of that area are in South Brunswick Township, with a different zip code than the core of the zip codes in South Brunswick... [such as] a place in South

Brunswick called Dayton. It's not the same as the South Brunswick zip code. It has its own.

[5/9/16T 47-25].

On the other hand, Dr. Angelides was critical of COAH's use of non-residential ratables as a surrogate for employment growth, believing it to be fundamentally flawed. In his opinion, using the valuation of non-residential properties within a municipality was not a reliable barometer of employment or employment growth. Instead, he advocated using employment-related allocation factors, as COAH did in its First Round methodology, which, in his view, was superior. He also belittled the "zip code problem" as a non-issue, since it both adds and subtracts employees within the same municipality, resulting in a statistical off-set.

The net effect of Dr. Angelides' methodology was a prediction that South Brunswick would experience zero employment growth during the 2015 to 2025 compliance cycle, a rather remarkable and troubling conclusion in light of the Township's heavy reliance on multiple 100% percent affordable housing projects which it intended to finance, at least in part, with money collected and deposited in its Affordable Housing Trust Fund from assessments levied against developers of new non-residential projects.

Dr. Kinsey referred to this circumstance as both  
"puzzling" and "curious":

THE COURT: So, how do you square that with the plan of South Brunswick that shows according to Econsult a zero employment growth? They're using a zero employment growth, and yet the South Brunswick plan is depending upon non-residential development to fund its affordable housing trust fund.

DR. KINSEY: That's a puzzling set of facts and arguments that you put your finger on. The - if you recall that in the Econsult approach, there are four allocation factors. Two of them are economic and one, according to Econsult's data source, is zero for South Brunswick. So, if one multiplies the sum of four factors, one of which is zero by four, not surprisingly, one gets a lower number than my approach which was to follow the COAH methodology closely, and use three allocation factors and divide by three. And then secondly, in terms of your - the trust fund point you make, yes, it - it is curious that if the Township is anticipating additional non-residential development and -

THE COURT: They can't - can't both be right.

DR. KINSEY: They can't both be right.

[5/9/16T 38:8-39-7]

This glaring disconnect between the Township and its expert consultant dramatically undermines the credibility of both.

Not surprisingly, Mr. Bernard, the former Executive Director of COAH, took issue with Dr. Angelides' criticism of COAH's choices. He explained that the use of non-residential ratables was, in his (and COAH's) opinion, the best surrogate available to calculate employment and employment growth within a

municipality, and that non-residential tax valuations are the most accurate source of data:

MR. KENT-SMITH: Now, you heard testimony with regard to, particularly, Dr. Angelides, that the non-residential land values are not an accurate indicator of jobs. Does that concern alter your opinion, or your experience with COAH? Did they consider that issue?

MR. BERNARD: No, it doesn't alter my opinion at all. I'm not -- you know, Dr. Angelides presented a graph, and I'm not sure how accurate his jobs data was in terms of our non-residential valuation data, but I know the non-residential valuation data is correct. When he presents data that shows that South Brunswick had no job growth over a period of time I questioned that, and I know that they had a substantial increase in non-residential valuations over time. And -- and what we were doing with the allocation factors is we were trying to come up with reasonable, not necessarily exact, factors that would give us reasonable regional shares that we could allocate to communities around the state. The non-residential valuation factor, I think, turned out to be a really good improvement, because it -- it's accurate at the municipal level. It -- it result -- allow the process to move. We didn't lose units, and -- and even if it's not a 100 percent pure surrogate for employment, I think it is a good surrogate for municipal responsibility in that if [the] municipal tax base is -- is increasing rapidly, it's probably in a better position to address the affordable housing obligation that some towns that aren't getting a non-residential valuations.

THE COURT: And I take it -- it's more accurate relative one municipality to another if you're using the same standard for everybody?

MR. BERNARD: Yes.

MR. KENT-SMITH: And this change between the first round rules, and the second round rules, that was all vetted through the rule making process?

MR. BERNARD: It was.

[5/24/16T 19:15-21:1].

Mr. Bernard also criticized Dr. Angelides' opinion as "going backwards", a move that will inevitably cause the same problems that caused COAH to alter its First Round methodology:

THE COURT: Does Dr. Angelides follow the second round methodology as to allocation of regional need to the municipalities?

\* \* \*

MR. BERNARD: No, he doesn't. And what he does is he uses the census database called -- with the acronym LODES, that's based on unemployment data.

THE COURT: So, then what's your concern about this LODES -- the L-O-D-E-S -- the LODES database?

MR. BERNARD: Well, it strikes me we're going backwards, Your Honor, and we're going back to covered employment again, and as I recall Dr. Angelides' testimony couldn't even tell the Court that this database addressed the zip code problem. So, I think, you know, if the Court buys into this you're going to have the same situation that we had at COAH where municipalities are challenging the employment allocations. You're going to have to deal with -- someone is going to have to deal with the way to address it. It's going to take time. You're going to lose units, and the other thing that troubles me about Dr. Angelides' use of it is he counts employment twice, not once. So, any --

THE COURT: Explain that.

MR. BERNARD: Well, in the -- the second round we had three allocation factors... three factors treated equally, each factor counted as a third. Dr. Angelides uses not only current day employment as measured by this LODES data, but he also has this employment growth factor. So, he has two employment factors out of four. So, it counts as half of the allocation factor.

THE COURT: Instead of a third?

MR. BERNARD: So, if there's a mistake in the employment factor it's -- it's going to be magnified -

THE COURT: Magnified by the fact that it's using --

MR. BERNARD: -- by the fact it's counted twice.

THE COURT: -- two -- two factors instead of one out of three.

MR. BERNARD: Yes.

[5/24/16T 21:7-23:1].

Not only did Dr. Angelides completely ignore the Second Round methodology, but his use of two employment-related allocation factors, or fifty percent (50%) of the total allocation, exaggerates the inaccuracies in the LODES data, and, not surprisingly, lowers South Brunswick's prospective need numbers.

Based on the foregoing, and because South Brunswick is particularly susceptible to the "zip code" problem, Dr. Kinsey's use of non-residential ratables as a surrogate for employment, and his reliance on the Department of Community Affairs Local Government Services records for non-residential assessed property values, is consistent with COAH's Second Round methodology, and is accepted, as is his conclusion that South Brunswick's share of non-residential ratable growth is .086164517 (or, 8.6164517%).

**iii. Calculate the Undeveloped Land Factor**

The next step is to determine whether a municipality has the physical capacity to absorb and provide for affordable

housing, thus requiring an analysis of the potentially developable land in a municipality.

In his proposed methodology, Dr. Angelides sought to identify all of South Brunswick's vacant, developable land through the use of MOD-IV data, a source of property tax information, and then he eliminated parcels that were: (1) developed, but under-utilized; (2) in a redevelopment plan; (3) abandoned; (4) in foreclosure; and (5) developable, but environmentally sensitive.

Dr. Kinsey, on the other hand, adhering to COAH's Second Round methodology, utilized satellite and aerial imagery published by the New Jersey Department of Environmental Protection, along with data from Rowan University, to determine that approximately 1,000,000 acres of land remained undeveloped in the State. He testified that Dr. Angelides' use of property tax assessment records was not a COAH sanctioned or approved data source for calculating this factor, and perhaps more significantly, it did not accurately measure developed land, explaining:

Econsult took a different approach, a different data source for a starting point, in particular. I used undeveloped land. Econsult used vacant land as classified by tax assessors as recorded in property tax records at the municipal level, which are aggregated -- first, I'd like to -- and published by the State, and other sources. But the distinction is

important, because a -- a lot that a tax assessor calls vacant [land], could be two acres. Okay? A lot that a tax assessor calls residential, it could be twenty acres. That would be classified under the property tax classification system as residential. But common sense suggests that if only half of that twenty acres, more likely two thirds of it was woods, forest, maybe a huge lawn, all of that, I would consider to be undeveloped land, unless it was restricted for something. It could be farmland preservation, but that restriction shows up anywhere else. So, the distinction is between vacant land, which I think is an inaccurate measure of the undeveloped land, because of the problem I just identified.

[5/9/16T 60:4-61:11].

Dr. Kinsey continued, "I think land cover data is much more accurate in identifying undeveloped land" than using property tax records. 5/9/16T 63:7-12. Mr. Bernard agreed, stating that Dr. Kinsey's use of satellite and aerial imagery was: (1) consistent with COAH's methodology; (2) was the most accurate and efficient method of identifying developable land; and (3) that Dr. Angelides' use of the MOD-IV data was, in contrast, a clear departure from it:

MR. KENT-SMITH: All right. And then what, in your opinion and experience with COAH, then what transformed COAH's use from the round map to the second round satellite imagery?

MR. BERNARD: Well, we -- COAH found that the -- the first round use of the -- the growth areas from, I believe, it was the old state plan -- the old state development plan, allocated more need into areas that were already developed, and -- we had gone through a lot of vacant adjustments, and in those days, you'll

remember, Your Honor, that there was no requirement to do unmet needs, so we were losing a lot of units to vacant land adjustments, and we wanted to allocate the housing need based on where the undeveloped land was as weighted by what the goals of the state planners were, and in -- you know, which kind of matched up with their sewer service areas. We're -- were trying to get the housing to where we thought it was more likely to be built, and -- and, so that's the reason we -- we moved to that database.

MR. KENT-SMITH: And, in your opinion, was COAH's use of that database successful in the Second Round?

MR. BERNARD: It was. It was -- it was accurate, and came up with reasonable regional shares that were not challenged. We did not lose --

THE COURT: When you say challenged, you mean difficult to develop?

Mr. Bernard: No, what I mean by challenged the -- regional shares weren't challenged by municipalities.

THE COURT: Oh, okay.

MR. BERNARD: That the -- we didn't -- COAH did not lose time as a result of trying to figure out the correct allocation, nor did it lose units. I think it was a very efficient thing to do.

MR. KENT-SMITH: Does Dr. Angelides follow this second round methodology using satellite imagery?

MR. BERNARD: No, he -- he's using the municipal model for tax records.

MR. KENT-SMITH: And could you just explain, in terms of what concerns you have relative to the use of this tax data?

MR. BERNARD: Well, the first one is it really hasn't been vetted. We -- we don't know what some of the problems are going to be. I think Dr. Angelides, between December 30th, and now, has already found one problem with what he proposed in December 30th. I suspect there will be more. But it strikes me that his elimination of land as developable, based on the fact that it has some improvement on it, gives an

advantage to municipalities who have practiced large lot zoning at the municipal level, and also, with regard to commercial properties I can think of a lot of large parcels with minimal improvements on it that would be eliminated as -- as developable land as a result of that methodology. So I'm troubled by that.

[5/24/16T 26:14-28:19].

The obvious impact of Dr. Angelides' unilateral rejection of COAH's method of choice for determining vacant, developable land was the elimination of a substantial amount of acreage that was under-utilized, or capable of being redeveloped, thus skewing the results and lowering South Brunswick's fair share number.

On the other hand, Dr. Kinsey's approach is faithful to COAH's Second Round methodology, and was, according to Mr. Bernard's highly credible testimony, a more reliable and accurate method of calculating South Brunswick's vacant, developable land. As such, I accept Dr. Kinsey's calculation that South Brunswick's allocation factor for undeveloped land is .101856321 (or, 10.1856321%).

**iv. Calculate the Differences in Household Income Factor**

The next step is to evaluate the Township's fiscal capacity to absorb affordable housing, which is achieved by calculating the "household income difference" factor. As described by Dr. Angelides, this factor "both measures[s] how much richer in terms of income one township is compared to the -- the lowest income township in the region." 5/2/16T 146:12-18. He continued,

"So, if you're a low income township you get a very low assignment here. In fact, if you're the lowest you get nothing. If you're a very high income township, then your share of this factor is higher than everybody else's." Id. at 146:18-23.

In addressing this issue, Drs. Kinsey and Angelides essentially utilized the same methodology, consistent with COAH's Second Round Rules, and, predictably, reached similar results. However, while Dr. Kinsey used 2010-2014 ACS Survey data, Dr. Angelides used the less up-to-date 2009-2013 ACS data, without offering any explanation for doing so. Absent any compelling reason to do otherwise, the 2010-2014 ACS data (as the most current data) will be used in calculating the "household income difference" factor. Accordingly, South Brunswick's household income difference factor is .036042548 (or, 3.6042548%).

v. **Calculate the Average Allocation Factor to Distribute Low and Moderate Income Housing Need by Municipality**

Once the three allocation factors have been determined, both experts agree that the next step is to calculate the "average" allocation factor for each municipality, which is determined by adding the three allocation factors together, and then dividing the sum by three. See 5/9/16T 65:1-12.

Because I have accepted each of Dr. Kinsey's allocation factors, I find that South Brunswick's "averaged" allocation factor is .074687795.<sup>11</sup>

**vi. Calculate Gross Prospective Need**

The final step is to calculate the Township's gross prospective need, which requires that the regional prospective need number to be multiplied by the average allocation factor.

Because I have accepted Dr. Kinsey's calculation of regional prospective need, as well as his the average allocation factor, I am satisfied that South Brunswick's allocated prospective need is 7.47% of the projected 20,396 units, which, without adjusting for secondary sources, is 1,523 units.<sup>12</sup>

**c. Adjusting for Secondary Source of Demand and Supply**

To properly adjust for secondary sources of demand and supply, all parties agree that the following seven (7) steps must be completed:

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<sup>11</sup>  $.086164517$  (nonresidential valuation factor) +  $.101856321$  (undeveloped land factor) +  $.036042548$  (household income difference factor) =  $.22406337 / 3 = .074687795$ .

<sup>12</sup>  $20,396$  (regional prospective need) x  $.074687795$  (average allocation factor) =  $1,523.33216$ , which is then rounded down to  $1,523$  units.

- i. Estimate for 2015 and project for 2025 demolitions affecting low and moderate income households;
- ii. Estimate for 2015 and project for 2025 residential conversions affecting low and moderate income households;
- iii. Estimate and project filtering affecting low and moderate income households;
- iv. Calculation prospective need by municipality;
- v. Calculate the 20-percent cap and, if applicable, reduce prospective need;
- vi. Calculate prospective need obligations (net) by municipality; and
- vii. Calculate the 1000-unit cap and, if applicable, reduce the prospective need obligation.

Those steps are addressed more fully below.

**i. Estimate for 2015 and Project for 2025 Demolitions Affecting Low and Moderate Income Households**

In its prior round methodologies, COAH accounted for affordable housing units that were demolished (and therefore no longer available to low and moderate income households) by increasing a municipality's affordable housing obligation for each demolished unit. It did so by using the number of demolitions permits issued.

Using the number of demolition permits issued (as recorded by the DCA) from 1999 to 2015, Dr. Kinsey established an annualized "trend line," to project the probable amount of demolitions that would take place between 2015 and 2025. He then multiplied that number by the share of demolitions impacting low

and moderate income households in the county, to calculate the resulting reduction of units available to low and moderate income persons.

While Dr. Angelides also used the DCA data to establish an annualized trend line, he opted not to use COAH's methodology for calculating the share of low and moderate income households lost through demolitions. Instead, using HUD's "Components of Inventory Change" data, he tried to estimate the number of demolished units that were actually occupied by low and moderate income households, even though this was a departure from the prior round methodologies:

DR. ANGELIDES: ... And so, we had to figure out of the demolitions that were occurring how many of them were providing housing to low and moderate income families? And so that's a several step process. First of all, in order for the unit to be providing housing to low and moderate income families it has to actually be occupied. All right? So there are - throughout New Jersey and throughout the rest of the country there are numerous units that have been vacant long term, they're not providing housing services to anybody. And many of those get demolished. So, the demolition of those types of units does not decrease the supply of housing for low and moderate income families because they haven't been in the housing market in some sense. They are demolished, but they haven't been providing housing. And we also need to know of the units that are demolished which ones are occupied by low and moderate income households. So, some units are occupied by non-low and moderate income households, and those numbers don't decrease the supply. And then, finally, you have an issue of double counting in the sense that some of the housing that's demolished is deficient in one of the three ways that we talked about earlier. And those things have been already

captured in the present need, so we don't want to double count them, just once is fine. And that's it.

[5/2/16T 157:13-158:15].

Predictably, Dr. Angelides' failure to follow COAH's prior round methodologies resulted in a reduction of South Brunswick's fair share obligation:

MR. GORDON: Demolitions. Did you deviate from how the number of demolitions were calculated in the prior round methodology in any way?

DR. ANGELIDES: Yes, that calculation is different.

MR. GORDON: Is it technically possible to do the calculation in the same way that it was done in the prior round methodology?

DR. ANGELIDES: Yes, it is.

MR. GORDON: And did that deviation increase the need or decrease the need?

DR. ANGELIDES: Um --

[Pause in proceeding]

DR. ANGELIDES: So, I hesitate. I think the total number is lower, but I don't think that's true for every region.

[5/2/16T 144:19-145:7].

Because Dr. Angelides' unnecessary deviation from COAH's methodology served no discernable purpose other than to reduce South Brunswick's affordable housing obligation, I decline to accept it.

ii. Estimate for 2015 and Project for 2025 Residential  
Conversions Affecting Low and Moderate Income Households

Conversions are another secondary source affecting the supply side of housing units. Conversions occur when a residential property is altered or "converted" into multiple housing units, which, unlike demolitions, lower a municipality's affordable housing obligation. As Dr. Kinsey explained:

Again, the COAH theory is that there's - there's some dwelling units that are not accounted for.... But if you take the difference between the two censuses, and you look at building permits, and you look at demolitions, it all doesn't mesh neatly. And COAH's theory is that [these] are some units that for some reason aren't getting the approval that's recorded somewhere, and that's what COAH characterized as conversions. The -- concept of a -- an industrial loft, nonresidential become residential, or a single family house becomes a two unit apartment, or the other way around. A -- a two unit house becomes a single person house.

[5/5/16T 127:11-128:2].

While both experts generally followed the same methodology in calculating conversions, they used different data sources. Dr. Angelides utilized "certificates of occupancy," (as reported by the DCA) based on his belief that they were a more reliable metric for determining completed residential construction. Dr. Kinsey disagreed. In his view, "by using certificates of occupancy instead of building permits, which is what COAH used, Econsult is incorrectly calculating and projecting conversions. And there is a difference of some twenty thousand units."

5/5/16T 176:24-177:3. Explaining his preference for using building permits, Dr. Kinsey testified:

DR. KINSEY: It's reliable -- [building permits are] more reliable. It turns out there are some places, in particular in -- in Hudson County, where there's a huge... leakage. There are -- there are far more building permits that are issued than are -- than the number of CO's that are issued. That's somehow, the CO's just don't get issued. It's -- the State-wide percentage of CO's to building permits is something like 89 percent. It varies from county to town. In Ocean -- in Hudson County, it's more like 50 percent. And the -- the particular example... look at Jersey City. Everybody sees all the -- all the thousands of units that have been built in Jersey City. It's tangible, visible. Jersey City leads the State in terms of building permits, but not in CO's. What's out of sync here? What's wrong with this picture? And it's the way CO's are counted and recorded in Jersey City. It's a problem in Hoboken as well.

THE COURT: You think that it's an unreliable source, because they're not counted properly?

DR. KINSEY: That's correct.

THE COURT: Not because building permits are issued, but then they don't actually result in buildings being built.

DR. KINSEY: That's correct.

THE COURT: Okay. Go ahead.

DR. KINSEY: It's a reasonable housing policy, understanding... that not all building permits result in a CO. Developers give up on a project, something happens, whatever. But that's not what's happening in New Jersey --

[5/5/16T 178:8-179:18].

Furthermore, Dr. Angelides' use of certificates of occupancy was admittedly inconsistent with COAH's approach, a choice that, once again, lowered the estimated need for

affordable housing. See 5/3/16T 145:19-146:4 ("Had I used building permits and certificates of occupancy, the State-wide need would have been higher"); see also 5/2/16T 166:5-9.

As before, I view Dr. Kinsey's testimony to be highly credible, persuasive and consistent with COAH's rules, while Dr. Angelides' deviation, which projects approximately 20,000 fewer affordable housing units throughout the State, is rejected as inappropriate.

**iii. Estimate and Project Filtering Affecting Low and Moderate Income Households**

The final secondary source of demand and supply is "filtering". Downward filtering (which reduces prospective need) occurs when a middle or upper income household moves out of a housing unit that is affordable to a low and moderate income household. Conversely, upward filtering (which increases prospective need) occurs when the cost of a housing unit that was once affordable to a low and moderate income household rises above that which is affordable to a low or moderate income household. According to Mr. Bernard:

MR. BERNARD: . . . filtering recognized that there are older buildings that change hands over time, and as they change hands over time on balance, housing units become available and affordable to low and moderate income households.

MR. KENT-SMITH: So, what do you mean when you use the term "on balance?"

MR. BERNARD: Well, it -- it means that -- that some units -- when they change hands, are lost to low and moderate income households, and some change hands from people who are not income eligible to people who are. But on balance more filter down than filter up.

MR. KENT-SMITH: Did COAH have standards as it related to when a unit would filter down? What was COAH's standard?

MR. BERNARD: Well, in order for a unit to filter to be counted towards filtering, it needed to change hands from someone who was not income eligible, to someone who was. It needed to be in sound condition, and it needed to be affordable to low and moderate income households.

MR. KENT-SMITH: And this was part of the second round methodology, this filtering?

MR. BERNARD: It was.

[5/24/16T 35:3-25].

In 2007, however, the Appellate Division invalidated COAH's Third Round Rules filtering model, which was based, in large part, on prior round methodologies. See In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 45-46 (App. Div. 2007). While the court did not foreclose the use of filtering as a secondary source, it cautioned that a methodology for filtering "must be based on the most recent and reliable data available". Id. at 46. Because of that decision, neither Dr. Kinsey nor Dr. Angelides attempted to replicate the prior round methodologies, instead choosing to create their own filtering models.

Dr. Angelides explained his filtering methodology thusly:

DR. ANGELIDES: So, we collect data on filtering in New Jersey. And the way we do that is by looking at all of

the housing transactions between 2000 and 2014 in New Jersey. So, every single housing transaction in New Jersey between 2000 to 2014. And we measure whether -- and we look through all of them and identify houses that sold twice in that period of time. And if you look at the measure for the first transaction and for the second transaction, whether that house was affordable to a low and moderate income family.

\* \* \*

And so, [to determine whether that house is affordable,] we convert that [purchase price] into a housing cost that -- on an annualized basis. So, we take a percentage number that we apply to the sale price that accounts for property tax and interest and mortgage insurance, and homeowner's insurance, and create an annual housing price.

\* \* \*

So... if a house was not affordable in the first transaction, and if it was affordable in the second transaction, then it's filtering down. If it was affordable to low and moderate income families in the first transaction, and was not affordable in the second transaction, that's filtering up.

\* \* \*

So, we calculate -- observe which units filter and which do not, according to our definition. And we use those observations to develop an econometric model of filtering that takes into account whether you had filtered the income of the community, the density of the community, how many units are in the community, and other economic factors in the community, and then we used that model to predict future filtering based on the characteristics of the community going forward in predictions of growth.

[5/2/16T 186:19-199:21].

Dr. Angelides estimated that 37,604 units will filter down to low and moderate income persons throughout the State between 2015 and 2025 (thus reducing the statewide affordable housing need), and projected that South Brunswick's allocation of that

downward filtering would decrease its affordable housing need by 54 units.

On cross-examination, Dr. Angelides conceded that his methodology suffered from several flawed assumptions. Not only did he ignore the need for a down payment in his definition of "housing cost", but he excluded the principal payments as well as the interest required to amortize a conventional 30- year mortgage:

MR. GORDON: So, your -- your assumption is that something's affordable without looking at whether it includes a principal on a mortgage or not?

DR. ANGELIDES: So, principal's not a cost in the same [sense] that interest is. Interest is gone, just like rent, when you spend the rent, the rent's gone, you never get it back. The principal is not gone. It's yours. It's savings. So, it's a form of forced savings.

MR. GORDON: If a low and moderate income person's going to a bank and applying for a mortgage, do they have to qualify based on whether they can pay just the interest or the principal plus the interest?

DR. ANGELIDES: Both.

MR. GORDON: Both the principal and the interest?

DR. ANGELIDES: Yes.

[5/4/16T 99:8-22; 5/4/16T 102:3-103:4].

Tellingly, when Dr. Angelides altered his filtering methodology to include principal and interest, the need for affordable housing increased. See 5/4/16T 119:21-120:25.

In addition, since he lacked an "actual" statewide data source for rental housing, he had to "extrapolate" the filtering of rental units from the owner-occupied housing data:

MR. GORDON: ... I want to start with rental units. How do you determine whether or not a rental unit gets filtered in your methodology?

DR. ANGELIDES: There is no direct -- so, the -- the filtering model uses data from owner-occupied housing.

MR. GORDON: So, there is no data for rental housing?

DR. ANGELIDES: That's correct.

MR. GORDON: Do you know what share of low and moderate income households in New Jersey are renters?

DR. ANGELIDES: A large percentage. I don't know the number offhand.

MR. GORDON: Upwards of half?

DR. ANGELIDES: That's my belief, yes. My -- my understanding, not my belief.

MR. GORDON: So, -- so, for a population that is in your understanding more than half of the low and moderate income households in New Jersey, your model doesn't have any actual data; is that correct?

DR. ANGELIDES: That's correct. Not on -- so, the -- the data are based on owner-occupied housing. That's correct.

[5/4/16T 89:2-21].

Since his model did not use "actual data", Dr. Angelides was uncertain as to whether or not the transaction data he did rely on excluded vacant lots or homes that were damaged by Super Storm Sandy which, of course, would further burden a low and moderate income household in terms of the funds required to

construct a home or re-construct it to make it habitable. See  
5/4/16T 77:24-82:24.

Finally, Dr. Angelides included any housing unit so long as it "is available to be purchased by low and moderate income family." See 5/4/16T 74:74:7-75:15. Despite the fact that COAH's maximum sales price for a moderate income household in Region 3 is \$196,000, see 5/9/16T 74:19-22, Dr. Angelides testified that a \$500,000.00 home at the Jersey Shore was "affordable," 5/4/16T 148:10-13, not a credible position. When questioned about that issue, he acknowledged that his numbers would change if the homes purportedly available for filtering down were not actually affordable to, or occupied by, low and moderate income households:

DR. ANGELIDES: If those houses are not filtering down, then that would change the numbers, yet.

[5/4/16T 195:9-196:7]

In stark contrast, Dr. Kinsey utilized a three-step process to determine if a unit had filtered:

- (1) Whether the unit was initially unaffordable to low and moderate income household, but is now affordable;
- (2) Whether the unit is in sound condition; and
- (3) Whether the unit was already occupied by low and moderate income persons.

[5/9/16T 70:1-71:25].

Although he used the same set of repeat sale transactions, and included the same factors as Dr. Angelides, unlike his counterpart, he did recognize the need for low and moderate income households to pay principal and interest, hazard insurance, mortgage insurance and property taxes. See 5/9/16T 73:22-74:16.

Addressing rental units, Dr. Kinsey used the ACS data to determine first, whether a rental unit had "changed hands" at least once since 2000; and second, whether those units were affordable or not. See 5/9/16T 82:3-83:23. He also used the ACS data to determine the share of both rental and owner occupied units that were actually occupied by low and moderate income households. See 5/9/16T 80:8-18, 84:15-18. Based on all of these factors, Dr. Kinsey projected a statewide loss of 30,047 units (between 2015 and 2025) due to "upward" filtering, a phenomenon that equated to a 395 unit increase in the Township's affordable housing obligation.

While Mr. Bernard was particularly critical of Dr. Angelides' filtering model, he was also unsure that Dr. Kinsey's model was reliable:

MR. BERNARD: ... Well my conclusion is that Dr. Angelides' methodology for filtering is -- not accurate. It bears no resemblance to what actually has occurred on the ground, and it strikes me that Court, is pretty much in the same position with Dr.

Angelides' methodology as the Appellate Division was in 2007, where the Appellate Division was faced with a consultant, with a very complex, technical, hypothetical model that showed that filtering was occurring, and some hard census data that shows the opposite is true. It also strikes me that another way to look at this data, Your Honor, is when you think about the various constructs within the prior round methodology that include demolitions and conversions, that include a number of assumptions, and that they're in effect theoretical constructs that you could look at these data, and you could say, you know, even -- no matter what happened with demolitions, and no matter what happened with filtering we lost 130,000 affordable units in the state from 2010 -- from 2000 to 2010 if -- if you're looking for a simple way to quantify it, and if we projected that number 16 years forward, then the number would be huge, and if Your -- Your Honor was thinking about using something like this as an alternative to these complex theoretical models you might choose to defer most of that. But -- but -- but I think what this does show is that although I can't say that the -- the Fair Share Housing Center model is -- is accurate, I think it shows that it is, at least, in the right direction and probably conservative.

THE COURT: But they both use a filtering factor, both Angelides and Kinsey.

MR. BERNARD: Well, Kinsey, in effect, takes the -- the Angelides model and corrects some of the assumptions, some of things we talked about, about [principal], and the interest rate, and -- whether it's actually occupied by low and moderate income households, and the fact that it doesn't have any data about rentals, well, the Kinsey model has data about rentals. It has -- it corrects the assumptions about [principal] and interest. A unit doesn't filter unless it's actually occupied by a low and moderate income household.

THE COURT: Well, those are the things that you believe COAH would want to see were they to try to overcome the Appellate Division's identification of deficiencies?

MR. BERNARD: Yes.

MR. KENT-SMITH: Now, with regard to the -- the model and construct that Dr. Angelides prepared, then your opinion, just to summarize for the Court, is that that is a less reliable model than Dr. Kinsey's?

MR. BERNARD: I -- I don't know that either model is reliable. I -- I don't understand the -- the Kinsey model well enough to say that it's a reliable model. All I can say is that the results are -- have -- are more consistent with what you see when you just look at the hard data, and -- and that the results may be even conservative.

[5/24/16T 54:11-56:22].

Finally, Mr. Bernard expressed serious reservations as to whether filtering is appropriate at all, in light of the Appellate Division's mandatory prerequisites for including a "filtering" component in a fair share methodology:

Well, there were a number of concerns, one is that the Appellate Division had laid out five conditions that -- that COAH needed to demonstrate existed in New Jersey for filtering to occur, and I found that they couldn't show that those conditions existed, filtering especially, because of the tight housing market, and the low vacancy rate.

[5/24/16T 38:11-16].

While both Drs. Angelides and Kinsey included "filtering" as a factor to be considered in formulating an appropriate fair share methodology, neither satisfactorily addressed the deficiencies identified by the Appellate Division in In Re Adoption of N.J.A.C. 5:94 and 5:95, supra, or the criticisms offered by Mr. Bernard in his credible and persuasive testimony. Given the Supreme Court's admonition to avoid using

"disapproved" techniques, and Mr. Bernard's candid reservations as to the reliability of either Dr. Angelides' or Dr. Kinsey's model, I have excluded the concept of "filtering" from the fair share methodology adopted herein.

**iv. Calculate Prospective Need by Municipality**

The next step is to adjust the Township's gross prospective need, of 1,523 units, in light of the secondary sources of supply and demand. While I have excluded the concept of "filtering," both demolitions and conversions remain viable secondary sources, which will ultimately affect South Brunswick's fair share of this region's affordable housing need.

According to Dr. Kinsey's methodology, South Brunswick's fair share obligation increased by 30 units because of "demolitions" between 2015 to 2025, but it decreased by 20 units based on "conversions". Accordingly, after applying the net increase of 10 units, South Brunswick's fair share obligation is 1,533, a number that will be further adjusted based on a number of COAH approved regulations and devices.<sup>13</sup> Finally, the last three steps of this component which are:

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<sup>13</sup>The precise calculations performed to compute South Brunswick's unadjusted fair share number of 1533, are detailed, infra in the attached Appendix.

(a) calculate the 20% cap and, if applicable, reduce prospective need;

(b) calculate prospective need obligations (net) by municipality; and

(c) calculate the 1,000-unit cap and, if applicable, reduce the prospective need obligation

The availability and application of these potential adjustments will be addressed during the compliance phase of the trial, as discussed more fully in Section IV below.

### **C. Summary of Witness Credibility**

While I have, throughout this opinion, expressed my view of the credibility of the experts, I feel compelled to summarize them and to comment on some of the more subtle indicia of truthfulness. These factors include the witnesses' tones while testifying, whether they maintained eye contact, their demeanor, whether they appeared evasive or forthright, whether any motive or bias was apparent, as well as the witnesses' general body language. All of these factors were taken into consideration by me in assessing the credibility of each witness.

Mr. McCue, whom I believe to be one of the foremost experts in the country, answered all questions directly and candidly. He was knowledgeable, had no apparent bias or motive to "shade" his testimony, nor did he hedge or delay when being cross-examined. His testimony was consistent with common sense, supported by reliable data, and generally believable in all respects.

Likewise, Mr. Bernard's testimony was also highly credible and persuasive. His unique background: (1) as COAH's Executive Director; (2) as an affordable housing consultant for both municipalities and builders/developers; and (3) as a court appointed Special Master, enabled him to offer a truly unique perspective, unrivaled by any other witness, about the substantive issues confronting the court. His presence at COAH during the promulgation of that Agency's First and Second Round Rules imbued him with knowledge of, and invaluable insights into, COAH's policy objectives and rationales. He provided thoughtful, direct answers on both direct and cross-examination, and showed no bias in evaluating the strengths or weaknesses of the parties' respective positions. The fact that he found neither Dr. Angelides' nor Dr. Kinsey's methodology regarding "filtering" reliable was, in my view, demonstrative of his candor.

I also found the testimony of Dr. Kinsey to be credible and forthright as well. Sounding more like an academic professor than an advocate, he provided detailed explanations in response to my questions, as well as those posed by opposing counsel. Indeed, Dr. Kinsey's testimony unquestionably underscored his deep, possibly unparalleled understanding of the Mount Laurel doctrine, drawn from his background as: (1) a private sector planning consultant on affordable housing issues; (2) a public sector consultant assisting municipalities with their housing elements and fair share plans; (3) as a Special Master in affordable housing litigation; (4) as an active participant and commenter to COAH during its rule making process; (5) as a professor and lecturer on affordable housing issues at Princeton University, Rutgers University, and the University of Pennsylvania; and (6) as an author of scholarly articles related to the Mount Laurel doctrine, (one of which was cited approvingly by the Supreme Court).

In addition, Dr. Kinsey's efforts to craft a constitutionally acceptable fair share methodology, began well before South Brunswick's declaratory judgment action was filed, a task he undertook simply because he wanted "to do it afresh". Based upon these, and other less tangible factors, such as his tone, his eye contact with the court, and his willingness to change or alter his opinions based upon new information or well-

founded criticisms, I found his testimony persuasive and gave it great weight.

In stark contrast, Dr. Angelides' testimony was far less credible on matters of importance, and was, on more than one occasion, inconsistent with common sense, and contrary to established COAH rules and judicial precedent. Many of these criticisms were, perhaps, due to his admitted unfamiliarity with the Mount Laurel Doctrine, (stating that he could not recall whether or not he had actually read any of the foundational Mount Laurel decisions). He also professed to having little knowledge of compliance mechanisms routinely used by municipalities to achieve their fair share of the region's need for affordable housing - both rather startling and disturbing disclosures.

On cross examination, his answers were often evasive, prompting me to remind him to answer the questions being asked at least a dozen times. See, e.g., 5/3/16T 45:1-3; 5/4/16T 48:25.

I also found his opinions to be unpersuasive on the merits. Much of this is attributable to his failure to adhere to the Supreme Court's directive in Mount Laurel IV, that "previous methodologies employed [by COAH] in the First and Second Round Rules should be used to establish present and prospective

housing need. Mount Laurel, supra, 221 N.J. at 30 (citation omitted). The parties should demonstrate to the court computations on housing need and municipal obligations based on those methodologies." Ibid.

In point of fact, Dr. Angelides deviated from COAH's prior round methodologies on twenty-six (26) occasions, often when comparable data was readily available and replication was possible. Each one of those deviations, either directly or indirectly, reduced South Brunswick's prospective fair share obligation. While not exhaustive, the following examples demonstrate why I have concluded that his methodology should be rejected as a result-oriented effort that was designed and crafted to reduce the projected prospective need on a statewide basis:

- (1) Instead of following COAH's income limits and the UHAC regulations, Dr. Angelides crafted an untested and untried method to calculate income limits for low and moderate income households, which, when applied, reduced the statewide prospective need by thousands of units;
- (2) Used those income limits to determine whether a household qualified as low or moderate income, despite their admitted inconsistency with HUD regulations (and COAH/UHAC rules); advocating this position while South Brunswick was proposing, as a significant part of its

failed fair share plan, several 100% affordable housing projects, each dependent upon federal tax credits that mandated different income limits for occupancy eligibility;

- (3) Projected that, between 2015 and 2025, the Township would experience "zero" employment growth, despite the Township's reliance on significant future non-residential growth to fund its affordable housing trust fund and finance its proposed 100% affordable housing project(s);
- (4) Instead of using the two most recent decennial censuses, Dr. Angelides deviated from COAH's Second Round methodology in calculating headship rates, by using the ACS data, which had the effect of reducing the statewide prospective need number by approximately ten thousand units; and
- (5) Opined that a home priced under \$500,000 was affordable to low and moderate income persons, based on his exclusion of normal household expenses such as principal and interest required to amortize a mortgage, the cost of utilities, or the necessity of making a down payment.

Based upon these and other deficiencies, as well as the rather obvious disconnects between Dr. Angelides' methodology and South Brunswick's proposed plan, I found his testimony not credible, and rejected his methodology as inconsistent with

approved COAH regulations and violative of the FHA and judicial precedent.

#### IV. REMEDIAL PROCEEDINGS - PHASE II

The next phase of South Brunswick's bifurcated compliance trial would, ordinarily, require "an individualized assessment" of the Township's housing element and fair share plan, based upon the Township's calculated fair share of the present and prospective regional need for affordable housing. See Mount Laurel IV, supra, 221 N.J. at 28-29. Here, however, because of the Township's systematic "abuses" of the declaratory judgment process, and the revocation of its immunity, the Township stands in a far less favorable position than it would have, had it proceeded "with good faith" and with "reasonable speed". See id. at 26, 33. Instead of being given an opportunity to "supplement" and remedy perceived deficiencies in its housing element and fair share plan, while, at the same time, retaining its "immunity" from builder remedy lawsuits, a more intrusive, less deferential approach is warranted.

Unfortunately, the path chosen by the Township: (1) measured by its insistence on including in its plans mechanisms that were legally invalid, demonstrably impractical, and inconsistent with COAH regulations and judicial precedent; and (2) marked by its steadfast refusal to make the necessary modifications, caused me to conclude that South Brunswick was

"determined to be constitutionally non-compliant", resulting in a concomitant loss of its immunity. Id. at 33.

After its immunity was revoked, several actions were filed against South Brunswick seeking site specific relief - builders' remedies - which collectively sought to have their respective properties rezoned to permit affordable housing to be constructed thereon. These builders' remedy actions, which, under Mount Laurel IV, supra, were authorized only where the declaratory judgment review process is "abused" or has become "unreasonably protracted", id. at 26, or where the Township's proposed manner of compliance has been found "constitutionally wanting", id. at 29, are substantially different than the "reward-based" approach authorized by the Supreme Court in Mount Laurel II, supra, 92 N.J. at 158, 278-80 (builders' remedies "should be granted" where a builder/plaintiff "proceeds in good faith" and thereafter "vindicates the constitutional obligation"). Instead, the framework established in Mount Laurel IV, supra, fundamentally alters that approach, rendering obsolete the "first to file" priority scheme first articulated

in J.W. Field Co., Inc. v. Franklin Twp., 204 N.J. Super 445 (Law Div. 1985).<sup>14</sup> This is especially so, since being a "successful plaintiff", previously a prerequisite to a builder's remedy, is no longer a consideration. Compare, Mount Laurel IV, supra, 221 N.J. at 26-27, 29.

As such, any builders' remedies awarded in this case will be based upon a more interactive process, and will be guided primarily by equitable considerations, which should include, at a minimum, an assessment of whether any project was clearly more likely to result in actual construction than other projects, the availability of infrastructure, the project's proximity to goods and services, its regional accessibility, and the property's environmental suitability and compatibility with neighboring land uses. See J.W. Field Co., Inc., supra, 204 N.J. Super. at 460-463; see also Mount Laurel II, supra, 92 N.J. at 211 (the obligation to encourage low income housing, will depend upon "natural long-range land use planning" rather than upon "sheer

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<sup>14</sup> While the "date of filing" priority system adopted in J.W. Field Co., Inc., supra, 204 N.J. Super at 460, 462, has never been specifically embraced by any appellate authority, it has, for all intents and purposes, become embedded and generally followed in Mount Laurel jurisprudence for more than 30 years. It seems reasonable to conclude that it remains a viable protocol for determining priorities among multiple plaintiffs in litigation against towns that were neither "certified" nor enjoyed "participating status" before COAH. Nonetheless, the Supreme Court has encouraged "present-day courts" to employ "flexibility in controlling and prioritizing litigation". See Mount Laurel IV, supra, 221 N.J. at 26.

economic forces.""). As confirmed by the Supreme Court, the "Constitution of the State of New Jersey does not require bad planning". Id. at 238.

In the second phase of this litigation, the inclusion, timing, and prioritization of the various competing builders' remedy sites shall be addressed in the first instance by the Special Master. Her review and ultimate recommendations to the court regarding how to best achieve constitutional compliance, shall be guided by the equities (as described above) as well as sound environmental and planning considerations. See Mount Laurel II, supra, 92 N.J. at 279-280 (builder's remedy warranted unless the proposed project is "clearly contrary to sound land use planning"); see also id. at 280 ("trial courts may adjust the timing of builders' remedies so as to "cushion the impact" of these developments where the impact would otherwise cause a "sudden and radical transformation of the municipality."). Any objections to her recommendations shall be made in writing and filed with the court on notice to all parties, including the Special Master, and adjudicated in accordance with the framework articulated above.

V. CONCLUSION

In enacting the FHA, the Legislature "clearly signaled," and the Supreme Court recognized, that an administrative remedy that resulted in "voluntary municipal compliance" with its affordable housing obligation, was "preferred" to litigation culminating in a "compelled rezoning." Mount Laurel IV, supra, 221 N.J. at 34. However, as a result of COAH's inability to function in the manner envisioned by the FHA, the Supreme Court determined that the FHA's "exhaustion-of-administrative-remedies requirement" should be "dissolved", leaving the courts to "resume" their role as "the forum of first instance," id. at 20, to adjudicate a municipality's constitutional compliance "on the merits of the records developed in individual actions." Id. at 29.

The Supreme Court undoubtedly envisioned that "certified" and "participating" towns would likely subject themselves, as South Brunswick did in this case, to judicial review via the filing of a declaratory judgment action, taking advantage of the temporary immunity offered to them, thus insulating them from the threat of multiple exclusionary zoning/ builder's remedy lawsuits. Id. at 23-24.

The Court also recognized, however, that some municipalities might not embrace, in full, their affordable housing obligation, choosing instead to pursue a path of

resistance, resulting in a loss of immunity, and consequent vulnerability to builders' remedy lawsuits. Judge Serpentelli's admonition in J.W. Fields Co., Inc., 204 N.J. Super. at 468, bears repeating here: "[i]f a municipality chooses not to voluntarily comply, it brings upon itself the potential that multiple builders will force it to comply. The choice is the municipality's."

Regrettably, because South Brunswick failed to heed this warning, the elements of its affordable housing plan will not be those selected by its elected and appointed representatives, but instead, will be those designed and implemented by third parties, the Special Master and the Court.

Intervenor FSHC shall submit an appropriate form of order under the 5-Day Rule, incorporating this Opinion by reference, and which: (1) sets South Brunswick's pre-credited and unadjusted fair share of the region's prospective need at 1,533 units; (2) directs the parties to contact the Court to set a CMC to address the scope and scheduling of Phase II of this bifurcated trial; and (3) directs the parties to meet and confer in advance of the CMC, to address the prioritization and realistic development potential of the various builders' remedy sites.

Costs to Defendant-Intervenors.

**APPENDIX**

<b>Third Round Prospective Need, 2015-2025 Calculations Summary, Township of South Brunswick, Middlesex County, NJ, July 2016</b>			
<b>PROSPECTIVE NEED, 2015-2025 (affordable housing units)</b>			
<b>Step</b>	<b>Sources and Calculations</b>	<b>Result</b>	
<b>PHASE ONE: CALCULATE REGIONAL PROSPECTIVE NEED</b>			
1	Identify the 'housing region"	Report, pp. 23-24	COAH Housing Region 3 West Central: Hunterdon, Somerset, and Middlesex Counties
2	Determine the population projection period	Report, p. 25	2015-2025
3	Determine the regional population 2015 and project regional population 2025 (persons)	Model: Tabs 1c., 1c1., 1e., & 1ef.	1,378,500
4	Identify and remove 2014 "group quarters" population from total population	Model: Tab 1h.	
5	Calculate 2000 and 2014 headship rates and project 2015 and 2025 headship rates	Model: Tab 1g.	
6	[Estimate 1999 LMI HH: Removed from April 2016 Model at request of the Court]		
7	Calculate 2015 low and moderate income households	Model: Tabs 1b. & 1f.	184,462
8	Project 2025 low and moderate income households	Model: Tab 1b1.	204,857
9	Calculate and project the regional increase in low and moderate income households, 2015-2025	Step 8 - Step 7 = 204,857 - 184,462 = 20,396	20,396
10	Pool and reallocate projected regional growth in low and moderate income households below age 65	Not applicable	Not applicable
11	Determine regional prospective need (units)	Step 9	20,396
<b>PHASE TWO: ALLOCATE MUNICIPAL PROSPECTIVE NEED</b>			
12	Exempt Qualifying Urban (Municipal) Aid municipalities from housing need allocations	Not applicable	Not applicable

13	Calculate the equalized nonresidential valuation (ratables) factor	Model: Tab 3, A275:T275	0.086164517
14	Calculate the undeveloped land factor	Model: Tab 4, A275:H275	0.101856321
15	Calculate the differences in household income factor	Model: Tab 5, B275:P275	0.036042548
16	Calculate average allocation factor to distribute regional low and moderate income housing need by municipality	(Step 13 + Step 14 + Step 15)/3 = (0.086164517 + 0.101856321 +0.036042548)/3 = 0.074687795	0.074687795
17	Calculate gross municipal prospective need municipality (units)	Step 11 x Step 16 = 20,396 x 0.074687795 = 1,523	1,523
<b>PHASE THREE: ADJUST FOR SECONDARY SOURCES OF DEMAND AND SUPPLY</b>			
18	[Filtering: Removed from April 2016 Model at the request of the Court]		
19	Estimate residential conversions affecting low and moderate income households (units)	Model: Tab 8, A275:I275	20
20	Estimate demolitions affecting low and moderate income households (units)	Model: Tab 8, A321:AD321	30
21	Calculate prospective need by municipality (units)	Step 17 - Step 19 + Step 20 = 1,523 - 20 + 30 = 1,533	1,533
<b>PHASE FOUR: ADJUST FOR CAPS</b>			
22	Calculate the 20% cap and, if applicable, reduce prospective need (units)	Model: Tab 2015-25 Mid C. Post Cap, A24:I24	Not applicable
23	Calculate the prospective need obligation (net) by municipality (units)	Step 21	1,533
24	Calculate the 1,000 unit cap and, if applicable, reduce the net prospective need obligation	To be determined after verification of credits by the Court	To be determined after verification of credits by the Court
Notes:			
A	For a description and explanation of each of the steps and data sources used to reach the determinations in this table, see "NEW JERSEY FAIR SHARE HOUSING OBLIGATIONS FOR 1999-2025 (THIRD ROUND) UNDER MOUNT LAUREL IV FOR MIDDLESEX COUNTY," dated April 21, 2016, prepared by David N. Kinsey, PhD, FAICP, PP, for and in collaboration with Fair Share Housing Center ("Report").		
B	For the data and calculations that are the source of the determinations in this table, see the Excel workbook with linked worksheets that provide the data, data sources, and calculations used to compute 2015 Present Need, 1987-1999 Prior Round obligations, and 2015-2025 net Prospective Need allocations using the Prior Round methodology, FSHC R3 Model - Middlesex County - Without Gap Period and Filtering, submitted July 19, 2016 ("Model").		
Prepared by David N. Kinsey, PhD, FAICP, PP, Kinsey & Hand, Princeton, NJ, July 20, 2016			