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April 15, 2016

Honorable Thomas C. Miller, J.S.C.
Somerset County Court House
P.O. Box 3000
Somerville, NJ 08876

Re: IMO The Township of Branchburg's Housing Element and Fair Share Plan
Docket No.: SOM-L-898-15
Our file: 16bl-47

Dear Judge Miller:

This firm represents the Township of Branchburg ("Branchburg") in the above referenced matter. On February 5, 2016, this Court issued an Order Appointing Special Master and Providing for the Payment of the Special Master Fees (the "Order"). In paragraph 7, the Court ordered each of the parties to set forth its position relating to compliance issues by March 18, 2016. At Branchburg's request, this deadline was extended to April 18, 2016. Branchburg respectfully requests that the Court accept this letter in lieu of a more formal document as Branchburg's brief on compliance issues.

Introduction

Trial courts may use COAH's second round rules, N.J.A.C. 5:93 ("Second Round Rules"), as a framework for compliance issues. The Supreme Court invalidated the second iteration of the third round rules ("Third Round Rules"), adopted in 2008, N.J.A.C. 5:97. See In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 215 N.J. 578, 618, 620 (2013)(invalidating the second iteration of the Third Round Rules adopted in 2008). COAH never adopted the third iteration of the Third Round Rules.

For purposes of these declaratory judgment actions, the Supreme Court has held that *Mount Laurel* judges can exercise the same level of discretion as COAH when evaluating a municipality's plan for *Mount Laurel* compliance. In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 32 (2015) ("Mount Laurel IV"). However, the Supreme Court also advised that courts were not "replacement agenc[ies] for COAH" and that in evaluating compliance, courts should not act as an "alternative form of statewide administrative decision maker for unresolved policy details of replacement Third Round Rules ...." Mount Laurel IV, 221 N.J. at 29.

The Supreme Court did, however, specifically approve the following six standards in the Third Round Rules, which trial judges should apply:

a. Bonuses for new construction (extension of expiring controls);
b. Bonuses for units affordable to the very poor;
c. Bonuses for "Smart Growth";
d. Bonuses for "Redevelopment";
e. Exclusion of the cost-burdened poor from the present need/rehabilitation calculation; and
f. Utilization of fewer than seven surrogates to approximate substandard housing.

Mount Laurel IV, 221 N.J. at 31-33. Thus, the trial courts may generally follow the compliance standards of the Second Round Rules, as well as the six standards of the Third Round Rules set forth above.

Positions on Compliance Issues

1. Family Rental Bonuses

COAH adopted a Third Round Rule requiring that half of a municipality's fair share obligation must be met with housing open to families. N.J.A.C. 5:97-3.9. Fair Share Housing Corporation ("FSHC") claims that trial courts should follow this rule. However, the Third Round Rules were invalidated, with certain limited exceptions, and COAH's 2014 regulations were

never adopted. Therefore, the better course is for the Court to follow the Second Round Rules.

The Second Round Rules did not impose a family rental requirement. Instead they created an incentive for municipalities to create family rentals by offering a two for one bonus for rentals under N.J.A.C. 5:93-5.15(d). In its most recent decision, the Supreme Court did not address the issue of the family rental requirement. See Mount Laurel IV, 221 N.J. at 9, 30.

Thus, this Court should follow the Second Round Rules, rather than the unadopted Third Round Rule. It should not impose a 50% family rental requirement. It should allow a two-for-one bonus for all family rental units built, which provides a strong incentive to provide such housing, as prior rounds have shown.

2. Rental Bonus Credits

The first round rules, N.J.A.C. 5:92 (the "First Round Rules"), and the Second Round Rules offered bonus credits for rental housing. N.J.A.C. 5:92-14.4; 5:93-5.15(d)(one and one-third credits per senior rental unit; two credits per family rental unit). These bonus credits were upheld by the Appellate Division. See In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1, 82 (App. Div. 2007), cert. denied, 192 N.J. 71 (2007)(citing prior cases upholding bonuses). This Court should allow the rental bonus credits, which are set forth in the Second Round Rules as follows:

> (d)The Council shall grant a rental bonus for rental units that are constructed and conform to the standards contained in N.J.A.C. 5:93-5.8(d) and 5.9(d) and 5:93-7. The Council may also grant the rental bonus prior to construction when it determines that the municipality has provided or received a firm commitment for the construction of rental units. A municipality may lose the benefit of the rental bonus granted in advance of the actual construction of the rental units if the municipality has not constructed the rental units within the time periods established as a condition of substantive certification; or

> granted preliminary or final approval for the construction of the rental units (where a developer agreed to construct the rental units). A municipality may also lose the benefit f a rental bonus if the preliminary or final approval is no longer valid or if the developer has abandoned the development.
>
> 1. A municipality shall receive two units (2.0) of credit for rental units available to the general public.
>
> 2. A municipality shall receive one and one-third (1.33) units of credit for age restricted rental units. However, no more than 50 percent of the rental obligation defined in (a) and (b) shall receive a bonus for age restricted rental units unless:
>
> i. The rental units have been constructed prior to the effective date of this rule;
>
> ii. The development has a valid preliminary or final approval from the municipality and the developer remains committed to building rental housing as of the effective date of this rule; or
>
> iii. The time limit for constructing the rental units as per the conditions of substantive certification has not expired.
>
> 3. No rental bonus shall be granted for rental units in excess of the rental obligation defined in (a) and (b).

N.J.A.C. 5:93-5.15(d).

The municipalities should be allowed to rely on this regulation, as well as on the six provisions of the Third Round Rules specifically addressed by the Supreme Court in Mount Laurel IV. The Supreme Court approved certain bonuses in the Third Round Rule rules, but did not suggest that trial courts were barred from applying the Second Round bonuses. Mount Laurel IV, 220 N.J. at 31-32 (approving of bonuses for new construction credit and for units for the very poor). Those bonuses create

incentives to create affordable housing and were effective in past rounds. Municipalities have a right to rely upon the Second Round Rules. Therefore, this Court should apply N.J.A.C. 5:93-5.15(d).

3. Very Low Income Units

The Supreme Court approved of the grant of bonuses for units affordable to the very poor. Specifically, the Court stated:

> The same [Appellate] panel also approved the allocation of a bonus credit to a municipality "for each unit that is affordable to the very poor, that is, a member of the general public earning thirty percent or less of the median income."

Mount Laurel IV, supra, 220 N.J. at 32 (citing In re Adoption of N.J.A.C. 5:95 & 5:95, 390 N.J. Super. 1, 84-85 (App. Div. 2007) and N.J.A.C. 5:94-4.22)

N.J.A.C. 5:94-4.22 provides as follows:

> Notwithstanding the provisions of N.J.A.C. 5:94-4.20(d), a municipality shall receive two units of credit for affordable units available to households of the general public earning 30 percent or less of median income by region.

Thus, this Court should allow municipalities to receive a two-for-one credit for each unit of very low income housing provided in the Third Round.

4. Redevelopment Area Credits

Mount Laurel IV specifically addressed Redevelopment Area Credits and made a point of recognizing that the Appellate Division approved these credits under N.J.A.C. 5:97-3.19. As the Court explained:

> [T]he Appellate Division approved ... "Redevelopment" bonuses contained in the second iteration of the Third Round Rules. 416 *N.J. Super.* at 496-97 .... The

> "Redevelopment" bonus awarded "1.33 units of credit for each affordable housing unit addressing its growth share obligation ... that [wa]s included in a designated redevelopment area or rehabilitation area pursuant to the Local Redevelopment and Housing Law." *N.J.A.C.* 5:97-3.19.

Mount Laurel IV, supra, 221 N.J. at 31-32.

In light of the Supreme Court's acknowledgement of the Appellate Division's decision relating to N.J.A.C. 5:97-3.19, this Court should treat redevelopment area credits in the same fashion as COAH treated such credits under N.J.A.C. 5:97-3.19.

5. Vacant Land Adjustments

Pursuant to the FHA, COAH adopted criteria and guidelines for adjusting a municipality's fair share if a municipality lacks sufficient vacant and developable land. N.J.S.A. 52:27D-307(c)(2)(f). COAH preserved the right of a municipality with insufficient land to determine how to satisfy its obligations once its adjusted obligation -- otherwise known as its "realistic development potential" or "RDP" -- has been determined. N.J.A.C. 5:93-4.2(g). Thus, if a municipality lacked sufficient land to meet its obligations, COAH policies preserved its right to decide how to satisfy its adjusted obligation. This Court should preserve COAH's past practice of allowing the municipality to have full control over how it satisfies its adjusted obligation.

Branchburg agrees with the arguments made by other municipalities that this Court should adopt the approach in the First Round Rules, rather than the approach in the Second Round Rules. In the First Round, COAH forgave the municipalities' unmet need, while in the Second Round, COAH required municipalities to address their unmet need.

6. Compliance Bonus

The Second Round Rules allow bonuses for substantial compliance, under N.J.A.C. 5:93-3.6, as follows:

(a) A reduction of the 1987-1999 inclusionary component of calculated need shall be granted according to the following schedule when the Council determines that a municipality has substantially complied with the terms of its substantive certification, and has actually created, within the municipality or issued building permits for a substantial percentage of the new units that were part of the municipal 1987-1993 housing obligation within the period of substantive certification (as extended by a grant of interim substantive certification pursuant to N.J.A.C. 5:91-14.1(a)):

Percentage of Units Completed	Reduction
90+	20 percent
80-89	10 percent
70-79	5 percent

This reduction shall be based solely on the percentage of new low and moderate income units constructed within the municipality that received substantive certification or were the recipients of building permits. The percentage of units completed shall be determined by dividing the number of new low and moderate income units actually constructed or receiving building permits within the municipality by the number of low and moderate income units designated for construction within the municipality in the 1987-1993 fair share plan.

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

(b) The reduction in (a) above shall only be applied to the inclusionary component of the 1987-1999 calculated need, as determined by the Council. The reduction shall be applied to the remaining

> inclusionary component after the Council has accepted all other reductions and credits (including any rental bonus).
>
> Example: A municipality as a 1987-1999 precredited need of 200. It had a 1987-1993 inclusionary component of 100. All 100 new units were actually constructed or received building permits within the municipality. The reduction for substantial compliance is 20 percent. The remaining calculated need is 100. However the rehabilitation component is 20, leaving an inclusionary component of 80. The 20 percent reduction is applied to the 80 remaining new units, leaving a inclusionary component of 64.

Neither the Supreme Court nor the Appellate Division overturned or otherwise addressed this regulation. Consequently, trial courts should utilize this standard in the Third Round. This would require the Court to look to the Second Round period (1993-1999) and determine the percentage of the municipality's Second Round completed units. The Court would then have to reduce the municipality's obligation by the percentage set forth above. This provision rewards municipalities for voluntary compliance and for the production of realistic opportunities for affordable housing.

7. Smart Growth Bonus

The Third Round Rules established a "Smart Growth" bonus. N.J.A.C. 5:97-3.18. In Mount Laurel IV, the Supreme Court upheld the use of this bonus, as well as the Redevelopment bonus:

> [T]he Appellate division approved the "Smart Growth" and "Redevelopment" bonuses contained in the second iteration of the Third Round Rules. 416 N.J. Super. at 495-97. The "Smart Growth" bonus awarded municipalities "1.33 units of credit for each affordable housing unit addressing its growth share obligation ... that [wa]s included in a Transit Oriented Development in a Planning Area 1, 2 or a designated center." N.J.A.C. 5:97-3.18. The "Redevelopment" bonus awarded "1.33 units of credit

> for each affordable housing unit addressing its growth share obligation ... that [wa]s included in a designated redevelopment area or rehabilitation area pursuant to the Local Redevelopment and Housing Law." N.J.A.C. 5:97-3.19.

Mount Laurel IV, supra, 221 N.J. at 31-32.

Therefore, the Court should grant bonuses for Smart Growth as set forth in N.J.A.C. 5:97-3.18.

8. Extension of Controls

The Appellate Division recognized that "[e]xtending affordability controls on existing housing prevents the loss of much needed affordable housing." In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95, supra, 390 N.J. Super. at 84. In Mount Laurel IV, the Supreme Court addressed this technique for addressing a municipality's fair share as follows:

> ...the Appellate Division also approved the allowance of bonus credits towards satisfaction of a municipality's affordable housing obligations. For example, in *In re Adoption of N.J.A.C. 5:94 & 5:95, supra*, the panel affirmed the validity of a new construction credit, *N.J.A.C.* 5:94-4.16(a), which provided a municipality with credit "for each low or moderate income for-sale housing unit that [wa]s subject to affordability controls that [we]re scheduled to expire ... if the affordability controls [we]re extended in accordance with" *N.J.A.C.* 5:80-26. *N.J.Super.* at 81-84. The same panel also approved the allocation of a bonus credit to a municipality.

Mount Laurel IV, supra, 221 N.J. at 31.

In light of the Supreme Court's authorization for municipalities to rely upon the expiring deed restriction technique, any municipality that satisfies the standards set forth in N.J.A.C. 5:94-4.16 should be entitled to address its obligations in that way.

9. Phasing

The Supreme Court approved of the phasing of a municipality's fair share of affordable housing:

> It is within the power of trial courts to adjust the timing of builder's remedies so as to cushion the impact of these developments on municipalities where that impact would otherwise cause a sudden and radical transformation of the municipality.

Southern Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158, 280 (1983)("Mount Laurel II"). "The Supreme Court demonstrated its concern for the quantity of construction which could occur within a short time." The Allan-Deane Corp. v. Township of Bedminster, 205 N.J. Super. 87, 110(Law. Div. 1985).

In Allan-Deane, the Law Division explained that "*Mount Laurel II* does not provide a definition of radical transformation. The common sense connotation is a rapid and extreme change in existing conditions." 205 N.J. Super. at 111. The Law Division further explained:

> The court must measure the capacity of the municipality to absorb that change within a specified planning period. Implicated in that evaluation will be the extent of required capital improvements such as water, sewer and roads. Institutional and service demands such as schools, police and fire protection and municipal government facilities must also be examined. Of course, this capacity measurement must also account for any unique environmental or planning conditions which might render a town particularly sensitive to sudden growth.

The Allan-Deane Corp., supra, 205 N.J. Super. at 111 (allowing Bedminster to phase in its affordable housing obligation).

Similarly, Judge Wolfson recently ruled that municipalities can phase in their gap period obligations in three separate, consecutive ten year cycles. In the Matter of the Adoption of the Housing Element for the Township of Monroe, 2015 N.J. Super.

LEXIS 219 at *20 (Law Div. Oct. 5, 2015). Attached as Exhibit "A" to the Certification of Jolanta Maziarz ("Maziarz Cert.").

In the FHA, the New Jersey Legislature also approved phasing, finding that "[t]he State can also maximize the number of low and moderate income units provided in New Jersey by allowing its municipalities to adopt appropriate phasing schedules for meeting their fair share, so long as the municipalities permit a timely achievement of an appropriate fair share of the regional need for low and moderate income housing as required by the Mt. Laurel I and II opinions and other relevant court decisions." N.J.S.A. 52:27D-302e.

Branchburg may request a phasing in of its affordable housing obligation. This Court should consider phasing as a tool approved by the Supreme Court and the Legislature that should be used in appropriate circumstances.

10. Non-Residential Inclusionary Developments

As part of its housing plan, Branchburg may include a proposal that provides affordable housing in a commercial and retail development. Such ordinances have been used by other municipalities. For example, in Nuckle v. Borough of Little Ferry, 2015 N.J. Super. Unpub. LEXIS 344 (App. Div. February 25, 2015)(Maziarz Cert., Exh. B), Little Ferry entered into an agreement with a developer that would partially satisfy Little Ferry's affordable housing obligation. The developer promised to build a mix of commercial and residential uses consisting only of affordable dwelling units.

The Appellate Division stated as follows:

> The mandate of the *Mt. Laurel* doctrine and the FHA is to facilitate a realistic opportunity to construct affordable housing. Construction of market rate units is the developer's choice, not a mandate. Presumably, a developer could construct a project consisting entirely of "affordable" housing as defined in the regulation if it had a reason to do so, was not motivated by economic considerations, and met the minimum density and other requirements of the zoning ordinance.

Nuckel, supra, 2015 N.J. Super. Unpub. LEXIS 344 at *29. The developer was agreeable to building only affordable housing in its project, but only on the condition that it be granted a deviation from the minimum density requirement of the ordinance. Because the ordinance improperly allowed the governing body -- rather than the zoning or planning boards --- power to grant such deviations, it was invalid. Nevertheless, the Appellate Division strongly implied that under a properly drafted ordinance, an affordable housing project can consist entirely of commercial and affordable housing units.

11. Regional Contribution Agreements

In prior rounds, Regional Contribution Agreements ("RCA's") were a useful technique for allowing municipalities to meet their affordable housing obligations. The Supreme Court rejected claims that they promote racial and economic segregation and violate the New Jersey Law Against Discrimination. Hills Development Co. v. Township of Bernards, 103 N.J. 1, 37-38,47 n.13 (1986); In re Township of Warren, 247 N.J. Super. 146, 162 (App. Div. 1991), reversed on other grounds, 132 N.J. 1 (1993). See In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95, supra. 390 N.J. Super. at 80.

The Legislature has found that RCA's should no longer be used as a statutory mechanism for the creation of affordable housing by the council. N.J.S.A. 52:27D-302j; N.J.S.A. 52:27D-312(g). However, they are not unconstitutional, and municipalities should be able to transfer a part of their municipal housing obligations to other municipalities which may, for example, be closer to jobs or have greater access to public transportation.

Conclusion

Branchburg reserves the right to amend the foregoing and to respond to the comments of any interested party.

Respectfully submitted,

Jolanta Maizarz
ID 0183022006

JJM:no

cc: Service List, attached hereto.
Christine Cofone, Special Master

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	: SUPERIOR COURT OF NEW JERSEY
IN THE MATTER OF THE TOWNSHIP	: LAW DIVISION
OF BRANCHBURG'S HOUSING ELEMENT	: SOMERSET COUNTY
AND FAIR SHARE PLAN	: DOCKET NUMBER: SOM-L-898-15
	:
	: Civil Action
	:
	: CERTIFICATION OF
	: JOLANTA MAZIARZ
	:

I, Jolanta Maziarz, being of full age, hereby certify as follows:

1. I am a principal with the law firm Woolson Sutphen Anderson, P.C., attorneys for the Township of Branchburg ("Branchburg"). I make this certification in support of the Branchburg's brief on compliance issues.

2. Attached hereto as Exhibit "A" is a true and correct copy of the unpublished trial court decision In the Matter of the Adoptin of the Housing Element for the Township of Monroe, 2015 N.J. Super. LEXIS 219 (Law Div. Oct. 5, 2015).

3. Attached hereto as Exhibit "B" is a true and correct copy of the unpublished appellate court decision Nuckel v. Borough of Little Ferry, 2015 N.J. Super. Unpub. LEXIS 344 (February 24, 2015).

I hereby certify that the foregoing statements are true. I understand that if any of the foregoing statements is found to be willfully false, I am subject to punishment.

Jolanta Maziarz

Dated: April 15, 2016

EXHIBIT "A"

IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENT FOR THE TOWNSHIP OF MONROE AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES. IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE TOWNSHIP OF SOUTH BRUNSWICK AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES. IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE TOWNSHIP OF EDISON AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES. IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE BOROUGH OF SOUTH PLAINFIELD AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES. IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE TOWNSHIP OF OLD BRIDGE AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES. IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE TOWNSHIP OF PLAINSBORO AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES. IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE BOROUGH OF SAYREVILLE AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES. IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE TOWNSHIP OF EAST BRUNSWICK AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES

DOCKET NO. L-3365-15, DOCKET NO. L-3878-15, DOCKET NO. L-3944-15, DOCKET NO. L-3994-15, DOCKET NO. L-3997-15, DOCKET NO. L-4007-15, DOCKET NO. L-4010-15, DOCKET NO. L-4013-15

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY

2015 N.J. Super. LEXIS 219

October 5, 2015, Decided

SUBSEQUENT HISTORY: [*1] Approved For Publication February 12, 2016.

PRIOR HISTORY: *In re In re Monroe Twp. Housing Element & Fair Share Plan, 442 N.J. Super. 565, 125 A.3d 760, 2015 N.J. Super. LEXIS 176 (Law Div., 2015)*

COUNSEL: *Marguerite Schaffer* (*Shain, Schaffer & Rafanello, P.C.*, attorneys), and *Jerome Convery* for the Township of Monroe.

Donald J. Sears for the Township of South Brunswick.

Leslie G. London for the Township of Edison (*McManimon Scotland & Baumann*, attorneys).

Steven A. Kunzman for the Township of East Brunswick, the Township of Old Bridge, and the Borough of South Plainfield (*DiFrancesco Bateman, Kunzman, Davis, Lehrer & Flaum, P.C.*, attorneys).

Michael W. Herbert of the Township of Plainsboro (*Herbert, Van Ness Cayci & Goodell, P.C.*, attorneys).

Lawrence B. Sachs for the Borough of Sayreville.

Stephen M. Eisdorfer and *Thomas F. Carroll, III* for Intervenor Monroe 33 Developers LLC (*Hill Wallack LLP*, attorneys).

Kenneth D. McPherson, Jr. for Intervenor South Brunswick Center, LLC (*Waters, McPherson, McNeill, P.C.*, attorneys).

Robert A. Kasuba for Intervenor Tices Developers, LLC (Bisgaier Hoff, attorneys).

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

Henry Kent-Smith for Intervenor Richardson Fresh Ponds and Princeton Orchard Associates (*Fox, Rothschild*, attorneys).

JUDGES: WOLFSON, J.S.C.

OPINION BY: WOLFSON

OPINION

CIVIL ACTION

WOLFSON, J.S.C.

I. Statement [*2] Of The Case

Following the Supreme Court's decision in *In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1, 110 A.3d 31 (2015)*, (hereinafter "*Mount Laurel IV*"), several municipalities moved before this court for a declaration that their respective fair share numbers should be capped at 1000 units in accordance with the Fair Housing Act ("FHA") and with existing regulations of the Council on Affordable Housing ("COAH"). *See N.J.S.A. 52:27D-307(e)*; *N.J.A.C. 5:97-5.8.*[1]

1 These municipalities include the following: Monroe; South Brunswick; East Brunswick; Old Bridge; Plainsboro; Edison; South Plainfield; and Sayreville (collectively, the "Municipalities"). Each of these municipalities has pending, separate declaratory judgment actions seeking declarations that their respective housing elements and fair share plans are constitutionally compliant. For purposes of efficiency, I have consolidated these cases for oral argument only, and have allowed interested parties to file briefs and supplemental briefs and also participate in the oral argument.

Consequently, the novel issues to be adjudicated here concern: (1) the availability, applicability, and manner of implementation of the "1000-unit cap" as to each municipality's respective Third Round obligations; (2) whether and [*3] to what extent those obligations must address, in the aggregate, both the unmet need for lower income housing that had been generated between 1999 and today (the "gap period"), as well as their fair share of the region's prospective need for such housing as calculated from today through 2025; and (3) how credits for affordable units constructed during those prior cycles shall be applied.

II. Relevant History Of The 1000-Unit Cap

In response to *Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975)* (hereinafter "*Mount Laurel I*") and *Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983)* (hereinafter "*Mount Laurel II*"), the Legislature enacted the FHA, which created COAH. That administrative agency was empowered to "define housing regions within the state and the regional need for low and moderate income housing, along with the power to promulgate criteria and guidelines to enable municipalities within each region to determine their fair share of that regional need." *Hills Dev. Co. v. Bernards, 103 N.J. 1, 20, 510 A.2d 621 (1986)* (hereinafter "*Mount Laurel III*"); *see N.J.S.A. 52:27D-305* (establishing COAH). In addition, the Legislature bestowed upon COAH, instead of the courts, the power "to decide whether proposed ordinances and related measures of a particular municipality will, if enacted, satisfy its *Mount Laurel* obligation," thereby embracing and codifying a municipality's [*4] constitutional obligation to provide a realistic opportunity for the construction of its fair share housing for lower and moderate income households. *Mount Laurel III, supra, 103 N.J. at 20, 510 A.2d 621*; *see also Sod Farm Assocs. v. Twp. of Springfield, 366 N.J. Super. 116, 123, 840 A.2d 885 (App. Div. 2004)* (COAH established "as an alternative method of review to be used by municipalities for challenges, review of zoning regulations and for protection from future challenges").

In a concerted effort calculated to protect municipalities from onerous fair share burdens that could cause a "radical transformation" of the municipality, (*see Mt. Laurel II, supra, 92 N.J. at 219, 456 A.2d 390* (where the construction of the requisite housing would "radically transform the municipality overnight," trial courts were authorized to relieve a municipality of its duty to satisfy its obligation immediately)), the Legislature directed COAH to adopt guidelines that would "adjust" the present and prospective fair share if "[t]he established pattern of development in the community would be drastically altered." *N.J.S.A. 52:27D-307(c)(2)(b)*. Pursuant to

N.J.S.A. 52:27D-307(e), COAH was authorized in its discretion to

> place a limit, based on a percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the council deems appropriate, upon the aggregate number of units which may be allocated to a [*5] municipality as its fair share of the region's present and prospective need for low and moderate income housing.

Consistent with this directive, COAH enacted *N.J.A.C. 5:92-7.1*, which provided:

> (a) After receiving the crediting provided in Subchapter 6, Credits, where a municipality's present and prospective fair share exceeds 20 percent of its total occupied housing stock as estimated as of July 1, 1987, the municipality may adjust its fair share to 20 percent of its estimated 1987 occupied housing stock.
>
> (b) After receiving the crediting provided in *N.J.A.C. 5:92-6*, Credits, where a municipality's present and prospective fair share exceeds 1,000 low and moderate income housing units, the municipality may adjust its fair share to 1,000.

Three years after these regulations were promulgated, the Appellate Division invalidated them. *See Calton Homes, Inc. v. Council on Affordable Hous., 244 N.J. Super. 438, 450, 582 A.2d 1024 (App. Div. 1990)*, (COAH's determination that a fair share number exceeding 1000 per se constitutes a drastic alteration of the established pattern of development in all New Jersey municipalities deemed arbitrary and unreasonable), *certif. denied, 127 N.J. 326, 604 A.2d 601 (1991)*. Because a per se cap did not properly account for the fact that "certain municipalities may have a fair share obligation more than double the 1,000-unit cap," [*6] the Appellate Division predicted that a substantial fair share disparity might well arise among municipalities within the same housing region, *id. at 450-451, 582 A.2d 1024*, prompting it to remark that the Legislature "could not have intended to convey unbridled discretion to select an absolute cap on the number of units to be built without first considering the burden imposed on the petitioning municipality and its relationship to other municipalities sharing the burden of providing regional and statewide housing needs." *Id. at 448, 582 A.2d 1024*.

The Legislature quickly responded to the *Calton Homes* decision by adopting an amendment to the FHA designed to cure the deficiencies adjudicated to exist in the prior version. *See Sponsor's Statement to S. 858* (1993) ("[t]he courts declared the regulation illegal because it imposed a cap that was not based upon the facts and circumstances of the municipality").

As amended, *N.J.S.A. 52:27D-307(e)* provides, in pertinent part:

> No municipality shall be required to address a fair share of housing units . . . beyond 1,000 units within six years from the grant of substantive certification, unless it is demonstrated, following objection by an interested party and an evidentiary hearing, based upon the facts and circumstances of [*7] the affected municipality that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within that six-year period.

Instead of a "per se" 1000-unit cap, the Legislature "add[ed] criteria correlating a 1,000 unit cap with a municipality's capacity to absorb a substantial amount of affordable housing." *In re Application of Twp. of Jackson, 350 N.J. Super. 369, 373, 795 A.2d 318 (App. Div. 2002)*.

Among "the facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units . . . shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the six-year period preceding the petition for substantive certification." *N.J.S.A. 52:27D-307(e)*.

In accordance with its administrative authority, COAH promulgated *N.J.A.C. 5:93-14.1*, which directly paralleled §307(e) of the FHA:

> No municipality shall be required to address a fair share beyond 1,000 units within six years from the grant of substantive certification, unless it is demonstrated, following an objection and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than [*8] 1,000 low and moderate income units within the six year period. The facts and

> circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the six year period preceding the petition for substantive certification.

COAH's determination that the 1000-unit cap applied to "calculated" and not "pre-credited" need, was upheld in *Jackson, supra, 350 N.J. Super. at 375-76, 795 A.2d 318*. According to the COAH regulations, "pre-credited need" is defined as "the municipal low and moderate income housing obligation resulting from subtracting filtering, residential conversion and spontaneous rehabilitation from the sum of indigenous need, reallocated present need, prior cycle prospective, prospective need and demolitions." *N.J.A.C. 5:93-1.3*. "Calculated need" is defined as "the result of subtracting adjustments, reductions, credits, bonuses, prior cycle credits and the 20 percent cap from the precredited need. To the extent that the Council has knowledge of prior cycle credits and eligible reductions, these credits and reductions have been applied to the municipal housing obligation." *Ibid.*

In 2002, the Legislature [*9] increased the "certification" period from six to ten years, but the Legislature did not otherwise alter § 307(e) of the FHA. *See N.J.S.A. 52:27D-307(e)*; *see also Sponsor's Statement to S.* 1319 (2000) ("This bill would increase from six to ten years the certification period under" the FHA). Consistent with that amendment, COAH promulgated *N.J.A.C. 5:97-5.8*, which provides:

> (a) No municipality shall be required to plan for a projected growth share obligation beyond 1,000 units within 10 years from the grant of substantive certification, unless it is demonstrated, following an objection and an evidentiary hearing, based upon the facts and circumstances of the affected municipality, that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low- and moderate- income units within the 10-year period. The facts and circumstances which shall determine whether a municipality's projected growth share shall exceed 1,000 units shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the 10-year period preceding the petition for substantive certification.

III. Application of the 1000-Unit Cap to Third Round Compliance

Because COAH [*10] failed to adopt its Third Round rules by 1999, it has been left to the designated trial courts to address the manner and method by which a municipality's fair share obligation shall be addressed, including, for example, how the 1000-unit cap should be applied going forward. *Mount Laurel IV, supra, 221 N.J. at 5, 110 A.3d 31*; *see also In re Adoption of N.J.A.C. 5.96 and 5.97, 416 N.J. Super. 462, 473, 6 A.3d 445 (App. Div. 2010)* (requiring the court to determine the legislative intent and purpose); *DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005)* ("The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language"). The court must "ascribe to the statutory words their ordinary meaning and significance," *ibid.* and must be "guided by the legislative objectives sought to be achieved by the statute." *Shelton v. Restaurant.com , Inc., 214 N.J. 419, 429, 70 A.3d 544 (2013)*. In doing so, two vastly disparate legislative interests must be weighed: first, insuring that municipalities meet their constitutional obligations to provide their fair share of affordable housing on the one hand, and second, sensitivity to, and recognition of the reality that the imposition of a large or onerous municipal housing obligation in a relatively short time span may well cause a "sudden and radical transformation" in many municipalities, on the other. *See* [*11] *N.J.S.A. 52:27D-307(e)*; *N.J.A.C. 5:97-5.8*; *see also Mount Laurel II, supra, 92 N.J. at 280, 456 A.2d 390*.

In this regard, the municipalities maintain that the FHA's and COAH's implementing regulations are clear and unambiguous, and based thereon, if their Third Round fair share obligation *is greater than* 1000 units, then they are statutorily "entitled" to have their respective fair share obligations limited to 1000 units over the ten-year period following their anticipated judgments of compliance. In contrast, the Intervenors argue that had COAH functioned as intended, Third Round rules would have been adopted in 1999, Fourth Round rules would have been adopted in 2009, and Fifth Round rules would be adopted in 2019. Assuming that the 1000-unit cap was applicable during those time periods and that COAH had granted substantive certification for each of those rounds, Intervenors contend that the "cap" would have been aggregated and would have been 2600 units, because the true compliance period for these declaratory judgment

actions is actually twenty-six years (from 1999 to 2025), and not the single ten-year period going forward from the anticipated 2015 judgment of compliance. To conclude otherwise, they urge, would result in an unconstitutional "dilution" of the actual affordable [*12] housing need, contrary to the mandates of the *Mount Laurel* decisions.

In striving to resolve this controversy and to achieve an equitable and lawful result, it is not the job of the trial court to become a "replacement agency for COAH." *Mount Laurel IV, supra, 221 N.J. at 29, 110 A.3d 31.* Nevertheless, in the absence of a current administrative format within which to operate, the Supreme Court in *Mount Laurel IV* has suggested that the designated *Mount Laurel* trial judges "track" the processes provided for in the FHA "as closely as possible," so as to create "a system of coordinated administrative and court actions." *Ibid.* In doing so, it is helpful to examine COAH's past practices and regulatory framework (both as enacted and proposed) as well as the Supreme Court's treatment of these issues in an effort to glean some assistance, insights and guidance in crafting a workable construct that tracks "as closely as possible" the probable manner in which COAH, if tasked to do so today, would address these competing concerns and policies. *Id. at 6, 110 A.3d 31.*

In pertinent part, *N.J.S.A. 52:27D-307(e)* states, "No municipality shall be required to address a fair share of housing units affordable to households with a gross household income of less than 80% of the median gross household [*13] income beyond 1,000 units within ten years from the grant of substantive certification." Unquestionably, the Legislature intended the 1000-unit cap to be applied to a single ten-year compliance period. What the Legislature could not have foreseen was that COAH would cease to function, leaving the courts, literally, to fill the fifteen-year gap period from 1999 until today.

The constitutional obligation to provide affordable housing is a strong one, and has been a bedrock principle of our judicial fabric for nearly forty-five years, *see e.g., Oakwood at Madison, Inc. v. Madison Twp., 117 N.J. Super. 11, 283 A.2d 353 (Law Div. 1971)*, and *Oakwood at Madison, Inc. v. Madison Twp., 128 N.J. Super. 438, 320 A.2d 223 (Law Div. 1974), modified, 72 N.J. 481, 494, 371 A.2d 1192 (1977)* ("[T]he basic rationale embraced by Judge Furman in both of his [trial court] opinions in the case is substantially that adopted by this court in *Mount Laurel*"), and has, likewise, been firmly embraced by our Legislature for nearly twenty years. Indeed, the Supreme Court only recently demonstrated the strength of its resolve to enforce this constitutional imperative in both *In re Adoption of N.J.A.C. 5:96, supra, 215 N.J. at 588, 74 A.3d 893*, and *Mount Laurel IV, supra, 221 N.J. at 3, 110 A.3d 31.* However, balanced against this constitutional imperative is an equally strong sensitivity to, and interest historically exhibited by both the Legislature and the courts, that municipalities deserve protection from a sudden, dramatic [*14] influx of housing units (both affordable and market rate), which potentially could drastically alter the landscape of, and/or radically transform a given municipality. *See N.J.S.A. 52:27D-307(e); see also Mount Laurel II, supra, 92 N.J. at 219, 456 A.2d 390.*

Nonetheless, I cannot abide the result urged by the municipalities. Not only is it abundantly clear that the Legislature never intended the cap period to extend beyond one single ten-year period, but a contrary interpretation would undoubtedly lead to an untenable and unconstitutional result, *see e.g., Calton Homes, supra, 244 N.J. Super. at 460-461, 582 A.2d 1024*, which should, where possible, be avoided. *See Schierstead v. Brigantine, 29 N.J. 220, 230, 148 A.2d 591 (1959)* (if reasonably possible, statutes should be accorded a construction that is sensible and consonant with reason and good discretion, rather than one that leads to absurd consequences); *see also State Farm Mut. Auto Ins. Co. v. State, 124 N.J. 32, 61, 590 A.2d 191 (1991)* (courts should avoid interpretation of a statute that would render it unconstitutional).

While the municipalities before me may well be blameless for COAH's inaction, the well-documented failures of that Agency neither relieved nor absolved these towns from fulfilling (or at least attempting to fulfill) their respective fair share responsibilities. Regrettably, these constitutional obligations have been accumulating for the past sixteen years with little evidence of [*15] significant statewide compliance. Interpreting the FHA and COAH regulations so as to ignore that unmet need would be squarely at odds with the Constitution and the Legislature's overarching intent to produce affordable housing. *See In re Adoption of N.J.A.C. 5:96, supra, 215 N.J. at 588, 74 A.3d 893* (the main purpose of the FHA and the *Mount Laurel* decisions is to fulfill a constitutional, moral, and general welfare obligation to provide housing to the less fortunate in our society); *see also Calton Homes, supra, 244 N.J. Super. at 460-461, 582 A.2d 1024* (cautioning that, in some instances, the 1000-unit cap may result in a dilutionary effect, which could, itself, unconstitutionally interfere with the FHA's overall purpose).

IV. Implementing Outstanding Fair Share Housing Obligations

Notwithstanding the inevitable conclusion that the municipal fair share obligation must, in some fashion, include the unmet need that accumulated during the prior sixteen-year gap period, I must, if possible, give effect to the competing legislative and judicial concerns and cau-

tions to avoid drastically altering the landscape and/or causing a radical transformation by allowing an excessively onerous or burdensome influx of housing (*see Sponsor's Statement to S. 858* (1993) (stating that COAH intended "to [*16] avoid the imposition of onerous burdens on municipalities by adopting a regulation capping the fair share of each municipality at 1000"); *see also Mount Laurel II, supra, 92 N.J. at 219, 456 A.2d 390*).

In striking an equitable balance between these competing imperatives and policies, it is appropriate to examine the Supreme Court's treatment of the "radical transformation" issue as well as COAH's own responses and conduct relative thereto. *See Mount Laurel IV, supra, 221 N.J. at 29-30, 110 A.3d 31* (instructing that "certain guidelines can be gleaned from the past and can provide assistance to the designated *Mount Laurel* judges in the vicinages").

In *Mount Laurel II*, the Supreme Court indicated that courts were authorized to relieve a municipality of its duty to immediately satisfy its present need in a situation when the construction of the requisite housing would be "in such quantity as would radically transform the municipality overnight," *Mount Laurel II, supra, 92 N.J. at 219, 456 A.2d 390*, but cautioned that such relief was to be granted "sparingly." *Ibid.* The Appellate Division has, likewise, weighed in, concluding that under a "judicially supervised plan," when the danger of radical transformation exists, the "'[t]rial courts should have the discretion, under those circumstances, to moderate the impact of such housing by allowing the present [*17] need *to be phased in* over a period of years.'" *Calton Homes, supra, 244 N.J. Super. at 449-50, 582 A.2d 1024* (quoting *Mount Laurel II, supra, 92 N.J. at 219, 456 A.2d 390*) (emphasis supplied).

On the regulatory front, before its demise, COAH was in the midst of considering a new substantive rule, *N.J.A.C. 5:99*. If adopted, *N.J.A.C. 5:99* would have repealed 5:97 (*see 46 N.J.R. 924* (Jun. 2, 2014)), and essentially, would have allowed participating Municipalities *to phase in* their "Unanswered Prior Obligation" over subsequent compliance cycles: "[m]unicipalities shall be governed by the standards in *N.J.A.C. 5:93* to address Unanswered Prior Obligations but *shall not be required to address more than 50 percent* of the Unanswered Prior Obligation, except as constrained by the Positive Prior Cycle Buildable Limit column in chapter Appendix D." *46 N.J.R. 931* (June 2, 2014) (emphasis added).

Inasmuch as the proposed rule would have protected a municipality that sought substantive certification against being forced to provide for "more than 50 percent" of its prior round obligation, it is logical to infer that COAH contemplated that these units would not be ignored or lost, but rather, presumptively, would have been *phased in* and addressed, but in no less than two future rounds of compliance. *See 46 N.J.R. 931* (Jun. 2, 2014) (municipalities are "not required to address more than 50 percent" during [*18] their current compliance cycle).

Even though *N.J.A.C. 5:99* was never adopted by COAH, it does provide a window into the mindset of that Agency and demonstrates its concern that imposing a significant "Unanswered Prior Obligation" onto a municipality's prospective need number could result in a radical transformation of the municipality. Instead, as proposed, a municipality's prior unmet need would not disappear or be ignored, but rather, the impact of its inclusion would be softened, by phasing it in over at least two consecutive compliance cycles. Such a regulation would not facially offend the Constitution, inasmuch as the Supreme Court and Appellate Division have both concluded that a "phasing in" of the present need over time is appropriate where necessary to avoid a radical transformation. *See Mount Laurel II, supra, 92 N.J. at 219, 456 A.2d 390*; *Calton Homes, supra, 244 N.J. Super. at 449-50, 582 A.2d 1024*. Indeed, the trial courts were specifically authorized to "moderate the impact" of a burdensome or onerous influx of housing by allowing the accumulated unmet need to be phased in "over a period of years." *See Mount Laurel II, supra, 92 N.J. at 219, 456 A.2d 390*.

Likewise, in referencing those prior Appellate Division decisions upholding COAH's discretion in the rulemaking process, the Supreme Court has instructed that the designated Mount Laurel judges [*19] may "confidently" rely on those cases and utilize similar discretion when assessing a town's plan, when persuaded that the techniques proposed will promote a realistic opportunity for producing a town's fair share of affordable housing. *See Mount Laurel IV, supra, 221 N.J. at 30, 110 A.3d 31*.

So too, here, *N.J.S.A. 52:27D-307(e)* and *N.J.A.C. 5:97-8* can be applied so as to give effect to the intent and dual purposes of both the Legislature and the Supreme Court--providing affordable housing *without any unnecessary dilution*, while at the same time, reducing the potential for a "radical transformation" through a "phasing in" of the housing need generated during the gap period over several consecutive cycles. Such an interpretation avoids an absurd, untenable, or unconstitutional result, and is entirely consistent with the discretion and flexibility expressly afforded the trial courts under *Mount Laurel IV, Mount Laurel II*, and *Calton Homes*. *See e.g., Mount Laurel IV, supra, 221 N.J. at 33, 110 A.3d 31* (emphasizing the need for the courts to employ "flexibility" in assessing a town's constitutional compliance).

In order to effectuate these principles, those municipalities qualifying for the 1000-unit cap for the 2015-2025 period, shall be required to address the affordable housing need attributable to the gap period, but they [*20] will not be required to do so entirely during the first ten-year period following an adjudication of compliance. Instead, those units attributable to the gap period may be provided in three equal installments of the next ten-year cycles, starting with the ten-year period following their anticipated 2015 grant of compliance. The presumptive use of three consecutive cycle periods may be subject to a downward modification if a moving party demonstrates by clear and convincing evidence that a given municipality could reasonably create more units than the presumptive one-third of the aggregate need from the prior cycles, or can reasonably do so in fewer than three consecutive ten-year cycles, based upon sound environmental and planning principles, as well as those "facts and circumstances" contemplated in *N.J.A.C. 5:97-5.8*. While a particular municipality with unique physical or environmental constraints, could, in good faith, seek to extend the presumptive three-cycle period within which to absorb its unmet prior obligations, given the likely constitutional challenge, and the questionable likelihood of success, the viability of such a request seems highly doubtful.

For any municipality that cannot qualify [*21] for the 1000-unit cap, there will be a presumption against phasing in its prior unmet need, which presumption may be overcome only if, by clear and convincing evidence, the "facts and circumstances" demonstrate that satisfying the entirety of its fair share obligation during the 2015-2025 cycle, would, based on sound environmental and planning principles, cause that municipality to undergo a radical transformation.

All municipal requests for credits, (whether "cap" eligible or not), shall be addressed in the manner authorized by COAH, as upheld by the Appellate Division in *Jackson, supra, 350 N.J. Super. at 374-77, 795 A.2d 318*, and implicitly sanctioned by the Supreme Court in *Mount Laurel IV, supra, 221 N.J. at 30, 110 A.3d 31* (previous methodologies and aspects of COAH's rules found valid by the appellate courts may be utilized "confidently" by trial judges). Accordingly, all credits are to be applied first to the calculated need for the gap period (1999-2015), and if, after having applied these credits, excess credits still remain, they would be applied against a municipality's prospective need obligation covering the 2015 to 2025 cycle. *See Jackson, supra, 350 N.J. Super. at 374-75, 795 A.2d 318*. Any excess credits that were earned during prior rounds (1987-1999) or since 1999 are to be applied *first* to the sixteen-year gap period between [*22] 1999 and 2015, after which a municipality's affordable housing obligation would be capped at a maximum of 1600 units, and (if not exhausted), thereafter, against the prospective need obligation for the next ten-year cycle (2015-2025).

V. Conclusion

For the reasons set forth above, I am satisfied that the accumulated need that developed during the gap period must be included as a component of a municipality's affordable housing obligation, but that allowing it to be phased in over this and future compliance cycles, where warranted by the "facts and circumstances," properly balances the laudatory public policies and constitutional interests promoted by, and embodied in, both the FHA and the *Mount Laurel* decisions. Likewise it fairly reconciles these constitutional protections with the competing concerns of those municipalities, whether eligible for the 1000-unit cap or not, that their respective towns not be radically transformed "overnight," while tracking "as closely as possible," the intent and purposes of the FHA, COAH regulations, and the true spirit of the *Mount Laurel* decisions.

Intervenor Fair Share Housing Center shall submit an appropriate form of order, incorporating this opinion [*23] by reference under the five-day Rule. No costs.

EXHIBIT "B"

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DONALD NUCKEL, NORTH VILLAGE I, L.L.C., NORTH VILLAGE II, and GILBERT MANOR, L.L.C., Plaintiffs-Appellants, v. BOROUGH OF LITTLE FERRY, a Municipal Corporation of the State of New Jersey, COUNTY OF BERGEN, THE MAYOR AND COUNCIL OF THE BOROUGH OF LITTLE FERRY, THE BOROUGH OF LITTLE FERRY PLANNING BOARD, 110 BERGEN TURNPIKE, L.L.C., Defendants-Respondents. NORTH VILLAGE I, L.L.C., NORTH VILLAGE II, L.L.C, GILBERT MANOR, L.L.C., DONALD NUCKEL & COMPANY, and DONALD NUCKEL, individually, Plaintiffs-Appellants, v. BOROUGH OF LITTLE FERRY PLANNING BOARD, Defendant-Respondent.

DOCKET NO. A-0672-13T1, A-0673-13T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2015 N.J. Super. Unpub. LEXIS 344

November 6, 2014, Argued
February 24, 2015, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1] On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-3280-12 and L-4741-11.
Nuckel v. Borough of Little Ferry, 2013 N.J. Super. Unpub. LEXIS 2051 (App.Div., Aug. 15, 2013)

COUNSEL: Ira E. Weiner argued the cause for appellants (Beattie Padovano, L.L.C., attorneys; Mr. Weiner, of counsel and on the brief; Daniel L. Steinhagen, on the brief).

Joseph G. Monaghan argued the cause for respondent Borough of Little Ferry and The Mayor and Council of the Borough of Little Ferry.

Brian T. Giblin argued the cause for respondent Planning Board of the Borough of Little Ferry (Giblin & Giblin, P.C., attorneys; Mr. Giblin, on the brief).

Archer & Greiner, P.C., attorneys for respondent 110 Bergen Turnpike, L.L.C., join in the brief of respondents Borough of Little Ferry and the Mayor and Council of the Borough of Little Ferry.

JUDGES: Before Judges Fuentes, Ashrafi, and O'Connor.

OPINION

PER CURIAM

We decide in a single opinion two appeals raising *Mt. Laurel*[1] challenges to zoning ordinances of the Borough of Little Ferry. Previously, with respect to essentially the same parties, we affirmed a judgment of compliance and repose determining that Little Ferry's *Mt. Laurel* plan fulfilled its current affordable housing obligation pursuant to the Fair Housing Act, *N.J.S.A. 52:27D-301 to -329. Nuckel v. Borough of Little Ferry, No. A-4940-11, 2013 N.J. Super. Unpub. LEXIS 2051 (App. Div. Aug. 15, 2013) (slip op. at 4, 26).* [*2]

1 *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel (Mt. Laurel I), 67 N.J. 151, 336 A.2d 713, cert. denied and appeal dismissed, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975); S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel (Mt. Laurel II), 92 N.J. 158, 456 A.2d 390 (1983).*

We noted in our prior decision that plaintiffs had two other actions pending against defendants. *Id.* at 14. Those actions challenged the Housing Element and Fair Share Plan (HEFSP) that the Planning Board and the

Borough Council of Little Ferry adopted during the pendency of plaintiffs' earlier action and the "overlay" zoning ordinance enacted to implement the HEFSP. *Id.* at 26. The current appeals are from the trial court's final judgments in each of those two other cases.

To distinguish the three actions, we will refer to plaintiffs' original action which we previously affirmed in A-4940-11 as the "builder's remedy" action, the current appeal in A-673-13 as the "HEFSP" action, and the current appeal in A-672-13 as the "overlay ordinance" action. For purposes of the current appeals, we adopt and incorporate the statement of facts and procedural history stated in our prior opinion in the builder's remedy action. *Id.* at 1-14.

We now affirm the trial court's HEFSP judgment in A-673-13, and we reverse its overlay ordinance judgment in A-672-13 with respect to one aspect of the zoning ordinance.

I.

HEFSP Action, A-673-13

[*3] Since 2006, plaintiffs have litigated against Little Ferry's zoning ordinances applicable to their property adjacent to the Hackensack River. Plaintiffs sought approval for a development project that would replace about 208 occupied and maintained garden apartments currently located on that property with a higher density residential complex, including two fourteen-story apartment buildings. As an incentive to gain approval, plaintiffs proposed *Mt. Laurel* affordable housing as part of their development plan. *Id.* at 2-3.

Plaintiffs' builder's remedy action originally succeeded. The trial court found that Little Ferry's zoning ordinances did not provide a realistic opportunity for inclusion of low and moderate income housing, and it granted a limited builder's remedy in 2008. The court's judgment permitted plaintiffs to build apartment buildings limited to eight stories rather than the fourteen-stories they requested. Plaintiffs decided that the project as so restricted was not financially feasible and opted out of the builder's remedy they had won.

Little Ferry then entered into a developer's agreement with a different developer and nearby landowner, 110 Bergen Turnpike, LLC ("110 Bergen"). *Id.* at 11-12. Ironically, the agreement with 110 Bergen permitted fourteen-story [*4] buildings to be built on that developer's site. *Id.* at 12. However, the proposed development would include a mix of commercial and residential uses, with the residential uses consisting only of the appropriate number of affordable dwelling units needed to comply with the borough's *Mt. Laurel* obligation. *Ibid.* By the agreement, Little Ferry permitted high-rise, mixed-use structures but limited the total number of residential units that could be built.

On April 20 and May 3, 2011, the planning board and the borough council of Little Ferry acted to adopt an HEFSP. Then, as part of plaintiffs' builder's remedy action, the trial court conducted a fairness and compliance review hearing on May 20, 2011, with respect to the borough's *Mt. Laurel* plan. The court issued a written opinion on February 10, 2012, deciding that the HEFSP was in compliance with the borough's affordable housing obligations. The court entered a judgment of compliance and repose for Little Ferry on April 26, 2012, and we affirmed that judgment by our prior decision of August 15, 2013. *Nuckel, supra, 2013 N.J. Super. Unpub. LEXIS 2051, slip op. at 4, 26.*

Before their builder's remedy action was thus decided, plaintiffs filed a complaint in lieu of prerogative writs on June 2, 2011. They challenged [*5] the HEFSP adopted the previous month on both procedural and substantive grounds. Plaintiffs' complaint complied with *Rule 4:5-1(b)(2)* in that it identified related pending actions, including their builder's remedy action. In December 2011, defendant planning board filed an answer to the HEFSP complaint in which it raised only one affirmative defense, that plaintiffs' complaint did not state a claim upon which relief can be granted.

At the prerogative writs trial of the HEFSP action on October 19, 2012, defendant planning board maintained that plaintiffs' action was barred by the doctrine of collateral estoppel because the validity of the HEFSP had been litigated in the builder's remedy action. The trial court agreed. On August 26, 2013, shortly after we affirmed the judgment of compliance and repose in the prior appeal, the trial court issued a written decision and an Order for Judgment in the HEFSP action. The court upheld the adoption of the HEFSP and dismissed the HEFSP action on grounds of collateral estoppel.

On appeal, plaintiffs press only one ground challenging the HEFSP -- that its adoption failed to comply with a provision of the FHA, *N.J.S.A. 52:27D-310(b)*, that requires the HEFSP to include a ten-year [*6] projection of affordable housing stock in Little Ferry and to identify the properties most appropriate for development of affordable housing. Plaintiffs contend their claim is not barred by the doctrine of collateral estoppel because their challenge pursuant to that statute was not an issue presented to or decided by the trial court in the prior builder's remedy action.

Defendant planning board responds that the court's prior judgment took into consideration all aspects of the HEFSP, and adds that plaintiffs' complaint should also be barred because it is contrary to the entire controversy doctrine, *Rule 4:30A*, and because the HEFSP in fact

complies with the requirements of *N.J.S.A. 52:27D-310(b)*.

Our review of the trial court's decision on grounds of collateral estoppel is a question of law and, therefore, our standard of review is plenary. *See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995)* ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

The doctrine of collateral estoppel "serve[s] the important policy goals of 'finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination [*7] of conflicts, confusion and uncertainty; and basic fairness.'" *First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352, 921 A.2d 417 (2007)* (quoting *City of Hackensack v. Winner, 82 N.J. 1, 32-33, 410 A.2d 1146 (1980)).* Whether an action is barred by collateral estoppel is evaluated under the test the Supreme Court set forth in *First Union* -- collateral estoppel bars a claim or defense if:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
>
> [*Ibid.*]

We agree with plaintiffs that whether Little Ferry's HEFSP complies with *N.J.S.A. 52:27D-310(b)* is not an issue identical to the compliance and fairness review of the HEFSP conducted in May 2011, and that the issue was not actually litigated in the prior builder's remedy action. The trial court's decision of February 10, 2012, addressed whether the HEFSP satisfies the municipality's "second round" affordable housing obligation under the FHA. That issue is not identical to whether a ten-year projection of housing stock and available [*8] properties for development is included in the HEFSP. While the builder's remedy action and the HEFSP action are related and based on much of the same documentary evidence, they focus on different legal questions.

The builder's remedy action focused on the number of affordable housing units the municipality was either credited for or required to construct or rehabilitate. The HEFSP action challenges one aspect of the planning board's and the borough's adoption of the HEFSP -- the sufficiency of its ten-year housing stock projection and identification of available lands for development. The two actions concern different arguments and law. We conclude, therefore, that the trial court erroneously dismissed plaintiffs' HEFSP prerogative writs action as collaterally estopped by the prior builder's remedy judgment.

Nevertheless, an appeal is taken from the court's judgment and not from the specific reasons for that judgment. *Walker v. Briarwood Condo Ass'n, 274 N.J. Super. 422, 426, 644 A.2d 634 (App. Div. 1994).* "It is a commonplace of appellate review that if the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of its affirmance." *Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175, 238 A.2d 457 (1968); see Grow Co. v. Chokshi, 403 N.J. Super. 443, 467 n.8, 959 A.2d 252 (App. Div. 2008); Khalil v. Motwani, 376 N.J. Super. 496, 499, 871 A.2d 96 (App. Div. 2005); Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 78, 628 A.2d 793 (App. Div. 1993).*

Here, the trial court's judgment dismissing plaintiffs' HEFSP complaint [*9] was correct because the later action was barred by the entire controversy doctrine, and also because plaintiffs' claim could not succeed on its merits.

Contrary to plaintiffs' contention, our prior decision on the appeal of the builder's remedy action did not hold that the HEFSP action could be prosecuted separately in the trial court. Rather, we acknowledged that plaintiffs had filed three separate actions. *Nuckel, supra, 2013 N.J. Super. Unpub. LEXIS 2051, slip op. at 14.* We also took note of the admonition in *East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328-29, 669 A.2d 260 (App. Div. 1996)*, that final judgment should ordinarily await conclusion of all related *Mt. Laurel* challenges to a municipality's zoning ordinance. However, because the builder's remedy action was fully briefed for the appeal, we chose not to remand the matter to the trial court to decide first the other pending actions. *Nuckel, supra, 2013 N.J. Super. Unpub. LEXIS 2051, slip op. at 26.* That decision did not mean that the other actions were properly prosecuted in separate lawsuits. The entire controversy doctrine required that they be brought together in a single action if they could have been so brought.

It is true, as plaintiffs argue, that defendant planning board did not plead or expressly argue the requirements of the entire controversy doctrine before the trial court. "[O]ur appellate courts will decline to consider questions [*10] or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the juris-

diction of the trial court or concern matters of great public interest.'" *Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 (1973)* (quoting *Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548, 156 A.2d 737 (App. Div. 1959), certif. denied, 31 N.J. 554, 158 A.2d 453 (1960)*); *accord Zaman v. Felton, 219 N.J. 199, 226-27, 98 A.3d 503 (2014)*. Moreover, the entire controversy doctrine is an affirmative defense, and it is waived if not timely raised. *Aikens v. Schmidt, 329 N.J. Super. 335, 339-40, 747 A.2d 824 (App. Div. 2000)*; *Kopin v. Orange Prods., Inc., 297 N.J. Super. 353, 375-76, 688 A.2d 130 (App. Div.), certif. denied, 149 N.J. 409, 694 A.2d 194 (1997)*.

However, the planning board did argue before the trial court that the matter had been previously adjudicated, thus implying that the issues raised in the HEFSP action were the same or should have been part of the builder's remedy action. The *Mt. Laurel* issues are important to the residents of Little Ferry and others. Moreover, the entire controversy doctrine is meant to protect the interests of the court as well as the parties and the public. *See, e.g., Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co., 207 N.J. 428, 443, 25 A.3d 1027 (2011)* ("Underlying the Entire Controversy Doctrine are the twin goals of ensuring fairness to parties and achieving economy of judicial resources."). The trial court could have taken it upon itself to raise the entire controversy doctrine as a bar to plaintiffs' HEFSP action even in the absence of an affirmative defense raised in the planning [*11] board's answer.

Such an action by the trial court would have been warranted especially because the merits of the single issue plaintiffs press on appeal could readily have been addressed as part of the earlier builder's remedy litigation and the judgment of compliance and repose. Although the HEFSP was adopted only weeks before the fairness and compliance review hearing held on May 20, 2011, the trial court's decision was not issued until February 10, 2012, and its judgment not entered until April 26, 2012. Plaintiffs could and should have moved to join the HEFSP action they filed in June 2011 with the pending builder's remedy action that was awaiting a judgment. Nothing in our record indicates that they attempted to do so until after final judgment was issued in the builder's remedy action and the appeal was pending before us. Their failure to seek joinder of the actions in the trial court is contrary to the beneficial purposes of the entire controversy doctrine and a sufficient ground to reject their appeal in the HEFSP action.

Moreover, even without consideration of the entire controversy doctrine, the HEFSP action fails on its merits. *See O'Shea v. N.J. Schs. Const. Corp., 388 N.J. Super. 312, 319, 908 A.2d 237 (App. Div. 2006)* ("assert[ing] our original jurisdiction [*R. 2:10-5*] inasmuch [*12] as th[e] issue is a question of law, no facts bearing on that question of law are in dispute, and the issue implicates the public interest").

In addressing the requirement that a municipality adopt an HEFSP, the FHA provides in *N.J.S.A. 52:27D-310*:

> A municipality's housing element . . . shall contain at least:
>
> . . . .
>
> b. A projection of the municipality's housing stock, including the probable future construction of low and moderate income housing, for the next ten years, taking into account, but not necessarily limited to, construction permits issued, approvals of applications for development and probable residential development of lands . . . .

See Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 577-78, 803 A.2d 53 (2002) (the components listed in *N.J.S.A. 52:27D-310* must be included in the housing element).

Plaintiffs assert that the HEFSP should have provided a specific number of projected affordable housing units and identified the specific properties that could be utilized to develop them. They contend the "general language" the planning board included in its HEFSP does not satisfy the statutory requirements. They also argue that the HEFSP contains appendices tracking the requirements of *subsections (a)*, *(c)*, and *(d) of N.J.S.A. 52:27D-310*, but no appendix addressing *subsection (b)*.

The planning board asserts the following discussion [*13] in the HEFSP satisfies the statutory requirements of *subsection (b)*:

> Projected Housing, Demographic and Employment Changes in Little Ferry:
>
> The Borough of Little Ferry is largely built out, with few vacant parcels remaining to be developed over which Little Ferry has zoning control. Land in Little Ferry that falls under the jurisdiction of the Meadowlands Commission may have some development potential, but that area is outside the control of the Borough. Left in place with no changes, the current zoning of the Borough of Little Ferry would accommodate little or no growth. There are, however, some previously developed

parcels in the Borough, especially along the Hackensack River but outside the Meadowlands jurisdiction, that have additional development potential, provided sufficient incentives could be offered to encourage their owners to make the investment.

Significant portions of the riverfront area are impacted by the Hackensack River flood plain, and any new development will need to be elevated above the base flood elevation and will also need to comply with NJDEP's zero net fill Rule. These challenges would not preclude development of the affected sites, but they will require more extensive site [*14] engineering and more expensive construction measures in order to address them. Consequently, sufficient incentives must be built into any regulations for the development of this area (in the form of the development intensity allowed) so that developers will be willing to take on the challenges, develop the properties, and also provide the affordable housing needs to satisfy Little Ferry's constitutional low and moderate income housing.

To satisfy the balance of its affordable housing obligation for the prior round, the Borough has prepared and will be adopting a revised Ordinance creating a Riverfront Development Inclusionary Overlay A Zone (RF-A Overlay) covering all of Block 25 . . . . The Ordinance is designed in part to implement an Agreement with 110 Bergen Turnpike, L.L.C., in which 110 Bergen Turnpike, L.L.C., has agreed to build a minimum of 12 and as many as 28 low and moderate income units in fulfillment of the Borough's entire prior round obligation as part of its development of Lot 2, Block 25, with a hotel and various other uses as permitted in the RF-A zone.

The provisions for the RF-A zone are intended to provide the incentives needed to stimulate development along the [*15] portion of the riverfront lying south of Route 46 in the form of increased building height, which will result in higher intensity of development and an enhanced opportunity to address NJDEP flood plain regulations. The increased intensity of development is also intended to provide a compensatory benefit to developers in exchange for the provision of low and moderate income housing. The RF-A Overlay zone will cover a geographical area of roughly 17.5 acres of Block 25. Of these 17.5 or so acres, 5.24 acres are encompassed by Lot 2, Block 25. This is the former Walker Porous site, which, while located wholly within the Hackensack River flood plain, is now vacant and is proposed for a type of development permitted and regulated by the new RF-A Overlay Zone.

While these paragraphs of the HEFSP identify only one property intended for development of affordable housing and recite only the projected affordable housing on that one property, they designate the very limited area in the borough that might be developed to fulfill Little Ferry's affordable housing obligations in the future. In the circumstances of a small, fully developed municipality such as Little Ferry, the quoted language complies [*16] with the requirements of *N.J.S.A. 52:27D-310(b)*.

In sum, the trial court did not err in dismissing plaintiffs' challenge to Little Ferry's HEFSP, although not on grounds of collateral estoppel.

II.

Overlay Ordinance Action, A-672-13

As part of the fairness and compliance review hearing conducted on May 20, 2011, Little Ferry proposed its Ordinance No. 1362-17-12 to implement its HEFSP and to comply with its *Mt. Laurel* affordable housing obligations. The ordinance would create an overlay zone on the entirety of a single block on the municipal tax map, Block 25, which is located along the riverfront. The ordinance would not replace the underlying zoning ordinance but would provide alternative criteria for development in an effort to create incentives for the construction of affordable housing. The ordinance would also recognize explicitly that Little Ferry entered into a developer's agreement with 110 Bergen as part of its *Mt. Laurel* compliance and it would authorize the terms of that agreement.

By a complaint in lieu of prerogative writs filed on April 27, 2012, plaintiffs challenged the overlay ordinance, raising claims including the adequacy of the public notice Little Ferry issued before the ordinance [*17] was adopted and the lawfulness of an exemption provision contained in the ordinance.[3] After conducting a prerogative writs trial on May 24, 2013, the trial court is-

sued a written opinion and accompanying order dated August 21, 2013. The court concluded that the borough's notice was sufficient and that the ordinance is not contrary to law. The court dismissed plaintiffs' overlay ordinance action.

> 2 The ordinance was proposed and adopted after the date of the trial court's February 10, 2012 decision in the builder's remedy action. The grounds for plaintiffs' challenge to the ordinance did not exist before its adoption, and so, could not be considered as part of the entire controversy that was pending before the court in the builder's remedy action.

On appeal, plaintiffs assert the trial court erred because: (1) inadequate notice of the proposed ordinance was given to the public, in violation of *N.J.S.A. 40:55D-62.1* and the case law interpreting that and similar land use notice statutes; and (2) the ordinance is contrary to law because it authorizes the governing body of the borough to grant exemptions from the residential density requirements of the ordinance. We reject the notice argument but agree [*18] that a provision of the ordinance unlawfully grants powers to the governing body of Little Ferry that are not authorized by the Municipal Land Use Law (MLUL), *N.J.S.A. 40:55D-1 to -163*, or any other statute.

On February 24, 2012, Little Ferry sent to property owners within 200 feet of Block 25 a notice stating that the overlay ordinance had been introduced and passed on first reading, and that a public hearing was scheduled for March 13, 2012, to consider its adoption. The notice included the title of the ordinance: "AN ORDINANCE AMENDING CHAPTER 35, LAND USE, OF THE CODE OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY, NEW JERSEY, TO ESTABLISH A NEW RF-A RIVERFRONT DEVELOPMENT INCLUSIONARY OVERLAY A ZONE ENCOMPASSING BLOCK 25 AND ALSO SETTLING LITIGATION." A copy of the entire ordinance accompanied the notice.

Plaintiffs contend the notice did not comply with all the requirements of *N.J.S.A. 40:55D-62.1* and also did not use plain language to state the purpose and nature of the matter to be considered by the governing body. They claim that public notice of a zoning change must be worded in language understandable to "the ordinary layperson," as this court held in *Perlmart of Lacey, Inc. v. Lacey Township Planning Board, 295 N.J. Super. 234, 239, 684 A.2d 1005 (App. Div. 1996)*. According to plaintiffs, merely publishing [*19] the title and the full text of the ordinance provides insufficient notice to the public of the nature and purpose of the proposed ordinance.

N.J.S.A. 40:55D-62.1 provides, in pertinent part:

> Notice of a hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district . . . shall state the date, time and place of the hearing, the nature of the matter to be considered and an identification of the affected zoning districts and proposed boundary changes, if any, by street names, common names or other identifiable landmarks, and by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office.

In *Perlmart, supra, 295 N.J. Super. at 237* (internal citations omitted), we stated that "the purpose for notifying the public of the 'nature of the matters to be considered' is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof . . . ." We added that "the critical element of such notice has consistently been found to be an accurate description of what the property will be used for under the application." *Id. at 238*.

We held that a public notice was deficient [*20] in *Pond Run Watershed Ass'n v. Township of Hamilton Zoning Board of Adjustment, 397 N.J. Super. 335, 355, 937 A.2d 334 (App. Div. 2008)*, because it failed to reference a 5000-square-foot restaurant that was a significant component of the proposed development and thus the notice did not adequately apprise the public "of what the property would actually be used for."

Unlike in *Perlmart* and *Pond Run*, the notice in this case neither used overly generalized or technical language nor failed to describe a major use proposed for the overlay zone. The proposed ordinance was written in reasonably understandable language and explained the nature and purpose of the proposed zoning change.

The first page of the ordinance outlined its purposes, including "to facilitate the private sector's development of previously developed and vacant land along the Hackensack River waterfront." The ordinance stated that it would permit high-density development, including high-rise, multi-family residential structures and added that "any such residential development will be subject to an affordable housing set-aside." The ordinance also stated in its introductory provisions that it "confers substantial benefit upon any owner/developer of land within the overlay zone due to significant increase in density and

intensity of land use achievable through [*21] the additional building heights permitted."

A section of the ordinance marked "Purpose" sets forth the *Mt. Laurel* inclusionary zoning objective of the ordinance:

> The purpose of the RF-A Riverfront Development Inclusionary Overlay A Zone is to create a realistic opportunity for the construction of affordable housing through mixed use development, in which there is a mandatory residential component with an affordable housing set-aside, in a setting that will also provide opportunities for economic development of regional business uses and an incentive to improve the riverfront area for the benefit of all residents of the Borough of Little Ferry.

These statements and other parts of the ordinance were adequate to inform the general public of the purpose and nature of the proposed zoning change.

Contrary to plaintiffs' argument, we have not held that publication of the entire ordinance is contrary to the statutory notice requirements. In *Rockaway ShopRite Associates, Inc. v. City of Linden, 424 N.J. Super. 337, 345, 37 A.3d 1143 (App. Div. 2011), certif. denied, 209 N.J. 233, 36 A.3d 1064 (2012)*, we considered statutory provisions that permit a municipality to publish only a summary of a proposed ordinance rather than the entire ordinance. We held that "the 'summary' being substituted for the full text of the ordinance [must] apprise [*22] interested readers throughout the municipality of the zoning changes contemplated as well as their nature and import." *Ibid.* We did not hold that publication of the entire ordinance is improper. In this case, the language we have quoted from the ordinance alerted the public of the purposes and nature of the proposed ordinance, and it did so as well or better than a summary might have done.

Nor was the notice defective in identifying the location of the zoning change. The first page of the ordinance identified the boundary of the proposed overlay zone as "the entirety of Block 25." Page two added the following description of the properties included within the zoning change:

> [T]he within zoning amendment creates an overlay zone (the RF-A Zone) along a portion of the Little Ferry riverfront that permits appropriate development of all of the properties within Block 25, including the property of 110 Bergen Turnpike, LLC, consistent with the intent of the Borough for the riverfront area but tailored to the specific problems and issues associated with the properties located to the south of Route 46 . . . .

N.J.S.A. 40:55D-62.1 requires that a notice include "street names, common names or other identifiable landmarks" [*23] where boundary changes will be made by the proposed zoning ordinance. Here, the overlay zone did not change the boundaries of the zoning district but only affected the permitted uses in the existing, identified district.

In *Northgate Condominium Ass'n, Inc. v. Borough of Hillsdale Planning Board, 214 N.J. 120, 138, 68 A.3d 292 (2013)*, the Supreme Court confirmed that proper notice is a jurisdictional requirement for a municipal agency to take zoning action, and that defective notice renders municipal action null and void. The Court also considered identification of the affected property although in the context of an application for development of a particular parcel, not for a zoning change. The Court concluded that using a block number and descriptive terms to identify the location of the property was sufficient in the circumstances of that case. *Id. at 141-43.* Here, too, the affected properties were adequately identified by means of the block number and plain descriptive language of the geographical area affected by the overlay zone.

We agree with the trial court that the notice of the hearing at which the overlay zoning ordinance was adopted was adequate to apprise the public of the purpose and nature of the zoning change as well as its location.

The ordinance, however, includes a provision that is not [*24] authorized by the MLUL or any other law.

At the time of the fairness and compliance review hearing on May 20, 2011, Little Ferry presented for the court's review an earlier version of the proposed implementing ordinance, including reference to its developer's agreement with 110 Bergen. That agreement permitted 110 Bergen to construct a high-rise structure with primarily commercial uses and to deviate from the residential density requirement of the proposed overlay ordinance. In exchange for that deviation, the agreement provided that 110 Bergen's project would include between twelve and twenty-eight units of *Mt. Laurel* affordable housing but not any market rate residential units.

The trial judge referred to the provision of the MLUL that requires uniform treatment of similar land-

owners, *N.J.S.A. 40:55D-62*, and expressed concern that other developers and landowners would seek a similar opportunity to deviate from the density requirements of the ordinance. In response to the court's concern, Little Ferry added an exemption provision to the proposed ordinance that plaintiffs now correctly challenge as unlawful.

In its section 3.F.2., the residential component of Little Ferry's Ordinance 1362-17-12 requires both [*25] a minimum and a maximum density of residential units -- twenty-five to sixty residential units per acre. Minimum residential density was included in the ordinance so that the borough could require a set-aside of residential units for *Mt. Laurel* affordable housing. The provision that the borough added and that plaintiffs now challenge allows an exemption from the minimum residential density requirement for landowners that may seek a similar arrangement as 110 Bergen.

The disputed provision of section 3.F.2. states:

> [I]t is acknowledged that the Agreement with 110 Bergen Turnpike, LLC . . . exempts the developer of that lot from the minimum residential development requirements set forth herein. *Such an exemption also may be requested by any developer and approved by the Borough for any other development in the RF-A Riverfront Development Inclusionary Overlay A Zone based on an executed agreement between the developer and the Borough of Little Ferry wherein the developer will provide the number of affordable units otherwise required based upon the mandatory residential component without having to construct any market-rate residential units.*
>
> [(emphasis added).]

Plaintiffs contend the underscored provision grants [*26] unlawful discretionary authority to the governing body to determine whether a landowner is exempted from the density requirements of the ordinance. Plaintiffs contend that only a zoning board, and not a governing body of a municipality, may exercise such a power under the MLUL to permit a deviation from the requirements of a zoning ordinance. We agree.

In *Goerke v. Township of Middletown, 85 N.J. Super. 519, 521, 205 A.2d 338 (App. Div. 1964)*, this court disapproved an amendment to a local zoning ordinance that "empowered the township committee to issue temporary use permits for 'temporary activities for a limited period of time which activities may be prohibited by other provisions of this Ordinance . . . .'" Observing that the governing body was effectively given the "power to grant an exemption from the prohibitory regulations of the zoning ordinance," *ibid.*, we held such powers were not authorized by any zoning statute, and therefore, the ordinance was invalid. *Id. at 522*. Our holding in *Goerke* applies here.

N.J.S.A. 40:55D-62 requires that "[t]he regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structure or uses of land . . . ." *N.J.S.A. 40:55D-70(d)* authorizes a board of adjustment to grant variances from the zoning regulations [*27] "for special reasons" and in specifically enumerated circumstances. In addition, *N.J.S.A. 40:55D-60(a)* authorizes a planning board to exercise ancillary jurisdiction in granting certain kinds of variances from the requirements of the zoning regulations. Nothing in the MLUL permits a governing body to exercise similar powers and to exempt a landowner from the requirements of the zoning regulations it has adopted.

In arguing to uphold the ordinance, Little Ferry refers to the trial court's prompting of the exemption provision for purposes of uniform treatment of all landowners, and also emphasizes the salutary purpose of the provision as part of the borough's innovative compliance with its obligations under the *Mt. Laurel* doctrine. Little Ferry further contends that we already considered the validity of the ordinance in our affirmance of the trial court's judgment of compliance and repose.

None of these arguments addresses whether the exemption provision is authorized by the MLUL or any other law. We agree with plaintiffs that a governing body may not confer upon itself a power to control land use development when that power is not authorized by statute. Little Ferry has not cited any legal authority [*28] establishing a governing body's power to grant exemptions from a zoning ordinance.

The ordinance in this case is unusual. The parties and the two experts who testified at the prerogative writs trial interpreted the ordinance as mandating the inclusion of "market rate" residential units as well as a set-aside for affordable housing. This interpretation comes from section 3.E.1.i. of the ordinance, which states that one of the permitted principal uses within the new overlay zone is "[m]ulti-family residential buildings consisting of both market rate and affordable housing units as provided and required in Subsection F.9. herein."[3] However, the ordinance does not define the term "market-rate" units.[4] The regulations applicable to the Council on Affordable Housing include the following definition of "Market rate units": "housing within an inclusionary development, not restricted to low and moderate income households, that

may sell at any price determined by a willing seller and a willing buyer." *N.J.A.C. 5:93-1.3*. Similarly, the regulations define "[a]ffordable" as "a sales price or rent within the means of a low or moderate income household as defined in *N.J.A.C. 5:93-7.4*."

> 3 The reference to "F.9" is apparently a typographical error. It should [*29] be "F.8," which sets forth the inclusionary affordable housing component of residential development under the ordinance.
>
> 4 The FHA defines "moderate income," "low income," and "very low income" housing, *see N.J.S.A. 52:27D-304*, but it does not define the term "market rate" units or housing.

The record on this appeal does not reveal to us by what authority and for what purpose a municipality may mandate that a developer include "market rate" units as so defined. The mandate of the *Mt. Laurel* doctrine and the FHA is to facilitate a realistic opportunity to construct affordable housing. Construction of market rate units is the developer's choice, not a mandate. Presumably, a developer could construct a project consisting entirely of "affordable" housing as defined in the regulation if it had a reason to do so, was not motivated by economic considerations, and met the minimum density and other requirements of the zoning ordinance.

The disputed exemption language in the ordinance is meant for the developer who, like 110 Bergen, is agreeable to building only affordable housing in its project but on the condition that it be granted a deviation from the minimum density requirement of the ordinance. While [*30] the governing body may have a role in such an arrangement in that it can require a developer's agreement,[5] the governing body is not the appropriate municipal body to determine which landowners should be permitted to deviate from the ordinance's minimum density requirement. Under the MLUL, that decision requires an application to and action by either the zoning board of adjustment or the planning board. *See also Wawa Food Mkt. v. Planning Bd. of Ship Bottom, 227 N.J. Super. 29, 34-36, 545 A.2d 786 (App. Div.), certif. denied, 114 N.J. 299, 554 A.2d 853 (1988)* (Deviations from the zoning ordinance may only be accomplished by the variance procedure.).[6] Alternatively, the ordinance must itself indicate optional requirements for affordable housing that deviate from the density requirements for combined market rate and affordable residential development.

> 5 Section F.8.e. of the ordinance requires that a developer enter into a "Developer's Agreement" with "the Mayor and Council" of Little Ferry to ensure that the affordable housing component of the development will be constructed in accordance with applicable regulations and rules, be marketed to appropriate buyers, and retain its status as affordable housing in the future.
>
> 6 Since it has not been argued, we do not determine what kind of variance would be required under *N.J.S.A.* [*31] *40:55D-70* to deviate from a minimum density regulation.

Because the ordinance places in the governing body of Little Ferry authority to grant an exemption from the density requirements of the ordinance, that provision of the ordinance is contrary to law and must be set aside.

The ordinance contains a severability provision so that only the portion of section 3.F.8. that we underscored previously is invalid. We have not been asked to and make no determination as to other provisions of the ordinance.

Affirmed in part, reversed in part.

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	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
IN THE MATTER OF THE TOWNSHIP	:	SOMERSET COUNTY
OF BRANCHBURG'S HOUSING	:	
ELEMENT AND FAIR SHARE PLAN	:	DOCKET NO. SOM-L-898-15
	:	
	:	Civil Action

CERTIFICATION OF SERVICE

TO: Honorable Thomas C. Miller, J.S.C.
Superior Court of New Jersey
P.O. Box 3000
Somerville, New Jersey 08876

Dawn G. Huffman, of full age, hereby certifies as follows:

1. I am a legal secretary in the firm of Woolson Sutphen Anderson, P.C., attorneys for the Township of Branchburg. All of the statements are made to the best of my knowledge and belief.

2. On April 15, 2016, I forwarded to the Honorable Thomas C. Miller, J.S.C. an original and one (1) copy of the Township of Branchburg's brief on compliance issues, certification of Jolanta Maziarz, and certification of service.

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ELEMENT AND FAIR SHARE PLAN	:	DOCKET NO. SOM-L-898-15
	:	
	:	Civil Action

CERTIFICATION OF SERVICE

TO: Honorable Thomas C. Miller, J.S.C.
Superior Court of New Jersey
P.O. Box 3000
Somerville, New Jersey 08876

Dawn G. Huffman, of full age, hereby certifies as follows:

1. I am a legal secretary in the firm of Woolson Sutphen Anderson, P.C., attorneys for the Township of Branchburg. All of the statements are made to the best of my knowledge and belief.

2. On April 15, 2016, I forwarded to the Honorable Thomas C. Miller, J.S.C. an original and one (1) copy of the Township of Branchburg's brief on compliance issues, certification of Jolanta Maziarz, and certification of service.

3. On April 15, 2016, I forwarded a copy of the Township of Branchburg's brief on compliance issues, certification of Jolanta Maziarz and certification of service to all of the parties on the attached service list via regular mail.

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

Dawn G. Huffman

Dawn G. Huffman

Dated: October 15, 2016.

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	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
IN THE MATTER OF THE TOWNSHIP	:	SOMERSET COUNTY
OF BRANCHBURG'S HOUSING	:	
ELEMENT AND FAIR SHARE PLAN	:	DOCKET NO. SOM-L-898-15
	:	
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