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December 28, 2015

Elizabeth K. McManus, PP, AICP, LEED
Clarke Caton Hintz
100 Barrack Street
Trenton, New Jersey 08608

Re: In the Matter of the Application of the Borough of East Rutherford for a Judgment of Compliance and Repose
Docket No.: BER-L-5925-15

The Borough's Response to Catalyst's Objection to the Borough's Summary of Plan.

Dear Ms. McManus:

I represent the Borough of East Rutherford (the "Borough"). Please accept this letter and the report from George Stevenson, P.P., A.I.C.P. attached as Exhibit A in response to the objections filed by Catalyst Development Partners, LLC ("Catalyst") to the Borough's Summary of Plan filed with you on November 25, 2015 (the "Summary"). This letter should be read in conjunction with Mr. Stevenson's accompanying letter attached as Exhibit A.

1. **As to the Summary as a Whole.**

There can be no question that the Borough's Summary was submitted in good faith, with substantial justification for each entry. Not only was each entry explained in the notes to the Summary, but each entry has a substantive factual and legal basis.

At the time the Summary was filed it was required by the Court as part of the Court's

review of the Borough's Declaratory Judgment action seeking a Judgment of Compliance and repose, essentially finding that the Borough has satisfied it affordable housing obligations. Simply put, that obligation is to provide a realistic opportunity for the construction of the Borough's fair share of affordable housing. It is important to keep both these points in mind when evaluating Catalyst's objections.

2. <u>As to Catalyst's Specific Objections</u>.

With those general responses in mind, each of Catalyst's objections is discussed below in this letter or in Mr. Stevenson's letter (Exhibit A).

A. <u>The Borough's Use of the 2014 Proposed Regulations</u>.

Catalyst's lead objection asserts that the Borough should not rely on the not adopted regulations promulgated by COAH in 2014. That objection ignores both the state of the law and the factual reality at the time the Summary was filed.

The Summary was, by its nature, a preliminary document. Indeed, it could be nothing more. At the time the Summary was filed there was no authoritative source of the Borough's prospective need. Indeed there was no authoritative source for prospective need anywhere in New Jersey. Yet the Summary was required and the Summary itself required a recitation of "prospective need." The Borough elected to use what the Borough's notes to the Summary itself described as "the only currently available non-adversarial attempt to establish the "need" as required by the Fair Housing Act." The Summary itself recognized that there was a "...likelihood that these numbers will be revised..." ***See Summary, Note 1.***

Second, at least one Mount Laurel judge has specifically authorized the use of the not adopted regulations promulgated by COAH in 2014. In ordering the filing of a Summary of Plan for North Plainfield Borough, Judge Miller required completion and filing of the Summary of

Plan "... with the understanding that the municipalities may utilize the fair share numbers form the proposed third iteration of the Third Round rules that were never adopted due to COAH's 3-3 tie vote." ***See Paragraph 3 of Judge Miller's December 4, 2015 order attached as Exhibit B.***

The Summary provided that "The Borough will likely propose revisions to this plan upon receipt and analysis of the Econsult report." ***See Summary Note 1.*** The Borough intends to meet that commitment.

B. <u>The Binding Effect of the Tomu Decision</u>.

The court's decision in ***Tomu Development Co., Inc. v. Borough of East Rutherford, et al., Docket No.: BER-L-5895-03*** determined that the Borough's then current need (now the Prior Round Obligation) was 60 units. This was determined after a full trial on the merits, and affirmed on appeal, see Docket No. A-5621-05T1. The determination in the ***Tomu*** matter is binding (i.e., "res judicata") as to the Borough's Prior Round Need, i.e., 60 units. In addition, the builder's remedy in ***Tomu*** awarded 420 units (360 market rate and 60 affordable rental units). This satisfies East Rutherford's second round obligation as determined by the ***Tomu*** court and provides a surplus. As a fully litigated decision on the precise issue which is the subject of Catalyst's objection, that decision is also binding. ***See the Court's November 28, 2005 Order and its Final Judgment in Tomu, both attached as Exhibit C.*** Catalyst's objection is foreclosed as a matter of law.

Catalyst terms the Tomu units as "phantom." That characterization ignores both the res judiciata effect of the Tomu decision and the actions of Tomu itself in defending the so-called "phantom" rights. Counsel for Tomu recently notified the Borough in writing that it will seek to intervene in this declaratory judgment action to protect the builder's remedy granted in the Tomu decision, i.e., the units that Catalyst calls "phantom." ***See December 11, 2015 letter of Robert Kasuba, Esq. to Elizabeth K. McManus attached as Exhibit D.***

C. **The Reservation of Funds for the Housing Authority.**

The reservation of funds to the Housing Authority of Bergen County ("HABC") is real. The Borough's Mayor and Council committed the funds by resolution. ***See Mayor and Council resolution No. 78 attached as Exhibit E.*** The HABC is relying on those funds even though it has yet to finalize its plans. ***See August 15, 2013 letter from Charlotte Vandervalk, then Director of Development of the HABC attached as Exhibit F.*** There is the requisite commitment by the Borough and the credits claimed are appropriately included in the Summary.

D. **Other Issues.**

These issues and others raised in Catalyst's objection are more fully discussed in Mr. Stevenson's letter attached as Exhibit A.

E. **Conclusion.**

The Borough submits that any report you render to the Court on the Summary, as it may be revised, positively report the Borough's good faith compliance with the Court's requirements and the affordable housing process.

Respectfully,

Richard J., Allen, Jr.

RJA/da
cc: George Stevenson, P.P., A.I.C.P
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Robert A. Kasuba, Esq.
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NJ State League of Municipalities
c/o Edward J. Buzak, Esq.
NJ Council on Affordable Housing
c/o Geraldine Callahan, Deputy Attorney General
Robert T. Regan, Esq. – Compliance Monitor

EXHIBIT A

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December 28, 2015

Elizabeth K. McManus
Clarke Caton & Hintz
100 Barrack Street
Trenton, New Jersey 08608

Re: East Rutherford Summary Plan for Fair Share Obligation; Response to Steven M. Lydon, PP/AICP Letter of Objection of December 15, 2015
Our file #02-12-T-024

Dear Ms. McManus:

Our office has reviewed the above referenced letter of objection and offers the below comments for your evaluation. This letter should be read in conjunction with Mr. Allen's accompanying letter to you of even date.

Paragraph 1. This paragraph notes that the summary plan is based on 2014 COAH proposed obligations that were never adopted. The objector's observation states the obvious problem of attempting to develop a plan in advance of known numeric obligations, leaving municipalities with the viable alternative of utilizing the aforementioned COAH obligations as they are non-adversarial. East Rutherford is one of the municipalities making up the consortium of towns that had retained Dr. Robert Burchell of Rutgers University for the development of obligations and methodology. Due to the health issue that has precluded Dr. Burchell from continuing with his work, the consortium retained the services of Econsult to replace Dr. Burchell. Econsult's report has just been received and is currently under review. East Rutherford will amend and supplement its summary plan after review of the Econsult report.

Point 1: Rehabilitation. The objector accurately notes that the summary form reflects 0 credits for rehabilitation. The Borough's plan will call for the encouragement of participation in the Bergen County Home Improvement Loan Program. Participation can only be encouraged - not mandated. Households cannot be forced to participate. Therefore, the objection is nothing more than a recitation of the obvious and does not support an inference of bad faith or failure of performance by the Borough.

In addressing the rental unit rehabilitation, it should be noted that submission of the summary form well predates Planning Board review and adoption of the Housing Element and Fair Share Plan. It is the expectation that the Borough will either administer an in-house program or, in the alternative, contract with a qualified agency for said rehabilitation. With that factual background in mind, the objection does not support an inference of bad faith or failure of performance by the Borough.

Point 2: 1987-1999 New Construction Obligation. The overarching Mount Laurel obligation of every community is to provide the opportunity for the creation of affordable units. Here, East Rutherford can rightfully claim the TOMU credits as, by virtue of the award of a builder's remedy, there is, in effect, a court imposed opportunity for affordable units. Further, the Borough is not in receipt of any information that would indicate that the developer has abandoned the project. This conclusion is reinforced by the recent letter of Tomu to you dated December 11, 2015 in which counsel for Tomu asserts that it will defend its builder's remedy rights award in that case. The builder's remedy awarded to Tomu is alive and well, and satisfies the Borough's Round 2 obligations, and more.

Point 3: 1999-2015 Gap Obligation. No response is necessary.

Point 4: 2015-2025 Obligation. Catalyst's objection overlooks the Appendix C table of the proposed COAH 2014 regulations setting forth the Borough's obligation as 24 units. The objection claims that East Rutherford is using "phantom affordable housing units" (TOMU) credit to address the obligation. That objection misses the mark.

First, the Tomu approved units are not "phantom." They are part of a court's final judgment which was affirmed by the Appellate Division and over which the Supreme Court denied review.

Second, East Rutherford's obligation is to provide the opportunity for affordable housing, which here is provided by the Tomu court order.

As to the objection to claim for 3 of the 6 credits, owing to an approval for a 33 unit inclusionary development, which provides for the construction of 3 units and 3 payment-in-lieu, the plan will set forth that the court appointed monitor, appointed pursuant to an order of the TOMU court, will require elimination of the referenced payments-in-lieu in favor of construction of 3 affordable units, resulting in 6 affordable units. Whether the credit is awarded at the time of plan or when the certificate of occupancy is issued is beside the point. The units are real and the plan recognized those units.

As to Catalyst's claim of an indication for 86 units of credit for proposed 2015-2025 inclusionary zoning, the summary form indicates for said category 68 proposed units. No adjustment to the summary form is necessary. As an aside, and as described in Mr. Allen's accompanying letter, East Rutherford has committed the funds to the Housing Authority of Bergen County; however the Housing Authority has not yet finalized its acquisition.

As to the objection to the claim for credits relating to the expansion of the Group at 3 development, Mr. Allen's accompanying letter describes the basis for the claim, i.e., an agreement among the Borough and the court appointed Mount Laurel monitor and approved by COAH.

As to the request for clarification of the round three rental bonuses and ultimately arriving at a total of 148 low/mod units, there are 6 round three rental bonuses. The plan claims 15 rental bonuses from the TOMU development against the 1987-99 prior round obligation. In aggregate, a total of 21 bonus credits are claimed. The claim of a total of 148 low/mod units is correct and is simply the sum of 45 TOMU units addressing the 1987-99 prior round obligation and 103 units (35 constructed, 51 proposed, 2 from agreement with HABC, and 15 carry over TOMU units) addressing the third round obligation of 148.

As to the claim of a mathematical mistake in the summary table at the bottom of page 2, we agree and find that, upon recalculation, that the percent of non-age restricted units equates to 176% of the obligation (148 units/84). A typographical error.

For the foregoing reasons, and those set forth in Mr. Allen's accompanying letter, East Rutherford urges the Master to favorably report East Rutherford status to the Court.

Sincerely yours,

REMINGTON, VERNICK & ARANGO ENGINEERS

George R. Stevenson, Jr., P.P., AICP

cc: Richard J. Allen, Jr., Esq.

EXHIBIT B

ORDER PREPARED BY THE COURT

IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF NORTH PLAINFIELD, A Municipal Corporation of the State of New Jersey, Petitioner.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY DOCKET NO. SOM-L-935-15 CIVIL ACTION (Mount Laurel) **ORDER**

THIS MATTER having been opened to the Court by Petitioner, Borough of North Plainfield, upon notice to all Parties requiring notice, for an Order extending the period of temporary immunity from exclusionary zoning and builder's remedy lawsuits; and the Court having considered the papers filed in support of and in opposition to Petitioner's request and the argument of counsel, and for good cause appearing,

It is on this 4TH day of December, 2015, **ORDERED** as follows:

1. Extension of Temporary Immunity. The temporary immunity for the municipality and its Planning Board from any and all exclusionary zoning lawsuits to remain in effect until December 2, 2015, remains in full force and effect and is hereby extended until March 31, 2016.

2. Appointment of Special Master. The Court' shall appoint John J. Coyle, Jr. (Ret. Judge) as the Special Master in this matter. Any fees incurred by the Special Master shall be divided equally between the municipality and all intervenors (if any), except that FSHC shall not be required to pay a share of such fees.

3. Matrix Forms. On or before December 14, 2015, the municipality shall complete and provide to the Court, Special Master, FSHC and intervenors (if any) the "matrix forms" that were developed by Frank Banisch, PP, AICP, with the understanding that the municipality may utilize the fair share numbers from the proposed third iteration of the Third Round rules that were never adopted due to COAH's 3-3 tie vote.

4. Meetings. On or before December 14, 2015, the municipality shall furnish the Court with a proposed plan, schedule and commentary concerning meetings with any and all interested parties (which should include the Special Master if at all possible), and if the municipality has already begun that process, the municipality shall submit a report of the progress of the meeting(s).

5. Pre Trial Submissions. With respect to the fair share number "trial" that will be scheduled by the Court, the municipality and any participating Intervenor shall, by December 18, 2015, provide a concise position paper concerning the following: (a) the issues to be resolved; (b) the expected number of witnesses that each intends to call; (c) any anticipated issues or problems that need to be addressed; (d) a preliminary list of exhibits or evidence to be presented; (e) the anticipated length of the trial; (f) the proposal for the exchange of Pretrial Information (see, R. 4:25-7 and Appendix XXIII to the New Jersey Court Rules); (g) the plan for accomplishing any stipulations on contested procedural, evidentiary or substantive issues; (h) the plan for submission of trial briefs; (i) counsel and expert availability and, if availability is limited, proposal for alternate counsel; and (j) the proposal to address such other issues as any party deems appropriate for the management of the case and/or the "fair share" portion of the trial.

6. Expert Reports on Fair Share Issues. On or before January 15, 2016, the municipality and the intervenors (if any) shall provide to each other, the Special Master, and to the Court their respective expert reports on fair share issues.

7. Positions on Compliance Issues. On or before January 15, 2016, the municipality shall furnish the Court with its positions relating to compliance issues.

8. Case Management Conference to set Fair Share Trial Date. The Court will hold a case management conference in early to mid February, 2016 to set a trial date relating to the municipality's fair share obligation.

9. Service of within Order. A copy of the within Order shall be served on counsel for all persons and/or entities on the municipal service list within five (5) days of receipt of this order by counsel for the municipality.

HON. THOMAS C. MILLER, P.J.Ch.

SEE ATTACHED STATEMENT OF REASONS

MOTION EXTENDING TIME TO OBTAIN EXPERT REPORT

Re: In re Borough of North Plainfield, Docket No. SOM-L-935-15

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The issues before the Court arises from circumstances that have developed as part of the Declaratory Judgment Action (hereinafter DJ) that have been filed with this Court in response to the New Jersey Supreme Court's Order of March 10, 2015 enforcing the Court's ruling in the matter known as In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the Council on Affordable Housing, 221 N.J. 1 (2015) (hereinafter "In re COAH").

This Court has been deeply involved in the efforts necessary to make a preliminary assessment of the current status of compliance with each municipalities' constitutional affordable housing obligations. As part of the Court's review, this Court has previously reviewed the Complaint, Certifications, and documentation filed with the Court in this matter. Those documents have provided details concerning the status of the determination of the Supplemental Housing Plan Element and Fair Share Plan.

With regards to North Plainfield, this Court has previously found that it has satisfied the criteria for securing temporary immunity. As a result, on August 25, 2015 this Court has previously awarded North Plainfield Borough temporary immunity from "Exclusionary Lawsuits" for a period of five months with the temporary immunity period to terminate on December 8, 2015.

In this Motion, North Plainfield Borough moves to extend the time to obtain its expert report in this matter until January 8, 2016 and to extend temporary immunity until March 31, 2016. In the Plaintiff's moving papers it references and relies upon a Certification of its counsel, Eric M. Bernstein, Esq. ("Bernstein Cert.") as well as the September 28, 2015 decision of the Honorable Nelson C. Johnson, J.S.C. in Atlantic and Cape May County Mount Laurel Litigation and the Certification filed by Jonathan Drill, Esq., counsel for six other pending Mt. Laurel cases within this Court's Vicinage.[1]

[1] In re Township of Alexandria, Docket No. HNT-L-300-15
In re Township of Clinton, Docket No. HNT-L-315-15
In re Borough of Glen Gardner, Docket No. HNT-L-302-15
In re Borough of Milford, Docket No. HNT-303-15
In re Township of Union, Docket No. HNT-305-15
In re Township of Greenwich, Docket No. WRN-L-228-15

FACTUAL BACKGROUND PARTICULAR TO THE NORTH PLAINFIELD CASE

North Plainfield Borough provides the following factual background with regards to its history concerning Mt. Laurel compliance.

1. On August 25, 2015 the Court entered an Order granting Plaintiff's Motion for Temporary Immunity and set forth that the temporary immunity would expire on December 8, 2015.

2. The calculation of affordable housing obligations has been within the purview of the Council on Affordable Housing (COAH) in accordance with the Fair Share Housing Act, N.J.S.A. 52:27D-301, et seq. However, COAH has not been able to promulgate valid municipal affordable housing regulations since its Second Round rules expired in 1999.

3. Following the Supreme Court's ruling in Mount Laurel IV, municipalities throughout the State sought to obtain an expert with the knowledge to calculate affordable housing obligations under the methodology described by the Supreme Court. A significant group of municipalities chose to join together and enter into a Municipal Shared Services Defense Agreement (MSSDA) to collectively retain Rutgers University and Dr. Robert Burchell to develop a methodology and provide a determination as to each municipality's affordable housing obligation.

4. On June 22, 2013, the Borough Council of the Borough of North Plainfield adopted a Resolution, authorizing the Mayor and Borough Clerk to execute the MSSDA on behalf of the Borough, permitting the Borough to join with various municipalities in the State of New Jersey who sought to employ Dr. Burchell's expertise. See Resolution 06-22-15-02f attached as Plaintiff's Exhibit A. The Petitioner thereafter became a party to the MSSDA and the Municipal Group (MG) that was formed as a result.

5. A Research Study Agreement (RSA) was signed between Rutgers and the MG on July 9, 2015. It was contemplated that a final report would be issued by Dr. Burchell by September 30, 2015 and the municipalities would then be prepared to develop or update their fair share plans in accordance with the obligation determined under that methodology.

6. However, on July 28, 2015 members of the MG learned that Dr. Burchell had suffered a stroke. Thereafter, it became readily apparent that Dr. Burchell would be unable to complete the work required under the RSA. In fact, on September 11, 2015 Rutgers terminated the RSA.

7. In response to Rutgers' decision, members of the MG met and decided to authorize an amendment to the MSSDA which would allow the MG to enter into an agreement with Econsult Solutions, Inc. (Econsult) for the purpose of determining municipal affordable housing obligations. Econsult had previously undertake such work on behalf of COAH and had knowledge of municipal affordable housing obligations under COAH's prior round methodologies.

8. On October 13, 2015 the Borough Council of North Plainfield adopted a Resolution authorizing amendment to the MSSDA. See Resolution No. 10-13-15-03b attached as Plaintiff's Exhibit B.

9. Accordingly, the Petitioner seeks an extension of temporary immunity in order to potentially incorporate the affordable housing obligation determined by Econsult into its Fair Share Plan.

CIRCUMSTANCES LEADING TO THE PRESENT MOTION

North Plainfield filed a Declaratory Judgment Action and Motion for Temporary Immunity on July 8, 2015 in accordance with the Supreme Court's directive in the matter entitled In re 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) (hereinafter "Mount Laurel IV"). On August 25, 2015 this Court entered an Order setting a specific and tight schedule for prosecution of this matter, in accordance with the Borough's expectations regarding the delivery of its expert report in this matter.

In this Motion North Plainfield Borough indicates that the schedule that was proposed in their original Order is no longer tenable in light of intervening circumstances that have occurred. North Plainfield Borough offers factual background provided by Jonathan Drill, Esq. in his Certification in the Hunterdon and Warren County cases which are referenced in Footnote 1 above.

Mr. Drill's Certification provides much of the specific factual background that forms the basis of the Township's request to extend time to obtain a new expert and for the extension of temporary immunity.

According to Mr. Drill, over 200 municipalities in the state entered into a Municipal Shared Services Defense Agreement (the "MSSDA") with over 200 other municipalities (the form of which was attached as Exhibit A to Plaintiff's counsel's Certification). Mr. Drill certifies that of the dozens of attorneys representing municipalities in the hundreds of Mount Laurel Declaratory Judgment actions pending throughout the state, four of those attorneys have taken a leadership role with respect to the MSSDA, namely, Jeffrey R. Surenian, Jonathan E. Drill, Edward J. Buzak, and

Steven Kunzman. (Drill Certification, para. 3) Mr. Surenian is the designated primary attorney to administer the MSSDA and Jonathan Drill is the "backup". (Id. See, paragraphs 3, 4, 7, and 10 of the MSSDA, which was attached as Exhibit A to the Drill Certification)

The primary purpose of the MSSDA was to create a Municipal Group (the "MG") to collectively retain Rutgers, the State University of New Jersey ("Rutgers"), and Robert Burchell, Ph.D. ("Dr. Burchell"), a Rutgers professor, for the purpose of conducting an analysis and preparing a report (the "report") of the affordable housing need for each region of the state and the allocating the regional need to each individual municipality in each region. (Drill Certification, paragraph 4) In fact, as provided in paragraph 3 of the MSSDA, Mr. Surenian signed a Research Study Agreement (the "RSA") with Rutgers on behalf of the MG on July 9, 2015, which was signed by Rutgers and Dr. Burchell on July 13, 2015. (A copy of the RSA was attached as Exhibit B to the Drill Certification)

The purpose of the RSA was to: establish present and prospective statewide and regional affordable housing need and allocating fair share obligations among municipalities in accordance with applicable law, (see paragraph 1 of the RSA); to produce a report for the MG so that its members could use that report in the pending Declaratory Judgment actions and to produce Dr. Burchell to testify on behalf of individual members of the MG for the purpose of presenting the conclusions of the report (see, paragraph 6 of the RSA). Pursuant to paragraph 6 of the RSA, Dr. Burchell was required to submit the report to the MG by September 30, 2015.

On July 28, 2015 Mr. Drill indicates that he learned that Dr. Burchell had suffered a "mini-stroke" on July 27, 2015 while at work. (Drill Certification, para. 10) MG representatives were advised that he would be in the hospital for a few days and that he would then go through rehabilitation at Kessler Institute for three weeks. Id. Mr. Drill indicates that he "was hopeful and [he] believe[d] [his] hope was reasonable based on the reports [he] was getting, that Dr. Burchell would be able to finish the report by the September 30, 2015 contractual deadline and would be able to testify by October 21, 2015." Id.

However, by the beginning of September, 2015, representatives of Dr. Burchell and representatives of Rutgers apparently began indicating that Dr. Burchell would not be able to testify due to the stroke he had suffered. (Drill Certification, para. 11) By letter dated September 11, 2015, Rutgers terminated the RSA on the basis of paragraph 15 of the RSA, sections 1 and 2, due to the medical condition of Dr. Burchell. (A copy of the Rutgers termination letter was attached as Exhibit D to the Drill Certification)

On September 10, 2015, the day before Rutgers sent the MG the termination letter, the MG met to discuss what to do in the event that Rutgers terminated the RSA. The MG voted at the September 10th meeting to seek each municipality's authorization to amend the MSSDA to provide for the MG to enter into an agreement with Econsult Solutions, Inc. ("Econsult") for the purpose of establishing present and prospective statewide and regional affordable housing need and allocating fair share obligations among municipalities in accordance with applicable law, and producing a report for the MG so that its members could use that report in the pending Declaratory Judgment actions and producing experts employed by Econsult to testify on behalf of individual members of the MG for the purpose of presenting the conclusions of the report.(Drill Certification, para. 12) While Econsult has been retained by the New Jersey League of Municipalities ("NJLOM") to provide an analysis of Dr. David Kinsey's 2015 calculations of statewide affordable housing obligations which were prepared for the Fair Share Housing Center ("FSHC"), the MG is in the process of retaining Econsult to provide a much broader study and report. Unlike the report done for the NJLOM which identifies and analyzes the methodological issues identified in Dr. Kinsey's report, the report that the MG is in the process of retaining Econsult to perform will determine and allocate municipal housing obligations via Econsult's own independent opinion on the methodology that should be utilized. (Drill Certification, para. 13)

Apparently by September 16, 2015, most (if not all) of the municipalities in the MG would be authorizing amendment of the MSSDA to authorize entry into an agreement with Econsult. In fact, the Borough apparently authorized the amendment of the MSSDA or at least has indicated that they will be authorizing the amendment of the MSSDA.

Econsult has advised the MG that it could not produce its report much sooner than the end of the year, December 30, 2015. (Drill Certification, para. 14)

COURT'S OPINION

A. MOTION REQUEST

In this Motion the Court is faced with the issue as to whether to extend the time that was previously established by the Court for the Borough to prepare its "HPE & FSP" in the manner proposed in their Motion. As part of that request, North Plainfield Borough seeks to extend the grant time within which it is to provide its expert report and to extend the immunity previously awarded by the Court until March 31, 2016.

The Movants argue that the unexpected and exceptional circumstances that have arisen warrant the relief that is proposed.

The Motion is opposed by the Fair Share Housing Council (FSHC) on the basis that (1) the extension of immunity is not authorized by the New Jersey Supreme Court decision of "*In re COAH*"; and (2) the circumstances also do not warrant the relief requested by the Movants.

The FSHC proposes that the Court adopt a different approach than that offered by the Movants.[2]

The FSHC filed an omnibus response to the Plaintiff's requests in this motion as well as other similar motions field in other cases in Vicinage 13. FSHC opposes the Plaintiff's request and proposed an alternative approach which it claims has been utilized by Judges in four Vicinages.

The FSHC opposes the Plaintiff's requests for three stated reasons:

First, these requests simply further the 15 years of delay that the Supreme Court criticized, instructing the trial courts to use aggressive case management and concrete deadlines to end. The municipalities do not acknowledge that there is an alternate approach that trial courts in Mercer, Middlesex, Monmouth and Union Counties have already endorsed, taking into consideration the same facts and circumstances that municipalities rely on here. In all of those counties, Judges are requiring municipalities to submit initial plans within the five months of initial immunity based on a good faith estimate of a fair share number based on the Prior Round methodology – which as detailed further below, municipalities have a considerable amount of information to use in making.

Second, there are substantial reasons to question the diligence of the attorneys who are representing the municipal group. The FSHC indicates that Jeffrey Surenian claims that he and other lawyers decided to dismiss Dr. Burchell as an expert on August 27, 2015. Mr. Surenian and other attorneys have suggested that they have retained alternative consultants, but as of October 9, 2015, more than six weeks after Dr. Burchell was dismissed, according to a response to an Open Public Records Act request filed by the FSHC, the municipal group still has not actually contracted

[2] Intervenor Defendants in this matter and in other matters in Vicinage 13 have filed responses and were also considered in this motion as the Court believes that the issue should be addressed uniformly for all affected parties. It should be noted that several of the municipalities within the Court's Vicinage have argued that there has been no opposition to their specific application so that the Court should consider their particular application as unopposed. The Court notes that each of the municipalities has received copies of the objections filed by the Intervenors in the other actions. In fact, each has responded to those arguments in their own way. In any event, since the Court recognizes that it is equitable to decide these issues uniformly, the Court has considered the submissions of all of the parties to the matters in Vicinage 13 as part of this opinion.

with Econsult. This is an outstanding period of delay in the face of a Supreme Court decision imposing strict deadlines.

Third, the amount of time sought is also unreasonable in the light of the specific findings of the Supreme Court and Appellate Division in the matter that led to these cases. The FSHC contends that if the municipalities' new consultants are genuinely complying with the Supreme Court decision, they should have already been able to produce fair share numbers given that they have already been working on the process for over three months; if what they seek is instead more time to come up with novel methodology inconsistent with the Supreme Court's directives, that is not a basis for this Court to provide more time.[3]

B. FACTUAL BACKGROUND

The Court makes factual findings that are generally contained within the previous submission made by North Plainfield Borough as well as findings made by Nelson C. Johnson, JSC, the designated Mt. Laurel Judge in Atlantic and Cape May Counties that are applicable to the cases and the issue before the Court.

FINDINGS OF FACT

1. Each of the Plaintiff municipalities have adopted a Resolution of Participation and filed their pleadings with the Court in a timely fashion, consistent with the mandates of the Order and Decision in *In re COAH*, and in an apparent good faith effort to go forward toward compliance with their constitutional affordable housing obligations.

2. Most of the Plaintiff municipalities – to varying degrees and at various times – went to considerable expense and effort in submitting a filing of their updated municipal planning documents with COAH, to wit, a Housing Element and Fair Share Plan, only to have their efforts frustrated and their municipal resources dissipated as a consequence of COAH's failure to act on their submissions.

3. As discussed hereinafter, there is presently an inability to calculate the "fair share", to wit, the number of affordable housing units necessary for each municipality, nor can this Court readily discern what criteria and guidelines to apply regarding the measures to be taken by the municipalities of Atlantic and Cape May Counties in satisfying their constitutional affordable housing obligations.

4. In reviewing the various submissions of the parties, it is apparent that there is a significant dispute in the "fair share" calculations advanced by the competing interests in this litigation. Proceeding to a plenary hearing on any of the Plaintiff's constitutional affordable housing obligations in advance of the demonstration of

[3] The Court has addressed these issues in this opinion as well as the opinions issued for other municipalities within the Court's Vicinage.

rational and reasonable criteria for calculating the affordable housing needs of the Plaintiffs will yield nothing but frustration.

5. Robert W. Burchell, PhD, a professor with Rutgers University, was the individual who prepared the analysis upon which COAH based the third iteration of the "Round 3" regulations for the present and prospective regional need for affordable housing; they were proposed, but never adopted by COAH.

6. David N. Kinsey, PhD, a professor with Princeton University was the individual who prepared the analysis for the Fair Share Housing Council (FSHC) and the New Jersey Builders' Association (NJBA).

7. The divergence in the opinions of Dr. Burchell and Dr. Kinsey as to the need for affordable housing in New Jersey and in the various regions is a formidable obstacle to an expeditious resolution of the fifty eight DJs pending before this Court in Hunterdon, Somerset and Warren Counties.

8. Complicating things further, the Court is now advised by legal counsel that Dr. Burchell suffered a stroke on July 27, 2015. It was reported to the Court that Dr. Burchell's illness is debilitating to such an extent that he will not be able to participate in these proceedings.

9. Given Dr. Burchell's illness, the Court must recognize the reality that there will be a delay in the finalization of a rational and reasonable criteria for calculating the constitutional affordable housing needs of the Plaintiffs. Despite this Court's diligent inquiries, it has yet to finalize arrangements for the appointment of a Fair Share Analyst, but is hopeful that it will occur soon.

C. LEGAL ANALYSIS

"[C]ourts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full utilization of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of as their paramount objective." Allegro v. Afton Village Corp., 9 N.J. 156, 161 (N.J. 1952) (citing Pepe v. Urban, 11 N.J. Super. 385 (App. Div. 1951). As the Appellate Division explained: "Our ultimate goal is not, and should not, be swift disposition of cases at the expense of fairness and justice. Rather, our ultimate goal is the fair resolution of controversies and disputes." R.H. Lytle Co. v. Swing-Rite Door Co., Inc., 287 N.J. Super. 510, 513 (App. Div. 1996).

It has long been the rule in New Jersey that where an expert on whom a party has relied becomes unavailable due to a medical condition, a reasonable time must be accorded to that party to retain a new expert and furnish a new report. Nadel v. Bergamo, 160 N.J. Super. 213 (App. Div. 1978).

As the Appellate Division explained in Leitner v. Toms River Regional Schools, when it was describing the then recently adopted "Best Practices" amendments to the Court Rules, the rules "are not inflexible, unbending dictates, but vest significant discretion with the trial courts to determine on a case-by-case basis if a discovery period should be extended and, if so, what deadlines and conditions should be set." 392 N.J. Super. 80, 90 (App. Div. 2007) (reversing the trial judge's order denying an extension of discovery in the absence of a fixed arbitration or trial date on appeal in a discrimination suit against a school district). Furthermore, the Leitner Court found that "a trial judge's approach to an application to extend discovery for the purpose of submitting a late expert report should not be materially different from the pre-'Best Practice" approach." The long established prior rule pertaining to situations where an expert on whom a party will rely becomes unavailable is that the trial courts must accord a reasonable time to that party to retain a new expert and furnish a report. Nadel v. Bergamo, 160 N.J. Super. 213, 217-219 (App. Div. 1978). As explained in Pressler & Verniero, *New Jersey Court Rules* (Gann 2015), Comment 1.1 to R. 4:17-7, the "interest of justice standard continues fully viable under Best Practices" and, therefore, "the death or other unavoidable or unanticipated unavailability of the expert whose report and testimony are relied on will continue to constitute an exceptional circumstance warranting relief."

Certainly the reasoning that applies in cases where "Best Practices" amendments to the Court Rules are construed is also applicable to the circumstances presented in this case. For instance, the Court may, pursuant to Rule 4:24-1(c), enter an order extending discovery for a stated period for good cause shown, and specifying the date by which discovery shall be completed. The extension order must describe the discovery to be engaged in and such other terms and conditions as may be appropriate. If there has not yet been notice of an arbitration or trial date, an extension of the discovery end date will be granted if "good cause" is shown. The Order extending discovery must specify the date by which discovery shall be completed as well as the nature of the additional discovery and any other appropriate terms and conditions.

If, on the other hand, an arbitration or trial date has been set, an extension of the discovery period will be granted only upon the movant's showing of "exceptional circumstances." The court in O'Donnell v. Ahmed, 363 N.J. Super. 44, 51-52 (Law Div. 2003), held that "exceptional circumstances" are defined as legitimate problems beyond mere attorney negligence, inadvertence or the pressure of a busy schedule. The O'Donnell Court articulated an instructive list of extraordinary circumstances, including a personal sudden health problem of counsel, death of a

family member, death or health problems of a client, and the death or health problems of a key witness. Id. Certainly, the health problems of the municipalities' key expert, Dr. Burchell, is analogous to the instructive examples of extraordinary circumstances provided by the O'Donnell Court.

"In order to extend discovery based upon 'exceptional circumstances,' the moving party must satisfy four inquiries: (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time." Rivers v. LSC Partnership, 378 N.J. Super. 68, 79 (App. Div. 2005) (internal citation omitted).

In this case, a trial date for the plenary hearing to determine the present and prospective statutory affordable housing need and the present and prospective need for each municipality has been contemplated but not specifically set by the Court. However, the circumstances presented by the municipalities in the circumstances presented to the Court still meet the stricter exceptional circumstances standard.

For instance, the Appellate Division, in Rivers v. LSC Partnership, found that "[t]he Best Practices 'exceptional circumstances' requirement warranting an extension of discovery will not excuse the [plaintiff's] late request to secure expert reports . . . where her counsel failed to exercise due diligence during the extended discovery period." 378 N.J. Super. 68, 82 (App.Div. 2005). In that case, the plaintiff had already been given a total of 500 days of discovery; however, the plaintiff never even attempted to obtain an expert before the end of the discovery period. This is not the case here. Id. at 81. The municipalities had obtained an expert, Dr. Burchell, and if it not had been for his unfortunate stroke, they would not have been forced to obtain an alternate, nor request for an extension from the Court. In this case, Counsel has exercised due diligence within the prescribed time-frame and promptly contracted with Econsult to replace the void that was unfortunately caused when Dr. Burchell suffered a stroke.

Likewise, in Huszar v. Greate Bay Hotel & Casino, Inc., the Appellate Division found that where the "delay rests squarely on plaintiff's counsel's failure to retain an expert and pursue discovery in a timely manner," there are no exceptional circumstances to warrant an extension. 375 N.J. Super. 463, 473-74 (App. Div. 2005). However, in that case, the plaintiff's counsel gave no excuse for needing the discovery extension other than that the defendant's had failed to provide

them with correct information concerning the elevator that allegedly injured the plaintiff. Id. at 473. The Huszar Court indicated that the plaintiff did not even discover the error until after the 300 day discovery period had already passed, and notably, the plaintiff also failed to retain an expert during that period. In this case, the facts before the Court demonstrate the municipalities have been diligent in retaining their alternate expertise in the face of unanticipated and exceptional circumstances. They have pursued their responsibilities in a timely manner, and if it wasn't for Dr. Burchell's stroke, they would likely not be requesting the Court for this extension.

On the other hand, in Garden Howe Urban Renewal Assocs. v. HACBM Architects Eng'rs Planners, LLC, the Appellate Division found that "the trial court mistakenly exercised its discretion by refusing to extend the time for discovery" to allow plaintiff to obtain a new expert report after the judge barred substantially all of the plaintiff's initial expert report. Garden Howe Urban Renewal Assocs. v. HACBM Architects Eng'rs Planners, LLC, 439 N.J. Super. 446, 459-461 (App. Div. 2015). In that case, the discovery end date was adjourned several times and the court scheduled the matter for trial; however, the Appellate Division still found that there were exceptional circumstances to warrant the extension of discovery where the plaintiff's initial expert report was barred on the "eve of trial." Id. Similarly, here, not allowing the municipalities an extension for their new expert to complete his report would be contrary to reason as well as being unjustly prejudicial to the municipalities.

Moreover, it has long been the law that a "pretrial order may be modified at any time to prevent manifest injustice." Wilkins v. Hudson County Jail, 217 N.J. Super. 39, 44 (App. Div. 1987), *certif. denied*, 109 N.J. 520 (1987) (finding that the trial judge was not absolutely bound by the terms of the pretrial order).

The process that was established by the Supreme Court for "Mt. Laurel" cases is not intended to punish the Towns represented before this Court. In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the Council on Affordable Housing, 221 N.J. 1 (2015) ("In re COAH"), the Supreme Court clearly stated that it did not intend to punish municipalities for the utter failure of the Council on Affordable Housing ("COAH") to do its job:

> [T]he process established **is not intended to punish the Townships** represented before this Court, or those that are not represented but which are also in a position of unfortunate uncertainty **due to COAH's failure to maintain the viability of the administrative remedy**. Our goal is to establish an avenue by which Townships can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes.

In re COAH at 23 [Emphasis added].

The solution to the problem should contemplate that the ultimate goal is to fairly establish the affordable housing obligations of each of the municipalities and then to establish a mechanism whereby that laudable goal can be reached. In so doing, this Court should strive to reject legal strategy and posturing that detracts from the Court's ultimate mission. This Court finds that the approach adopted by Judge Nelson C. Johnson in Atlantic-Cape May is the sensible solution to the problem. As Judge Johnson indicated:

> COAH created the mess we are all in and it's all our task to deal with it responsibly. This Court's instinct is to err on the side of preserving precious municipal resources and to avoid unnecessary confrontations and redos upon remands to the trial court. The FSHC will be granted ample opportunity to be heard on the constitutional affordable housing obligations in Atlantic and Cape May Counties in an efficient, cost effective and reasonable manner. ...
>
> ...
>
> E. When reading the above provisions of the FHA with the language of our Supreme Court, it is readily apparent that trial courts are obligated to continue enforcing the public policy provided for by the FHA. Because there are no current "criteria and guidelines" adopted by COAH, this Court must proceed with the necessary inquiries for ascertaining rational and reasonable criteria for calculating the constitutional affordable housing needs of Atlantic and Cape May Counties. Absent a basis for calculating "fair share numbers", the Plaintiff municipalities do not have a target at which to aim in preparing their Housing Element and Fair Share Plan.
>
> F. Plaintiffs share no responsibility for COAH's abject failure to fulfill its responsibility to adopt regulations in a timely fashion as mandated by the FHA. This Court will not punish the Plaintiff municipalities for COAH's failure to enforce the FHA and its own regulations.
>
> G. Stripping the Plaintiff municipalities of immunity from Builder's Remedy litigation at this juncture in time will foster unnecessary litigation and will on serve to delay constitutional compliance. New Jersey law and common sense dictate the five month period of repose must be reviewed periodically to ensure that the Plaintiffs are working with rational and reasonable criteria in calculating their affordable housing needs.

Unless the Court modifies CMO #1 to extend the times by which the municipalities must submit their expert reports as well as the other related discovery and briefing dates, a manifest injustice will result in that the municipalities will be unable to retain the services of an expert to offer an approach to fair share methodology in opposition to the Kinsey approach which is being

advocated by FSHC and many other intervenors that are before this Court. Having the merits of this issue determined on such a one-sided basis, even if that resolution is only temporary, does not serve to meet the goals of the Court's mission.

The Mt. Laurel IV decision was clear that "the process established is not intended to punish" municipalities "due to COAH's failure to maintain the viability of the administrative remedy." Mt. Laurel IV, 221 N.J. at 23. The Court stressed that the "judicial processes" authorized in its decision should "reflect as closely as possible the FHA's processes" and that the goal was to allow municipalities to demonstrate their Mount Laurel constitutional compliance through "processes . . . that are similar to those which would have been available through COAH for the achievement of substantive certification" and that the "process . . . is one that seeks to track the processes provided for in the FHA." Id. at 6, 23, 29.

The Supreme Court specifically referenced section 316 of the FHA, allowing towns five months to submit their Housing Plan Element and Fair Share Plan during which initial immunity should be provided. Id. at 27-28. Section 316 of the FHA provides that the period of submission of a Housing Plan Element and Fair Share Element should be "within five months from the date of transfer, or promulgation of criteria and guidelines by [COAH] . . . **whichever occurs later**." (emphasis added). The criteria and guidelines by governing the fair share numbers are yet to be established in this matter, and the five-month date should run from when they are so established.

Considering the Court's specific reference to Section 316 of the FHA in Mt. Laurel IV, it is clear that municipalities should first be provided the benefit of being able to present an expert to the court and have the court endorse certain criteria and guidelines by which the municipality can craft its final Housing Plan Element and Fair Share Plan prior to immunity beginning to run. The Court recognizes that the determination of the "fair share" number is one of the "most troublesome" issues in the Mt. Laurel litigation. "It takes the most time, produces the greatest variety of opinions and engenders doubt as to the meaning and wisdom of Mt. Laurel". Mt. Laurel II, 92 N.J. at 248.

It is not unfair to characterize the municipalities' position with regards to the methodology offered by Dr. Kinsey as being that the Kinsey methodology is "deeply flawed". The municipalities argue that the Kinsey report is "fundamentally flawed" because it erroneously assumes that the Supreme Court required Prospective Need Calculations to be based on a formula "identical" to COAH's prior round methodologies. They claim that such a presumption was never contemplated or required by the Mt. Laurel Courts. The municipalities argue instead that the Courts only have

required the approach to be merely "similar to" the approach taken by COAH in the first and second rounds. In fact, they claim that to utilize a methodology exactly the same as the prior rounds would not be practical because the methodologies in the prior rounds differ.

The Court is not charged with making a decision concerning the municipalities' position in this Motion. The Court is mindful, however, that an approach should be adopted that will permit the parties to establish a complete record and for the Court to conduct a full analysis. The relief sought by the municipalities facilitates those purposes.

In fact, to do otherwise, especially at a time when the Movants have lost their expert to a debilitating stroke, could be lead to total disorder and an explosion of builder's remedy and exclusionary zoning litigation, the waste of valuable resources which would otherwise be put towards the provision of affordable housing.

In fact, to do otherwise, especially at a time when the Movants have lost their expert to a debilitating stroke, could be lead to total disorder and an explosion of builder's remedy and exclusionary zoning litigation, the waste of valuable resources which would otherwise be put towards the provision of affordable housing.

Certain intervenors have argued that granting the extension sought will delay the production of affordable housing that will, itself, constitute a "manifest injustice." The Supreme Court rejected such an argument when it decided Hills Dev. Co. v. Bernards Tp., 103 N.J. 1 (1986) (sometimes referred to as Mount Laurel III). The Court held that a delay in producing affordable housing does not constitute "manifest injustice;" only a circumstance that would render the production of affordable housing "practically impossible" would constitute a "manifest injustice." Id.at 51, 54-56. As the Court explained, to constitute a "manifest injustice," the circumstances must be unforeseen. Id. at 49, 53. If there was ever a circumstance that was unforeseen, it was Dr. Burchell suffering a stroke and Rutgers terminating the RSA.

In fact, this Court specifically referenced section 316 of the FHA, allowing towns five months to submit their HPE&FSP during which "initial immunity" should be provided. Id. at 27-28. Section 316 of the FHA provides that the period for submission of a HPE&FSP should be "within five months from the date of transfer, or promulgation of criteria and guidelines by [COAH] . . . whichever occurs later . . . ." (emphasis added) Here, the date of transfer of the municipalities' cases from COAH to the courts was July 2, 2015, the (approximate) date the Declaratory Judgment actions were filed. However, the criteria and guidelines governing the fair share numbers has yet to be established by the court and will not be established until at least

February 19, 2016. North Plainfield Borough is not now asking for five months from the February 19, 2016 date to adopt and submit their HPE&FSP. In fact, North Plainfield Borough has proposed a reasonable and "tight" schedule that is unfortunately the best alternative under the circumstances.

Considering that the Court specifically referenced section 316 in Mount Laurel IV, it is evident that the towns should first be provided the benefit of the determination required by section 316, then be given the opportunity to develop a complying plan. Any other sequence – especially at this point and under these circumstances where the municipalities have lost their expert – is neither orderly nor will be in accordance with the normal course of presentation of evidence and, therefore, is fraught with inequity and injustice.

The Movant is simply seeking an Order that keeps the playing field level. To require them to proceed in the illogical manner that necessitates the rather arbitrary assignment of fair share numbers in the first instance and an unnecessary duplication of effort in the second is neither fair nor a valid use of scarce judicial resources.

Finally, North Plainfield notes that the Court held that, "as part of the court's review [of a municipality's Third Round HPE&FSP], . . . we authorize . . . a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court's review proceedings, even if supplementation of the plan is required during the proceedings." "[T]he trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court's determination of the municipality's presumptive compliance with its affordable housing obligation."

Specifically the objections to Plaintiffs' Motion make several arguments which should be addressed. First, it has been argued that the New Jersey Supreme Court made it very clear that any immunity granted to the municipalities should be limited to five (5) months. In re COAH, supra. at 27.

This Court acknowledges that the Supreme Court did endorse the award of limited grants of immunity. Temporary immunity should be awarded under the parameters that were established by the Court in In re COAH. The power to grant temporary immunity presumes that the Court will exercise its sound discretion when determining whether the municipalities are exercising good faith. With regards to the issues presented to this Court, it must certainly be recognized that the Supreme Court could not have foreseen the circumstances of Dr. Burchell's infirmity and the ramifications of that development upon the municipalities. In any event, this Court does not read

In re COAH to mean that the grant of immunity is limited to only five months, especially under unexpected circumstances that have arisen.

The objectors also suggest that the Court adopt alternate approaches to the problem. For instance, the FSHC and other intervenor-objectors suggest that this Court require municipalities to submit their initial plans by December 8, 2015, even though those plans will not be complete as the municipalities will not have a fair share number until the Econsult report is submitted about a month later. They propose that the Trial Court and the Special Master can review the plan, with an opportunity to be heard by interested parties, while waiting for the fair share numbers.

The objectors' proposal does not provide an efficient process for the parties and especially the Court to be able to manage the overburdened calendar. The approach will entail a set of hearings. There are 58 municipalities in this Court's Vicinage that have filed Declaratory Judgment Actions. Virtually all of those municipalities had retained Dr. Burchell to act as their expert in these matters. The process suggested by the FSHC does not simply entail another set of plenary hearings in order to review each of the "partially" prepared municipal plans, but instead it entails a monumental expenditure of judicial resources that will be consumed to hold the first set of plenary hearings while all the time knowing that a second, somewhat duplicative hearing will necessarily follow.

Judge Nelson addressed and rejected that approach. Judge Nelson noted that:

> [The FSHC's] arguments demonstrate the breadth of [its] knowledge on all issues before the Court except one, the facts on the ground. As a consequence of COAH's abject failure to perform its duties, and the unfortunate and untimely illness of Dr. Burchell, there presently do not exist rational and reasonable criteria for calculating the affordable housing needs of any of the Plaintiffs.
>
> [The FSHC's] urgings are not grounded in reality. The task [that it] urges upon the Court is akin to being dropped in the middle of a dense forest on a cloudy day, without a compass, and told "Find your way home". With a compass one would have some comfort as to the direction to pursue; with the sun, one could plot a general course and hope for the best; with neither, one could walk in circles.
>
> [The FSHC's] demands for this Court to move with urgency read more like hastiness ... [The FSHC's] demand that the Court review Plaintiff's Fair Share Plans and calculate their affordable needs is not accompanied by a yardstick; [its] complaint of a "free pass" to the Plaintiffs ignores the reality that the Plaintiffs spent tax dollars and public officials time toward compliance with COAH only to have their efforts ignored by COAH. The Court refuses to punish the Plaintiffs for COAH's failings ...

> This Court's instruct is to err on the side of preserving precious municipal resources and to avoid unnecessary confrontations and redos upon remand to the trial court. The FSHC [and interested intervenors] will be granted ample opportunity to be heard on the constitutional affordable housing obligations ... in an efficient, cost effective and reasonable manner.

The FSHC and other objectors also raise questions concerning the diligence of the attorneys who are representing the municipalities. In support of its allegation, the objectors point to (1) claimed inconsistencies in the accounts given by the municipalities; and (2) its response to an OPRA request that was filed with the MG, which indicates that as of October 9, 2015 the MB had still not retained Econsult. At least one objector has suggested that the Court hold a plenary hearing concerning the diligence of the MG as well.

The municipalities have, of course, presented a divergent viewpoint, all the while claiming that they have acted in good faith and with diligence. The municipalities indicate that during the pendency of this Motion an agreement has been reached with Econsult and a copy of that agreement was provided to the Court. They also point out that (1) it was Rutgers that terminated Dr. Burchell's contract, not the MG; and (2) certainly the MG would not have incurred the additional cost of $125,000 (plus) for a new expert report if one was not necessary. In support of their "diligence", lead counsel for the municipalities indicates that:

> 1. We sought to persuade Rutgers to assign another employee of the University to complete the contract and thereafter testify about the final report. See Surenian Certification dated October 7, 2015 at paragraph 54.
>
> 2. We tried to persuade Rutgers to retain a sub-consultant, as permitted by the agreement, to complete the report and then testify about it. See Id. at 46.
>
> 3. Immediately after meeting with Dr. Burchell and weeks before Rutgers terminated the contract, we opened negotiations with Econsult, the only entity that could possibly produce a Solutions Report expeditiously, to explore its interest and willingness to prepare a report as quickly as possible setting forth a methodology to identify the need and allocate it. See Id. at 57.
>
> 4. We: (a) reviewed the shared services agreement by the September 10, 2015 meeting of the designated attorneys for the Municipal Group and concluded that we could not retain another consultant without an amendment to the SSA; (b) drafted an Amendment to the SSA by September 11, 2015; and (c) distributed the Amendment to the Municipal Group. See Id. at 61-66.
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> 5. We negotiated an agreement with Econsult establishing that we would have an expert report by the end of the year. See Edwards Certification, Exhibit E.

The municipalities also claim that in order to meet the "tight schedule" that they propose it will require a "Herculean" effort. The municipalities also point to the "legal requirements" and other red tape that is required for them to retain consultants and take the necessary actions for them to proceed. The municipalities, as governmental entities, are certainly "encumbered" by statutory requirements created by the requirements of the Open Public Records Act and the Open Public Meeting Act as well as other related Statutes that ensure that they act in a manner that "squares all corners". Certainly the objectors, both profit and non-profit, do not have these impediments. The opposition's seeming callousness with regards to those issues demonstrates a lack of understanding of the manner in which a public body acts and how those processes differ from a private body.

This Court is confronted with the divergent positions on whether the Econosult can produce their report sooner. This Court does not intend to invest the time, expense and energy that would be necessary in order to require the municipalities and Econsult to hold a plenary hearing on that subject. At that plenary hearing the movants indicate that they would like to probe a series of topics[4]. The reality of the situation is that given the Court's calendar, the plenary hearings will likely last longer than the requested extension. The hearings would also likely cause additional delay due to the mobilization effort for the hearings. Neither does the Court have the judicial resources to conduct such a hearing. In any event, such a hearing would only serve to further delay this process and enrich the attorneys and other experts who will be required to prepare and attend.

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[4] Intervenor-Objector, SAR I, LLC, Bridgewater Plaza and K. Hovnanian North Jersey Acquisitions propose the following list of questions as a starting point:

- Why is there no certification from Dr. Burchell explaining that he personally believes that he cannot complete the work he seemingly completed in late July?
- Why is there no certification from anyone at Rutgers University explaining that no one else within Rutgers faculty can finalize Dr. Burchell's report?
- Why has this motion been filed on the eve of the Township's deadline despite the fact that Dr. Burchell's stroke occurred in July 2015?
- Why does Econsult require an additional ninety (90) days to formalize a report that should largely be completed by virtue of the work they have already performed as part of their September 24, 2015 report and the draft report that has been prepared by Dr. Burchell?
- Will the Township guarantee that it will accept the fair share obligation as determined by Econsult or would the Township like to retain the option of rejecting Econsult's conclusions in early 2016 and asking for another delay so as to retain yet another expert?

The municipalities point out that while the objectors make it seem like an easy task for Econsult to generate a new report, the FSHC's own expert, Dr. Kinsey, had "three tries" to formulate his opinion before the New Jersey League of Municipalities provided two expert reports revealing numerous flaws in the analysis. The municipalities indicate that those circumstances belie the Intervenor's arguments that the generation of a new report should be simple.

Again, this Court's emphasis is to produce a result which will fairly assess each municipality's constitutional obligations as well as the preparation development and interpretation of a real plan that will produce real results for the parties that are really affected. Another hearing will not facilitate those goals.

In any other litigated matter before this Court, the Court would freely extend the time limits to allow a party to obtain a replacement expert and not be placed in a litigation disadvantage due to circumstances beyond its control by reason of losing its expert to a stroke. Certainly if similar circumstances affected the FSHC or any of the other intervenors, the Court would not require them to proceed in the manner that the FSHC and the intervenors have advocated for the municipalities in this case or other companion cases that are before the Court.

Ironically the net effect of having the Movant obtain the requested relief by motion has only caused more delay and expense. The Movant's plans have been interrupted while it waited for the Court to address its Motion in this case as well as the Motions made in other Mt. Laurel cases within this Vicinage. The Movant's limited financial resources were also further taxed by the exercise. Further, the Court's limited judicial resources were required to be marshaled to decide these Motions instead of dedicating its time toward managing its Mt. Laurel calendar with the purpose of advancing these cases in order to achieve real results.

The Court can only hope that the parties will be able to work together more cooperatively in order to avoid these costly forays.

For the reasons set forth above, the Court will GRANT the relief requested by North Plainfield Borough. The Borough's grant of "temporary immunity" shall be extended to March 31, 2016.

ADDITIONAL CASE MANAGEMENT CONSIDERATIONS

The Court's opinion has been prepared to address the specific requests to extend the time within which the municipalities can replace Dr. Burchell and submit a replacement report from Econsult. The Court's opinion also addresses the municipality's request to correspondingly extend their grant of temporary immunity.

The issues before the Court do not end there however. By granting the municipality's motion, that does not mean that the court has issued an unconditional reprieve until the early Spring of 2016. The municipalities need to continue to diligently and in good faith advance this matter by preparing for the process of addressing their fair share obligation, the prompt preparation of their Housing Elements and Fair Share Plan. As a part of that process, the Court strongly encourages

that process be developed in each municipality to address those issues promptly and efficiently. The process should include a plan to diligently meet with any and all interested parties concerning their interests and their presentation of any contributions that they can offer towards satisfying the fair share obligation that is ultimately determined.[5]

As a result, the Court will order the following additional requirements as part of this opinion:

(1) The Court's previous Order of temporary immunity and granting intervention as it applies to the Movant Municipality is incorporated herein and remains in effect except as may be specifically altered in the Court's opinion or Order.

(2) On or before January 8, 2016 the Intervenors[6] and the Municipality shall supply each other, to the Special Master, and to the Court their respective expert report(s) on Fair Share Issues.

(3) On or before January 8, 2016 the Municipality shall furnish the Court with its positions and comments relating to compliance standards.

(4) The Municipality shall complete the "matrix forms" that were developed by Mr. Banisch by December 1, 2015 with the understanding that the Municipality may utilize the fair share numbers from the proposed Third Round Rules (that were never adopted due to the 3-3 tie vote) in the completion of the forms[7]. The forms shall be provided to the Court, to the Special Master and to any Intervenors in its matter (including the FSHC).

(5) On or before December 1, 2015 the Municipality shall furnish the Court with a proposed plan, schedule and commentary concerning meetings with any and all interested parties (which should include the designated Special Master, if possible).[8]

(6) The Court shall set a Case Management Conference in mid to late January, 2016, subject to the Court's schedule to set a trial relating to the Municipality's fair share obligations.

---

[5] The Court notes that, for instance, in this case, the municipality has already established a "public" process for interested parties to present the opportunities and contributions that they can offer. This Court does not express an opinion one way or the other concerning whether the process must be or should be public, but Raritan should be lauded for initiating a process that provides an early opportunity for interested parties to address their concerns, make proposals and foster communication.

[6] If any are applicable to any of the movants in these matters before the Court.

[7] The forms shall be completed without prejudice and may be supplemented or modified once the municipalities obtain their expert reports or when the Court ultimately determines the actual fair share number.

[8] If the Municipality has already begun that process, the Court will expect a report concerning the progress of those meetings.

(7) With respect to the fair share "trial" that will be scheduled before this Court, each Municipality and any participating Intervenor shall, by December 8, 2015, provide a concise position paper concerning (a) the issues to be resolved; (b) the expected number of witnesses that each intends to call; (c) any anticipated issues or problems that need to be addressed; (d) a preliminary list of exhibits or evidence to be presented, which shall be subject to amendment at the Case Management Conference to be scheduled by the Court; (e) the anticipated length of the trial; (f) their proposal for the exchange of Pretrial Information (see R. 4:25-7 and Appendix XXIII to the New Jersey Court Rules; (g) their plan for accomplishing any stipulations on contested procedural, evidentiary or substantive issues; (h) their plan for submission of trial briefs; (i) counsel and expert availability, or if availability is limited, proposal for alternate counsel; and (j) their proposal to address such other issues as any party deems appropriate for the management of the case and/or the "Fair Share" portion of the trial.

(8) The fees incurred by the Special Master shall be divided equally between the Municipality and the Intervenors, if any, except that the FSHC shall not be required to pay a share of the cost.

Mayor Michael Giordano Borough of North Plainfield 263 Somerset Street North Plainfield, NJ 07060-4846	Richard Phoenix, RMC Borough of North Plainfield 263 Somerset Street North Plainfield, NJ 07060-4846	Gordon N. Gemma, PP, AICP Director of Planning Services PMK Group 1415 Wyckoff Road, Suite 206 Farmingdale, NJ 07727
David Testa, Engineer Borough of North Plainfield 263 Somerset Street North Plainfield, NJ 07060-4846		Dan McGuire Homeless Solutions 540 West Hanover Avenue Suite 100 Morristown, NJ 07960
Matthew J. O'Donnell, Esq. O'Donnell, McCord and DeMazo,PC 15 Mount Kimble Avenue Morristown, NJ 07960	Art Bernard, PP THP, Inc. 77 North Union Street Lambertville, NJ 08530	David E. Hollod, Business Adm'r. Planning Board Rep. Borough of North Plainfield 263 Somerset Street North Plainfield, NJ 07060-4846
Bob Bzik, PP, Dir. Of Planning Somerset County Planning Bd. Somerset County Admin. Bldg. 20 Grove Street, P.O. Box 3000 Somerville, NJ 08876-1262	Susan McDonough, Exec. Dir. Friends of the Carpenter c/o Watchung Avenue Presbyterian Church 170 Watchung Avenue North Plainfield, NJ 07060	Courtenay Mercer Office of Smart Growth, Dept. Community Affairs 101 South Broad Street P.O. Box 204 Trenton, NJ 08625
Jon Vogel, Development Dir. AvalonBay Communities, Inc. 517 Route One South Suite 5500 Iselin, NJ 08830	Dennis J. Oury, Esq. Dennis J. Oury, LLC One University Plaza Suite 601 Hackensack, NJ 07601-1827	Kevin D. Walsh, Esq. Adam M. Gordon, Esq. Fair Share Housing Center 510 Park Boulevard Cherry Hill, NJ 08002
Jonathan E. Drill, Esq. Stickel, Koenig, Sullivan & Drill, LLC 571 Pompton Avenue Cedar Grove, NJ 07009	Edward J. Buzak, Esq. The Buzak Law Group, LLC Montville Office Park 150 River Road Montville, NJ 07045	Geraldine Callahan, Esq., DAG Office of the Attorney General 25 W. Market Street P.O. Box 112 Trenton, NJ 08625
Jeffrey R. Surenian, Esq. Michael A. Jedziniak, Esq. Jeffrey R. Surenian & Associates, LLC 707 Union Avenue, Suite 301 Brielle, NJ 08730	Jeffrey Kantowitz, Esq. Law Office of Abe Rappaport 195 Route 46 West, Suite 6 Totowa, NJ 07512	Stephen Eisdorfer, Esq. Hill Wallack, LLP 21 Roszel Road P.O. Box 5226 Princeton, NJ 08543
	John J. Coyle, Jr. One Pluckemin Way Crossroads Business Center P.O. Box 754 Bedminster, NJ 07921	

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.

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 D

BISGAIER HOFF

Attorneys At Law A Limited Liability Company

Robert A. Kasuba
Member of the NJ Bar
E-mail: rkasuba@bisgaierhoff.com
Phone: (856) 375-2807

December 11, 2015

Via Regular Mail and E-Mail
Elizabeth K. McManus, P.P., AICP, LEED
Clarke Caton Hintz
100 Barrack Street
Trenton, NJ 08608

Re: In the Matter of the Application of the Borough of East Rutherford for a Judgment of Compliance and Repose
Docket No. BER-L-5925-15

Dear Ms. McManus:

Our firm represents Tomu Development Co., Inc. ("Tomu"), an interested party to the above-referenced litigation. This submission is made pursuant to Paragraph 3 of the October 29, 2015 Case Management Order, which provides that interested parties must submit objections or comments to the Borough of East Rutherford's Summary of Plan no later than December 17, 2015. Pursuant to the Court's directive, please accept this letter as Tomu's commentary to the Plan Summary.

By way of brief background, in the litigation styled Tomu Development Co. v. Borough of East Rutherford, et. al., Docket No: BER-L-5895-03, Tomu was awarded a builder's remedy in order to construct an inclusionary development within the Borough. As we understand the Borough's submission, our client's proposed site has been included in the November 25, 2015 Plan Summary. Accordingly, Tomu will seek to intervene as a party in this litigation simply to ensure that occurs. In light of the foregoing, Tomu has no objection to the Borough's Plan Summary submission.

This firm requests to be included on the Borough's service list for all future correspondence related to this litigation.

Thank you for your attention to this matter.

Respectfully submitted,

BISGAIER HOFF, LLC

Robert A. Kasuba

cc: Richard J. Allen, Jr., Esq. (via regular mail and e-mail)
Thomas Bruinooge, Esq. (via regular mail and e-mail)
Attached Service List (via regular mail)
Tomu Development Co., Inc. (via e-mail)

EAST RUTHERFORD SERVICE LIST (8)

Avalon Bay Communities, Inc. 517 Route One South Suite 5500 Iselin, NJ 08830	Jonathan E. Drill, Esquire Stickel, Loenig, Sullivan & Drill 571 Pompton Ave Cedar Grove, NJ 07009-1720
Jeffrey R. Surenian, Esquire Jeffrey R. Surenian and Assoc, LLC 707 Union Ave – Suite 301 Brielle, NJ 08730-1470	Edward J. Buzak, Esquire Buzak Law Group, LLC 150 River Road - Suite N-4 Montville, NJ 07045-9441
Kevin D. Walsh, Esquire Fair Share Housing Center 510 Park Boulevard Cherry Hill, NJ 08002	Geraldine Callahan, Dep Att General Richard J. Hughes Justice Complex 25 Market Street 8th Floor Trenton, NJ 08625-0080
Stephen M. Eisdorfer, Esquire Hill Wallack LLP 202 Carnegie Center Princeton, NJ 08543-5226	Anne L. H. Studholme, Esquire Post, Polak, Goodsell, MacNeill & Strauchler 40 Prospect Avenue Princeton, NJ 08540

EXHIBIT E

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			

EXHIBIT F

HOUSING DEVELOPMENT CORPORATION OF BERGEN COUNTY
ONE BERGEN COUNTY PLAZA, 2ND FLOOR
HACKENSACK, N.J. 07601
PHONE: 201-336-7600
FAX: 201-336-7660

Mayor James Cassella and Councilmembers
Borough of East Rutherford
1 Everett Place
East Rutherford, NJ 07073

August 15, 2013

Re: Affordable Housing in East Rutherford

Dear Members of the Governing Body,

Let me begin by thanking you for the passage of East Rutherford's resolution on June 19, 2012, which formalized your intent to support affordable housing for your community, and for your support to use Affordable Housing Trust Funds for their intended purpose.

The Housing Development Corporation of Bergen County is the non-profit arm of the Housing Authority of Bergen County, and as such, we were pleased to apply for a grant to provide a two-family home within your borders for people with low/moderate income. We made formal application to HUD for this grant in December 2012, and were recently notified of its approval and award.

It is important to understand that these grants require matching contributions in order to receive the award. Therefore, East Rutherford's contribution of $140,000 of Affordable Housing Trust Funds is critical to achieve successful completion of this housing project.

There are requirements imposed by the grant to complete the project within a certain timeline. We are awaiting specifics on that, but are aware that HUD expects performance in order to award future grants to our agency for affordable housing. That, of course, is reasonable and protective of the public.

May we hear from you as to when the funds may be utilized, so that we may pursue going forward with this housing project. Again, it is commendable that you are participating with us to provide housing that is truly needed in this area.

Very truly yours,

Charlotte Vandervalk
Director of Development