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May 6, 2016

Honorable Thomas C. Miller, J.S.C.
Superior Court of New Jersey
Somerset Courthouse
20 North Bridge Street, 2nd Floor
Somerville, NJ 08876

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

Dear Judge Miller:

In accordance with the court's April 19, 2016 order, please accept this letter brief on behalf of Fair Share Housing Center (FSHC) in response to the Motions for Summary Judgment regarding compliance standards submitted by various municipalities. This letter brief will supplement our previous submissions on compliance matters, which substantially address the issues raised in the municipalities' motions.

Prior to addressing those issues, I note my objection to the correspondence regarding the pending motions for summary judgment submitted by Jeffrey Surenian, Esq. on May 3, 2016 and to what is addressed therein. That correspondence states:

> This will confirm that due to the Appellate Division's grant of the application by Barnegat Township to review Judge Troncone's decision on the gap issue, the Court will await the Appellate Division's determination on that issue. Therefore, your Honor has this afternoon indicated it is not necessary for the Vicinage 13 municipalities to reply to the opposition filed to its motion on the gap period issue. Since the Appellate Division appeal does not address the 1,000-unit cap issue, however, which was also the subject of Judge Troncone's decision, I will respond to arguments on that issue.

I object to this decision and the manner in which it was made and communicated. If in fact this occurred, and I note Mr. Surenian does not provides any details, it appears an order has been modified without an opportunity for other parties to address Mr. Surenian's request. I object to the ex parte application to modify a court order and to the court's decision to grant an ex parte application without any opportunity for others to be heard. I request that this not occur going forward. Any attorney who seeks to modify an order should be required to give notice of that application. And I request that the court not consider or grant such applications without directing that notice be provided to other counsel regarding the application. I also recognize that Mr. Surenian may not have accurately communicated the court's position and request clarification if that is the case.

I. Introduction

FSHC's brief on compliance issues adequately addresses the majority of compliance issues raised by the various municipalities. We respond here regarding a central weakness in the arguments made by the municipalities: The municipalities' motions for summary judgment on compliance issues fail to account for the deference generally owed to agencies and incorrectly suggest trial courts can ignore binding decisions issued by the Appellate Division and Supreme Court of New Jersey. Their request to ignore interpretations of the Fair Housing Act and binding case law should be rejected because courts must give deference to agencies and trial courts are bound to follow decisions issued by higher courts.

The municipalities' positions should also be rejected because their goal is plainly to undermine Mount Laurel and nothing else. Consider:

- Redevelopment is inarguably a dominant force in New Jersey land use, but the municipalities argue that it should play no role in meeting their substantial unmet fair share obligations resulting from vacant land adjustments. They either want no redevelopment to occur or want to exclude lower-income families, people with disabilities, and seniors from any redevelopment that does occur.
- Mount Laurel is primarily intended to assist lower-income families with children. The municipalities seek the ability to exclude all very low income families.
- The municipalities want to change longstanding practices, embodied in adopted rules, regarding who qualifies for affordable housing, with the goal of excluding households who are comparatively poorer.

Our specific arguments regarding the positions advocated by the municipalities are as follows:

1. The municipalities have failed to account for the deference given to an agency's interpretations of its enabling legislation.

FSHC contends that N.J.A.C. 5:93 provides the baseline framework for compliance with Mount Laurel in the declaratory judgment proceedings before it, and that the court should depart from those rules when appropriate. One area in which a departure is appropriate is when the Council on Affordable Housing (COAH) interprets its own enabling legislation. The municipalities urge the court to ignore COAH's interpretations of the Fair Housing Act of 1985 (FHA), N.J.S.A. 52:27D-301 to -329.19, which is plainly not permitted under binding Mount Laurel case law addressing how trial courts and the agency interact and under general case law regarding deference owed to state agencies.

The municipalities' position ignores that for decades courts have relied on, and are still required to rely on, COAH's rules to provide a framework for implementing Mount Laurel. In Hills Development Co. v. Bernards Tp., 103 N.J. 1 (1986), the Supreme Court emphasized that COAH was empowered under the FHA to create, through its regulations, uniform standards regarding affordable housing policy and procedures that could be applied throughout the state. The Court noted that COAH is charged with creating "an overall plan for the entire state . . . with definitions and standards that will have the kind of consistency that can result only when full responsibility and power are given to a single entity." Id. at 22. "In furtherance of consistent determinations of regional needs and fair share allocations," the Supreme Court stated in Hills that "'the judiciary . . . will be responsive to the actions of the Council and conform its decisions

in this field to the Council's various determinations." Toll Bros. v. West Windsor, 173 N.J. 502, 547 (2002) (citing Hills, supra, 103 N.J. at 37) (emphasis in original)). The Supreme Court further wrote:

> While the Legislature has left a continuing role under the Act for the judiciary in Mount Laurel matters, any such proceedings before a court should conform wherever possible to the decisions, criteria, and guidelines of the Council. We do not believe the Legislature wanted lower income housing opportunities to develop in two different directions at the same time, contrary to sound comprehensive planning.
>
> [Hills, supra, 103 N.J. at 63 (emphasis added).]

This is consistent with the general deference given by courts to a state agency. The Supreme Court has recognized that courts "should give considerable weight to a state agency's interpretation of a statutory scheme that the legislature has entrusted to the agency to administer." In re Election Law Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010)(citations omitted).

> This deference comes from the understanding that a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise. Moreover, regulations promulgated by an agency in furtherance of a statutory scheme it is charged with enforcing are presumed to be valid. We will **defer to an agency's interpretation of both a statute and implementing regulation, within the sphere of the agency's authority, unless the interpretation is "plainly unreasonable."**
>
> [Ibid. (emphasis added).]

A court "must defer to a choice of procedures by an administrative agency to implement legislative policy 'so long as the selection is responsive to the purpose and function of the agency.'" Bernards Twp v. Dept. of Cmty. Affairs, 233 N.J. Super. 1, 9 (App. Div. 1989)(interpreting COAH's powers to interpret FHA)(quoting Radiological Soc. of New Jersey v. New Jersey Dept. of Health, 208 N.J. Super. 548, 560 (App.Div.1986), certif. denied 104 N.J. 444 (1986)). The requirement to defer to a state agency's position interpreting a regulation or statute arises even when the agency is not a party in the litigation. See US Bank, N.A. v. Hough, 210 N.J. 187, 200 (2012); In re Adoption of a Child by W.P., 163 N.J. 158, 173-74 (2000).

On numerous issues, including rental bonus credits, vacant land adjustments, very low income housing, family housing, affordability standards, and general rules on crediting affordable housing, the municipalities urge the court to ignore COAH's rules and interpretations of those rules and to replace them with the municipalities' own novel views of what the FHA says. They make those arguments without arguing or showing that the rules and interpretations are not authorized by statute or that the rules and interpretations are "plainly unreasonable," Election Law Enf't Comm'n, supra, 201 N.J. at 262, or "responsive to the purpose and function" of COAH, Bernards, supra, 233 N.J. Super. at 9. COAH's adopted rules and interpretations certainly are entitled to deference when they fill in the gaps left in general legislation. With the exception of specific rules that have been invalidated, which trial courts were directed not to rely

on, see In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 33 (2015)(trial courts "should exercise caution to avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules"), COAH's rules should receive deference unless the municipalities carry the high burden of demonstrating their invalidity.

The municipalities have suggested that COAH's Third Round rules were in their entirety vacated, but that is not dispositive of whether standards included in those rules reflect a valid interpretation of the FHA and whether they should be applied for purposes of implementing Mount Laurel. Trial courts were directed not to use rules that were "expressly disapproved," ibid., but otherwise directed to use many of the rules included in N.J.A.C. 5:97. The Supreme Court did not indicate that those specifically-identified rules are the only ones that trial courts may rely on, and that issue was certainly never briefed. In the absence of a rule being invalidated because it violates Mount Laurel or the FHA, such as growth share and residency preferences, see infra, the rule is entitled to deference as an agency articulation of policy or agency interpretation of its enabling legislation.

2. The municipalities ignore or dismiss decisions issued by the Appellate Division and Supreme Court involving unmet need and very low income housing.

The municipalities urge the court to disregard relevant decisions issued by higher courts. A trial court, of course, is bound by the decisions of higher courts. The municipalities' arguments that trial court should effectively ignore higher courts' rulings should be rejected.

a. Unmet need

The municipalities argue that the court should not require unmet need to be met because, they contend, the FHA provides the only relevant source of law on unmet need. They dispute the rules adopted in 1994, which required unmet need to be met, as unauthorized by the FHA. This position is rejected by numerous court decisions. In In re of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 86 (App. Div. 2007), the Appellate Division found that requirements to meet unmet need are essential to compliance with Mount Laurel:

> We cannot assume that COAH will not do what it has promised to do. Indeed, COAH has reviewed the development and redevelopment opportunities in developed municipalities and recalculated the realistic development potential with the ultimate goal of requiring additional affordable housing should land become available. In re Petition for Substantive Certification of Borough of Montvale, 386 N.J. Super. 119, 122 (App.Div.2006). Accordingly, we conclude N.J.A.C. 5:94-3.4, as presently construed and as administered by COAH, is valid.

Fair Share Housing Center v. Township of Cherry Hill, 173 N.J. 393, 416 (2002); Montvale, supra; and In re Fair Lawn Borough, 406 N.J. Super. 433, 441-442 (App. Div. 2009), likewise all enforce and interpret COAH's rules on unmet need. There are thus at least four decisions issued by higher courts on this issue. The municipalities urge the court to take nothing from those decisions because they have an argument that trumps those decisions – they have the FHA version of a Royal Flush – and the judges involved in those decisions were never aware of their new argument.

The municipalities urge the court to ignore published decisions and, for the first time in 30 years, to interpret the FHA as prohibiting any requirement to meet unmet need. What is this sleeper argument, which has lied dormant for three decades, but is now ready to come to life to upend decades of rulemaking and case law? What argument do the municipalities turn to in an effort to supplant a unanimous Supreme Court, nine different Appellate Division judges, and repeated rulemaking by the COAH Board? Legislative silence. The municipalities argue at page 5 of the Readington/Far Hills brief that "the FHA is void of any provision that can be credibly construed to impose an Unmet Need obligation." The Legislature did not require unmet need to be met, so it must have intended it to be ignored. That approach is inconsistent with accepted standards of legislative interpretation and administrative law, but it is the entirety of their argument regarding the FHA and unmet need. In the face of binding case law and rules entitled to deference, it is a weak argument to make because the Legislature does not speak through silence. See Amerada Hess Corp. v. Director, Div. of Taxation, 107 N.J. 307, 322 (1987)(legislative silence is a "'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute")(citation omitted). Likewise, the Legislature, which has amended the FHA several times since the adoption of rules requiring unmet need to be met, is deemed to be aware of the court decisions and regulations that require municipalities to meet unmet need[1], see generally Maeker v. Ross, 219 N.J. 565, 575 (2014), and it is noteworthy that no changes were made by the Legislature.

The municipalities do not have a Great New Argument that trumps existing court decisions. This court should thus follow the Appellate Division's and Supreme Court's decisions regarding unmet need and should, as we argued, adopt the updated approach to vacant land adjustments included in N.J.A.C. 5:97-5.1 to -5.3.

b. Very low income housing

The municipalities contend they should not be required to ensure that half of the very low income units required by the FHA are available to families. FSHC addressed this issue in our earlier papers filed in this matter and directed the court to COAH's October 30, 2008 guidance letter. That letter was correctly found to be binding on municipalities by the Appellate Division in In re Substantive Certification of Blairstown Township, Docket No. A-6355-08T3 (unpublished decision; Exh. A, attached hereto[2]), which required a municipality to meet half of its very low income obligation through family units. In addition to not ignoring COAH's interpretation of the FHA, that interpretation should also be followed because it was enforced and found to be valid by the Appellate Division. No legal or policy justification has been provided for rejecting an interpretation of the FHA and COAHs' rules that was upheld by the Appellate Division.

In conclusion, the municipalities urge the court to adopt novel interpretations of the FHA while ignoring decades of binding case law that already address these issues. The trial court plainly cannot ignore decisions issued by the Appellate Division and Supreme Court.

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[1] N.J.S.A. 52:27D-310.1, which addresses vacant land, was amended three times, see L. 1995, c. 231, § 1; L. 1997, c. 49; L. 2008, c. 46, §39, but at no point was COAH's approach to unmet need disapproved by the Legislature.

[2] Counsel for FSHC is unaware of any contrary court opinions.

3. Substantive certification may be challenged in three ways under the FHA and longstanding COAH practice.

The municipalities also argue that municipalities that receive a vacant land adjustment should not be subject to changes during the ten-year period of substantive certification they receive. Municipalities that have or do not have a vacant land adjustment are entitled to a measure of protection from litigation, but it is not absolute – for three reasons.

First, under the FHA, as amended in 2008, all municipalities must demonstrate that their fair share plans comply with the Mount Laurel doctrine halfway through the ten-year period of certification. See N.J.S.A. 52:27D-310.1 ("The Council shall establish procedures for a realistic opportunity review at the midpoint of the certification period and shall provide for notice to the public."). Municipalities that receive the "judicial equivalent of substantive certification and accompanying protection as provided under the FHA," In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 6, obtain a limited period during which they are protected to a degree from Mount Laurel litigation. Under N.J.S.A. 52:27D-310.1, their plans must be reviewed at the latest five years after the date of certification, if not earlier for some other reason. This requirement will have to be incorporated into any final order, and the court should leave room for such a requirement given the clear mandate of the FHA.

Second, COAH always recognized that substantive certification is not ironclad through the inclusion of paragraphs such as the following in its resolutions granting substantive certification:

> BE IT FURTHER RESOLVED that any changes to the facts upon which this substantive certification is based or any deviations from the terms and conditions of this substantive certification which affect the ability of [the municipality] to provide for the realistic opportunity of its fair share of low and moderate income housing and which the [municipality] fails to remedy, may render this certification null and void.
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> [Exhibit B, page 4, attached hereto.]

This approach should be included in any orders concluding declaratory judgment litigation

Third, even during the period of substantive certification, municipalities may be required to amend their fair share plans to account for new opportunities. See COAH decision in In re Haddonfield, pages 7-10 November 22, 2004 (requiring amended plan and imposing restraints on development in municipality with vacant land adjustment *during period of substantive certification* due to availability of redevelopment opportunities), Exhibit C, attached hereto.

The municipalities are correct that they are entitled to protection from Mount Laurel litigation when their plans are certified as compliant, but there are limitations to that protection that are intended to protect the interests of lower-income households. Those limitations were recognized by COAH and should be recognized by the trial courts as well.

It is also important to note that municipalities have incorrectly suggested they are entitled to repose. The Supreme Court has specifically decided that municipalities should receive "the judicial equivalent of substantive certification and accompanying protection as provided under the FHA." In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 6 (emphasis added). Repose is not a

protection received "under the FHA" and thus cannot be obtained through Mount Laurel IV litigation.

For the reasons articulated in this responsive brief, and in our initial brief on compliance standards, we respectfully urge the court to deny summary judgment on the compliance issues identified by the municipalities and adopt the compliance standards advocated by FSHC.

Thank you for your attention to this matter.

Respectfully,

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

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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6355-08T3

IN RE SUBSTANTIVE
CERTIFICATION OF
BLAIRSTOWN TOWNSHIP.

Argued March 22, 2011 – Decided May 23, 2011

Before Judges Carchman, Messano and St. John.

On appeal from the New Jersey Council on Affordable Housing.

Adam M. Gordon argued the cause for appellant Fair Share Housing Center.

George N. Cohen, Deputy Attorney General, argued the cause for respondent New Jersey Council on Affordable Housing (Paula T. Dow, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Mr. Cohen, on the brief).

Benbrook & Benbrook, attorneys for respondent Township of Blairstown, join in the brief of respondent New Jersey Council on Affordable Housing.

PER CURIAM

Fair Share Housing Center (Fair Share) appeals from the Council on Affordable Housing's (COAH) grant of third-round substantive certification to the housing plan submitted by Blairstown Township (Blairstown). Fair Share contends that COAH violated the Administrative Procedures Act, N.J.S.A. 52:14B-1 to

Exh. A

-24 (APA), the Fair Housing Act, N.J.S.A. 52:27D-301 to -329 (FHA), and the Mount Laurel doctrine[1] establishing the constitutional obligation of New Jersey's municipalities to permit the development of affordable housing. We have considered the arguments raised in light of the record and applicable legal standards. We reverse and remand for further proceedings consistent with this opinion.

Before proceeding, we note that Fair Share and COAH have urged us to consider the issues at hand despite the ongoing litigation involving COAH's third-round certification regulations, and the introduction of legislation designed to significantly revamp the FHA.[2] See In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462 (App. Div. 2010), certif. granted, 205 N.J. 317 (2011); N.J. Legislature Bills 2010-2011, S.1). We agree that pending developments before the Court and the Legislature do not affect our consideration of the issues presented on appeal, which are discrete and may be resolved on the record presented.

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[1] S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983)(Mount Laurel II); S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 67 N.J. 151, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975)(Mount Laurel I).

[2] Blairstown has not filed a brief and relies upon the brief filed and argument presented by COAH.

I.

On July 17, 2008, the FHA Amendments Act, L. 2008, c. 46, was enacted. Among other things, the law established a new standard for meeting the housing needs for very-low-income households. Section 7 of the law, codified at N.J.S.A. 52:27D-329.1, provides:

> [COAH] shall coordinate and review the housing elements as filed pursuant to [N.J.S.A. 52:27D-311], and the housing activities under [N.J.S.A. 52:27D-320], at least once every three years, to ensure 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, as that term is defined pursuant to [N.J.S.A. 52:27D-304]. Nothing in this section shall require that a specific percentage of the units in any specific project be reserved as very low income housing; . . . . The council shall coordinate all efforts to meet the goal of this section in a manner that will result in a balanced number of housing units being reserved for very low income households throughout all housing regions.
>
> [(Emphasis added).]

N.J.S.A. 52:27D-304(m) defines "'[v]ery low income housing'" as housing affordable to "households with a gross household income equal to 30% or less of the median gross household income for households of the same size within the housing region in which the housing is located." On July 24, 2008, COAH sent a letter to all municipalities summarizing the major provisions of the

new law, explaining that it "provide[d] a comprehensive reform of New Jersey housing law" by, among other things, "promoting the creation of very low-income housing."

In another letter to the municipalities dated October 30, 2008, labeled "Guidance Document" (COAH's October 2008 letter), COAH referenced the prior letter and added:

> We are now writing to provide you with further guidance on the implementation of[] 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:
> . . . .

The significance of the following first item is the crux of this appeal; it read as follows:

> 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 . . . .
>
> 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.

> 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.
>
> [(Emphasis added).]

N.J.A.C. 5:97-3.9, in turn, provides: "At least 50 percent of the units within the municipality addressing the growth share obligation shall be family housing units."

Blairstown's submission undisputedly did not comply with the guidance provided in COAH's October 2008 letter. As noted in COAH's planning consultant's compliance report of June 19, 2009 (the compliance report), Blairstown had a projected growth share obligation of 118 affordable housing units. Because Blairstown's plans enabled it to take credit for 29 units of rental bonuses, its plan needed to accommodate 89 units of additional affordable housing. Of the 89 units of affordable housing to be provided, the compliance report calculated that at least 44 units (50%) must be family units, and 12 units (13%) must meet the very-low-income requirement. Blairstown planned to meet the very-low-income requirement through 14 units of supportive and special needs housing provided in group homes;

none of the planned 45 family units were designated as very-low-income housing units.

On December 23, 2008, Blairstown filed its third-round petition for substantive certification with COAH. COAH published notice of the plan on January 27, 2009, and did not receive any objections to the petition. On April 27, 2009, Blairstown adopted an amendment to its housing element and fair share plan, and on May 4, Blairstown filed a motion with COAH for a minor revision that does not affect consideration of the issues presented by this appeal. The compliance report recommended that COAH grant substantive certification.

On July 7, 2009, Fair Share filed comments to the compliance report, criticizing the lack of family housing in Blairstown's plans, and its failure to meet the requirement to provide for very-low-income family housing. Fair Share asserted that "COAH effectively change[d] its regulations on the requirement for very-low-income homes without a notice and comment process." Referencing COAH's October 2008 letter, Fair Share charged that "COAH, in proposing to grant Blairstown substantive certification without requiring family very-low-income units, would be ignoring its existing rules."

Fair Share further commented that it had recently appealed two other substantive certification decisions in which COAH

failed to enforce its very-low-income requirement in accordance with its October 2008 letter. Those two appeals, A-5285-08 (West Amwell) and A-5286-08 (Hardystown Township), were settled using the Civil Appeals Settlement Program with those municipalities each agreeing to provide very-low-income family housing units as was required. In the West Amwell matter, COAH provided a response regarding this issue, asserting that Fair Share "misinterpret[ed]" COAH's October 2008 letter. COAH explained:

> The letter was not intended to advise municipalities that N.J.A.C. 5:97-3.9 applies to the new statutory requirement that municipalities provide 13% of the fair share obligation to very low income households. N.J.A.C. 5:97-3.9 provides that at least 50 percent of the units within the municipality addressing the growth share obligation shall be family units. This regulation applies to the growth share obligation as a whole and was adopted before A500 [the bill enacted as L. 2008, c. 46] was enacted. Thus, COAH did not contemplate its application to the recently adopted very low income housing requirement. Likewise, COAH did not intend the letter to act as an interpretation of N.J.A.C. 5:97-3.9. This regulation applies to the entire growth share obligation, not just the very low income units. It was not intended to require that 50 percent of the very low income units be provided through family housing in all cases, although COAH encourages municipalities to do so.
>
> COAH did not intend the October 30, 2008 letter as an interpretation of its regulations so as to require municipalities

> to provide 50 percent of the very low income units as family units. Therefore, as discussed in the COAH Compliance Report, West Amwell's plan does comport with COAH regulations in this regard.

Fair Share's appellate appendix includes a table dated February 2, 2010, compiling information from COAH's resolutions granting substantive certification to petitions filed by fifty-seven municipalities in December 2008. For each of those municipalities, Fair Share's appendix also includes the relevant compliance report pages that indicated how each municipality planned to meet its very-low-income housing requirement.[3]

Those records reveal that the municipalities that obtained substantive certification overwhelmingly adopted plans in which 50% or more of their very-low-income housing units were provided as family housing units. Forty-five of those municipalities provided at least half of their very-low-income units as family housing units; five others fulfilled their obligations prior to enactment of the FHA Amendments Act, so they did not have a very-low-income housing obligation. In short, the overwhelming majority of municipalities that submitted housing plans

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[3] Fair Share asks that we take judicial notice of those public records pursuant to N.J.R.E. 201(a) and 202(b). We conclude the documents are subject to judicial notice. Mount Olive Complex v. Twp. of Mount Olive, 340 N.J. Super. 511, 527 (App. Div. 2001), remanded on other grounds, 174 N.J. 359 (2002)).

subsequent to COAH's October 2008 letter complied with the directive contained in that correspondence.

At COAH's July 8, 2009 hearing, Fair Share raised objections to Blairstown's plan. However, without discussion, COAH voted to grant the substantive certification and adopted resolution #24-09. This appeal followed.

II.

Fair Share contends that COAH erred by granting substantive certification despite Blairstown's noncompliance with COAH's family housing rule, N.J.A.C. 5:97-3.9. Fair Share asserts this amounted to error, both because COAH violated the APA by making a policy change without following the proper procedures for rulemaking, and because the policy reflected by adoption of resolution #24-09 itself violated the FHA and the Mount Laurel doctrine.

(A)

We generally will not disturb an administrative agency's action unless it is arbitrary, capricious, or unreasonable. In re Warren, 117 N.J. 295, 296 (1989). We "can intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other State policy." George Harms Constr. v. Tpk. Auth., 137 N.J. 8, 27 (1994).

An agency's regulations enacted pursuant to legislative authority and to implement legislative policy enjoy a presumption of validity. In re Substantive Certification Filed by the Twp. of Warren, 132 N.J. 1, 26 (1993). We therefore "place[] great weight on the interpretation of legislation by the administrative agency to whom its enforcement is entrusted." Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 69-70 (1978). The "principle of judicial deference to agency action is particularly well-suited to our review of administrative regulations adopted by COAH to implement the [FHA]." Twp. of Warren, supra, 132 N.J. at 27. Yet, we have also noted:

> COAH's regulations must be consistent with the central purpose of the FHA to provide affordable housing on a regional basis consistent with both sound planning principles and the Mount Laurel doctrine, and COAH may not adopt any regulation that undermines its methodology for calculating or allocating regional fair share obligations.
>
> [In re the Adoption of N.J.A.C. 5:94 & 5:95 by the N.J. Council on Affordable Hous., 390 N.J. Super. 1, 32 (App. Div.) (citing Twp. of Warren, supra, 1, 32 N.J. at 28 certif. denied, 192 N.J. 72 (2007); Non-Profit Affordable Hous. Network v. N.J. Council on Affordable Hous., 265 N.J. Super. 475, 479 (App. Div. 1993))].

"An agency determination that is intended to be applied as a general standard and with widespread coverage and continuing effect can also be considered an administrative rule if it is

not otherwise expressly authorized by or obviously inferable from the specific language of the enabling statute." Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 329 (1984). If "the . . . agency determination constitute[s] a rule, . . . its adoption require[s] compliance with [the] statutory rule-making procedures" of the APA. Id. at 334.

With these general concepts in mind, we turn to the arguments raised by Fair Share.

(B)

Fair Share contends that COAH was required to follow the APA's notice and comment procedures because COAH made a significant policy change in an established and generally applicable policy when it certified Blairstown's plan. Fair Share acknowledges that agencies may apply an existing rule to new legislation or previously unanticipated situations, without notice and comment. In re Hosps.' Petitions for Adjustment of Rates, 383 N.J. Super. 219, 249 (App. Div.), certif. denied, 187 N.J. 81, 187 N.J. 82 (2006). Fair Share argues, however, that if COAH seeks to "reverse course from an adopted regulation," even to adopt a position that might have been reasonable without additional rulemaking if it had been the initial interpretation, it must always use a notice and comment process, see Glaser v. Downes, 126 N.J. Super. 10, 18 (App. Div. 1973), certif. denied,

64 N.J. 513 (1974) and Am. Emp'rs Ins. Co. v. Comm'r of Ins., 236 N.J. Super. 428, 433-34 (App. Div. 1989). Fair Share contends that it reasonably relied upon COAH's October 2008 letter interpreting N.J.A.C. 5:97-3.9, as did municipalities and the public, and, since none of the established exceptions from notice and comment rulemaking apply, COAH violated the APA. We agree.

"'An agency may not use its power to interpret its own regulations as a means of amending those regulations or adopting new regulations.'" In re Hosps.' Petitions, supra, 383 N.J. Super. at 247 (quoting Besler & Co. v. Bradley, 361 N.J. Super. 168, 173 (App. Div. 2003) (in turn quoting Venuti v. Cape May Cnty. Constr. Bd. of Appeals, 231 N.J. Super. 546, 554 (App. Div. 1989)). Such a procedure violates "proper rulemaking under the standards set in Metromedia, supra, 97 N.J. at 328-37." Ibid. However, if "[t]he amendment was a clarification of the original rule, not a material change[,] . . . it did not require compliance with APA new rule-making procedures." Cobo v. Mkt. Transition Facility, 293 N.J. Super. 374, 394 (App. Div. 1996).

In Glaser, supra, 126 N.J. Super. at 14, the Director of the Division of Taxation sent a written notice to all licensed retail motor fuels dealers in New Jersey that pursuant to an injunction issued in Chancery Division litigation, it was

"illegal and violative of N.J.S.A. 56:6-2(e)" for any of the dealers to issue certain trading stamps or giveaways, whether or not conditioned on the purchase of motor fuel. The litigation involved one service station litigant and an issue regarding trading stamps, but the discussion in that case evolved to include other giveaways and motor fuels retailers statewide. Id. at 15-17. We concluded that the action taken by the Director was invalid, explaining:

> The order was in effect a rule or regulation. N.J.S.A. 52:14B-2(e) defines an administrative rule as an "agency statement of general applicability and continuing effect that implements or interprets law or policy . . . . The term includes the amendment or repeal or any rule . . . ." The October 2 notice was precisely such an "agency statement," and since it offered an interpretation of N.J.S.A. 56:6-2(e) different from that embodied in the existing regulation, N.J.A.C. 18:19-2(a), it also constituted a repeal or amendment of that rule. It was a directive of universal application, for it was mailed to all licensed motor fuels dealers in New Jersey.
>
> What the Director did violated every requirement of N.J.S.A. 52:14B-4(a), which deals with notice and hearing prior to the adoption, amendment or repeal of any rule. That section requires at least 20 days' notice of the intended action; an opportunity afforded all interested persons to submit data, views or arguments, orally or in writing, and agency consideration of all such submissions.
>
> [Id. at 18-19 (emphasis added).]

See also Am. Emp'rs Ins. Co., supra, 236 N.J. Super. at 433-34 (holding that modification of existing regulations needed to be achieved through the APA).

This case presents an unusual factual complex. As enacted, N.J.S.A. 52:27D-329.1 required only that "13 percent of the housing units made available for occupancy by low-income and moderate income households . . . be reserved for occupancy by very low income households." Fair Share concedes that the legislation did not explicitly provide that the set-aside for "very low income households" be designated for family housing. However, COAH concluded that to implement the legislative command, N.J.A.C. 5:97-3.9, its family-housing regulation, now required that "at least 50 percent of the very-low[-]income housing requirement [be satisfied] through family housing." COAH's October 2008 letter to all municipalities expressly cited the regulation and the need to conform the regulation to the newly-enacted FHA amendments.

COAH's October 2008 letter was clearly an "agency statement of general applicability and continuing effect that implement[ed] or interpret[ed] law or policy." N.J.S.A. 52:14B-2(e); Glaser, supra, 126 N.J. Super. at 18. Perhaps COAH's conclusion in this regard was not compelled by the express language of N.J.S.A. 52:27D-329.1. But the agency's decision to

construe the existing regulation in this manner was not an unreasonable decision. See Am. Emp'rs Ins. Co., supra, 236 N.J. Super. at 433. And, having done so, COAH's October 2008 letter effectively amended N.J.A.C. 5:97-3.9.

That conclusion, therefore, inevitably compels reversal. Having interpreted its own regulation to require municipalities to submit plans that proposed 50% of their very-low-income housing be set aside for very-low-income families, COAH's certification of Blairstown's submission violated the regulatory framework. We note that in approving Blairstown's plan, COAH offered no explanation or excuse for permitting non-compliance. The explanation it offered in the East Amwell appeal has been essentially reiterated before us.

It is acknowledged that N.J.A.C. 5:97-3.9 existed before the FHA was amended, that, on its face, the regulation does not address the very-low income requirement, and that the regulation was not amended through invocation of the APA's procedures. But those facts do not help us attribute significance to COAH's October 2008 letter.

COAH's after-the-fact explanation of its intention in issuing the directive -- it was a suggestion to encourage municipalities to provide very low income family housing but not a mandatory directive -- contradicts the express language of the

guidance letter. We reject the assertion that the October 2008 letter was not intended to interpret N.J.A.C. 5:97-3.9 in light of the statutory amendments, because the letter specifically referenced the regulation and set forth COAH's interpretation. Nor can it be alleged that the guidance letter was not intended to advise municipalities of their obligations under the FHA amendments because that is precisely what it did.

Moreover, the explanation proffered by COAH ignores the consequences of what actually ensued as a result of the issuance of the October 2008 letter. An overwhelming percentage of municipalities complied with the letter's directive in submitting their plans for certification.

Therefore, COAH's certification of Blairstown's plan reflects a change in its interpretation of N.J.A.C. 5:97-3.9, achieved without utilizing the APA's rule-making procedures. In re Hosps.' Petitions, supra, 383 N.J. Super. at 247. As a result, we are compelled to reverse and remand the matter to COAH for further proceedings that are consistent with this opinion.

In light of our holding, we need not consider the other arguments raised by Fair Share on appeal.

Reversed and remanded. We do not retain jurisdiction.

RESOLUTION GRANTING FINAL THIRD ROUND SUBSTANTIVE CERTIFICATION #57-18(a)

Cranbury Township, Middlesex County

WHEREAS, Cranbury Township, Middlesex County, petitioned the Council on Affordable Housing (COAH) on December 31, 2008 for substantive certification of its Housing Element and Fair Share Plan addressing its total 1987-2018 affordable housing obligation; and

WHEREAS, Cranbury Township's fair share plan addresses a total 1987-2018 affordable housing obligation of 492 units, consisting of a six-unit rehabilitation share, a 216-unit prior round obligation and a 269-unit projected growth share obligation pursuant to N.J.A.C. 5:97; and

WHEREAS, Cranbury proposes to address its six-unit rehabilitation share through participation in the Middlesex County Department of Housing and Community Development's Rehabilitation Program; and

WHEREAS, the Township will address its 217-unit prior round obligation with a 76-unit Regional Contribution Agreement with Perth Amboy City, a 34-unit Regional Contribution Agreement with Carteret Borough, 26 credits and 26 bonuses from the Cranbury Housing Associates (CHA) family rental development, three credits from the CHA family for-sale development, 20 credits and seven bonuses from the senior rental development and six credits and six bonuses from the SERV Centers of NJ group home; and

WHEREAS, Cranbury will address its projected 269-unit growth share obligation with 27 credits from the CHA family for-sale development, 20 credits and 20 bonuses from the Old Cranbury Road development, five credits from the SERV Centers of NJ group home, 83 units and 47 bonuses between the Route 130 D Site and a future family rental site and 67 units at a future senior rental site; and

Exh. B

WHEREAS, on January 13, 2010, COAH granted Cranbury Township conditional substantive certification with three conditions to be met within 60 days, or no later than March 15, 2010 (see COAH Conditional Compliance Report and resolution granting conditional third round substantive certification, attached as Exhibit A and incorporated by reference herein); and

WHEREAS, the three conditions were:

1. the Township must determine the exact number of units to be constructed on the Route 130 D Site and the Future Family Rental Site; and
2. the Township must provide an implementation schedule for the Future Family Rental Site, which specifies construction will begin by January 2012 and site acquisition will occur by September 2010; and
3. the Township must provide an updated spending plan with specific allocations for each of the proposed municipally sponsored construction projects; and

WHEREAS, on March 9, 2010, Cranbury Township submitted a resolution, which was passed on March 8, 2010, determining that the Route 130 D Site will accommodate 32 family rental units and the Future Family Rental Site will accommodate 51 family rental sites; and the implementation schedule for the Future Family Rental Site has been revised to reflect land acquisition to occur by September 2010, construction to begin by January 2012 and occupancy in 2013 and the revised spending plan reflects the anticipated use of affordable housing funds for each project; and

WHEREAS, pursuant to N.J.A.C. 5:96-6.2(a)2, on March 23, 2010 COAH issued a Compliance Report recommending approval of Cranbury Township's petition for third round substantive certification; and

WHEREAS, the 14-day period to submit comments to the COAH Compliance Report pursuant to N.J.A.C. 5:96-6.2(b) ended on April 6, 2010 and COAH did not receive comments.

NOW THEREFORE BE IT RESOLVED that COAH has reviewed Cranbury Township's petition for substantive certification of its third round Housing Element and Fair Share Plan and the additional documentation submitted by the Township and has determined that Cranbury has satisfied the outstanding conditions, as noted in the Final Compliance Report dated March 17, 2010 (attached as Exhibit B and incorporated by reference herein); and

BE IT FURTHER RESOLVED that the Housing Element and Fair Share Plan submitted by Cranbury Township comports to the standards set forth at N.J.S.A. 52:27D-314 and meets the criteria for third round substantive certification pursuant to N.J.A.C. 5:96-6.3; and

BE IT FURTHER RESOLVED that pursuant to N.J.A.C. 5:96-6.3(a) and after having reviewed and considered all of the above, COAH hereby grants final third round substantive certification to Cranbury Township; and

BE IT FURTHER RESOLVED that Cranbury Township shall comply with COAH monitoring requirements as set forth in N.J.A.C. 5:96-11, including reporting Township's actual growth pursuant to N.J.A.C. 5:97-2.5; and

BE IT FURTHER RESOLVED that pursuant to N.J.A.C. 5:97-4.1(d), all credits will be verified and validated during monitoring subsequent to substantive certification pursuant to N.J.A.C. 5:96-11; and

BE IT FURTHER RESOLVED that pursuant to N.J.A.C. 5:96-10.1, COAH shall conduct biennial plan evaluations upon substantive certification of Cranbury's Housing Element and Fair Share Plan to verify that the construction or provision of affordable housing has been in proportion to the actual residential growth and employment growth in the municipality and to determine that the mechanisms addressing the projected growth share obligation continue to present a realistic opportunity for the creation of affordable housing; and

BE IT FURTHER RESOLVED that if upon any biennial review the difference between the number of affordable units constructed or provided in Cranbury and the number of units

required pursuant to N.J.A.C. 5:97-2.5 results in a prorated production shortage of 10 percent or greater, the Township is not adhering to its implementation schedule pursuant to N.J.A.C. 5:97-3.2(a)4, or the mechanisms addressing the projected growth share obligation no longer present a realistic opportunity for the creation of affordable housing, COAH may direct Cranbury to amend its plan to address the shortfall; and

BE IT FURTHER RESOLVED that pursuant to N.J.A.C 5:97-2.5(e), if the actual growth share obligation determined is less than the projected growth share obligation, Cranbury shall continue to provide a realistic opportunity for affordable housing to address the projected growth share; and

BE IT FURTHER RESOLVED that pursuant to N.J.A.C. 5:96-6.3(b), Cranbury's substantive certification shall remain in effect until December 30, 2018; and

BE IT FURTHER RESOLVED that any changes to the facts upon which this substantive certification is based or any deviations from the terms and conditions of this substantive certification which affect the ability of Cranbury to provide for the realistic opportunity of its fair share of low and moderate income housing and which the Township fails to remedy, may render this certification null and void.

I hereby certify that this resolution was
duly adopted by the Council on Affordable
Housing at its public meeting on April 21, 2010

Reneé Reiss

Reneé Reiss, Secretary
Council on Affordable Housing

IN RE PETITION FOR SUBSTANTIVE CERTIFICATION FILED BY BOROUGH OF HADDONFIELD, CAMDEN COUNTY, MOTION FOR SCARCE RESOURCE RESTRAINTS	)	COAH DOCKET NO. COAH 04-1605
IN RE PETITION FOR SUBSTANTIVE CERTIFICATION FILED BY BOROUGH OF HADDONFIELD, CAMDEN COUNTY, MOTION TO AMEND SUBSTANTIVE CERTIFICATION	)	COAH DOCKET NO. COAH 04-1605(a)

OPINION

This matter comes before the Council on Affordable Housing (COAH or Council) by way of two separate motions filed by the Fair Share Housing Center, Inc. (FSHC). By letter dated May 31, 2004, FSHC filed a motion asking the Council to issue an Order restraining the Borough of Haddonfield's Planning Board and Zoning Board from issuing any development approvals and requiring the Borough of Haddonfield (Borough or Haddonfield) to submit a vacant land inventory within 30 days. By letter dated October 25, 2004, FSHC filed a motion asking the Council to direct Haddonfield to amend its substantive certification and/or void the substantive certification. Through this Opinion, COAH decides both motions.

Haddonfield had a first round fair share obligation of 284. COAH granted Haddonfield's petition for substantive certification for its first round fair share obligation by Resolution adopted June 6, 1989. The Borough received a vacant land adjustment that reduced the new construction component of its fair share obligation to zero based upon a finding that there was no available, developable or suitable vacant land in Haddonfield. The Borough met its 21 unit rehabilitation component through rehabilitation.

Exh. C

Haddonfield's second round fair share obligation was 255 units, which consisted of a 192 unit new construction component and a 63 unit rehabilitation component. Haddonfield again claimed a lack of vacant land to meet its new construction component and, accordingly, submitted a housing element and fair share plan (plan) which sought a realistic development potential (RDP) of zero. The plan addressed the rehabilitation component through credits and other means. Haddonfield petitioned for substantive certification of its plan on March 11, 1997. As a result of objections filed and subsequent mediation, the Borough re-petitioned with an amended plan, which still maintained an RDP of zero.[1] COAH granted Haddonfield's petition by Resolution adopted July 7, 1999, which included a finding of an RDP of zero and an unmet need of 192 units.

FSHC MOTION

On May 31, 2004, the FSHC filed a motion asking COAH to impose a scarce resource Order and temporary restraints prohibiting Haddonfield from granting any development approvals. FSHC also asked that COAH require Haddonfield to file a vacant land inventory within 30 days. In its papers, FSHC advised COAH that the Borough was scheduled to hear an application for a nine unit residential development above existing offices on June 1, 2004. FSHC further advised COAH that Haddonfield already had approved a 20 unit residential development on top of retail space in the Central Business Zone on or about April 26, 2004 and had recently approved a 12 unit development on another site. None of the developments include any affordable units. FSHC asserts that restraints to prohibit further development are warranted under N.J.A.C. 5:91-10.1 and 12.4 because

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Haddonfield's initial plan included an overlay zone for a site that was owned and used by Christ the King parish. Mediation resulted in the removal of the site since the site was part of a functioning parish and the church had no intention of selling the property.

Haddonfield is developing without providing for affordable housing while it has a large unmet need and it received an RDP of zero. FSHC relies upon Holmdel Builders Association v. Township of Holmdel, 121 N.J. 550, 565-66 (1990), Fair Share Housing Center v. Cherry Hill, 173 N.J. 393 (2002); and Hills Development Co. v. Bernards Tp., 130 N.J. 1, 62-63 (1986), as well COAH's actions regarding Wanaque Borough in support of its position.

In further support of its position, FSHC notes that Haddonfield has not complied with the terms of its substantive certification as the Borough has not completed two studies required by the terms of its substantive certification. One of these studies concerned the expansion of the business district. FSHC argues that the failure to produce these studies may void certification in view of the final paragraph of the July 7, 1999 resolution stating "that any changes to the facts upon which this substantive certification is based ... which affects the ability of Haddonfield Borough to provide for the realistic opportunity of its fair share of low and moderate income housing ... may render this certification null and void." FSHC argues that these omissions, coupled with the ongoing development, provide a basis for the entry of an Order prohibiting Haddonfield from issuing any further development approvals. FSHC also references the Council's prior actions with regard to Wanaque Borough which received a vacant land adjustment and a corresponding reduction in the RDP, where after certification the Borough rezoned the property increasing the RDP but did not increase the obligation.

HADDONFIELD RESPONSE

Initially, in its response, the Borough advises COAH that its boards will not issue any development approvals for multifamily projects of five or more units until such time as the Borough can formulate a planning response to the issues raised by the motion and COAH accepts that

response. Haddonfield notes that it has hired special counsel and a planner with Mt. Laurel expertise and has created a committee to respond to the issues.

Haddonfield argues that it is in compliance with its substantive certification and, therefore, there is no basis to act based on FSHC's allegations that the Borough has violated the terms. Haddonfield points out that COAH did not include any conditions in its grant of substantive certification. The Borough submits that even though certain issues were referenced in the staff report, since the Council did not specifically include any conditions in the resolution, did not set forth the reasons for any conditions in the resolution, and did not require the Borough to refile within 60 days with any changes, the Borough has acted in accordance with the resolution granting substantive certification. Respondent further states that the fact that no developer even applied for multifamily redevelopment until 2003 demonstrates that an overlay zone in the business district would not have created a realistic opportunity for affordable housing.

RESPONSES FROM KING'S COURT AND JAMES RHOADS

COAH also received responses from two property owners. King's Court at Haddonfield, LLC, filed a letter dated July 13, 2004 advising COAH that the Planning Board approved its project to construct residential units above existing retail space in the downtown historic district on April 26, 2004, with a memorializing resolution adopted on June 1, 2004. King's Court argues that, pursuant to the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq., its development is immune from any restraining order by virtue of its Planning Board approval.

By letter dated July 15, 2004, 110 Ellis Street, LLC, 501 Haddon Avenue, LLC and James Rhoads, as principal, filed a joint response. According to the response, 110 Ellis Street received final site plan approval on April 20, 2004. Accordingly, with regard to this site, the

response states that the MLUL renders the approval immune from any restraints that may be entered. According to the response, 501 Haddon Avenue was waiting only for a final vote from the Planning Board as all testimony on the application had been completed. The 501 Haddon Avenue project involves the construction of two stories above existing offices to create nine rental units. 501 Haddon Avenue asserts that affordable units cannot be incorporated into the plan given the small scale of the project, although a payment in lieu could be explored.

COAH scheduled oral argument on the motion for August 11, 2004. COAH adjourned the matter at the parties' request to allow the parties an opportunity to resolve the matter. COAH ultimately heard oral argument at its public meeting on October 13, 2004. During oral argument, FSHC stated that it did not seek to have restraints imposed against projects that have received preliminary or final site plan approval. COAH reserved decision and directed a task force to review the submissions in greater detail.

FSHC MOTION #2

Thereafter, by letter dated October 25, 2004, FSHC filed a motion asking COAH to direct Haddonfield to amend its substantive certification and/or to void the substantive certification. FSHC argues that the relief it seeks is warranted because circumstances have changed since COAH granted Haddonfield's petition for substantive certification in 1999. While the certified plan called for an RDP of zero, Haddonfield is now issuing development approvals as a result of zoning which allows redevelopment in the downtown area. Therefore, according to FSHC, the premise upon which COAH granted a zero RDP is no longer valid. FSHC points to language in the Resolution granting Haddonfield's petition for substantive certification which states that "changed circumstances" may render a certification null and void.

HADDONFIELD RESPONSE

In its November 8, 2004 reply, Haddonfield sets forth several arguments as to why COAH should deny FSHC's motion. Initially, the Borough argues that FSHC's motion in reality is an improper attempt to re-argue its motion for imposition for scarce resource restraints. Haddonfield points out that, as argued in its response to the first motion, Haddonfield has not violated the terms of its substantive certification. Haddonfield further asserts that the proper way to address the current development is through the third round growth share methodology.

Citing N.J.S.A. 52:27D-301.1, Haddonfield further argues that COAH cannot require land that is not vacant to be used for affordable housing. Haddonfield argues that this provision does not apply to properties with existing structures that are not being demolished to provide for redevelopment. Haddonfield relies upon FSHC v. Cherry Hill, COAH Docket No. COAH 87-7(c), which the Borough argues stands for the proposition that land is not considered vacant until any existing structure has been demolished.

Haddonfield also argues that the "changed circumstances" paragraph from the certification relied upon by FSHC does not empower the Council to now retroactively change the terms of the substantive certification. According to Haddonfield, there must be a violation of "the terms and conditions of the certification" or "changes to the facts upon which certification was granted." The Borough has not violated the terms of its certification, nor has FSHC presented facts so grievous as to warrant revocation. The Borough further asserts that it is a discretionary, not a mandatory, act of the Council to change the terms of certification, and that the issues in the filed objection have already been decided during the review of the municipality's petition for certification and cannot be raised again. Haddonfield points out that FSHC has not specified the changes that COAH should mandate

and has not demonstrated why changes to the certification are necessary, nor has FSHC demonstrated that it is a "party" entitled to request an amendment to the certification pursuant to N.J.A.C. 5:91-13.1.

DISCUSSION

COAH first will address FSHC's motion to amend and/or void Haddonfield's substantive certification. Contrary to Haddonfield's claims that the relief sought is not warranted because the Borough is complying with terms of its substantive certification and circumstances have not changed so as to justify such relief, it is COAH's opinion that circumstances have indeed changed. As a result of these changed circumstances, COAH will require Haddonfield to amend its substantive certification to reflect those changed circumstances.

In this case, Haddonfield's first round fair share obligation new construction component was reduced from 271 to zero based on a lack of vacant land. Likewise, although Haddonfield's new construction component for the second round was 192, it received an RDP of zero due to lack of vacant land. In 1992, Haddonfield adopted zoning which allowed redevelopment of the downtown business district so as to permit residential construction on the top of existing structures. At the time COAH reviewed and approved Haddonfield's second round petition for certification, Haddonfield had represented to COAH that there were no pending applications for development under this ordinance and further that no developer had expressed an interest in developing under the 1992 ordinance. At that time, Haddonfield did not anticipate any such development in the near future. Based upon its review of the plan, COAH determined that an RDP of zero was appropriate.

At the time COAH granted Haddonfield's petition, there was no appropriate vacant

land for development and it appeared that no developer was seeking to or would seek to develop on top of existing structures in the downtown business district. As evidenced by the recent development approvals granted and the applications pending, however, residential development is now occurring in the downtown. Specifically, according to Haddonfield, the Planning Board has approved four projects with a total of 40 units.[2] Presently pending before the Planning Board are applications for three more projects with a total of 39 units proposed.[3] None of the projects, either approved or pending, include affordable housing. Moreover, Haddonfield has no development fee ordinance so the projects are not contributing in any way towards the provision of Haddonfield's fair share.

Based upon the above, circumstances have changed to a degree that calls into question the terms of COAH's grant of substantive certification. A municipality that receives an RDP of zero and then devises a manner in which to create units despite that zero RDP should revisit its plan to determine how much of its unmet need it can in fact address. Haddonfield's unmet need does not disappear because of a zero RDP. Accordingly, COAH will require Haddonfield to amend its plan to address the new development occurring, as well as any other development that may occur.

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[2] Those projects are: 30 Center Street, 3 units; 110 Ellis Street, 12 units; 146-148 King's Highway 20 units and 200 King's Highway East, 5 units.

[3] Those projects are: 501 North Haddon Avenue, 9 units; 114-116 King's Highway East, 18 units and Washington and King's Highway West, 12 units.

Regarding the motion for imposition of scarce resource restraints, after consideration of the papers filed as well as arguments made by the parties during oral argument, COAH finds that it is appropriate under the facts of this case to restrain Haddonfield from issuing any further development approvals pending COAH's review and approval of an amended plan. In Hills Dev. Co. v. Bernards Tp., 103 N.J. 1 (1986), the New Jersey Supreme Court found that COAH has the authority to require a municipality to preserve resources that may be necessary for the municipality to satisfy its fair share obligation. Id. at 61.[4] The Court stated that the Council can require a municipality to preserve a resource upon a finding that "further development or use of these facilities is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future." Id. at 62. COAH codified this authority in N.J.A.C. 5:91-11.1 and N.J.A.C. 5: 91-13.

As discussed previously, Haddonfield, despite its zero RDP, is allowing residential development and is not providing for affordable housing as part of that development. Under these circumstances, if COAH does not act to restrain further development, the ability of the Borough to provide any affordable housing will be lost. Haddonfield is approving development on top of or adjacent to existing structures in the downtown. This redevelopment is finite as there are only a certain number of structures where this can occur. Accordingly, COAH finds that it is appropriate to

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For a detailed discussion of COAH's authority to impose scarce resource restraints see the Council's Opinion in Morris County Fair Share Housing Council, et al. v. Boonton Township, et al., COAH Docket No. 86-2.

restrain Haddonfield from granting any further development approvals. This restraint will not be limited to the downtown business district. Haddonfield has shown that it can be innovative in devising mechanisms to provide for development despite its lack of vacant land. Thus, any development that occurs must be considered in the context of affordable housing. COAH does not intend, however, to restrict individuals from making improvements to their property. Accordingly, single and two-family houses are exempt from the restrictions.

As stated above, COAH will require Haddonfield to submit an amended plan within 60 days that takes into account how it will address its unmet need. The restraints ordered here will remain in effect for 120 days or until COAH acts on that amended plan. These restraints are necessary to ensure that further opportunities for affordable housing are not lost. If any property owner feels that his or her property should not be subject to the restraints, that owner may move before the Council to seek an exemption from the restraints.

In conclusion, COAH grants FSHC's motion to require Haddonfield to amend its plan to account for the recent development in the Borough, as well as to address any other means to satisfy its unmet need of 192 within 60 days. Because the Council has granted the motion to require an amendment, FSHC's motion to declare Haddonfield's substantive certification null and void is deemed moot. COAH further grants FSHC's motion to restrain Haddonfield from granting any development approvals until COAH acts on Haddonfield's amended plan. Single and two-family homes are exempt. FSHC's request to require Haddonfield to submit a vacant land inventory is moot, as Haddonfield is required to submit an amended plan.

Dated: November 22, 2004