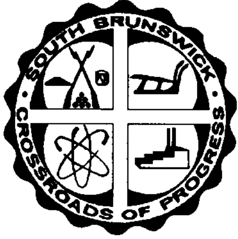

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August 21, 2015

Via email and regular mail

Honorable Douglas K. Wolfson, J.S.C.
Superior Court of New Jersey
Middlesex County Courthouse
56 Paterson Street
P.O. Box 964
New Brunswick, NJ 08903-0964

Re: In the Matter of the Adoption of the Monroe Township
Housing Element and Fair Share Plan and Implementing Ordinances
Docket No. MID-L-3365-15
Our File No. L1347

Dear Judge Wolfson:

Please accept this Letter Memorandum on behalf of the Township of South Brunswick, submitted with the Court's permission to assist the Court in its consideration of the application of the 1,000 unit cap in the Third Round.

Statutory Requirements

N.J.S.A. 52:27D-307(e) states, in pertinent part:

> No municipality shall be required to address a fair share of housing units affordable to households with a gross household income of less than 80% of the median gross household income beyond 1,000 units within ten years from the grant of substantive certification, unless it is demonstrated, following objection by an interested party and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within that ten-year period. For the 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 which the objection was filed.

The Second Round regulations adopted by the Council on Affordable Housing ("COAH") similarly state at N.J.A.C. 5:93-14.1:

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

Thus, both the Legislature in the Fair Housing Act ("FHA"), and COAH through its Second Round adopted regulatory scheme, recognized that no municipality can be required to provide for more than 1,000 low and moderate income units for a certain period of time following the grant of substantive certification. Under the regulations, that period of time is 6 years while under the FHA that period of time is 10 years.

It is well established that a statute takes precedence over a regulation. An administrative regulation "must be within the fair contemplation of the delegation of the enabling statute." So. Jersey Airways v. Nat. Bk. of Secaucus, 108 N.J. Super. 369, 383 (App. Div.1970). When an administrative agency's rule or regulation contravenes the statute which created it, the rule "will be set aside." In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004); see also DesChamps Laboratories, Inc. v. Martin, 427 N.J. Super. 84 (App. Div. 2012) (invalidating, as ultra vires, a DEP regulation that was in conflict with the terms and enumerated objectives of the applicable statute). As such, the period of time applicable to the 1,000 unit cap issues is 10 years as set forth in the FHA, not 6 years as indicated in the regulations.

Having established that municipalities are entitled to a 1,000 unit cap on affordable housing obligations for a 10-year period, there remain two primary issues that must be resolved in relation to the application of the 1,000-unit cap: (1) what period of time does the cap cover; and (2) how are credits for third round activity applied?

Period of Time Covered by 1,000-unit cap

Both the statute and the regulation granting municipalities a 1,000 unit cap agree that the time period for applying the 1,000 unit cap is to be measured "from the grant of substantive certification." N.J.S.A. 52:27D-307(e); N.J.A.C. 5:93-14.1. Clearly the Legislature and COAH

contemplated that a municipality's approved, certified plan would be limited to no more than 1,000 units over the subsequent 10 year period. Implementing such a cap was designed to prevent the imposition of an unrealistic, unachievable and impractical obligation upon a municipality.

Indeed, the 1,000 unit cap in the FHA and in the COAH regulations was adopted as a direct response to the Supreme Court's acknowledgement in So. Burlington Cty. N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983) ("Mt. Laurel II") that a judicially-imposed remedy to affordable housing could result in the "construction of lower income housing in such quantity as would radically transform the municipality overnight." Id. at 219. Since the Mt. Laurel doctrine was never intended to "sweep away all land use restrictions or leave our open spaces and natural resources prey to speculators," id., the Court encouraged the Legislature to adopt legislative remedies, which it did in the form of the FHA. See In Re Application of Township of Jackson, 350 N.J. Super. 369, 372-373 (App. Div. 2002).

In a letter dated December 13, 1999, the then Executive Director of COAH, Shirley M. Bishop, wrote to the Hon. Susan Bass Levin, Mayor of Cherry Hill Township at the time, explaining COAH's interpretation of the 1,000-unit limitation (Exhibit A). As is clear from the letter, COAH's position was that the 1,000-unit cap "applies during the six-year delivery period for affordable housing subsequent to certification, not to the calculation period." (emphasis in original). The letter referred Mayor Bass Levin to an excerpt from COAH's expert report, which was attached to the letter. COAH's expert, Dr. Robert W. Burchell, consultant to COAH, explained that:

> The concept behind the 1,000-unit cap is that delivery of more than 1,000 units of combined present and prospective affordable housing need during a six-year period would be injurious to a community, radically changing its economic composition. It is intended that the 1,000-unit cap will apply during a six-year delivery period, not a twelve-year calculation period. The current delivery period for all obligations is 1993 to 1999. During that period, regardless of the scale of numbers calculated, the maximum affordable housing need to be addressed in a community cannot exceed 1,000 units. (emphasis in original). Id.

Without question, the Legislature and COAH both intended to limit a municipal obligation to 1,000 units over the 10 year period after substantive certification is granted.

It has been suggested that the Court apply what would amount to a 2,000 unit cap for the Third Round. In support of this argument, its proponents assert that the Third Round covers 26+ years (i.e. - 1999 – 2025). As a result, these parties conclude that since the 1,000 unit cap was intended to cover only 10 years, it should be applied twice (presumably once for 1999-2009 and again for 2009-2019). This, however, is contrary to the plain reading of the statute, which unambiguously states that the ten years of the cap begins on the date of substantive certification. The ten year period was never intended to begin on the date the Third Round began. Rather, it was clearly intended to begin on the date when substantive certification is granted.

Moreover, applying a 2,000 unit cap for the Third Round would be unduly punitive and would result in the punishment of municipalities, contrary to the clear direction of the N.J. 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) ("Mt. Laurel IV"), the N. J. Supreme Court emphasized that trial courts were to (1) follow the FHA processes "as closely as possible," and (2) provide municipalities "like treatment to that which was afforded by the FHA." Mt. Laurel IV, supra., at 6, 27. The Supreme Court's goal was "....to have [trial] courts provide a substitute for the substantive certification process that COAH would have provided for towns that had sought its protective jurisdiction." Id. at 23-24. Of paramount importance to the Supreme Court was that "the process established is not intended to punish the towns represented before this Court, or those that are not represented but which are also in a position of unfortunate uncertainty due to COAH's failure to maintain the viability of the administrative remedy." Id. at 31. Thus, in analyzing the issues presented for review, this court is to follow the FHA "as closely as possible," being ever mindful of the Supreme Court's desire not to "punish" municipalities but rather to seek ways in which "towns can demonstrate their constitutional compliance." Id. at 31-32.

If this court were to determine that a 2,000 unit cap was required, this would be devastating to those municipalities subject to the cap. In a municipal plan that relies solely on inclusionary development to satisfy its obligation, this would mean that the municipality would have to provide for 10,000 new units of housing (assuming a presumptive 20% set-aside) over the next 10 years. Such a result would be crushing, and would clearly punish the municipality. The entire nature and character of a municipality would be changed completely as these new homes were built. The impact to the infrastructure would be overwhelming and the strain on already scarce municipal resources would be too much to bear. Assuming a modest 2-3 people per household, the population of the municipality would increase by 20,000 – 30,000 people. No town could possibly sustain such a drastic change, brought on by unfettered, unreasonable and uncontrolled growth. The "radical transformation of a municipality overnight" that the Supreme Court spoke of in Mt. Laurel II, and the very type of exploding growth that the Legislature and COAH sought to prevent, would become a reality. This court should not sanction such punishment upon a municipality.

David N. Kinsey, Ph.D., has been offered as the expert for Fair Share Housing Center ("FSHC") and the New Jersey Builder's Association ("NJBA"). In his report, he states that the period covered by the 1,000 unit cap is the "10 year period of substantive certification." See Kinsey report, April 16, 2015, p. 39. This no doubt will be used to support the argument that the Third Round should be broken into two 10-year periods. Professor Kinsey himself, however, cites to N.J.S.A. 52:27D-307(e) for support of his conclusion. As is clear from that statute and the above argument, it is not the "10 year period ***of*** substantive certification," but rather the "10 year period ***from*** substantive certification." Thus, the 10-year cap was always intended to be applied prospectively, beginning on the date the municipality's plan is approved, and not retroactively back to the date the Third Round began. Such an application of the 1,000 unit cap law would defeat the very reason the law and the regulation were adopted in the first place.

Additionally, municipal efforts to obtain substantive certification have been frustrated from the start of the Third Round by COAH's inability and/or unwillingness to adopt valid Third Round regulations. As the Court in Mt. Laurel IV stated:

> COAH has had fifteen years to adopt Third Round Rules as it is required to do in accordance with its statutory mission. It has been under several orders of the Appellate Division and this Court directing it to adopt Third Round Rules using a known methodology by specific deadlines. It has not done so........COAH is noncompliant with this Court's orders and underlying September 2013 decision. COAH has failed to respond (1) to the requirements of the last in the series of judicial orders entered against it and (2) to its statutory duties that directly affect the fulfillment of constitutional obligations. Mt. Laurel IV, supra., at 21.

Given the lack of valid Third Round regulations, resulting in the inability of most towns to obtain substantive certification from COAH through no fault of their own, it would truly be a punitive exercise to force municipalities to develop in 10 years' time what they may have otherwise been required to do in 26 years, if only COAH had functioned as it was intended. This court should not visit the punishment rightly due COAH upon individual municipalities, many of which sought desperately to meet their constitutional obligation for the Third Round but were frustrated by COAH's failure to act.

Accordingly, the 1,000 unit cap should be applied for the 10-year period from the date this court approves the municipality's fair share plan (which at this point is the equivalent to COAH's "grant of substantive certification") and not from the date of the beginning of the Third Round. Such a result is consistent with the plain meaning of the FHA at N.J.S.A. 52:27D-307(e); COAH's Second Round regulations at N.J.A.C. 5:93-14.1; as well as the Legislative and Judicial intent behind implementation of the cap.

Credits for Third Round Activity

The second issue related to the 1,000 unit cap deals with how credits for Third Round activity should be applied. In prior rounds, "COAH interpreted the 1,000-unit cap as applying to calculated, not pre-credited need." In Re Jackson, supra., at 374. According to COAH's Second Round regulations, pre-credited need is defined at N.J.A.C. 5:93-2.13 as the municipality's total need plus prior-cycle prospective need, plus demolitions, minus filtering, minus residential conversions, minus spontaneous rehabilitation. Once the pre-credited need is calculated, N.J.A.C. 5:93-2.17 describes how the calculated need is determined. Pursuant to this portion of the regulations, calculated need equals pre-credited need minus the reduction permitted for affordable housing activities undertaken as part of the prior rounds (as certified by COAH or

court settlement plan), including a reduction for units zoned for or transferred, whether or not the units have been constructed. The reduction also includes rental bonuses. In addition, prior cycle credits and application of the twenty-percent cap rule (N.J.A.C. 5:93-2.15 and -2.16 respectively) are deducted from the pre-credited need. The resulting figure is the "calculated need." It is this "calculated need" that constitutes the municipality's "fair share number." See In Re Jackson, supra., at 375-376.

In arriving at this conclusion, both COAH and the court in In Re Jackson, supra., were analyzing application of credits based upon affordable housing activity that was done to address a prior round obligation. Thus, when calculating Jackson's fair share obligation, its cumulative twelve-year obligation was calculated, which was then reduced by activity that created housing as part of its First Round Plan. It was that activity that was deducted from the pre-credited need to arrive at the calculated need.

In the Third Round, it is clear that at least some municipalities (including South Brunswick) fully satisfied their First and Second Round fair share obligation and then made significant strides toward satisfying the future, unknown Third Round obligation. COAH contemplated this very situation in its Second Round rules, providing that "a credit and/or a reduction in excess of the municipal pre-credited need shall be applied on a one for one basis or as a rental bonus credit against its future housing obligation." N.J.A.C. 5:93-3.1(f). As such, the Second Round regulations already require that housing activity in excess of a municipality's pre-credited (First and Second Round) need would be applied to reduce the municipality's future (Third Round, or calculated) need. This court should apply the same process.

As previously demonstrated to this court in In Re South Brunswick, currently pending before this court under Docket No. MID-L-003878-15, South Brunswick has completely met its cumulative First and Second Round 878-unit obligation with the production of 882 units/credits. This left an excess of four units of credit to be applied toward the Third Round. In response to the first two iterations of the Third Round Rules, the Township filed appropriate petitions for Third Round Substantive Certification on December 16, 2005 and again on December 31, 2008. Although COAH never approved its application for Third Round Substantive Certification, the Township proceeded to take steps to produce affordable housing and has demonstrated that it is entitled to an additional 580 credits for housing that has actually been built and/or approved for the Third Round. As such, the Township produced an additional 584 credits, over and above the First and Second Round cumulative obligation, that it should be permitted to deduct from its calculated need.

Various objectors that have been permitted to intervene in the South Brunswick case have argued that South Brunswick's fair share obligation is as much as 4,000 new units. If these assertions are correct, the Township will be impacted directly by the 1,000-unit cap. Assuming for purposes of illustration that South Brunswick is a so-called "1,000 unit" municipality, in order to calculate how many new units the Township will be required to produce for the Third Round, this court should follow the formula set out below:

Calculate "pre-credited need" as per N.J.A.C. 5:93-2.13	1,000+
Calculate "calculated need" pursuant to N.J.A.C. 5:93-2-17 (including reductions permitted by the Second Round Rules and including units produced to address the Township's First and Second Round obligation)	1,000+
Third Round Fair Share (capped at 1,000 units)	1,000
Minus units/credits already produced/approved toward Third Round	- 584
Remaining obligation of Third Round	416

Any other treatment of activity toward the Third Round would result in an unfair application of the 1,000 unit cap law. South Brunswick, and other municipalities similarly situated, that took the initiative and proactively created affordable housing toward its unknown Third Round obligation would be punished since it would lose these credits if Third Round activity was lumped together with First and Second Round activity during the calculation process. The unfairness of this procedure becomes evident when it is realized that, pursuant to N.J.S.A. 52:27D-314, the Township had no obligation whatsoever to implement any portion of its Third Round Plan until it received formal Substantive Certification from COAH. If the Township had done nothing, and had not produced any of the 584 total credits toward its Third Round obligation, the Township still would have been eligible for application of the 1,000-unit cap, and its Fair Share obligation for the Third Round would have been 1,000 units. The Township, however, took its constitutional obligations seriously and made great strides toward satisfying its Third Round obligation by actually producing/approving 584 credits of housing toward the Third Round. Deducting the 584 Third Round credits from the pre-credited need, rather than from the calculated need, would result in a loss of all of these efforts by the Township to satisfy its constitutional obligations. This would truly be a travesty, and would punish a municipality that took significant steps to meet its constitutional obligation, despite the turmoil of COAH's inactivity and inability to function. It would truly punish a municipality for trying to fulfill its obligation, while a municipality that had done absolutely nothing, would be in the exact same position as South Brunswick going forward.

Since the Supreme Court clearly instructed trial courts that they are not to "punish" municipalities, but rather seek ways in which "towns can demonstrate their constitutional compliance," Mt. Laurel IV, supra., at 31-32. This court should determine that, although First and Second Round housing activity should be deducted from a municipality's pre-credited need

pursuant to the Second Round Rules, Third Round activity should not be deducted from the pre-credited need but rather the calculated need (i.e., fair share obligation).

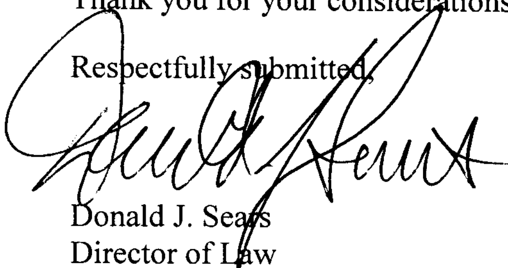
Conclusion

For the foregoing reasons, it is respectfully requested that this court rule as follows:

1. The 1,000-unit cap applies to a ten-year period;
2. The ten-year period begins on the date this court determines the municipality's fair share obligation; and
3. Housing activity produced toward the Third Round shall be deducted from a municipality's calculated need (i.e., fair share obligation).

Thank you for your considerations in this matter.

Respectfully submitted,



Donald J. Sears
Director of Law

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Thomas F. Carroll, III, Esq., and Stephen Eisdorfer, Esq., attorneys for Intervenor, Monroe 33 Developers, LLC
Kevin Walsh, Esq., and Adam Gordon, Esq., attorneys for Fair Share Housing Center
Elizabeth McKenzie, Special Master
Christine Nazzaro-Cofone, PP, Special Master
All Parties on attached Service List

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JANE M. KENNY
Chairman
SHIRLEY M. BISHOP, P.P.
Executive Director

December 13, 1999

The Honorable Susan Bass Levin
Cherry Hill Township
820 Mercer Street
Cherry Hill, NJ 08002

Dear Mayor Levin,

The Council on Affordable Housing (COAH) has been asked to interpret **N.J.S.A.** 52: 27D-307e and **N.J.A.C.** 5:93-14 One Thousand Unit Limitation and explain how this regulation is to be interpreted. Upon careful review, it was determined that this regulation applies to Cherry Hill Township's second round precredited obligation of 1,851. Please see the attached "Explanation of the 1,000 Unit Cap" from Dr. Robert W. Burchell, consultant to COAH.

As you can see in Dr. Burchell's explanation, the 1,000 unit cap provision, which states that "No municipality shall be required to address a fair share beyond 1,000 units within six years from the grant of substantive certification..." applies during the six year delivery period for affordable housing subsequent to certification, not to the calculation period.

Simply, in a potentially eligible 1,000-unit cap municipality, a two-step process is involved. An initial step is concerned with whether Prior-Cycle Prospective Need is less than 1,000 minus Present Need. If less than 1,000 minus Present Need, Prior-Cycle Prospective Need is used as is. If greater than 1,000 minus Present Need, it is revised to the level of 1,000 minus Present Need.

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Exhibit A

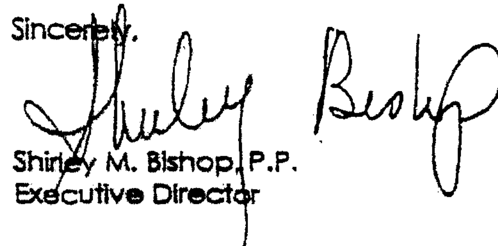
In the case of Cherry Hill, Prior Cycle Prospective Need is greater than 1,000 and Cherry Hill's Prior Cycle Prospective Need is revised to 806 (1,000-194).

In the second step, the Revised Prior Cycle Prospective Need is inserted into the cumulative methodology and results in Cherry Hill's Pre-Credited Need number being revised to 1,669.

All eligible credits and reductions are then subtracted from the revised Pre-Credited Need number of 1,669. If the remaining number is over 1,000, then Cherry Hills' obligation is capped at 1,000.

If you have any questions, you may call me at (609) 292-3000.

Sincerely,



Shirley M. Bishop, P.P.
Executive Director

c: COAH Members
Susan Jacobucci, Esq.
Dr. Robert Burchell
Kate Butler, COAH planner
William Malloy, DAG

EXPLANATION OF THE 1,000-UNIT CAP

The Components of Community Affordable Housing Need

A community's 1,000-unit limitation, or cap, includes both present and prospective need. Present need is the most recently identified deteriorated housing in a community (1993). Prospective need is composed of a combined estimate that includes a current-cycle prospective need (1993-1999) as well as a revised and recalculated prior-cycle prospective need (1987–1993). These three component-need estimates (present need plus two categories of prospective need) yield, respectively, the community's current rehabilitation and new construction obligations.

The Intent of the 1,000-Unit Cap

The concept behind the 1,000-unit cap is that delivery of more than 1,000 units of combined present and prospective affordable housing need during a six-year period would be injurious to a community, radically changing its economic composition. It is intended that the 1,000-unit cap will apply during a six-year *delivery period*, not a twelve-year calculation period. The current delivery period for all obligations is 1993 to 1999. During that period, regardless of the scale of numbers calculated, the maximum affordable housing need to be addressed in a community cannot exceed 1,000 units.

The Relationship of the Components of Need in the 1,000-Unit Cap

In order for a community not to have to address more than 1,000 units for the period 1993 to 1999, its carry-over prospective need must be linked in complementary fashion to current prospective need. This will ensure that both need components are regarded as constituents of need. Neither need component is more important than the other; both apply to, and must be delivered within, the most current delivery period. Therefore, for the inclusion of three components of need in the calculation, prior-cycle prospective need must be a number that is less than 1,000 minus present need.

How Large Can Prior-Cycle Prospective Need Be?

In a 1,000-unit cap community, for the delivery period 1993–1999, prior-cycle prospective need must be adjusted to allow some component of current-cycle prospective need. Thus, prior-cycle prospective need has a defined ceiling. This is expressed mathematically as follows:

Prior-Cycle Prospective Need = A

Current-Cycle Prospective Need = B

Current-Cycle Present Need = C

(1) $A + B + C = 1{,}000$

(2) $B = 1{,}000 - (A + C)$

(3) If $B > 0$ then $(A + C) < 1{,}000$

(4) In a growth community B is always > 0

(5) So $A + C$ must be $< 1{,}000$

(6) C is fixed and equals U.S. Census-measured present need

(7) If statement 1 is true, only A and B can vary

(8) If statement 4 is true, A must be varied to accommodate a situation where $B > 0$

Thus, in any growth community that is potentially eligible for a 1,000-unit cap, the linkage between prior prospective (A) and current prospective (B) need is fluid and can sum only to a total of 1,000 units minus present need.

(9) $A + B = 1{,}000 - C$

(10) If current-cycle prospective need is zero in a 1,000-unit-cap community, the largest that prior-cycle prospective need can be is 1,000 minus present need.

(11) $A + (B = 0) = 1{,}000 - C$