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January 6, 2016

Hon. William J. Meehan, J.S.C.
Bergen County Justice Center
10 Main Street
Hackensack, New Jersey 07601

**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 Fair Share Housing Center's
Objection to the Borough's Summary of Plan.**

Your Honor:

As you know, I represent the Borough of East Rutherford (the "Borough"). Please accept this letter in response to the objections filed by Fair Share Housing Center ("FSHC") to the Borough's Summary of Plan filed with the Special Master on November 25, 2015 (the "Summary"). A copy of the Summary as filed with the Special Master is attached as Exhibit A. This letter should be read in conjunction with the exhibits attached, including the report from George Stevenson, P.P., A.I.C.P., attached as Exhibit B.

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 its 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 FSHC's objections.

1. Objection to the Court's Consideration of FSHC's Submission.

The Borough objections to consideration of FSHC's objections. Paragraph 3 of the Court's October 29, 2015 Case Management Order required comments such as those filed by FSHC to be filed with the Special Master. Instead, FSHC filed the comments directly with the court.

In addition, that same paragraph required those objections to be filed with the Special Master on or before December 17, 2015. Here, FSHC's objections were dated December 21, thus could not be timely filed.

2. As to FSHC's Specific Objections.

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

A. The Borough's Use of the 2014 Proposed Regulations.

FSHC asserts that the Borough's Summary was submitted in bad faith because the Borough used the not-adopted COAH proposed regulations from 2014 as the metric for prospective need. FSHC seems to assert that the use of any metric other than the prospective need calculation supplied by it defines "bad faith." FSHC's position is unsupported by both law and fact.

“Bad faith” is not defined by compliance with FSHC’s advocacy position. Bad faith connotes the absence of a debatable issue. See, for example, *Badiali v. New Jersey Manufacturer’s Insurance Group*, 220 N.J. 544 (2015) (in insurance coverage context, “bad faith” shown where “...no debatable reason existed for denial of the benefit...”). In view of the intense public policy interest in the prospective affordable housing need, and the varying views of that need, it is simply impossible to claim, as FSHC seemingly does, that the use of the not-adopted 2014 proposed COAH regulations is in “bad faith.”

Indeed, acceptance of FSHC’s assertion that use of the not-adopted 2014 COAH proposed regulations is “bad faith” renders FSHC’s assertion that the correct prospective need is established by its own advocacy document, a report prepared by David Kinsey, PhD. and revised on more than one occasion similarly is in “bad faith.” On top of that, the FSHC advocacy document contains methodological flaws¹ and fails to meet the most basic element of the *Mount Laurel* doctrine, to wit, the creation of a realistic opportunity for affordable housing.²

FSHC’s objection that use of the prospective need calculation in the not-adopted 2014 proposed COAH regulations must fail for at least two other reasons.

First, 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 from

¹ See Econsult Solutions. (2015, September 24). Review and Analysis of Report Prepared by David N. Kinsey, PhD. Entitled: “New Jersey Low and Moderate Income Housing Obligations for 1999-2025.” Retrieved January, 2016 from <http://www.njslom.org/legislation/Econsult092815.pdf>.

² See Powell, Robert S. & Gerald Doherty. (2015, September 22). Demographic and Economic Constraints on the Inclusionary Zoning Strategy Utilized for the Production of Low and Moderate Income Housing in New Jersey. Retrieved January, 2016 from <http://www.njslom.org/legislation/NCA092815.pdf>.

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 C.*

Second, 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 at that point in time 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 Exhibit A – Summary, Note 1.*

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

Under the circumstances here, use by the Borough of the prospective need calculation in the not-adopted 2014 COAH proposed regulations was reasonable, certainly not "bad faith."

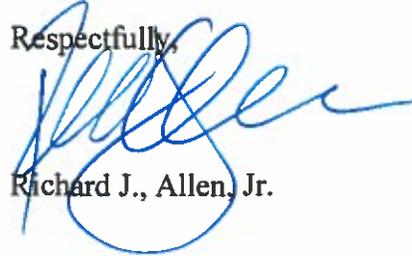
B. Other Issues.

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

C. Conclusion.

The Borough submits that the Summary, as it may be revised, is clear evidence of the Borough's good faith compliance with the Court's requirements and the affordable housing process.

Respectfully,



Richard J., Allen, Jr.

RJA/da

cc: Elizabeth McManus, P.P., A.I.C.P.
George Stevenson, P.P., A.I.C.P.
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Thomas Bruinooge, Esq.
Robert A. Kasuba, Esq.
Richard J. Abrahamsen, Esq.
Stephen M. Eisdorfer, Esq.
Jeffrey R. Surenian, Esq.
Jonathan E. Drill, Esq.
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

| SUMMARY OF PLAN FOR FAIR SHARE OBLIGATION | | MUNICIPALITY: East Rutherford COUNTY: Bergen <i>See Explanatory Notes beginning on third page ...</i> | | | | | | |
|---|---------------------|---|------------------|-----|-----|----------|-------------|--|
| | EST. OBLIG. | COMPLETED UNITS | PROPOSED UNITS | LOW | MOD | VERY LOW | TOTAL UNITS | |
| Rehabilitation Share (per 2010 Census) | 132 ⁱ | | | | | | | |
| <i>Rehabilitation Credits</i> | 0 | | | | | | | |
| Rehab Program(s) | | | | | | | | |
| Remaining Rehabilitation Share | 132 ⁱⁱ | | | | | | | |
| 1987-1999 Prior Round Obligation (1) | | | | | | | | |
| <i>Vacant Land Adjustment (if applicable)</i> | | | | | | | | |
| Unmet Need RDP | 60 ⁱⁱⁱ | | | | | | | |
| Mechanisms (2) | | | | | | | | |
| Prior Cycle Credits (4/1/80-12/31/86) | | | | | | | | |
| Credits without Controls | | | | | | | | |
| Inclusionary Zoning (Development) | | | 45 ^{iv} | | | | 45 | |
| 100% Affordable | | | | | | | | |
| Accessory Apartments | | | | | | | | |
| Write Down-Buy Down/Market-to-Affordable | | | | | | | | |
| Alternative Living/Supportive & Special Needs | | | | | | | | |
| Assisted Living | | | | | | | | |
| RCA Units (previously approved) | | | | | | | | |
| Compliance Bonus | | | | | | | | |
| Rental Bonuses | | | 15 ^v | | | | | |
| Total Prior Round Credits | | | 60 | | | | | |
| Units Addressing 1987-1999 Prior Round | | | 60 | | | | 60 | |
| 1999-2015 GAP Period Estimate (1) | | | | | | | | |
| <i>Mechanisms (2)</i> | (-) 2 ^{vi} | | | | | | 0 | |
| <i>Vacant Land Adjustment (if applicable)</i> | | | | | | | | |
| Unmet Need RDP | | | | | | | | |
| Inclusionary Zoning | | | | | | | | |
| Redevelopment | | | | | | | | |
| 100% Affordable | | | | | | | | |
| Accessory Apartments | | | | | | | | |
| Market-to-Affordable | | | | | | | | |

| | | | | | | |
|---|------------------|--------------------|------------------|--|--|-----|
| Supportive & Special Needs/Alternative Living | | | | | | |
| Assisted Living | | | | | | |
| Extended Affordability Controls | | | | | | |
| Other (describe on a separate sheet) | | | | | | |
| Smart Growth Bonuses | | | | | | |
| Redevelopment Bonuses | | | | | | |
| Rental Bonuses | | | | | | |
| Total Third Round Credits | | | | | | |
| Units Addressing 1999-2015 GAP period | 0 | | | | | 0 |
| 2015-2025 Third Round Obligation (1) | | | | | | |
| Mechanisms (2) | | | | | | |
| Vacant Land Adjustment (if applicable) | | | | | | |
| Unmet Need | | | | | | |
| RDP | | | | | | |
| Inclusionary Zoning (Development) | | 35 ^{viii} | 68 ^{ix} | | | 103 |
| Redevelopment | | | | | | |
| 100% Affordable | | | | | | |
| Accessory Apartments | | | | | | |
| Market-to-Affordable | | | | | | |
| Supportive & Special Needs/Alternative Living | | | | | | |
| Assisted Living | | | | | | |
| Extended Affordability Controls | | | | | | |
| Other (describe on a separate sheet) | | | | | | |
| Smart Growth Bonuses | | | | | | |
| Redevelopment Bonuses | | | | | | |
| Rental Bonuses | | 6 ^x | | | | |
| Total Third Round Credits | | 41 | 68 | | | 109 |
| Units Addressing 2015-2025 Fair Share | 24 | | | | | |
| Excess units | 85 ^{xi} | | | | | |

(1) Identify the basis for asserting this number as the municipal obligation

(2) Provide a description for each mechanism

| TOTALS | # | % OF TOTAL OBLIGATION |
|--------------------|---------------------|-----------------------|
| LOW/MOD UNITS | 148 ^{xiii} | 176% ^{xiii} |
| VERY LOW INCOME | TBD ^{xiv} | TBD |
| BONUS CREDITS | 21 | 25% ^{xv} |
| AGE-RESTRICTED | 0 | 0.0% |
| NOT AGE-RESTRICTED | 169 | 201% ^{xvi} |

Explanatory Notes to
Summary of Plan for Total Fair Share Obligation
Borough of East Rutherford
County of Bergen

ⁱ Obtained from the 2014 3rd Round rules proposed by COAH but not adopted. While these proposed rules are not law, they represent the only currently available non-adversarial attempt to establish the “need” as required by the Fair Housing Act. As a result, the Borough has chosen to use these numbers in this current plan. The Borough recognizes the likelihood that these numbers will be revised and, in fact, is part of a consortium of municipalities that had commissioned Dr. Robert Burchell of Rutgers University to design a methodology and perform the necessary need calculations. Unfortunately, Dr. Burchell suffered a stroke and is unable to complete the task. As a result, the consortium commissioned Econsult, Inc. to perform that analysis. The delay resulting from Dr. Burchell’s stroke has delayed the availability of the methodology and need calculations. The Econsult report is not yet available. The Borough will likely propose revisions to this plan upon receipt and analysis of the Econsult report.

ⁱⁱ Obtained from the 2014 3rd Round rules proposed by COAH but not adopted. The Borough disagrees with the statistical analysis resulting in the 132 unit rehabilitation need reported in proposed COAH rules. COAH’s Second Round Rules provide that the calculated number is an “estimate.” See N.J.A.C. 5:93-5.2(a). In the alternative, East Rutherford elects to perform a “Structural Conditions Survey” in accordance with Appendix C to N.J.A.C. 5:93. The Structural Conditions Survey results will be presented to the Court as part of East Rutherford’s Fair Share Plan, thus modifying the estimated rehabilitation need. A Structural Conditions Survey performed in 2008 and submitted to COAH as part of the Borough’s 2008 Housing Element and Fair Share Plan disclosed only 3 units in need.

ⁱⁱⁱ The Borough recognizes that the 2014 3rd Round rules proposed by COAH but not adopted provided for a Round 2 need of 70 units. Notwithstanding that, in *Tomu Development Co., Inc. v. Borough of East Rutherford, et al.*, Docket No.: BER-L-5895-03, the court determined that East Rutherford’s then current need (now the Prior Round Obligation) was 60 units. Since 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. In light of that, the Borough’s Prior Round Obligation is set at 60.

^{iv} The *Tomu* Court awarded a builders’ remedy to Tomu which provided for 60 affordable units in East Rutherford. Of those 60 units, 45 are applied to Round 2 and the balance of 15 units carried to Round 3.

^v The *Tomu* court required that the affordable housing units included in the builders’ remedy be rental units thereby qualifying for a “bonus” credit. Under the then effective Second Round rules, see N.J.A.C. 5:93-5.15(d)(2), the bonus credit is a maximum of 25% of the obligation. This yields a rental bonus of 15 units.

^{vi} Per 2014 3rd Round rules proposed by COAH but not adopted. See Endnote i above. No additional credit for this negative obligation is claimed at this time.

^{vii} Per 2014 3rd Round rules proposed by COAH but not adopted. See Endnote i above.

^{viii} The *Tomu* court appointed Robert T. Regan, Esq. as Mount Laurel Compliance Monitor (the “Monitor”) with power to control land development in East Rutherford. Since the appointment of the Monitor affordable housing has been a consideration in every significant land use application in East Rutherford. As a result, the following land use developments have been approved and completed with an affordable housing set-aside:

| | |
|----------------------|--|
| 132 Union, LLC | 3 (plus an additional 3 “in lieu payments) |
| Group at 3 (Phase 1) | 32 (pursuant to COAH order) |
| Total | 35 |

The following land use developments have been approved with an affordable housing set-aside

| | |
|-------------------------------------|---|
| M& M Investment (Van Winkle Avenue) | 6 (3 on site -3 “in lieu payments) |
| GFM Builders LLC | 5 |
| Capodagli | 9 |
| 384 Paterson LLC | 1 |
| Sterling | 30 (awaiting decision, likely in December, 2015) |
| Total | 51 |

In addition:

the Group at 3 approvals anticipate a Phase II (not yet approved) which currently proposes 44 affordable housing units pursuant to a COAH order and requires Group at 3 to provide additional affordable units, not to exceed 20%, under certain circumstances.

East Rutherford committed the balance of \$140,000 in its affordable housing trust fund to a project proposed by the Housing Authority of Bergen County (“HABC”.) This project would create at least 2 additional units of affordable housing.

^{ix} See Note viii above. The 15 units carried over from Round 2 and the 2 units committed to HABC from the Borough’s trust fund are added to the 51 units described in that table

^x 25% of the 24 unit obligation – see Note vii above.

^{xi} Total Round 3 credits of 109 units less the 21 bonus rental units (see Note vii above) yields 148 units.

^{xii} Total units of 84 divided by total units proposed (including credits) of 169 yields 201%.

^{xiii} Total obligation of 84 divided by total units proposed (less bonus credits) of 148 yields 176%.

^{xiv} To be determined per COAH rules after any necessary revisions to the Plan upon consideration of the Econsult report. See Note i above.

^{xv} 25% of the 24 unit obligation – see Notes vii and x above.

^{xvi} Total obligation of 84 divided by total units proposed (including credits) of 169 yields 201%.

Exhibit B

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January 5, 2016

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

Re: **East Rutherford Summary Plan for Fair Share Obligation;
Response to Joshua D. Bauers, Esq., Letter of Objection of
December 21, 2015 on Behalf of the Fair Share Housing Center
(FSHC)
Our file #02-12-T-024**

Dear Ms. McManus:

Our office has reviewed the above referenced letter of objection which was both untimely filed and incorrectly sent to the court. That letter of objection: (i) asserts the municipality's reliance on the adopted methodology included in N.J.A.C. 5:99 constitutes bad faith; (ii) asserts the presence of East Rutherford in the Meadowlands region requires the municipality's fair share obligations to be coordinated through regional planning in accordance with the Mount Laurel doctrine; and (iii) asserts that there are multiple problems with compliance mechanisms in the municipality's plan summary. With respect to these assertions, the below comments are offered for your evaluation:

a. *The municipality's reliance on the adopted methodology included in N.J.A.C. 5:99 constitutes bad faith.*

In the first instance, it needs to be kept in mind that East Rutherford enjoys the status of a "participating" municipality which, stated another way from a procedural standpoint, makes evident that East Rutherford fully participated in the Council on Affordable Housing ("COAH") process in East Rutherford's currently pending attempt to acquire plan certification through COAH. The Borough adopted a Housing Element and Fair Share Plan (HEFSP) on December 15, 2008; which was endorsed by the Mayor and Council on December 16, 2008, and by the Mount Laurel Implementation Monitor on December 22, 2008.

The HEFSP was filed with COAH on December 31, 2008, and deemed complete on June 8, 2009. Such good faith measures turned out to be for naught however as East Rutherford was left by COAH's inaction in an "ongoing holding pattern" relative to the grant of plan certification.

In the second instance, the Borough's recent filing for a Declaratory Judgment action seeking a Judgment of Compliance and Repose in itself represents a good faith attempt to demonstrate acknowledgement of, and compliance with, its Mount Laurel obligations in the absence of court approved statewide numeric obligations - which remains the case at the time of this writing.

As to methodology, the assertion that the Borough's reliance on un-adopted methodology included in N.J.A.C. 5:99 constitutes bad faith ignores what is made abundantly clear in the Borough's Summary Form, that being the use of the numeric obligations set forth in the 2014 COAH proposed, but not adopted, rules are a placeholder given (i) the absence of any court approved statewide obligations, and (ii) more importantly release of the Econsult Report as the Borough is a participant in the consortium of towns that retained Econsult when it became apparent that Dr. Robert Burchell of Rutgers University would not be able to complete his work on methodology yielding statewide numeric obligations.

The Summary Form also points out the expectation of revising the plan pursuant to the release of the Econsult Report. Said report has just been issued and is now being reviewed. The expectation of the Borough is that the report will comply with the Supreme Court's instructions regarding the calculation of the prospective need giving credence therefore to the resulting numeric obligations.

- b. The presence of East Rutherford in the Meadowlands region requires the municipality's fair share obligations to be coordinated through regional planning in accordance with the Mount Laurel doctrine.***

Underpinning the FSHC assertion is the statement that "The Borough must consider lands that both inside and outside of the Meadowlands District in determining its affordable housing obligations. The Borough cannot simply rely on its presence on the Meadowlands region to claim that no growth is possible, but must work with the regional planning authority and land it controls in the municipality to meet its obligations."

The assertion ignores the facts that: (i) the Borough made no such argument; and (ii) the Summary Form does not claim a vacant land adjustment. The Borough is not seeking to convert, in effect, a kinetic numeric obligation to a potential (RDP) obligation.

The Borough never made an assertion that "no growth is possible." Indeed, the FSHC's reference to the concept of "growth" appears to be a remnant of the days when the debate revolved around the "growth share" based obligations. That debate is in the past.

Contrary to the intimation in the FSHC's objection, the Borough has worked with the New Jersey Sports and Exposition Authority ("NJSEA") and its predecessor agency (the New Jersey Meadowlands Commission) to meet its affordable housing obligations.

East Rutherford's overarching obligation relative to affordable housing is the affording of a realistic opportunity for the production of housing affordable to households of low and moderate income. The claim that the Borough must work with the regional planning authority to meet its obligations is already in practice. Notwithstanding that, FSHC's position does not take into account the structural realities that impede such claim.

The Summary Form in footnote viii points out that the Tomu court appointed a Mount Laurel Compliance Monitor with the power to control land development in East Rutherford, and that the Compliance Monitor has been vested with the legal authority to speak for the Borough in all matters relating to housing in the Meadowlands district. Indeed, the Borough is prohibited from doing do without the consent of the Monitor.

As a result of the foregoing, East Rutherford only has a conditional seat at the table, so to speak, in the issuance of zoning certificates for development by the NJSEA, which issuance is conditioned on satisfaction of COAH requirements, and a limited role, subject to the consent of the Monitor, in the determination of densities and affordable setasides set forth in redevelopment plans under NJSEA jurisdiction.

The Tomu decision revolved around the Borough's obligation to work with the Meadowlands Commission (now the NJSEA) in the affordable housing area.

The Monitor, appointed in Tomu, reviews all applications for land use approvals in the East Rutherford portion of the Meadowlands District. East Rutherford has already worked with the Monitor and the Meadowlands Commission (predecessor agency to the New Jersey Sports and Exposition Authority) to bring affordable housing to fruition in the Meadowlands. Thirty two units of affordable housing are now occupied in The Monarch, an apartment development in the Meadowlands.

Under the facts here, to say that the Borough has failed to work with the NJSEA or its predecessor agencies is simply unsupported.

- c. *There are multiple problems with compliance mechanisms in the municipality's plan summary.*

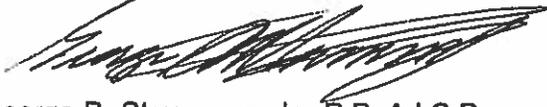
The claim that the Borough does not acknowledge the Rehabilitation Share obligation as developed by the FSHC ignores the Borough's right to perform a Structural Conditions Survey as provided for under Appendix C to N.J.A.C. 5:93. Footnote ii of the Summary Form refers. Regardless of the ultimate number, the plan will encourage participation in the Bergen County Home Improvement Loan Program and provide for the rehabilitation of rental units as required at N.J.A.C. 5:93-5.2(f), which approach represents what is realistically possible in that rehabilitation of units cannot be mandated.

As to the setaside of the Group at 3 development, the plan will fully discuss the setaside for which credit will be claimed and indicate units affordable to low, moderate, and very low income households. The document under review is only a summary.

For the foregoing reasons, we ask that you find that the Borough has acted in good faith in submitting its Summary of plan.

Yours truly,

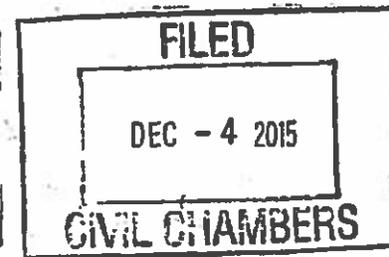
REMINGTON, VERNICK & ARANGO ENGINEERS



George R. Stevenson, Jr., P.P, A.I.C.P.

Exhibit C

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 filed 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 Intervenor 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.

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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.
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 Econosult to hold a plenary hearing on that subject. At that plenary hearing the movants indicate that they would like to probe a series of topics⁴. 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.

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 Econosult 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 Econosult or would the Township like to retain the option of rejecting Econosult’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 Econosult 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 Intervenors⁶ 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 forms⁷. 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.

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