FAIR SHARE
HOUSING CENTER

Peter J. O'Connor, Esq.
Kevin D. Walsh, Esq.
Adam M. Gordon, Esq.
Laura Smith-Denker, Esq.

April 14, 2016

Clerk
Superior Court of New Jersey
Somerset County Courthouse
20 North Bridge Street
Somerville, NJ 08876

Re: In re Hunterdon/Somerset/Warren Municipalities Seeking Declarations of Compliance with Mount Laurel (See attached service list for captions, Docket numbers, and attorney information)

Dear Madam/Sir:

In accordance with the consolidated case management order entered on February 17, 2016 by Judge Miller in these consolidated proceedings, Fair Share Housing Center (FSHC) moves for summary judgment through the attached motion, which includes a notice of motion, brief with exhibits, and certification.

Please note fees are waived in accordance with the attached order.

Please stamp a copy of the proof of service filed and return in the enclosed envelope.

Thank you for your attention to this matter.

Respectfully,

Kevin D. Walsh, Esq.
Counsel for Fair Share Housing Center

c: Hon. Thomas C. Miller, J.S.C.
Richard Reading
Frank Banisch, PP, FAICP
Phillip Caton, PP, FAICP
Elizabeth McKenzie, PP, AICP
Michael Bolan, PP, AICP
Elizabeth McManus, PP, AICP
Somerset/Hunterdon/Warren service list
Supreme Court service list

(856)665-5444, X7

Pete: TBD

SUPREME COURT OF NEW JERSEY

Pursuant to Rule 1:13-2(a), it is ORDERED that the payment of filing fees, other fees, and charges of public officers for service of process in connection with actions filed by the Fair Share Housing Center shall be waived; this Order is effective immediately and until further order of the Court.

For the Court:

Chief Justice

Dated: January 16, 2007

Somerset/Warren/Hunterdon service list

WRN	L -215-15	In the Matter of the Township of Knowlton	Richard P.	Cushing	PO Box 4001		Clinton	NJ	08809	rcushing@gklegal.com
WRN	L -220-15	In the Matter of the Township of Pohatcong	Kevin P.	Benbrook	1734 Route 31 North	Suite 1	Clinton	NJ	08809	kbenbrook@benbrooklaw.com
WRN	L -224-15	In the Matter of the Township of Franklin	Kevin P.	Benbrook	1734 Route 31 North	Suite 1	Clinton	NJ	08809	kbenbrook@benbrooklaw.com
WRN	L -226-15	In the Matter of the Township of Blairstown	Kevin P.	Benbrook	1734 Route 31 North	Suite 1	Clinton	NJ	08809	kbenbrook@benbrooklaw.com
WRN	L -228-15	In the Matter of the Township of Greenwich	Jonathan E.	Drill	571 Pompton Ave		Cedar Grove	NJ	07009	jdrill@sksdlaw.com
WRN	L -230-15	In the Matter of the Borough of Washington	Richard P.	Cushing	PO Box 4001		Clinton	NJ	08809	rcushing@gklegal.com
WRN	L -233-15	In the Matter of the Borough of Alpha	Christopher	Troxell	370 Pursel Street		Philipsburg	NJ	08865	
WRN	L -231-15	In the Matter of the Township of Frelinghuysen	David Burton	Brady	55 Madison Avenue		Morristown	NJ	07960	wackslaw@yahoo.com
WRN	L -232-15	In the Matter of the Township of Allamuchy	David Burton	Brady	55 Madison Avenue		Morristown	NJ	07960	wackslaw@yahoo.com
WRN	L -234-15	In the Matter of the Town of Hackettstown	Mark R.	Peck	235 Broubalow Way		Philipsburg	NJ	08865	MPeck@fpsflawfirm.com
WRN	L -237-15	In the Matter of the Township of Hope	Michael	Selvaggi	1500 Route 517	Suite 300	Hackettstown	NJ	07840	mselvaggi@lsaclaw.com
WRN	L -238-15	In the Matter of the Township of Belvidere	Katrina	Campbell	1500 Route 517	Suite 300	Hackettstown	NJ	07840	kcampbell@lsaclaw.com
WRN	L -239-15	In the Matter of Harmony Township	Katrina	Campbell	1500 Route 517	Suite 300	Hackettstown	NJ	07840	kcampbell@lsaclaw.com
WRN	L -240-15	In the Matter of Hardwick Township	Michael	Lavery	1500 Route 517	Suite 300	Hackettstown	NJ	07840	mlavery@lsaclaw.com
WRN	L -241-15	In the Matter of the Township of Lopatcong	Michael	Lavery	1500 Route 517	Suite 300	Hackettstown	NJ	07840	mlavery@lsaclaw.com
WRN	L -242-15	In the Matter of the Township of Mansfield	Michael	Lavery	1500 Route 517	Suite 300	Hackettstown	NJ	07840	mlavery@lsaclaw.com
WRN	L -243-15	In the Matter of the Township of Oxford	Michael	Lavery	1500 Route 517	Suite 300	Hackettstown	NJ	07840	mlavery@lsaclaw.com
WRN	L -244-15	In the Matter of the Township of Washington	Michael	Lavery	1500 Route 517	Suite 300	Hackettstown	NJ	07840	mlavery@lsaclaw.com
WRN	L -245-15	In the Matter of the Township of White	Brian R.	Tipton	235 Broubalow Way		Philipsburg	NJ	08865	BTipton@fpsflawfirm.com
WRN	L -246-15	In the Matter of Independence Township	Richard P.	Cushing	PO Box 4001		Clinton	NJ	08809	rcushing@gklegal.com

SOM	L -866-15	IMO FRANKLIN TOWNSHIP (TCM MT LAUREL)	Edward	Boccher	Glenpointe Centre West	500 Frank W. Burr Blvd. Suite 31	Teaneck	NJ	EBoccher@decotiislaw.com
SOM	L -898-15	IMO BRANCHBURG TOWNSHIP *MOUNT LAUREL TCM*	Mark S.	Anderson	11 East Cliff Street		Somerville	NJ	MSA@woolsonlaw.com
SOM	L -900-15	IMO HILLSBOROUGH TWP PETITIONER *MOUNT LAUREL TC	Andrew	Bayer	428 River View Plaza		Trenton	NJ	ABAYER@GLUCKLAW.COM
SOM	L -901-15	IMO ROCKY HILL BOROUGH "TCM" MT LAUREL	Steven	Kunzman	25 Mountain Blvd		Warren	NJ	skunzman@newjerseylaw.net
SOM	L -902-15	IMO WATCHUNG BOROUGH OF "TCM" MT LAUREL	Steven	Kunzman	25 Mountain Blvd		Warren	NJ	skunzman@newjerseylaw.net

SOM	L -903-15	IMO FAR HILLS BOROUGH PETITIONER (MT LAUREL TCM)	Jeffrey	Surenian		707 Union Avenue, Suite 301	Brielle	NJ	jrs@surenian.com
SOM	L -904-15	IMO WARREN TOWNHIP OF "TCM:" MT LAUREL	Steven	Kunzman	25 Mountain Blvd		Warren	NJ	skunzman@newjerseylaw.net
SOM	L -899-15	IMO BERNARDS TOWNSHIP "TCM" MT LAUREL	John P.	Belardo	1300 Mount Kemble Avenue	P.O. Box 2075	Morristown	NJ	jbelardo@mdmc-law.com
SOM	L -905-15	IMO PEAPACK GLADSTONE BOROUGH MOUNT LAUREL TCM	Karen	Greco-Buta	One Legal Lane	P.O. Box D	Newton	NJ	kgreco-buta@dolanlaw.com
SOM	L -925-15	IMO BERNARDSVILLE BOROUGH "TCM" MT LAUREL	John R.	Pidgeon	600 Alexander Road		Princeton	NJ	jpidgeon@pidgeonlaw.com
SOM	L -934-15	IMO BRIDGEWATER TWP OF MOUNT LAUREL TCM	Alexander	Fisher	77 North Bridge Street		Bridgewater	NJ	fisher@maurosavo.com
SOM	L -914-15	IMO BEDMINSTER TOWNSHIP "TCM" MT LAUREL	John P.	Belardo	1300 Mount Kemble Avenue	P.O. Box 2075	Morristown	NJ	jbelardo@mdmc-law.com
SOM	L -924-15	IMO MONTGOMERY TOWNSHIP PETITIONER MT LAUREL TCM	Kevin A.	Van Hise	101 Poor Farm Road		Princeton	NJ	kvanhise@mgplaw.com
SOM	L -926-15	IMO RARITAN BOROUGH MOUNT LAUREL TCM	Richard	Wenner	1500 Route 517, Suite 300		Hackettstown	NJ	rwenner@lsaclaw.com
SOM	L -929-15	IMO GREEN BROOK TOWNSHIP (MOUNT LAUREL TCM)	Edward	Boccher	Glenpointe Centre West	500 Frank W. Burr Blvd. Suite 31	Teaneck	NJ	EBoccher@decotiislaw.com
SOM	L -935-15	In the Matter of the Application of the Borough of North Plainfield	Eric M.	Bernstein	34 Mountain Blvd, Building A	P.O. Box 4922	Warren	NJ	embernstein@embalaw.com

HNT	L -298-15	IMO BOROUGH BLOOMSBURY VS STATE OF NJ *MT LAUREL	William	Bloomsbury	461 Corliss Ave		Phillipsburg	NJ	08865	
HNT	L -300-15	IMO TOWNSHIP ALEXANDRIA VS STATE OF NJ *MT LAURE	Jonathan	Drill	571 Pompton Ave		Cedar Grove	NJ	07009	jdrill@sksdlaw.com
HNT	L -301-15	IMO READINGTON TWP VS STATE OF NJ *MT LAUREL*	Jeffrey	Surenian		707 Union Avenue, Suite 301	Brielle	NJ	08730	jrs@surenian.com
HNT	L -302-15	IMO BOROUGH GLEN GARDNER VS STATE NJ *MT LAUREL*	Jonathan	Drill	571 Pompton Ave		Cedar Grove	NJ	07009	jdrill@sksdlaw.com
HNT	L -303-15	IMO BOROUGH MILFORD VS STATE OF NJ *MT LAUREL*	Jonathan	Drill	571 Pompton Ave		Cedar Grove	NJ	07009	jdrill@sksdlaw.com
HNT	L -304-15	IMO TOWN OF CLINTON VS STATE OF NJ *MT LAUREL*	Richard	Cushing	P.O. Box 4001		Clinton	NJ	08809	rcushing@gklegal.com
HNT	L -305-15	IMO TOWNSHIP OF UNION VS STATE OF NJ *MT LAUREL*	Jonathan	Drill	571 Pompton Ave		Cedar Grove	NJ	07009	jdrill@sksdlaw.com
HNT	L -312-15	IMO RARITAN TOWNSHIP VS STATE OF NJ *MT LAUREL*	John	Belardo	1300 Mount Kemble Ave	P.O. Box 2075	Morristown	NJ	07962-2075	jbelardo@mdmc-law.com

HNT	L -315-15	IMO TOWNSHIP CLINTON VS STATE OF NJ *MT LAUREL*	Jonathan	Drill	571 Pompton Ave		Cedar Grove	NJ	07009	jdrill@sksdlaw.com
HNT	L -299-15	IMO TOWNSHIP LEBANON VS STATE NJ *MT LAUREL*	Richard	Cushing	P.O. Box 4001		Clinton	NJ	08809	rcushing@gklegal.com
HNT	L -306-15	IMO TWP EAST AMWELL VS STATE OF NJ *MT LAUREL*	Richard	Cushing	P.O. Box 4001		Clinton	NJ	08809	rcushing@gklegal.com
HNT	L -309-15	IMO BOROUGH FRENCHTOWN VS STATE OF NJ *MT LAUREL	Steven	Kunzman	15 Mountain Boulevard		Warren	NJ	07059	skunzman@newjerseylaw.net
HNT	L -307-15	IMO TWP WEST AMWELL VS STATE OF NJ *MT LAUREL*	Richard	Cushing	P.O. Box 4001		Clinton	NJ	08809	rcushing@gklegal.com
HNT	L -308-15	IMO BOROUGH OF FLEMINGTON VS STATE OF NJ*MT LAUR	Steven	Firkser	Metro Corporate Campus One	P.O. Box 5600	Woodbridge	NJ	07095-0988	sfirkser@greenbaullaw.com
HNT	L -310-15	IMO BOROUGH HIGH BRIDGE VS STATE OF NJ *MT LAURE	Steven	Firkser	Metro Corporate Campus One	P.O. Box 5600	Woodbridge	NJ	07095-0988	sfirkser@greenbaullaw.com
HNT	L -311-15	IMO CITY LAMBERTVILLE VS STATE OF NJ *MT LAUREL*	Brian	Shotts	44 Euclid Street		Woodbury	NJ	08096	bshotts@longmarmero.com
HNT	L -316-15	IMO TOWNSHIP OF BETHLEHEM VS STATE OF NJ MT LAUR	Robert	Kenny	40 Paterson Street		New Brunswick	NJ	08901	rkenny@hoaglandlongo.com
HNT	L -313-15	IMO TWP OF TEWKSBURY VS STATE OF NJ *MT LAUREL*	Michael	Solvaggi	1500 Route 517, Suite 300		Hackettstown	NJ	07840	mselvaggi@lsaclaw.com
HNT	L -314-15	IMO TOWNSHIP FRANKLIN VS STATE OF NJ *MT LAUREL*	Katrina	Campbell	1500 Route 517, Suite 300		Hackettstown	NJ	07840	kcampbell@lsaclaw.com
HNT	L -317-15	IMO TOWNSHIP KINGWOOD VS STATE OF NJ *MT LAUREL*	Katrina	Campbell	1500 Route 517, Suite 300		Hackettstown	NJ	07840	kcampbell@lsaclaw.com
HNT	L -321-15	IMO BOROUGH OF LEBANON VS STATE ON NJ**MT LAUREL	Joseph	Novak	Perryville Centre	78 Route 173 Ste. 12	Hampton	NJ	08827	joseph@novakandnovak.com

Service List
In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015)

Edward J. Buzak, Esq.
The Buzak Law Group
Montville Office Park
150 River Road, Suite N-4
Montville, NJ 07045
ejbuzak@buzaklawgroup.com

Valentina M. DiPippo, DAG
Personnel, Community Affairs and Elections
R.J. Hughes Justice Complex
25 Market Street, 2nd Floor
PO Box 112
Trenton, NJ 08625-0112
Valentina.dipippo@dol.lps.state.nj.us

Thomas F. Carroll, III, Esq.
Hill Wallack
21 Roszel Rd,
Princeton, NJ 08540
tfc@hillwallack.com

Jonathan Drill, Esq.
Stickel Koenig Sullivan & Drill
571 Pompton Avenue
Cedar Grove, NJ 07009
jdrill@sksdlaw.com

Jeffrey L. Kantowitz, Esquire
Law Office of Abe Rappaport
Suite 6
195 US Highway 46
Totowa, NJ 07512-1833
jeffrey.kantowitz@gmail.com

Kevin D. Walsh, Esq.
Fair Share Housing Center
510 Park Blvd.
Cherry Hill, NJ 08002
kevinwalsh@fairsharehousing.org

Jeffrey R. Surenian, Esq.
Surenian & Associates, LLC
707 Union Ave, Suite 301
Brielle, NJ 08730
T: 732-612-3100
F: 732-612-3101
jrs@surenian.com

FAIR SHARE HOUSING CENTER
510 Park Boulevard
Cherry Hill, New Jersey 08002
P: 856-665-5444
F: 856-663-8182
Attorneys for Fair Share Housing Center
By: Kevin D. Walsh, Esq. (030511999)

In re Somerset, Hunterdon and Warren County Municipalities Seeking Declarations of Compliance with Mount Laurel (see attached list for captions, docket numbers, and names of counsel)

SUPERIOR COURT
Law Division
Somerset County

CIVIL ACTION

Notice of Motion for Summary Judgment

Docket Nos.

SOM-L-866-15	SOM-L-935-15	HNT-L-310-15	WRN-L-232-15
SOM-L-898-15	HNT-L-298-15	HNT-L-311-15	WRN-L-234-15
SOM-L-900-15	HNT-L-300-15	HNT-L-316-15	WRN-L-237-15
SOM-L-901-15	HNT-L-301-15	HNT-L-313-15	WRN-L-238-15
SOM-L-902-15	HNT-L-302-15	HNT-L-314-15	WRN-L-239-15
SOM-L-903-15	HNT-L-303-15	HNT-L-317-15	WRN-L-240-15
SOM-L-904-15	HNT-L-304-15	HNT-L-321-15	WRN-L-241-15
SOM-L-899-15	HNT-L-305-15	WRN-L-215-15	WRN-L-242-15
SOM-L-905-15	HNT-L-312-15	WRN-L-220-15	WRN-L-243-15
SOM-L-925-15	HNT-L-315-15	WRN-L-224-15	WRN-L-244-15
SOM-L-934-15	HNT-L-299-15	WRN-L-226-15	WRN-L-245-15
SOM-L-914-15	HNT-L-306-15	WRN-L-228-15	WRN-L-246-15
SOM-L-924-15	HNT-L-309-15	WRN-L-230-15	
SOM-L-926-15	HNT-L-307-15	WRN-L-233-15	
SOM-L-929-15	HNT-L-308-15	WRN-L-231-15	

To: Clerk
Superior Court of New Jersey
Somerset County Courthouse
20 North Bridge Street
Somerville, NJ 08876

Service List attached to cover letter

PLEASE TAKE NOTICE that, on a date and time to be determined by the court, Fair Share Housing Center (FSHC), by and through undersigned counsel, will apply through a motion for summary

judgment regarding compliance standards, 1000-unit cap, and gap period to the Superior Court of New Jersey, Law Division, Hon. Thomas C. Miller, J.S.C., Somerset County Courthouse, 20 North Bridge Street, Somerville, NJ 08876, for entry of the attached order or for other relief the court finds appropriate.

PLEASE TAKE FURTHER NOTICE that in support of this motion, Fair Share Housing Center will rely upon the enclosed brief with exhibits and certification.

Oral argument is requested.

Dated: 4/14/2016

Kevin D. Walsh, Esq.
Counsel for Fair Share Housing Center

FAIR SHARE HOUSING CENTER
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Attorneys for Fair Share Housing Center
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In re Somerset, Hunterdon and Warren County Municipalities Seeking Declarations of Compliance with Mount Laurel (see attached list for captions, docket numbers, and names of counsel)

SUPERIOR COURT
Law Division
Somerset County

CIVIL ACTION

Order

Docket Nos.

SOM-L-866-15	HNT-L-298-15	WRN-L-215-15
SOM-L-898-15	HNT-L-300-15	WRN-L-220-15
SOM-L-900-15	HNT-L-301-15	WRN-L-224-15
SOM-L-901-15	HNT-L-302-15	WRN-L-226-15
SOM-L-902-15	HNT-L-303-15	WRN-L-228-15
SOM-L-903-15	HNT-L-304-15	WRN-L-230-15
SOM-L-904-15	HNT-L-305-15	WRN-L-233-15
SOM-L-899-15	HNT-L-312-15	WRN-L-231-15
SOM-L-905-15	HNT-L-315-15	WRN-L-232-15
SOM-L-925-15	HNT-L-299-15	WRN-L-234-15
SOM-L-934-15	HNT-L-306-15	WRN-L-237-15
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	HNT-L-316-15	WRN-L-243-15
	HNT-L-313-15	WRN-L-244-15
	HNT-L-314-15	WRN-L-245-15
	HNT-L-317-15	WRN-L-246-15
	HNT-L-321-15	

This matter having been brought before the Court on the application of Intervenor/Interested Party Fair Share Housing Center, through its counsel, Kevin D. Walsh, Esq., for a motion for summary judgment in the above-captioned consolidated proceedings;

And the court having considered all filed written submissions and having heard and considered the oral arguments of all counsel, if any;

IT IS on this _____ day of _____, 2016 ORDERED as follows:

1. Fair Share Housing Center's (FSHC) Motion for summary judgment is granted.

2. The court hereby determines it will apply the following standards in evaluating municipal compliance with the Mount Laurel doctrine in the pending declaratory judgment matters that are part of these consolidated proceeding:

a. Unless otherwise directed herein, or by subsequent court order, municipalities shall generally rely upon N.J.A.C. 5:93 in preparing fair share plans for the court's review and approval.

b. In accordance with, among other rules, N.J.A.C. 5:97-6.4(i)(inclusionary zoning rules must comply with UHAC) and N.J.A.C. 5:97-6.7(c)(100% affordable developments must comply with UHAC), municipalities may receive credit

in the Third Round for units that comply with the Uniform Housing Affordability Controls, N.J.A.C. 5:80, unless they otherwise demonstrate that they are entitled to credit, which showing shall be made by motion on notice and opportunity to be heard for interested parties. Municipalities shall identify claims of credits that do not comply with UHAC.

c. Municipalities that claim to have inadequate vacant or redevelopable land shall comply with N.J.A.C. 5:97-5.1 to -5.3, not N.J.A.C. 5:93-4.2.

d. Municipalities shall comply exclusively with the bonus rules included in N.J.A.C. 5:97, with the exception of the compliance bonus provided therein, which was invalidated.

e. Alternative to paragraph d: Municipalities may choose to implement the bonus credit structure from either the Second Round Rules or the Third Round Rules as part of their compliance programs, but may not combine provisions from different Rounds.

f. Half of municipality's fair share obligation shall be met with housing open to families pursuant to N.J.A.C. 5:97-3.9.

g. No more than 25% of a municipality's Prior Round or Third Round fair share obligations shall be satisfied with age-restricted housing.

h. Half of a municipality's rental obligation for Third Round prospective need must be met through rental homes available to families pursuant to N.J.A.C. 5:97-3.4(b).

i. Half of the very low income units required to be provided in a municipality's fair share plan shall be available to families.

j. Municipalities shall comply with N.J.S.A. 52:27D-329.1, which provides that "at least 13 percent of the housing units made available for occupancy by low-income and moderate income households will be reserved for occupancy by very low income households."

k. In accordance with In re Warren, 132 N.J. 1, 35-36 (1993), no credit will be provided toward a municipality's Mount Laurel obligation for units that have a residency preference.

3. The 1000-unit cap shall limit municipalities to a 2600-unit fair share obligation, and all units developed or made affordable since 1999 may count toward that amount.

4. Municipalities shall meet the fair share obligations that accrued from 1999-2015. No deferral of the need shall be permitted. Municipalities that have not already submitted gap period calculations shall do so within 10 days of this order.

5. A copy of this order shall be served on all counsel of record and otherwise be made available to all interested parties by the counsel for declaratory judgment plaintiffs in these matters

as directed by the New Jersey Supreme Court in Mount Laurel IV within seven days of the date hereof.

Hon. Thomas A. Miller, J.S.C.

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Attorneys for Fair Share Housing Center
By: Kevin D. Walsh, Esq. (030511999)

In re Somerset, Hunterdon and Warren County Municipalities Seeking Declarations of Compliance with Mount Laurel (see attached list for captions, docket numbers, and names of counsel)

SUPERIOR COURT
Law Division
Somerset County

CIVIL ACTION

Proof of Service

Docket Nos.

SOM-L-866-15	HNT-L-298-15	WRN-L-215-15
SOM-L-898-15	HNT-L-300-15	WRN-L-220-15
SOM-L-900-15	HNT-L-301-15	WRN-L-224-15
SOM-L-901-15	HNT-L-302-15	WRN-L-226-15
SOM-L-902-15	HNT-L-303-15	WRN-L-228-15
SOM-L-903-15	HNT-L-304-15	WRN-L-230-15
SOM-L-904-15	HNT-L-305-15	WRN-L-233-15
SOM-L-899-15	HNT-L-312-15	WRN-L-231-15
SOM-L-905-15	HNT-L-315-15	WRN-L-232-15
SOM-L-925-15	HNT-L-299-15	WRN-L-234-15
SOM-L-934-15	HNT-L-306-15	WRN-L-237-15
SOM-L-914-15	HNT-L-309-15	WRN-L-238-15
SOM-L-924-15	HNT-L-307-15	WRN-L-239-15
SOM-L-926-15	HNT-L-308-15	WRN-L-240-15
SOM-L-929-15	HNT-L-310-15	WRN-L-241-15
SOM-L-935-15	HNT-L-311-15	WRN-L-242-15
	HNT-L-316-15	WRN-L-243-15
	HNT-L-313-15	WRN-L-244-15
	HNT-L-314-15	WRN-L-245-15
	HNT-L-317-15	WRN-L-246-15
	HNT-L-321-15	

1. I, Donna Gomez, work with Fair Share Housing Center.

2. On April 14, 2016, I arranged to be delivered by overnight mail to the Superior Court Clerk's office and to Judge Miller a cover letter, notice of motion, brief, certification of David N. Kinsey and this proof of service at the following addresses:

Hon. Thomas C. Miller, J.S.C.
Superior Court of New Jersey
Somerset County Courthouse
20 North Bridge Street
Somerville, NJ 08876

Clerk
Superior Court of New Jersey
Somerset County Courthouse
20 North Bridge Street
Somerville, NJ 08876

3. On that same day, I forwarded one copy of those documents to the attorneys and special masters listed with the cover letter in this matter.

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

Dated: 4/14/2016

Donna Gomez

FAIR SHARE HOUSING CENTER
510 Park Boulevard
Cherry Hill, New Jersey 08002
P: 856-665-5444
F: 856-663-8182
Attorneys for Fair Share Housing Center
By: Kevin D. Walsh, Esq. (030511999)

In re Somerset, Hunterdon and Warren County Municipalities Seeking Declarations of Compliance with Mount Laurel (see attached list for captions, docket numbers, and names of counsel)	SUPERIOR COURT Law Division Somerset County CIVIL ACTION

Fair Share Housing Center's Statement of Material Facts

1. In a certification that is attached as Exh. D to the brief filed in this matter, David N. Kinsey addresses this question in the context of the so-called "Gap Period" (1999-2015) issue in implementing the March 10, 2015 decision of the New Jersey Supreme Court in In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing. 221 N.J. 1 (2015) ("Mount Laurel IV"): What has been the change in "cost-burdened" low and moderate income ("LMI") households ("HH") in Hunterdon, Somerset, and Warren Counties during 1999-2015, compared with the experience of LMI HH on a statewide basis in New Jersey? Kinsey Certif. ¶1.

2. The Fair Housing Act and the applicable rules of New Jersey Council on Affordable Housing ("COAH") define the terms "low income household" and "moderate income household" in the context of

affordable housing. By definition, in the 1985 Fair Housing Act, HH with incomes less than 80% of the regional gross median household income, adjusted for household size, are considered low and moderate income households ("LMI"), based on federal Department of Housing and Urban Development (HUD) or other recognized standards:

> "'Low income housing means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to 50% of less of the median gross household income for households of the same size within the housing region in which the housing is located."[1]
>
> "'Moderate income housing' means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to more than 50% but less than 80% of the median gross household income for households of the same size within the housing region in which the housing is located."[2]
>
> [Kinsey Certif. ¶6.]

7. COAH Second Round Rules defined precisely in 1994 how median income by HH size was to be calculated:

> "Median income by household size shall be established by a regional weighted average of the uncapped Section 8 income limits published by HUD. To compute this regional income limit, the HUD determination of median county income for a family of four is multiplied by the estimated households within the county. The resulting product for each county within the housing region is summed. The sum is divided by the estimated total households in each housing region. The quotient represents the regional weighted average of median income for a household of four. This regional weighted

[1] N.J.S.A. 52:27D-304.c.
[2] N.J.S.A. 52:27D-304.d.

average is adjusted by household size based on multipliers used by HUD to adjust median income by household size."[3]

[Kinsey Certif. ¶7.]

8. According to the U.S. Department of Housing and Urban Development ("HUD"), "Families who pay more than 30 percent of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care."[4] [emphasis added] Kinsey Certif. ¶8.

9. HUD regularly makes publicly available special data tabulations, known as CHAS (Comprehensive Housing Affordability Strategy) data, obtained from the U.S. Census Bureau from its annual Five-Year American Community Survey ("ACS").[5] Kinsey Certif. ¶9.

10. HUD makes CHAS data available to help housing planners and policy-makers identify housing needs. CHAS data is available, for example, for the state of New Jersey, as well its counties, for 2000 and 2008-2012 that approximate two-thirds of the period 1999-2015. Kinsey Certif. ¶9.

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[3] N.J.A.C. 5:93-7.4(b), 26 N.J.R. 2332, June 6, 1994.
[4] HUD website, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/ <accessed April 13, 2016>
[5] On CHAS data, see the HUD website: http://www.huduser.gov/portal/datasets/cp.html <accessed January 3, 2016)> HUD CHA Data Query Tool: http://www.huduser.gov/portal/datasets/cp/CHAS/data_querytool_chas.html <accessed January 3, 2016)>

11. According to the HUD CHAS data, New Jersey had about 3.2 million households in 2015, of which 1.2 million qualified as low and moderate income households. Kinsey Certif. ¶10.

12. During 1999-2015, the number of LMI HH in New Jersey increased by 10.4%, but the number of cost-burdened LMI HH increased by 49.7%.[6] Kinsey Certif. ¶10.

13. During 1999-2015, the number of LMI HH in Hunterdon County increased by 20.5%, but the number of cost-burdened LMI HH increased by 122.9%. Kinsey Certif. ¶11.

14. High cost-burden reflects scarce affordable housing and high housing costs, which are not surprising as Hunterdon County was the nation's fourth-ranked county by median income in 2012.[7] [8] Kinsey Certif. ¶11.

15. During 1999-2015, the number of LMI HH in Somerset County increased by 24.1%, but the number of cost-burdened LMI HH increased by 80.2%. Kinsey Certif. ¶12.

16. Again, high cost-burden reflects scarce affordable housing and high housing costs, which are not surprising as Somerset County was the nation's eighth-ranked county by median income in 2012.[9] [10] Kinsey Certif. ¶12.

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[6] See Kinsey Certif. Exhibit A for supporting data and calculations.
[7] See Kinsey Certif. Exhibit B for supporting data and calculations.
[8] The Washington Post, September 20, 2012, http://www.washingtonpost.com/wp-srv/special/local/highest-income-counties/ <retrieved April 13, 2016>
[9] See Kinsey Certif. Exhibit B for supporting data and calculations.
[10] The Washington Post, September 20, 2012, http://www.washingtonpost.com/wp-srv/special/local/highest-income-counties/ <retrieved April 13, 2016>

17. During 1999-2015, the number of LMI HH in Warren County increased by 3.3%, but the number of cost-burdened LMI HH increased by 132.2%. High cost-burden among LMI HH indicates scarce affordable housing.[11] Kinsey Certif. ¶13.

Dated: 4/14/2016

Kevin D. Walsh, Esq.
Counsel for Fair Share Housing Center

[11] See Exhibit B for supporting data and calculations.

FAIR SHARE
HOUSING CENTER

Peter J. O'Connor, Esq.
Kevin D. Walsh, Esq.
Adam M. Gordon, Esq.
Laura Smith-Denker, Esq.

April 14, 2016

Hon. Thomas C. Miller, J.S.C.
Superior Court of New Jersey
Somerset County Courthouse
20 North Bridge Street
Somerville, NJ 08876

Re: In re Hunterdon/Somerset/Warren Municipalities Seeking Declarations of Compliance with Mount Laurel (See attached service list for captions, Docket numbers, and attorney information)

Dear Judge Miller:

In accordance with the court's February 17, 2016 order, this brief is filed in support of Fair Share Housing Center's motion for summary judgment regarding compliance issues and the obligation to include the gap period need in determining municipal fair share obligations.

This motion principally seeks summary judgment on legal issues, without introducing facts. The exception to this approach is the facts introduced in the enclosed certification of David N. Kinsey, PhD, PP, FAICP regarding the gap period. A separate document is enclosed with this brief that includes our statement of material facts.

I. Introduction

Following 15 years of delay by the Council on Affordable Housing (COAH), the New Jersey Supreme Court in In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 61 (2015) transferred proceedings for evaluating compliance with the Mount Laurel doctrine to the trial courts, stating that "[t]he FHA's exhaustion-of-administrative-remedies requirement is dissolved . . . and the courts may resume their role as the forum of first resort for evaluating municipal compliance with Mount Laurel obligations." Following that decision, the trial court with jurisdiction over municipalities in Somerset, Hunterdon, and Warren Counties has consolidated these matters for both adjudication of compliance standards and the determination of fair share obligations. In an order entered on February 17, 2016, the court directed parties to seek adjudication of compliance issues and gap period obligations through summary judgment.

FSHC through this filing seeks summary judgment on compliance standards through reliance on Mount Laurel case law, statutes, and regulations. This brief addresses broadly applicable policies, and not crediting standards or other municipal-specific issues, which are better addressed in specific matters and as part of plan review. FSHC moves for summary judgment regarding (1) the establishment of N.J.A.C. 5:93 as a baseline for compliance; (2) vacant land adjustments and unmet need; (3) bonuses; (4) requirements related to family housing, including family rental housing as a component of the rental obligation; (5) housing affordable to very low income households who earn 30% or less of median income; and (6) residency preferences.

This motion further seeks summary judgment as to the 1000-unit limitation permitted by N.J.S.A. 52:27D-307(e). We urge the court to withhold decision on that issue of the 1000-unit limitation for a later day, but should it find it appropriate to address it now,

we urge the court to find that the limitation must be adjusted for the reality that the Third Round is now 26 years, not 10, as contemplated by the statute. The court should follow the published decision in In re Hous. Element for the Twp. of Monroe, ___ N.J. Super. ___ 2015 N.J. Super. LEXIS 219 (Law Div. 2015), instead of the Ocean County decision that adopts a narrow and unconstitutional approach to the application of the 1000-unit limitation.

Finally, this motion urge the court to find that the need that was generated during the 1999-2015 gap period must be met, in accordance with binding Supreme Court and Appellate Division case law. To date, no judge in the state has accepted municipalities' arguments regarding the gap period need disappearing. We urge Your Honor to also reject that position and to direct municipalities to meet the full need recognized by the Mount Laurel doctrine.

It is easily forgotten in litigation, where we argue about obligations, bonuses, and caps, among other things, that Mount Laurel at its core involves people. Mount Laurel recognizes that people need homes, that homes link people to communities, and that the community one lives in overwhelmingly influences what opportunities one has in life. Mount Laurel recognizes that lower-income New Jerseyans, most often families with children and people with disabilities, are harmed by the tendency of municipalities to make decisions based exclusively on local goals, without considering who may be excluded. Many municipalities make decisions that exacerbate the deep, longstanding, and very damaging racial and economic segregation of our state. Few municipalities welcome and actively facilitate housing for people with disabilities unless they are required by law to comply with Mount Laurel. In the context of a state that is among most racially and economically segregated in the country, in which land use decisions are almost always made based on how many school children will move into town and in which racism in many cases still plays a role, Mount Laurel promises that the municipal desire to exclude will not deny all opportunities.

Our goal is for Mount Laurel to succeed in actually creating opportunities for families and people with disabilities of all incomes and backgrounds to live in every community in New Jersey. In this brief, we identify the standards the trial court should direct municipalities to comply with so that Mount Laurel does succeed. Certainty regarding these issues is needed in part because there is some ambiguity, but, more than that, certainty is needed because municipalities have ignored many of the legal standards that are beyond reasonable debate. The plan summaries filed by municipalities throughout the state, including in this vicinage, demonstrate that, in the absence of a court order specifying which standards apply, municipalities will fabricate standards that advance their goals of exclusion; will seek an unlawful application of the 1000-unit cap; and will propose to exclude the gap period need. FSHC therefore respectfully urges the court to grant summary judgment in favor of FSHC on the important issues presented herein.

II. Legal Argument

The legal argument of this brief addresses general compliance issues in Sections A through G. Section H addresses the 1000-unit cap. Section I through K address the gap period need.

A. N.J.A.C. 5:93 provides the baseline compliance framework.

In its March 2015 decision directing trial courts to provide forums for the adjudication of Mount Laurel claims, the Supreme Court directed trial courts to adjudicate

the fair share obligations of municipalities based on the Prior Round methodology. Id. at 53. It further provided that "municipalities are expected to fulfill" their prior round obligations and that "prior unfulfilled housing obligations should be the starting point for a determination of a municipality's fair share responsibility." Ibid. (citing In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 498-500 (App. Div. 2010)). Consistent with the Court's endorsement of the Prior Round methodology, and in view of the ongoing relevance of and reliance upon the rules adopted to implement the Prior Round, N.J.A.C. 5:93, those rules provide the appropriate base for compliance by municipalities in the court-administered Third Round.

The Supreme Court further recognized there are areas in which more recent legal changes require a departure from N.J.A.C. 5:93 to account for statutory amendments and interpretations by COAH of the FHA. Departures from N.J.A.C. 5:93 are appropriate with regard to broadly applicable policies such as the requirements for bonuses, which the Supreme Court explicitly approved COAH's deviations in 2004 and 2008 from the N.J.A.C. 5:93 approach. In re N.J.A.C. 5:96 and 5:97, supra, 221 N.J. at 31-33. Those areas also include policies as to what credits a municipality may seek which in some areas prohibit credits that were previously granted, and in some areas provide credits that were previously unavailable. For example, the Legislature in 2008 eliminated credits for Regional Contribution Agreements that had previously been available under N.J.A.C. 5:93. N.J.S.A. 52:27D-312(g). Conversely, COAH in 2004 and 2008 in its attempts at the Third Round rules added credits for the extension of expiring affordability controls, which the Appellate Division generally upheld, as the Supreme Court noted in its March decision. In re N.J.A.C. 5:96 and 5:97, supra, 221 N.J. at 31.

FSHC thus respectfully urges the Court to find that N.J.A.C. 5:93 provides the baseline framework for compliance with Mount Laurel in the declaratory judgment proceedings before it, with departures when appropriate, either because the Supreme Court directed those departures or because other external changes in law or circumstance justify the departure.

B. N.J.A.C. 5:80 provides the appropriate standards for making homes affordable to lower-income households.

The New Jersey Housing and Mortgage Finance Agency (HMFA) adopted rules in 2005, the Uniform Housing Affordability Controls (UHAC), 37 N.J.R. 2476(a), that are commonly relied on to administer affordable housing in New Jersey. COAH has previously incorporated these rules into its own. See, e.g., N.J.A.C. 5:97-6.4(i)(inclusionary zoning rules must comply with UHAC); N.J.A.C. 5:97-6.7(c)(100% affordable developments must comply with UHAC). Generally, these standards provide a critical baseline on a range of issues such as the split between low- and moderate-income units in particular developments, having a range of bedroom sizes to accommodate a range of family sizes, how rents and sales prices are fairly set, and affirmative marketing to ensure that everyone who needs housing hears about opportunities. In order to ensure that once homes are actually built they reach the people who need the homes in a fair way, the court should incorporate the UHAC as a basic standard in all compliance.[1]

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[1] The Uniform Housing Affordability Controls exclude certain developments from their ambit because those developments are governed by other applicable regulations, such as federal housing program regulations. N.J.A.C. 5:80-26.1. FSHC agrees that such exclusion is appropriate, while also reiterating that broadly applicable policies that apply in Mount Laurel described below, such as the banning of residency preferences and the overall municipal requirements for serving very-low-income and low-income households, still apply.

C. The court should order municipalities to meet their unmet need by complying with N.J.A.C. 5:97-5.3.

Mount Laurel requires municipalities to use their land use powers in ways that meet the regional need for affordable housing. This sometimes occurs through rezoning of vacant greenfields, but it is increasingly necessary for municipalities to comply with Mount Laurel through redevelopment. Both the Prior Round rules, N.J.A.C. 5:93-4.2, and the Third Round rules, N.J.A.C. 5:97-5.3, include provisions for what municipalities that do not have sufficient vacant land must do to demonstrate that the need a "vacant land adjustment" (VLA); show which portion of their fair share obligation they can meet; and otherwise plan to meet the remainder of their obligation, or their "unmet need." N.J.A.C. 5:97 though establishes a clearer and more efficient process for evaluating claims to vacant land adjustments. Clarity regarding this issue is especially important because municipalities commonly ignore their redevelopment potential and thus delay proceedings and otherwise attempt to undermine Mount Laurel. We urge the court to require municipalities to comply with that chapter's VLA rule, N.J.A.C. 5:97-5.1 to -5.3, for the following four reasons.

First, N.J.A.C. 5:97-5.1 to -5.3, necessarily reflects COAH's experience in dealing with claims of inadequate vacant land for three decades, including after redevelopment became a strong force in New Jersey land use. That approach embodied in that rule, which is not tied to growth share, was not challenged and was not overruled by any court. In the absence of an argument that N.J.A.C. 5:97-5.1 to -5.3 does not comply with Mount Laurel, the court should defer to COAH's expertise.

Second, N.J.A.C. 5:97-5.2(b) adopts the general Mount Laurel requirement that the burden of proving compliance remain on municipalities in stating that "[t]he municipality shall be responsible for demonstrating that the municipal response to its housing obligation is limited by the lack of land capacity." This is especially important in view of the absence of defendants in most of the pending declaratory judgement actions pending around the state. "A party's access to proofs tends to support allocating the burden of proof to that party. 'We generally have imposed the burdens of persuasion and production on the party best able to satisfy those burdens. . . . [T]he party with greater expertise and access to relevant information should bear those evidentiary burdens.'" State v. Wright, 410 N.J. Super. 142, 150-51 (Law Div. 2008)(quoting J.E. ex rel. G.E. v. State, 131 N.J. 552, 569-70 (1992). See also County of Essex v. First Union Nat'l Bank, 373 N.J. Super. 543, 555 (App.Div.2004) (burden of establishing a fact is generally placed "'on the person relying thereon"). Municipalities with zoning and planning boards and planners have better access to information than members of the public or public interest organizations, like FSHC. N.J.A.C. 5:97-5.2(b) thus imposes burdens that are consistent with the general evidentiary rules that are used in New Jersey courts.

Third, using the updated approach requires municipalities to at least initially propose mechanisms to meet unmet need, rather than COAH or the court. N.J.A.C. 5:97-5.2(b) provides that "[m]unicipalities shall provide a response to the unmet need in accordance with N.J.A.C. 5:97-5.3." (Emphasis added). N.J.A.C. 5:93-4.2(h) placed the obligation on COAH, which here would mean the court, to direct the municipality what to do to meet unmet need. Municipalities are fond of citing that rule in court proceedings in order to cause delay and claim that they may not need to do anything to meet unmet need. The updated approach is thus more efficient and more likely to avoid delay.

Fourth, the approach relied on in N.J.A.C. 5:97 is consistent with case law that requires municipalities to meet and not ignore their unmet need. Case law has developed, in part because of COAH's positions, in the direction of taking unmet need more seriously than N.J.A.C. 5:93-4.2 suggests. Case law recognizes that a municipality that has a vacant land adjustment "must identify potential sites for development, and a method to generate additional affordable units should those sites become available." In re Petition for Substantive Certification of Borough of Montvale, 386 N.J. Super. 119, 122 (App. Div. 2006). In In re Fair Lawn Borough, 406 N.J. Super. 433, 441-442 (App. Div. 2009), the Appellate Division wrote:

> COAH's regulations recognize that some towns may not have enough currently developable land to meet their fair share requirements, although they may have vacant land that is capable of future development for that purpose. A municipality may receive a "vacant land" adjustment, conditioned on adopting zoning geared at allowing the eventual development of affordable housing on those properties. N.J.A.C. 5:93-4.1, -4.2.
>
> [Citations omitted.]

In that decision, the Appellate Division affirmed COAH's order dismissing a municipality from its jurisdiction for failing to meet unmet need. Id. at 442-43. This shows that a VLA is not the free pass many municipalities will claim it to be.

The Appellate Division has further recognized that unmet need is not "'a permanent adjustment to municipal affordable housing obligations.'" In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 87-88 (App. Div.), certif. denied, 192 N.J. 71 (2007)(quoting 36 N.J.R. 5770 (December 20, 2004)). The Appellate Division has found that COAH's approach to unmet need met the requirements of the Mount Laurel doctrine because it must be satisfied through, for instance, overlay zoning. Ibid. See also 40 N.J.R. 5965(a), 6005 (October 20, 2008)(COAH's regulations are intended to "require meaningful plans for unmet need"); In re Fair Lawn, supra, 406 N.J. Super. at 445 (noting in case in which COAH required overlay zoning that COAH "carefully scrutinized" a municipality's "plan to be sure the vacant land adjustment did not become a hollow promise").

FSHC therefore urges the court to find that municipalities that claim to be unable to meet their fair share obligations due to an absence of vacant and redevelopable land should rely on N.J.A.C. 5:97-5.3 in the pending declaratory judgment proceedings, and should in no circumstances be able to exclude opportunities for redevelopment from their analysis, given that case law supports the necessity of including redevelopment and the reality that such redevelopment is increasingly the way many, and in some places most, development occurs.

D. The Supreme Court's March 2015 decision requires the use of the N.J.A.C. 5:97 bonus rules. Alternatively, the court should adopt the approach employed by Judge Jacobson in Mercer County.

Municipalities have indicated that they intend to combine the N.J.A.C. 5:93 and 5:97 bonus rules to achieve as much dilution of their fair share obligations as possible. FSHC urges the court to grant summary judgment regarding this issue by holding that the Supreme Court's reliance on the bonus provisions of N.J.A.C. 5:97 includes the bonus

cap provided in those rules. Alternatively, and without waiving our argument that N.J.A.C. 5:97 controls, in order to avoid dilution, the court at minimum should adopt the approach used by the Honorable Mary C. Jacobson, A.J.S.C. in her November 19, 2015 order and decision, which is attached hereto as Exh. A.[2]

1. The bonus provisions of N.J.A.C. 5:97 should apply, including the bonus cap.

While the Supreme Court's March 2015 decision in most instances instructs trial courts to disregard COAH's invalidated 2004 and 2008 Third Round rules, it provides an exception for the bonus structure developed by COAH in those rules, since the Appellate Division and Supreme Court generally upheld that structure despite otherwise rejecting the rules. Thus, bonuses are one area in which COAH's 2004 and 2008 Third Round Rules should be used instead of N.J.A.C. 5:93, as further detailed below.

COAH's second round rules only offered one type of bonus, a bonus for rental housing. N.J.A.C. 5:93-5.15(d). That bonus offered two for one credit for family rental units that were constructed or for which "the municipality has provided or received a firm commitment for the construction of rental units." Ibid. In certain circumstances, the bonus also offered a 1.33-for-one credit for age-restricted housing units that were constructed or had a firm commitment. Ibid. The bonus could be for up to 25 percent of the municipality's new construction fair share obligation. N.J.A.C. 5:93-5.15(d)(3) (referencing the 25 percent rental obligation in N.J.A.C. 5:93-5.15(a)).

In its 2004 Third Round rules, COAH changed the specific units that could receive bonuses by expanding bonuses available for some units and reducing bonuses available for other units. The 2004 rules provided that, instead of getting bonuses for rental units up to the municipality's rental obligation, rental bonuses would only be provided for units "in excess of the rental obligation." N.J.A.C. 5:94-4.20(d). Furthermore, rental units would only be provided for family rental housing "available to the general public" and not for age-restricted rental housing. Ibid. While COAH restricted the rental bonus, it also provided an additional new bonus credit for very-low-income units serving "households of the general public earning 30 percent or less of median income," provided that any given unit could not receive both types of bonuses. N.J.A.C. 5:94-4.22, 5:94-4.23.

While the Appellate Division generally struck down the 2004 Third Round Rules, the Appellate Division specifically upheld this revised bonus structure in which more bonus types were available, but bonuses for rental units were more limited:

> In the second round rules, COAH awarded a two-for-one bonus credit because the "need for rental units and the subsidies necessary to produce them are so great as to warrant incentives to municipalities to provide plans that respond to the need." 25 N.J.R. 5772 (December 20, 1993), comment and response 112. COAH did not believe it could require municipalities to construct rental housing, and developers would opt to build sales units rather than rental units because of the lower internal subsidies required for sales units. 26 N.J.R. 2307-08 (June 6, 1994), comment and response 55.

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[2] Counsel FSHC is unaware of any contrary unpublished opinions. R. 1:36-3.

> The rationale for bonus credits in the third round remains the same. COAH "believes that bonus credits are an appropriate tool to create incentives for types of housing that may not otherwise be provided in the municipality." 36 N.J.R. 5769. On the other hand, the third round rules are less generous in awarding rental bonus credits than the second round rules. First, COAH awards no rental bonus credits for age-restricted rental housing. N.J.A.C. 5:94-4.20(d). Second, a municipality is entitled to a bonus credit only to the extent that it provides for rental housing in excess of the twenty-five percent minimum. Ibid.
>
> The third round rules do not dilute satisfaction of the housing need to the same degree as the first round or second round rules. This court has upheld the first round and second round rules. Appellants offer no persuasive reason for departing from [existing precedent, particularly in the face of current rules that bestow less generous incentives than in prior rounds.
>
> [In re Adoption of N.J.A.C. 5:94 & 5:95 By N.J. Council On Affordable Hous., 390 N.J. Super. 1, 82-83 (App. Div. 2007).]

Based on the Appellate Division's affirmation of the bonus structure of the 2004 rules, COAH further refined that structure in 2008. COAH maintained the overall limitation of bonuses of 25 percent of prospective need from N.J.A.C. 5:93 and the concept that no unit could receive more than one type of bonus. N.J.A.C. 5:97-3.20. COAH in 2008 also maintained the more limited rental bonus structure from 2004 in which rental bonuses are only available for going beyond the minimum rental obligation, and only for family units. COAH also maintained bonus credits for very low income units, N.J.A.C. 5:97-3.7.[3] COAH then clarified bonus credits available for rental housing for people with special needs by stating that such bonuses could be awarded as a 1.25-for-1 credit based on the bedroom or 2-for-1 credit based on the unit depending on the type of supportive housing. N.J.A.C. 5:97-3.6(a). COAH also added bonus credits for two additional affordable housing activities not found in either N.J.A.C. 5:93 or 5:94 smart growth and redevelopment.[4] N.J.A.C. 5:97-3.18 and -3.19.[5] The Appellate Division affirmed both of these new bonuses, which provide a 1.33 for 1 unit credit, in 2010. In re N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 496-97 (App. Div. 2010).

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[3] Note the Legislature subsequently limited very low income bonus credits to those in excess of the minimum 13 percent very low income housing requirement. "[A] municipality shall not receive bonus credits for the provision of housing units reserved for occupancy by very low income households unless the 13 percent target has been exceeded within that municipality." N.J.S.A. 52:27D-329.1.

[4] COAH also offered a "compliance bonus" in N.J.A.C. 5:97-3.17 to recognize the difference between the 1 in 9 growth share ratio in 2004 and the 1 in 5 ratio in 2008. The Appellate Division invalidated this bonus in 2010. In re N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 497 (App. Div. 2010). While the Supreme Court ultimately stated that it would not express any position on the compliance bonus, In re N.J.A.C. 5:96 and 5:97, 215 N.J. 578, 619 (2013), and left further determinations on that bonus to COAH on remand, such bonus was based on growth share ratios and thus does not comport with a fair share system.

Thus, in the 2007 and 2010 decisions, the Appellate Division affirmed COAH's Third Round bonus scheme of limiting rental bonuses in exchange for creating additional types of bonuses, namely very low income, redevelopment, and smart growth bonuses, that municipalities could claim. The Supreme Court then in its March decision explicitly approved of this approach by the Appellate Division:

> [T]he 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. . . 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." Ibid. (citing N.J.A.C. 5:94-4.22). In approving those bonuses, the appellate court acknowledged COAH's discretion in creating a comprehensive scheme and further found that "[t]he [T]hird [R]ound [R]ules d[id] not dilute satisfaction of the housing need to the same degree as the [F]irst [R]ound or [S]econd [R]ound [R]ules," which were both approved. Id.at 82-83, 914 A.2d 348. Again, the Mount Laurel judges may exercise the same level of discretion when evaluating a municipality's plan for Mount Laurel compliance.
>
> [In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 31-32 (emphasis added)].

The Supreme Court specifically noted the Appellate Division's prior approval of the smart growth and redevelopment bonuses . Id. at 32. Thus, the Supreme Court suggested that trial courts may approve bonuses based on the "same level of discretion" that COAH had to craft a scheme involving a range of bonuses that dilutes the housing need to a degree less than the bonus scheme in the first and second round, including the smart growth and redevelopment bonuses.

Because the Appellate Division and Supreme Court, with a few minor exceptions, upheld COAH's 2008 rules' bonus structure, this court should follow the provisions approved by the courts as conforming to the Supreme Court's most recent directive. Specifically, bonuses for the prospective need obligation should be available for units that are constructed or have a firm commitment for construction as follows:

- A 2 for 1 credit for family rental units in excess of the 25 percent minimum rental obligation, provided that at least half of the rental units used to meet the 25 percent minimum rental obligation are family units. N.J.A.C. 5:97-3.6(a)(1) and (4).
- A 2 for 1 credit by unit or 1.25 for 1 credit by bedroom for supportive and special needs housing units in excess of the 25 percent minimum rental obligation, provided that at least half of the rental units used to meet the 25 percent minimum rental obligation are family units. N.J.A.C. 5:97-3.6(a)(1), (2) and (4).
- A 1.33 for 1 credit for smart growth or redevelopment projects. N.J.A.C. 5:97-3.18 and -3.19.

- A 2 for 1 credit for very low income units in excess of the 13 percent minimum very low income obligation (which obligation is discussed further below). N.J.A.C. 5:97-3.7 as modified by N.J.S.A. 52:27D-329.1.
- Cumulatively bonuses may not exceed 25 percent of the prospective need obligation, and no unit may receive more than one type of bonus. N.J.A.C. 5:97-3.20.

By relying on these established COAH standards that have been upheld by the Appellate Division and explicitly referred to in the Supreme Court's most recent decision, this court can comply with the Court's direction in that decision to offer bonuses consistent with past precedent. Summary judgment should therefore be granted directing municipalities to rely on the N.J.A.C. 5:97 bonus structure.

2. Alternatively, at minimum, municipalities should be able to choose which set of bonus rules to use, but they should not be allowed to mix and match.

In the alternative, and without waiving our argument that N.J.A.C. 5:97 controls, in order to avoid dilution, FSHC urges the court to rely on the approached adopted by the Honorable Mary C. Jacobson, A.J.S.C. in her November 19, 2015 order and decision in the consolidated Mercer County. Exh. A.

In her order, Judge Jacobson provided that "municipalities may choose to implement the bonus credit structure from either the Second Round Rules or the Third Round Rules as part of their compliance programs, but may not combine provisions from different Rounds." Exh. A (order) at 2. Judge Jacobson based her decision in part on FSHC's concern "that combining bonuses and credits from both rounds could dilute the municipalities' obligations to a degree COAH sought to avoid." Exh. A at 15. "COAH itself never aggregated the bonus credits in the manner advocated by the municipalities. To the contrary, as noted above, COAH maintained a certain balance in the credits between the Second and Third Rounds: while the Third Round Rules increased the number and type of bonus credits available, COAH limited the use of the rental bonus credit from the Second Round and established an overall cap for bonus credits." Id. at 15-16. Judge Jacobson noted that:

> the court is concerned that a significant imbalance could result if the court were to permit municipalities to choose bonuses from either Round. For example, such an order would permit a municipality to maintain the Second Round's allowance for rental bonus credits for each unit constructed in meeting the municipality's obligation (rather than permitting such bonuses only after that obligation has been met, as provided in the Third Round), plus the three new credits implemented in the Third Round, with no limit on their aggregate use. The court agrees with the concerns voiced by FSHC that such an imbalanced system would impermissibly dilute the Mercer county municipalities' constitutional obligations. Accordingly, the municipalities may choose either one or the other approach in developing their plans, but may not combine both.
>
> [Id. at 16 (emphasis in original).]

In the event the court is not inclined to simply require the N.J.A.C. 5:97 bonus structure referenced by the Supreme Court, which will cause less dilution than the N.J.A.C. 5:93 bonus structure and which we maintain provides the appropriate balancing of incentives versus dilution, we request the court to adopt Judge Jacobson's approach, which allows one or the other approach to be used, but prohibits picking and choosing elements of the two approaches that cause the most dilution.

E. The Fair Housing Act and court precedent require a minimum of 50 percent family housing and require that half of all rental units and half of the required number of very low income units be made available to families.

Families with children are the primary intended beneficiaries of the Mount Laurel doctrine. See Taxpayers Ass'n of Weymouth v. Township of Weymouth, 80 N.J. 6, 50 (1976)("[W]e were specifically concerned in Mt. Laurel with the needs of younger families with children"). In In Re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super 1, 76 (App. Div. 2007), the Appellate Division recognized that "[t]he desire to exclude families with children drives exclusionary zoning, a fact recognized when the Court first announced the Mount Laurel doctrine . . . . The cost of primary and secondary education generates a significant burden which can be lowered by limiting housing opportunities for families with children." The panel found that age-restricting half a municipality's affordable housing "represents an exclusionary restriction" that "has the potential to significantly reduce the availability of affordable housing for poor families with children, and is therefore exclusionary." Id. at 79. It is thus important that trial courts adjudicating compliance with the Mount Laurel doctrine pay special attention to the needs of lower-income families.

Even COAH eventually recognized that lower-income families receive priority under Mount Laurel. Following the Appellate Division's decision, COAH recognized that its prior practice did not provide sufficient opportunity for families with children and thus was inconsistent with Mount Laurel and the FHA. COAH thus took four steps to implement the Court's decision.

First, COAH adopted a rule that required half of municipality's fair share obligation to be met with housing open to families. N.J.A.C. 5:97-3.9. COAH interpreted the FHA as requiring this minimum standard, stating that "[t]o encourage 'a variety and choice of housing' pursuant to the Fair Housing Act, the new rules include a requirement that 50 percent of the growth share obligation addressed within a municipality must be family housing units." 40 N.J.R. 238 (Jan. 22, 2008). The agency thus interpreted N.J.S.A. 52:27D-302h, which provides in part that municipalities are required to provide "for a variety and choice of housing including low and moderate cost housing, to meet the needs of people desiring to live there" as requiring half of units provided within a municipality to be available to families. Given that an agency's interpretation of its enabling legislation is entitled to deference, see, e.g., In re Warren, 132 N.J. 1, 28 (1993), trial courts implementing Mount Laurel should also defer to the requirement that half of all units meeting a fair share obligation be available to families with children.

Second, COAH limited age-restricted housing to 25% of a municipality's fair share obligation, which is also consistent with Prior Round practice. N.J.A.C. 5:97-3.10(c); N.J.A.C. 5:93-5.14. When municipalities urged an increase, the agency refused, stating that it was prohibited from doing so by the Appellate Division's decision. 40 N.J.R. 2751.

Third, COAH required that half of a municipality's rental obligation for Third Round prospective need must be met through rental homes available to families. N.J.A.C. 5:97-

3.4(b). COAH has required a minimum of 25% of the prospective need obligation to be met with rental housing. N.J.A.C. 5:93-5.15(a); N.J.A.C. 5:97-3.10(b). By recognizing that satisfaction of the rental requirement must include families, COAH ensured that the needs of families who cannot afford to buy a home are met. These needs have only become more acute since the economic crisis of 2008 and subsequent lack of availability of mortgages to many first time homebuyers.

Fourth, following the 2008 amendments to the FHA requiring that municipalities provide opportunities for families earning 30% or less of median income, known as very low income housing, COAH interpreted the new legislation and its rules, which were adopted to implement the FHA, as requiring that half of the very low income units be available to families. COAH October 30, 2008 Guidance Document at 1-2 (attached to this brief as Exhibit B).

In order to comply with Judge Cuff's decision and broader precedent on the inclusion of families in Mount Laurel housing, the court should grant summary judgment in favor of FSHC regarding the above four requirements for the municipalities under its jurisdiction.

F. The 2008 Fair Housing Act amendments require a minimum of 13 percent very low income housing as part of the 50 percent of housing in each fair share plan required to be affordable to low income households.

In 2008, the Legislature passed A-500, a substantial revision to the Fair Housing Act covering a range of issues. P.L. 2008, c. 46. Many of these issues have a greater impact at the individual municipal compliance level, such as the elimination of Regional Contribution Agreements and standards for development fees and spending plans. One component of A-500 particularly impacts the general standards that are the subject of this brief, N.J.S.A. 52:27D-329.1, which requires 13 percent of municipal fair share to be met with very low income housing.

N.J.S.A. 52:27D-329.1 requires that "at least 13 percent of the housing units made available for occupancy by low-income and moderate income households will be reserved for occupancy by very low income households." COAH in the aforementioned 2008 guidance document stated that "Third Round Housing Element and Fair Share Plans must address the 13 percent very low income requirement." Exhibit B at 1. Thus, 13 percent of each municipality's plan for Third Round prospective need must be comprised of units affordable to very low income households. These units may contribute to the minimum 50 percent of housing units in each plan that are required to be affordable to low income households. N.J.A.C. 5:93-2.20 ("The municipal calculated need obligation shall be divided equally between low- and moderate- income households.. . . [a]n odd number is always split in favor of the low-income unit.").

Thus, in accordance with statutory requirements and COAH regulations, the court should issue summary judgment regarding the requirement that at least half of the units in the fair share plan to be affordable to low income households, including at least 13 percent of the units affordable to very-low-income households. As noted above, at least half of this 13 percent must be available to families; the remaining half can serve very-low-income people with special needs and seniors.

G. Residency preferences are prohibited.

The court should also prohibit municipalities from seeking credit for units with residency preferences. Developments with residency preferences are not eligible for credit under the Mount Laurel doctrine in accordance with In re Warren, 132 N.J. 1, 35-36 (1993). The Court in that decision held that a policy that "excludes from eligibility for a portion of the municipality's low- and moderate-income housing members of the class for whose benefit the obligation to construct that housing was established" is inconsistent with the Mount Laurel doctrine. No exceptions to that rule have ever been allowed.

The court should therefore direct municipalities to prepare plans that do not include residency preferences and should prohibit municipalities from seeking credit for units that have residency preferences.

H. If the court decides the issue now, the 1000-unit limitation should be adjusted to account for the 26-year period of housing need and should not include present need.

Thus far, two trial courts have addressed the application of the 1000-unit cap permitted by N.J.S.A. 52:27D-307(e) after the Supreme Court's March 2015 decision. Judge Wolfson issued a decision that has been published. In re Hous. Element for the Twp. of Monroe, ___ N.J. Super. ___ 2015 N.J. Super. LEXIS 219 (Law Div. 2015). That decision found that the 1000-unit cap must be adjusted to account for the 26-year period of affordable housing need that has accrued without lawful rules in place.

The Honorable Marlene Lynch Ford, A.J.S.C. and the Honorable Mark A. Troncone, J.S.C. issued a decision on February 18, 2016 (henceforth "Ocean County decision"), available as Exh. C. The Ocean County decision addresses the application of the 1000-unit limitation in a piecemeal fashion. The court decided two issues: First, it decided that municipalities cannot be required to provide more than 1000-units. The decision presumably means that the 1000-unit limitation does not apply to units that already exist in accordance with In re Application of Tp. of Jackson, 350 N.J. Super. 369, 374-75 (App. Div. 2002), but the decision does not mention that binding opinion. Second, the court held that present need must be included in the 1000 unit calculation. The court did not address crediting, dilution of the need, or other issues arise under the 1000-unit cap.

As a threshold matter, we respectfully submit it is inadvisable for the court to decide any issues involving the 1000-unit cap at this point. The court can at best provide general guidance regarding the application of the limitation because the limitation does not eliminate the need to calculate a municipality's fair share obligation and its application is necessarily fact sensitive. Indeed, as recently as 2013, the Supreme Court stated the FHA requires an initial allocation of fair share obligations prior to applying any caps. In re N.J.A.C. 5:96 and 5:97, 215 N.J. 578, 613 (2013). If the court elects to address the 1000-unit limitation permitted by N.J.S.A. 52:27D-307(e) at this point, we urge it to hold (1) that the limitation does not simply mean 1000 units; (2) that present need is not included within the limitation; and (3) that dilution of affordable housing is an issue that must be addressed on a fully developed record and that sufficient dilution of the need may result in a violation of Mount Laurel.

1. The 1000-unit limitation should be applied in a way that accounts for the 26-year length of the Third Round and thus should not be applied to simply set the obligation at 1000.

In re Hous. Element for the Twp. of Monroe, ___ N.J. Super. ___ 2015 N.J. Super. LEXIS 219 (Law Div. 2015), and the Ocean County decision differ widely in their interpretation of 1000-unit limitation provided by N.J.S.A. 52:27D-307(e). FSHC urges the court at minimum to rely on In re Monroe because it more faithfully implements the goal of the FHA.

The court in In re Monroe provided an extensive history of the statutory, regulatory, and decisional law involving the 1000-unit limitation. The court also surveyed the various positions argued by parties to the Middlesex County proceedings. Judge Wolfson held as follows:

> 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, which should, where possible, be avoided. See Schierstead v. Brigantine, 29 N.J. 220, 230 (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 (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 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 (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 (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).
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> [In re Monroe, supra, ___ N.J. Super. ___, 2015 N.J. Super. LEXIS 219, at *14-15.]

Judge Wolfson further provided that municipalities with more than a 1000-unit obligation for 2015-2025 may avoid a "radical transformation" through a "'phasing in' of the housing

need generated during the gap period over several consecutive cycles." Id. at *19. His decision requires municipalities to provide up to 2600 units, in part through phasing. Judge Wolfson held that "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." Ibid. (citations omitted).

The Ocean County decision focused on a plain language interpretation of N.J.S.A. 52:27D-307(e) writing that "[t]he specific language of the FHA relative to the cap is precise, clear and unambiguous, i.e., no municipality is to have a fair share obligation beyond 1000 units in any ten (10) year cycle." Ocean County decision at 24.

Judge Wolfson and Judge Troncone take essentially opposite views regarding the impact of N.J.S.A. 52:27D-307(e), with the former holding that "the Legislature never intended the cap period to extend beyond one single ten-year period," In re Monroe, supra, ___ N.J. Super. ___, 2015 N.J. Super. LEXIS 219, at *14-15, and the latter finding that the plain language controls without considering whether the result of the plain language is sensible or fair in this context. FSHC urges the court to follow the approach taken by Judge Wolfson in In re Monroe for three reasons.

First, the plain language of N.J.S.A. 52:27D-307(e) provides for a 1,000 unit cap based on ten years, not twenty-six years, of fair share obligation. Judge Troncone recognized in the Ocean County decision that the "cycle" is necessarily more than 10 years and thus should have recognized that, while the 1,000 unit cap over ten years would control if the need were for only a ten year period, the language of the statute does not provide for a 1,000 unit cap over a 26 year period.

Second, the approach taken in the Ocean County decision rewards municipalities that delayed and excluded lower-income households for the past 16 years and fails to recognize municipalities that have attempted to comply with the law. A municipality with a 1600-unit obligation that provided 600 units has to meet an obligation of 1000 units going forward, and a municipality with a 1000-unit obligation that did nothing has the same obligation. Absurd results such as this should be avoided. See State v. Williams, 218 N.J. 576, 586 (2014) (citation omitted).

Third, the Ocean County decision fails to even mention, never mind account for and apply, Calton Homes, Inc. v. Council on Affordable Hous., 244 N.J.Super. 438 (App.Div.1990), certif. denied, 127 N.J. 326 (1991). That decision found that the First Round 1,000-unit cap regulation (which applied to only a six-year period) had a disparate impact on some municipalities and also risked unconstitutionally diluting the fair share obligation. "[The cap's] application substantially exacerbates disparity in the obligation imposed on various municipalities in the same region and, therefore, clearly demonstrates that the cap is unreasonable. . . . While it can be argued that no immediate financial consequence falls upon the other municipalities because the excess fair share obligation of the capped municipality is not shifted to other municipalities, it is nonetheless a fact of life that those other municipalities who do their full share have a right to expect that other municipalities will be required to do their part as well." Id. at 453. The Appellate Division incorporated a table and analysis from the appellant's brief in that case which noted that, for example, "As a result of the 1,000-unit 'cap,' Middletown's fair share of 1,000 units is only slightly higher than that of Freehold Township (937 units) although Middletown has 3.3 times more households than Freehold to share the obligation." Ibid. The Ocean County decision provided no analysis whatsoever as to whether its interpretation of the cap would lead to some municipalities in Ocean County or its housing region having a

much higher fair share relative to their capacity to meet the need, thus failing to address an issue that binding law holds raises significant constitutional concerns.

The failure of the Ocean County decision to account for controlling case law issued by a higher court provides another reason for the court to follow In re Monroe, which recognizes Calton Homes and holds that interpretations that offend the constitution should be avoided, In re Monroe, supra, ___ N.J. Super. ___, 2015 N.J. Super. LEXIS 219, at *14 (citing State Farm v. State, 124 N.J. 32, 61 (1991) (courts should avoid interpretation of a statute that would render it unconstitutional), and thus provides an approach that reduces the dilutionary impact of the 1000-unit limitation.

2. The 1000-unit cap includes only prospective need in accordance with a binding interpretation of the FHA.

The In re Monroe and Ocean County decisions are also at odds regarding whether the 1000-unit limitation includes present need or just prospective need. Judge Wolfson held that the limitation relates only to prospective need. In re Monroe, supra, ___ N.J. Super. ___, 2015 N.J. Super. LEXIS 219, at *21-22. Judge Troncone notes that there is ambiguity as to what the 1000-unit limitation applies to, Ocean County decision at 24-25, but then states that the court "is constrained by the clear language of the FHA and therefore the fair share obligation of any municipality, constituting the gap period from 1999 to 2015, the present need and the upcoming third round prospective needs, is subject to that statute's 1000 unit cap," id. at *26 (emphasis added). There is no explanation provided regarding how the same sentence of the FHA is at once both ambiguous and so clear as to unavoidably lead to a single conclusion.

FSHC urges the court to reject the determination that the 1000-unit limitation includes present need as inconsistent with the text of N.J.S.A. 52:27D-307(e) and contrary to binding case law and COAH's interpretation of the statute. The inclusion of present need within the limitation is contrary to the structure of N.J.S.A. 52:27D-307(e). The limitation relates to a municipality's capacity to absorb new units. The statute considers whether "it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within that ten-year period." Ibid. Meeting present need has nothing to do with zoning powers, but instead involves the establishment of "a rehabilitation program . . . to rehabilitate substandard housing units occupied by low and moderate income households." N.J.A.C. 5:93-5.2(b).

The reasoning underlying the Ocean County decision also contravenes In re Jackson, 350 N.J. Super. 369, 377 (App. Div. 2002). Judge Troncone reasoned at page 25 that "Section 307 of the FHA in defining the duties of COAH specifically authorizes COAH to consider the municipality's "fair share of the regions present and prospective need" when applying the 1000 unit cap. N.J.S.A. 52:27D-307(e)(emphasis supplied). The court is satisfied the present need is part of a town's 'fair share' and thus subject to the cap." The sentence that Judge Troncone relies on has already been found in a binding Appellate Division decision to be inapplicable to the 1000-unit limitation because it was not part of the 1993 amendment that imposed the limitation, L. 1993, c. 31, and because, whereas the general language about COAH limiting fair share obligations in the first sentence of N.J.S.A. 52:27D-307(e) is not mandatory, and thus cannot be read to control the later-added second sentence as to the 1000-unit limitation, which is mandatory. "Jackson's principal argument before us is that COAH's interpretation ignores the first sentence of § 307e. . . However, the word 'aggregate' was not added to the 1993 amendment; it was part of the FHA when originally enacted. *See L.* 1985, c. 222, § 7(e). Moreover, by its very terms, § 307e permits COAH to place limits on the aggregate

number of units which may be allocated to a municipality, but does not require COAH to do so." In re Jackson, supra, 350 N.J. Super. at 377. The focus of the Ocean County decision on the first sentence of N.J.S.A. 52:27D-307(e) as providing the sole basis to find that present need is included within the 1000-unit limitation is thus inconsistent with binding law of a higher court. As the Appellate Division correctly held, "fair share" means something different in the discretionary power of COAH in the first sentence of N.J.S.A. 52:27D-307(e) from the mandatory power of COAH to impose a 1000-unit cap in the second sentence.

Relatedly, the mandatory statutory test for whether a municipality should be granted a 1000-unit cap addresses whether "it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within that ten-year period," which shall be based upon "a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units" over the past decade. The "zoning powers" and "certificates of occupancy" have nothing to do with present need, which is a measure of existing dilapidated units occupied by low- and moderate-income households. Thus, a plain language reading of the statute conflicts with the notion that existing homes should be included in the 1000-unit limitation.

The inclusion of present need within the 1000-unit limitation is also contrary to COAH's interpretation of N.J.S.A. 52:27D-307(e). N.J.A.C. 5:97-5.8 states that the limitation applies to prospective need (at that time "growth share"), and there is no mention of present need. N.J.A.C. 5:97-5.8 is the only regulation COAH adopted that addresses explicitly whether present need is included. In the Second Round, it was also clear that present need under the rules was not included in the 1000-unit limitation because COAH adopted and readopted N.J.A.C. 5:93-5.2(m)[6] to address municipalities that faced too substantial a present need. As noted above, COAH's interpretation of its enabling legislation is entitled to deference. Judge Troncone acknowledged N.J.S.A. 52:27D-307(e) is ambiguous, and then, as a result, undertook his own analysis of the statute. That approach is inconsistent with well-established law that states that a state agencies' view of what a statute means is more important than what a judge believes. See generally Matturri v. Bd. of Trs. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). It was well within COAH's powers, especially following the Appellate Division's decision in In re Jackson, supra, 350 N.J. Super. at 377, which held that the sentence that includes the term to "present need" in the statute has no bearing on the 1000-unit limitation, to interpret N.J.S.A. 52:27D-307(e), in a way that conforms with that decision. Judge Troncone erred in replacing the agency's view of what N.J.S.A. 52:27D-307(e) means with his own view.

It is also important to note that there is no COAH rule the court can look to for applying the 1000-unit limitation in a way that includes present need. Does the limitation result in a reduction of the present need or the prospective need? Or both on a proportionate basis? This is not addressed in any COAH regulation and, therefore, the

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[6] N.J.A.C. 5:93-5.2(m) provides: "A municipality receiving State aid pursuant to P.L. 1978, c. 14 (N.J.S.A. 52:27D-178 et seq.) may seek a waiver from addressing its entire rehabilitation component in one six year period of substantive certification. A municipality seeking such a waiver shall demonstrate that it cannot rehabilitate the entire rehabilitation component in six years and/or that an extraordinary hardship exists, related to addressing the entire rehabilitation component in six years."

court would need to break new ground on this issue if it elects to require the inclusion of present need within the 1000 units.

3. The Ocean County decision permits an unconstitutional dilution of the affordable housing need.

The Ocean County decision, without mentioning Calton Homes, supra, 244 N.J. Super. at 458, approved two kinds of dilution of the regional need for affordable housing that should lead this court to find that it is not appropriate to defer to the decision. The Ocean County decision interprets the 1000-unit limitation as applying to a 26-year period instead of a 10 year period, thus potentially reducing need in some municipalities by more than half. The court also included present need within the 1000-unit limitation, which reduces either the present need or the prospective need, or both. Calton Homes recognizes that the dilution of affordable housing need is an issue of constitutional dimension. The Appellate Division incorporated a table and analysis from the appellant's brief in that case which noted that, for example, "As a result of the 1,000-unit 'cap,' Middletown's fair share of 1,000 units is only slightly higher than that of Freehold Township (937 units) although Middletown has 3.3 times more households than Freehold to share the obligation." Ibid. That analysis is not possible to prepare accurately until fair share obligations are adjudicated, but it is an issue that FSHC reserves the right to raise at a later date, including after the adjudication of Third Round fair share obligations.

I. The Supreme Court has ordered, and COAH in its Prior Round rules and consistently in every iteration of its Third Round rules explicitly required, retention of unsatisfied prospective need from prior periods.

Judge Wolfson in In re Monroe, supra, ___ N.J. Super. ___, found that there is a gap period need that must be met. Likewise, the February 18, 2016 Ocean County decision finds that municipalities are "constitutionally mandated" to address need arising from 1999-2015 based on the holding from Mount Laurel II that "obligation to meet the prospective lower income housing need of the region is, by definition, one that is met year after year in the future." Ocean County decision at 3, 11 (citing Southern Burlington County NAACP v. Tp. of Mt. Laurel, 92 N.J. 158, 218, 219) (emphasis in Ocean County decision). The court additionally finds that "there exists a rational methodology to calculate and determine the affordable housing need which arose during the 'gap period.'" Id. at 3. FSHC agrees with those holdings and urges the court to issue summary judgment regarding the requirement to meet the gap period need for the following reasons.

First, the issue of whether the gap period need must be satisfied was decided by the Supreme Court in In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 30 (2015). The Supreme Court held that its decision did not eradicate "prior unfulfilled housing obligations." Ibid. It did so against the backdrop of parties to the Court decision, the Four Towns group, attempting to convince the Court that such obligations indeed would be eradicated, as the Court noted in its decision, id. at 14:

> Bernards Township, Clinton Township, Union Township, and Greenwich Township (collectively the Four Towns) express concern about the complex questions that would be thrust upon judges if exclusionary zoning litigation were to return to the Law Division. For example, they contend that trial courts would be tasked with determining whether a municipality's fair share allocation will be "cumulative" or applicable only to one compliance period. The Four Towns also contend that

> adjudicating such *Mount Laurel* matters would require courts to confront the myriad differences between the methodologies utilized in the prior rounds and those contained in the various iterations of COAH's Third Round Rules.
>
> [Emphasis added.]

That context helps explain the Court's discussion of "prior unfulfilled housing obligations" which comes in the section of the decision regarding "certain guidelines [that] can be gleaned from the past and can provide assistance to the designated Mount Laurel judges in the vicinages." Id. at 29-30. The Court responded to concerns raised by the Four Towns and others about these trial court matters becoming open debates about any and all potential issues, even long settled issues, by providing guidance. And part of that guidance was responding to the issue about whether prior obligations continued raised by the Four Towns by saying that "prior unfulfilled housing obligations" remained. While the Court specifically cited the Prior Round period in that section, that is likely because the Court correctly saw post-1999 obligations as being part of the Third Round. More generally, the Court expressed its overriding desire to end "the lengthy delay in achieving satisfaction of towns' Third Round obligations." In re N.J.A.C. 5:96 and 5:97, supra, 221 N.J. at 33. It would make little sense to be concerned about such delay if, at the end of the day, the obligations simply vanished.

Second, COAH, in every iteration of its rules since the First Round, including all three attempts at Third Round rulemaking, always has recognized that fair share obligations run continuously, and include the time lost during the Third Round process. In the Prior Round rules, which the Supreme Court directed this court to use as the basis for the present process, id. at 30, COAH explicitly rejected a suggestion that past unmet housing need disappear. In 1993, with the promulgation of the Second Round rules, COAH explicitly found that "prior cycle prospective need" from the First Round remained. N.J.A.C. 5:93 App. A, 26 N.J.R. 2348. COAH faced criticism for doing so, from those who wished to see the unmet Prior Cycle Prospective Need disappear. Those commenters claimed that the prior cycle prospective need overlapped with the most current present need figures from the 1990 Census, and thus were double counted. In response, COAH stated that "[t]he Council has included low and moderate income households living in substandard units and projections of low and moderate income household formation in its estimates of need. It has also adopted a cumulative approach to estimating need, establishing the principle that the need does not disappear if unaddressed." 26 N.J.R. 2300, 2301 (June 6, 1994)(adoption of Second Round rules)(emphasis added). COAH thus established in its Prior Round rules that the calculation of present need and prospective need were to be undertaken separately, that there was no "overlap," and that need did not disappear over time if unaddressed.

Similarly, in all three of COAH's Third Round rule proposals — *including the proposal authored by Econsult in 2008* — the period of need calculation started in 1999, not at the date of the rule proposal. In 2004, COAH in its first iteration of the Third Round rules carried forward the unmet obligation from the First and Second Round. N.J.A.C. 5:94 App. A ("Prior Round Prospective Need is brought forward"). It also included the need generated in the five year period from the expiration of the Second Round in 1999 to the rule promulgation in 2004, stating that "Fifteen-year need (1999-2014) is delivered in ten years (2004-2014)" – i.e. COAH projected the full need starting in 1999 through 2014, and then required municipalities to meet it between 2004 and 2014. Ibid.

In 2008, when COAH retained Econsult to develop the methodology, it once again retained the First and Second Round need. N.J.A.C. 5:97 App. C. COAH further stated that the "period for which we are projecting need" is "between 1999 and 2018," thus looking back to 1999 even though nine years had passed, and started its population projections for the Third Round at 1999. N.J.A.C. 5:97 App. A. Even COAH's deeply flawed 2014 rule proposal incorporated both Prior Round need from 1987-1999 and prospective need from 1999 through 2024. On its worse day, even COAH never proposed getting rid of the need from 1999 to 2014. "Affordable housing need of the past is composed of the Prospective Need of prior periods net of what affordable housing was produced by municipalities and what was accomplished through public provision of subsidized housing. These periods are 1987-1999 and 1999-2014. . . In the case of Prospective Need, where the need has been projected for the forthcoming period, if it is not met, this obligation does not simply go away." Proposed N.J.A.C. 5:99 App. A, 46 N.J.R. 956.

Thus, COAH consistently recognized that prospective need obligations from the past continue if unmet. It did so in its Prior Round Rules that the Supreme Court ordered be used as the template for this court process. It also did so three times in Third Round rules that carried forward the portion of the Third Round need that had accumulated up to that time. Many parties challenged many issues from COAH's rules in 2004 and 2008 before the Appellate Division and Supreme Court, but not this basic mainstay of COAH's rules that has always existed. If the notion that prospective need disappears held any legal significance, rather than being an attempt to simply reduce housing need by ignoring low- and moderate-income households who actually need housing and have always been included in the need, presumably some party would have challenged COAH's longstanding past practice sometime between 1987 and now. No party did. and this court should not overturn such well established law.

Third, the League of Municipalities and other municipal parties argued the exact opposite position, that need is cumulative and any need from a "gap period" is necessarily recaptured whenever obligations are ultimately determined, in the Appellate Division case of In re Six Month Extension, 372 N.J.Super. 61 (App. Div. 2004). Judge Troncone found that "the municipalities are estopped from now abandoning the position, presumably made in good faith before the Appellate Division in 2004, that there should be no gap period obligation." Ocean County Decision at 15. FSHC agrees with Judge Troncone's holding as to judicial estoppel, but even if such estoppel did not exist, a published Appellate Division decision is binding on this court and thus requires the decision reached by Judge Troncone. FSHC discusses the specific details of this decision and its relevance to the matter at hand further in the next legal argument section.

Fourth, some parties may assert, as Econsult did in its initial report for the League of Municipalities, that the increase in present need from 2000 to 2010 reflects the "double counting" of households included in the prospective need. This argument not only is wrong as a matter of law in that COAH explicitly rejected it in the Prior Round rules, it is also factually incorrect, as a basic look at the Census data Econsult cites shows. As noted above, when COAH adopted the Second Round rules, municipalities made exactly this argument, and COAH rejected it, stating that "low and moderate income households living in substandard units and projections of low and moderate income household formation" are two separate types of need and stating that "need does not disappear if unaddressed." 26 N.J.R. 2301. At page 21, the Ocean County decision correctly rejected the claim that doublecounting prevents a fair calculation of the gap period need and left any further claims regarding that issue for trial.

Fifth, to the degree that the need for 1999 to 2015 is not counted, municipalities may not claim credits for units constructed during that period either. Municipalities that actually continued to produce affordable housing would thus be in a worse position than municipalities that did nothing, which violates the basic principles of Mount Laurel and the Fair Housing Act of rewarding compliance rather than discouraging it. Both COAH and the Appellate Division previously considered the link between the period of need calculation and the period of crediting, and found that municipalities may not receive credits for periods outside of the need calculation. In the Prior Round, households formed prior to 1980 were not counted as part of the need, and as such COAH did not allow credits for housing units created prior to 1980. N.J.A.C. 5:93-3.1(a) ("Given the approach the Council has developed for determining calculated need, the Council has determined that it is appropriate to allow credits for units constructed after April 1, 1980."). Municipalities challenged this approach, and the Appellate Division affirmed. As the Appellate Division held, "By excluding the pre-1980 units, COAH's model. . . projected the growth of these figures and the need to have each municipality absorb its fair share of the required new housing." Twp. of Bernards v. State, Dept. of Community Affairs, 233 N.J. Super. 1, 11-12 (App. Div. 1989). Thus, COAH in the Prior Round rules adopted, and the Appellate Division upheld, a rule providing that credits are only available to match the period need was counted. Not crediting units built from 1999 to 2015 would not only reward the municipalities that acted in the most exclusionary fashion, but also create perverse incentives going into the future. If a municipality could stall meeting its obligation, it would eliminate or reduce its obligation, thus creating every possible incentive for a municipality to stall compliance.

Sixth, the need for affordable housing in Somerset, Hunterdon, and Warren counties exploded during the gap period, with housing overall becoming substantially less affordable and thereby causing harm to lower-income households. According to the HUD data, New Jersey had about 3.2 million households in 2015, of which 1.2 million qualified as low and moderate income households. Kinsey Certif. ¶10. During 1999-2015, the number of LMI HH in New Jersey increased by 10.4%, but the number of cost-burdened LMI HH increased by 49.7%. Ibid. This troubling trend existed in the counties that are the subject of this proceeding. During 1999-2015, the number of LMI HH in Hunterdon County increased by 20.5%, but the number of cost-burdened LMI HH increased by 122.9%. Kinsey Certif. ¶11. High cost-burden reflects scarce affordable housing and high housing costs, which are not surprising as Hunterdon County was the nation's fourth-ranked county by median income in 2012. Ibid. During 1999-2015, the number of LMI HH in Somerset County increased by 24.1%, but the number of cost-burdened LMI HH increased by 80.2%. Kinsey Certif. ¶12. Again, high cost-burden reflects scarce affordable housing and high housing costs, which are not surprising as Somerset County was the nation's eighth-ranked county by median income in 2012. Ibid. During 1999-2015, the number of LMI HH in Warren County increased by 3.3%, but the number of cost-burdened LMI HH increased by 132.2%. Kinsey Certif. ¶13. The harm caused by the failure of the law to prevent exclusionary zoning should not be ignored. The plight of families and people with disabilities should be recognized by the court.

In sum, decades of past precedent, and the Supreme Court's decision, require the need from 1999 to 2015 to be addressed. COAH required prior unfulfilled obligations to be addressed in the Prior Round rules that provide the template for the present court process, and all three iterations of COAH's Third Round rules, including the version prepared by Econsult, required addressing the need from 1999 to present, without serious challenge. While municipalities may argue to the contrary to attempt to reduce their obligations, this issue is not a close call. There is simply no precedent that allows the

court to make prospective need from 1999 to 2015 to disappear, and ample controlling precedent that requires it to be included.

We thus respectfully urge Your Honor to adopt the part of the Ocean County decision that finds that the gap period need must be met and may be reliably quantified.

J. The court should require calculation of gap period need based on the Prior Round methodology.

The Ocean County decision correctly found there is a gap period need that must be met, but, in our view, incorrectly found that that need should be "calculated as a separate and discrete component of a municipality's fair share obligation."

The issue of whether the gap period need should be calculated separately has never been an issue in any earlier litigation. Every court-approved methodology and every methodology ever adopted by COAH included calculations for times that have passed in a single calculation of need, using a single methodology. In 1984, prior to the adoption of the Fair Housing Act, Judge Serpentelli issued the seminal decision in AMG Realty Co. v. Warren Tp., 307 N.J.Super. 388, 428 (Law Div. 1984), which required the need attributable to a gap period to be met and did so as part of a single calculation. Likewise, after adoption of the Fair Housing Act, COAH continued the precedent established by AMG and subsequent cases.[7] The Prior Round methodology promulgated by COAH in 1994 covered a cumulative period from 1987 to 1999, which included both a "prior cycle prospective need" recalculating the 1987 to 1993 obligations based on the most recent Census and state data, in addition to a "gap" of 11 months between the start of the Second Round and the adoption of the Second Round rules. COAH explained that in developing its estimate of need, COAH included "those low and moderate income households living in substandard housing, all low and moderate income households the Council believes have formed between 1987 and 1993 and all the low and moderate income households that are expected to form during a 1993 – 1999 projection period." 26 N.J.R. 2301 (comment 4)(June 6, 1994). See also N.J.A.C. 5:93 App.A, 26 N.J.R. 2348. This occurred as part of a single calculation, not a separate one. While the recalculation of need for 1987 to 1993 took into account actual observed household growth as opposed to projections — as any calculation now also should do — that calculation still followed the same methodology as the calculation of need going forward from 1993 to 1999, and resulted in a single cumulative Prior Round housing obligation, not a separate "gap period" need.

The cumulative approach to calculating prospective need as part of a single calculation was continued in COAH's two Third Round rule adoptions. Indeed, between the Prior Round and Third Round, the Appellate Division specifically affirmed this "cumulative" approach to guide COAH's development of the Third Round rules, and, as noted above and in Judge Troncone's decision, many of the same parties that now claim there is no "gap period" in the Third Round obligation, and those parties' expert Econsult, took the exact opposite position throughout the prior development of the Third Round rules. In re Six Month Extension, supra, 372 N.J.Super. at 74-75, addressed a series of challenges by the New Jersey Builders Association (NJBA), various individual builders and several public interest groups to COAH's grants of extended substantive certifications

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[7] COAH noted that its methodology was very similar to that developed in the Superior Court prior to the formation of COAH, citing specifically Calton Homes, Inc. v. Council on Affordable Housing, 244 N.J. Super. 438 (App. Div. 1990), certif. denied 127 N.J. 326 (1991) and In re Township of Warren, 132 N.J. 1(1993). 26 N.J.R. 2301.

pursuant to COAH's procedural rule for granting municipalities protection from builder's remedies while the Third Round rules were being developed. Various municipalities, the League of Municipalities and COAH defended the procedural regulation. In a November 2002 decision denying NJBA's challenge to the regulation COAH explained that any delay in the determination of municipal obligations would be accounted for and recaptured in the third round methodology. COAH's position was quoted by the Appellate Division as follows:

> The Council's third-round methodology and rules, once adopted, will comply with the requirements of the FHA and the Mount Laurel doctrine. The third-round methodology will continue the work of the first- and second-round methodologies and implementing regulations by fairly and accurately determining the state-wide affordable housing need and by assigning that need to the State's municipalities. The mere fact that there may be a "gap" between the second and third compliance periods, does not violate the Mount Laurel doctrine. In fact, there was a similar gap between the first and second round compliance periods as well[,] as the first-round compliance period was from 1987 to 1993, yet the second-round rules were not adopted until June 6, 1994. Nonetheless, the affordable housing need was calculated from July 1987 through July 1999, creating a continuous calculation period upon which the first and second-rounds were based. Likewise, the third-round numbers will ultimately capture the full housing need projected through 2010. Based on this history, the Council saw fit to provide compliant towns with some degree of protection from a builder's remedy lawsuit during this "gap" period by adopting rules which extend second-round substantive certifications.
>
> [In re Six Month Extension, supra, 372 N.J. Super. at 82 (emphasis added).]

COAH subsequently adopted the first set of third round rules in 2004, incorporating the cumulative approach to determining what was now denominated as "growth share." Those rules calculated prospective need based on a cumulative period from 1999 to 2014, even though COAH promulgated those rules five years after the Third Round period started. Those rules were invalidated for other reasons and the matter was remanded to COAH for additional rulemaking.

In response to the court's order, COAH retained a number of experts to assist it in developing a second iteration of the third round rules. One of these experts was Econsult, which produced what became Appendix A to N.J.A.C. 5:97. In that report, Econsult calculated each municipality's affordable housing obligation for the period from 1999 to 2018. N.J.A.C. 5:97, App. A, "Introduction."[8] In its response to comments, COAH said

[8] This contrasts markedly with the December 30, 2015 Econsult report, which defines the prospective need period as the ten years between 2015 and 2025; and claims that what it was able to do in 2008 for COAH is not only not authorized by the FHA and Mount Laurel II, it is fraught with "structural problems, in part because the Prior Round methodologies do not envision computing Prospective Need for a period that includes both forward-looking and retrospective components in

"[t]he Council believes that the growth share ratio for both housing and employment growth accurately and effectively address the need for affordable housing within the state for the period of time 1999 through 2018." 40 N.J.R. 2690(a) (June 2, 2008). See also N.J.A.C. 5:97-2.2(d), -2.4(a) and App. F. There was no separate calculation. And nothing in the challenge to those rules, which ultimately led to the proceedings at hand now, overturned the cumulative calculation of Third Round need from 1999 through ten years into the future.

In view of that history, in which there has never been a separate calculation of need in any methodology adopted by the courts or COAH, there is no reason to do so now. The Supreme Court required that "previous methodologies employed in the First and Second Round Rules should be used to establish present and prospective statewide and regional affordable housing need. The parties should demonstrate to the court computations of housing need and municipal obligations based on those methodologies." In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 30 (2015) (citing In re N.J.A.C. 5:96 and 5:97, 215 N.J. 578, 620 (2013)). That is not an invitation to innovate. The practice of calculating one obligation for each round should not altered, and the Prior Round methodology should be used for calculating the full obligation from 1999 to 2025. This does not require, nor does FSHC suggest, ignoring what we know about what household growth on the ground from 1999 until now; actual data on household growth can and should be used, and in fact the official state Department of Labor projections that FSHC's expert relies upon as the basis for his expert opinion have already been updated based on actual growth.[9] There is no need, nor a legal basis, for otherwise treating the gap period differently from the Prior Round methodology that the Supreme Court ordered be used in these proceedings.

Further, to the extent the court intends to address this issue and consider requiring two calculations, doing so should be considered at trial, with expert testimony, and should not the subject of pre-trial decisions. The fact sensitive nature of this issue does not permit a summary decision-making process.

K. The court should not permit the deferral of part of the gap period need.

We further urge Your Honor require the full need to be met and to reject the deferral of the gap period need that was permitted in the Ocean County decision as inconsistent with the Fair Housing Act, as shown by the text of the act and legislative history of that legislation.

The Ocean County decision addressed this issue at pages 26-27 as follows:

> In some circumstances, [a municipality's] surviving "gap" obligation after the cap is applied may be substantial. Such towns would be obligated to provide their entire fair share within the next ten (10) year third round housing cycle. Such

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the same calculation, and in part due to the double counting that arises when the Present Need calculation does not align with the start of the Prospective Need period." "New Jersey Affordable Housing Need and Obligations," December 30, 2015.

[9] See New Jersey Department of Labor, Projection of Total Population by County, New Jersey 2012 to 2032, available at http://lwd.dol.state.nj.us/labor/lpa/dmograph/lfproj/table1.xls (showing use of Census 2010 data and subsequent 2012 Census estimate to update projections) (last accessed April 14, 2016).

> a result, in many cases, may unduly strain municipal services or otherwise detrimentally impact these towns. Mr. Reading, in his report, recommends the court consider a two cycle phase-in period for a town's gap period obligation. Mr. Reading notes such a deferral was proposed in COAH's unadopted third round rules. The court agrees with this approach and therefore such municipalities may petition the court to defer up to 50 percent of its "gap" obligation to the fourth round. This determination will be made during the court's review of the individual municipal plans and will be based upon objective factors to be developed by the court with the assistance of its local masters.

The decision thus further effectively reduces the need in the short term in a manner that is disconnected from the Fair Housing Act. The Fair Housing Act originally allowed for this kind of phasing in of the need through deferral. L. 1985, c. 222, § 23 ("Phase-in of obligation"). This section of the original Fair Housing Act explicitly allowed for a "municipal request [to] be allowed to phase in its obligation for a fair share of low and moderate income housing" as part of Mount Laurel litigation. The statute listed a variety of factors for courts to use in looking at phase-ins including developable land and past performance in providing affordable housing. Ibid. The statute also provided for a suggested set of guidelines for judges as to phase in to be adjusted based on the aforementioned factors — which, as will become more relevant below, generally tracked the 1000 unit cap in providing a suggestion of extension of time beyond the then-standard six years only for municipalities with more than a 1,000 unit obligation, but also allowed in some circumstances deferral for municipalities with less than a 1,000 unit obligation.

In implementing the 1000-unit cap, the Legislature did so specifically as a replacement for this kind of phasing, repealing the phasing section of the Fair Housing Act as part of the same bill. L. 1993, c. 31 deleted section 23 of the Fair Housing Act in its entirety, and also deleted a part of N.J.S.A. 52:27D-307 that permitted "[p]hasing of present and prospective fair share housing requirements," and simultaneously included the 1000-unit limitation. This expressed the Legislature's intent for the 1000 unit cap to replace, not supplement, other forms of deferral, and the Legislature's disapproval of phasing for municipalities with obligations that are less than 1000 units. The Ocean County decision thus violates the express purpose of the FHA by authorizing phasing for municipalities with obligations that are less than 1000 units, which the FHA formerly permitted but now explicitly does not.

IV. Conclusion

In view of the above arguments, FSHC respectfully urges the court to grant summary judgment as follows as addressed in the enclosed order:

a. Unless otherwise directed herein, or by subsequent court order, municipalities shall generally rely upon N.J.A.C. 5:93 in preparing fair share plans for the court's review and approval.

b. In accordance with, among other rules, N.J.A.C. 5:97-6.4(i)(inclusionary zoning rules must comply with UHAC) and N.J.A.C. 5:97-6.7(c)(100% affordable developments must comply with UHAC), municipalities may receive credit in the Third Round for units that comply with the Uniform

Housing Affordability Controls, N.J.A.C. 5:80, unless they otherwise demonstrate that they are entitled to credit, which showing shall be made by motion on notice and opportunity to be heard for interested parties. Municipalities shall identify claims of credits that do not comply with UHAC.

c. Municipalities that claim to have inadequate vacant or redevelopable land shall comply with N.J.A.C. 5:97-5.1 to -5.3, not N.J.A.C. 5:93-4.2.

d. Municipalities shall comply exclusively with the bonus rules included in N.J.A.C. 5:97, with the exception of the compliance bonus provided therein, which was invalidated.

e. Alternative to paragraph d: Municipalities may choose to implement the bonus credit structure from either the Second Round Rules or the Third Round Rules as part of their compliance programs, but may not combine provisions from different Rounds.

f. Half of municipality's fair share obligation shall be met with housing open to families pursuant to N.J.A.C. 5:97-3.9.

g. No more than 25% of a municipality's Prior Round or Third Round fair share obligations shall be satisfied with age-restricted housing.

h. Half of a municipality's rental obligation for Third Round prospective need must be met through rental homes available to families pursuant to N.J.A.C. 5:97-3.4(b).

i. Half of the very low income units required to be provided in a municipality's fair share plan shall be available to families.

j. Municipalities shall comply with N.J.S.A. 52:27D-329.1, which provides that "at least 13 percent of the housing units made available for occupancy by low-income and moderate income households will be reserved for occupancy by very low income households."

k. In accordance with In re Warren, 132 N.J. 1, 35-36 (1993), no credit will be provided toward a municipality's Mount Laurel obligation for units that have a residency preference.

l. The 1000-unit limitation of N.J.S.A. 52:27D-307(e) is adjusted to be a 2600-unit limitation, with credit for all units developed since 1999 to be counted toward that figure.

m. Municipalities shall meet the full need that has accrued from 1999-2015.

Thank you for your attention to this matter.

Respectfully,

Kevin D. Walsh, Esq.
Counsel for Fair Share Housing Center

Enclosures:

Exhibit A: November 19, 2015 order and decision by Honorable Mary C. Jacobson, A.J.S.C.

Exhibit B: Council on Affordable Housing October 30, 2008 Guidance Document

Exhibit C: February 18, 2016 decision by Honorable Marlene Lynch Ford, A.J.S.C. and the Honorable Mark A. Troncone, J.S.C.

Exhibit D: April 14, 2016 Certification of David N. Kinsey, PhD. PP. FAICP

FILED

PREPARED BY THE COURT NOV 19 2015

SUPERIOR COURT OF NJ
MERCER VICINAGE
CIVIL DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

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

In the Matter of the Application of the Township of Lawrence

In the Matter of the Application of the Township of Robbinsville

In the Matter of the Application of the Municipality of Princeton

In the Matter of the Application of the Borough of Pennington

In the Matter of the Application of Ewing

In the Matter of the Application of the Township of Hopewell

In the Matter of West Windsor Township

In the Matter of the Application of the Borough of Hightstown

In the Matter of the Application of the Township of Hamilton

Petitioners.

Civil Action
(Mt. Laurel)

ORDER ON USE OF BONUS CREDITS

DOCKET NUMBERS:
MER-L-1522-15
MER-L-1538-15
MER-L-1547-15
MER-L-1550-15
MER-L-1555-15
MER-L-1556-15
MER-L-1557-15
MER-L-1561-15
MER-L-1568-15
MER-L-1573-15

THIS MATTER having come before the court for consideration of the various arguments put forth by the parties regarding compliance issues unrelated to the methodology for determining the extent of the municipalities' affordable housing obligations; and the court having considered the arguments put forth in the briefing and at oral argument; and for good cause shown and for the reasons set forth in the attached decision:

Exh. A.

IT IS this 19th day of November, 2015, **HEREBY ORDERED** that:

1. The municipalities may choose to implement the bonus credit structure from either the Second Round Rules or the Third Round Rules as part of their compliance programs, but may not combine provisions from different Rounds.
2. All other matters are deferred until the court has received a full expert analysis.
3. The municipalities are permitted to utilize affordable housing obligation numbers calculated by Dr. David Kinsey in his expert report or the numbers calculated by Special Methodology Master Richard Reading in his spreadsheet attached to the court's decision as "Appendix A" in preparing their preliminary plans for court review.

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

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

NOT FOR PUBLICATION WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS

PREPARED BY THE COURT

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

In the Matter of the Application of the Township of Lawrence

In the Matter of the Application of the Township of Robbinsville

In the Matter of the Application of the Municipality of Princeton

In the Matter of the Application of the Borough of Pennington

In the Matter of the Application of Ewing

In the Matter of the Application of the Township of Hopewell

In the Matter of West Windsor Township

In the Matter of the Application of the Borough of Hightstown

In the Matter of the Application of the Township of Hamilton

Petitioners.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

Civil Action
(Mt. Laurel)

DECISION ON COMPLIANCE ISSUES

DOCKET NUMBERS:
MER-L-1522-15
MER-L-1538-15
MER-L-1547-15
MER-L-1550-15
MER-L-1555-15
MER-L-1556-15
MER-L-1557-15
MER-L-1561-15
MER-L-1568-15
MER-L-1573-15

November 19, 2015

JACOBSON, A.J.S.C.

Factual and Procedural History

The present matter has arisen out of the New Jersey Supreme Court's 2015 decision reinstating the courts as "the forum of first instance for evaluating municipal compliance with Mount Laurel obligations." In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 20 (2015). That role had previously been held by the Council on Affordable Housing ("COAH"), which was authorized by the Fair Housing Act ("FHA"), N.J.S.A. 52:27D-301 to -329, to guide municipalities in meeting their affordable housing obligations. Having concluded that COAH was "not capable of functioning as intended by the FHA," In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 19, the Court directed the trial courts both to establish the present affordable housing obligations for New Jersey's municipalities and to certify municipal plans to meet those obligations through declaratory judgment actions. Id. at 24-29.

Pursuant to the Supreme Court's directive, eleven of the twelve Mercer County municipalities filed declaratory judgment actions with this court: Hamilton, East Windsor, West Windsor, Lawrence, Robbinsville, Princeton, Pennington, Ewing, Hopewell Township, Hightstown, and Hopewell Borough.[1] In addition, the municipalities have been joined by several intervenors: Fair Share

[1] On November 10, 2015, Hopewell Borough voluntarily dismissed its declaratory judgment action, citing the expense of participation.

Housing Center ("FSHC"), New Jersey Builders Association ("NJBA"), OTR East Windsor Investors, LLC, Thompson Realty Company of Princeton, Inc., CF Hopewell, LLC, Howard Hughes Corp., The Blackpoint Group, LLC, and Avalon Watch, LLC.

Like some other courts enforcing Mount Laurel obligations, this court has treated certain common issues among the parties in a consolidated manner. In an effort to establish some guidelines for all of the municipalities to follow as they prepare preliminary affordable housing plans for judicial review, the court invited the parties to submit briefs addressing any compliance issue they thought could be decided as a matter of law. On September 25, 2015, the court established a briefing schedule and oral argument for the compliance issues. Given the municipalities' representation that their expert report on methodology would not be available until the end of 2015, the court determined not to address the mechanism for calculating the affordable housing obligation at this time.

That decision was prompted by the fact that the court had only received expert reports on methodology from two intervenors. First, and most prominently, FSHC submitted a report from its expert, Dr. David Kinsey. Dr. Kinsey's report both presented an affordable housing calculation methodology and then applied that methodology to assign numerical affordable housing obligations for

all Mercer County municipalities. In addition, NJBA submitted a report from Art Bernard supporting and endorsing Dr. Kinsey's work.

Conversely, the municipalities had initially selected Dr. Robert Burchell to provide an alternate methodology for calculating the affordable housing obligation for each town. But due to Dr. Burchell's unexpected incapacity last summer, he was unable to complete this task. The municipalities subsequently retained a replacement, Econsult Solutions, Inc. ("Econsult"), both to critique the expert report of Dr. Kinsey and to provide a separate calculation of each town's fair share burden. While Econsult submitted its critique of Dr. Kinsey's report to the court in October, it is not anticipated that it will provide its affordable housing methodology and calculations until December 2015 at the earliest. Without the benefit of expert testimony on behalf of the municipalities, the court was reluctant to evaluate and then determine the appropriate methodology to calculate affordable housing needs.[2]

Nevertheless, the court anticipated that there might be a set of legal issues relevant to the towns' compliance obligations but unrelated to the methodology of determining the number of units

[2] On October 30, 2015, Special Methodology Master Richard Reading, appointed to assist the courts in Ocean, Monmouth, and Mercer Counties (COAH Region 4), issued a report discussing both the Kinsey Report as well as Econsult's critique. This report included a preliminary, total affordable housing number for the whole of Mercer County, but did not provide preliminary numbers for each town. Upon this court's request, however, Mr. Reading's office recently provided preliminary affordable housing calculations for each municipality in Mercer County. These numbers are attached as "Appendix A" to this decision.

necessary to meet those obligations that were ripe for decision. The court hoped that inviting the presentation of such issues and releasing a decision on such matters would have a positive impact on the compliance process by assisting municipalities in drafting their compliance plans and fostering mediation by reducing uncertainty. Although the oral argument proved so divisive that the court's hopes for mediated settlements early in the process were dashed, the court nonetheless concludes that some clarity in the compliance process may ultimately contribute to mediated resolutions in some of the Mercer County towns. Notably, however, the court will address only a small subset of the panoply of arguments made by the parties because most of the issues were too intertwined with the methodology for calculating the obligations to be decided at this point absent full expert input.

For example, the validity of the Kinsey Report and his calculation methodology was argued by many of the parties. FSHC's extensive briefing sought to defend the Kinsey approach. A similar defense was a prominent feature of briefs submitted by OTR East Windsor Investors, LLC, and Thompson Realty Co. of Princeton, Inc. Conversely, briefing from Mason, Griffin, & Pierson, on behalf of various municipalities, presented arguments directly contesting the Kinsey methodology. The court is persuaded that the merits of these arguments cannot be properly reviewed without the benefit of expert input on each side.

In addition, East Windsor argued extensively against Dr. Kinsey's inclusion of senior citizen households in his affordable housing calculations. This argument was disputed by FSHC, NJBA, OTR East Windsor Investors, LLC, and Thompson Realty Co. of Princeton, Inc. Here again, the court has determined that the appropriate consideration of senior citizen households in calculating affordable housing obligations is too closely related to methodology to be decided at this time. This sentiment was echoed by Special Master Richard Reading in his October report, in which he noted that, while East Windsor's concerns were legitimate, the precise degree to which the calculation needed adjustment could only be determined after further expert input on methodology. While Mr. Reading opined that some adjustment was necessary and he incorporated an adjustment into his preliminary report, East Windsor seemed to suggest that senior citizen households should be excluded from consideration in the methodology altogether. The court thus has decided that this issue cannot appropriately be decided at this time.

Almost all of the parties commented on whether a 1,000-unit cap should be used to limit each municipality's affordable housing obligation pursuant to N.J.S.A. 52:27D-307(e). While the Honorable Douglas Wolfson, J.S.C., released a decision on this issue on October 5, 2015, Middlesex County Mt. Laurel Litigation, MID-L-

3365-15, et al., this court has decided not to address the matter at this time.

Firstly, it remains unclear how many Mercer County towns will be eligible to claim the 1,000-unit cap. Mr. Reading's preliminary calculations, for example, utilize the cap for only one Mercer County town. If that analysis or a similar one is adopted by this court, the issue can be reviewed in the one case where it may be relevant. Moreover, the court was persuaded (particularly by arguments put forth in the Mason, Griffin & Pierson brief) that analysis of the 1,000-unit cap issue may very well be intertwined with questions regarding methodology. For example, the court will likely need to determine the applicability of the 1,000-unit cap to the sixteen-year gap in regulatory action from the expiration of the Second Round Rules in 1999 to the present declaratory judgment actions. Before considering this issue, the court may require expert input to determine whether, for example, the inclusion of this regulatory "gap period" would result in any double counting.

After considering the numerous arguments put forth by the parties in response to its September 25 order, the court has decided to issue a ruling only on the limited subject of the appropriate bonus credits Mercer County municipalities may use in

their plan proposals.[3] This decision is provided in an effort to clarify some compliance issues to assist the municipalities in developing their preliminary plans and perhaps to help foster some mediated settlements.

Legal Analysis

After reviewing the arguments of the parties, the court concludes that Mercer County municipalities may choose either the Second Round or Third Round framework regarding bonus credits, but may not combine approved bonus credits from both rounds. This limited discretion comports with Mount Laurel case law and the specific guidance provided by the Supreme Court in its 2015 order to the courts.

The Mount Laurel doctrine places a constitutional requirement on each municipality to provide a realistic opportunity for the construction of its fair share of the present and future regional housing needs for low and moderate income households. S. Burlington County NAACP v. Twp. of Mount Laurel, 67 N.J. 151, 174 (1975) (Mt. Laurel I); In re adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 15 (App. Div. 2007), certif. denied, 192 N.J. 72 (2007). The Supreme Court's opinion in S. Burlington County NAACP v. Twp. of

[3] The court also notes, for clarity's sake, that "bonus credits" are distinct from "construction credits." See In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 81 (App. Div. 2007). The latter pertains to the subject of the extension of affordability controls and will not be covered by this decision.

Mount Laurel, 92 N.J. 158 (1983) (Mt. Laurel II) provided the basic framework for establishing whether a municipality has met its Mount Laurel obligations. The Court directed that municipalities must first establish their housing need by calculating a concrete number of housing units. Id. at 215-16. Following enumeration of the need, municipalities must create housing plans that provide a "realistic opportunity" to meet that housing need. Id. at 221.

The latter requirement entailed an entirely practical review of a plan's effect on a municipality and developer incentives: municipalities need to demonstrate that there "is in fact a likelihood—to the extent economic conditions allow—that the lower income housing will actually be constructed." Id. at 222. Indeed, subsequent courts have struck down rules that inadequately incentivize development or dilute a town's obligation. See In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. at 73-74 (noting that such inadequate incentives "provide[ ] municipalities with an effective tool to exclude the poor by combining an affordable housing requirement with large-lot zoning and excessive demands for compensating fees in lieu of providing such housing").

These goals were largely adopted by the Legislature when it created an administrative mechanism for enforcing affordable housing requirements through the FHA and the State Planning Act. N.J.S.A. 52:18A-196 to -207. Most notably, the FHA created an administrative agency, COAH, which would be required to promulgate

periodic rules to guide municipalities in both ascertaining their fair share housing obligation and in developing an appropriate compliance program to meet that obligation.

COAH twice carried out this task successfully—passing the First Round Rules in 1986, N.J.A.C. 5:92-1.1 to -18.20, which covered housing obligations from 1987 to 1993, and the Second Round Rules in 1994, N.J.A.C. 5:93-1.1 to -15.1, which covered housing obligations accrued from 1987 through 1999. These Rules largely withstood various legal challenges levied against them. The Third Round Rules, by contrast, failed on two separate attempts to secure judicial approval. See In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. 1 (overturning the first iteration, codified at N.J.A.C. 5:94-1.1 to -9.2); In re Adoption of N.J.A.C. 5:96, 215 N.J. 578 (2013) (overturning the second iteration, codified at N.J.A.C. 5:96-1.1 to -20.4). When COAH failed to adopt a third iteration, leaving a fifteen-year regulatory gap, the Supreme Court decided to remove COAH from its role and reinstate the courts as the primary enforcement mechanism for affordable housing obligations. In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 19-20. Despite the fact that the Third Round Rules were rejected by the Appellate Division in 2007 and again in 2010, those courts explicitly endorsed specific features of the Rules in each review. See, e.g., In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 495-98 (App. Div. 2010), aff'd sub nom. In re Adoption

of N.J.A.C. 5:96, 215 N.J. 578 (2013). The Supreme Court explicitly acknowledged these determinations as potential sources of guidance for the trial courts in carrying out their current task. In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 30-33. (The 2010 Appellate Division rulings were also largely endorsed by the Supreme Court in 2013. In re Adoption of N.J.A.C. 5:96, supra, 215 N.J. at 619).

The usage of bonus credits in affordable housing plans has repeatedly been approved by courts as a proper incentive to foster the creation of affordable housing units. See, e.g., Mount Laurel II, supra, 92 N.J. at 217; Calton Homes v. Council on Affordable Housing, 244 N.J. Super. 438, 456-58 (App. Div. 1990), certif. denied 127 N.J. 326 (1991) (permitting the use of rental bonus credits to ensure that such units are constructed). Their use was among the provisions of the Third Round Rules that were explicitly endorsed by the Appellate Division. See, e.g., In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. 1, 81-84 (App. Div. 2007); In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 495-97. Bonus credits supply incentives by rewarding towns that approve the construction of specific types of affordable housing units. The bonuses encourage towns to approve affordable developments because the bonuses assist the municipalities in meeting their affordable housing obligations. Thus, for example, a two-for-one bonus credit for rental housing would double-count

each rental unit constructed in satisfying a municipality's overall obligation.

COAH implemented different systems of bonus credits in both the Second Round Rules and the Third Round Rules. In the Second Round, there was only one type of bonus credit authorized to incentivize the construction of rental units. See N.J.A.C. 5:93-5.15(d). The Rules required municipalities to provide 25% of their housing obligations in the form of rental units. Id. In order to incentivize the construction of such units, the Rules permitted the municipalities to receive bonus credits for each rental unit constructed in meeting that 25% minimum. Id. Specifically, the Rules provided a two-for-one credit for family rental units and a 1.33-for-one credit for age-restricted and alternative living units. Id.

The Third Round Rules endorsed significant changes to the bonus credit structure. First, COAH altered the rental bonus so that municipalities could only receive it *after* having met the 25% mandatory minimum for rental units. N.J.A.C. 5:97-3.6(a). Second, COAH introduced four new types of bonuses: (1) a 1.33-for-one bonus for each affordable unit constructed in housing areas designated as most desirable for development by the State Planning Commission (the so-called "Smart Growth" bonus), N.J.A.C. 5:97-3.18; (2) a 1.33-for-one bonus for each affordable unit constructed in redevelopment or rehabilitation areas designated by the Local

Redevelopment and Housing Law (the "Redevelopment" bonus), N.J.A.C. 5:97-3.19; (3) a two-for-one bonus for each affordable unit constructed for very low income households (i.e., those members of the public earning no greater than 30% of the median income), N.J.A.C. 5:97-3.7; and (4) a two-for-one bonus for municipalities that had followed the iteration of the Third Round Rules in effect between 2004 and 2008 (the "Compliance" bonus). N.J.A.C. 5:97-17. In addition, COAH limited the aggregate of all bonuses permitted to 25% of a municipality's overall housing obligation. N.J.A.C. 5:97-3.20. In 2007, the Appellate Division affirmed the very low income credit bonus. In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. at 81-84. In 2010, the Appellate Division affirmed both the Smart Growth and Redevelopment bonuses. In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 495-98. These conclusions were explicitly cited with favor by the Supreme Court in its 2015 decision. In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 31-32. The Appellate Division also overturned the Compliance bonus, In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 497-98, but the Supreme Court expressed no opinion on this point. See In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 31-32.

It is important to note that the courts did not merely rubber-stamp COAH's bonus credits; rather, they closely inspected each provision to ensure that it properly incentivized the development

of affordable housing. The courts were well aware that bonuses and credits that do not incentivize construction could result in an unconstitutional dilution of housing obligations, providing rewards without requiring action. See, e.g., In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 493-95 (invalidating rental bonus credits awarded to municipalities for units that had been planned in the prior round but had not yet been constructed). Thus, the bonus credits of the Second and Third Round Rules that were upheld by the courts were only accepted after a rigorous legal analysis to ensure their validity.

The present inquiry does not require the court to determine whether new bonuses properly incentivize construction without unduly diluting the affordable housing need. Rather, the Supreme Court directed the trial courts to utilize, at their discretion, the available Second and Third Round Rules. Thus, this court's task is simply to determine which of the already accepted bonus credits from the previous rounds may be applied by the Mercer County towns as they prepare preliminary affordable housing plans due to the court in December 2015.

The municipalities argued that the court should permit the use of the Second Round bonus structure in conjunction with the specific Third Round bonuses approved by the Appellate Division—e.g. the Redevelopment and Smart Growth bonuses—as well as the Compliance bonus credit that was expressly struck down. By

contrast, FSHC argued that the court should use only the bonus credit structure of the Third Round. To further highlight the diversity of opinions proffered, the court also notes that NJBA seems to find almost any combination of bonus credits acceptable, so long as the court maintains the aggregate 25% cap on all bonus credits contained in the Third Round Rules.

Having reviewed the arguments of the parties and applicable case law, the court will authorize the municipalities to choose either the bonus credit structure of the Second Round Rules or that of the Third Round Rules except for those provisions, such as the Compliance Bonus, that were expressly rejected by the Appellate Division. This court does not see the need to revisit the in-depth analysis of prior appellate courts regarding the Rules. The municipalities should not be deprived of policies that have been permitted by the courts in the past.

On the other hand, the court will not permit the municipalities to select any combination of bonus credits previously authorized. The court shares the concern expressed by FSHC at oral argument and in its briefing—namely, that combining bonuses and credits from both rounds could dilute the municipalities' obligations to a degree COAH sought to avoid. Notably, COAH itself never aggregated the bonus credits in the manner advocated by the municipalities. To the contrary, as noted above, COAH maintained a certain balance in the credits between

the Second and Third Rounds: while the Third Round Rules increased the number and type of bonus credits available, COAH limited the use of the rental bonus credit from the Second Round and established an overall cap for bonus credits.

Notably, the court is concerned that a significant *imbalance* could result if the court were to permit municipalities to choose bonuses from either Round. For example, such an order would permit a municipality to maintain the Second Round's allowance for rental bonus credits for each unit constructed in meeting the municipality's obligation (rather than permitting such bonuses only after that obligation has been met, as provided in the Third Round), plus the three new credits implemented in the Third Round, with no limit on their aggregate use. The court agrees with the concerns voiced by FSHC that such an imbalanced system would impermissibly dilute the Mercer County municipalities' constitutional obligations. Accordingly, the municipalities may choose either one or the other approach in developing their plans, but may not combine both.

Moreover, the municipalities' position is unsupported by the case law. A close examination of the applicable opinions shows that the courts evaluated the impact of each bonus credit within the broader context of the then current Rules as a whole. E.g. Calton Homes, supra, 244 N.J. Super. at 457 ("The rental bonus rule is part of a comprehensive scheme to encourage municipalities

and developers to build affordable rental units in the future."). In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. at 83 (noting in its analysis of the bonus credit structure in the Third Round Rules that "[t]he third round rules do not dilute satisfaction of the housing need to the same degree as first or second round rules"). In other words, the rulings regarding bonus credits were purposefully contained within the context of the broader Round of rules in which they were found. The court is not persuaded that the appellate courts intended that specific bonus credits be divorced from the context in which they were adopted. Consequently, the court will apply the discretion afforded it by the Supreme Court as a "forum of first instance for evaluating municipal compliance with Mount Laurel obligations," In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 20, by providing the Mercer County municipalities with the choice described above.

In adopting this approach, the court has tried to remain cognizant of the Supreme Court's direction that the "judicial role . . . is not to become a replacement agency for COAH." Id. at 29. The Court explicitly eschewed "creat[ing] an alternate form of statewide administrative decision maker for unresolved policy details of replacement Third Round Rules." Id. On the other hand, the Court emphasized the courts' "flexibility in assessing a town's compliance" and explicitly endorsed the use of creative means to achieve it. Id. at 33. Thus, the courts have been ordered to use

the same tools that were used in the prior rounds in flexible ways to assure satisfaction of each town's constitutional obligation to provide affordable housing.

In addition, the Supreme Court's directive gives trial courts the discretion to utilize both Second Round and Third Round Rules in various combinations as they adjudicate affordable housing obligations. While the Supreme Court did ban the use of the Third Round's "growth share" methodology, stating instead that "previous methodologies employed in the First and Second Round Rules should be used to establish present and prospective statewide and regional affordable housing need," Id. at 30, the Court did not simply condemn the Third Round Rules *in toto*. Quite to the contrary, the Court explicitly enumerated with positive endorsement several Third Round Rules that had been upheld by the Appellate Division in 2007 and 2010. Id. at 30-33. This list included the new bonus credits discussed above, as well as other Third Round alterations relating to the methodology for calculating affordable housing obligations (which are not presently before the court). Id.

The Supreme Court's positive view of aspects of the accepted Third Round Rules demonstrates the flexibility the Supreme Court provided to the trial courts to use rules from either the Second or the Third Round. First, the list itself is presented in permissive terms. See Id. at 33 (noting that the list is meant to "guide" courts). Thus, although it explicitly endorses the use of

Third Round bonuses and credits that were approved by the Appellate Division, the Court quite strikingly did not *require* that these bonuses be used. Second, the list itself was also not meant to be exhaustive; rather, it simply provides a sample of Third Round Rules that may be used.

Thus, this court is satisfied that permitting the municipalities to choose from bonus structures that have already withstood judicial scrutiny will allow them to select the option best suited to each municipality's circumstances without risking the dilution condemned by the appellate courts. Moreover, the approach falls within the flexibility that the Supreme Court afforded to the trial courts in reviewing municipal efforts to meet their Mount Laurel obligations.

In short, the court concludes that by permitting the use of either the Second Round or Third Round bonus credit structure, the municipalities' compliance plans will—as required by the Mount Laurel doctrine—appropriately incentivize development without diluting their affordable housing obligations. The court now leaves it to the Mercer County municipalities to select which of the bonus credit structures they will utilize as they develop their plan proposals.

Other Matters

Finally, the court will continue to require submission of preliminary plans from each town that has an active declaratory judgment action by December 7, 2015. In preparing the plans, each town may utilize either the Kinsey numbers or the preliminary numbers proposed by Special Methodology Master Richard Reading and provided to the court on November 13, 2015. These numbers are attached to this decision as "Appendix A," and were calculated based on the approach contained in Mr. Reading's report of October 30, 2015, which has already been circulated to the parties.

Appendix A – Prospective Need Calculations for Mercer Municipalities

Muni Code	Municipality	Gross Prospective Need, 1999-2025 (units)	Secondary Sources (units)			Calculated Prospective Need, 1999-2025 (units)	Prospective Need 20 Percent Cap, 1999-2025	20 Percent Cap Applies?	Prospective Need Obligation, 1999-2025 (units)	Prospective Need Obligation, 1999-2025 (units after 20% and 1000 unit caps) (1)
			Demolitions, 1999-2025	Filtering, 1999-2025	Conversions, 1999-2025					
1101	East Windsor Township	356	32.0	(83)	56	415	1,890	N	415	415
1102	Ewing Township	377	38.3	424	80	0	2,510	N	0	0
1103	Hamilton Township	855	187.6	1542	279	0	6,705	N	0	0
1104	Hightstown Borough	57	16.2	(7)	26	54	400	N	54	54
1105	Hopewell Borough	66	17.9	(4)	10	78	163	N	78	78
1106	Hopewell Township	828	54.6	(24)	15	891	1,100	N	891	891
1107	Lawrence Township	501	46.5	145	63	339	2,159	N	339	339
1108	Pennington Borough	90	6.8	(6)	7	96	203	N	96	96
1114	Princeton	480	196.9	119	134	424	1,874	N	424	424
1111	Trenton City	0	642.0	982	670	0	5,887	N	0	0
1112	Robbinsville Township	475	32.4	21	5	481	815	N	481	481
1113	West Windsor Township	970	124.9	(32)	32	1095	1,456	N	1,095	1,000
		5,054	1,391	2,877	1,370	3,873	25,161	-	3,873	3,778

State of New Jersey
Council on Affordable Housing
101 South Broad Street
PO Box 813
Trenton NJ 08625-0813
(609) 292-3000
(609) 633-6056 (FAX)

JON S. CORZINE
Governor

JOSEPH V. DORIA JR.
Commissioner
LUCY VANDENBERG
Executive Director

October 30, 2008

Re: Affordable Housing Reform Statute, P.L.2008, c.46 – Guidance Document

Dear Mayor:

On July 24, 2008, COAH sent you correspondence summarizing the major provisions of P.L.2008, c.46, which was signed by Governor Corzine on July 17, 2008, and makes significant changes to the provision of affordable housing in New Jersey, including amendments to the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. As noted in that correspondence, P.L. 2008, c.46, provides a comprehensive reform of New Jersey housing law by establishing a Statewide non-residential development fee, eliminating Regional Contribution Agreements, promoting the creation of very low-income housing, creating incentives for inclusionary development, providing new authority for regional planning entities to work with municipalities to create affordable housing and requiring a 20 percent affordable housing set-aside for state-funded initiatives and residential development within the jurisdiction of regional planning entities.

Subsequently, on September 12, 2008, COAH sent you correspondence regarding the Statewide Non-Residential Development Fee Act, including guidance on the imposition, collection, and use of development fees. Model documents are available on COAH's website at http://www.nj.gov/dca/coah/round3resources.shtml .

We are now writing to provide you with further guidance on the implementation on P.L.2008, c.46, as it relates to fair share plans being submitted to meet COAH's December 31, 2008 deadline. COAH is in the process of preparing amendments to its regulations to comply with the new statute. Guidance is offered in the following areas:

Very low income housing:
P.L.2008, c.46, creates a requirement that at least 13 percent of affordable housing units be reserved for occupancy by very low income households, defined as households with a gross household income equal to 30 percent or less of area median income for households of the same size within the housing region.

Third Round Housing Elements and Fair Share Plans must address the 13% very low-income requirement of the growth share obligation. Pursuant to N.J.A.C. 5:97-3.3, at least 50% of the units addressing a municipality's fair share obligation must be affordable to low-income households. The 13% of the total obligation that must be deed restricted for occupancy by very low income households under the statute may be a part of this 50% low-income requirement.

Exh. B

In keeping with COAH's current rules at N.J.A.C. 5:97-3.9 requiring that 50 percent of the growth share obligation be addressed with family housing and the new statutory requirement for 13% very low income housing, your plan will need to provide at least 50 percent of the very-low income housing requirement through family housing. The balance could be met with age-restricted units or supportive and special needs housing.

Examples of ways your municipality can address the very-low income requirement include: project-based Section 8 vouchers for rental units where the units are deed restricted for occupancy by very-low income households; providing additional incentives or a direct subsidy to subsidize the creation of affordable rental housing priced and reserved for very-low income households in a zoning ordinance or specified in a developer's or redeveloper's agreement; buying down the cost of a unit to very-low income households through a market-to-affordable program; a municipally sponsored 100 percent affordable project where a portion of the units are priced to be affordable to very-low income households; supportive and special needs housing reserved for very-low income households; and accessory apartments that are priced and reserved for very-low income households. In addition, any funds from the municipal affordable housing trust fund that are used to subsidize a unit to make it a very-low income unit would also qualify as addressing the municipality's very-low income affordability assistance requirement in N.J.A.C. 5:97-8.8(a).

N.J.A.C. 5:97-3.7(a), which permitted bonuses for all very low income units meeting the criteria of this section, is no longer effective given the enactment of P.L.2008, c.46. In keeping with P.L.2008, c. 46, and COAH's current regulations at N.J.A.C. 5:97-3.7(b), municipalities may now only receive a bonus for each very-low income family affordable unit addressing the growth share obligation that is built after June 6, 1999 in excess of the very-low income requirement. Very low-income bonuses are provided for family units created under the provisions of N.J.A.C. 5:97-6.4, 6.5, 6.6, 6.7, 6.9, 6.13 or 6.15.

The requirement to address the very-low income requirement will be monitored biennially by COAH at the municipal Plan Evaluations pursuant to N.J.A.C. 5:96-10.1.

Regional planning entities:
P.L.2008, c.46, requires that developments within the jurisdiction of any regional planning entity, including but not limited to the New Jersey Meadowlands Commission, the Pinelands Commission, the Fort Monmouth Economic Revitalization Planning Authority, and the Highlands Water Protection and Planning Council, shall be required to reserve at least 20 percent of the residential units constructed for affordable housing to the extent economically feasible.

In determining economic feasibility, as required by the statute, the Council will be considering the presumptive densities and set-asides in COAH's rules pursuant to N.J.A.C. 5:97-6.4(b)2 (for-sale housing) and N.J.A.C. 5:97-6.4(b)6 (rental housing). A site zoned for inclusionary development would be presumed to be economically feasible if it meets these minimum densities and maximum set-asides. The Council will work cooperatively with each of the regional planning entities to tailor these presumptive densities and set-asides, as necessary, to ensure consistency with each entity's regional master plan while preserving a realistic opportunity for the 20 percent affordable housing set-aside to be created.

The requirement to include 20 percent affordable housing in residential developments within the jurisdiction of regional planning entities will be monitored biennially by COAH at the municipal Plan Evaluations pursuant to N.J.A.C. 5:96-10.1.

In addition, pursuant to P.L.2008, c.46, a new program to foster regional planning entities has been created, through which the regional planning entities listed above, as well as Atlantic County, shall identify and coordinate affordable housing opportunities in partnership with municipalities. The regional planning program allows for up to 50 percent of the municipality's affordable housing obligation to be provided outside the municipality but within that region. Affordable units under this regional planning process may not be provided in urban aid municipalities or in Abbott districts. The New Jersey Sports and Exposition Authority in the Meadowlands District is exempt from this 50 percent limitation.

To address this provision of the statute, municipalities may use the Affordable Housing Partnership Program (to be renamed Regional Partnership Program) provided in COAH's rules at N.J.A.C. 5:97-6.13 up to the 50 percent limitation.

In addition, some of the regional planning entities, such as the New Jersey Meadowlands Commission, have issued guidance and/or are soliciting input from experts, to help identify suitable affordable housing sites and programs within the context of their respective regional master plans. COAH has entered or will be entering into Memoranda of Understanding with the affected regional planning entities to further the implementation of P.L.2008, c. 46.

State-funded planning initiatives:
Pursuant to P.L.2008, c.46, projects consisting of newly constructed residential units financed in whole or in part with State funds, including transit villages, units constructed on State-owned property, and urban transit hubs, are required to provide at least a 20 percent set aside of units for low and moderate income households, unless the municipality has received substantive certification from the Council or a judgment of compliance or repose from the court, and the set-aside is not required under the approved affordable housing plan.

Such state-funded planning initiatives must be identified at the time of petition or in accordance with the municipality's implementation schedule and proposed zoning ordinances or redevelopment plans, as applicable, must include a minimum 20 percent set-aside for affordable housing.

The requirement to include 20 percent affordable housing in residential developments financed in whole or in part with State funds will be monitored biennially by COAH at the municipal Plan Evaluations pursuant to N.J.A.C. 5:96-10.1.

Non-residential to residential zone change:
Pursuant to P.L.2008, c.46, if a municipality changes the zoning of a site from non-residential to residential within 24 months of an application for residential development, the Council shall require a percentage, to be determined by the Council based on economic feasibility, be reserved for occupancy by low and moderate income households.

Municipalities must document at the time of petition sites that are proposed to be rezoned from nonresidential to residential uses as follows: all sites that were rezoned from nonresidential to residential uses since July 17, 2006 where a developer has made an application for development after July 17, 2008. This would include both applications to the municipal planning board and to the municipal zoning board. Such sites shall include affordable housing as a percentage of the units constructed on-site based on economic feasibility.

In determining economic feasibility, as required by the statute, the Council will be considering the presumptive densities and set-asides in COAH's rules pursuant to N.J.A.C. 5:97-6.4(b)2 (for-sale housing) and N.J.A.C. 5:97-6.4(b)6 (rental housing). A site zoned for inclusionary development would be presumed to be economically feasible if it meets these minimum densities and maximum set-asides.

The requirement to address include affordable housing on sites rezoned from non-residential to residential will be monitored biennially by COAH at the municipal Plan Evaluations pursuant to N.J.A.C. 5:96-10.1.

Incentives for inclusionary development:
As noted above, P.L.2008, c.46 imposes a new inclusionary development requirement for several regions of the State (Highlands, Meadowlands, Pinelands, and Fort Monmouth), as well as for a variety of new development types (non-residential to residential rezonings and State-funded planning initiatives). Further, under P.L.2008, c.46, municipalities choosing to meet their affordable housing obligation through inclusionary zoning must now provide specific incentives to developers in the form of increased densities and reduced costs. A municipality and a developer may apply to the Council for reduced affordable housing set-asides or increased densities to ensure the economic feasibility of an inclusionary development.

In order to provide increased incentives to both developers and municipalities to create affordable housing through inclusionary development and ensure the economic feasibility of the inclusionary developments now required by the statute, COAH will permit any additional market-rate units that result from a rezoning to permit increased density to accommodate affordable housing to be exempted from the actual growth share obligation. In such circumstances, provided the affordable set-aside complies with COAH's standards, the increased density provided in an inclusionary zone would not generate a growth share obligation. Only the base density before the rezoning would generate a growth share obligation.

Example: A site in Planning Area 2 that does not include affordable housing permits four dwelling units per acre. The municipality rezones the site using COAH's presumptive density of six dwelling units per acre for Planning Area 2, an increase of two dwelling units per acre. The four dwelling units per acre would generate a growth share obligation, but the additional two dwelling units per acre would not.

This correspondence is intended to provide you with guidance on implementing the newly adopted Fair Housing Act amendments and other statutory changes. COAH will also be taking the necessary steps to conform the COAH regulations to the new statutory requirements. Please be sure to check COAH's website at www.nj.gov/dca/coah/legislation.shtml for additional updates.

We look forward to working with you over the coming weeks as you prepare to meet COAH's December 31, 2008 deadline for third round plan submission.

Sincerely,

Lucy L Vandenberg

Lucy Vandenberg
Executive Director

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART

DOCKET NO.: OCN-L-2640-15
(Consolidated Action)

IN RE DECLARATORY JUDGMENT ACTIONS FILED BY VARIOUS MUNICIPALITIES, COUNTY OF OCEAN, PURSUANT TO THE SUPREME COURT'S DECISION IN In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015)

Civil Action

OPINION

Decided February 18, 2016

Counsel: Jean L. Cipriani, Esquire and Robin La Bue, Esquire for the firm of Gilmore and Monahan, LLC on behalf of the Township of Jackson; the Township of Manchester; the Township of Lacey; and the Township of Little Egg Harbor

Jeffrey R. Surenian, Esquire, Michael A. Jedziniak, Esquire and Eric C. Nolan, Esquire for the firm of Jeffrey R. Surenian and Associates, LLC on behalf of the Township of Berkeley; the Borough of Pine Beach; the Borough of Beach Haven; the Township of Brick; and the Township of Barnegat

Steven A. Kunzman, Esquire for the firm of DiFrancesco Bateman Kunzman, PC on behalf of the Township of Toms River

Jerry J. Dasti, Esquire for the firm of Dasti Murphy McGuckin on behalf of the Township of Stafford

Andrew Bayer, Esquire for the firm of Gluck Walrath, LLP on behalf of the Township of Ocean

Kevin D. Walsh, Esquire and Adam M. Gordon, Esquire on behalf of Fair Share Housing Center, Intervenor in the Borough of Pine Beach

Edward J. Buzak, Esquire for the Buzak Law Group, LLC on behalf of the League of Municipalities, Intervenor in the consolidated matter

Exh. C

Richard J. Hoff, Jr. and Robert A. Kasuba for the firm of Bisgaier Hoff, LLC on behalf of Highview Homes, LLC, and Oaklane Little Egg Harbor, LLC, Intervenor in the matter of the Township of Jackson and the Township of Little Egg Harbor

Tracy A. Siebold, Esquire for the firm of Nehmad Perillo Davis on behalf of Volunteers of America Delaware Valley, Intervenor in the Township of Ocean matter

Thomas F. Carroll, III, Esquire and Stephen M. Eisdorfer, Esquire for the firm of Hill Wallack, LLP on behalf of New Jersey Builders Association, Intervenor in the matter of the Borough of Pine Beach

Daniel S. Eichorn, Esquire for the firm of Sokol Behot, LLP on behalf of Ocean Mews, 2015, LLC, Intervenor in the matter of the Township of Stafford

Richard T. O'Connor, Esquire for the firm of O'Connor and O'Connor on behalf of Manchester Development Group, Intervenor in the matter of the Township of Manchester

MARK A. TRONCONE, J.S.C.

NATURE OF THE PROCEEDING

This matter concerns the court's continuing review of various Declaratory Judgment actions filed by thirteen (13) Ocean County municipalities in accordance with the procedure established by the New Jersey Supreme Court in In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015) ("Mount Laurel IV").1

The primary issue addressed in this opinion is whether the court has the authority to impose an obligation upon municipalities to satisfy the affordable housing need which arose from 1999 to the present – the so-called "gap period" commencing from the end of the second

1 Those municipalities include: Township of Barnegat, Borough of Beach Haven, Township of Berkeley, Township of Brick, Township of Jackson, Township of Lacey, Township of Little Egg Harbor, Township of Manchester, Township of Ocean, Borough of Pine Beach, Borough of Point Pleasant, Township of Stafford and Township of Toms River

round housing cycle. Since 1999, New Jersey's Council on Affordable Housing ("COAH") has, on three occasions, attempted and failed to adopt third round rules. This opinion will also address the circumstance of how this unanswered prior obligation would be resolved in those municipalities whose third round obligation, with the inclusion of this "gap" obligation, will exceed the statutory cap of a 1000 units for any one housing cycle.

For the reasons set forth below, the court is satisfied there exists a rational methodology to calculate and determine the affordable housing need which arose during the "gap period" of 1999 to 2015.2 The court finds municipalities are constitutionally mandated to address this obligation. This "gap period" need is to be calculated as a separate and discrete component of a municipality's fair share obligation. This component together with a municipality's unmet prior round obligations 1987 to 1999 and its present need and prospective need shall comprise its "fair share" affordable housing obligation for the third housing cycle. Municipalities may petition the court during its review of their individual plans to defer up to 50 percent of its gap period component obligation to the fourth round housing cycle.

The court finds, however, it is constrained by the clear language of the FHA relating to the 1000 unit cap and thus no municipality shall be required to address a fair share obligation beyond 1000 units for the upcoming ten (10) year third round cycle. Therefore, the 1999 to 2015 gap component coupled with the present and prospective need components are subject to the 1000 unit cap.

THE PARTIES

In addition to the thirteen municipalities, a number of interested parties have intervened in the various individual municipal cases or in the in the consolidated proceeding established by

2 The court acknowledges the gap period will now extend into 2016. However, for ease of reference the year 2015 will be used throughout the opinion as the end year of the gap period.

the court to determine the regional housing need and the allocation of that need to the constituent Ocean County municipalities.

The non-municipal parties involved in this aspect of the litigation include: Fair Share Housing Center ("Fair Share" or "FSHC"), a non-profit entity which advocates for the development of affordable housing throughout New Jersey; The New Jersey League of Municipalities ("NJLM"), an association created by state statute to assist and serve New Jersey municipalities and their officials; New Jersey Builders' Association ("NJBA"), a trade organization promoting the interests of its members. In addition to the organizations listed above, various private land development companies have also intervened in this matter. They, together with NJBA, will collectively be referred to as "the builders" throughout this opinion. The individual municipalities and NJLM will collectively be referred to as "the municipalities" or "towns."

PROCEDURAL HISTORY TO DATE OF THE MOUNT LAUREL CASES PENDING BEFORE THIS COURT

In order to fully explain the context of this matter, a brief recitation of the procedural history to date is helpful. On March 10, 2015, the New Jersey Supreme Court issued its decision in "Mount Laurel IV." That action was commenced by Fair Share by the filing of a motion in aid of litigants' rights due to the failure of COAH to promulgate the third round rules as directed by the Court in its decision, issued the preceding year, in In re Adoption of N.J.A.C. 5:96, 215 N.J. 578 (2014). Because of COAH's inability or reluctance to act, the Court in Mount Laurel IV dissolved FHA's exhaustion-of-administrative-remedies requirement and opened the courts to actions by parties concerned about municipal compliance with constitutional affordable housing

obligations. 221 N.J. at 5. Providing for an orderly procedure for such actions, the Supreme Court established a process whereby municipalities could obtain substantive certification from the courts provided that such towns either 1) achieved substantive certification from COAH under prior iterations of third round rules which were subsequently struck down by the Court or 2) had "participating" status before COAH, i.e., they were actively seeking approval of their affordable housing plans from COAH. The Court delayed the effective date of its order for ninety (90) days. Towns which sought continued protection from Mount Laurel lawsuits were then required to file declaratory judgment actions within thirty (30) days of the effective date.

Pursuant to the Court's decision in Mount Laurel IV, qualified towns had five (5) months from the expiration of the thirty (30) day filing period, i.e., December 8, 2015, to prepare and submit their plans for judicial review. During this five (5) month period, the trial courts assigned to these cases could grant a period of temporary immunity from Mount Laurel lawsuits while the towns went about the business of preparing their affordable housing plans.

Soon after the commencement of the declaratory judgment actions by the Ocean County municipalities, this court appointed Philip B. Caton and John D. Maczuga, New Jersey-licensed professional planners with extensive experience in Mount Laurel matters, to assist the court and the municipalities as "special local masters." Mr. Caton and Mr. Maczuga were each assigned individual municipalities.

During the court's initial hearings with the parties, it soon became apparent the towns needed some direction from the court regarding the development of an appropriate methodology to determine their respective third round obligation. To that end, the court in consultation with its special local masters, established a procedure by which the court could determine, on a preliminary basis, the affordable housing obligation for each Ocean County municipality and

address those municipal compliance issues so as to provide a rational basis that would allow the towns to file its affordable housing plan to the court by the deadline imposed by the Supreme Court of December 8, 2015.

The procedure established by the court was based on the language in Mount Laurel IV where the Supreme Court stated:

> In the end, a court reviewing the submission of a town that had participation status before COAH will have to render an individualized assessment of the town's housing element and affordable housing plan based on the court's determination of present and prospective regional need for affordable housing applicable to that municipality. **A preliminary judicial determination of the present and prospective need will assist in assessing the good faith and legitimacy of the town's plan, as proposed and as supplemented during the processes authorized under the FHA-conciliation, mediation, and use of special masters-and employed in the court's discretion.** The court will be assisted in rendering its preliminary determination on need by the fact that all initial and succeeding applications will be on notice to FSHC and other interested parties. 221 N.J. at 29. (emphasis supplied)

Accordingly, the court consolidated the thirteen individual municipal cases for the purpose of determining the towns' present and prospective needs. As directed by the Supreme Court in Mount Laurel IV, it was also decided in making this determination the court would, wherever possible, follow COAH's past methodology to calculate statewide housing need and then allocate that need to the housing regions previously established by COAH.3 Once the regional need was determined then the same would be allocated to the constituent Ocean County municipalities.4 This work required special expertise. Therefore, after inviting the submission of resumes by interested experts and upon the advice of the two local masters, the court appointed Mr. Richard B. Reading as the "Special Regional Master" to assist the court in making

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3 Mount Laurel IV at p. 30

4 Ocean County is situated in COAH Region 4, together with Monmouth and Mercer Counties.

the preliminary determination envisioned by the Supreme Court of the present and prospective needs.5 A case management order was then entered by the court on September 17, 2015, which provided for an expedited process culminating in a plenary hearing following which the court would make a determination of the regional housing need and the allocation of that need to the municipalities which would serve as the basis for the preparation of the municipal housing plans. All parties consented to this procedure.

The case management order provided for two mediation sessions with all the masters and parties outside the presence of the court. The parties were to then submit expert reports setting forth a proposed fair share methodology for review by the regional master. After the receipt of these reports, Mr. Reading issued an initial draft of a report entitled "Preliminary Review and Assessment of Low and Moderate Income Housing Needs of Ocean County Municipalities" ("Preliminary Assessment") which set forth the regional fair share number and allocated the same to every Ocean County municipality. The parties were then invited to submit their comments to this initial draft and after consideration of these comments, Mr. Reading would issue the final draft of his Assessment.

However, before he could complete his final draft, Mr. Reading became ill and was unavailable for several months. Faced with this unexpected turn of events, the court, with the consent of the parties, directed the municipalities to utilize the fair share housing numbers set forth in Mr. Reading's initial draft as the basis upon which to prepare and submit their plans. This was done with the understanding that these numbers were subject to modification once Mr. Reading returned to health and could complete his work.

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5 Mr. Reading was subsequently retained as the Special Regional Master by the Monmouth and Mercer County Superior Courts.

Accordingly, all thirteen municipalities, utilizing these preliminary numbers, completed their plans and submitted their proposed housing plans in advance of the December 8, 2015 deadline. At a hearing conducted on December 8, 2015, the court acknowledged the receipt of the towns' plans and directed local masters, Caton and Maczuga, to conduct a preliminary review of the submitted plans to determine whether the same constituted a good faith effort by the individual municipalities to meet their constitutional obligations. During this review, the court granted a one (1) month extension of the immunity period. On January 7, 2016, the court considered the reports of Mr. Caton and Mr. Maczuga and granted, with one exception, a further extension of immunity to July 31, 2016 to, first, allow time for Mr. Reading to complete his final report; second, for the court to then conduct a plenary hearing to decide compliance issues and determine the regional fair share number and allocation of the same to the constituent municipalities in Ocean County; and, finally for the towns to perfect their affordable housing plans and submit the same to the court for approval.

It was during Mr. Reading's absence that the issue of the so-called "gap period" came to the fore. Most experts agreed the "gap period" housing need, if included, would constitute anywhere from 40 to 60 percent of a municipalities affordable housing need obligation for the third round housing cycle. Important too, was the application of the 1000 unit cap to the "gap period" obligation for the third round. The parties also questioned that if a "gap period" obligation was to be included in a town's obligation for the third round cycle, would it be subject to the FHA's 1000 unit cap or would such an obligation be outside the cap?

All parties agreed that these issues needed to be addressed before the court made a ruling on the regional and municipal needs. Accordingly, the court invited the parties to submit briefs and reports from their respective experts on these issues and the court heard oral argument of

counsel. During oral argument, the court raised its concern whether the passage of time did not preclude the development of a methodology that could reliably calculate the sixteen (16) year "gap" obligation. Accordingly, the parties submitted additional expert reports addressing the same. All expert reports were to be reviewed by Mr. Reading. The court received the critique of these reports from Mr. Reading in advance of this opinion.

ARGUMENTS OF THE PARTIES

The parties to this action have extensively briefed and argued these issues before the court and their positions are clearly defined. The municipalities assert there can be no such gap obligation and point to the provisions of the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 to 329 ("FHA") which provide a municipality's fair share obligation has only two (2) components, i.e. present and prospective need. Present need is the number of low and moderate households residing in substandard units. Prospective need is a future projection of how many new low and moderate income households will form or move into the community during the next ten years. The municipalities argue that since the FHA is silent on the issue of how to address an obligation which would arise during the period or "gap" between the end of one housing cycle and the start of another, the courts do not have the authority to create what in essence would be a new component of a municipality's fair share obligation.

The municipalities advance other arguments for not including a new "gap" component. First, they assert the gap obligation would be accounted for within the present need calculation and that any attempt to add a component for a need arising during the gap period would result in some degree of double counting of affordable households. Second, the towns contend no methodology exists and none could be developed which accurately calculates the gap need. Any

attempt to do so would result in speculation. Finally, at oral argument the municipalities argued that to impose an obligation to address what is essentially a twenty six (26) year need within a ten (10) year housing cycle is unduly burdensome and therefore runs counter to the protections afforded the towns by the FHA to ensure the orderly development of affordable housing.

Regarding the application of the 1000 unit cap in those towns where a new gap component would push a municipality's fair share obligation over 1000 units or in those towns whose third round number already exceeds 1000 units, the municipalities again rely on the plain language of the FHA which states no municipality shall be required to address a fair share obligation beyond 1000 units within any ten (10) year housing cycle. N.J.S.A. 52:27D-307(e). This unambiguous language, in the opinion of the municipalities, bars COAH, and by implication, this court from exempting the "gap" obligation from the operation of a 1000 unit cap. In other words, if the court were to find a gap obligation exists and should therefore be addressed during the third round, this component should be subject to the cap just as the present and prospective need components are. Moreover, the municipalities urge this court to reject any formula or requirement which seeks to preserve the entire calculated gap obligation or a large portion of it by deferring the obligation to the next housing cycle or cycles as had been ordered by another New Jersey trial court.

In opposition to these arguments, Fair Share and the builders assert that basic fairness to those families in need of affordable housing mitigates in favor of including the gap period in the calculation of affordable housing need. They reject municipal claims that to do so would be overly burdensome to the towns. The courts must ensure the goal of providing affordable housing so that the actual need which arose during the 1999 to 2015 gap period is accomplished to the greatest extent possible. Further, Fair Share and the builders argue COAH and the

municipalities had previously recognized the need for affordable housing is cumulative, i.e., it accrues year by year and therefore there can be no "gaps." The builders also claim that COAH and the municipalities represented to the courts that any such gap need would be folded into the third round's prospective need. With regard to the 1000 unit cap, Fair Share and the builders argue that the gap period should be outside the FHA 1000 unit cap or alternatively be capped by the procedure adopted by another New Jersey trial court.

As noted above, the court raised the concern, shared by Regional Master Richard Reading, whether the need which arose during the gap period could be accurately "recaptured." This concern was first voiced by the Appellate Division nearly twelve years ago in In re Six Month Extension of N.J.A.C., 372 N.J. Super. 61 (App. Div. 2004) ("In re Six Month Extension"). Thus, even if this court was satisfied in theory that an affordable housing need arose during the gap period and should be accounted for in the determination of a municipality's fair share obligation, could such a need be accurately and reliably calculated by a rational methodology.

LEGAL ANALYSIS AND FINDINGS

A.
THE AFFORDABLE HOUSING NEED WHICH AROSE DURING THE "GAP PERIOD" CAN BE RELIABLY CALCULATED AND MUST BE INCLUDED IN THE DETERMINATION OF A MUNICIPALITY'S FAIR SHARE OBLIGATION FOR THE THIRD ROUND CYCLE

In So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983), ("Mount Laurel II"), the New Jersey Supreme Court found the "obligation to meet the prospective lower income housing need of the region is, by definition, one that is met **year after year** in the future,

throughout the years of the particular projection used in calculating prospective need." Mount Laurel II, 92 N.J. at 218, 219. (emphasis supplied). Therefore, New Jersey's affordable housing need is cumulative and there can be no gaps in time left unaddressed. This obligation is clear and, moreover, one that has been acknowledged without objection by both COAH and the municipalities themselves in the past.

Despite this, the municipalities now argue that the courts and COAH have historically limited a town's affordable housing obligation to two (2) components, i.e., present and prospective need. The present need, also known as "rehabilitative share," is the number of identifiable deficient housing units occupied by low and moderate income households. That number is generated by a calculation based upon the most recent census data. Prospective need is forward-looking. It is the number of low and moderate income households expected to be formed within the next ten (10) year housing cycle. N.J.S.A. 52:27D-304 (j).

Never before, the municipalities assert, have the courts or COAH attempted to recapture a past "gap" need to calculate the fair share obligation. Any attempt to do so would be constitutionally suspect since the FHA does not authorize the courts to recapture such a need. If it were to do so, the court would be acting either as a "super-legislature", thus violating basic notions of separation of powers or acting as a replacement agency to COAH – something the Supreme Court expressly directed the court to avoid in Mount Laurel IV:

> The judicial role here is not to become a replacement agency to COAH. The agency is *sui generis* – a legislative created, unique device for securing satisfaction of Mount Laurel obligations. In opening the courts ..., it is not this court's province to create an alternate form of statewide administrative decision maker for unresolved policy details of replacement third round rules.... Mount Laurel IV at 29.

On the more practical side, the municipalities and their expert, Econsult Solutions, Inc., contend any attempt to recapture a past "gap" would inflate their obligation by double counting some households already included in the present need. Further, Econsult maintains it is a "practical impossibility" to develop a reliable methodology to determine the "gap" need. Therefore, municipalities should be able to rely upon the only process used in the past to determine their fair share obligation.6

For their part, the builders argue the municipalities should be "judicially estopped" from asserting their constitutional fair share housing obligation is not cumulative and therefore no obligation exists for the period from 1999 to 2015. They point to the municipalities' position asserted before the Appellate Division in In re Six Month Extension.

Indeed, it is ironic that both parties (or interests) appearing in the 2004 Appellate Division case are now advancing arguments before this court they vehemently opposed in 2004. On one hand, the builders and Fair Share's predecessors asserted:

> By granting extended certifications and not finalizing third round numbers or releasing interim obligations that would quantify the municipalities' continuing realistic obligation during the gap period, COAH has effectively excused New Jersey municipalities from meeting the obligations to provide their fair share of affordable housing, which obligations continue to accrue in the intervening time period. Appellants argue that the Mount Laurel doctrine's fair share requirement **cannot be phased in or satisfied after the fact**.
> 372 N. J. Super. at 89. (emphasis supplied)

And, on the other hand, COAH together with the municipalities successfully contended:

> [t]hat the gap between the Second Round and third round methodologies is less significant than it appears. The urge that the delay is not indefinite and that the third round methodology will be **cumulative and recapture** any obligation. Id. at 96 (emphasis supplied)

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6 Econsult Solutions, Inc., "Analysis of the Gap Period (1999-2015)", dated February 8, 2016, page 7

Further in the opinion, the Appellate Division noted both COAH and the municipalities stressed the FHA itself and the regulations adopted in accordance therewith contemplate municipalities would be able to adopt appropriate phasing schedules for meeting their fair share.

> COAH and the municipal respondents contend... that N.J.A.C. 5:91-14.3 realistically – and properly – recognizes and deals with the gap between the expiration of the second round standards and COAH's adoption of its third round methodology and rules. They stress that when the same type of gap occurred between the first and second rounds, COAH retroactively incorporated in succeeding methodology the statewide need for the period commencing with the end of the prior regime; thus achieving a cumulative result. Id. at 90.

The Appellate Division also noted COAH had steadfastly maintained its view that:

> [t]he Council's third-round methodology and rules, once adopted, will comply with the requirements of the FHA and the Mount Laurel doctrine. The third-round methodology will continue the work of the first- and second-round methodologies and implementing regulations by fairly and accurately determining the state-wide affordable housing need and by assigning that need to the State's municipalities. The mere fact that there may be a "gap" between the second and third round compliance periods, does not violate the Mount Laurel doctrine. In fact there was a similar gap between the first and second round compliance periods as well as the first-round compliance period was from 1987 to 1993, yet the second round rules were not adopted until June 6, 1994. Nonetheless, the affordable housing need was calculated from July 1987 through July 1999, creating a continuous calculation period upon which the first and second-rounds were based. Likewise, the third-round numbers will ultimately capture the full housing need projected through 2010. Based upon this history, the Council saw fit to provide compliant towns with some degree of protection from a builder's remedy lawsuit during this "gap" period by adopting rules which extend second round substantive certification. Id. at 82.

Although the Appellate Division struck down COAH's regulations for extending second round substantive certifications on procedural grounds, the court there was satisfied with COAH's stated position that the gap period obligation would be ultimately captured in the third

round rules. Clearly, the Appellate Division's decision in In re Six Month Extension was based upon both the COAH and municipal assertion there would be a seamless transition in the second to third round methodologies accounting for the affordable housing obligation arising in the gap period.

It is this court's view therefore that the municipalities are estopped from now abandoning the position, presumably made in good faith before the Appellate Division in 2004, that there should be no gap period obligation. New Jersey courts have ruled a party, who is successful in asserting a position upon which a court bases its decision, may not assert a contradictory position thereafter. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 2004). Clearly the Appellate Division relied on representations of COAH and the municipalities that there would be no gaps when assessing a town's fair share.

Even if the municipalities were not to be estopped from advancing their position and despite their efforts here to distinguish both the position they forcefully advocated before the Appellate Division in In re Six Month Extension and that court's subsequent opinion in reliance of the same, the court finds the underlying principles in that case, as first enunciated by the Supreme Court in Mount Laurel II, are the same as the matter here. A municipality's fair share obligation is cumulative; to the extent it has not been addressed during the gap period it must be and, so long as this obligation can be reliably calculated by rational means, it is to be included in the third round cycle.

The court further notes all three iterations of COAH's proposed third round rules provided the gap need would be incorporated into the towns' third round obligation.

The first version of COAH's third round rules provided:

> The "growth share" for the period January 1, 2004 through January 1, 2014 shall initially be calculated based on municipal

growth projections pursuant to N.J.A.C. 5:94-2.2. Projections of population and employment growth shall be converted into projected growth share affordable housing obligations by applying a ratio of one affordable unit for every eight new market-rate residential units projected, plus one affordable unit for every 25 newly created jobs as measured by new or expanded non-residential construction within the municipality in accordance with Appendix E, as projected in the municipality pursuant to N.J.A.C. 5:94-2.4. The growth share projections shall be converted into actual growth share obligation when market-rate units and newly constructed and expanded non-residential developments receive permanent certificates of occupancy, pursuant to N.J.A.C. 5:94-2.5. **Although the overall statewide need calculations are figured from the last year of the prior round (1999) to the last year of the new round (2014), the municipality's portion of the statewide need is compressed into a delivery period that runs from January 1, 2004 to January 1, 2014. N.J.A.C. 5:94-2.1(d).** (Emphasis supplied).

The second version stated:

> The actual growth share obligation shall be based on permanent certificates of occupancy issued within the municipality for market-rate residential units and newly constructed or expanded non-residential developments in accordance with chapter Appendix D. Affordable housing shall be provided in direct proportion to the growth share obligation generated by the actual growth. However, if the actual growth share obligation is less than the projected growth share obligation, the municipality shall continue to provide a realistic opportunity for affordable housing to plan for the projected growth share through inclusionary zoning or any of the mechanisms permitted by N.J.A.C. 5:97-6. The municipality may submit an implementation schedule as detailed in N.J.A.C. 5:94-3.2(a) that sets forth a detailed timetable for affordable units to be provided within the period of substantive certification that demonstrates realistic opportunity and a timetable for the submittal of all information and documentation required for each mechanism. The implementation schedule shall consider the economic viability of the proposed mechanism, including the availability of public subsidies, development fees and other source of financing. **Although the overall Statewide and regional need calculations are figured from the last year of the prior round (1999) to the last year of the new round (2018), the municipality's portion of the statewide need is compressed into a delivery period that runs from January 1, 2004 to December 31, 2018. N.J.A.C. 5:97-2.2(e).** (Emphasis supplied).

The third version prepared for COAH by Dr. Robert Burchell also incorporated the then 1999-2014 gap period into local municipality's affordable housing obligation for the third cycle. N.J.A.C. 5:99-2.1(a). Dr. Burchell's proposed rules, however, allowed the towns to equally split the delivery of these units over the third and fourth cycles. See, Appendix D to N.J.A.C. 5:98 and 5:99.

Therefore, although each version of the proposed third round rules differed in their approach in delivering the gap obligation, all three iterations required each municipality to account for all or a portion of these units in the upcoming third round. While the first two iterations of COAH's round three rules were invalidated by the courts, no reviewing court has struck down COAH's attempts to recapture the gap need. The only issue remaining therefore is whether the gap number can be reliably calculated.

It is this issue, raised by this court, and the one expressed below by the Appellate Division nearly twelve years ago which presents the greatest challenge:

> We are constrained to observe that the permissive approach to the passage of time connoted by Mount Laurel II and Hills Dev. Co. .... was applied when the subject matter was new and COAH was only an idea or in its infancy. The passage of so much time since then places a different perspective on the principle. Nevertheless, although factual figures, when ultimately developed, might never provide an adequate basis for recapturing the gap-time obligations of particular municipalities, to conclude so now, on the records before us would be speculations. We are obliged to accept COAH's intentions and goals as stated and leave for future development and remediation ... any idea that real opportunity for affordable housing have been irretrievably lost during the gap in ways that do not comport with the policies and principles underlying the process. In re Six Month Extension at page 97 in the upcoming housing cycle.

In addition to, once again, confirming the "gap" need is to be addressed, the Appellate Division clearly foresaw the potential difficulties in determining the gap period need and suggested that this task would be left to those with the expertise to develop the "factual figures."

THE REPORT OF SPECIAL REGIONAL MASTER RICHARD B. READING

To that end, the court here acknowledges the report of its Regional Master, Mr. Reading, a copy of which accompanies this opinion as "Appendix A", who has received, reviewed and critiqued the detailed "gap period" methodology developed by Dr. David Kinsey on behalf of Fair Share and the reports of Econsult and other experts either criticizing or supporting that methodology.

The point of the court's inquiry here was not to determine whether the gap methodology proposed by Dr. Kinsey is flawless or appropriate. The details relating to the proper methodology will be determined at the upcoming plenary hearing. Rather, the inquiry is twofold – first, can a "gap methodology" be developed so as to provide a rational, reasonable and reliable basis to calculate the gap need and, second, to determine whether the gap need should be incorporated into a single 1999 to 2025 "prospective need," as originally proposed by Dr. Kinsey, or whether the gap need is more accurately recaptured when calculated as a separate and discrete component of a town's fair share. On these two questions, the court must necessarily rely on expert opinion.

In his report, Mr. Reading concedes there is a challenge in arriving at a methodology for the gap period. This, is not because the calculation is any more difficult than that used in determining present or prospective need but due primarily to the lack of any pre-existing methodology.

> The calculation of the current needs of the affordable households formed during the sixteen year Gap Period is not a process that is imbedded in the Prior Round methodology, is not a projected (Prospective) need, but should be undertaken as a separate and discrete component of affordable housing need. Prior submissions provided by FSHC and Econsult on December 8, 2015 contended that the calculation of the Gap Period affordable housing needs were unnecessary because they were properly a part of the 1999-2015 Prospective Need (FSHC) or were unnecessary altogether because the FHA does not make any provision for a retrospective need (Econsult). Furthermore, it was argued that the precise identification of the LMI households formed during the Gap Period that have a continuing need for affordable housing may be so speculative that it would appear to defy empirical calculation. The continuing needs of LMI households formed during the Gap period are different and distinct from the measurement of deficient housing units or the projection of future LMI households.
> Accordingly, the Gap Period would necessitate a different methodology than those used for Present and Prospective Need.
> Reading Report, page 14.

Mr. Reading further provides:

> The fact that a task may require a different form of analysis should not preclude its attempt. Assertions that a determination of Gap Period affordable housing needs cannot be reduced to a precise mathematical calculation devoid of all assumptions and estimates is not distinctly different than the preparation of estimates for the other components of housing need. In this regard, the other components of affordable housing need, including Present Need and Prospective Need are likewise predicated upon estimates that are structured as calculations. The different nature of time frame encompassed by the Gap Period should not be an impediment to its quantification., **and a methodology that utilizes the actual data and yields a realistic outcome would, in reality, be no more impaired than the estimates of the Present and Prospective components of affordable housing need.**
> Id. at page 14-15. (emphasis supplied).

Thus, Mr. Reading states the gap period methodology may actually be more reliable. In this regard, Mr. Reading notes that unlike prospective need which necessarily relies on assumption estimates and projections, the gap period will be based on data from actual events

"that is less subjective and yields results that are trustworthy and readily verifiable." Id. at page 17.

Next, Mr. Reading found in reviewing the two alternatives presented by Dr. Kinsey, the method which calculates the gap need as a separate and discrete calculation is the preferable approach.

> FSHC has presented two alternative methodologies for the calculation of Gap Period LMI housing needs. The first method (Alternative 1) follows their position that a Prospective Need period from 1999 and 2025 is the correct approach, but contends that this 26 year projection can readily be broken down into two projections; one from 1999 to 2015 (Gap Period) and one from 2015 to 2025 (Prospective Need). In the first alternative, the same projection methodology is used for both components, and despite the fact that the 1999-2015 Gap Period has already passed and has available data, is still treated as a projection from 1999. The second methodology advanced by FSHC is based upon a 1994 recalculation by COAH of the prior round (1987-1993) housing obligations due to more up to date information (1990 Census) that reflected a slower rate of population and housing growth.
>
> The second alternative presented by FSHC is preferable to the first alternative to the extent that its addresses the housing needs in a prior period by utilizing actual data rather than projections and estimates. The second alternative is a move in the right direction, but needs to be further refined to incorporate more factual data and to include more information to accurately identify the LMI households formed, but not satisfied during the Gap Period. Of greater significance than FSHC's specific calculations is the fact that FSHC has acknowledged that a separate and discrete methodology can be prepared and utilized for the determination of Gap Period affordable housing needs. In this latter regard, one of the competing methodologies has recognized the existence of the Gap Period and, despite the rejection of COAH's last approach for its calculation, has confirmed that an alternative methodology could be developed and utilized for the Gap Period calculations.
> Id. at page 16.

Finally, the court notes Mr. Reading's report addresses the potential of double counting of low and moderate-income households in both the gap period and the present need – a fear raised by the municipalities. As part of his recommendations for developing a methodology, Mr. Reading agrees the methodology ultimately employed must "adjust the Gap Period LMI households for 2015 LMI Present Need households..." Reading Report, "Recommended Procedure," item 4, page 17. Again, the purpose here is not to adopt a specific methodology at this juncture. However, the court is confident that Mr. Reading will further address this concern and resolve it satisfactorily prior to recommending any methodology to the court.

The court finds Mr. Reading's report to be both comprehensive in its scope and clear in its recommendations. Accordingly, his recommendations as to the methods and processes to be employed in developing an accurate and reliable methodology to determine the gap period need is adopted by the court and shall be utilized by the parties when preparing their suggested methodologies to the court in advance of the upcoming trial.

B.

THE 1999 to 2015 GAP PERIOD NEED TOGETHER WITH A MUNICIPALITY'S PRESENT NEED AND 2015 TO 2025 PROSPECTIVE NEED CONSTITUTE THE COMPONENTS OF A MUNICIPALITY'S THIRD ROUND FAIR SHARE OBLIGATION WHICH ARE THEREFORE SUBJECT TO THE 1000 UNIT CAP PROVISION OF THE FHA

With the inclusion of the gap period, there are four components of a municipality's affordable housing obligation. The first component, in time, is the town's unmet or unsatisfied obligation, to the extent there remains one, from the first and second housing cycles. Next, as determined above, is a town's gap period obligation from 1999 to 2015. The third component is

the municipality's present need. The fourth and final component is the town's prospective need from the present to the end of the upcoming ten-year housing cycle. All but the first component is subject to FHA's 1000 unit cap.

The first component is clearly not. In Mount Laurel IV, the Supreme Court identified certain guiding principles that the trial courts should follow. The very first principle was that a town's prior affordable housing obligations of the first two rounds must be satisfied. Specifically, the Court stated "our decision today does not eradicate the prior round obligations. As such, prior unfulfilled housing obligations should be **the starting point** for a determination of a municipality's fair share responsibility." Mount Laurel IV at page 30 (emphasis supplied). Given this clear directive, these obligations must be met in full with no further abatement.7

The question then becomes which of the remaining components are subject to FHA's 1000 unit cap limitation. That statute provides that COAH and the courts cannot impose a fair share obligation on a municipality in excess of 1000 units per each ten-year housing cycle.

> No municipality shall be required to address a fair share beyond 1000 units within ten years form the grant of substantive certification, unless it is demonstrated, following objection by an interested party and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that is likely that the municipality through its zoning power could create a realistic opportunity for more than 1000 low and moderate income units within that ten-year period. N.J.S.A. 52:27D-307(e)

The FHA then specifies what those facts and circumstances would be:

> For purposes of this section, the facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units, as provided above, shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the ten-year period preceding the petition for substantive certification in connection with the objection filed. Ibid.

---

7 This prior round obligation may already have been subject to adjustment by operation of the 1000 unit cap or the 20 percent cap.

The municipalities argue the FHA's 1000 unit cap should be applied to a municipality's entire fair share obligation, i.e., the present need and the prospective fair share for 2015 to 2025 **and** any "gap period" obligation determined to be applicable by the court.

The builders, on the other hand, urge the court to adopt the approach recently taken by the trial court in the recently reported case of In the Matter of the Adoption of the Housing Element of Monroe Township, Dkt. No. MID–3665-15 (Law Div. Middlesex Cty, October 5, 2015) ("Monroe Township"). In that case, the court determined it was never the intent of the Legislature to cap what in essence is a twenty six (26) year obligation at 1000 units. Instead, the court in Monroe Township split the town's obligation into two components, i.e., a 2015-2025 component and a gap period component. If the municipality's fair share obligation for the 2015-2025 period exceeded the 1000 unit cap, it could utilize the cap as provided for in the statute. The gap period obligation however was moved "outside" the statutory cap. In its place, the Monroe Township court created a pro-rated gap need cap of 1600. However, in order to lessen the impact on municipalities, the Monroe Township court allowed the municipality to spread its gap obligation equally over three cycles. Thus, for example, if a municipality had a present and prospective need obligation for 2015 to 2025 of 1200 units and a "gap" need for 1999 to 2015 of 1800 units, the town's 1200 unit present and prospective need would be capped at 1000 and the 1800 gap need would be separately capped at 1600 units. These gap units would then be spread over the next three cycles in three equal installments of approximately 533 units per cycle. Therefore, in this example, the municipality would be obligated to provide 1533 fair share units during the 2015-2025 third cycle plus 533 units in each in the next two cycles in addition to their then-calculated fair share need.

The builders argue by raising the cap for the gap obligation to 1600 but allowing the towns to phase in that obligation, the Monroe Township court was attempting to balance the legislative concerns of lessening the impact of such a large obligation upon towns but recognizing the intent of the Mount Laurel doctrine to preserve a town's past gap obligation, where possible, to thereby produce the most affordable housing units allowable. The municipalities however assert the Monroe Township court failed to observe the plain meaning of the FHA's 1000 unit cap provision. They further assert that the prorated 1600 unit gap obligation cap has no basis in law whether that be prior court decisions, prior COAH regulations or the FHA. They ask the court therefore to adhere to the plain language of the FHA.

The beginning point for determining the intent of a statute is the language of the statute itself. Courts must be bound by the axiom that when a legislature speaks by drafting a statute, the law says what the legislature meant. Thus, if the words of a statue are plain, clear and unambiguous , the "judicial inquiry is complete." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). In this state, the New Jersey Supreme Court has ruled:

> When interpreting statutory language, the goal is to divine and effectuate the Legislature's intent. In furtherance of that goal, we begin each such inquiry with the language of the statute, giving the terms used therein then ordinary and accepted meaning. When the Legislature's chosen words lead to one clear and unambiguous result, the interpretative process comes to a close, without the need to consider further intrinsic aids. We seek out extrinsic evidence, such as legislative history, for assistance when statutory language yields "more than one plausible interpretation." (citations omitted). State v. Shelley, 205 N.J. 320, 323 (2011) citing to and quoting DiProspero v. Penn, 183 N.J. 477, 492-93.

The specific language of the FHA relative to the cap is precise, clear and unambiguous, i.e., no municipality is to have a fair share obligation beyond 1000 units in any ten (10) year cycle. The only possible ambiguity perhaps is the meaning of the term "fair share" in the context

of a sixteen (16) year gap. Does it refer only to the "present need and prospective need" calculation for the period of 2015 to 2025 thereby excluding the "gap period?" If so, then the argument advance by the builders and adopted by the court in Monroe Township would be compelling.

Surprisingly, the FHA does not specifically define either the term "fair share" or "present need." It does, however, define "prospective need" which could lead to a question as to whether "present need" is subject to the 1000 unit cap. However, Section 307 of the FHA in defining the duties of COAH specifically authorizes COAH to consider the municipality's "fair share of the regions **present and prospective need**" when applying the 1000 unit cap. N.J.S.A. 52D-307(e). (emphasis supplied). The court is satisfied the present need is part of a town's "fair share" and thus subject to the cap.

This court also finds the term "fair share" applies to a municipality's present need and prospective need for 2015 to 2025 and to its 1999 to 2015 gap period. As noted above, COAH and the municipalities have previously asserted that any gap would be included in the next round's prospective need and the Appellate Division had agreed with this assertion. Therefore, whether the gap period is folded into a new round's prospective need or calculated as a separate and discrete component, the gap period is part of the fair share need. Moreover, in the unadopted third iteration of COAH's third round rules, the 1999 to 2014 "gap period" is denoted as the "1999-2014 unanswered prior obligation" and involves projections for the years 1999 to 2014. "Fair Share of Prospective Need" or "Fair Share" is defined in those same rules as "a projection of affordable housing needs based upon the development and growth that is reasonably likely to occur in the region or municipality during the period of 2014 to 2024." Thus, the unanswered prior obligation or gap obligation appears to be qualitatively the same as "prospective need" and

thus both are components of a municipality's "fair share." Therefore, both of these components constitute "fair share" and are subject to and within the cap.

In the final analysis, the court finds it is constrained by the clear language of the FHA and therefore the fair share obligation of any municipality, constituting the gap period from 1999 to 2015, the present need and the upcoming third round prospective needs, is subject to that statute's 1000 unit cap.

C.

A MUNICIPALITY MAY DEFER, SUBJECT TO THE DISCRETION OF THE COURT UP TO 50 PERCENT OF ITS "GAP NEED" OBLIGATION TO THE FOURTH ROUND HOUSING CYCLE

The court notes that most municipalities in Ocean County and the overwhelming majority of New Jersey municipalities do not, even when including the "gap period", have fair share obligations exceeding 1000 units for the third round. In some circumstances, their surviving "gap" obligation after the cap is applied may be substantial. Such towns would be obligated to provide their entire fair share within the next ten (10) year third round housing cycle. Such a result, in many cases, may unduly strain municipal services or otherwise detrimentally impact these towns. Mr. Reading, in his report, recommends the court consider a two cycle phase-in period for a town's gap period obligation. Mr. Reading notes such a deferral was proposed in COAH's unadopted third round rules. The court agrees with this approach and therefore such municipalities may petition the court to defer up to 50 percent of its "gap" obligation to the fourth round. This determination will be made during the court's review of the individual

municipal plans and will be based upon objective factors to be developed by the court with the assistance of its local masters.

Finally, the court acknowledges there may be a circumstance in Ocean County where a town's obligation may, with the inclusion of the gap period, be pushed beyond the 1000 unit cap. Indeed, Mr. Reading approximates there may be anywhere from thirty to forty municipalities throughout the state facing such an eventuality. The question thus presented is which component is capped. In those rare circumstances, and if it were to occur in Ocean County, the regional master, when allocating the regional need to such a town would first account for the present and prospective needs. This need will be given first priority. Then, the gap need units, 50 percent of which may be eligible to deferral, would be added and then the cap applied. For example, if a town's housing need is determined to be as follows: present need – 200 units; prospective need – 500 units; gap need – 400 units, the master is to first add the present and prospective need (200 units plus 500 units) and then add that portion of the gap need (300 units) to arrive at the 1000 unit cap. The remaining 100 gap units are eliminated and one half of the surviving 300 gap units (150 units) may be deferred to the fourth cycle.

CONCLUSION

Based upon the findings of this opinion, the Special Regional Master is hereby ORDERED to prepare his final report so as to:

1. Include, as a separate and discrete component, the affordable housing need which arose during the "gap period" encompassing the period from the end of the second round housing cycle in 1999 to the present into his methodology in determining the statewide and regional housing need and the allocation of that need to the constituent Ocean County municipalities.

2. Apply FHA's 1000 unit cap provision as directed by this opinion. A municipality's present and prospective need for the third round housing cycle

together with the gap period need shall all be subject to the cap. A municipality's present and prospective need shall be accounted for first and then the gap period need is to be added.

3. Include in his methodology a mechanism whereby all municipalities may seek to defer up to 50 percent of its gap period need to the fourth round housing cycle. The court's determination on the requested deferral shall be determined during the court's review of the individual affordable housing plans. The Special Local Masters shall prepare a report to the court and Mr. Reading within forty-five days setting forth suggested factors to be utilized in such a determination.

MARLENE LYNCH FORD, A.J.S.C., concurs with and joins in the opinion of the court.

FAIR SHARE HOUSING CENTER
510 Park Boulevard
Cherry Hill, New Jersey 08002
P: 856-665-5444
F: 856-663-8182
Attorneys for Defendant-Intervenor
Fair Share Housing Center
By: Kevin D. Walsh, Esq. (030511999)
Adam M. Gordon, Esq. (033332006)

In the Matter of the Declaratory Judgment Actions Filed in the County of Somerset, State of New Jersey, Pursuant to In re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015),	SUPERIOR COURT Law Division Somerset County CIVIL ACTION
In the Matter of the Declaratory Judgment Actions Filed in the Count of Hunterdon, State of New Jersey, Pursuant to In re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015),	SUPERIOR COURT Law Division Hunterdon County CIVIL ACTION
In the Matter of the Declaratory Judgment Actions Filed in the Count of Warren, State of New Jersey, Pursuant to In re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015),	SUPERIOR COURT Law Division Warren County CIVIL ACTION

David N. Kinsey, PhD, FAICP, PP, of full age, hereby certifies as follows:

Exh. D

1. In this Certification I answer a question raised in the context of the so-called "Gap Period" (1999-2015) issue in implementing the March 10, 2015 decision of the New Jersey Supreme Court in In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015) ("Mount Laurel IV"): What has been the change in "cost-burdened" low and moderate income ("LMI") households ("HH") in Hunterdon, Somerset, and Warren Counties during 1999-2015, compared with the experience of LMI HH on a statewide basis in New Jersey?

2. I am a licensed Professional Planner in New Jersey, a Fellow of the American Institute of Certified Planners (FAICP), and a partner in the planning consulting firm of Kinsey & Hand of Princeton, New Jersey. My practice concentrates on affordable housing planning and has included 14 assignments as a Court-appointed Special Master in Mount Laurel exclusionary zoning litigation since 1985. I have prepared municipal housing elements and fair share plans and plan amendments certified by the New Jersey Council on Affordable Housing ("COAH"), and have advised municipalities throughout the process of obtaining COAH substantive certification. I have also advised public interest and builder plaintiffs and interveners in Mount Laurel litigation and objectors in proceedings before COAH, the Appellate Division of Superior Court, and the New Jersey Supreme Court. I have been active in Mount Laurel litigation and implementation since the 1970s, beginning with my service as Director of the Division of Coastal Resources in the New Jersey Department of Environmental Protection. I am fully familiar with COAH rules, policy, proposals, and practice on affordable housing since 1985, as well as with the decisions of the Appellate Division of Superior Court in 2007 and 2010 and the New Jersey Supreme Court in 2014 and 2015 on COAH's three iterations of post-1999 Third Round Rules.

3. I have taught graduate courses in affordable housing, land use policy and planning in the United States, planning theory and process, and related topics at Princeton University since 1998. I have also taught graduate courses in urban planning at Rutgers

University and in environmental planning at the University of Pennsylvania. I am a co-author of Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb, published by the Princeton University Press in 2013, which was awarded the Paul Davidoff Award by the Association of Collegiate Schools of Planning in 2013. I am co-author of "Developing Effective Municipal Housing Plans: A Guide for Nonprofits and Advocates on Implementing the New Jersey Supreme Court's March 2015 Decision on Fair Share Housing," published in May 2015 by the Housing and Community Development Network of New Jersey. I have an A.B. in Government-Architecture from Dartmouth College and a Master of Public Affairs and Urban Planning and Ph.D. in Public and International Affairs from Princeton University.

4. Fair Share Housing Center, Inc. ("FSHC") retained me for planning advice on Mount Laurel IV implementation.

5. I first define the key terms in the question posed and answered in this Certification.

6. The Fair Housing Act and the applicable rules of New Jersey Council on Affordable Housing ("COAH") define the terms "low income household" and "moderate income household" in the context of affordable housing. By definition, in the 1985 Fair Housing Act, HH with incomes less than 80% of the regional gross median household income, adjusted for household size, are considered low and moderate income households ("LMI"), based on U.S. Department of Housing and Urban Development (HUD) or other recognized standards:

> "'Low income housing means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to 50% of less of the median gross household income for households of the same size within the housing region in which the housing is located."[1]
>
> "'Moderate income housing' means housing affordable according to federal Department of Housing and Urban Development or other recognized standards

[1] N.J.S.A. 52:27D-304.c.

for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to more than 50% but less than 80% of the median gross household income for households of the same size within the housing region in which the housing is located."[2]

7. COAH Second Round Rules defined precisely in 1994 how median income by HH size was to be calculated:

"Median income by household size shall be established by a regional weighted average of the uncapped Section 8 income limits published by HUD. To compute this regional income limit, the HUD determination of median county income for a family of four is multiplied by the estimated households within the county. The resulting product for each county within the housing region is summed. The sum is divided by the estimated total households in each housing region. The quotient represents the regional weighted average of median income for a household of four. This regional weighted average is adjusted by household size based on multipliers used by HUD to adjust median income by household size."[3]

8. According to HUD, "Families who pay more than 30 percent of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care."[4] [emphasis added]

9. HUD regularly makes publicly available special data tabulations, known as CHAS (Comprehensive Housing Affordability Strategy) data, obtained from the U.S. Census Bureau from its annual Five-Year American Community Survey ("ACS").[5] HUD makes CHAS data available to help housing planners and policy-makers identify housing needs. CHAS data is available, for example, for the state of New Jersey, as well its counties, for 2000 and 2008-2012 that approximate two-thirds of the period 1999-2015.

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[2] N.J.S.A. 52:27D-304.d.
[3] N.J.A.C. 5:93-7.4(b), 26 N.J.R. 2332, June 6, 1994.
[4] HUD website, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/ <accessed April 13, 2016>
[5] On CHAS data, see the HUD website: http://www.huduser.gov/portal/datasets/cp.html <accessed January 3, 2016)> HUD CHA Data Query Tool: http://www.huduser.gov/portal/datasets/cp/CHAS/data_querytool_chas.html <accessed January 3, 2016)>

10. According to the HUD CHAS data, New Jersey had about 3.2 million households in 2015, of which 1.2 million qualified as low and moderate income households.[6] During 1999-2015, the number of LMI HH in New Jersey increased by 10.4%, but the number of cost-burdened LMI HH increased by 49.7%.[7]

11. During 1999-2015, the number of LMI HH in Hunterdon County increased by 20.5%, but the number of cost-burdened LMI HH increased by 122.9%. High cost-burden reflects scarce affordable housing and high housing costs, which are not surprising as Hunterdon County was the nation's fourth-ranked county by median income in 2012.[8] [9]

12. During 1999-2015, the number of LMI HH in Somerset County increased by 24.1%, but the number of cost-burdened LMI HH increased by 80.2%. Again, high cost-burden reflects scarce affordable housing and high housing costs, which are not surprising as Somerset County was the nation's eighth-ranked county by median income in 2012.[10] [11]

13. During 1999-2015, the number of LMI HH in Warren County increased by 3.3%, but the number of cost-burdened LMI HH increased by 132.2%. High cost-burden among LMI HH indicates scarce affordable housing.[12]

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[6] HUD's method of calculating low and moderate income is somewhat different than that used in New Jersey under the Fair Housing Act and COAH rules since the mid-1980s, and results in somewhat lower estimates of LMI HH, but the HUD CHAS data is commonly used nationally to calculate the numbers of LMI HH over time.

[7] See Exhibit A for supporting data and calculations.

[8] See Exhibit B for supporting data and calculations.

[9] The Washington Post, September 20, 2012, http://www.washingtonpost.com/wp-srv/special/local/highest-income-counties/ <retrieved April 13, 2016>

[10] See Exhibit B for supporting data and calculations.

[11] The Washington Post, September 20, 2012, http://www.washingtonpost.com/wp-srv/special/local/highest-income-counties/ <retrieved April 13, 2016>

[12] See Exhibit B for supporting data and calculations.

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

David N. Kinsey

DAVID N. KINSEY, PhD, FAICP, PP

Dated: April 14, 2015

EXHIBIT A: NEW JERSEY DATA AND CALCULATIONS

Changes in Low and Moderate Income Households During Gap Period, 1999-2015								
	1999 (extrapolation)	2000	2010	Change 2000-2010	Change Per Year 2000-2010	2015 (extrapolation)	Change 1999-2015 (extrapolation)	% Change 1999-2015
New Jersey								
Total Households	3,052,075	3,064,330	3,186,880	122,550	12,255	3,248,155	196,080	6.4%
Cost-Burdened Households		1,057,194	1,343,150					
Cost-Burdened Households as % of Total HH		34.5%	42.1%					
Low and Moderate Income Households (<80% of median income)	1,120,863	1,128,142	1,200,930	72,788	7,279	1,237,324	116,461	10.4%
Low and Moderate Income Households % of Total Households		36.8%	37.7%					
Cost-Burdened Low and Moderate Income Households (>30% of Income for Housing)	668,797	689,577	897,375	207,798	20,780	1,001,274	332,477	49.7%
Cost-Burdened Low and Moderate Income Households as % of Total LM HH	59.7%	61.1%	74.7%			80.9%		35.6%

Notes:

(a) Median income is HUD Adjusted Median Family Income ("HAMFI"), which is different that the CDAH definition and results in different income limits by hou

(b) The 2008-2012 ACS data is a sample over five years best interpreted as of the midpoint of 2010

Sources of data:

Consolidated Plan/CHAS 2000 Data, HUD USERHUD, special tabulation for HUD of 2000 Census, http://egis.hudusergov/chas/cpdatable.odb <accessed April 12 2016>

2008-2012 ACS, HUD CHAS data, http://www.huduser.gov/portal/datasets/cp/CHAS/data_querytool_chas.html <accessed September 21, 2015>

Prepared by: David N. Kinsey, PhD, FAICP, PP, September 24, 2015, revised April 12, 2016

EXHIBIT B: COUNTY DATA AND CALCULATIONS

Changes in Low and Moderate Income Households During Gap Period, 1999-2015								
	1999 (extrapolation)	2000	2010	Change 2000-2010	Change Per Year 2000-2010	2015 (extrapolation)	Change 1999-2015 (extrapolation)	% Change 1999-2015
Hunterdon County								
Total Households	43,298	43,673	47,420	3,747	375	49,294	5,995	13.8%
Cost-Burdened Households		36,800	17,380					
Cost-Burdened Households as % of Total HH		84.3%	36.7%					
Low and Moderate Income Households (<80% of median income)	9,420	9,541	10,750	1,209	121	11,355	1,934	20.5%
Low and Moderate Income Households % of Total Households		21.8%	22.7%					
Cost-Burdened Low and Moderate Income Households (>30% of Income for Housing)	5,821	6,269	10,740	4,471	447	12,976	7,154	122.9%
Cost-Burdened Low and Moderate Income Households as % of Total LM HH	61.8%	65.7%	99.9%			114.3%		84.9%
Somerset County								
Total Households	108,357	108,973	115,130	6,157	616	118,209	9,851	9.1%
Cost-Burdened Households		39,200	43,815					
Cost-Burdened Households % of Total HH		35.2%	38.1%					
Low and Moderate Income Households (<80% of median income)	24,807	25,283	29,040	3,757	376	30,919	6,011	24.1%
Low and Moderate Income Households % of Total Households		23.2%	25.2%					
Cost-Burdened Low and Moderate Income Households (>30% of Income for Housing)	18,722	19,650	29,040	9,390	938	33,730	15,008	80.2%
Cost-Burdened Low and Moderate Income Households as % of Total LM HH	75.2%	77.8%	100.0%			109.1%		45.1%
Warren County								
Total Households	38,316	38,618	41,640	3,022	302	43,151	4,835	12.6%
Cost-Burdened Households		29,400	16,544					
Cost-Burdened Households % of Total HH		76.1%	39.7%					
Low and Moderate Income Households (<80% of median income)	14,096	14,125	14,415	290	29	14,560	464	3.3%
Low and Moderate Income Households % of Total Households		36.6%	34.6%					
Cost-Burdened Low and Moderate Income Households (>30% of Income for Housing)	7,647	8,173	14,410	6,240	624	17,530	9,883	132.3%
Cost-Burdened Low and Moderate Income Households as % of Total LM HH	53.5%	57.8%	100.0%			120.4%		124.9%

Notes:

(a) Median Income is HUD Adjusted Median Family Income ("HAMFI"), which is different that the CDAH deflator and results in different income limits by hous

(b) The 2008-2012 ACS data is a sample over five years, best interpreted as at the midpoint of 2010

Sources of data:

Consolidated Plan/CHAS 2000 Data, HUD USER/HUD, special tabulation for HUD of 2000 Census, http://socds.huduser.gov/chas/statistable.odb <accessed April 12 2016>

2008-2012 ACS, HUD CHAS data, http://www.huduser.gov/portal/datasets/cp/CHAS/data_querytool_new.html,<accessed September 21, 2015>

Prepared by: David N. Kinsey, PhD, FAICP, PP, September 24, 2015, revised April 12, 2016