TOWNSHIP OF SOUTH BRUNSWICK

Municipal Building • P.O. Box 190 • Monmouth Junction, NJ 08852-0190

Phone
732-329-4000
TDD
732-329-2017
Fax
732-329-0627

July 22, 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: South Brunswick Declaratory Action and Motion for Temporary Immunity from Mount Laurel Lawsuits
Docket No.MID-L-3878-15
Our File No. L1347

Dear Judge Wolfson:

Please accept this Letter Memorandum on behalf of the Township of South Brunswick ("Township") in opposition to the Motions to Intervene filed by Richardson Fresh Ponds, LLC and Princeton Orchards Associates, LLC (collectively "Richardson") and South Brunswick Center, LLC ("SBC"), in the above referenced matter, and in further support of the Township's Motion for Temporary Immunity filed in conjunction with the rulings and guidance articulated by the Supreme Court on March 10, 2015, in In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. (2015) ("Mount Laurel IV"). Said motions are returnable before Your Honor on July 31, 2015.

This Court has already established the parameters by which these motions are to be measured and when, and under what conditions, such motions are to be granted, in In the Matter of the Adoption of the Monroe Township Housing Element and Fair Share Plan and Implementing Ordinances, unpublished opinion dated July 9, 2015, Superior Court of New Jersey, Law Division, Docket # MID-L-3365-15 ("In Re Monroe") (Exhibit B to Certification of Henry Kent-Smith, Esq.; Exhibit B to Certification of Kenneth D. McPherson, Jr., Esq.)[1]

[1] Pursuant to R. 1:36-3, there are no contrary unpublished opinions known to counsel for South Brunswick.

THE MOTIONS TO INTERVENE SHOULD BE DENIED

As Richardson points out, the Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-51, et seq., governs declaratory judgment actions in New Jersey (Richardson Brief, p. 9). Although the act requires that "all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding" (See N.J.S.A. 2A:16-56), certain additional requirements must be met before an interested party is permitted to intervene. Among these threshold requirements, the primary object of a party's interest in any pending matter must be to "afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." N.J.S.A. 2A:16-51; Bergen County v. Port of New York Authority, 32 N.J. 303 (1960). In addition, there must be a "justiciable controversy" between adverse parties. Young v. Byrne, 144 N.J. Super. 10 (Law Div. 1976). Indeed, a Court's ability to issue a declaratory judgment should not be used to obtain an advisory opinion. Gotlib v. Gotlib, 399 N.J. Super. 295 (App. Div. 2008). On the contrary, where an interested party's claim does not raise a judicial controversy that is "ripe for judicial determination," that party should not be permitted to assert its claim via a declaratory judgment proceeding. See Independent Realty Co. v. Township of North Bergen, 376 N.J. Super. 295 (App. Div. 2005).

Motions to intervene are governed by Rule 4:33-1, which states:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As such, a party seeking to intervene must show that it:

1) has an interest in the property or transaction;
2) is so situated that the disposition of the action may impair or impede the ability to protect that interest; and
3) there is no adequate representation of its interests by existing parties.

In the instant case, neither Richardson nor SBC can meet the requirements for intervention in the Township's declaratory judgment action. As such, their motions should be denied.

As this Court has already determined, in a declaratory judgment action filed by a municipality in response to the decision in Mount Laurel IV, supra., interested parties may intervene, but their intervention is "limited to the question of whether the particular town has complied with its constitutional housing obligations." In Re Monroe, supra., at 9. This right to intervene

> .....does not extend so far as to authorize [intervenors] to contest the municipality's site selections and/or methods of compliance by suggesting or claiming that other sites (owned or controlled by them) are superior to, or perhaps, better suited for an inclusionary development. While such

> parties' "participation" may, of course, include proofs related to whether the proposed affordable housing plan passes constitutional muster, so long as the plan does so, the municipality's choices (including site selection and the manner and methods by which it chooses to satisfy its affordable housing obligations) remains, as it was under the [Fair Housing Act] FHA and [the Council on Affordable Housing] COAH's oversight, paramount. Accordingly, claims that a "better" and/or "more suitable" site is, or may be available will not be entertained in any declaratory judgment action brought by a certified or participating municipality. Simply stated, to hold otherwise would be to permit an interested party to do indirectly that which the Supreme Court has specifically prohibited from being done directly. In Re Monroe, supra., at 9-10.

Indeed, Mt. Laurel IV "expressly prohibits exclusionary zoning litigation until after the compliance phase of the declaratory judgment action has concluded". In Re Monroe, supra., at 14 (citing Mt. Laurel IV, supra., at 35-36).

Both Richardson and SBC seek to intervene in order to argue to this Court that the Township's "site selections and/or methods of compliance" in its Third Round plan are deficient. Moreover, they plan to do so "by suggesting or claiming that other sites (owned or controlled by them) are superior to, or perhaps, better suited for an inclusionary development." These types of arguments are exactly what were prohibited by the Court in In Re Monroe. Both Richardson and SBC present detailed arguments related to the current and proposed use of their specific properties, their efforts to develop the properties and that the Township should be compelled to rezone and/or otherwise include their properties in its final Third Round plan (See Richardson proposed Counterclaim; SBC brief Points I, II and III). Contrary to their assertion that they seek only to assist the Court in determining whether the Township's actions and/or proposed plans are constitutionality compliant, their real motive is to obtain a builder's remedy against the Township. Such cannot be the basis for intervention.

This Court has made abundantly clear that all declaratory judgment actions involving "certified" or "participating" municipalities[2] shall be subject to the procedures and protocols set out below:

> 1. Interested parties shall be permitted to intervene, but only for the limited purpose of participating (through meditation, negotiation, conciliation, etc.) in the Court's adjudication of the subject municipality's constitutional compliance with its affordable housing obligation;
>
> 2. Interested parties shall not be permitted to file exclusionary zoning/builder's remedy actions, via counterclaims or through independently filed separate actions, until such time as the Court has rendered an assessment of the town's affordable housing plan and has decided that the municipality is constitutionally noncompliant, and is determined to remain so by refusing to timely supplement its plan to correct its perceived deficiencies; and

[2] South Brunswick is a "participating" municipality pursuant to Mt. Laurel IV.

> 3. If, after having received a full and fair opportunity to comply with its constitutional obligations, the Court concludes that a municipality is "determined to be noncompliant," builders and any other interested parties may then initiate and prosecute exclusionary zoning actions against the town, through which any builder's remedies to be awarded would be guided by equitable considerations and principles of sound planning, and not upon who filed first. In Re Monroe, supra., at 16-17.

Accordingly, the Court has already precluded the type of intervention sought by Richardson and SBC. Thus, at this point, there is no "judicial controversy that is ripe for judicial determination" in relation to the claims sought to be presented by Richardson and SBC. Their claims, if they are permitted at all, must await this Court's determination on the Township's compliance with its obligation to provide for affordable housing.

In addition, there is also no "uncertainty [or] insecurity with respect to rights, status and other legal relations" of Richardson or SBC. This Court has already adequately protected their rights related to their proposed exclusionary zoning/builder's remedy claims: "If, after having received a full and fair opportunity to comply with its constitutional obligations, the Court concludes that [the Township] is 'determined to be noncompliant,'" this Court has firmly established that Richardson and SBC "may then initiate and prosecute exclusionary zoning actions against the [Township]." In Re Monroe, supra., at 17. This resolves any "uncertainty" with respect to their rights and indeed more than adequately protects their rights in the instant matter. As this Court has observed, "[b]arring interested parties from pursuing builder's remedies, either via an independent action, or as here, by way of a counterclaim, results in no discernible prejudicial impact. Indeed, site-specific relief is wholly irrelevant to the larger, and preliminary, question of constitutional compliance." In Re Monroe, supra., at 11.

For all of the foregoing reasons, the motions to intervene filed on behalf of Richardson and SBC should be denied.

THE TOWNSHIP'S MOTION FOR TEMPORARY IMMUNITY SHOULD BE GRANTED

This Court has also already articulated the standard that must be met to warrant the grant of temporary immunity in declaratory judgment actions filed in response to Mt. Laurel IV. If the municipality has "made a good faith attempt to satisfy its affordable housing obligation," it is entitled to temporary immunity. In Re Monroe, supra., at 6.

In explaining the rationale for establishing this standard, this Court has explained:

> The process outlined by the Court affords [certified and participating] towns a reasonable opportunity to demonstrate constitutional compliance to a Court's satisfaction (including time to take curative action if the municipality's plan requires further supplementation), without the specter

> of a builder's remedy action hanging over them like a 'sword of Damocles.' Importantly, the Supreme Court authorized the Courts to grant a period of temporary immunity for up to five months, preventing any exclusionary zoning actions from proceeding, to those municipalities that promptly sought such declaratory relief. In Re Monroe, supra at 3-4.

No party contests the fact that the Township enjoys "participating" status. The Township has now affirmatively sought judicial approval of its affordable housing plan through the filing of its declaratory judgment action. Thus, pursuant to In Re Monroe, it "should receive like treatment to that which was afforded by the FHA to towns that had their exclusionary zoning cases transferred to COAH when the Act was passed." In Re Monroe, supra. (citing Mt. Laurel IV, supra, at 27; N.J.S.A. 52:27D-316.5). As this Court further explained in In Re Monroe:

> These towns received "insulating protection" by virtue of their submission to COAH's jurisdiction, "provided that they prepared and filed a housing element and fair share plan within five months." N.J.S.A. 52:27D-316. So too here, as a "participating" town, Monroe similarly has "no more than five months in which to submit their supplemental housing element and affordable housing plan. During that period, the Court may provide initial immunity preventing any exclusionary zoning actions from proceeding." In Re Monroe, supra. (quoting Mt. Laurel IV, supra, at 27-28.

In considering the actions of Monroe Township, and whether it had made a good faith attempt to satisfy its affordable housing obligation entitling it to temporary immunity, this Court indicated that "[s]ince Monroe had actually devised a housing element and took action toward adopting ordinances in furtherance of its plan, it has earned a more "favorable" or "generous" review of its request for immunity." In Re Monroe, supra at 4-5. In the instant case, the Township did not just "take steps toward preparation of a formal plan demonstrating its constitutional compliance", (which by itself would have been enough for immunity); instead, it actually created affordable housing units.

As was demonstrated in detail in the Township's main brief submitted in support of the motion for temporary immunity, the Township has completely satisfied its First and Second Round 878-unit obligation, with an additional 4 units credit to be applied toward the Third Round. In response to the first two iterations of the Third Round rules, the Township petitioned for third round substantive certification on December 16, 2005 and again on December 31, 2008, submitting each time its approved Housing Element and Fair Share Plan. That petition was still pending before COAH when the third round rules were struck down by the Courts (Township Brief, p. 20).

Notwithstanding that it never received Third Round certification from COAH, the Township proceeded to produce/approve 580 additional affordable housing units, resulting in a total of 584 units of credit toward an unknown Third Round obligation (Township Brief, p. 22). As such, the Township has taken significant steps toward satisfying its as yet undetermined Third Round obligation.

A. SBC Opposition to Motion for Temporary Immunity

SBC takes issue with the various units of affordable housing that the Township has produced/approved toward its Third Round obligation, alleging that these units are "conjectural projects," "not realistic," and will not be available "with reasonable speed." (SBC Brief, p. 20; McPherson Certification, Exhibit A, p. 12). Preliminarily, SBC refers to a supplement to its expert's report, purporting to quote from this "supplement" (SBC Brief, p. 21). No such supplemental report has ever been served by SBC on the Township and is not included in the supporting documents submitted by SBC with its motion to intervene. Such arguments, therefore, should be discounted as without merit or support. Even if supported by such a supplemental report, however, this argument should be rejected since it clearly is SBC's attempt "to contest the municipality's site selections and/or methods of compliance," which this Court has already ruled to be inappropriate argument at this stage of the proceedings. See In Re Monroe, supra., at 9.

The true argument being made by SBC is that, although the Township has made significant steps toward actually producing affordable housing with projects that were fully recognized by the Supreme Court in Mt. Laurel IV, SBC is miffed because its site was not included. Extension of controls (Woodhaven Terrace); Inclusionary Development (Sassman and Menowitz); Special Needs/Alternative Living Arrangements (Dungarvin and Wilson Farm); and Senior Housing (Wilson Farm) are all recognized as acceptable methods available to municipalities to meet their affordable housing obligations. See Mt. Laurel IV, supra. Additionally, the mere fact that the Township has not agreed to rezone SBC's property for its outrageous 1,850 housing units does not in any way result in the conclusion that "there is no prospect of compliance that would warrant the grant of temporary immunity." (SBC Brief, p.24). Such an assertion is posturing at its worst, and ignores the actual facts of what has occurred in the Township. A number of the projects listed have already been constructed and are occupied by qualified recipients of affordable housing.

As to the Wilson Farm Redevelopment project (the project that SBC alleges is not a realistic affordable housing development opportunity (See SBC Brief, p. 20)), significant steps have been taken by the Township to bring this development to fruition. These include:

- Township acquisition of 17.7 acres of former Brownfields site at a cost of $3 million dollars – December 23, 2013
- Agreement with South Brunswick Community Development Corporation (SBCDC), a non-profit affordable housing provider, for development of an affordable housing complex of up to 300 units – July 23, 2014
- Resolution of Council referring proposed declaration of area as Area in Need of Rehabilitation to the Planning Board for review – September 9, 2014
- Resolution of Planning Board in support of declaration of area as Area in Need of Rehabilitation – October 1, 2014
- Resolution of Council declaring area as Area in Need of Rehabilitation – October 14, 2014
- Letter of DCA Commissioner Richard E. Constable, III, approving Area in Need of Rehabilitation – November 5, 2014

- Draft Redevelopment Plan reviewed; application for Long Term Tax Abatement and PILOT agreement filed by SBCDC on behalf of Wilson Farm Urban Renewal I, LLC as Urban Renewal Entity – March 20, 2015
- Resolution authorizing CME Associates, Township Engineer, to provide engineering services in relation to redevelopment project – April 14, 2015
- Resolution of Council approving Wilson Farm Urban Renewal I, LLC as Urban Renewal Entity – April 28, 2015
- Introduction of Ordinance 2015-11 authorizing a Tax Abatement and PILOT agreement with Wilson Farm Urban Renewal I, LLC for affordable housing – April 28, 2015
- Introduction of Ordinance 2015-12 adopting the Wilson Farm Redevelopment Plan – April 28, 2015
- Referral of Ordinance 2015-12 to Planning Board for consideration – April 29, 2015
- Approval of Ordinance 2015-12 by Planning Board – May 7, 2015
- Adoption of Ordinance 2015-11 by Council – May 12, 2015
- Adoption of Ordinance 2015-12 by Council – May 12, 2015
- Application for Preliminary and Final Major Site Plan Approval submitted by Wilson Farm Urban Renewal I, LLC for first phase of development – May 13, 2015
- Township letter of support to New Jersey Housing and Mortgage Finance Agency on application of Wilson Farm Urban Renewal I, LLC, for Tax Credit funding – June 11, 2015
- Approval by Planning Board of application for Preliminary and Final Major Site Plan Approval submitted by Wilson Farm Urban Renewal I, LLC for first phase of development – June 17, 2015
- Resolution of Planning Board granting Preliminary and Final Major Site Plan Approval to Wilson Farm Urban Renewal I, LLC for first phase of development – July 15, 2015

(See Sears Certification, para.2)

Far from being an "unrealistic affordable housing development opportunity," the Wilson Farm Redevelopment project is well on its way to providing up to 300 affordable housing units. Thus, SBC's criticism of this project is wholly unwarranted.

SBC also attempts to paint the Township as recalcitrant in managing its affordable housing trust fund. In support of this argument, SBC attempts to suggest to this Court that the Township "just accumulates affordable housing trust fund money, as evidenced by the fact that South Brunswick was a 'lead defendant' in the recent affordable housing trust fund litigation." (SBC Brief, p. 30-31) This statement completely misconstrues the Township's participation in that litigation. It also shows the complete ignorance of SBC in understanding the Township's commitment to affordable housing.

In In Re Failure of Affordable Housing Trust Fund Regulations, ___ N.J. Super. ___ (App. Div. 2015), a case initially started by Fair Share Housing Center ("FSHC"), the Township proactively sought and was granted permission to intervene in the pending case before the Appellate Division. Both FSHC and the New Jersey State League of Municipalities supported the Township's application for intervention, since the Township was considered a model municipality in managing and producing affordable housing with its local trust fund money. After being granted permission to intervene in the case, the Township, FSHC and the League of Municipalities worked together to successfully prevent State government from seizing municipal trust funds, thereby preserving a municipality's ability to use its trust fund money to actually produce affordable housing. At no time was the Township sued for merely "accumulating its affordable

housing trust funds." (See Sears Certification, para. 3-7). On the contrary, after COAH reviewed the Township's compliance with the requirements of N.J.S.A. 52:27D-329.2 and -329.3, COAH specifically ruled that the Township was in full compliance with the statutory requirements for expenditure and/or commitment of trust funds (Sears Certification, para. 8). SBC is fully aware of this fact, the issue having been included in the litigation papers in its ongoing builder's remedy suit. Its argument on this issue in opposition to the Township's motion for temporary immunity is disingenuous at best.

SBC next argues that the Township has somehow shown a lack of good faith by its support of a proposed legislative remedy to the affordable housing quagmire currently facing all New Jersey municipalities. Contrary to evidencing a lack of good faith, the Township's participation with other municipalities in supporting efforts of its legislative representatives to provide a legislative remedy is exactly what the Supreme Court in Mt. Laurel IV invited. Indeed, the Supreme Court made abundantly clear its strong desire that either COAH or the Legislature take action. Indeed, the Court stated:

> In conclusion, we note again that the action taken herein does not prevent either COAH or the Legislature from taking steps to restore a viable administrative remedy that towns can use in satisfaction of their constitutional obligation. In enacting the FHA, the Legislature clearly signaled, and we recognized, that an administrative remedy that culminates in voluntary municipal compliance with constitutional affordable housing obligations is preferred to litigation that results in compelled rezoning. See Hills [Development Co. v. Bernards Tp. In Somerset County, 103 N.J. 1, 21-22 (1986)]. It is our hope that an administrative remedy will again become an option for those proactive municipalities that wish to use such means to obtain a determination of their housing obligations and the manner in which those obligations can be satisfied. Mt. Laurel IV, supra.

As such, rather than evidence of bad faith, the Township's participation seeks to respond to the invitation of the Supreme Court to actually provide a long-term, legislative solution to ensure compliance with its constitutional obligation for affordable housing.

SBC also alleges that the Township has shown bad faith in its alleged attempt to condemn utility improvements constructed by SBC on its property (SBC Brief, p. 38-40). There is absolutely no evidence that the Township has engaged in any effort to condemn any utility infrastructure constructed by SBC on its property. This assertion is nothing more than a fantasy of imagination without support in the record.

B. Richardson Opposition to Motion for Temporary Immunity

Richardson argues that the Township is required to submit its Third Round plan and a "preliminary determination" of its Third Round obligation before it is entitled to immunity. (Richardson Brief, p. 12-15). In support of this assertion, Richardson claims that this is required by the Supreme Court's decision in Mt. Laurel IV; the Fair Housing Act (FHA)(N.J.S.A. 52:27D-310(e)); COAH regulations (N.J.A.C. 5:93-5.1); and the Municipal Land Use Law (MLUL)(N.J.S.A. 40:55D-62(a)). In all respects related to this assertion, Richardson is mistaken.

As the Supreme Court and this Court have already determined, it is the trial court that must make the "preliminary determination" of the Township's obligation. See Mt. Laurel IV, supra., at 28-29; In Re Monroe, supra., at 5. Indeed, Richardson seems to concede this point when it later states in its brief that "[t]he Court will be assisted in rendering *its preliminary determination on need* by the fact that all the initial and succeeding applications will be on notice to FSHC and other interested parties." (Richardson Brief, p. 20, quoting from Mt. Laurel IV, supra., at p. 29)(emphasis supplied). As such, the Supreme Court in Mt. Laurel IV did not expect or require municipalities to submit a completed Third Round Housing Element and Fair Share Plan with a motion for immunity.

In addition, as this Court has already established, the process to be followed by the trial court to determine the Township's obligation must provide the Township with "a reasonable opportunity to demonstrate constitutional compliance to [the] Court's satisfaction (including time to take curative action if the municipality's plan requires further supplementation)." In Re Monroe, supra., at 3-4. Richardson suggests that this "reasonable opportunity" consists of the 120 day period immediately following the date Mt. Laurel IV was decided (Richardson Brief, p. 18). Contrary to this assertion, the Supreme Court's opinion itself makes clear that it was of no effect (i.e. – was stayed) for 90 days (or until June 8, 2015). Thereafter, municipalities were given 30 days (or until July 8, 2015) to file declaratory judgment actions and motions for temporary immunity. See Mt. Laurel IV, supra. Once filed, the Supreme Court instructed trial courts to grant municipalities five months to submit a completed Third Round Housing Element and Fair Share Plan. Mt. Laurel IV, supra. If, as Richardson suggests, a municipality were required to submit a fully conforming Third Round plan with its initial filings, the five months granted to municipalities by the Supreme Court would be meaningless. There would be no protection from builder's remedy litigation while municipalities prepared and submitted Third Round plans for review by the court. This would completely frustrate the process established in Mt. Laurel IV and undermine the orderly transition from COAH oversight to court oversight that the Supreme Court envisioned.

The section of the FHA cited by Richardson, N.J.S.A. 52:27D-310 (e), likewise does not support this assertion. This portion of the act merely requires that a municipality include in its Housing Element "a determination of the municipality's present and prospective fair share for low- and moderate-income housing and its capacity to accommodate its present and prospective housing needs, including its fair share for low- and moderate-income housing." This does not mean, however, that it is the municipality's responsibility to calculate its present and prospective fair share of affordable housing. On the contrary, N.J.S.A. 52:27D-309 (a) indicates that a municipality must prepare and file with COAH the required Housing Element, "based on [COAH's] criteria and guidelines" within five months after COAH's "adoption of its criteria and guidelines." Clearly, the FHA contemplated that COAH would first calculate the municipality's obligation when it adopted the "criteria and guidelines" for the specific housing round. Indeed, the FHA specifically states that it was always the duty of COAH to determine housing regions, estimate the present and prospective need for affordable housing on a statewide and regional level and adopt criteria and guidelines for municipal determination of present and prospective fair share. N.J.S.A. 52:27D-307. Once adopted by COAH, that obligation was to be incorporated into the municipality's Housing Element along with the municipality's capacity to meet the obligation. The FHA never contemplated that a municipality would calculate its own obligation. Indeed, this was the very criticism of COAH's Growth Share methodology. As such, the FHA does not require that a municipality itself calculate its obligation.

Likewise, the MLUL merely requires that a municipality adopt a Housing Element and Fair Share Plan. It does not require that the municipality calculate its affordable housing obligation.

As to the COAH regulation cited by Richardson (N.J.A.C. 5:93-5.1), it states "once a municipality has subtracted its credits (pursuant to N.J.A.C. 5:93-3) from its calculated need, and/or received an adjustment (pursuant to N.J.A.C. 5:93-4), it shall develop a plan to address the municipal housing obligation." This section of the Second Round Rules, however, does not require that the Township "calculate" its own need. On the contrary, the Township is required to factor its calculated need into how it will address that need in the Housing Element. How the need is calculated is set forth in N.J.A.C. 5:93-2.1, et seq. Most importantly, N.J.A.C. 5:93-3.1 states unequivocally that "the Fair Housing Act provides that [COAH] determine municipal fair share..." As such, it is abundantly clear that COAH was tasked with the duty to calculate a municipality's fair share obligation. This was never an obligation imposed upon municipalities

It is therefore abundantly clear that Richardson's assertion that a municipality comes into court having already calculated its obligation, and formulated a plan to address that obligation, is without merit. The process established by the Supreme Court, and confirmed by this court in In Re Monroe, is designed to result in a fully conforming plan, not require that the Township begin with one.

C. The Five (5) Month Period of Immunity Begins on the Date the Trial Court Determines the Township's Obligation

Oral argument is respectfully requested on this issue.

In its decision, the Supreme Court made abundantly clear its desire (1) to follow the FHA processes "as closely as possible" and (2) to provide municipalities "like treatment to that which was afforded by the FHA." Mt. Laurel IV, supra, at 6, 27. Following the FHA processes "as closely as possible," and giving the Township "like treatment to that which was afforded by the FHA," inescapably leads to the conclusion that the Township is entitled to five months from the date the trial court establishes its Third Round obligation to provide its Third Round Plan for addressing that obligation. As provided in the FHA, municipalities were given "five months after [COAH's] adoption of its criteria and guidelines...to prepare and file with [COAH] a Housing Element, based on [COAH's] criteria and guidelines..." N.J.S.A. 52:27D-309 (a). In construing the statute, this court's "fundamental duty is to effectuate the intent of the legislature." Merin v. Maglaki, 126 N.J. 430, 435 (1992). Judges must also consider the legislative policy underlying the statute and "any history which may be of aid." State v. Madden, 61 N.J. 377, 389 (1972). Indeed "it is a fundamental duty of [the] court to construe a statute in a manner which advances the legislative policy and purpose." Royal Food Distributors Inc. v. Dir., Div. of Taxation, 15 N.J. Tax 60, 73 (1995) (citing Lesniak v. Budzash, 133 N.J. 1, 8 (1993) (other citations omitted)). Thus, this court has an obligation to seek to fulfill "the essential legislative policy" of the FHA and to give meaning to its reason and spirit.

The Legislature clearly stated its purpose in Section 303 of the FHA, entitled "Legislative Declaration and Intention" with the following:

> The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this Act and not litigation...(N.J.S.A. 52:27D-303).

This legislative intent was so strong that the Legislature included a moratorium on builder's remedy lawsuits in the FHA, prohibiting builder's remedy litigation from the effective date of the FHA "until five months from when COAH established its criteria and guidelines through the rulemaking process." N.J.S.A. 52:27D-328 (referencing the five-month timeframe established in N.J.S.A. 52:27D-309) (emphasis supplied).

The Supreme Court's decision in Mt. Laurel IV does not invalidate this clear intent of the FHA. On the contrary, the Court sought to implement the Act when it stated that "the judicial processes authorized herein reflect as closely as possible the FHA's processes and provide the means for a town transitioned from COAH's jurisdiction to judicial actions to demonstrate that its housing plan satisfies Mount Laurel obligations." Mt. Laurel IV, supra at 6. The Supreme Court envisioned that trial judges would use processes "that are similar to those which would have been available through COAH for the achievement of substantive certification [such as] conciliation, mediation, and the use, when necessary, of Special Masters." Compare N.J.S.A. 52:27D-314 and -315 with Mt. Laurel IV, supra at 23-24.

If the Township were before COAH, the process would be:

1) The grant of temporary immunity beginning on the date of adoption of a resolution of participation (N.J.S.A. 52:27D-309) and ending five months after COAH establishes the Township's obligation (N.J.S.A. 52:27D-316; -328)
2) Once temporary immunity is in place, COAH has the duty to establish the Township's obligation, using its adopted "criteria and guidelines" (N.J.S.A. 52:27D-307).
3) Once the obligation is established, the Township must submit its Housing Element and Fair Share Plan within five months (N.J.S.A. 52:27D-309).
4) Once a Plan is submitted, objectors have the opportunity to comment on the Plan (N.J.S.A. 52:27D-315).
5) COAH holds "conciliation and mediation" sessions with all interested parties in an attempt to resolve objections and finalize the Township's Plan (N.J.S.A. 52:27D-314 and -315).
6) If no resolution of objections can be achieved through "conciliation and mediation," the matter is transferred to the Office of Administrative Law for hearing (N.J.S.A. 52:27D-315).
7) At the conclusion of all "conciliation and mediation" sessions, or after a decision by the Administrative Law judge, COAH makes a final decision as to whether the Township's Plan satisfies its obligation, either granting or denying substantive certification (N.J.S.A. 52:27D-314 and -315).

This process was later reflected in COAH's Second Round Procedural Rules set forth at N.J.A.C. 5:91-1, et seq. It is clear from this process, outlined in the FHA and COAH's Second Round Procedural Rules,

that the Township's obligation must be established before it can be expected to submit a Plan to meet that obligation.

Once the obligation is established by the Court, the municipality can intelligently prepare a plan to address that obligation, which can then be reviewed, critiqued, modified and finalized through the "conciliation, mediation and Special Master" process, just as it would have been under the FHA. Productive sessions of "conciliation, mediation" and meetings with Special Masters can only be achieved if the municipality is granted a period of immunity for five months beginning on the date the trial court determines the municipality's obligation. Until such time as the trial court determines the Township's obligation, any Third Round Plan proposed by the Township would be speculative at best.

In an apparent nod to Richardson's arguments, SBC asserts that the Township should have known its obligation for the Third Round, since estimates were given in COAH's Technical Appendix published in June 2014 as well as the Kinsey report prepared on behalf of FSHC (SBC Brief, p. 9-10). None of these estimates, however, were ever finally adopted by COAH or tested and approved by any court. As such, they are merely that—estimates that reflect the untested opinions of various individuals. Moreover, the Kinsey estimate prepared on behalf of FSHC and referenced by SBC in its brief (Kinsey 2015 report) are different than estimates given less than a year earlier by Professor Kinsey. Richardson has retained its own expect, Arthur Bernard, who has also prepared estimates, giving an opinion that arrives at a different obligation for the Township. Reviewing all of these estimates shows that they vary wildly from a low of 1,157 units up to almost 4,000 units. Faced with such a large discrepancy in unadopted, untested, and unapproved estimates of the Township's obligation, it would have been irresponsible of the Township to arbitrarily choose an obligation and prepare a Third Round Plan in support of a motion for immunity.

Instead of blindly preparing a Third Round Plan, with no certainty as to its obligation, the Township should be given the opportunity to first have its obligation determined by this court, and then a period of five months from that date to develop a plan to address that obligation. In order to assist the court, the Township has authorized the execution of a Municipal Shared Services Defense Agreement with various municipalities to retain the services of Dr. Robert W. Burchell of Rutgers, the State University of New Jersey, and various other experts employed by Rutgers, "in order to establish a rational and reasonable methodology for determination of the Township's obligation to provide a realistic opportunity through its land use ordinances for its fair share of affordable housing." (Sears Certification, para. 9). Once that report is prepared, the Township's obligation can be determined by the court and the parties can engage in meaningful "conciliation and mediation" toward a satisfaction of the Township's Third Round obligation and ultimately a conforming Third Round Plan.

While this process is continuing, this court should grant immunity from exclusionary zoning/builder's remedy litigation so that the finite resources of the Township can be devoted to voluntary compliance as opposed to defending against needless litigation.

Thank you for your considerations in this matter.

Respectfully submitted,

Donald J. Sears
Director of Law

DJS/lw
Enclosures

Cc: Middlesex County Superior Court Clerk
Henry Kent-Smith, Esq., attorney for Richardson
Kenneth D. McPherson, Jr., attorney for SBC
Kevin Walsh, Esq., attorney for FSHC
Benjamin Bucca, Jr., Esq., attorney for SB Planning Board
Christine Nazzaro-Cofone, PP, Special Master