KIPP & ALLEN, L.L.P.
By: Richard J. Allen, Jr., Attorney No. 023041981
52 Chestnut Street
P. O. Box 133
Rutherford, New Jersey 07070
(201) 933-3633
Attorneys for Plaintiff Borough of East Rutherford

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-BERGEN COUNTY

IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF EAST RUTHERFORD FOR A JUDGMENT OF COMPLIANCE AND REPOSE

DOCKET NO.:

Civil Action
(Mount Laurel)

EXHIBITS TO PLAINTIFF'S COMPLAINT

Exhibit Designation	Description
A	Resolution No. 82-2015 of the East Rutherford Mayor and Council
B	Form of Notice to Interested Entities
C	Order entered on November 28, 2005 by the Hon. Jonathan N. Harris, J.S.C. in the matter entitled Tomu Development Co., Inc. v. Borough of Carlstadt, et. al.
D	November 10, 2005 Opinion of the Court in Tomu Development Co., Inc. v. Borough of Carlstadt, et. al.
E	Final Judgment entered on June 1, 2006 by the Hon. Jonathan N. Harris, J.S.C. in the matter entitled Tomu Development Co., Inc. v. Borough of Carlstadt, et. al.
F	May 19, 2006 Opinion of the Court in Tomu Development Co., Inc. v. Borough of Carlstadt, et. al.
G	June 5, 2006 letter from Mt. Laurel Compliance Monitor setting forth the Monitor's directives
H	Spreadsheet from Council on Affordable Housing setting forth record filings by East Rutherford
I	East Rutherford Housing Element and Fair Share Plan filed December, 2008
J	East Rutherford Mayor and Council Resolution No. 78-2012 committing funds to an Affordable Housing Project of the Housing Authority of Bergen County

Exhibit

A

BOROUGH OF EAST RUTHERFORD
RESOLUTION NO. 82-2015

RESOLUTION DECLARING THE INTENT OF THE BOROUGH OF EAST RUTHERFORD TO FULLY COMPLY WITH ITS CURRENT AND FUTURE MOUNT LAUREL OBLIGATIONS AND TO SERVE AS THE "CATALYST FOR CHANGE" TO RENDER ANY EXCLUSIONARY ZONING LAWSUITS AS "UNNECESSARY LITIGATION"

WHEREAS, on or about June 1, 2006, the Superior Court entered a Final Judgment in the matter entitled ***Tomu Development Co. v. Borough of East Rutherford*** (the "Tomu Decision") which; among other things, determined that the Borough failed to meet its Affordable Housing obligations, appointed a Compliance Monitor (the Monitor") to supervise the Borough's land use regulatory system and required the Borough and the Monitor to draft and submit an Affordable Housing Plan to Council on Affordable Housing ("COAH") to obtain substantive Certification from COAH of the Borough's Affordable Housing Plan; and

WHEREAS, the *Tomu* decision awarded a Builder's Remedy to *Tomu* permitting it to construct 420 units of housing in East Rutherford at the site of which 60 units would be affordable; and

WHEREAS, the Court's Final Judgment in Tomu required the Borough to seek substantive Certification of its Housing Element and Fair Share Plan ("HEFSP") through COAH and therefore the Borough brought itself under COAH's jurisdiction to permit administrative process to resolve disputes over affordable housing matters rather than litigation (see N.J.S.A. 52:27D-303); and

WHEREAS, on or about December 31, 2008, the Borough submitted a HEFSP and a Petition for Substantive Certification to the Council on Affordable Housing ("COAH"); and

WHEREAS, the Borough's Petition was deemed complete by COAH on or about June 8, 2009; and

WHEREAS, the Borough has awaited the COAH process to move forward pursuant to its duly adopted regulations; and

WHEREAS, as a result of that filing with COAH, the Borough has been protected against exclusionary zoning and builder's remedy lawsuits by the provisions of the Fair Housing Act, ***N.J.S.A. 52:27D-316*** pending completion of COAH's process; and

WHEREAS, on September 26, 2013, the Supreme Court released ***In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 215 N.J. 578 (2013)*** which invalidated the Round 3 regulations adopted in 2008 by the New Jersey Council on Affordable Housing ("COAH"); and

WHEREAS, the HEFSP submitted by the Borough was based upon the regulatory requirements of the regulations invalidated in that case; and

WHEREAS, on March 14, 2014, the Supreme Court issued an order directing COAH to propose new Round 3 regulations on or before May 1, 2014 and to adopt them by October 22, 2014; and

WHEREAS, the March 14, 2014 Order further provided that, if COAH failed to meet these deadlines, the Court would entertain a Motion in Aid of Litigant's Rights which could include an application for the right, on a case-by-case basis, to file a builder's remedy suit against a municipality under COAH's jurisdiction, such as the Borough; and

WHEREAS, on April 30, 2014, in accordance with the March 14, 2014 Order, COAH proposed Round 3 regulations and published them in the New Jersey Register on June 2, 2014; and

WHEREAS, the proposed third round regulations again modified the regulatory basis for calculating the Borough's "fair share;" and

WHEREAS, COAH accepted public comments on the proposed Round 3 regulations until August 1, 2014, and indeed received roughly 3,000 comments; and

WHEREAS, on October 20, 2014, the COAH board met to consider adopting the proposed regulations, reached a 3-3 deadlock and therefore did not adopt the proposed regulations; and

WHEREAS, COAH therefore failed to meet the Supreme Court's October 22, 2014 deadline; and

WHEREAS, COAH's failure to adopt the proposed regulations has left the Borough in a continuing state of limbo, without knowledge of the applicable governing standards, despite its continuing commitment to satisfying its obligations voluntarily and without the need for litigation; and

WHEREAS, on October 31, 2014, Fair Share Housing Center ("FSHC") filed a Motion In Aid of Litigant's Rights urging the Supreme Court, among other things, to direct trial judges – instead of COAH – to establish standards with which municipalities must comply; and

WHEREAS, FSHC's motion included an alternative fair share calculation for each municipality, further highlighting the uncertainty of the regulatory framework with which municipalities must ultimately comply; and

WHEREAS, on March 10, 2015, the Supreme Court issued its decision which removed the immunity provided to municipalities like East Rutherford that complied with the Fair Housing Act and COAH's regulations but did so prospectively by affording those municipalities, including East Rutherford, a stay of 90 days plus a 30 day period following that stay wherein East Rutherford would have an exclusive right to seek Court approval of its HEFSP and an extension of the immunity from Mt. Laurel lawsuits; and

WHEREAS, the Supreme Court's March 10, 2015 decision did not adopt the FSHC's alternative calculations; however, as a result of future regulations, litigation, and/or legislation, it is entirely possible that the Borough's obligation may indeed differ from those proposed by COAH or advocated by FSHC; and

WHEREAS, in light of all this uncertainty, it is possible that the Borough's HEFSP may not be in compliance with the latest iteration under applicable State law of its affordable housing obligations; and

WHEREAS, regardless of whatever its obligation is ultimately assigned, the Borough remains committed to comply voluntarily with its obligations; and

WHEREAS, the Borough wishes to be in a position to complete its efforts to comply voluntarily once its obligations are defined; and

WHEREAS, in ***So. Burlington County N.A.A.C.P. v. Tp. Of Mount Laurel, 92 N.J. 158, 279-80 (1983) ("Mount Laurel II")***, the New Jersey Supreme Court ruled, subject to several other limitations, that in order for a plaintiff to be entitled to a builder's remedy, it must "succeed in litigation;" and

WHEREAS, in ***Toll Bros. Inc. v. Tp. Of W. Windsor, 173 N.J. 502, 507 (2002)***, the Supreme Court ruled that in order for a developer to succeed in litigation, it must not only prove that the municipality failed to create a realistic opportunity to satisfy its affordable housing obligation, but also must be the "catalyst for change;" and

WHEREAS, the Borough, in cooperation with the Monitor, has complied with its obligations under the Fair Housing Act and duly adopted COAH regulations; and

WHEREAS, accordingly, the Borough wishes to seek a continuation of its immunity from the courts now that the Supreme Court has ruled that trial judges should perform COAH's functions so that the Borough can complete its efforts to comply voluntarily with whatever standards the courts may determine are appropriate; and

WHEREAS, the Borough herein intends to make its intentions to continue that voluntary compliance process inescapably clear to the public and all concerned.

NOW THEREFORE, BE IT RESOLVED as follows:

1. The Borough acknowledges that, given its reliance upon COAH's original Round 3 regulations and subsequent uncertainty in the law, it is entirely possible that the Housing Element and Fair Share Plan ("HEFSP") submitted to COAH in December of 2008 may not be in compliance with the Borough's affordable housing obligations as may need to be revised to comply with standards other than the original Round 3 regulations.

2. The Borough hereby reaffirms its commitment to satisfy its affordable housing obligations, however they may ultimately be defined, voluntarily and in the absence of any Mount Laurel lawsuits.

3. The Borough directs the Borough Attorney and Borough Planner, subject to the supervision of the Monitor, to revise the Borough's HEFSP to reflect compliance with the latest requirements and to submit that revised HEFSP to the Planning Board for further action. Once its affordable housing obligations are defined, the Borough directs its legal and planning professionals to take all reasonable and necessary action to enable it and its Planning Board to satisfy those obligations expeditiously.

4. The Borough Attorney and Borough Planner, in cooperation with the Monitor, shall take such action as may be necessary or advisable, including the institution of an action in the Superior Court for a Judgment of Compliance and Repose granting the Borough immunity from exclusionary zoning and builder's remedy lawsuits and to rely upon this Resolution as appropriate to maintain the Borough's current immunity from exclusionary zoning suits.

5. The Borough Clerk shall forward a copy of this Resolution to the East Rutherford Planning Board and to Robert T. Regan, Esq., the Monitor and to place this Resolution on file in Borough Hall to put the public and all interested parties on notice of the formal commitments herein.

6. This Resolution shall take effect immediately.

I hereby certify that the foregoing is a true copy of the resolution passed by the Mayor and Council at the meeting held on the 19th day of May, 2015.

Danielle Lorenc, RMC

Councilmember	Moved	Second	Aye	Nay	Abstain	Absent
Brizzi		X	X			
Homaychak			X			
Lahullier	X		X			
Perry			X			
Stallone			X			
Ravettine			X			

Exhibit B

KIPP & ALLEN, L.L.P.
By: Richard J. Allen, Jr., Attorney No. 023041981
52 Chestnut Street
P. O. Box 133
Rutherford, New Jersey 07070
(201) 933-3633
Attorneys for Plaintiff

IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF EAST RUTHERFORD FOR A JUDGMENT OF COMPLIANCE AND REPOSE

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-BERGEN COUNTY

DOCKET NO. : BER-L-_____-15

Civil Action

NOTICE OF FILING OF A COMPLAINT BY THE BOROUGH OF EAST RUTHERFORD FOR A DECLARATORY JUDGMENT SEEKING A JUDGMENT OF COMPLIANCE AND REPOSE

TO ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that the Borough of East Rutherford, acting pursuant to the authority granted by the New Jersey Supreme Court in its decision in the case captioned ***In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015)*** has filed a Complaint (with exhibits) with the Superior Court of New Jersey seeking the following relief:

(a) An Order exercising jurisdiction over the compliance by East Rutherford with its constitutional affordable housing obligations;

(b) An Order granting East Rutherford a five month period from the date that a methodology or formula is established by the Court, or otherwise, to prepare a constitutionally complaint HEFSP that incorporates the formula and methodology approved by this trial court or otherwise;

(c) An Order granting temporary immunity from third party exclusionary zoning lawsuits against East Rutherford from the date of the filing of this Declaratory Judgment action until the Court issues a Final Judgment of Compliance and Repose to the Borough of East Rutherford for its Housing element and Fair Share Plan to be formulated, adopted and approved in accordance with the applicable formula and methodology established by this Court;

(d) An Order declaring that East Rutherford has fully discharged its

constitutional affordable housing obligations and is granted protection and repose against exclusionary zoning litigation;

(e) A Judgment of Compliance and Repose for a period of ten (10) years from its date of entry;

(f) An Order approving the Spending Plan of East Rutherford heretofore pending before the Council on Affordable Housing;

(g) An Order continuing the jurisdiction of this Court to consider and approve any amendments to the Approved Spending Plan; and

(h) An Order granting such additional relief as the Court deems equitable and just.

The complaint and exhibits are available for public inspection at the office of the Borough Clerk at the East Rutherford Municipal Building, One Everett Place, East Rutherford, New Jersey during normal business hours.

If you have any objections or comments to the relief sought by the Borough you must make a motion before the court to intervene in this matter.

KIPP & ALLEN, L.L.P.
Attorneys for Plaintiff/Petitioner,
BOROUGH OF EAST RUTHERFORD

Dated: **June ____, 2015**

By:_____
Richard J. Allen, Jr.
Borough Attorney

Exhibit C

ROBERT T. REGAN, ESQ.
Special Master
345 Kinderkamack Road
P.O. Box 214
Westwood, New Jersey 07675
(201) 664-3344

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5894-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

Civil Action

ORDER

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5895-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

Civil Action

ORDER

THIS MATTER coming on for trial before the Honorable Jonathan N. Harris on August 8th and 9th, 2005, September 26th, 27th,

28th and 29th, 2005 and November 2nd and 3rd, 2005, in the presence of Thomas Jay Hall, Esq. and Robert Kasuba, Esq. of the firm of Sills, Cummis, Epstein & Gross, P.C., attorneys for plaintiff Tomu Development Co., Inc. ("plaintiff" or "Tomu"); Richard J. Allen, Jr., Esq. of the firm of Kipp & Allen, LLP, attorney for defendants Borough of Carlstadt and Planning Board of Carlstadt; Beverly M. Wurth, Esq. of the firm of Calo Agostino, P.C., attorney for defendants Borough of East Rutherford and Planning Board of East Rutherford; and Robert L. Gambell, Esq., Deputy Attorney General (Peter C. Harvey, Attorney General), attorney for defendant New Jersey Meadowlands Commission ("NJMC"), upon plaintiff's Complaint for a builder's remedy pursuant to Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983) (hereinafter "Mount Laurel II"), and the Court having previously entered an Order granting plaintiff's motion for partial summary judgment and determining that the land use ordinances and regulations of Carlstadt and East Rutherford are unconstitutional under Mount Laurel II, and the Court having rendered a written decision on November 10, 2005, the provisions of which are incorporated herein by reference, and good cause appearing:

IT IS on this 28 day of NOVEMBER, 2005:

ORDERED as follows:

1. Plaintiff is determined to be entitled to a builder's remedy pursuant to the decision in Mount Laurel II, and its lands in East Rutherford and Carlstadt may be developed with a mixed use project as follows:

> The development in East Rutherford shall consist of no more than 420 residential units consisting of 360 market rate units and 60 affordable rental units, plus no more than 420 residential units consisting of 340 market rate units and 80 affordable rental units in Carlstadt. These units shall be located in two midrise buildings which height shall not exceed the lesser of Federal Aviation Administration elevation guidelines or 230 feet. All dimensional requirements of the NJMC shall be satisfied, as must all applicable requirements of the Residential Site Improvement Standards found in N.J.A.C. 5:21-1, *et seq.* In addition, there shall be no more than 38,000 square feet of "ancillary development" that shall include limited commercial facilities (such as a dry cleaner or convenience store), recreational facilities, public safety facilities, and meeting rooms. The development shall include a marina available to the public, to be overseen by the NJMC, but reserving five berths for the development or its residents. Tomu shall construct a riverwalk promenade, plus public parking, to allow access to the Hackensack River by members of the public, all as directed by the NJMC and in accordance with applicable law. The development shall comply with all other rules and regulations of the NJMC that are not inconsistent with this builder's remedy. Finally, the development shall comply with all Federal and local

> statutes, regulations, development regulations or ordinances that may apply and shall also comply with all other State laws including, but not limited to, the Fair Housing Act, N.J.S.A. 52:27D-301 *et seq.*; Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 *et seq.*; the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 *et seq.*; the Water Supply Management Act, N.J.S.A. 58:1A-1 *et seq.*; the Water Pollution Control Act, N.J.S.A. 58:10A-1 *et seq.*; the Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 *et seq.*; the Water Quality Planning Act, N.J.S.A. 58:11A-1 *et seq.*; the Safe Drinking Water Act, P.L. 1977, c.224, N.J.S.A. 58:12A-1 *et seq.*; the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 *et seq.*, and all implementing rules.

2. The land use regulations of Carlstadt and East Rutherford remain invalid and unconstitutional insofar as such provisions continue past exclusionary practices.

3. The Carlstadt and East Rutherford Planning Boards and the respective governing bodies of these Borough (hereinafter collectively "the municipal defendants") shall immediately prepare comprehensive compliance plans (including appropriate strategies to address the indigenous and unmet needs) for each municipality, together with zoning and planning legislation to satisfy the fair share obligations of rounds one and two, and the unmet need, all in accordance with regulations adopted by the Council On Affordable Housing ("COAH").

4. The municipal defendants shall draft meaningful Housing Element and Fair Share Plans, together with fee ordinances (if appropriate) and spending plans that are consonant with COAH rules.

5. The municipal defendants shall exercise planning discretion in deciding whether to employ a program of rehabilitation grants, regional contribution agreements, accessory apartments, mobile homes, overlay zones, or any other incentive devices to meet the fair share and unmet need.

6. The plans of the municipal defendants shall be completed, adopted and presented to the Court no later than February 28, 2006. In default thereof, *all* development regulations in East Rutherford and Carlstadt, as the case may be, shall be permanently invalidated, and a scarce resource order enjoining *all* land use development applications in the defaulting Borough (whether before the Planning Board, Board of Adjustment or the NJMC) shall become automatically effective.

7. In the event the municipalities, or either of them, comply with the requirements hereinabove set forth, in such event the respective complying municipality will be entitled to a six (6) year judgment of repose commencing no earlier than February 28, 2006.

8. The Special Master shall regularly consult with designated representatives of both Boroughs and their Planning Boards and governing bodies during the preparation of the compliance plans and he shall provide appropriate input and constructive criticism throughout the process.

9. A copy of this Order shall be served by the Special Master upon all counsel of record within 5 days of the date hereof.

JONATHAN N. HARRIS, J.S.C.

Exhibit D

Exhibit

C

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5894-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT,
PLANNING BOARD OF CARLSTADT,
and the NEW JERSEY
MEADOWLANDS COMMISSION

Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5895-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF EAST RUTHERFORD,
PLANNING BOARD OF EAST
RUTHERFORD, and the NEW JERSEY
MEADOWLANDS COMMISSION

Defendants,

Decided: November 10, 2005

Robert A. Kasuba and Thomas Jay Hall (Sills Cummis Epstein & Gross, P.C., attorneys) tried the cause for plaintiff.

Richard J. Allen, Jr. (Kipp & Allen, LLP, attorneys) tried the cause for defendant Borough of Carlstadt and Planning Board of Carlstadt.

Beverly M. Wurth (Calo Agostino, A Professional Corporation, attorneys) tried the cause for defendant Borough of East Rutherford and Planning Board of East Rutherford.

Robert L. Gambell (Peter C. Harvey, Attorney General, attorney) tried the cause for defendant New Jersey Meadowlands Commission.

JONATHAN N. HARRIS, J.S.C.

INTRODUCTION

On August 14, 2003, plaintiff filed two lawsuits alleging that two southern Bergen County municipalities -- Carlstadt and East Rutherford (see Figure 1)-- have engaged in patterns of exclusionary

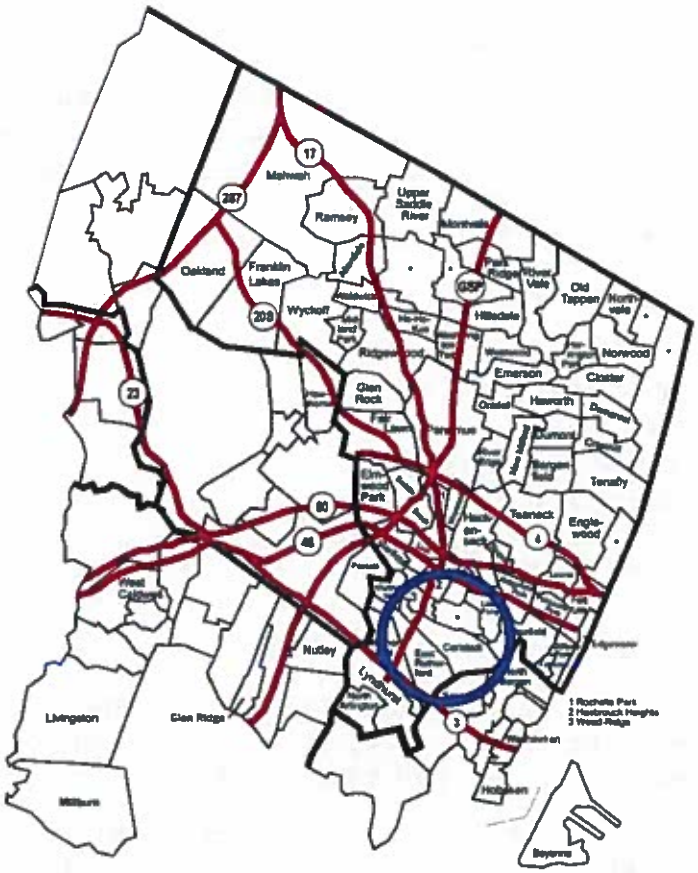

Figure 1

zoning that violate the New Jersey Constitution as interpreted

in the *Mount Laurel* cases,[1] their progeny,[2] and the Fair Housing Act of New Jersey (FHA).[3] A builder's remedy is sought to allow plaintiff's waterfront land at the foot of historic Paterson Plank Road on the Hackensack River to be developed with 840 units of non-age-restricted housing, including 140 units of affordable rental housing. The municipalities contend that they are not responsible for the alleged abdication of constitutional responsibility because they enjoy neither the power to zone plaintiff's land nor to affect the vast acreage[4] within their municipal boundaries that is within the preeminent zoning authority of codefendant New Jersey Meadowlands Commission (NJMC) pursuant to N.J.S.A. 13:17-11.

I conclude that the municipalities have failed to comply with their express obligations to provide realistic opportunities for affordable housing within their borders, and that the NJMC has implicitly fostered the long-standing municipal failures

---

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

[2] Oakwood at Madison v. Township of Madison, Inc., 72 N.J. 481 (1977); Holmdel Builders Ass'n v. Township of Holmdel, 121 N.J. 550 (1990); Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502 (2002).

[3] N.J.S.A. 52:27D-301 to -329.

[4] The New Jersey Meadowlands region consists of 19,485 acres spread over 30.4 square miles in two counties and fourteen municipalities. http://www.meadowlands.state.nj.us/commission/index.cfm (last visited on November 4, 2005.)

through its benign neglect of the housing needs of the poor.[5] On this subject, but perhaps not with the NJMC directly in mind, Chief Justice Wilentz, in Mount Laurel II wrote:

> The basis for the constitutional obligation is simple: ***the State controls the use of land, all of the land.*** In exercising that control, it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else. ***The government that controls this land represents everyone.*** While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages.
>
> [92 N.J. at 209-210 (emphasis added).]

Additionally, plaintiff is entitled to a builder's remedy because none of the defendants has demonstrated that the site is environmentally constrained, that construction of a high-density mixed-use project would represent bad planning, or that plaintiff has prosecuted this action in bad faith.

II. FACTUAL BACKGROUND

Plaintiff Tomu Development Co., Inc. (Tomu) owns several adjoining parcels of land in Carlstadt and East Rutherford at the

[5] NJMC regulation N.J.A.C. 19:4-3.8 purports to reflect the NJMC's commitment to affordable housing. However, it gives little more than institutionalized lip service to affordable housing obligations by merely "encouraging" municipal compliance with guidelines of the Council on Affordable Housing (COAH). Unlike the proactive posture of the former Hackensack Meadowlands Development Commission in the 1980s, the NJMC's position until very recently simply reinforced municipal inertia and maintained the *status quo* of a dearth of affordable housing in East Rutherford and Carlstadt.

intersection of Paterson Plank Road's eastern[6] terminus (in Bergen County) and Outwater Lane, shoehorned between the New Jersey Turnpike's Western Spur and the Hackensack River. (See Figure 2.)

Figure 2

It appears from the record that the total land mass consists of approximately 26.9 acres, with 4.9 acres located in Carlstadt and 22 acres located in East Rutherford. Not all of this land is developable. Tomu acknowledges that in Carlstadt, only 3.584

[6] Paterson Plank Road is commonly considered an east/west thoroughfare, at one time having been a wooden planked road through the Hackensack Meadowlands that connected Hoboken and Paterson. See State ex rel. Zimmerman v. Township Committees of Bergen, 57 N.J.L. 68 (Sup. Ct. 1894). In reality, it is skewed to a northwest/southeast alignment and at the point where it adjoins Tomu's land, it is arguably at its *southern* terminus in Bergen County. (See Figure 2.)

acres are developable uplands (not wetlands) and in East Rutherford, 5.286 acres are developable uplands (not wetlands).

In 1989, as part of a planned unit development consisting of 1,328,430 square feet of improvements proffered by then-owner Riverview Associates, the land in East Rutherford received permission from the NJMC to be developed with 350 residential units, of which 70 were required to be devoted to affordable housing. Additionally, the adjoining parcels were approved for a 100-suite hotel, 1,200-seat banquet facility, restaurants, fitness center, multi-level parking facility, and a full service 135-berth marina. Although there was to be substantial development in Carlstadt, no residential housing units were proposed for that municipality. The NJMC zoning regulations at the time designated the land as being within the Waterfront Recreation and Marshland Preservation zones.[7] Residential uses were permitted at that time when they were included with a marina or other water-oriented recreation use at a density of 15 units per acre. Today, the NJMC's zoning regulations do not permit residential uses in the East Rutherford or Carlstadt parcels, reflecting its 21st century view of the land as most suitable primarily for recreational uses associated with access to the

[7] Today the lands are split between the Environmental Conservation zoning district and the Waterfront Recreation zoning district. Residential use was permitted on all of Tomu's uplands until the 2004 amendment to the NJMC Master Plan, after the commencement of the instant *Mount Laurel* action.

Hackensack River.[8] N.J.A.C. 19:4-5.18 ("The Waterfront Recreation zone is designated to accommodate marinas in combination with other water-oriented commercial and recreation facilities that provide and encourage public access to and visibility of the Hackensack River or its tributaries. The Waterfront Recreation zone is to be developed in such a way that views of the river are protected.").

The land was never developed according to the approvals granted in 1989. However, so-called "interim uses" were permitted by the NJMC to be established and operated on the land until the ultimate development became realistic. These interim uses include a marina, a golf driving range and putting facility, and a cafe. For ten years following the initial approval, the NJMC and its predecessor agency approved extensions keeping the approvals alive. Then, in 1999, the NJMC declined further to extend Tomu's approvals. Presently, Tomu and the NJMC are engaged in litigation in the Office of Administrative Law that revolves around whether the 1989 development approvals were unreasonably not extended by the NJMC. For reasons that are unclear, this dispute has lingered without resolution at the agency level for more than five years.

---

[8] For a recent take on how another riverfront is undergoing redevelopment, see *New York Times* article of October 31, 2005, "Rooms With Views Replace Factories on Hudson's Banks," http://www.nytimes.com/2005/10/31/nyregion/31hudson.html?ex=1131685200&en=af379e948d52a128&ei=5070 (last visited on November 9, 2005). See also *The Record* article of November 4, 2005, "Visions of Hackensack River Renaissance," http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjcxN2Y3dnFlZUVFeXkzJmZnYmVsN2Y3dnFlZUVFeXk2ODA3NzA3 (last visited on November 8, 2005).

As part of its efforts in this case to secure a builder's remedy, Tomu has proposed building a mixed-use facility on its combined lands. Originally, Tomu sought a builder's remedy for 988 residential units, divided equally between the two municipalities. By the end of the trial, however, Tomu refined its proposal so that the development would consist of 420 housing units (360 market rate units (85.7%) and 60 affordable rental units (14.3%)) in East Rutherford, plus an additional 420 housing units (340 market rate units (81%) and 80 affordable rental units (19%)) in Carlstadt. In the aggregate, the final proposal offers a total of 840 housing units, of which 140 would be available for rent to low and moderate income persons.[9] These units would be located in two midrise buildings that would not exceed Federal Aviation Administration elevation guidelines, approximately 230 feet in height. In addition, Tomu proposes approximately 38,000 square feet of "ancillary development" that would include limited commercial facilities such as a dry cleaner, recreational facilities, public safety facilities, and meeting rooms. Tomu would make a marina on the site available to the public, presumably to be overseen by the NJMC, reserving five berths for private purposes. Finally, Tomu proposes that it build a

[9] These affordable housing units would have to comply with COAH regulations regarding distribution of incomes, N.J.A.C. 5:93-7.2 and distribution of bedroom types, N.J.A.C. 5:93-7.3. The details of compliance with these regulations were not explored at the trial. As rental units, each municipality should be able to garner bonus credits provided by N.J.A.C. 5:93-5.15(d)(1).

riverwalk promenade, plus public parking, to allow access to the Hackensack River by members of the public.

In earlier proceedings in this action, I determined that Tomu had clearly demonstrated that both East Rutherford and Carlstadt had failed to comply with their constitutional obligations regarding affordable housing opportunities.[10] The municipal failures were systemic and long standing. Neither East Rutherford nor Carlstadt had done anything meaningful to fulfill their separate obligations for new affordable housing, and their response to indigenous need was a deafening silence. Although both municipalities claimed that they were utterly helpless to accommodate affordable housing by rezoning land under the jurisdiction of the NJMC -- an understandable, if crabbed, position -- they even neglected to address their obligation to rehabilitate substandard housing units. Neither municipality participated in COAH's voluntary process leading to substantive certification. Although the witnesses who testified on behalf of the municipalities vociferously trumpeted their openness to low and moderate income housing, their inaction over at least the last two decades bespeaks the opposite.

The municipalities argue that since they control the land use decisions over such little land within their borders, they

[10] In granting partial summary judgment in favor of Tomu on the issue of municipal noncompliance with the *Mount Laurel* doctrine and the FHA, I appointed Robert T. Regan, Esq. to serve as Special Master to assist the parties and the court in developing a compliance plan.

should be either relieved of their *Mount Laurel* obligations or otherwise excused from constitutional compliance. Although many sounds and messages are carried by the natural breezes that flow across the Hackensack Meadowlands, I will not allow the message of *Mount Laurel* to be drowned out. The NJMC must share some of the blame for the baleful circumstances that exist in these municipalities' responses to affordable housing obligations. The NJMC has been a convenient scapegoat upon which the municipalities heap their scorn when it comes to discussions about their loss of home rule over land use decisions. The irony is not lost on me that now the municipalities seek refuge under the inaction of their former nemesis, the NJMC. What is even more distressing is the past behavior of the NJMC -- arguably inconsistent with one of its purposes to foster the use of land for new homes and residential uses[11] -- that has enabled the defendant-municipalities to avoid providing affordable housing opportunities, thereby perpetuating the exclusionary character of these boroughs.

III. DETERMINATIONS OF LAW

The dominant question in every *Mount Laurel* action is whether the municipality has created a realistic opportunity for the construction of its fair share of the region's needs for affordable housing. In reviewing the municipality's response to

[11] N.J.S.A. 13:17-1.

its constitutional duty, the judiciary should harmonize its decisions wherever possible to COAH guidelines and policy. See Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 22 (1986). Courts hearing and deciding exclusionary zoning cases should follow COAH's fair-share methodology. Id. at 63 and see Bi-County Dev. Corp. v. Mayor of Borough of Oakland, 224 N.J. Super. 455, 458-59 (Law Div. 1988); Mount Olive Complex v. Township of Mount Olive, 340 N.J. Super. 511, 527-28 (App. Div. 2001). The good faith or bad faith of the municipality is not a relevant consideration in determining the municipal obligation. Such considerations, however, may be appropriate once a remedy must be imposed.

The instant case is dramatically more complicated[12] than the ordinary contested *Mount Laurel* case (which is already complicated enough) because the lands that are the subject of the builder's remedy, together with large tracts in both municipalities, are not subject to municipal land use controls. The role of the NJMC thus becomes a focus of the action. Upon a review of the extensive record generated in this case, I conclude that there is no significant evidence in this case that any of the governmental agencies -- meaning Carlstadt, East Rutherford, and the NJMC -- took any meaningful steps to provide reasonable

[12] The trial consumed eight trial days spread over four months. In addition, I viewed the property in the presence of the attorneys under the procedures of Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 548-49, (1963). A lengthy recess was taken in August and September 2005, to give the parties a final chance to try to reach a mutual accommodation and resolve their differences. Although the Special Master valiantly pursued settlement efforts, the mediation process failed.

opportunities for low and moderate income housing in East Rutherford and Carlstadt. Indeed, shortly before the trial in this case, the NJMC approved a housing development in an isolated area of East Rutherford that conspicuously omitted any obligation on the part of the developer to devote a percentage of the units to the needs of low and moderate income persons. Also, in East Rutherford's downtown -- albeit before this exclusionary zoning case was filed -- the municipality approved multi-family developments on lands within its zoning control, but made no accommodations for a set aside of low or moderate income housing units. Although at trial the NJMC attempted to eschew its prior gentle disregard of affordable housing needs, I conclude that it is as responsible for the lack of affordable housing in East Rutherford and Carlstadt as are those municipalities' elected officials. Although I can not say that the NJMC violated *its* duty under the constitution to provide affordable housing opportunities, it aided and abetted the municipalities' turning blind eyes to the plight of the poor, in direct violation of the municipalities' affirmative obligations under the *Mount Laurel* doctrine.

The threshold step in determining municipal compliance with the *Mount Laurel* doctrine requires calculation of fair share.

Carlstadt's current[13] cumulative affordable housing obligation as determined by COAH is 198 units. Twelve of these units represent satisfaction of an indigenous need, or rehabilitation component. The balance of 186 units represents Carlstadt's pre-credited obligation of its region's present and prospective need, or the so-called inclusionary or new construction component. Carlstadt claims that it is land poor and therefore it is entitled to a reduction in the COAH-computed obligation for new construction because it has no sites available, including the Tomu site, which it considers unsuitable for housing. It also claims that it is entitled to credits for some of its indigenous obligation because of rehabilitation work done in the last few years. Under COAH rules, credits for rehabilitation are governed by N.J.A.C. 5:93-3.4:

> (a) A municipality may receive credit for rehabilitation of low and moderate income substandard units performed subsequent to April 1, 1990.
>
> (b) Units shall be eligible for crediting if:
>
> 1. They were rehabilitated up to the applicable code standard and that the average capital cost expended on rehabilitating the housing units was at least $8,000; and
>
> 2. The unit is currently occupied by the occupants who resided within the unit at the time of rehabilitation or by other eligible low or moderate income households.

[13] This does not include Carlstadt's third round obligations as implemented by COAH's "growth share" regulations. N.J.A.C. 5:94-1.1 *et seq.*

> (c) Credits for rehabilitation shall not exceed the rehabilitation component and shall only be credited against the rehabilitation component.

Carlstadt proved at trial that several dwelling units in the municipality were the beneficiaries of block grants exceeding $8,000 each to be used for unspecified purposes, but presumably rehabilitative in nature. However, it did not satisfy the requirement of proving that any unit "is currently occupied by the occupants who resided within the unit at the time of rehabilitation or by other eligible low or moderate income households." Thus, Carlstadt is not entitled to any credits against its twelve unit obligation for indigenous need.

East Rutherford's current[14] cumulative affordable housing obligation as determined by COAH is 104 units. Thirty-four of these units represent satisfaction of an indigenous need and the balance of 70 units represents East Rutherford's new construction component. Unlike Carlstadt, East Rutherford neither challenges the new construction component of its fair share obligation nor seeks a vacant land adjustment. Like Carlstadt, however, it claims entitlement to credits for recent rehabilitation efforts. However, also like Carlstadt, and for the same reasons, it has failed to satisfy the proof requirements of N.J.A.C. 5:93-3.4(b)(2). Thus, East Rutherford is not entitled to any credits against its 34 unit obligation for indigenous need.

[14] This does not include East Rutherford's third round obligations as implemented by COAH's "growth share" regulations. N.J.A.C. 5:94-1.1 *et seq.*

Under N.J.A.C. 5:93-4.1 and -4.2, where developable land is supposedly scarce, a municipality may attempt to demonstrate that it does not have the physical capacity to address the fair share housing obligation calculated by COAH. This is known as the "lack of land" or "vacant land" adjustment. It is up to the municipality to prove its entitlement to this adjustment. N.J.A.C. 5:93-4.2. This process involves the identification of all appropriate vacant land in the municipality and the assignment thereto of dwelling unit densities, which produces what COAH calls the municipal realistic development potential (RDP). N.J.A.C. 5:93-4.2(f). Another way of expressing this adjustment process is to recognize that a land poor municipality is entitled to a vacant land adjustment or "adjustment due to available land capacity." However, in order to obtain this adjustment, the municipality must perform an exhaustive planning analysis and convince the court of its clear entitlement to an adjustment.

The actual calculation of RDP is not subject to arithmetic precision or mathematical perfection. It is based upon an assessment of the competent factual and expert evidence, informed by the gloss of COAH rules, and ultimately distilled into a concrete number. It is neither forensic alchemy nor judicial sleight-of-hand that results in the RDP. Rather, it emerges from the overarching notion that whatever the development potential is calculated to be, it must perforce be based upon a foundation of

realism. The question to be answered is, what is the realistic (not necessarily the maximal) development capacity of the land?

The process of computing the RDP is expressly outlined in N.J.A.C. 5:93-4.2 and is supposed to begin with the municipality creating a map showing all existing land uses. Next, the municipality should prepare an inventory of all vacant parcels by block and lot. Third, the municipality may exclude certain vacant lands from the inventory based upon certain objective conditions. Fourth, the municipality must presumptively include all other vacant lands and may include underutilized, but not vacant, lands including certain golf uses, nurseries and farms, and nonconforming uses. In connection with nonvacant land, COAH may request confirmation from the owner indicating the site's availability for inclusionary development. Fifth, land may be excluded from the inventory by the municipality if it falls within any of the following categories:

1. Constrained agricultural lands.
2. Environmentally sensitive lands.
3. Historic and architecturally important sites.
4. Certain active recreational lands.
5. Certain conservation, parklands, and open space lands.
6. Other sites determined to be not suitable for low and moderate-income housing.

The final step in the RDP recipe is to assign a site-specific density and percentage set-aside for each parcel that

has survived the culling process. The *minimum* presumptive density shall be six units per acre and the *maximum* presumptive set-aside shall be 20 percent. The regulations require a consideration of "the character of the area surrounding each site and the need to provide housing for low and moderate income households in establishing densities and set-asides for each site." N.J.A.C. 5:93-4.2(f).

Before completing the computation of RDP, I must point out that the criteria for inclusion in RDP is not the same criteria used to determine the inclusion or exclusion of a site as part of an ultimate compliance mechanism. N.J.A.C. 5:93-5.3 provides guidance as to which sites are appropriate to be designated for inclusionary development. It includes the requirement that the site be "available, suitable, developable, and approvable, as defined in N.J.A.C. 5:93-1." These criteria -- except arguably suitability -- do not apply when RDP is computed. Rather, they play a role when the municipality's compliance plan reveals those sites to which it intends to confer incentive inclusionary zoning or other site-specific affirmative measures to meet the RDP. Thus, the only two relevant criteria for RDP purposes are 1) planning concerns and 2) affordable housing needs.

Carlstadt argues that it has neither vacant nor underutilized land that could accommodate housing, much less affordable housing, and therefore its RDP should be fixed at zero. The Special Master concurs, to the extent that he agrees that Carlstadt has scarce

land resources, but disagrees that the Tomu site is inappropriate for housing. Indeed, as the Special Master noted, the Tomu property is "the only game in town."

To make its argument, Carlstadt contends that the Tomu site is unsuitable for housing because it is located on a cul de sac and isolated from the already-residentially developed areas of Carlstadt. A careful, nuanced analysis of actual adjacent uses, the surrounding road network, and local environmental conditions was eschewed in favor of the default position that simply because the Tomu land was approximately three miles from the core of municipal services (municipal building, public safety facilities, library, and schools) it was not appropriate for housing. This undefined concept of site isolation as a basis for unsuitability for housing is belied by the recent NJMC approval of a 614 unit residential development in East Rutherford on a distant and isolated area of Route 3. This project, approved by the NJMC in May 2005, shares many of the same attributes of the Tomu land, yet it was thought fully appropriate for residential development by the NJMC. In like vein, during the trial, the NJMC virtually conceded site suitability of the Tomu site and did not seriously dispute that the Tomu land in Carlstadt could be used for housing. However, it clearly preferred that it be utilized for recreation purposes in accordance with the NJMC Master Plan and not for high density housing.

Carlstadt's position regarding site suitability is untenable and unpersuasive, even though it was expressed by the experienced expert on behalf of the municipality. I conclude that her ultimate opinion constitutes nothing more than a net opinion, the product of the personal views of the expert, untethered to objective standards and principles in the discipline of professional planning. The net opinion rule provides that an expert's "bare conclusions, unsupported by factual evidence" are inadmissible. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). The rule often focuses upon "the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Ibid. In this regard, the net opinion rule requires the expert witness "to give the why and wherefore of his expert opinion, not just a mere conclusion." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996). It is insufficient for an expert simply to follow slavishly an "accepted practice" formula; there must be some evidential support offered by the expert establishing the existence of the standard. A standard that is personal to the expert is equivalent to a net opinion. Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999). In Kaplan v. Skoloff, 339 N.J. Super. 97 (App. Div. 2001), an attorney's expert opinion was rejected in a legal malpractice case for the following reasons:

> Plaintiff's expert offered no evidential support establishing the existence of a standard of care, other than standards that were apparently personal to himself. In this regard, Ambrosio failed to reference any written document or unwritten custom accepted by the legal community recognizing what would constitute a reasonable settlement under the facts presented in this case. In this stark absence of supporting authority, Ambrosio provided only his personal view, which, as we have explained, "is equivalent to a net opinion."(quoting Taylor v. DeLosso, 319 N.J. Super. at 180).
>
> [339 N.J. Super at 103.].

In the instant case, Carlstadt's expert opinion regarding site suitability was similarly barren of evidential support, and I reject it. In fact, using COAH parameters for suitability found in N.J.A.C. 5:93-1.3 ("[s]uitable site means a site that is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in N.J.A.C. 5:93-4") it appears that the Tomu land in Carlstadt is plainly suitable for housing. The land that surrounds the Tomu site is dedicated to nature preservation, river access, and benign utility uses. The Special Master described the area as positively "bucolic" in comparison to the Route 3 residential development recently approved in East Rutherford. Although it is at the end of a long cul de sac (Paterson Plank Road) that also serves as a major service road along the northern edge of facilities at the New Jersey Sports and Exposition Authority, the site has access to a significant thoroughfare that is plainly capable of handling the anticipated traffic. Carlstadt did not present any expert evidence that the capacity of the road network would be inappropriate for

the proposed housing; its best argument seemed to be that potential residents would encounter congestion when the New Jersey Sports and Exposition Authority's facilities were operating or that they might endure inconvenience if the road were closed because of an accident or other emergency. These arguments do not militate against the development of housing on the site. Even Carlstadt's argument about the land's remote location -- as compared to Carlstadt's developed "downtown" -- is unpersuasive because Paterson Plank Road provides excellent access to points north and east, including the already-residentially developed areas of Carlstadt and East Rutherford. Finally, Carlstadt did not demonstrate how the Tomu uplands, already being used for commercial purposes, would detract from, degrade, or defeat the environmental policies of the NJMC.

Table 1 summarizes my computation of RDP according to COAH methodology and results in Carlstadt's RDP of 72 units of low and moderate income housing:

Table 1:
Summary of RDP Calculation
for Carlstadt

Site	Unconstrained Area (In acres)	Units per Acre	Total Units	Set-Aside	RDP Units
Tomu Site	3.584	100	358	20%	72

I selected a density of 100 units per acre because it is consistent with the approximate average of the density approved on

the East Rutherford portion of the Tomu site by the NJMC in 1989 of 66[15] units per acre, and the recently approved density of 146[16] units per acre on the Route 3 site by the NJMC. I also took into account the Special Master's reminder that a density of 110[17] units per acre was the agreed-upon density in East/West Venture v. Fort Lee, 286 N.J. Super. 311, 322 (App. Div. 1996). Tomu's final proposal for a builder's remedy results in a density of 117[18] units per acre, which is not much more than the density I selected for purposes of computed Carlstadt's RDP.

A developer is entitled to a builder's remedy if: (1) it succeeds in Mount Laurel litigation; (2) it proposes a project with a substantial amount of affordable housing; and (3) the site is suitable, that is, the municipality fails to meet its burden of proving that the site is environmentally constrained or construction of the project would represent bad planning. Mount Laurel II, 92 N.J. at 279-280; Shire Inn, Inc. v. Borough of Avon-by-the-Sea, 321 N.J. Super. 462, 465 (App. Div.), certif. denied, 162 N.J. 132 (1999). "The builder's remedy is a device that rewards a plaintiff seeking to construct lower income housing for success in bringing about ordinance compliance through

[15] 350 units were approved on 5.286 acres of upland.

[16] 614 units were approved on 4.2 acres of upland.

[17] 585 units were approved on 4.88 acres.

[18] 420 units are proposed on 3.584 acres of upland.

litigation." Allan-Deane Corp. v. Bedminster Township, 205 N.J. Super. 87, 138 (Law Div. 1985).

Even if a developer satisfies these three prongs, it may still be disqualified from receiving a builder's remedy if it is found that the developer acted in bad faith or has used the *Mount Laurel* doctrine as a bargaining chip:

> Care must be taken to make certain that Mount Laurel is not used as an unintended bargaining chip in a builder's negotiations with the municipality, and that the courts not be used as the enforcer for the builder's threat to bring Mount Laurel litigation if municipal approvals for projects containing no lower income housing are not forthcoming. Proof of such threats shall be sufficient to defeat Mount Laurel litigation by that developer.
>
> [Mount Laurel II, 92 N.J. at 280.]

The loss of a builder's remedy to an otherwise-qualifying plaintiff-developer is neither novel, nor shocking. The interests of the absent class -- the unhoused poor -- for which the litigation is prosecuted, will not be prejudiced as long as the municipality's compliance mechanism is capable of satisfying the ultimate fair share obligation. Other land in the municipality that is identified as being realistically developable with affordable housing will absorb the disqualified plaintiff-developer's complement of low and moderate-income housing. In this case, however, no other land in either municipality has been proffered as being capable of providing affordable housing. Ironically, the NJMC, just a few months ago, squandered an

opportunity to inject affordable housing into East Rutherford as part of the 614-unit residential development approved for the Route 3 Service Road. Thus, even if some bad conduct exists on the part of plaintiff, it must be balanced by the needs of the absent class.

The record produced at trial does not support the conclusion that Tomu acted in bad faith or manifestly engaged in conduct prohibited by the *Mount Laurel* doctrine. Notwithstanding Tomu's conceded profit motivation, it cannot rightly be criticized as abusing *Mount Laurel* principles simply because of its incessant efforts to develop its land. The administrative proceedings that are pending in the Office of Administrative Law have little bearing on Tomu's present application. There is nothing contrary to the public interest for a land owner to attempt to keep as many of its development options open and available as possible. The doctrine of election of remedies is inapposite when the rights of the absent class of unsheltered poor are involved. Although there is some evidence in the record that suggests that Tomu representatives may have allowed the words "Mount Laurel Project" to slip from their lips during one or more discussions with, or in the presence of, municipal officials, I find those comments to be stray and harmless error, not worthy of a wholesale disenfranchisement that would redound to the detriment of the absent class.

No responsible local official is unaware of the obligations that the *Mount Laurel* doctrine has imposed. To argue seriously that the chief executive officers of the NJMC, East Rutherford, and Carlstadt were taken aback by mention of affordable housing in connection with the development of vacant land is almost laughable. The dreadful record of disaccomplishment of the NJMC, East Rutherford, and Carlstadt since Mount Laurel II and the adoption of the FHA speaks volumes more than an amateurish utterance by a Tomu representative of the new seven dirty words,[19] "Mount Laurel low and moderate income housing." *Mount Laurel* litigation must not devolve into a dreaded game of gotcha, where the mere expression of proscribed words results in a disqualification. Taken in context and under the totality of the circumstances I can not say that the Tomu representatives' references to potential *Mount Laurel* litigation had any negative effect upon the public interest, other than the transient righteous indignation suffered by the officials who heard the comments.

In this case, Tomu satisfies all three prongs of the three-prong test for entitlement to a builder's remedy. First, it successfully participated in obtaining summary judgment declaring East Rutherford's and Carlstadt's development regulations

[19] The original seven dirty words, of course, are attributed to comedian George Carlin. See http://en.wikipedia.org/wiki/George_Carlin (last visited on November 8, 2005). I will not repeat them here, but they may be found at FCC v. Pacifica Foundation, 438 U.S. 726, 751; 98 S. Ct. 3026, 3041; 57 L. Ed. 2d 1073, 1095 (1978).

invalid, thereby necessitating rezoning and the appointment of the Special Master. Second, it has offered to make substantial contributions to the municipalities' nonexistent stock of family-type low and moderate income housing units. Third, the municipalities have failed to demonstrate that because of substantial planning concerns, Tomu's proposed use of its land in both municipalities is clearly contrary to sound land use principles. Said another way, the competent evidence clearly establishes that the land is fully capable of being developed for Tomu's proposed development and there are neither legitimate planning concerns nor environmental constraints that would hinder a sound development. The site is qualified for affordable housing substantially in the manner proposed by Tomu.

One issue that received attention at the trial was the manner of conveying wastewater from the site. The Carlstadt inclusionary development will be serviced by the Carlstadt Sewerage Authority. The East Rutherford inclusionary development could be serviced by the East Rutherford Sewerage Authority, but Tomu wants all of the development's sewage to be serviced by the infrastructure of the Carlstadt Sewerage Authority under an inter-municipal agreement authorized by Dynasty Building Corp. v. Borough of Upper Saddle River, 267 N.J. Super. 611 (App. Div. 1993) and Samaritan Center, Inc. v. Borough of Englishtown, 294 N.J. Super. 437 (Law Div. 1996), as validated by Bi-County Dev. of Clinton, Inc. v. Borough of High Bridge, 174 N.J. 301, 327-328

(2001). Since East Rutherford enjoys its own sewer network, there is no sound reason, on the record presented in this trial, for me now to declare that Tomu is entitled to a Bi-County-like remedy. It is simply premature to engineer the wastewater management of the project, keeping in mind that Tomu has demonstrated the feasibility of dealing with its sewage discharge through either or both municipalities' infrastructure.

In light of the foregoing, I shall enter an order granting Tomu's application for a builder's remedy to allow its lands in East Rutherford and Carlstadt to be developed with a mixed use project as follows:

> The development In East Rutherford shall consist of no more than 420 residential units consisting of 360 market rate units and 60 affordable rental units, plus no more than 420 residential units consisting of 340 market rate units and 80 affordable rental units in Carlstadt. These units shall be located in two midrise buildings which height shall not exceed the lesser of Federal Aviation Administration elevation guidelines or 230 feet. All dimensional requirements of the NJMC shall be satisfied, as must all applicable requirements of the Residential Site Improvement Standards found in N.J.A.C. 5:21-1 *et. seq.*[20] In addition, there shall be no more than 38,000 square feet of "ancillary development" that shall include limited commercial facilities (such as a dry cleaner or convenience store), recreational facilities, public safety facilities, and meeting rooms. The development shall include a marina available to the public, to be overseen by the NJMC, but reserving five berths for the development or its residents. Tomu shall construct a riverwalk promenade, plus public parking, to allow access to the Hackensack River by members of the public, all as directed by the NJMC and in accordance

[20] This decision does not prohibit Tomu from applying to the appropriate agency for variances, exceptions, waivers or other relief from applicable regulations.

> with applicable law. The development shall comply with all other rules and regulations of the NJMC that are not inconsistent with this builder's remedy. Finally, the development shall comply with all Federal and local statutes, regulations, development regulations or ordinances that may apply and shall also comply with all other State laws including, but not limited to, the Fair Housing Act, N.J.S.A. 52:27D-301 *et seq.*; Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 *et seq.*; the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 *et seq.*; the Water Supply Management Act, N.J.S.A. 58:1A-1 *et seq.*; the Water Pollution Control Act, N.J.S.A. 58:10A-1 *et seq.*; the Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 *et seq.*; the Water Quality Planning Act, N.J.S.A. 58:11A-1 *et seq.*; the Safe Drinking Water Act, P.L. 1977, c.224, N.J.S.A. 58:12A-1 *et seq.*, the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 *et seq.*, and all implementing rules.

The order shall further declare that East Rutherford's and Carlstadt's land use regulations remain invalid and unconstitutional insofar as they continue past exclusionary practices. The East Rutherford and Carlstadt Planning Boards and the respective governing bodies shall immediately prepare comprehensive compliance plans (including appropriate strategies to address the indigenous and unmet needs) for each municipality, together with zoning and planning legislation to satisfy the fair share obligations of rounds one and two, and the unmet need, all in compliance with COAH regulations. They shall draft meaningful Housing Element and Fair Share Plans, together with fee ordinances (if appropriate) and spending plans that are consonant with COAH rules. They shall exercise planning discretion in deciding whether to employ a program of rehabilitation grants,

regional contribution agreements, accessory apartments, mobile homes, overlay zones, or any other incentive devices to meet the fair share and unmet need. This plan shall be completed, adopted, and presented to the court no later than February 28, 2006. In default thereof, *all* development regulations in East Rutherford and Carlstadt shall be permanently invalidated and a scarce resource order enjoining *all* land use development applications in East Rutherford and Carlstadt (whether before the Planning Board or Board of Adjustment or the NJMC) shall become automatically effective. On the other hand, if the municipalities, or either of them, comply, they will be entitled to a six-year judgment of repose commencing no earlier than February 28, 2006.

The Special Master shall regularly consult with designated representatives of East Rutherford and Carlstadt and their Planning Boards and governing bodies during the preparation of the compliance plans and he shall provide appropriate input and constructive criticism throughout the process.

IV. CONCLUSION

I understand that "no one wants his or her neighborhood determined by judges." Hills Dev. Co. v. Bernards, supra, 103 N.J. at 63-64. Nevertheless, this case demonstrates the risks that attend the failure of municipalities to advance proactively affordable housing opportunities. Hiding in plain sight of the

NJMC, each of the defendant-municipalities elected to turn a cold shoulder to the needs of those citizens most in need of decent and affordable shelter.[21] In like vein, the NJMC stood mute for years while prospects for affordable housing were lost in East Rutherford and Carlstadt, and available land grew scant. The NJMC is complicit in the municipalities' commission of constitutional torts and the silent acquiescence of conditions where not one unit of identifiable affordable housing has been built in twenty years. Where other governmental actors have failed to conform their conduct to the dictates of the constitution, it becomes the duty of the judiciary to order remediation. That, simply, is what has happened here. The stark reality of the situation is that in the absence of court intervention, low and moderate income housing would remain as illusory today as it has since the inception of the NJMC and its predecessor agency more than three decades ago.

I request that the Special Master prepare the appropriate order to memorialize this decision and submit it to all counsel and to the court as soon as practicable pursuant to R. 4:42-1(c).

---

[21] As I write this opinion, I am aware that France is encountering its worst civil unrest in four decades, partly because of neglecting the shelter needs of its most economically vulnerable citizens, incongruously living in the *suburbs* of Paris. See "France Riots Spill Into 8th Day," http://www.cbsnews.com/stories/2005/11/03/world/main1006022.shtml (last visited on November 8, 2005) and *New York Times* article "Inside French Housing Project, Feelings of Being the Outsiders," http://www.nytimes.com/2005/11/09/international/europe/09projects.html (last visited on November 9, 2005). The United States, including New Jersey, has a history of *urban* violence that has been mitigated, however, -- in part -- by the creation of new housing opportunities (and some better jobs and schools) for members of economic underclasses. One of the goals of the *Mount Laurel* doctrine is to consign such unrest and violence to the dustbin of history.

Exhibit

E

ROBERT T. REGAN, ESQ.
Special Master
345 Kinderkamack Road
P.O. Box 214
Westwood, New Jersey 07675
(201) 664-3344

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5894-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

Civil Action

FINAL JUDGMENT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5895-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

Civil Action

FINAL JUDGMENT

THIS MATTER coming on to be heard before the Honorable Jonathan N. Harris on April 26, 2006 in the presence of Thomas Jay

Hall, Esq. and Robert Kasuba, Esq. of the firm of Sills, Cummis, Epstein & Gross, P.C., attorneys for plaintiff Tomu Development Co., Inc. ("plaintiff" or "Tomu"); Richard J. Allen, Jr., Esq. of the firm of Kipp & Allen, LLP, attorney for defendants Borough of Carlstadt and Planning Board of Carlstadt; Beverly M. Wurth, Esq. of the firm of Calo Agostino, P.C., attorney for defendants Borough of East Rutherford and Planning Board of East Rutherford; and Christine Piatek, Esq., Deputy Attorney General (Zulima V. Farber, Attorney General), attorney for defendant New Jersey Meadowlands Commission ("NJMC"), upon the application of defendants Borough of Carlstadt and Planning Board of the Borough of Carlstadt and Borough of East Rutherford and Planning Board of the Borough of East Rutherford (hereinafter collectively "municipal defendants") for entry of a Judgment of Repose pursuant to Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983) (hereinafter "Mount Laurel II"), and the Court having previously entered an Order granting plaintiff a builder's remedy and determining that the land use regulations of the municipal defendants remain invalid and unconstitutional insofar as such provisions continue past exclusionary practices, which determination was memorialized in an Order dated November 28, 2005, which also obligated the municipal defendants to draft meaningful

Housing Element and Fair Share Plans and other legislation consonant with rules of the Council On Affordable Housing (hereinafter "COAH"), and the Court having rendered a written Decision dated May 19, 2006, the provisions of which are incorporated herein by reference, and good cause appearing:

IT IS on this 1 day of JUNE, 2006:

ORDERED AND ADJUDGED that effective on June 1, 2006 and continuing until further Order of this Court as follows:

1. There are hereby created, as independent judicial officers, a Mount Laurel Implementation Monitor for the Borough of East Rutherford and a Mount Laurel Implementation Monitor for the Borough of Carlstadt (collectively called "Monitor"). All reasonable fees, costs, and expenses of the Monitor shall be borne by the Boroughs of East Rutherford and Carlstadt in proportion to the work done on behalf of each municipality by the Monitor. The Monitor shall have no role in local government affairs except as provided in this judgment. Excluding matters within the sole jurisdiction of the New Jersey Meadowlands Commission, no zoning permit, building permit, or any other authorization to use or develop land or structures within the Borough of East Rutherford or the Borough of Carlstadt shall be valid until and unless it is reviewed and approved by the Monitor who shall have the following

additional powers:

A. The Monitor shall have unfettered access to all documents and information the Monitor determines are necessary to assist it in the execution of its duties. The Monitor shall have the authority to meet with, and require reports on any relevant subject from any officer, agent, or employee of the Boroughs of East Rutherford and Carlstadt. The Monitor shall receive advance notice of, and have the option to attend scheduled meetings of the governing bodies, planning boards, and boards of adjustment.

B. After giving due regard to the current (but now suspended) land use development legislation heretofore enacted by the municipalities, the Monitor shall forthwith adopt all necessary rules and regulations (including, if appropriate, interim or temporary rules and regulations) - in lieu of zoning, land use, and development ordinances - that will immediately provide reasonable opportunities for the creation of low and moderate income housing in accordance with the Fair Housing Act (hereinafter "FHA") and the rules and regulations of COAH. Each municipality shall immediately adopt by ordinance the Monitor's rules and regulations as the municipality's respective land use legislation. If a municipality fails or refuses to adopt the Monitor's rules and regulations as its respective land use

legislation, said rules and regulations shall nevertheless substitute for and act as the land use laws of the respective municipality, to be enforced as such by the Monitor and the municipality's agents, officers, and employees.

C. The monitor shall oversee and review all applications for development, requests for land use or building permits, requests for interpretations, and appeals that would otherwise be within the jurisdiction of the boards of adjustment, planning boards, or administrative officials' jurisdiction under the Municipal Land Use Law. In order to validate any application for development, request for land use or building permit, request for interpretation, or appeal, the approval of the Monitor shall be required. The Monitor shall have the authority to disapprove, reverse, or reject any application for development, application for a land use or building permit, request for an interpretation, or appeal if it would frustrate, impede, or counteract the creation of low and moderate income housing in the municipality. Similarly, the Monitor shall have the authority to overrule and reverse the denial of an application for development, request for a land use or building permit, request for an interpretation, or appeal if, in the exercise of the Monitor's discretion and judgment, such application for development, request for a land use

or building permit, request for an interpretation, or appeal would foster the creation of low and moderate income housing opportunities.

D. The Monitor shall prepare a formal Housing Element and Fair Share Plan (hereinafter "Affordability Plan") for each municipality. The Affordability Plan shall comply with the FHA and all current rules and regulations of COAH, and shall include provisions to meet all obligations relating to indigenous need, new construction, unmet need, and COAH's third round rules. The Monitor shall be permitted to utilize and implement any technique authorized by the FHA or COAH including but not limited to regional contribution agreements, accessory apartments, and mobile homes to achieve compliance. Each municipality shall be required to adopt the Affordability Plan of the Monitor and shall take all appropriate actions, including appropriating funds and executing all necessary documents, to implement the provisions of the Affordability Plan.

E. The Monitor shall act in the place and stead of the municipality or its designated agent (as provided by statute, regulation, or common practice) in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey

Meadowlands Commission. In this capacity, the Monitor shall advocate, either district-wide or on an application-by-application basis, for the creation of affordable housing opportunities within each municipality even if the New Jersey Meadowlands Commission has sole jurisdiction over the matter. The Boroughs of East Rutherford and Carlstadt, together with their agents, officers, and employees, are enjoined and barred from taking any action, whether orally or in writing, in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission unless such action is approved by the Monitor in writing in advance.

F. The Monitor shall apply to COAH, when the instant litigation is concluded, for substantive certification pursuant to then extant statutes, rules, and regulations.

G. The Monitor shall take such other actions, including but not necessarily limited to the hiring of experts, agents, and employees, that are reasonably necessary for conducting the activities of the Monitor. Additionally, the Monitor shall have authority to require the municipalities and their agents, officers, and employees to take any actions the Monitor believes are necessary for compliance with this judgment.

2. All zoning, land use, and development ordinances of the Borough of East Rutherford and the Borough of Carlstadt, including site plan and subdivision ordinances, are hereby suspended and rendered ineffectual relating to any and all future land use, construction, or development efforts in the municipalities. Such ordinances shall be treated as advisory only and shall serve as commentary to serve the Monitor. Until the Monitor adopts the rules and regulations as required by this judgment (whether interim, temporary, or permanent) 1) no development applications shall be reviewed by the municipalities' boards of adjustment or planning boards and 2) no building or other land use permits shall be issued by any officer, agent, or employee of the defendant municipalities, except those necessary to avoid imminent peril to life or property. Said ordinances, however, shall continue in full force and effect for all uses and structures that currently exist (meaning that there is a valid certificate of occupancy or building permit in effect) in order to prevent the illegal use of land and structures. Uses and structures that have been approved by a local construction official, zoning officer, board of adjustment, or planning board but have not yet commenced operation or begun construction are prohibited from commencing operation or beginning construction until reviewed and approved by the Monitor

for compliance with this judgment.

3. The terms and conditions of the Order Imposing Scarce Resource Restraints dated May 13, 2005 (annexed to this Final Judgment) are continued until further order of the court.

4. Robert T. Regan, Esq. is appointed the Monitor. If the Monitor resigns or is unable to serve, a successor shall be appointed by the court within thirty days. The Monitor shall serve until further order of the court or until final substantive certification is obtained from COAH, whichever is sooner.

5. All elected officials of the Boroughs of East Rutherford and Carlstadt shall be required to certify in writing, and submit their certifications to the Monitor no later than December 31, 2006, that they have read the Preface (pp. xi to xiv), Prologue (pp. 3 to 11), and Chapter XI (pp. 175 to 185) of Suburbs Under Seige by Charles M. Haar (Princeton University Press 1996).

6. The municipalities are not entitled to a judgment of repose because they have not met their constitutional obligations and have not complied with the FHA, including the COAH third round obligations. In lieu of a judgment of repose, upon the conclusion of this case the municipalities shall apply for and obtain substantive certification through COAH's procedures.

7. A copy of this Final Judgment shall be served by the

Special Master upon all counsel of record within 5 days of the date hereof.

JONATHAN N. HARRIS, J.S.C.

Exhibit

F

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5894-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT,
PLANNING BOARD OF CARLSTADT,
and the NEW JERSEY
MEADOWLANDS COMMISSION

Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5895-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF EAST RUTHERFORD,
PLANNING BOARD OF EAST
RUTHERFORD, and the NEW JERSEY
MEADOWLANDS COMMISSION

Defendants,

Decided: May 19, 2006

Robert A. Kasuba and Thomas Jay Hall (Sills Cummis Epstein & Gross, P.C., attorneys) argued the cause for plaintiff.

Richard J. Allen, Jr. (Kipp & Allen, LLP, attorneys) argued the cause for defendant Borough of Carlstadt and Planning Board of Carlstadt.

Beverly M. Wurth (Calo Agostino, A Professional Corporation, attorneys) argued the cause for defendant Borough of East Rutherford and Planning Board of East Rutherford.

Robert L. Gambell and Christine Piatek (Zulima V. Farber, Attorney General, attorney) argued the cause for defendant New Jersey Meadowlands Commission.

JONATHAN N. HARRIS, J.S.C.

PREFACE

More than six months have elapsed since I unequivocally declared that Carlstadt and East Rutherford had neglected their constitutional obligations under the *Mount Laurel*[1] doctrine and their statutory duties under the Fair Housing Act. No responsible local official is unaware of the responsibilities that these principles have imposed. Yet, ignoring my order to comply fully by February 28, 2006 (110 days from the November 10, 2005 opinion), the defendant municipalities have again disappointed the citizens of the State of New Jersey. I start my analysis of the situation with the following thoughts in mind:

> If not you, who? If not now, when?
>
> (Paraphrased from the Talmud)

> Given the importance of the societal interest in the Mount Laurel obligation and the potential for inordinate delay in satisfying it, presumptive validity of an ordinance attaches but once in the face of a Mount Laurel challenge. Equal treatment requires at the very least that government be as fair to the poor as it is to the rich in the provision of housing opportunities. That is the basic justification for Mount Laurel. When that clear obligation is breached, and instructions given for its satisfaction, it is the municipality, and not the plaintiffs, that must prove every element of compliance. *It is not fair to require a poor man to prove you were wrong the second time you slam the door in his face.*
>
> *Mount Laurel*, supra, 92 N.J. at 190-191. (Emphasis added.)

[1] So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158 (1983).

INTRODUCTION

This is the compliance portion of a *Mount Laurel* II builder's remedy action that now requires the defendant municipalities to comply tangibly with their constitutional obligations regarding affordable housing. On November 10, 2005, in a written opinion, I declared that Carlstadt and East Rutherford had engaged in conduct unbecoming local government in New Jersey. In addition to awarding plaintiff a builder's remedy, I gave the municipal defendants one last chance each to legislate frameworks that would constitute compliance with their obligations to ensure reasonable opportunities for the actual construction of low and moderate income housing within their borders. Notwithstanding being painfully aware that such tasks would be complicated in light of the mutual exclusivity of zoning authority attributable to the New Jersey Meadowlands Commission's control of vast lands in East Rutherford and Carlstadt, they have incompletely performed. Accordingly, I must reluctantly employ drastic steps to fulfill the judiciary's duty to vouchsafe fidelity to constitutional norms. *Mount Laurel* II commands such actions in the face of such longstanding and blatant disregard for the unhoused and underhoused poor.

II. FACTUAL BACKGROUND

The factual background of this case is documented in the prior opinion dated November 10, 2005, and familiarity with that opinion

is assumed. Following the builder's remedy phase of the case, I ordered the following:

> East Rutherford's and Carlstadt's land use regulations remain invalid and unconstitutional insofar as they continue past exclusionary practices. The East Rutherford and Carlstadt Planning Boards and the respective governing bodies shall immediately prepare comprehensive compliance plans (including appropriate strategies to address the indigenous and unmet needs) for each municipality, together with zoning and planning legislation to satisfy the fair share obligations of rounds one and two, and the unmet need, all in compliance with COAH regulations. They shall draft meaningful Housing Element and Fair Share Plans, together with fee ordinances (if appropriate) and spending plans that are consonant with COAH rules. They shall exercise planning discretion in deciding whether to employ a program of rehabilitation grants, regional contribution agreements, accessory apartments, mobile homes, overlay zones, or any other incentive devices to meet the fair share and unmet need. This plan shall be completed, adopted, and presented to the court no later than February 28, 2006. In default thereof, *all* development regulations in East Rutherford and Carlstadt shall be permanently invalidated and a scarce resource order enjoining *all* land use development applications in East Rutherford and Carlstadt (whether before the Planning Board or Board of Adjustment or the NJMC) shall become automatically effective. On the other hand, if the municipalities, or either of them, comply, they will be entitled to a six-year judgment of repose commencing no earlier than February 28, 2006.

For its first and second round obligations as derived by the Council on Affordable Housing (COAH) under the Fair Housing Act, N.J.S.A. 52:27D-301 et. seq. (FHA), East Rutherford was obligated to provide 70 units of new construction and 34 units of rehabilitated housing. Since the builder's remedy provided for 60 affordable units on the Tomu site, East Rutherford did not have far

to stretch to find the additional ten units to fulfill its complement of new construction. Carlstadt, on the other hand, had a COAH-generated obligation of 186 units of new construction and 12 units of rehabilitated housing. The builder's remedy provided 80 affordable units in Carlstadt, thereby producing an unmet need for new construction of 106 units.

In order to meet the mandate of this court's order to rezone, both municipalities engaged in legislative activities. East Rutherford proposes three zoning changes. The first, implementing a mandatory 20% set aside for affordable units, will apply in its Neighborhood Commercial District. The second, an overlay zone providing for the redevelopment of industrial properties, will affect an 18-acre site known as the Star-Glo site and a separately owned 7.44-acre site. Third, a "Mixed Residential Overlay Zone," will affect a 4.79-acre site known as the Sequa site. The evidence presented regarding these zoning changes vis-à-vis site suitability and feasibility of development within the next six years was scanty and unpersuasive. Additionally, East Rutherford intends to implement a development fee ordinance. Conspicuously missing from East Rutherford's plan is any treatment of its rehabilitation obligation. Furthermore, East Rutherford eschews its COAH round three obligations, claiming that they are irrelevant to this proceeding.

In addition to adopting its own development fee ordinance, Carlstadt created two overlay zones in what it calls "upland Carlstadt" to fulfill its unmet need of new construction. One overlay zone affects Carlstadt's entire residential district and the other affects a light industrial area. In addition, Carlstadt claims that it has committed itself to redevelop municipally owned land (the former Washington School) to 100% affordable senior housing, but the details are conspicuously ambiguous. As with East Rutherford, Carlstadt has taken no meaningful steps to address its rehabilitation obligation and has ignored its round three obligations.

III. DETERMINATIONS OF LAW

At this stage of proceedings, the municipalities bear a tremendous burden of persuasion. Not only have they lost the builder's remedy portion of the litigation, but also their land use regulations have been found constitutionally wanting. This latter deficiency is required to be fixed as part of a unitary piece of litigation. Although the Special Master finds some salvation in East Rutherford's compliance effort, I cannot agree with him. With regard to Carlstadt, its thinly veiled half-baked offering was rightly rejected by the Special Master, a conclusion that is well supported by the record.

When a municipality has been found to have failed in its constitutional mandate to provide realistic opportunities for low

and moderate income housing within its borders, the court, as here, gives it one last chance. With that last-chance opportunity, the municipality must hew to applicable COAH regulations. At the very least, a municipality must conform its conduct to meet its new construction obligation, its rehabilitation obligation, and if a vacant land adjustment is granted (as here with Carlstadt), its unmet need. The easiest determination to make in this case relates to the utter failure and continued deafening silence of both municipalities to provide resources for their indigenous rehabilitation obligations. This is peculiarly significant because providing housing opportunities for rehabilitation purposes affects homegrown local citizens, not newcomers. Such efforts, usually to be applicable on a micro-local scale, are noteworthy for improving neighborhoods and individual qualities of life. Rehabilitation efforts do not implicate the more-feared large scale intrusions of mixed use or multifamily developments containing both market rate and affordable housing units. Although each defendant professes false piety that it is willing to participate in a recognized rehabilitation program administered by a county agency, no affirmative steps toward that end appear to have been seriously contemplated, much less planned for. This, again, is especially egregious because the rehabilitation obligation relates to existing residences and will most likely affect existing residents. The failure to address proactively a rehabilitation program for each

municipality's indigenous need leaves their current low and moderate income populace at grave risk to all of the ills associated with substandard housing.

Under past and present COAH rules, the municipalities were required, by the compliance due date of February 28, 2006, at least to designate an administrator to administer a rehabilitation program, submit a marketing plan, provide a framework of affordability controls for between six and ten years, fund up to $10,000 per unit of rehabilitation, submit a rehabilitation manual, and agree to submit to COAH monitoring. See N.J.A.C. 5:93-5.2; N.J.A.C. 5:94-4.3. It is no answer to their default that the municipalities plan to do all of this in the future. Their obligation was to comply before this litigation even commenced, and in the face of that initial failure, to comply by the date ordered in my November 10, 2005 written opinion.

Much more provocative is the failure of East Rutherford and Carlstadt to comply adequately with their recalculated new construction obligations and unmet need. East Rutherford must identify the reasonable likelihood that at least ten affordable units can be distilled from its revamped zoning regulations. In order to do this, it must designate sites and prove that they meet the criteria of N.J.A.C. 5:93-5.3(b)(availability, suitability, developability, and approvability). Instead of that painstaking proof, East Rutherford merely casts a blanket of a 20% set-aside

upon a land mass without demonstrating the likely yield of affordable units therefrom. Anecdotal information about the plans of developers and ongoing, incomplete applications is no substitute for the firm evidence required by COAH regulations. In addition, East Rutherford's planning efforts to encourage redevelopment for affordable residential use in an industrial district ignores whether any of the hoped-for sites are qualified to be counted under N.J.A.C. 5:93-5.3(b) as likely candidates for actual construction of affordable housing.

Carlstadt's efforts toward compliance stand on a different footing than East Rutherford's because it received a vacant land adjustment, and the Tomu builder's remedy will fulfill its new construction obligation. However, under N.J.A.C. 5:93-4.1, the difference between the initial new construction obligation and the recomputed (after a vacant land adjustment) obligation must be the subject of planning initiatives to ensure that if developable land becomes available in the future, there will be a firm mechanism in place to capture affordable housing opportunities on that land. Thus, the municipality must plan for this unmet need by legislative devices such as a redevelopment ordinance, a development fee ordinance, or an apartments-in-a-developed-area ordinance. N.J.A.C. 5:93-4.1(b). None of these strategies was used. Instead, Carlstadt uses a simplistic overlay zone technique that does not reveal the likely yield of units as to any potential properties in the future.

In addition, however, Carlstadt trumpets its plan to convert a former school into an affordable housing facility for seniors. None of the details of the proposal complies with N.J.A.C. 5:93-5.5, leaving the court and poor seniors in the dark as to the nature, scope, and timetable of the not-even embryonic development.

The missing link in all of the municipalities' compliance efforts has been the land in the jurisdiction of the New Jersey Meadowlands Commission. Contrary to plaintiff's view that East Rutherford and Carlstadt are required to lobby *affirmatively* for housing within their borders but beyond their control, I think that the municipalities should not be required to advocate purposefully positions that their elected officials deem contrary to the local public interest. This is especially so if it turns out that the New Jersey Meadowlands Commission is itself someday authoritatively obligated to ensure compliance with the *Mount Laurel* doctrine. However, recalcitrant municipalities, such as the defendants here, should not be allowed to inflict damage to affordable housing opportunities by either their active discouragement of such housing opportunities or by silence. As I will outline later, as part of the remedies section of this opinion, a Mount Laurel Implementation Monitor shall be appointed to speak on behalf of each municipality on matters affecting affordable housing in the New Jersey Meadowlands District in order to ensure that the inertia engendered by each municipality will no longer impede appropriate affordable

housing opportunities on lands in these municipalities under the control of the New Jersey Meadowlands Commission.

Among the remedies available to the judiciary if a municipality fails or refuses to comply with a court-ordered *Mount Laurel* rezoning effort is to enjoin all further development within the municipal borders. Another is to suspend all legislative barriers that prohibit multi-family uses while at the same time ensuring that any such development includes affordable housing. It is no answer that the court should give East Rutherford and Carlstadt one more chance to comply; that they misunderstood the court's direction; and now they will get it right. The reason for the absence of this last bite of the apple remedy is two-fold. First, the Supreme Court in *Mount Laurel* II would not countenance such a transparent delay tactic. Second, any further lag would only increase the detriment to plaintiff and the third party beneficiaries of plaintiff's builder's remedy by delaying the entry of a final, appealable judgment, again putting off into the future the ultimate disposition of this litigation. I must act *now* to end this litigation in a way that protects and preserves the interests of all concerned. One remedy that I have considered and rejected is the use of contempt proceedings against individual governmental actors or the municipal corporations themselves. Although monetary sanctions might well incite the defendant municipalities into action, and I truly understand the power of the wallet, I intend to

avoid the replication of local government errors that were committed in the past. Another reason I have eschewed the traditional contempt mode of ensuring compliance is to avoid the martyrdom syndrome that some public officials exploit. Rather than involve those governmental actors who have failed the public in the past, I have elected to simply remove them from the process and substitute a court-appointed monitor to oversee land development activities in East Rutherford and Carlstadt for the foreseeable future.

Here is my plan, to be effective on June 1, 2006, and continuing until further order of the court:

1. There are hereby created, as independent judicial officers, a Mount Laurel Implementation Monitor for the Borough of East Rutherford and a Mount Laurel Implementation Monitor for the Borough of Carlstadt (collectively called Monitor). All reasonable fees, costs, and expenses of the Monitor shall be borne by the Boroughs of East Rutherford and Carlstadt in proportion to the work done on behalf of each municipality by the Monitor. The Monitor shall have no role in local government affairs except as provided in this judgment. Excluding matters within the sole jurisdiction of the New Jersey Meadowlands Commission, no zoning permit, building permit, or any other authorization to use or develop land or structures within the Borough of East

Rutherford or the Borough of Carlstadt shall be valid until and unless it is reviewed and approved by the Monitor who shall have the following additional powers:

a. The Monitor shall have unfettered access to all documents and information the Monitor determines are necessary to assist it in the execution of its duties. The Monitor shall have the authority to meet with, and require reports on any relevant subject from any officer, agent, or employee of the Boroughs of East Rutherford and Carlstadt. The Monitor shall receive advance notice of, and have the option to attend, scheduled meetings of the governing bodies, planning boards, and boards of adjustment.

b. After giving due regard to the current (but now suspended) land use development legislation heretofore enacted by the municipalities, the Monitor shall forthwith adopt all necessary rules and regulations (including, if appropriate, interim or temporary rules and regulations) -- in lieu of zoning, land use, and development ordinances -- that will immediately provide reasonable opportunities for the creation of low and moderate income housing in accordance with the FHA and the rules and regulations of COAH. Each municipality shall immediately adopt by ordinance the Monitor's rules and regulations as the municipality's respective land use legislation. If a municipality fails or refuses to adopt the Monitor's rules and regulations as its respective land use legislation, said rules and regulations shall nevertheless substitute for and act as the land use laws of the respective municipality, to

be enforced as such by the Monitor and the municipality's agents, officers, and employees.

c. The Monitor shall oversee and review all applications for development, requests for land use or building permits, requests for interpretations, and appeals that would otherwise be within the jurisdiction of the boards of adjustment, planning boards, or administrative officials' jurisdiction under the Municipal Land Use Law. In order to validate any application for development, request for land use or building permit, request for interpretation, or appeal, the approval of the Monitor shall be required. The Monitor shall have the authority to disapprove, reverse, or reject any application for development, application for a land use or building permit, request for an interpretation, or appeal if it would frustrate, impede, or counteract the creation of low and moderate income housing in the municipality. Similarly, the Monitor shall have the authority to overrule and reverse the denial of an application for development, request for a land use or building permit, request for an interpretation, or appeal if, in the exercise of the Monitor's discretion and judgment, such application for development, request for a land use or building permit, request for an interpretation, or appeal would foster the creation of low and moderate income housing opportunities.

d. The Monitor shall prepare a formal Housing Element and Fair Share Plan (Affordability Plan)for each municipality. The Affordability Plan shall comply with the FHA and all current rules and regulations of COAH, and shall include provisions to meet all obligations

relating to indigenous need, new construction, unmet need, and COAH's third round rules. The Monitor shall be permitted to utilize and implement any technique authorized by the FHA or COAH including but not limited to regional contribution agreements, accessory apartments, and mobile homes to achieve compliance. Each municipality shall be required to adopt the Affordability Plan of the Monitor and shall take all appropriate actions, including appropriating funds and executing all necessary documents, to implement the provisions of the Affordability Plan.

e. The Monitor shall act in the place and stead of the municipality or its designated agent (as provided by statute, regulation, or common practice) in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission. In this capacity, the Monitor shall advocate, either district-wide or on an application-by-application basis, for the creation of affordable housing opportunities within each municipality even if the New Jersey Meadowlands Commission has sole jurisdiction over the matter. The Boroughs of East Rutherford and Carlstadt, together with their agents, officers, and employees, are enjoined and barred from taking any action, whether orally or in writing, in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission unless such action is approved by the Monitor in writing in advance.

f. The Monitor shall apply to COAH, when the instant litigation is concluded, for substantive certification pursuant to then extant statutes, rules, and regulations.

g. The Monitor shall take such other actions, including but not necessarily limited to the hiring of experts, agents, and employees, that are reasonably necessary for conducting the activities of the Monitor. Additionally, the Monitor shall have authority to require the municipalities and their agents, officers, and employees to take any actions the Monitor believes are necessary for compliance with this judgment.

2. All zoning, land use, and development ordinances of the Borough of East Rutherford and the Borough of Carlstadt, including site plan and subdivision ordinances, are hereby suspended and rendered ineffectual relating to any and all future land use, construction, or development efforts in the municipalities. Such ordinances shall be treated as advisory only and shall serve as commentary to serve the Monitor. Until the Monitor adopts the rules and regulations as required by this judgment (whether interim, temporary, or permanent) 1)no development applications shall be reviewed by the municipalities' boards of adjustment or planning boards and 2)no building or other land use permits shall be issued by any officer, agent, or employee of the defendant municipalities, except those necessary to avoid imminent peril to life or property. Said ordinances,

however, shall continue in full force and effect for all uses and structures that currently exist (meaning that there is a valid certificate of occupancy or building permit in effect) in order to prevent the illegal use of land and structures. Uses and structures that have been approved by a local construction official, zoning officer, board of adjustment, or planning board but have not yet commenced operation or begun construction are prohibited from commencing operation or beginning construction until reviewed and approved by the Monitor for compliance with this judgment.

3. The terms and conditions of the Order Imposing Scarce Resource Restraints dated May 13, 2005 (annexed to this opinion) are continued until further order of the court.
4. Robert T. Regan, Esq. is appointed the Monitor. If the Monitor resigns or is unable to serve, a successor shall be appointed by the court within thirty days. The Monitor shall serve until further order of the court or until final substantive certification is obtained from COAH, whichever is sooner.
5. All elected officials of the Boroughs of East Rutherford and Carlstadt shall be required to certify in writing, and submit their certifications to the Monitor no later than December 31, 2006, that they have read the Preface (pp. xi

to xiv), Prologue (pp. 3 to 11), and Chapter XI (pp. 175 to 185) of Suburbs Under Siege by Charles M. Haar (Princeton University Press 1996).[2]

6. The municipalities are not entitled to a judgment of repose because they have not met their constitutional obligations and have not complied with the FHA, including the COAH third round obligations. In lieu of a judicial judgment of repose, I contemplate that upon conclusion of this case, the municipalities will obtain substantive certification through COAH's procedures.

IV. CONCLUSION

I request that Mr. Regan prepare the appropriate final judgment to memorialize this decision and submit it to opposing counsel and to the court as soon as possible pursuant to R. 4:42-1(c).

[2] Available at the Ridgewood Public Library, Ridgewood, New Jersey under call number 344.73 HAA. See http://www2.bccls.org/ (last visited on May 19, 2006) and http://www.ridgewoodlibrary.org/ (last visited on May 19, 2006).

FILED

MAY 13 2005

JONATHAN N. HARRIS
J.S.C.

SILLS CUMMIS EPSTEIN & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 643-7000
Attorneys for Plaintiff, Tomu Development Co., Inc.

TOMU DEVELOPMENT CO., INC., Plaintiff, v. BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT and NEW JERSEY MEADOWLANDS COMMISSION, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - BERGEN COUNTY DOCKET NO: BER-L-5894-03 Civil Action
TOMU DEVELOPMENT CO., INC., Plaintiff, v. BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD and NEW JERSEY MEADOWLANDS COMMISSION, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - BERGEN COUNTY DOCKET NO. BER-L-5895-03 Civil Action ORDER IMPOSING SCARE RESOURCE RESTRAINTS

This matter has been brought to the Court upon the application of Plaintiff, Tomu Development Co., Inc. ("Tomu") for a scarce resource order in the above-captioned litigation, and the Court having heard oral argument on February 18, 2005 and requested the court-appointed Master to issue a report on this motion. The court-appointed Master has reviewed the parties' submissions and approved of the issuance of a scarce resource order as set forth in his report dated April 13, 2005, and the Court having considered the submissions of the parties regarding the master's report finds that good cause exists for this Order to be entered,

IT IS on this 13 day of May, 2005, ORDERED as follows:

#880922 v4

1. The Borough of Carlstadt's motion objecting to the report of the Special Master dated April 13, 2005 is DENIED.

2. The New Jersey Meadowlands Commission's objections to the report of the Special Master dated April 13, 2005 is DENIED in part and GRANTED in part, as set forth below.

3. The report dated April 13, 2005 of Mr. Regan, the court-appointed Master, is APPROVED except as MODIFIED below.

4. Land, public potable water supply and sewerage capacity are hereby declared to be a scarce resource within the Borough of East Rutherford ("East Rutherford") and the Borough of Carlstadt ("Carlstadt"), including the portions of both municipalities that are under the jurisdiction of the New Jersey Meadowlands Commission ("NJMC").

5. a. Subject to Paragraph 9 of this Order, public sewerage is hereby declared a scarce resource in Carlstadt and East Rutherford (collectively, "Municipal Defendants"). Any and all public sewer capacity in Carlstadt and East Rutherford, other than gallonage currently allocated to serve existing uses, is hereby placed under the control of the Court. No new sanitary sewer connections can be granted for any development and/or redevelopment project in Carlstadt and/or East Rutherford, including those portions of both municipalities that are located within the jurisdiction of New Jersey Meadowlands Commission ("NJMC"), without the prior approval of the Court.

b. Notwithstanding the provisions of Paragraph 5.a above, any new sanitary sewer connection, which is estimated to generate less than 1,500 gpd of wastewater, shall be automatically exempted from the restraints on the further depletion of the sewerage system as set

forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8.

6. a. Subject to Paragraph 9 of this Order, potable water is hereby declared a scarce resource in East Rutherford and Carlstadt. Any and all potable public water supply in East Rutherford and Carlstadt, other than that supply serving existing uses, is hereby placed under the control of the Court. No new connections to public water supply can be granted for any development and/or redevelopment project in East Rutherford and/or Carlstadt, including those portions of both municipalities that are located within the jurisdiction of the NJMC, without prior approval of the Court.

b. Notwithstanding the provisions of Paragraph 6.a above, any new connection to the public potable water supply, which is estimated to use less than 1,500 gpd of potable water, shall be automatically exempted from the restraints on further depletion of the public water supply as set forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8.

7. a. Subject to Paragraph 9 of this Order, land whether currently vacant or redevelopable, is hereby declared a scarce resource in Carlstadt and East Rutherford, including those portions of both municipalities that are located within the jurisdiction of the NJMC. No application for development and/or redevelopment, including any application under the regulations of the NJMC (specifically N.J.A.C. 19:4-1.1 et seq. and 19:5-1.1 et seq.) of any parcel of land larger than 20,000 square feet may be approved by the NJMC or the Municipal Defendants, acting either through their Planning Boards or Zoning Boards of Adjustment, without prior approval of the Court. Prior court approval is not necessary for the approval of any application involving minor applications for existing uses related to already developed

properties, such as the addition of rooms or decks to existing housing, modifications of an existing commercial or industrial site for continuation of existing uses, or minor subdivisions of land which do not result in any new structures or uses. All other applications for development or redevelopment, not otherwise exempt under this Order, shall require the prior approval of the Court before any land use approvals may be granted by the Municipal Defendants' Planning Boards or Zoning Boards or the NJMC.

b. Notwithstanding the provisions of Paragraph 7.a above, an application for final site plan or subdivision approval shall be automatically exempted from the restraints on the development and redevelopment of land as set forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8 provided that the application for final site plan or subdivision approval only seeks to ensure that the ordinance standards for final approval have been complied with and the conditions of the preliminary approval have been complied with subject to minimal deviations as set forth in N.J.S.A. 40:55D-50.a.

8. Applications for relief from any of the aforementioned scarce resource restraints shall be made as follows:

a. A full and complete description of the resource being sought to be released, along with the justification for the release of such resource shall be provided to the court-appointed Master and all parties to this litigation. An inclusionary or contributory affordable housing development, such as that sought by Toms would be appropriate for such release.

b. The court-appointed Master may request such additional information as necessary in order to fully understand the nature of the relief requested and the impact such

request would have on the production of affordable housing within Carlstadt and East Rutherford.

c. Within thirty days following receipt of all necessary information, the court-appointed Master shall supply to the Court, all parties in the litigation and anyone requesting such relief a copy of a report and recommendation, setting forth, in detail, the Master's position with respect to any release of any said resource.

d. The entity seeking release of such restraints shall thereafter file a motion on notice of all parties in this litigation for said relief with the Court, which has jurisdiction to allocate or withhold the requested relief. Notwithstanding the foregoing, if the Master recommends that the resource be released and no party in the litigation filed an objection with the Master, a formal motion shall not be required, and the entity seeking such restraints shall submit an Order to the Court and to all parties in this litigation under the five-day rule.

e. All costs for such requested relief, production of the Master's report, and court costs shall be borne by the entity seeking to obtain such relief. No such relief can be granted if in the determination of the Court, granting the relief will impede the construction of the Municipal Defendants' fair share of affordable housing units.

9. a. Any development and/or redevelopment project located within the jurisdiction of the New Jersey Sports and Exposition Authority shall be exempt from this Order and is not required to apply for relief from this Order under the procedures set forth in paragraph 8.

b. Any development and/or redevelopment project located on Block 104, Lots 1, 1.01, 1.02, 2 and 3 in the Borough of East Rutherford shall be exempt from this Order

and is not required to apply for relief from this Order under the procedures set forth under the procedures set forth in paragraph 8.

10. A copy of this Order shall be served upon all counsel of record within seven (7) days of the date hereof.

HON. JONATHAN N. HARRIS, J.S.C.

Jonathan N. Harris, J.S.C

Exhibit

G

ROBERT T. REGAN

A Professional Corporation
ATTORNEY AT LAW
STURBRIDGE COMMONS
345 KINDERKAMACK ROAD
P.O. BOX 214
WESTWOOD, NEW JERSEY 07675

MEMBER NEW JERSEY &
NEW YORK BARS

TEL: (201) 664-3344
FAX: (201) 664-3836
rtregan@rtreganlaw.com

June 5, 2006

BY FAX AND REGULAR MAIL

To: All Counsel On The Attached List

RE: Tomu Development Co., Inc. v.
Borough of Carlstadt, et als
Docket No. BER-L-5894-2003

Tomu Development Co., Inc. v.
Borough of East Rutherford, et als
Docket No. BER-L-5895-2003

Adoption of Rules and Regulations

Dear Counsel:

As you are aware, paragraph 1b of the decision of Judge Harris dated May 19, 2006 requires the adoption of rules and regulations "that will immediately provide reasonable opportunities for the creation of low and moderate income housing in accordance with the FHA and the rules and regulations of COAH. The following constitutes a draft of proposed rules and regulations which would be applicable in each municipality:

1. Any application for a development permit or approval pertaining to an existing one or two family residential dwelling may be reviewed and approved by the official or land use agency having jurisdiction, without the necessity for review by and approval of the Monitor, provided that such application does not propose the creation of a new residential unit or units.

2. An application pertaining to an isolated single family residential parcel which proposes to convert the use or structure to a two family dwelling, or to demolish the existing single family dwelling and to replace it with a new two family structure may be reviewed and approved by the official or land use agency having jurisdiction, without the necessity for review by and approval of the Monitor, provided that such application pertains to a single lot or parcel having an aggregate area of less than 10,000 square feet.

3. Any application for a development permit or approval for a residential development which does not meet the criteria of paragraphs 1 or 2 above may be accepted for review but shall not be processed, be certified as complete pursuant to N.J.S.A. 40:55D-10.3, be scheduled for a public hearing or be approved until such time as the Monitor has reviewed and has approved further action by the municipality. A copy of such development application together with all documents filed in connection therewith shall forthwith be forwarded, upon filing, to the Monitor.

4. An application for a development permit or approval involving an existing nonresidential structure on a parcel having a land area of less than 10,000 square feet may be reviewed and approved by the official or land use agency having jurisdiction, without the necessity for review by and approval of the Monitor, provided that such application does not propose the creation of a new residential unit or units.

5. An application for a development permit or approval involving an existing nonresidential structure on a parcel having a land area of 10,000 square feet but less than 20,000 square feet may be reviewed and approved by the official or land use agency having jurisdiction, without the necessity for review by and approval of the Monitor, provided that such application does not propose the creation of a new residential unit or units, and that the use will not generate a need for more than an additional 1,500 gpd of wastewater and more than an additional 1,500 gpd of potable water.

6. An application for a mixed use residential /nonresidential development involving an existing structure and not proposing the creation of an additional residential unit or units may be reviewed and approved by the official or land use agency having jurisdiction, without the necessity for review by and approval of the Monitor provided that the parcel comprises a land area of less than 20,000 square feet and will not generate a need for more than an additional 1,500 gpd of wastewater and more than an additional 1,500 gpd of potable water.

7. An application for a development permit or approval for a nonresidential use or mixed use which does not meet the criteria of paragraphs 5 and 6 above may be accepted for review but

shall not be processed, certified as complete pursuant to N.J.S.A. 40:55D-10.3, be scheduled for a public hearing or be approved until such time as the Monitor has reviewed and approved further action by the municipality. A copy of such development application together with all documents filed in connection therewith shall forthwith be forwarded, upon filing, to the Monitor.

8. Pursuant to paragraph 1E of the Final Judgment dated June 1, 2006 (hereinafter "Final Judgment"), the Monitor shall act in the place and stead of the municipality or its designated agent in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission (NJMC"). In connection therewith, any application for a development permit or approval in those portions of Carlstadt and East Rutherford within the jurisdiction of the NJMC shall be provided to the Monitor upon filing, if required by statute or regulation to be provided to the respective Municipality. Notwithstanding the foregoing, such application shall also be forwarded to the Municipality, subject to the conditions set forth in paragraph 1E of the Final Judgment.

9. Notwithstanding the provisions set forth in paragraph 8, an application for a development permit or approval involving a property within the jurisdiction of the NJMC and which meets the criteria of paragraphs 4 or 5 above may be reviewed and approved by the NJMC without the necessity for review by and approval of the Monitor, provided that such application does not propose the creation of a new residential unit or units.

10. With respect to properties within the jurisdiction of the NJMC, municipal officials may continue to perform such functions as authorized pursuant to statute or regulation without the approval of the Monitor, provided that the criteria of paragraph 9 above have been satisfied. Absent compliance with such criteria, review and approval of any municipal action by the Monitor shall be required.

11. Officials of the respective municipalities shall not take action in connection with any redevelopment area, either within or outside the jurisdiction of the NJMC, without specific authorization of the Monitor.

12. Pursuant to paragraph 2 of the Final Judgment, uses and structures that have been approved by a local construction official, zoning officer, board of adjustment or planning board but have not yet commenced operation or begun construction are prohibited from commencing operation or beginning construction until reviewed and approved by the Monitor for compliance with this Judgment. Notwithstanding the foregoing, any approval which meets the criteria of paragraphs 1, 2, 4 or 5 above may commence operations without further review and approval by the Monitor.

13. Except as provided for herein, and until further notice from the Monitor, existing zoning, land use, and development ordinances of the Borough of East Rutherford and the Borough of Carlstadt, including site plan and subdivision ordinances, shall continue in force and in effect.

14. Except as modified herein, the terms and conditions of the Order Imposing Scarce Resource Restraints shall continue in force and in effect.

15. The Rules and Regulations set forth herein shall continue in force and in effect unless and until same are modified, in writing, by the Monitor, or superseded by Court Order.

Should you have any questions or comments, please contact me immediately. It is my desire that these Rules and Regulations take effect on June 7, 2006.

Very truly yours,

ROBERT T. REGAN

RTR:ru

Distribution List:

Richard J. Allen, Jr., Esq.
Kipp and Allen, LLP
52 Chestnut Street
P. O. Box 133
Rutherford, New Jersey 07070
Fax No. 201-933-4611

Beverly M. Wurth, Esq.
Calo Agostino, P.C.
The Bank House
14 Washington Place
Hackensack, New Jersey 07602
Fax No. 201-488-5855

Thomas Jay Hall, Esq.
Sills, Cummis, Epstein & Gross, PC
One Riverfront Plaza
Newark, New Jersey 07102-5400
Fax No. 1-973-643-6500

Christine Piatek, Esq., DAG
Office of the Attorney General
Department of Law and Public Safety
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625-0093
Fax No. 1-609-341-5030

Exhibit

H

COAH THIRD ROUND N.J.A.C. 5:96 and 97 STATUS

NOTE: If you are submitting objections/comments electronically, send them to COAHmail@dca.state.nj.us ONLY. Please DO NOT send them via fax, mail, or hand delivery in addition to the electronic submission.

April 13, 2011

Municipality	County	Status	Expired	File Only Date	Petition Date	Repetition Date	Cond Certification Date	Certification Date	Amendment Date	Amendment Approved	Other electronic documents	Completeness of Petition/Filing/Repetition	Complete	Public Comment Deadline	Objections	
															Yes	No
Brigantine City	Atlantic	petition			12/30/08						YES	complete - 2/2/09	x	03/23/09	x	
Buena Vista Township	Atlantic	petition			06/16/10						YES	incomplete - 7/22/10				
Egg Harbor City	Atlantic	petition			04/27/10							complete - 9/20/10	x	11/08/10		x
Galloway Township	Atlantic	petition			12/31/08						YES	complete - 3/3/09	x	04/22/09	x	
Linwood City	Atlantic	petition			12/30/08						YES	complete - 2/2/09	x	03/23/09	x	
Mullica Township	Atlantic	petition			12/31/08						YES	complete - 3/10/09	x	04/30/09		x
Allendale Borough	Bergen	amendment			12/31/08			10/14/09	05/07/10		YES	complete - 7/7/10	x	08/26/10		x
Alpine Borough	Bergen	repetition			12/26/08	06/01/10					YES	complete - 8/31/10	x	10/24/10	x	
Bogota Borough	Bergen	petition			12/31/08							complete - 6/4/09	x	10/05/09		x
Carlstadt Borough	Bergen	petition			05/26/10						YES	complete - 9/10/10	x	11/02/10	x	
Closter Borough	Bergen	petition			12/31/08							complete - 6/24/09	x	08/17/09		x
Cresskill Borough	Bergen	certified			12/30/08			09/08/10				complete - 3/26/09	x	05/17/09		x
Demarest Borough	Bergen	certified			12/30/08			03/10/10			YES	complete - 2/9/09	x	03/31/09		x
East Rutherford Borough	Bergen	petition			12/31/08						YES	complete - 6/8/09	x	07/30/09	x	
Edgewater Borough	Bergen	petition			01/05/09						YES	complete - 5/6/09	x	06/23/09	x	
Emerson Borough	Bergen	petition			12/31/08						YES	complete - 3/6/09	x	06/15/09	x	
Englewood Cliffs	Bergen	petition			03/11/09							complete - 4/2/09	x	05/23/09		x
Fairview Borough	Bergen	petition			12/24/09							complete - 3/25/10	x	05/25/10		x
Fort Lee Borough	Bergen	repetition			12/30/08	02/02/10					YES	complete - 3/9/10	x	04/29/10	x	
Franklin Lakes Borough	Bergen	petition			12/30/08							complete - 5/20/09	x	07/05/09	x	
Glen Rock Borough	Bergen	petition			12/29/08						YES	complete - 2/9/09	x	03/30/09	x	
Harrington Park Borough	Bergen	petition			12/31/08							complete - 5/5/09	x	07/02/09	x	
Hasbrouck Heights Borough	Bergen	petition			12/30/08						YES	complete - 2/25/09	x	04/19/09		x
Haworth Borough	Bergen	petition			12/30/08							complete - 7/30/09	x	09/18/09		x
Hillsdale Borough	Bergen	petition			12/23/08						YES	complete - 1/12/09	x	03/03/09	x	
Ho-Ho-Kus Borough	Bergen	petition			12/23/08						YES	complete - 4/13/09	x	09/21/09	x	
Lyndhurst Borough	Bergen	petition			01/05/09						YES	complete - 5/27/09	x	07/20/09	x	
Mahwah Township ^	Bergen	petition			06/07/10							incomplete - 7/28/10				
Midland Park Borough	Bergen	petition			12/23/08						YES	complete - 1/28/09	x	03/23/09		x
Montvale Borough	Bergen	petition			12/30/08							complete - 1/9/09	x	03/06/09	x	
New Milford Borough	Bergen	petition			12/30/08						YES	complete - 5/6/09	x	06/22/09		x
Northvale Borough	Bergen	petition			12/30/08						YES	complete - 6/9/09	x	07/28/09		x
Norwood Borough	Bergen	petition			12/30/08						YES	complete - 6/9/09	x	07/27/09		x
Oakland Borough ^	Bergen	petition			06/08/10							incomplete - 7/22/10				
Old Tappan Borough	Bergen	petition			12/30/08						YES	complete - 4/15/09	x	06/08/09		x
Oradell Borough	Bergen	petition			12/30/08						YES	complete - 4/21/09	x	06/17/09	x	
Paramus Borough	Bergen	petition			12/29/08						YES	complete - 1/28/09	x	03/19/09	x	
Park Ridge Borough	Bergen	petition			12/29/08						YES	complete - 2/11/09	x	04/02/09	x	
Ramsey Borough	Bergen	petition			12/30/08							complete - 1/26/09	x	03/21/09	x	
Ridgefield Borough	Bergen	petition			12/30/08						YES	complete - 6/5/09	x	07/28/09	x	
Ridgefield Park Village	Bergen	petition			12/31/08						YES	complete - 5/12/09	x	07/05/09		x
Ridgewood Village	Bergen	petition			01/02/09						YES	complete - 8/18/09	x	10/09/09	x	
River Vale Township	Bergen	certified			12/18/08			03/10/10			YES	complete - 2/25/09	x	04/14/09	x	
Rochelle Park Township	Bergen	petition			12/29/08							complete - 6/4/09	x	07/23/09	x	
Rockleigh Borough	Bergen	certified			12/31/08			11/12/09			YES	complete - 5/27/09	x	07/14/09		x
Rutherford Borough	Bergen	petition			12/30/08						YES	complete - 3/17/09	x	05/14/09	x	
Saddle Brook Township	Bergen	petition			01/05/09						YES	complete - 5/5/09	x	06/23/09		x
Saddle River Borough	Bergen	petition			12/30/08							complete - 6/24/09	x	08/17/09		x
South Hackensack Township	Bergen	certified			12/30/08			08/12/09			YES	complete - 2/25/09	x	04/15/09	x	
Teaneck Township	Bergen	petition			12/30/08							complete - 4/20/09	x	06/08/09		x
Tenafly Borough	Bergen	petition			12/30/08						YES	complete - 6/9/09	x	07/29/09	x	
Teterboro Borough	Bergen	petition			12/30/08						YES	complete - 1/23/09	x	03/16/09		x
Upper Saddle River Borough	Bergen	petition			12/30/08						YES	complete - 6/8/09	x	07/28/09	x	

Exhibit

I

BOROUGH OF EAST RUTHERFORD
BERGEN COUNTY

HOUSING ELEMENT
AND
FAIR SHARE PLAN

Prepared by:
Jill A. Hartmann, PP, AICP
21 Sparrowbush Road
Mahwah, New Jersey 07430

December, 2008

BOROUGH OF EAST RUTHERFORD
PLANNING BOARD MEMBERS

2008

Robert Evans, Chairman
Mayor James Cassella
Councilman Samuel Stallone
Kas Dabek, Vice Chairman
Robert Roth, Secretary
Joseph Morris
John Fusco

The original document was appropriately signed and sealed in accordance with Chapter 41 of the State Board of Professional Planners.

Jill A. Hartmann, PP, AICP
Professional Planner #4088

TABLE OF CONTENTS

INTRODUCTION

The Borough of East Rutherford did not submitted a Housing Element and Fair Share Plan to address its established fair share obligation of affordable housing for rounds one and two. In 2005, the Borough of East Rutherford, along with the Borough of Carlstadt, was sued by the Tomu Development Co., Inc. In a builder's remedy law suit. The Superior Court, in 2006, entered an Order granting a builder's remedy to Tomu Development Co., Inc. which required East Rutherford to draft a meaningful Housing Element and Fair Share Plan and other legislation consonant with the rules of the Council on Affordable Housing (COAH). The Boroughs of East Rutherford and Carlstadt appealed the Superior Court's decision. The Appellate Division affirmed the lower court's decision in August, 2008.

COAH proposed its revised third round affordable housing obligations regulations on January 22, 2008. On May 6, 2008 COAH voted to adopt the rules, with minor clarifications. The adopted Anew@ third round affordable housing requirements are cumulative, for new construction, and result in an overall 1987-2018 affordable housing obligation. Based on an allocation model, COAH has projected the 2004-2018 residential and employment growth. These projections, at a minimum, **MUST** be utilized when a municipality is calculating its fair share obligation of affordable housing. The following Housing Element and Fair Share Plan is prepared in direct response to the Court's order and addresses the Borough of East Rutherford's cumulative fair share obligation as established by COAH for the period from 1987-2018. This Housing Element and Fair Share Plan meets the requirements of the Court's order and follows the requirements of NJSA 52:27D-310 and 5:94-2.3.

Community Overview

The Borough of East Rutherford is part of Region 1, a four-county is housing region (consisting of Bergen, Passaic, Hudson and Sussex Counties) established by COAH and located in southwestern region of Bergen County. East Rutherford is an established older urban, mixed single family and multifamily residential community. It is one of 13 municipalities that have lands located in t he New Jersey Meadowlands and thus substantial property under the jurisdictional control of the New Jersey Meadowlands Commission. East Rutherford has a total area of 2,487 acres or 3.89 square miles and is surrounded by six municipalities (Carlstadt, Wallington, Rutherford, Lyndhurst, City of Passaic and Secaucus).

The major arterial roadways through the Borough are State Highway Route 17, which runs in a north/ south direction; Paterson Plank Road, in the southern portion of the Borough and runs in an east/west direction; State Highway Route 3, in the northern reaches of the Borough and runs in an east/west direction; and Route 20, in the far eastern region of the Borough and runs in a north/south direction. These roadways serve as major highways to the Sports Complex (Giants Stadium, Continental Arena, and the Race Tract); major connections to the New Jersey Turnpike and Garden State Parkway; and primary connections to lower New York City.

East Rutherford is a fully developed community with little or no vacant land remaining. It is characterized by single family and two family residential neighborhoods on small 50' x 100' lots with non-conforming industrial uses dispersed throughout these mature neighborhoods.

HOUSING, POPULATION AND ECONOMIC CHARACTERISTICS

Inventory of Municipal Housing Stock

The U.S. Census of Housing in 2000 indicated that there were a total of 3,771 housing units in the Borough of East Rutherford, of which 13 were identified as seasonal housing units. The 3,771 housing units included 127 year round vacant units, representing a 1.7% vacancy rate. This and associated housing characteristics are presented in Table 1.

Table 1

Housing Characteristics
Borough of East Rutherford
2000

CHARACTERISTICS	NUMBER
Total Housing Units	3,771
Total Year-Round Housing Units	3,758
Seasonal Housing Units	13
Total Occupied Housing Units	3,644
Owner-Occupied	1,580
Renter-Occupied	2,064
Total Vacant Housing Units	127

Source: U.S. Census of Housing, 2000

Table 2 shows the relative age of the housing stock in the Borough, as reported in the U.S. Census of Housing. The majority of the Borough's housing stock, approximately 58% or 2,190 units, were built before 1950. Between 1970-1990 and additional 36% or 1,379 units, of the Borough's housing stock was constructed. This is tempered by a net loss of 46 housing units between 1990-2000.

Table 2

YEAR STRUCTURE BUILT
Borough of East Rutherford

YEAR CONSTRUCTED	NUMBER OF DWELLINGS	PERCENT OF TOTAL
1950	2,190	58
1960	2,438	7
1970	2,960	14
1980	3,211	7
1990	3,817	15
2000	3,771	- 1
TOTAL		100

Source: U.S. Census of Housing, 2000

The 2000 U.S. Census of Housing describes owner-occupied and renter-occupied housing values. Table 3 shows the distribution of housing values for owner-occupied housing units. The median value for such units was $196,200 in 2000. Similarly, Table 4 shows renter-occupied housing units with an average rental value of $817.

Table 3

SPECIFIED OWNER-OCCUPIED HOUSING UNITS BY VALUE
Borough of East Rutherford
2000

VALUE	NO. OF UNITS
Less than $50,000	0
$50,000 to $99,999	8
$100,000 to $149,999	91
$150,000 to $199,999	321
$200,000 to $299,999	328
$300,000 to $499,000	30
$500,000 or more	0
TOTAL	778
MEDIAN VALUE	$196,200

Source: U.S. Census of Population and Housing, 2000

Table 4

SPECIFIED RENTER-OCCUPIED HOUSING UNITS
Borough of East Rutherford
2000

RENT	NO. OF UNITS
Less than $200	36
$200 to $499	204
$500 to $749	523
$750 to $999	944
$1,000 to $1,499	312
$1,500 or more	12
No Cash Rent	37
TOTAL	2,068
MEDIAN RENT	$817

Source: U.S. Census of Population and Housing, 2000

Table 5 provides an analysis of the number of housing units in structures In the Borough. The data shows that a large majority of the housing stock is found in two-family detached structures. A total of 1,670 are located in such structures, representing 44.3 % of all housing in the Borough.

Table 5

UNITS IN STRUCTURES
BOROUGH OF EAST RUTHERFORD
2000

UNITS IN STRUCTURES	NUMBER	PERCENT
1 unit, detached	808	21.4
1 unit, attached	181	4.8
2 to 4 units	1,670	44.3
5 to 9 units	208	5.5
10 to 19 units	305	8.1
20 units or more	599	15.9
Mobile Home/Trailer	0	0.0
Other	0	0.0
TOTAL	3,771	100.0

Source: U.S. Census of Population and Housing, 2000

The quality of housing in the Borough is generally good. Although the U.S. Census does not measure housing quality directly, the traditional method of estimating deficient housing is through the use of census data known as indicators or "surrogates". Studies of substandard housing revealed that there are seven housing surrogates tabulated by the U.S. Census which can be used to reliably estimate the number of deficient units. The "Housing Quality Surrogates" used to indicate inferior or deficient housing are:

X Constructed prior to 1940;
X Overcrowded (more than one person per room);
X Inadequate plumbing facilities (incomplete plumbing facilities or lack of exclusive use of plumbing facilities);
X Inadequate kitchen facilities (either the shared use of a kitchen or the lack of a stove, refrigerator or sink with piped water);
X Inadequate heating (where no fuel or cola, coke or wood is used fro heating);
X Inadequate sewer service (no public sewer, septic tank or cesspool); or
X Inadequate water supply (no public water, drilled well or dug well).

This is the method employed by the Council on Affordable Housing (COAH) to determine the present needs of low or moderate income families for standard housing.
According to the 2000 Census and as shown in Table 6, 1,235 housing units, in the Borough of East Rutherford, were included in one and/or another of the seven surrogates. It should be strongly emphasized that an unknown quantity of units may have been counted more than once, since the Census data does not account for overlapping data. Moreover, in order for a housing unit to be considered substandard by COAH and included as an "indigenous need" unit, it must exhibit at least two of the seven surrogates and be occupied by a qualified low or moderate

income household. Additionally, the vast majority (87%) of the identified deficient housing units are included simply because they were constructed prior to 1940.

Table 6

NUMBER OF DEFICIENT UNITS BY HOUSING QUALITY SURROGATE BOROUGH OF EAST RUTHERFORD 2000

HOUSING SURROGATE	NO. Of UNITS
Constructed Prior to 1940	1,080
Overcrowded	116
Inadequate Plumbing Facilities	11
Inadequate Kitchen Facilities	6
Inadequate Heating	22
Inadequate Sewer Service	NA
Inadequate Water Supply	NA
TOTAL	1,235

U.S. Census of Population and Housing Characteristics, 2000

The units with deficiencies in Table 6 cannot be added to produce a total number of substandard units in 2000, since many units have more than one deficiency. In addition, this number only reflects occupied housing and does not account for the 127 vacant units. Thus, the number of 2000 units with one or more of these deficiencies is less than the total deficiencies shown in the Table 6. In addition, there also may be some units with none of these deficiencies which have structural defects.

The actual number of housing units that are theoretically affordable to low and moderate income households can be grossly estimated with the data that is available. Based upon the COAH 2005 Regional Median Income Limits for Region 1, a household of four persons can earn $37,232 and $59,571 for a low and moderate income household, respectively.

Using the established income limits discussed above and available Census data, and assuming certain monthly costs as required by COAH rules and regulations, it is possible to estimate the number of housing units in the Borough of East Rutherford that are available to low and moderate income households. As shown in Table 7, a number of existing housing units, particularly rental units, are affordable to low and moderate income households.

TABLE 7

EXISTING HOUSING THEORETICALLY AVAILABLE TO LOW AND MODERATE INCOME HOUSEHOLDS BOROUGH OF EAST RUTHERFORD

Sales Housing Units

	Low Income (Year/Month)	Moderate Income (Year/Month)
Total Income($)	37,232/3,103	59,571/4,946
28% for Housing	10,450/871	16,680/1,390
Less Property Taxes	1,829/152	3,266/272
Less Property Insurance	250/21	400/33
Net Available For Mortgage:	8,371/698*	13,014/1,085**

(*) For a low income household of four persons, assuming a fixed 30-year mortgage at 6.0%, a residential unit valued at $100,000 could be obtained. Of the 778 owner occupied units in the Borough of East Rutherford, listed in the 1990 Census, 8 (less than 1%) are indicated to be valued at less than $100,000.

(**) For moderate income households of four persons, assuming a fixed 30-year mortgage at 6%, a $150,000 mortgage could be obtained. Of the 778 owner occupied units in the Borough of East Rutherford, listed in the 1990 Census, 91 (12%) are indicated to be valued between $100,000 and $149,000.

Rental Housing Units

	Low Income (Year/Month)	Moderate Income (Year/Month)
Total Income($)	37,232/3,103	59,571/4,964
30% For Housing	11,170/931	17,871/1,489
Less Utilities	1,800/150	2,000/167
Net Available for Rent:	9,370/780(*)	15,871/1,323(**)

(*) For low income households of four persons, of the 2,068 renter occupied units in the Borough of East Rutherford, listed in the 1990 Census, 763 (37%) are indicated to be rented for less than $750.

(**) For moderate income households of four persons, of the 2,068 renter occupied units in the Borough of East Rutherford, listed in the 1990 Census, 1,707 (83%) are indicated to be rented for less than $1,000.

Population, Households and Income Analysis

COAH requires an analysis of the municipality's socio-economic characteristics, including an assessment of population size, rate of population growth, age and sex characteristics, income levels and household size.

In 2000, the Borough's population was 8,716 persons. Table 8 shows the historic population trends for the Borough from 1950 to 2000. This data reveals that East Rutherford Borough has continued to grow over the last 40 years. Until 1980, the Borough's population grew steadily. The Borough experienced a decline in population in 1980, but as of 2000 had recovered and exceeded 1980's population by 180 persons.

Table 8

RATE OF POPULATION GROWTH
BOROUGH OF EAST RUTHERFORD
2000

YEAR	POPULATION	POPULATION CHANGE
		*******
1950	7,438	
1960	7,769	331
1970	8,536	767
1980	7,849	- 687
1990	7,902	53
2000	8,716	814

Source: U.S. Census, 2000

Table 9 shows the breakdown of age by sex for the Borough's 2000 population. The data indicates that 4,475 or 51.3% of the population was female and 4,241 or 48.7% was male. Overall the Borough's median age was 37.9.

Table 9

AGE CHARACTERISTICS
BOROUGH OF EAST RUTHERFORD
2000

AGE GROUP	TOTAL	PERCENT
Under 5	475	5.0
5-17	1,214	14.0
18-24	616	7.2
25-34	1,606	18.5
35-44	1,579	18.2
45-54	1,196	13.8
55-64	780	9.0
65 and Over	1,250	14.3
TOTAL	8,716	100.0

Source: -U.S. Census, 2000

Table 10 shows the breakdown for household income by category. The median income for a East Rutherford Borough household in 1999 was $50,163. Approximately 50.4% of the households earned over $50,000 with approximately and 77% earning $25,000 or more. Approximately 77 individuals or 0.9% of East Rutherford Borough's population was at or below the poverty level in 2000.

Table 10

HOUSEHOLD INCOME
BOROUGH OF EAST RUTHERFORD
1999

INCOME CATEGORY	NO. OF HOUSEHOLDS	PERCENT
Less than $10,000	276	7.5
$10,000 to$24,999	547	15.0
$25,000 to $49,999	984	27.1
$50,000 to $74,999	779	21.4
$75,000 to $99,999	495	13.7
$100,000 to $149,999	335	9.2
$150,000 to $199,999	91	2.6
$200,000 or more	126	3.5
TOTAL	3,633	100.0

Source: U.S. Census, 2000

Consistent with the general trend, household size in East Rutherford Borough has been declining over the last several decades. Table 11 illustrates this general decline in household size.

Table 11

AVERAGE HOUSEHOLD SIZE
BOROUGH OF EAST RUTHERFORD
1960-2000

YEAR	HOUSEHOLD SIZE
1960	3.18
1970	2.91
1980	2.46
1990	2.36
2000	2.35

Source: U.S. Census, 2000

Existing and Probable Future Employment

The COAH Rules and Regulations require an analysis of the existing and probable future employment characteristics of the Borough, including the current employment in the municipality, employment characteristics and occupational patterns of the residents of the Borough, other community or regional factors which may impact municipal employment, and the probable future employment in the community.

Tables 12 and 13 describe the employment characteristics and occupational trends of East Rutherford Borough residents. Table 12 indicates that 41% of all jobs are concentrated in three fields: manufacturing, retail trade and educational, health and social services. Manufacturing accounts for 12.6% of all employment in the Borough, while retail trade accounts for 12.0% and professional services accounts for 16.6%.

Table 13 identifies resident employment by occupation. It indicates that 65% of the resident population is mainly employed in two categories: managerial and sales and office occupations. Managerial occupations account for 34.2% of all occupations, while sales and office occupations account for 30.8%.

Table 12

EMPLOYED PERSONS 16 AND OVER BY INDUSTRY
BOROUGH OF EAST RUTHERFORD
2000

INDUSTRY	NUMBER	PERCENT
Agriculture, Forestry, Fishing/Hunting, Mining	0	0
Construction	282	6.2
Manufacturing:	574	12.6
Transportation, Warehousing and Utilities	323	7.1
Wholesale Trade	248	5.5
Retail Trade	546	12.0
Information	227	5.0
Finance, Insurance, Real Estate	427	9.4
Professional, Scientific, Mgt., Admin., Waste Mgt.	348	7.7
Educational, Health and Social Services	755	16.6
Arts, Entertainment, Recreation, Accommodation, Food Services	365	8.0
Other Services (not public administration)	223	4.9
Public Administration	228	5.0
TOTAL	4,546	100.0

Source: U.S. Census of Population and Housing, 2000.

Table 13

EMPLOYED PERSONS 16 AND OVER BY OCCUPATION
BOROUGH OF EAST RUTHERFORD
2000

OCCUPATION	NUMBER	PERCENT
Managerial, Professional, Related Occupations	1,557	34.2
Service Occupations	647	14.2
Sales and Office Occupations	1,402	30.8
Farming, Forestry & Fishing Occupations	12	0.3
Construction, Extraction & Maintenance Occupations	285	6.4
Production, Transportation & Materials Moving Occupation	643	14.1
TOTAL	4,546	100.0

Source: U.S. Census of Population and Housing, 2000.

PROJECTION OF EAST RUTHERFORD'S HOUSING STOCK, INCLUDING THE PROBABLE FUTURE CONSTRUCTION OF LOW AND MODERATE INCOME HOUSING FROM 2004-20018

Future Construction of Housing

COAH regulations require a 10 year projection of a community's future housing to be based on an assessment of data which minimally must include the number of housing units constructed or has been issued building permits during the last 10 years, the number of low and moderate income housing units constructed previously, the number of low and moderate income housing units previously rehabilitated, a projection of the community's housing stock for the next 10 year period, and the number of subdivisions and site plans approved for residential purposes during the last six years.

Table 14 shows building permits issued during the past ten years from 1998 through June 2008. A total of 910 building permits were issued during this period. It should be noted that 614 of the 2007 building permits issued were for a multi-family residential development in the New Jersey Meadowlands Commission District (NJMC). No construction has yet to commence and the magnitude of these units is not consistent with the Borough's overall historical development pattern. An average of 29.6 units per year were approved for construction without the units associated with the NJMC. Incorporating the NJMC building permit figure of 614 units results in an average rate of 91 units per year. In addition, there were a total of 28 residential demolitions over the 10 year period for an average of 2.8 demolitions per year.

TABLE 14

NUMBER OF RESIDENTIAL BUILDING PERMITS ISSUED
BOROUGH OF EAST RUTHERFORD
2004- 2008

YEAR	PERMITS ISSUED	DEMOLITION
1998	2	2
1999	0	0
2000	2	2
2001	6	1
2002	4	1
2003	134	5
2004	115	1
2005	15	4
2006	1	4
2007	622	8
2008	24	N/A
TOTAL	910	28

Source: New Jersey Residential Building Permits,
N.J. Department of Labor 2004-2008.

A second component of establishing a historic development trend in the Borough, is to review all subdivision applications filed from 2000 to August, 2008 were reviewed. Table 15 provides the breakdown of subdivision approvals by year approved. As shown in Table 15, the creation of new lots was generally associated with single family residential lots that contained excess/surplus land. Such subdivisions were scattered throughout the Borough. A few small scattered multi-family residential complexes have been approved and can be anticipated to continue infrequently as former industrial sites are redeveloped. It should be noted that of the 622 building permits issued in 2007, 614 were associated with a Block 108.04, Lot 5 in the NJMC District. This is an extremely unusual situation, is verified by Table 14 above and to date construction has not yet commenced on the site.

TABLE 15

HISTORICAL RESIDENTIAL SUBDIVISION PATTERN
BOROUGH OF EAST RUTHERFORD
2000-2008

Year	Address	# New Lots
2000	----------	0
2001	----------	0
2002	----------	0
2003	----------	0
2004		0
	187 Van Winkle St.	1
	37 Hope St.	1
	366 Grove St.	1
2005		2
	42-44 John St.	
2006		1
	Mozart St.	1
	70 Prospect Terr.	1
	Railroad Ave.	
2007	----------	0
2008	859 York St.	1

Finally, the last component of establishing a historic development trend, is to examine the approved development applications from 2000 -2008. Tables 16 and 17 show the breakdown and pattern of residential and non-residential development approvals from 2000-2008.

TABLE 16

HISTORICAL RESIDENTIAL DEVELOPMENT APPLICATION APPROVALS
BOROUGH OF EAST RUTHERFORD
2000-2008

Year	Address	Description
2001	Park Ave.	2 units
2002	Orchard St.	108 units
	226 Orchard St.	1 unit
	Paterson Ave.	2 units
2003	175 Uhland St.	2 units
	Railroad Ave.	2 units
	131 Mozart St.	2 units
2004	187 Van Winkle Ave.	2 units
	22 Willow Wood Ct.	1 unit
	Paterson Ave./Randolph St.	1 unit
2005	Route 3	614 units
	Van Winkle St.	33 units
	Railroad Ave.	2 units
	183 Park Ave.	1 unit
	366 Grove St.	2 units
	42-44 John St.	6 units
2006	132 Union Ave.	30 units
	Railroad Ave.	2 units
	70 Prospect Terr.	2 units
	191 Van Winkle Ave.	1 unit
	37 Hope St.	2 units
2008	480-484 Paterson Ave.	24 units

Large scale multi-family residential development has occurred with the demolition of the Becton Dickinson corporate headquarters and the construction of 128 units. Similarly, an obsolete industrial site, located in close proximity to the Rutherford train station was redeveloped with 108 apartments (Orchard Square). Recent small multi-family residential approvals of 24-33 units have required an affordable housing component.

Table 17 below shows the non-residential development from 2000-2008. It is highlighted by two large redevelopment projects located along Route 17. The old Becton Dickinson site has development approvals for 134, 074 square feet of retail space, 100,000 square feet of office space, 3,000 square feet of bank facility and a 128 room hotel. The site is nearing completion

with only the office space outstanding. Across, Route 17, along the north side is an approved and redeveloped super fund site that contains a 135,224 square foot Lowe's, 16,500 square feet of restaurant and retail space. Future substantial redevelopment is not anticipated.

TABLE 17

NON-RESIDENTIAL DEVELOPMENT APPLICATIONS APPROVED
BOROUGH OF EAST RUTHERFORD
2000-2008

Year	Address	Square Footage	Use
2000	Stanley St./Route 17	134,074	Retail
		103,000	Office
		128 rooms	Hotel
2001	----------		
2002	252-258 Park Ave.	731	Restaurant
2003	Route 17/Paterson Plank Rd.	135,224	Retail/Storage
		16,500	Retail/ Restaurant
2004	----------		
2005	Route 17 North	1,080	Retail
	183 Park Ave.	1,880	Office
	228 Paterson Ave.		Deli
2006	51 Route 17	3,207	Retail
2007	Route 17/Union Ave.	7,385	Office/Bank
2008	480-484 Paterson Ave.	8,297	Retail/Office
	228 Park Ave.	4,605	Office
	250 Route 17	20,911	Retail/Office
	51 Route 17	256	Storage

LANDS MOST APPROPRIATE FOR AFFORDABLE HOUSING

The Borough of East Rutherford is a fully developed, older suburban community with little vacant land available for any type of new residential construction. It is Borough's position that affordable housing should be located throughout the community. East Rutherford is committed to the redevelopment of several scattered areas throughout the municipality and within the Neighborhood Commercial District as a whole.

The NC District permits multi-family residential development at a density of 30 units per acre with 20% set aside dedicated to affordable housing. The 132 Union Avenue development is the first application that redeveloped an old, obsolete industrial property with 32 units of market rate and affordable housing.

Block 8, Lots 1-9 and Block 18, Lot 14

These lots are located in the Carlton Hill section of the Borough and are bounded by the railroad spur to the south, industrial properties to the west, a well established single family residential neighborhood to the north and a well established townhouse and single family neighborhood to the east. It contains approximately 18 acres and is presently developed with antiquated factory and warehousing buildings. The Borough has adopted an Affordable Housing Overlay Zone that permits multi-family residential, townhouse and garden apartment development. All future residential development is required to set aside 20% of the units for low and moderate income households. The existing zone regulations will be amended to permits an overall density of 22 units per acre.

Block 29, Lot 3

This site is presently zoned industrial and contains an active industrial use. However, this 4.79 acre site has been at the center of redevelopment talks for the last few years. The Borough adopted a Mixed Residential Overlay Zone in order to create an overlay zone that would provide a variety of housing types to meet the needs of the Borough residents. This zone permits age restrict and non-age restricted housing. All future residential development is required to set aside 20% of the units for low and moderate income households The existing zone regulations will be amended to permits an overall density of 22 units per acre.

FAIR SHARE PLAN

Introduction

The Fair Share Plan for the Borough of East Rutherford provides a framework for how the Borough will meet is fair share obligation of low and moderate income housing. COAH's rules and regulations provide a number of options in planning for affordable housing, including rehabilitation programs; provisions for rental housing; new construction through the inclusionary development and/or municipally sponsored affordable housing mechanisms; and other methods described in COAH's rules and regulations. East Rutherford Borough's Fair Share Plan will address the Borough's fair share housing obligation consistent with COAH's requirements.

In a "Builder's Remedy" lawsuit, the Borough of East Rutherford was sued by Tomu Development Corporation in 2003. The case has been decided in favor of the builder at the Superior Court and Appellate Court levels. It is now before the Supreme Court. On June 1, 2006 Judge Harris created, as independent judicial officers, a Mount Laurel Implementation Monitor for the Borough of East Rutherford. Robert T. Regan, Esq. was appointed as the Monitor. The Borough, at the direction of the Mount Laurel Implementation Monitor, is submitting this Housing Element and Fair Share Plan to COAH for substantive certification.

East Rutherford's Fair Share Obligation

The methodology for determining the Borough's third-round affordable housing obligation has changed significantly from the prior round regulations. Under COAH's third-round rules, a municipality's third-round affordable housing obligation is a function of three components:

- Rehabilitation Share
- Remaining Prior Round Obligation
- Growth Share

The growth share component represents the most significant change from the prior round, as it requires that each municipality determine its own affordable housing obligation based on the amount of residential and non-residential growth anticipated over the third-round period from 2004 to 2018. Each of the three components is combined to determine the municipality's total affordable housing obligation. More detail on each component is provided below.

Rehabilitation Share

The rehabilitation share component of the affordable housing obligation is based on the municipality's existing housing deficiencies and includes existing housing units as of April 1, 2000 that are both deficient and occupied by households of low or moderate income. A municipality's total Rehabilitation Share is equal to the sum of its overcrowded and dilapidated units, multiplied by its regional Low-/Moderate-Income Deterioration Share, minus its Rehabilitation Share Credit. The rehabilitation share essentially replaces what was known as indigenous need in the previous rounds. COAH has assigned the Borough a rehabilitation share of 85 units.

Remaining Prior Round Obligation

The Prior Round Obligation is the total Fair Share Obligation for the period 1987 to 1999. As noted in Appendix C, COAH is adopting municipalities' unadjusted 1987 to 1999 obligations, first published in 1993. East Rutherford's Prior Round Obligation is 90 units. Credits and/or

adjustments, in accordance with COAH regulations, are permitted for units already built or transferred as part of a certified plan.

Growth Share
The growth share portion of a municipality's fair share obligation is based on the projected residential and employment growth in the municipality over the period between 2004 and 2018. Growth share is defined as:

> "The affordable housing obligation generated in each municipality by both residential and non-residential development from 2004 through 2018 and represented by a ratio of one affordable housing unit among five housing units constructed plus one affordable housing unit for every 16 newly created jobs as measured by new or expanded non-residential construction within the municipality."

This means that each individual municipality's actual growth between 2004 and 2018 generates an affordable housing obligation. For residential development, one unit of affordable housing obligation is generated for every four market rate residential units constructed in the municipality. For non-residential development, one unit of affordable housing obligation is generated for each 16 jobs created in the community. Job creation estimates are based on the amount of new non-residential square footage developed within the community. COAH has assigned the Borough with a growth share of 295 units.

Calculation of Affordable Housing Obligation
The calculation of East Rutherford's affordable housing obligation is detailed below as the Rehabilitation Share, the Remaining Prior Round Obligation and the Growth Share.

Rehabilitation Share
Appendix B of COAH's third round substantive rules establishes the Borough's rehabilitation share of 85 units.

Remaining Prior Round Obligation,
Appendix C of COAH's new rules indicates a prior round new construction obligation of 90 units for the Borough.

- Credits, Reductions and Adjustments Regarding Prior Round Obligation. The Borough seeks credits, reductions and adjustments as detailed in the following sections.

    - Credits
      Third-round rules permit credits for units that were constructed (i.e. received certificates of occupancy) or rehabilitated following April 1, 2000 (i.e. received final inspections after 4/1/2000), or transferred to another municipality as the subject of a regional contribution agreement (RCA). The Borough has not filed or received substantive certification for the prior round therefore it has no eligible reductions.

- Reductions
  Reductions from the prior round obligation are permitted for unbuilt sites that were zoned for affordable housing as part of the certified second round plan. Reductions are subject to COAH review and sites must continue to present a realistic opportunity for the construction of affordable housing. The Borough has not filed or received substantive certification for the prior round therefore it has no eligible reductions.

- Adjustments
  COAH honors adjustments granted as part of a second round certified plan, including vacant land adjustments. The Borough has not filed or received substantive certification for the prior round therefore it has no eligible reductions.

- Calculation of Remaining Prior Round Obligation
  As detailed in the sections above, the Borough The Borough has not filed or received substantive certification for the prior round therefore it has no eligible for any credits, adjustments or reductions toward its prior round obligation.

Growth Share
The growth share component of the Borough's affordable housing obligation is calculated based on the projected amount of residential and non-residential growth anticipated between 2004 and 2018. This projected growth is initially provided in Appendix F of the COAH regulations. However, a municipality can also provide a detailed (actual) projection resulting from an analysis of approved, pending and anticipated development applications. Once the detailed analysis is complete, this growth is translated into an affordable housing obligation, based on a standard of one affordable housing unit among five units that are projected and one affordable unit for every 16 jobs that are projected to be created.

The Borough of East Rutherford's growth share obligation, as established by COAH, is 120 affordable housing units.

- Projection of Residential Growth Share
  Appendix F of the third round regulations provides the data needed to calculate the residential growth share. The residential growth projection is determined by subtracting the number of households in 2004 from the projected household growth for the municipality in 2018. This calculation results in the estimated household growth.

  COAH projects that 110 dwelling units will be created in the Borough by 2018. The Borough accepts this figure as realistic of actual and anticipated growth between 2004 and 2018, and therefore East Rutherford elects not to provide its own detailed analysis. Based on the requirement that one affordable unit be constructed among every five units created in the Borough, this housing projection creates an affordable housing obligation of 22 unit. This figure will be combined later with the non-residential obligation to provide the total growth share obligation.

- Projection of Non-Residential Growth Share

  Appendix F of the third round regulations provides the data needed to calculate the non-residential growth share. The employment growth projection for non-residential development is estimated based on the employment projections for 2004 to 2018. The following calculation details the baseline non-residential growth projection for East Rutherford.

  COAH projects that 1,561 new jobs created in the Borough by 2018. The Borough accepts this figure as realistic of actual and anticipated employment growth between 2004 and 2018, and therefore East Rutherford elects not to provide its own detailed analysis. Based on the requirement that one affordable unit be constructed for every 16 jobs created in the Borough, this employment projection creates an affordable housing obligation of 98 unit.

Total Fair Share Obligation

As indicated previously, the total fair share obligation is the sum of the rehabilitation share, remaining prior round obligation, and the growth share. As shown below, East Rutherford has a total fair share obligation of 295 units.

Total Fair Share Obligation
East Rutherford, New Jersey

Component	Obligation
Rehabilitation Share	85
Remaining Prior Obligation	90
Growth Share	295
Total Fair Share Obligation	295

PLAN SUMMARY

This section of the plan details the projects, mechanisms and funding sources which will be used to meet the Borough's affordable housing obligation. The Borough was assigned a rehabilitation share of 85 units. Therefore, East Rutherford must address its third round rehabilitation obligation; its remaining prior round obligation; and its growth share obligation.

- Rehabilitation Share
  The third round rules assign the Borough with a new rehabilitation obligation of 85 units. At the outset, this rehabilitation figure appeared extremely high and unrealistic. The Borough elected to utilize the optional Exterior Housing Survey and Narrative method to determine the actual number of units in need of rehabilitation. The appropriate Borough Official conducted the Exterior Housing and concluded that only 3 structures meet the criteria for a residential unit in need of rehabilitation. The required documentation is appended to this Housing Element and Fair Share Plan.

- Remaining Prior Round Obligation
  The third round rules assign the Borough a prior round obligation of 90 units. As noted above, the Borough has been in a Builder's Remedy law suit and did not submit a prior round Housing Element and Fair Share Plan.

  The regulations governing the prior round obligation relate to East Rutherford as follows:

  - Rental Component
    COAH regulations stipulate in NJAC 5:97-3.5(a) that a municipality may receive 2 credits for each rental unit addressing its prior round rental obligation, provide the unit was created and occupied on or after December 15, 1985, is not-age restricted and has affordability controls for at least 30 years. COAH regulations stipulate in NJAC 5:97-3.10(b)(1) that at least 25 percent of a municipality's prior round obligation must be addressed with rental housing. Therefore, the Borough is obligated to provide 23 affordable family rental units.

  - Age Restricted Units
    COAH regulations stipulate in NJAC 5:97-3.5(b) that a municipality may receive 1.33 units of credit for each age restricted rental unit addressing its prior round rental obligation, provided the unit was created and occupied on or after December 15, 1985 and has affordability controls for at least 30 years. COAH regulations stipulate in NJAC 5:97-3.10(c)(1) that up to 25 percent of a municipality's prior round obligation may be addressed with age-restricted housing. Therefore, the Borough may provide up to 23 age-restricted units.

- Growth Share Obligation
  As detailed in the body of this report, East Rutherford's growth share obligation is 120 units. The rules governing the growth share obligation relate to East Rutherford as follows:

- Rental Component
  COAH regulations stipulate in NJAC 5:97-3.1 0(b)(3) that at least 25 percent of a municipality's growth share obligation must be addressed with rental housing. Therefore, the Borough is obligated to provide 30 affordable rental units.

- Very Low Income
  P.L.2008, c.46, creates a requirement that at least 13 percent of a municipality's affordable housing units be reserved for occupancy by very low income households with a gross household income equal to 30 percent or less of the median income for households of the same size within the housing region.(30% or less). Therefore, the Borough is obligated to provide 40 units of housing available to very low income households. In accordance with NJAC 5:97-3.9 at least 50 percent of these units or 16 units must be addressed with family housing. The balance may be age restricted.

- Age Restricted Units
  COAH regulations stipulate in NJAC 5:97-3.1 0(c)(2) that up to 25 percent of a municipality's growth share obligation may be addressed with age-restricted housing. Therefore, the Borough may provide up to 30 age-restricted units.

- Bonus Caps
  COAH regulations stipulate in NJAC 5:97-3.20(b) that the total number of bonuses for the growth share obligation granted in a fair share plan shall not exceed 25 percent of the projected growth share obligation. Therefore, the Borough may be granted up to 30 bonus credits.

PLAN COMPONENTS

- Rehabilitation Share

Every municipality must address its rehabilitation component of its fair share obligation. Municipalities may address this portion of their obligation either by zoning for new construction or by operating a local rehabilitation program to enable lower income households to borrow funds to repair their homes. East Rutherford has an adjusted rehabilitation share of 3 units.

The Borough proposes to meet its rehabilitation share through new construction, as noted below.

- Remaining Prior Round Obligation Plan Components

The Borough has a 90 unit remaining prior round obligation. It will be met through the use of inclusionary development as noted below.

NJAC 5:97-3.5(a) permits a municipality to receive two units of credit for each rental unit addressing its prior round obligation, provided the unit was or will be created and occupied in the municipality on or after December 15, 1985, in not age restricted and has affordability controls for at least 30 years. No rental bonuses shall be granted for rental units in excess of the prior round rental obligation. NJAC 5:97-3.5(b) permits a municipality to receive 1.33 units of credit for each age restricted unit addressing its prior round obligation, provided the unit was or will be created and occupied in the municipality on or after December 15, 1985 and has affordability controls for at least 30 years. No rental bonuses shall be granted to age restricted rental units in excess of 50% of the prior round rental obligation.

The prior round obligation of 90 units will be met with a combination of new construction and rental bonus credits.

Tomu Development Co., Inc. (Block 107.03 Lots 2, 5, 7 and 11)

This is the builder's remedy law suit site and must be included as part of the Borough's fair share plan to meet its 1987-2018 affordable housing obligation. The subject site straddles both the Boroughs of East Rutherford and Carlstadt. It has a total area of 26.9 acres with 22 acres located in East Rutherford and 4.9 acres in Carlstadt. The site is located along the western edge of the Hackensack River. Access to the site is via Paterson Plank Road. It is presently developed with commercial recreation uses in the form of a waterfront café and golf center. The site is located in those areas of the Borough of East Rutherford under the jurisdiction of the New Jersey Meadowlands Commission. The subject site is located in the Environmental Conservation and Waterfront Recreation Zones of the NJMC with the majority of the site in the Environmental Conservation Zone. Neither the Environmental Conservation nor the Waterfront Recreation Zones permit residential development. Wetland maps indicate that all of Lots 2, 5 and 11 are wetlands with only a portion of Lot 7 containing upland areas. A total 5.15± acres of uplands are located in East Rutherford and 3.75± acres of uplands in Carlstadt. The entire site is located in the 100 year flood plain. The Court has determined that this site is developable as an inclusionary development site.

The proposed development, in East Rutherford, will contain a total of 420 units with 60 units affordable to low and moderate income households. These units will be family rental units. Therefore, the Borough proposes to utilize the 45 of family rental units with 45 bonus credits to meet its prior round obligation. A total of 15 family rental units will be utilized to meet a portion of the Borough's third round obligation.

- Growth Share Obligation Plan Components
The Borough has a 120 unit growth share obligation which will be met as follows:

  - Prior Round Credits
As noted above, East Rutherford proposes to utilize 15 family rental unit credits from the Builder's Remedy law suit site that were in excess of East Rutherford's prior round obligation.

  - Inclusionary Development
The Borough of East Rutherford proposes to meet its remaining growth share obligation and its rehabilitation share through inclusionary development as follows:

    132 Union Avenue (Block 97, Lots 1-4)
This site is a 42,956 square foot site located in the NC-Neighborhood Commercial District. Approval for the construction of 30 was approved in 2006. Construction is nearing completion with 3 units of affordable housing constructed on-site and a payment in lieu of construction for the remaining 3 affordable units.

    Van Winkle Avenue (Block 92, Lot 16)
This site is a 1.12 acre parcel and located in the R-3 Multi-Family Residential District. It presently contains an existing industrial building known as "The Bindery." Approval for the redevelopment and construction of 33 residential units was awarded to M & M Investments, LP in 2005. The approval requires the construction of 3 affordable housing units on-site and the payment in-lieu of construction for 3 affordable housing units. To date no building permits have been issued for the construction of this multi-family residential complex. The Borough, at the Court appointed Monitor's request, will require 6 affordable housing units be constructed and forgo any payment in-lieu of construction.

    480-484 Paterson Avenue (Block 73, Lot 7)
This site is a 22,477 square foot parcel that is presently developed with a one-story brick industrial building and located in the I-Industrial District. The site received a use variance and site plan approval for the construction of a mixed use building in August, 2008. The proposed three story complex has approval for 8,297 square feet of retail/office use and 24 residential units. The approval requires 20% of the residential component or 5 units to be dedicated for affordable family units. All apartments will be rental.

Route 3 Service Road Project (Block 108.04, Lot 5)
The New Jersey Meadowlands Commission, on May 4, 2005 approved a Zoning Certificate for Block 108.04, Lot 5 which permits a 614 unit residential complex. Building permits were issued for the construction of these units in early 2007 but construction has not begun. All construction equipment has been removed from the site. It is anticipated that the site will develop within the statutory time frame of the Third Round affordable housing regulations. The Mt. Laurel Compliant Court appointed Monitor, Robert Regan, Esq. has directed the Borough to include this site in its inclusionary development parcels/projects. The Borough will request that the New Jersey Meadowlands Commission require the developer set aside 20% or 123 units for low and moderate income households consistent with the affordable housing requirements of COAH.

- Development Fees

The Borough will adopt a development fee ordinance, as provided by COAH's rules at NJAC 5:97-8.3, permitting the Borough to impose such fees on new development. The funds generated by the collection of development fees will be applied directly toward implementation of the Borough's Fair Share Plan.

Residential development fees of 1.5 percent of the equalized assessed value will be collected on residential development within all residential zoning districts. Non-residential development fees of 2.5 percent of the equalized assessed value will be collected on non-residential development within all non-residential zoning districts.

The following developers are exempt from paying development fees:

- Developers of low and moderate income units, or those who have made a payment in lieu of constructing affordable units;
- Developers of any not-for-profit uses; federal, state and municipal government uses; churches and other places of worship; and public schools;
- Developers who expand, enlarge, or improve existing single family or two family residences, unless the expansion, enlargement, or improvement leads to the creation of additional dwelling units(s).

With respect to the proposed development fee ordinance, the following is attached in the appendix of this plan:

- A draft Developer Fee Ordinance;
- A draft resolution from the governing body requesting COAH review and approval of development fee ordinance;
- A draft spending plan;
- A draft resolution from the governing body requesting COAH review and approval of spending plan.

CONCLUSION

The Borough has a 90 unit prior round obligation; an adjusted rehabilitation obligation of 3 units and a 120 unit growth share obligation, for a total rehabilitation obligation of 35 units and a new construction obligation of 213 units.

The table below provides a summary of how the prior round, adjusted rehabilitation share and third round growth share obligation of 213 will be met within the Borough.

Plan Summary
East Rutherford, New Jersey

Plan Component	Prior Round	Third Round
Tomu Development Corp. (B 107.03, L 2,5,7,11)	45-Rental Family Units 45- Bonus	15-Family Rental Units
132 Union Avenue (Block 97, L 1-4)		3-Famil Sale Units
Van Winkle Avenue (B 92, L16)		6-Family Sale Units
480-484 Paterson Avenue (B 73, L 7)		5-Family Rental Units
Route 3 Service Road (B 108.04, L5)		123-Family Sale Units
TOTAL	90 UNITS	152 UNITS

The Borough of East Rutherford will meet its prior round obligation of 90 units and, through approved inclusionary development projects, exceed its rehabilitation share and growth share obligation of 123 units with 29 surplus units.

APPENDIX A

Development Fee Ordinance

1. Purpose

a) In Holmdel Builder's Association V. Holmdel Township, 121 N.J. 550 (1990), the New Jersey Supreme Court determined that mandatory development fees are authorized by the Fair Housing Act of 1985, N.J.S.A. 52:27d-301 et seq., and the State Constitution, subject to the Council on Affordable Housing's (COAH's) adoption of rules. This ordinance establishes standards for the collection, maintenance, and expenditure of development fees pursuant to COAH's rules. Fees collected pursuant to this ordinance shall be used for the sole purpose of providing low- and moderate-income housing. This ordinance shall be interpreted within the framework of COAH's rules on development fees.

2. Basic requirements

a) Borough of East Rutherford shall not spend development fees until COAH has approved a plan for spending such fees and Borough of East Rutherford has received third round substantive certification from COAH or a judgment of compliance.

3. Definitions

a) The following terms, as used in this ordinance, shall have the following meanings:

i. "Affordable housing development" means a development included in the Housing Element and Fair Share Plan, and includes, but is not limited to, an inclusionary development, a municipal construction project or a 100 percent affordable development.

ii. "COAH" means the New Jersey Council on Affordable Housing.

iii. "Development fee" means funds paid by an individual, person, partnership, association, company or corporation for the improvement of property as permitted in COAH's rules.

iv. "Equalized assessed value" means the value of a property determined by the municipal tax assessor through a process designed to ensure that all property in the municipality is assessed at the same assessment ratio or ratios required by law. Estimates at the time of issuance of a building permit may be obtained utilizing estimates for construction cost. Final equalized assessed value will be determined at project completion by the

municipal tax assessor.

4. **Residential Development fees**

a) Within all zoning district(s), residential developers shall pay a fee of 1.5 percent of the equalized assessed value for residential development.

b) When an increase in residential density pursuant to N.J.S.A. 40:55D-70d(5) (known as a "d" variance) has been permitted, developers may be required to pay a development fee of 6 percent of the equalized assessed value for each additional unit that may be realized.

Example: If an approval allows four units to be constructed on a site that was zoned for two units, the fees could equal one percent of either the equalized assessed value, the coverage amount on the Home Owner Warranty document, or the appraised value on the document utilized for construction financing on the first two units; and six percent of either the equalized assessed value, the coverage amount on the Home Owner Warranty document, or the appraised value on the document utilized for construction financing for the two additional units. However, if the zoning on a site has changed during the two-year period preceding the filing of such a variance application, the density for the purposes of calculating the bonus development fee shall be the highest density permitted by right during the two-year period preceding the filing of the variance application

5. **Non-residential Development fees**

a) Within all zoning district, non-residential developers shall pay a fee of 2.5 percent of the equalized assessed value for non-residential development

b) If an increase in floor area ratio is approved pursuant to N.J.S.A. 40:55D-70d(4), then the additional floor area realized (above what is permitted by right under the existing zoning) will incur a bonus development fee of 6 percent of the equalized assessed value for non-residential development. However, if the zoning on a site has changed during the two-year period preceding the filing of such a variance application, the base floor area for the purposes of calculating the bonus development fee shall be the highest floor area permitted by right during the two-year period preceding the filing of the variance application.

6. **Eligible exactions, ineligible exactions and exemptions**

a) Affordable housing developments shall be exempt from development fees. All other forms of new construction shall be subject to development fees.

b) Developments that have received preliminary or final approval prior to the imposition of a municipal development fee shall be exempt from development fees unless the developer seeks a substantial change in the approval.

7. **Collection of fees**

Fifty percent of the development fee will be collected at the time of issuance of the building permit. The remaining portion will be collected at the issuance of the certificate of occupancy. The developer shall be responsible for paying the difference between the fee calculated at building permit and that determined at issuance of certificate of occupancy.

8. Contested fees

a) Imposed and collected development fees that are challenged shall be placed in an interest bearing escrow account by *Borough of East Rutherford.* If all or a portion of the contested fees are returned to the developer, the accrued interest on the returned amount shall also be returned.

9. Affordable Housing trust fund

a) There is hereby created a separate, interest-bearing housing trust fund in to be determined for the purpose of depositing development fees collected from residential and non-residential developers and proceeds from the sale of units with extinguished controls. All development fees paid by developers pursuant to this ordinance shall be deposited into this fund.

b) Within seven days from the opening of the trust fund account, Borough of East Rutherford shall provide COAH with written authorization, in the form of a three-party escrow agreement between the municipality, to be determined, and COAH to permit COAH to direct the disbursement of the funds as provided for in N.J.A.C. 5:94-6.16(b).

c) No funds shall be expended from the affordable housing trust fund unless the expenditure conforms to a spending plan approved by COAH. All interest accrued in the housing trust fund shall only be used on eligible affordable housing activities approved by COAH.

10. Use of funds

a) Funds deposited in the housing trust fund may be used for any activity approved by COAH to address the municipal fair share. Such activities include, but are not limited to: rehabilitation, new construction, RCAs subject to the provisions of N.J.A.C. 5:94-4.4(d), ECHO housing, purchase of land for affordable housing, improvement of land to be used for affordable housing, purchase of housing, extensions or improvements of roads and infrastructure to affordable housing sites, financial assistance designed to increase affordability, or administration necessary for implementation of the Housing Element and Fair Share Plan. The expenditure of all funds shall conform to a spending plan approved by COAH.

b) Funds shall not be expended to reimburse Borough of East Rutherford for past housing activities.

c) After subtracting development fees collected to finance an RCA, a rehabilitation program or a new construction project that are necessary to address the Borough of East Rutherford affordable housing obligation, at least 30 percent of the balance remaining shall be used to provide affordability assistance to low- and moderate-income households in affordable units included in the municipal Fair Share Plan. One-third of the affordability assistance portion of development fees collected shall be used to provide affordability assistance to those households earning 30 percent or less of median income by region.

i. Affordability assistance programs may include down payment assistance, security deposit assistance, low interest loans, and rental assistance.

ii. Affordability assistance to households earning 30 percent or less of median income may include buying down the cost of low or moderate income units in the third round municipal Fair Share Plan to make them affordable to households earning 30 percent or less of median income. The use of development fees in this manner shall entitle Borough of East Rutherford to bonus credits pursuant to N.J.A.C. 5:94-4.22.

iii. Payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall be exempt from the affordability assistance requirement.

d) Borough of East Rutherford may contract with a private or public entity to administer any part of its Housing Element and Fair Share Plan, including the requirement for affordability assistance, in accordance with N.J.A.C. 5:94-7.

e) No more than 20 percent of the revenues collected from development fees each year, exclusive of the fees used to fund an RCA, shall be expended on administration, including, but not limited to, salaries and benefits for municipal employees or consultant fees necessary to develop or implement a new construction program, a Housing Element and Fair Share Plan, and/or an affirmative marketing program. In the case of a rehabilitation program, no more than 20 percent of the revenues collected from development fees shall be expended for such administrative expenses. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with COAH's monitoring requirements. Development fee administrative costs are calculated and may be expended at the end of each year or upon receipt of the fees.

11. Monitoring

a) Borough of East Rutherford shall complete and return to COAH all monitoring forms included in the annual monitoring report related to the collection of

development fees from residential and non-residential developers, payments in lieu of constructing affordable units on site, and funds from the sale of units with extinguished controls, and the expenditure of revenues and implementation of the plan: certified by COAH. All monitoring reports shall be completed on forms designed by COAH.

12. Ongoing collection of fees

a) The ability for Borough of East Rutherford to impose, collect and expend development fees shall expire with its substantive certification on date of expiration of substantive certification unless Borough of East Rutherford has filed an adopted Housing Element and Fair Share Plan with COAH, has petitioned for substantive certification, and has received COAH's approval of its development fee ordinance. If Borough of East Rutherford fails to renew its ability to impose and collect development fees prior to expiration of substantive certification, it may resume the imposition and collection of development fees only by complying with the requirements of N.J.A.C. 5:94-6. Borough of East Rutherford shall not impose a development fee on a development that receives preliminary or final approval after the expiration of its substantive certification or judgment of compliance on [insert DATE], nor will Borough of East Rutherford retroactively impose a development fee on such a development. Borough of East Rutherford will not expend development fees after the expiration of its substantive certification.

APPENDIX B

Review and Approval of Development Fee Ordinance
Borough of East Rutherford

WHEREAS, the Governing Body of Borough of East Rutherford, Bergen County petitioned the Council on Affordable Housing (COAH) for substantive certification on *[Insert date]*; and

WHEREAS, P.L.2008, c.46 section 8 (C. 52:27D-329.2) and the Statewide Non-Residential Development Fee Act (C. 40:55D-8.1 through 8.7), permits municipalities that are under the jurisdiction of COAH or of a court of competent jurisdiction and that have a COAH-approved spending plan to impose and retain fees on residential and non-residential development; and

WHEREAS, subject to P.L.2008, c.46 section 8 (C. 52:27D-329.2) and the Statewide Non-Residential Development Fee Act (C. 40:55D-8.1 through 8.7), N.J.A.C. 5:97-8.3 permits a municipality to prepare and submit a development fee ordinance for review and approval by the Council on Affordable Housing (COAH) that is accompanied by and includes the following:

1. A description of the types of developments that will be subject to fees per N.J.A.C. 5:97-8.3(c) and (d);
2. A description of the types of developments that are exempted per N.J.A.C. 5:97-8.3(e);
3. A description of the amount and nature of the fees imposed per N.J.A.C. 5:97-8.3(c) and (d) ;
4. A description of collection procedures per N.J.A.C. 5:97-8.3(f);
5. A description of development fee appeals per N.J.A.C. 5:97-8.3(g); and
6. A provision authorizing COAH to direct trust funds in case of non-compliance per N.J.A.C. 5:97-8.3(h).

WHEREAS, Borough of East Rutherford has prepared a draft development fee ordinance that establishes standards for the collection, maintenance, and expenditure of development fees consistent with COAH's regulations at N.J.A.C. 5:97-8 and in accordance with P.L.2008, c.46, Sections 8 (C. 52:27D-329.2) and 32-38 (C. 40:55D-8.1 through 8.7).

NOW THEREFORE BE IT RESOLVED that the Governing Body of Borough of East Rutherford, Bergen County requests that COAH review and approve Borough of East Rutherford's development fee ordinance.

_____

Danielle Micci
Municipal Clerk

APPENDIX C

Affordable Housing Trust Fund Spending Plan
Borough of East Rutherford

OVERVIEW

[This model Spending Plan reflects the latest amendments to COAH's rules. In addition to demonstrating how municipal affordable housing trust funds will be expended, the spending plan should be prepared together with the implementation schedule of the fair share plan. The spending plan will serve as the basis for demonstrating realistic opportunity of each proposed affordable housing option that relies on affordable housing trust funds as well as a basis for any affordable housing delivery mechanisms that are the subject of an implementation schedule. Another key provision in this update is the requirement to spend existing balances as of July 17, 2008 within four years of the date the municipality's spending plan is approved by COAH. To ensure timeliness of fund expenditures, there is a requirement to spend or contractually commit newly collected funds within three years from the calendar year in which those funds were collected. Proposed spending may be through a revolving loan, no-interest loans, forgivable loans, below-market loans, bridge loans, a hybrid loan and grant program, etc.

This document is organized into five sections that address the standard information required by N.J.A.C. 5:97-8.10. A process describing the collection and distribution procedures for barrier free escrow funds pursuant to N.J.A.C. 5:97-8.5 should be detailed separately within the municipality's Affordable Housing Ordinance. Please tailor this form to the individual municipality's circumstance(s) and provide or insert information where text is italicized and in brackets [thus]. Depending on when this spending plan is completed, the actual versus projected years will vary and should be adjusted accordingly. Instructions for completing this model document are bolded, italicized and in brackets [thus] and should be deleted from the final document submitted to COAH for approval.

Please be aware that COAH staff will be utilizing the actual collections, expenditure and balances reported in the municipal affordable housing trust fund monitoring submitted to COAH via the Computer Tracking and Monitoring (CTM) system. The preparer is encouraged to collaborate with the municipal affordable housing trust fund report preparer to ensure consistency. Information about viewing municipal data in the CTM system is available on COAH's website at www.nj.gov/dca/coah/training.shtml.]

INTRODUCTION

Borough of East Rutherford, Bergen County has prepared a Housing Element and Fair Share plan that addresses its regional fair share of the affordable housing need in accordance with the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.), the Fair Housing Act (N.J.S.A. 52:27D-301) and the regulations of the Council on Affordable Housing (COAH) (N.J.A.C. 5:97-1 et seq. and N.J.A.C. 5:96-1 et seq.). A development fee ordinance creating a dedicated revenue source for affordable housing has been prepared by the Borough of East Rutherford and as part of the Borough of East Rutherford's submission for substantive certification of its third round Housing Element and Fair Share Plan has been submitted to COAH for its approval. The ordinance establishes the Borough of East Rutherford affordable housing trust fund for which this spending plan is prepared.

As of July 17, 2008, Borough of East Rutherford has collected $0 , expended $0 , resulting in a balance of $0. All development fees, payments in lieu of constructing affordable units on site, funds from the sale of units with extinguished controls, and interest generated by the fees are deposited in a separate interest-bearing affordable housing trust fund in to be determined for the purposes of affordable housing. These funds shall be spent in accordance with N.J.A.C. 5:97-8.7-8.9 as described in the sections that follow.

1. REVENUES FOR CERTIFICATION PERIOD

To calculate a projection of revenue anticipated during the period of third round substantive certification, Borough of East Rutherford considered the following:

(a) Development fees:

1. Residential and nonresidential projects which have had development fees imposed upon them at the time of preliminary or final development approvals;

2. All projects currently before the planning and zoning boards for development approvals that may apply for building permits and certificates of occupancy; and

3. Future development that is likely to occur based on historical rates of development.

Formatted: Bullets and Numbering

(b) Payment in lieu (PIL):
Actual and committed payments in lieu (PIL) of construction from developers is 0.

(c) Other funding sources:
Funds from other sources, including, but not limited to, the sale of units with extinguished controls, repayment of affordable housing program loans, rental income, proceeds from the sale of affordable units. No other funds have been or are anticipated to be collected.

(d) Projected interest:
Interest on the projected revenue in the municipal affordable housing trust fund at the current average interest rate.

[Provide a breakdown by year for all sources of funds collected and/or anticipated during the substantive certification period. COAH will substitute actual revenue for the period between the preparation of this spending plan and COAH's approval, as entered by the municipality in the CTM system. Use and submit additional spreadsheet(s) as necessary. A sample spreadsheet format is provided below.]

SOURCE OF FUNDS	PROJECTED REVENUES-HOUSING TRUST FUND - 2008 THROUGH 2018											
	7/18/08 Through 12/31/08	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	Total
(a) Development fees:												
1. Approved Development		20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000	200,000
2. Development Pending Approval												
3. Projected Development												
(b) Payments in Lieu of Construction												
(c) Other Funds (Specify source(s))												
(d) Interest												
Total		20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000	200,000

Borough of East Rutherford projects a total of $200,000 in revenue to be collected between July 18, 2008 and December 31, 2018. All interest earned on the account shall accrue to the account to be used only for the purposes of affordable housing.

2. ADMINISTRATIVE MECHANISM TO COLLECT AND DISTRIBUTE FUNDS

The following procedural sequence for the collection and distribution of development fee revenues shall be followed by Borough of East Rutherford:

(a) Collection of development fee revenues:

Collection of development fee revenues shall be consistent with East Rutherford's development fee ordinance for both residential and non-residential developments in accordance with COAH's rules and P.L.2008, c.46, sections 8 (C. 52:27D-329.2) and 32-38 (C. 40:55D-8.1 through 8.7).

(b) Distribution of development fee revenues:

[Provide a brief explanation of local procedures for distributing the municipality's affordable housing trust funds.]

3. DESCRIPTION OF ANTICIPATED USE OF AFFORDABLE HOUSING FUNDS

(a) Rehabilitation and new construction programs and projects (N.J.A.C. 5:97-8.7)

Borough of East Rutherford does not anticipate expending any to rehabilitation or new construction programs (see detailed descriptions in Fair Share Plan) as follows:

Rehabilitation program: $0

New construction project(s): $154,000

(b) Affordability Assistance (N.J.A.C. 5:97-8.8)

[Municipalities are required to spend a minimum of 30 percent of development fee revenue to render existing affordable units more affordable and one-third of that amount must be dedicated to very low-income households (i.e. households earning less than 30 percent of the regional median income). Utilize the formulae below to project the minimum affordability assistance requirements. The actual affordability assistance minimums are calculated on an ongoing basis in the CTM system based on actual revenues.

To initially project a funding amount that will be dedicated to affordability assistance, first subtract actual expenditures on all new construction, previously funded regional contribution agreements and rehabilitation activities from inception of the fund through June 2, 2008 from the sum of actual and projected development fees and interest through December 31, 2018. Multiply this amount by 30 percent and then subtract actual affordability assistance expenditures from inception of the fund through December 31, 2004 from the result. The outcome of this calculation will be

the total remaining funds that must be dedicated to affordability assistance for the period January 1, 2005 through December 31, 2018.

To initially project a funding amount that will be dedicated to affordability assistance for very low-income households, divide the affordability assistance figure derived from the above paragraph by three. The outcome of this calculation will be the total remaining funds that must be dedicated to very low-income affordability assistance for the period January 1, 2005 through December 31, 2018. Municipalities will receive credit against this projected minimum for affordability assistance activity from January 1, 2005 to the present.]

Projected minimum affordability assistance requirement:

Actual development fees through 7/17/2008		$0
Actual interest earned through 7/17/2008	+	$0
Development fees projected* 2008-2018	+	$200,000
Interest projected* 2008-2018	+	$ 20,000
Less housing activity expenditures through 6/2/2008	-	$0
Total	=	$220,000
30 percent requirement	x 0.30 =	$ 66,000
Less Affordability assistance expenditures through 12/31/2004	-	$0
PROJECTED MINIMUM Affordability Assistance Requirement 1/1/2005 through 12/31/2018	=	$66,000
PROJECTED MINIMUM Very Low-Income Affordability Assistance Requirement 1/1/2005 through 12/31/2018	÷ 3 =	$22,000

* Note: The 2008 portion of this projection reflects 2008 subsequent to July 17 as the remainder of 2008 is included in the actual figure reported above.

Borough of East Rutherford will dedicate $66,000 from the affordable housing trust fund to render units more affordable, including $22,000 to render units more affordable to households earning 30 percent or less of median income by region, as follows:

- Rental Assistance.

(c) Administrative Expenses (N.J.A.C. 5:97-8.9)

[Municipalities are permitted to use affordable housing trust fund revenue for related administrative costs up to a 20 percent limitation pending funding availability after programmatic and affordability assistance expenditures. The actual administrative expense maximum is calculated on an ongoing basis in the CTM system based on actual revenues.

To initially project a funding amount that will be available for administrative costs,

sum all development fees actually collected since the inception of the account and all actual interest earned since the inception of the account with all projected development fees and interest projected to be collected through December 31, 2018. To this amount, add all payments in lieu of constructing affordable units and other account deposits from the inception of the account through July 17, 2008. From this total amount, subtract RCA expenditures made or contractually obligated from the inception of the account through December 31, 2018. Multiply this amount by 20 percent and then subtract actual administrative expenditures made from the inception of the account through December 31, 2004. The outcome of this calculation will be the total remaining funds that will be available to defray administrative expenses for the period January 1, 2005 through December 31, 2018.]

Borough of East Rutherford projects that $44,000 will be available from the affordable housing trust fund to be used for administrative purposes. Projected administrative expenditures, subject to the 20 percent cap, are as follows:

- Expenditures toward the preparation of mandated plans.
- Expenditures toward municipal employee salaries related to the execution of affordable housing related tasks.

Borough of East Rutherford intends to use affordable housing trust fund revenues for the creation and/or rehabilitation of housing units. Where applicable, the creation/rehabilitation funding schedule below parallels the implementation schedule set forth in the Housing Element and Fair Share Plan and is summarized as follows.

[In developing this spending plan, it is important to note that all funds in the municipal trust fund as of July 17, 2008 must be fully expended or committed to be expended within four years of COAH's approval of the spending plan.]

[A sample spreadsheet format is provided below.]

Program *[Individually list programs and projects e.g. Rehab, Accessory Apartments, for-sale and rental municipally sponsored, etc].*	**Number of Units Projected**	Funds Expended and/or Dedicated	PROJECTED EXPENDITURE SCHEDUL 2009 -2018											
		2005-July 17, 2008	7/18/08 – 12/31/08	2009	2010	2011	2012	2013	2014	2015	201			
[Rehabilitation]														
Total Programs														
Affordability Assistance														
Administration														
Total														

5. EXCESS OR SHORTFALL OF FUNDS

Pursuant to the Housing Element and Fair Share Plan, the governing body of Borough of East Rutherford has adopted a resolution agreeing to fund any shortfall of funds required for implementing *[insert types of housing programs]*. In the event that a shortfall of anticipated revenues occurs, Borough of East Rutherford will bond. A copy of the adopted resolution is attached.

[COAH requires a municipality to pass a resolution of intent to bond or a resolution appropriating funds from general revenue for any unanticipated shortfall in a municipal rehabilitation program or municipal construction project.]

In the event of excess funds, any remaining funds above the amount necessary to satisfy the municipal affordable housing obligation will be used to *[describe type of housing activities]*.

6. BARRIER FREE ESCROW

Collection and distribution of barrier free funds shall be consistent with East Rutherford's Affordable Housing Ordinance in accordance with N.J.A.C. 5:97-8.5.

[Reference section of Affordable Housing Ordinance that explains the collection and distribution of barrier free funds.]

SUMMARY

Borough of East Rutherford intends to spend affordable housing trust fund revenues pursuant to N.J.A.C. 5:97-8.7 through 8.9 and consistent with the housing programs outlined in the housing element and fair share plan dated December 15, 2008.

Borough of East Rutherford has a balance of $0 as of July 17, 2008 and anticipates an additional $290,000 in revenues before the expiration of substantive certification for a total of $290,000. The municipality will dedicate $ *[insert amount of revenue for housing activities]* towards *[insert types of housing programs]*. $ *[insert amount of revenue for affordability assistance]* to render units more affordable, and $*[insert amount of revenue for administrative costs]* to administrative costs. Any shortfall of funds will be offset by *[insert source of funds]*. The municipality will dedicate any excess funds toward *[insert types of housing programs]*.

SPENDING PLAN SUMMARY	
Balance as of July 17, 2008	$0
PROJECTED REVENUE July 18, 2008-2018	$200,000
Development fees	+ $200,000
Payments in lieu of construction	+ $ 90,000
Other funds	+ $
Interest	+ $
TOTAL REVENUE	= $290,000
EXPENDITURES	
Funds used for Rehabilitation	- $
Funds used for New Construction	
1. *[list individual projects/programs]*	- $
2.	- $
3.	- $
4.	- $
5.	- $
6.	- $
7.	- $
8.	- $
9.	- $
10.	- $
Affordability Assistance	- $66,000
Administration	- $58,000
Excess Funds for Additional Housing Activity	= $
1. *[list individual projects/programs]*	- $
2.	- $
3.	- $
TOTAL PROJECTED EXPENDITURES	= $124,000
REMAINING BALANCE	= $166,000

Exhibit

J

BOROUGH OF EAST RUTHERFORD

RESOLUTION NO. 78

A RESOLUTION TO COMMIT FUNDS FROM THE BOROUGH'S AFFORDABLE HOUSING TRUST FUND TO AN AFFORDABLE HOUSING PROJECT OF THE HOUSING AUTHORITY OF BERGEN COUNTY.

WHEREAS, the Borough of East Rutherford has a balance of approximately $140,000 in its Affordable Housing Trust Fund; and

WHEREAS, the Housing Authority of Bergen County ("HABC") a public agency established pursuant to NJSA 40A:12A-17, has requested financial assistance from the Borough in order to acquire a two family home within the Borough and convert and restrict such 2 family home to affordable housing meeting the requirements of the Council on Affordable Housing or such other agency that may succeed it ("COAH"); and

WHEREAS, the Housing Authority intends to provide rental housing in the property to be acquired thereby providing the Borough with a bonus credit against the Borough's affordable housing obligation.

NOW THEREFORE, be it established by the Mayor and Council of the Borough of East Rutherford as follows:

1. Subject to the conditions set forth in this Resolution, the Borough hereby commits to loan from the Affordable Housing Trust Fund to the HABC such sums not to exceed $140,000 that are available in the Trust Fund, after satisfying any debts and obligation of the Trust Fund, to assist in the purchase and conversion of a two-family home located in East Rutherford to at least 2 units of affordable housing.

2. The financing described in Section 1 above shall be subject to the following conditions:

(a) The proceeds shall be used solely for the creation of affordable housing meeting the guidelines COAH and which qualify for a rental unit bonus from COAH;

(b) The Borough shall receive credit from COAH against its affordable housing obligations of at least two units;

(c) The HABC shall not sell, but instead shall retain title to the property acquired with the Borough's assistance;

(d) The HABC shall rent the units created by the Borough's assistance only to tenants qualified to rent affordable housing under COAH's guidelines;

(e) To the extent permitted by law the HABC shall grant a preference to East Rutherford residents in selecting tenants for the units, the Borough acknowledging that Tenant selection shall be conducted by the HABC consistent with COAH regulations;

(f) The Borough shall have no obligation or responsibility to manage or maintain the property, or to provide any additional funding for the project, all of which shall be performed or provided by the HABC.

(g) The amount advanced by the Borough shall remain an obligation of the HABC to the Borough but shall not bear interest nor shall it be subject to repayment of the Borough except as provided in this resolution;

(h) The amount advanced by the Borough shall be repaid by the HABC to the Borough if:

(i) The property is sold or title is transferred to a third party, including but not limited to a tenant or other person eligible to occupy affordable housing under COAH's regulations, it being the intent of the Borough that the property shall remain affordable rental housing (according to COAH guidelines of the HABC);

(ii) The property ceases to be used as affordable rental housing qualifying as such for a rental bonus under COAH regulations;

(iii) HABC shall breach any of the conditions herein or in any document referenced herein.

(i) The HABC shall comply with all local zoning, site plan and other land use regulations of the Borough (subject to such waivers and variances as may be granted) and with the requirements of other laws applicable to the project including but not limited to the New Jersey Uniform Construction Code.

(j) The HABC shall execute and deliver to the Borough, and record in the land records of the Bergen County Clerk, a mortgage in form and substance acceptable to the Borough Attorney and to the Mount Laurel Compliance Monitor placing on record the restrictions and conditions of the Borough's financing and the

other terms of this transaction and the HABC shall execute and deliver to the Borough such other agreements, affidavits, certification and other documents deemed necessary by the Borough Attorney or Mount Laurel Compliance Monitor.

3. If any amendment or other filing applicable to any Spending Plan or to this transaction which the Borough may be required to submit to COAH or to the Superior Court is necessary to carry this resolution into effect, such amendment or filing shall be prepared and filed by the Mayor, with the assistance of the Borough Planner and Borough Attorney, in accordance with applicable law.

4. This resolution is conditioned upon the approval of Robert T. Regan, Esq., the court-appointed Mount Laurel Compliance Monitor.

5. This resolution is conditioned upon the transaction described herein:

(a) Being deemed a landful investment by the Borough for affordable housing purposes; and

(b) Resulting in at least 2 units credit to the Borough against its affordable housing obligation.

6. All costs of the Borough incurred in the planning and implementation of the transaction described in this resolution shall be paid from the Affordable Housing Trust Fund but only to the extent permitted by law.

7. The Borough reserves the right to amend and supplement this resolution at anytime hereafter.

8. If the HABC does not acquire the property and create affordable housing as provided herein by December 31, 2012, the Borough may, in its sole discretion:

(i) extend the time for HABC performance;

(ii) otherwise amend this resolution; and/or

(iii) terminate this transaction in which event the loan described herein shall not be made.

9. This resolution shall take effect immediately but shall remain inoperative until approved by the Mount Laurel Compliance Monitor pursuant to Section 4 above.

10. Notwithstanding anything in this resolution including this commitment of funds, no amounts shall be paid to or for the HABC with regards to this project until all conditions precedent set forth herein and otherwise established by law for the expenditure of funds described herein have been satisfied.

CERTIFICATION

I, Danielle Lorenc, Municipal Clerk, do hereby certify that the foregoing is a true copy of the resolution passed by the Mayor and Council at the meeting held on the 19th day of June, 2012.

Danielle Lorenc, RMC

Councilmember	Moved	Second	Ayes	Nays	Absent	Abstain
Brizzi	X		X			
Ravettine					X	
Lahullier		X	X			
Perry			X			
Stallone					X	
Banca			X			