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January 11, 2016

Honorable Thomas C. Miller, J.S.C.
Superior Court of New Jersey
Somerset County Ceremonial Court House
20 North Bridge Street
Somerville, New Jersey 08876

Re: MOUNT LAUREL
In The Matter of the Township of Warren for a Judgment of Compliance of Its Third Round Housing Element and Fair Share Plan
Docket No. SOM-L-904-15

Re: In The Matter of the Borough of Watchung for a Judgment of Compliance of Its Third Round Housing Element and Fair Share Plan
Docket No. SOM-L-902-15

Re: In The Matter of the Borough of Rocky Hill for a Judgment of Compliance of Its Third Round Housing Element and Fair Share Plan
Docket No. SOM-L-901-15

Re: In The Matter of the Borough of Frenchtown for a Judgment of Compliance of Its Third Round Housing Element and Fair Share Plan
Docket No. HNT-L-309-15

Dear Judge Miller:

In accordance with the Case Management order of October 23, 2015, the Township of Warren, and the Boroughs of Rocky Hill, Watchung, and Frenchtown ("Municipalities) hereby advise the Court that they shall rely upon the following experts reports at the time of trial:

1. Report of Nassau Capital Advisors, dated September 22, 215.
2. Report of Econsult Solutions, analyzing the report of Dr. Kinsey, dated September 24, 2015.
3. Memo Report from Econsult Solutions dated December 8, 2015, addressing the "gap period" issues.
4. Report of Econsult Solutions, dated December 30, 2105.

We are aware that the reports and the spreadsheets supporting the December 30, 2015 Econsult Report have previously been submitted to the Court by counsel in other matters and, therefore, have not provided them so as not to inundate the Court with repetitive materials. If the Court would prefer we would be pleased to submit additional copies of the materials or provide them in an electronic format or on a CD. As all other counsel for intervening parties and most interested parties have also received this material in other matters, we are not providing it them again. If they wish to have it sent again, we will be pleased to accommodate their request.

We are also submitting a brief on compliance issues. A copy has been provided to all counsel.

We thank you for your continued attention to these matters and look forward to discussing them with the Court at the next case management conference.

Respectfully yours,

Steven A. Kunzman

SAK:kc

Encl

cc: All Counsel and Interested Parties w/encl

Steven A. Kunzman, Esq. (Atty I.D. # 012731981)

IN THE MATTER OF THE TOWNSHIP OF WARREN FOR A JUDGMENT OF COMPLIANCE OF ITS THIRD ROUND HOUSING ELEMENT AND FAIR SHARE PLAN	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION: SOMERSET COUNTY : DOCKET NO.: SOM-L-904-15 : : (MOUNT LAUREL) : *Civil Action*
IN THE MATTER OF THE BOROUGH OF WATCHUNG FOR A JUDGMENT OF COMPLIANCE OF ITS THIRD ROUND HOUSING ELEMENT AND FAIR SHARE PLAN	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION: SOMERSET COUNTY : DOCKET NO.: L-902-15 : : (MOUNT LAUREL) : *Civil Action*
IN THE MATTER OF THE BOROUGH OF FRENCHTOWN FOR A JUDGMENT OF COMPLIANCE OF ITS THIRD ROUND HOUSING ELEMENT AND FAIR SHARE PLAN	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION: HUNTERDON COUNTY : DOCKET NO.: HNT-L-309-15 : : (MOUNT LAUREL) : *Civil Action*
IN THE MATTER OF THE BOROUGH OF ROCKY HILL FOR A JUDGMENT OF COMPLIANCE OF ITS THIRD ROUND HOUSING ELEMENT AND FAIR SHARE PLAN	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION: SOMERSET COUNTY : DOCKET NO.: SOM-L-901-15 : : : : (MOUNT LAUREL) : *Civil Action*

POSITION STATEMENT ON HOUSING COMPLIANCE ISSUES

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On the Brief

INTRODUCTION

The Township of Warren, and the Boroughs of Rocky Hill, Watchung, and Frenchtown ("Municipalities") submit this position statement on housing compliance issues as is directed by the Court in the Case Management Orders of October 23, 2015.

THE COURT SHOULD APPLY THE SECOND ROUND RULES WITH SUCH ADDITIONAL MECHANISMS, CREDITS AND BONUSES ASHAVE BEEN FOUND ACCEPTABLE TO ENABLE A MUNICIPALIY TO DEVELOP A REALISTIC HEFSP.

In general the Municipalities recognize that the primary sources for compliance are the Second Round Rules, N.J.A.C. 5:93-1.1 ("Section 93" or "Second Round Rules") with such adjustments as may be gleaned from various decisions of the Appellate Division and the Supreme Court in the numerous opinions addressing the various iterations of Third Round Rules, N.J.A.C. 5:93-95, N.J.A.C. 5:93-99. See, In re Adoption of N.J.A.C. 5:96 and 5:97 221 N.J. 1, 29 (2105) ("Mount Laure IV"). It must be kept in mind that the various iterations of the Third Round Rules were fully realized and integrated regulatory determinations that included the determination of the present and prospective need for the municipalities, and corresponding compliance methodologies by which a municipality can address its obligation. By rejecting the growth share concept of the rules, see, In re Adoption of N.J.A.C. 5:94 AND 5:95, 890 N.J. Super. 1 (App. Div. 2007), or the failure of COAH to adopt the subsequent iteration, see, Mount Laure IV, it would be misguided to select any particular provision contained in those rules as gospel. One cannot have a complete understanding of the rules or the intent of COAH by looking at select pieces of a comprehensive, integrated, and complex set of regulations without consideration of the whole. As the Supreme Court has stated in In re Adoption of N.J.A.C. 5:96, 215 N.J. 578 (2013),

> Thus, the growth share methodology's intertwinement with the entire regulatory program is inseparable from the new regulatory scheme fashioned by COAH for municipal third-round obligations and how they may be satisfied because it is so pervasively woven into the entire regulatory program that it cannot be surgically removed. *See Wash. Nat'l Ins. Co. v. Bd. of Review of N.J. Unemployment Comp. Comm'n, 1 N.J.* 545, 556, 64 *A.*2d 443 (1949) ("[T]here must be such manifest independence of the parts as to clearly indicate a legislative intention that the

> constitutional insufficiency of the one part would not render the remainder inoperative."). It requires that the regulations be invalidated and new regulations for the third round be adopted. Because we hold today that a growth share approach is incompatible with the FHA, we need not delve further into the differences among the challengers' arguments about growth share as presented in their petitions.

Id. at 618. Where the appellate courts have found provisions acceptable, or have determined that they do not violate the decisions and purpose of the Mount Laurel doctrine, those provisions can be considered and utilized by the court to determine the most realistic and practical manner by which a municipality can create a plan that meets its fair share obligation. Since the trial courts are not a regulatory agency such as COAH, they can take concepts contained in those discrete rules into consideration in evaluating the manner by which each municipality seeks to meet its obligation. The Supreme Court's commentary on the acceptability of certain aspects of those rules must be seen for what they are: identification of mechanisms that can be considered, and can be used as "guidelines." 221 N.J. 1, 29 (2015.) The Supreme Court identified six such guidelines, but noted that the trial courts are to "judge [the declaratory judgement actions] on the merits of the records developed in individual actions." Id. The Supreme Court first "highlighted COAH's discretion in the rule-making process," then provided that the trial judges:

> ...may confidently utilize similar discretion when assessing a town's plan, if persuaded that the techniques proposed by a town will promote for that municipality and region the constitutional goal of creating the realistic opportunity for producing its fair share of the present and prospective need for low- and moderate-income housing. In guiding the courts in those matters, we identify certain principles that the courts can and should follow.

Id. at 30. In giving consideration to the various opinions and interpretations of the compliance issues, it is important to keep in mind that the municipal obligation is for the *realistic opportunity* for the development of its regional fair share of low and moderate income housing. The Fair Housing Act, N.J.S.A. 52:27D-301 *et. seq.* ("FHA"), in the definition of *prospective need* provides that the projection of housing needs is to be based on the "*development and growth which is reasonably likely to occur in a region or a municipality.*" N.J.S.A. 52:27D-304.j. The *realistic opportunity*, therefore, must take into

consideration what is realistic and feasible. This concept permeates the FHA, Section 307.1.e, and is found throughout the decisions of the courts. Further, the Supreme Court gave the trial Courts flexibility in dealing with these matters, including the consideration of the six guidelines and prior decisions of the appellate courts. The six guidelines are:

1. Prior round obligations must be fulfilled as a starting point for the determination of a municipality's fair share obligation.

2. Elimination of the reallocation of excess present need is permissible.

3. Bonus credits are acceptable. The Court identified, *by way of example*, credits for extension of affordability controls, and credits for every unit provided to the "very poor."

4. Smart Growth and rehabilitation bonuses as were contained in the "second iteration of the Third Round Rules." These are considered to be "reasonably designed to further important state policies."

5. Exclusion of the "cost-burdened poor" from the present need calculation.

6. The revised methodology for identifying substandard housing utilized in the Third Round Rules.

Id. at 32-33. In referring to the six "guidelines" the Court stated:

> The above examples of approved actions from the earlier appellate decisions are cited to guide the *Mount Laurel*-designated judges that will hear the actions pertaining to a town's housing plan. We emphasize that the *courts should employ flexibility* in assessing a town's compliance and should exercise caution to avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules.

Id. at 33. (emphasis added)

In sum, subject to cautionary use of disapproved practices, the charge to the trial courts is to give consideration to the host of available mechanisms for compliance, as well as the incentives, bonuses, and crediting that are available. Each town must be evaluated on it unique conditions, its history of development, its employment characteristics, and the plan it proposes. This approach essentially follows the decision made by Judge Jacobson in the Mercer County cases, a copy of which is attached as Exhibit A.

THE KINSEY MODEL SHOULD NOT BE RELIED UPON AS IT DOES NOT FOLLOW THE DIRECTIVE OF THE COURT.

Fair Share Housing Center ("FSHC"), the New Jersey Builders Association ("NJBA"), and various developers have contended in matters throughout the state that the appellate courts have directed the trial courts to simply apply the methodology developed in the second round rules, whereas the courts have actually stated that the methodology should be "based on the previous round methods," In re Adoption of N.J.A.C. 5:96, 215 N.J. at 620 (2013), or "similar to the methodology set forth in the first and second round rules." In re Adoption of N.J.A.C. 5:96 AND 5:97 416 N.J. Super 462, 484 (App. Div. 2010). FSHC and NJBA, as well as Dr. Kinsey himself, assert that Dr. Kinsey has adhered to the second round methodology without any deviation. Just as the Supreme Court did not require blind adherence to all the prior rules, but encouraged flexibility -- after all, twenty years has elapsed since the second round rules were created. There is not only updated data; there are two decades of experience since the creation of the second round methodology, plus the first decade in the transition from the courts to COAH to be considered in this ongoing social experiment. The Court did not require blind adherence to the previously used methodology; rather, it was to be "similar" or "based upon" and therefore could reasonably take into consideration the experience, knowledge and information that has been developed over the decades.

The New Jersey League of Municipalities ("NJLM") has presented a report from Econsult Solutions ("Econsult" or "ESI") which provides a critique of the Kinsey report and a report from Nassau Capital Advisors that addresses the practical, reality based considerations that the trials courts should consider, but were not taken into consideration by Dr. Kinsey. Econsult, which these Municipalities have adopted as their experts in these matters, recently issued its "Solutions Report." These municipalities maintain that the methodology set forth in the Solutions Report is the correct approach. Econsult has also prepared a separate position on the "gap period" (the period from 1999 to 2015 during which the rules from COAH and the obligations provided to the municipalities were not

sustained). These Municipalities rely upon the Econsult reports, subject to any facts related to actual development or information that pertains to actual development that has taken place in each Municipality, including the actual amount of present need that may be demonstrated through a survey.

As noted, the application of the compliance mechanisms, including bonuses and credits, is within the discretion of the trial court. The purpose of these proceedings is to determine how to achieve the *realistic opportunity* for the development of low and moderate income housing in the community. Courts are permitted to be flexible and can take into consideration the unique attributes and conditions of each municipality that is before the court, as well as the effort that the municipality has done to continue to comply, despite the confusion and uncertainty over the past sixteen years.

COMPLIANCE ISSUES

The Municipalities provide the following comments on the compliance issues. The Municipalities assert that the applicability of these concepts must be considered within the context of the final plans to be submitted to the Court for review. Without having a determination as to the actual present and prospective need obligation of each Municipality, the plan to be presented cannot be finally determined, and therefore, the credits and bonuses to be employed are not known. It is submitted that the available mechanisms can be utilized in accordance with the manner that they have been permitted by COAH, as supplemented or clarified by the Courts. The various credit and bonus issues that may be considered are discussed below.

Municipal Plans- Bonus Credits: A critical component is that the credits, including bonus credits, be applied cumulatively. This would also include the soft credits recognized in the 1980-1986 period.

1,000 Unit Cap: Although the Municipalities do not agree with the methodology and conclusions presented by Dr. Kinsey, since his calculations only places Warren Township in a situation where the 1,000 unit cap may be applied as under Dr. Kinsey's analysis, Warren's present and prospective need when combined exceeds 1,000 units. We are aware of the decision rendered by Judge Wolfson in the

Middlesex County[1] cases which addresses this issue; however, we disagree with his decision as it presumes that there is a calculable "need" for the period between 1999 and 2015 (the "gap period") and therefore he presumes there is an "obligation" for the period. These Municipalities rely upon the analysis of Econsult as set forth in the "Solutions Report" and the December 8, 2015 memo from ESI specifically related to the gap period which has been submitted to the Court for review and consideration. The FHA is specific that that 1,000 unit cap applies to limit the obligation of a municipality to no more than 1,000 in the 10 year compliance period. Judge Wolfson's decision effectively ignores the explicit language of the FHA and the legislative intent. Instead, Judge Wolfson relies upon the analyses that is derived from Appendix D of *the unadopted third round rules,* even though the Supreme Court did not state or even suggest that that aspect of the third round rules should be considered – it was not one of the six aspects discussed above. The purpose of the cap was to ensure that no municipality "need be concerned that it will be radically transformed by a deluge of low and moderate income developments." Mount Laure II, 92 N.J. 158, 219 (1983). After the Appellate Division struck down the a rule pertaining implementing a 1,000 unit cap in Calton Homes, the legislature amended the FHA to provide for the cap, and did so "to avoid the imposition of onerous burdens on municipalities by adopting a regulation capping the fair share of each municipality at 1,000." *Wolfson Opinion* p. 12, *citing*, Sponsor's Statement to Senate Bill No. 858 (Jan. 29, 1993) and Mount Laurel II, 92 N.J. at 291. Judge Wolfson, however, went to the unadopted third round rules N.J.A.C. 5:99 to conclude that the "mindset of that Agency" was that the gap period needs to be addressed and can be addressed over the three subsequent cycles. He ignored the fact that there is nothing in Mount Laurel IV that indicates that the 1,000 unit cap provision of the FHA should be ignored, adjusted, or even that the need should be calculated to include the gap years. The Supreme Court directed that the methodologies are to be used "to establish present and prospective" need, 221 N.J. at 30. Present need is the indigenous need which

[1] Annexed hereto at Exhibit B.

deals with substandard housing,[2] and prospective need is forward looking. The FHA defines prospective need as a "projection of housing needs based upon growth and development which is reasonable likely to occur." N.J.S.A. 52:27D-304j. Again, neither the FHA nor Mount Laurel IV supports calculating prospective need by looking backwards. There can be little doubt that the gap period was an issue that was known to the Supreme Court. The Court was explicit that municipalities should not be punished for the delay – which created this gap period – but did not require that it be addressed; instead, it focused solely on present and prospective need. The Supreme Court did address various aspects of the numerous iterations of the Third Round Rules and addressed some to be considered by the trial courts. The provision relied upon by Judge Wolfson was not one of them. What we are left with, then, is the obligation to consider present and prospective need, and the Fair Housing Act that places a 1,000 unit cap on *all of the need* (present and prospective); it does not permit the cap to be exceeded, and the Supreme Court did not require it to be done as a component of constitutional compliance. It should be kept in mind that the major portion of meeting the obligation is implemented over time. Past inequities are not resolved immediately as was noted in Mount Laurel II. This is a process involving zoning and planning. Municipalities are obligated to zone to create the realistic opportunity for the development of their regional fair share of low and moderate income housing; however, the legislature decided that there needs to be a cap to protect from radical transformation; so as not it place too great a burden on a municipality in any one cycle. Regardless of the cap, progress will be made towards the constitutional goal. The speed with which it is being achieved was tempered by the legislature to avoid drastic changes, including those which might not be sustainable is presented in the report from Nassau Capital. Accordingly, Judge Wolfson' ruling should not be followed and the 1,000 unit cap should be provided to the entire present and prospective need, whether it includes the gap period or not.

[2] See, AMG Realty Co. v. Warren Township, 207 N.J. Super. 388, 401 (L. Div. 1984)

20% Cap: The cap should be applied to limit the allocations in any particular allocation period. The Round Two Regulations, under N.J.A.C. 5:93–2.16 treat the cap as follows:

> (a) A cap of 20 percent of the estimated 1993 occupied housing stock (community capacity) cannot be exceeded by a municipality's need for new construction. The need for new construction is the pre-credited need minus the reductions, prior-cycle credits, and the rehabilitation components. This is based on the premise that if the affordable housing was provided as a 20–percent set-aside of inclusionary housing, and if the planned affordable housing was more than 20 percent of existing units, then the new affordable housing and accompanying market units would exceed the number of existing housing units in the community.
>
> (b) Community capacity is determined by multiplying the estimated 1993 occupied housing in the municipality (Appendix A, Exhibit 1, Column 4) by 0.20 and comparing this to the municipal need for new construction.
>
> 1. If the community capacity is larger than municipal need for new construction, the 20–percent cap is zero. This is the case for the present example.
>
> 2. If community capacity is smaller than municipal need for new construction, the difference between community capacity and the municipal need for new construction is subtracted from the latter to yield the 20–percent cap. The 20–percent cap is the difference between community capacity and the municipal need for new construction. Municipal need at this point equals pre-credited need minus the reduction, minus prior-cycle credits, minus the 20–percent cap.

Except as follows concerning the language set forth in 2 above, trial courts should simply follow the standard that COAH established and that remains in effect today. To follow the policy embodied in this regulation faithfully, it is necessary to pick a more recent date than the 1993 date COAH selected

when it adopted the regulation in 1994. Furthermore, it is unknown how best to gauge "community capacity" today. These questions are uniquely suited for planners to be addressed with plans to be developed and submitted.

Family Rental Requirement: The Round 2 regulations did not impose a family rental requirement. Instead, those regulations created an incentive for municipalities to create family rentals by offering a two for one bonus under N.J.A.C. 5:93-5.15. That incentive proved to be very effective as evidenced by the number of municipalities that designed plans with family rental components to secure the benefit of the incentive. The Supreme Court did not take a position as to whether there should be a family rental requirement and if so how best to achieve that objective. As the Supreme Court directed he trial judges to avoid being policy makers in Mount Laurel matters, it is submitted that the Court should not rely upon the 2008 regulations the Supreme Court later invalidated, or the 2014 regulations that COAH proposed, but never adopted. Instead, this Court should follow the Round 2 regulations on the issue.

Rental Bonus Credits: The Supreme Court did not address the treatment of the rental bonus credits, which have been the most utilized form of bonus credits. If the Supreme Court wanted to uphold the treatment of Rental Bonus credits as they appear in any iteration of the Round 3 regulations, the Court could have done so. Instead, the Court allowed its invalidation of the Round 3 regulations to stand and opined on a number of bonuses other than rental bonuses. N.J.A.C. 5:93-5.15(d) addressed rental bonus credits in the following manner:

> (d) The Council shall grant a rental bonus for rental units that are constructed and conform to the standards contained in N.J.A.C. 5:93–5.8(d) and 5.9(d) and 5:93–7. The Council may also grant the rental bonus prior to construction when it determines that the municipality has provided or received a firm commitment for the construction of rental units. A municipality may lose the benefit of the rental bonus granted in advance of the actual construction of the rental units if the municipality has not constructed the rental units within the time periods established as a condition of substantive certification; or granted preliminary or final approval for the construction of the rental units (where a developer agreed to construct the rental units). A municipality may also lose the benefit of a rental bonus if the preliminary or final approval is no longer valid or if the developer has abandoned the development.

1. A municipality shall receive two units (2.0) of credit for rental units available to the general public.

2. A municipality shall receive one and one-third (1.33) units of credit for age restricted rental units. However, no more than 50 percent of the rental obligation defined in (a) and (b) shall receive a bonus for age restricted rental units unless:

i. The rental units have been constructed prior to the effective date of this rule;

ii. The development has a valid preliminary or final approval from the municipality and the developer remains committed to building rental housing as of the effective date of this rule; or

iii. The time limit for constructing the rental units as per the conditions of substantive certification has not expired.

3. No rental bonus shall be granted for rental units in excess of the rental obligation defined in (a) and (b).

Municipalities should have a right to rely upon all the Round 2 regulations, and the six rulings of the Supreme Court from Mount Laurel IV. One regulation should not be able to be selected from a comprehensive regulatory scheme in a manner that would deny municipalities the right to rely on that regulation making compliance more onerous. The Supreme Court addressed individual bonus regulations from Round 3; it did not simply seek to uphold the Round 3 "bonus scheme," and there is no language in Mount Laurel IV that justifies such a position.

Age Restricted Housing: Generally, COAH's Round 2 regulations capped age-restricted housing at essentially 25 percent of the new construction obligation. See, N.J.A.C. 5:93-5.14. More specifically, COAH created specific categories of municipalities and articulated formulas for each category based upon the principal that there should be a 25 percent cap:

1. **For municipalities that have received substantive certification or a judgment of repose and are not seeking a vacant land adjustment,** COAH applied the following formula to determine the maximum number of age-restricted units a municipality could include in its plan: .25 (municipal precredited – prior cycle credits – credits pursuant to

N.J.A.C. 5:93-3.4 – the impact of the 20 percent cap – the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93-14) – any units age restricted in addressing the 1987-1993 housing obligation.

2. **For municipalities that received or are receiving a vacant land adjustment**: age restricted units, COAH applied the following formula to determine the maximum number of age-restricted units a municipality could include in its plan: .25 (realistic development potential + rehabilitation component – credits pursuant to N.J.A.C. 5:93-3.4) – any age restricted units in addressing the 1987-1993 housing obligation.

3. **For municipalities that have never received substantive certification or a judgment of repose and are not seeking a vacant land adjustment**: age restricted units, COAH applied the following formula to determine the maximum number of age-restricted units a municipality could include in its plan: .25 (municipal precredited need – prior cycle credits – credits pursuant to N.J.A.C. 5:93-3.4 – the impact of the 20 percent cap – the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93-14.)

These formulas could increase or decrease the total number of age-restricted units a municipality could use to address its obligations.

In addition, COAH's Round 2 regulations include a waiver provision. Specifically, N.J.A.C. 5:93-15.1 provides as follows:

> (a) Any party may request a waiver from a specific requirement of the Council's rules at N.J.A.C. 5:91, 5:92 and 5:93 at any time. Such a waiver may be requested as part of a municipal petition, by motion in conformance with N.J.A.C. 5:91–12, or in such other form as the Council may determine, consistent with its procedural rules at N.J.A.C. 5:91.
>
> (b) The Council will grant waivers from specific provisions of its rules if it determines:
> 1. That such a waiver fosters the production of low and moderate income housing;
> 2. That such a waiver fosters the intent of, if not the letter of, its rules; or
> 3. Where the strict application of the rule would create an unnecessary hardship.

In the absence of a waiver, seniors will increasingly drive up the need for affordable housing, while the 25 percent cap will increasingly preclude municipalities from targeting the need where they find it. Thus, the case for a waiver will get increasingly stronger with time. In the future, as in the past, a municipality should be eligible for a waiver if it can demonstrate that seniors account for more than 25 percent of the need for lower income housing in the municipality's region. Under such circumstances, the municipality would merely be meeting the need for affordable housing where it found it.

Very Low Income Units: The Supreme Court addressed Very Low Income ("VLI")Units in its decision in Mount Laurel IV as follows:

> The same [Appellate] panel also approved the allocation of a bonus credit to a municipality "for each unit that is affordable to the very poor, that is, a member of the general public earning thirty percent or less of the median income." *[In re Adoption of N.J.A.C. 5:94 & 5:95, supra]* (citing *N.J.A.C.* 5:94–4.22).
>
> [Mount Laurel IV, 221 N.J. at 32]

N.J.A.C. 5:94–4.22, the regulation the Supreme Court resuscitated, states: "Notwithstanding the provisions of N.J.A.C. 5:94-4.20(d), a municipality shall receive two units of credit for affordable units available to households of the general public earning 30 percent or less of median income by region."

In addition, this Court should reject FSHC's assertion that the 13 percent VLI requirement applies to the entire fair share, because such an interpretation violates well-established legal principles calling for prospective application of statutes. Specifically, "statutes generally should be given prospective application." James v. New Jersey Manufacturers Ins. Co., 216 N.J. 552, 563-65 (2014) (quoting In re D.C., 146 N.J. 31, 50 (1996)); see also Gibbons v. Gibbons, 86 N.J. 515, 522 (1981) ("It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair.") (quoting 2 Sutherland, Statutory Construction, § 41.02 at 247 (4th ed. 1973))). The preference for prospective application of new legislation "is based on our long-held notions of fairness and due process." James, supra, 216 N.J. at 563 (quoting Cruz, supra, 195 N.J. at 45; accord Landgraf v. USI Film

Prods., 511 U.S. 244, 266, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229, 253 (1994) (stating that "[t]he Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation").

Relevant to the various matters currently before this Court, N.J.S.A. 52:27D-329.1 requires that "at least 13 percent of the housing units made available for occupancy by low-income and moderate income households will be reserved for occupancy by very low income households." Section 329.1 does not require half of the very low-income units to be family rental units; nor does it specify that the 13 percent requirement applies retroactively. Therefore, it is submitted that the Court should presume that the 13 percent requirement applies prospectively to the Round 3 obligation. Moreover, we know of no instance where the 13 percent requirement has been imposed on a prior round obligation.

COAH did not address this requirement in the Round 2 regulations it adopted in 1994 because the Legislature enacted the very low-income requirement in 2008. Nor did COAH adopt regulations to implement the very low-income requirement.

The Court should impose the 13 percent requirement in accordance with Section 329.1 of the FHA; however, imposing an additional requirement that some percentage of those units must be "family units" is not in the FHA and, as stated above, our courts cannot "insert an 'additional qualification' into a clearly written statute when 'the Legislature pointedly omitted' doing so." Fair Share Hous. Ctr., Inc., supra, 207 N.J. at 502-03. Therefore, this Court should not impose the "family-unit requirement" into the FHA. Further, the courts should presumptively apply the 13 percent obligation prospectively to the Round 3 component. Finally, the Supreme Court upheld the bonus for very low-income units and this Court should honor that guidance.

Redevelopment Area Credits: Mount Laurel IV specifically addressed Redevelopment Area Credits and made a point to recognize that the Appellate Division approved these credits under N.J.A.C. 5:97-3.19

> [T]he Appellate Division approved... "Redevelopment" bonuse[] contained in the second iteration of the Third Round Rules. 416 *N.J. Super.* at 495–97, 6 *A.*3d 445...The "Redevelopment" bonus awarded "1.33 units of credit for each affordable housing unit addressing its growth share obligation ... that [wa]s included in a designated redevelopment area or rehabilitation area pursuant to the Local Redevelopment and Housing Law." *N.J.A.C.* 5:97–3.19.
>
> [Mount Laurel IV 221 N.J. at 31-32]

In light of the Supreme Court's acknowledgement of the Appellate Divisions decision relating to N.J.A.C. 5:97-3.19 and consistent with our position that the starting point in determining compliance issues is the prior round standards plus the six Round Three provisions expressly addressed in Mount Laurel IV, we assert that this Court should treat redevelopment area credits in the same fashion as COAH treated such credits under N.J.A.C. 5:97-3.19.

Extension of Affordability Controls: Mount Laurel IV also addressed the extension of affordability of controls as one of the six guidelines for crediting. The extension of affordability controls has been recognized as a proper and reasonable crediting mechanism for the provision and retention of affordable housing in a community. This can no better be illustrated than in Warren Township where the Township extended affordability controls on a 57 unit municipally sponsored development and a 60 unit 100% privately owned affordable rental development called "Whispering Hills." The affordable housing restrictions were extended for both developments for the Third Round. In fact, the Township has reserved in excess of $5 million from its affordable housing trust fund to extend the Whispering Hills affordable housing controls for 30 more years. It would be unreasonable to not allow the extension of affordability controls to be a proper crediting mechanism. Accordingly, in light of the Supreme Court's acknowledgement that the extension of affordability controls should be a proper crediting mechanism, we assert that this Court should treat the extension of affordability controls in the same fashion as COAH treated such credits under NJAC 5: 97-6.14.

Vacant Land Adjustments:

Realistic Development Potential ("RDP"): COAH has preserved the right of a municipality with insufficient land to determine how to satisfy its obligations once its adjusted obligation – otherwise known as RDP -- has been determined. COAH set forth this policy in N.J.A.C. 5:93-4.2(g), which provides as follows:

> The municipality may address its RDP through any activity approved by the Council, pursuant to N.J.A.C. 5:93–5. The municipality need not incorporate into its housing element and fair share plan all sites used to calculate the RDP if the municipality can devise an acceptable means of addressing its RDP. The RDP shall not vary with the strategy and implementation techniques employed by the municipality.

Accordingly, if the Court determines that any municipality lacks sufficient land to meet its obligations, COAH policies have always preserved the right of the municipality to decide how it wishes to satisfy its adjusted obligation. Most importantly, once it satisfies its adjusted obligation and secured Plan approval by COAH or the Court, the municipality should be entitled to a high level of "finality" as discussed below.

Municipalities have made planning and fiscal decisions in reliance on this principle for many years, and continuing this practice is critical to enabling municipalities to balance the need to create a realistic opportunity for satisfaction of a specific number of affordable units with the need to generate affordable housing in a manner that the community finds most acceptable. We submit that this Court should preserve COAH's past practice of allowing the municipality to have full control over how it satisfies its adjusted obligation.

The right of a municipality to choose how to satisfy its adjusted obligation should not vary if the court determines a municipality's RDP before approving its affordable housing plan or if the court recalibrates the municipality's RDP as a result of a developed site becoming available for development after approving the municipality's plan. Under both scenarios, the principles embodied in N.J.A.C. 5:93-4.2(g) should control as it empowers the municipality to make the choice as to how to satisfy the

adjusted obligation. This approach is supported by the FHA, N.J.S.A. 52:27D-311.a (providing that a municipality may address its affordable housing obligation "by means of any technique or combination of techniques which provide a realistic opportunity for the provision of the fair share.")

A review of the FHA and the legislative history discussed provides further support for preserving a municipality's right to decide how to address its adjusted obligation. An examination of that history reveals three clear and consistent themes:

(1) Voluntary compliance is preferable to exclusionary zoning litigation;

(2) Mount Laurel II significantly stripped municipalities of home rule and the FHA seeks to restore home rule via presumption of validity for compliant affordable housing plans;

(3) Municipalities need flexibility in fair share calculations based upon certain factors including the municipality's available, developable land.

Empowering municipalities to decide how to satisfy their obligations advances these goals generally and the Legislature's goal of restoring deference to the municipalities in the planning process.

Unmet Need: In Mount Laurel IV, the Supreme Court did not rule that COAH must use Round 2 regulations to formulate fair share standards. Instead, the Court indicated that trial courts should look to COAH's "prior round" rules and regulations in formulating fair share standards. Mount Laurel IV at 30. This is significant because COAH dealt with the unmet need very differently in Round 1 than in Round 2. In Round 1, COAH forgave the unmet need; those regulations have been upheld. In Round 2, COAH required municipalities to address their unmet need. More specifically, COAH gave itself wide discretion as to what it might require of municipalities with limited land to address their unmet need. History has also shown that COAH has used this discretion to give deference to municipal choices. Since the RDP defines the obligation that the municipality can realistically achieve, then everything else is "unrealistic" by default under the COAH standards and common sense. In this context, it is important too keep in mind that the Mount Laurel obligation is to create the "realistic opportunity for the

development of low and moderate income housing," not to impose obligations or to requiring planning for development that is unrealistic and may never take place, both burdening the town's planning process and the interests of private property owners.

Several factors support a Round 1 approach. First, in order to create a meaningful incentive for a municipality with limited land, a judgment of repose needs to provide attractive rights. At a minimum, the judgment must provide the municipality true repose. A municipality should know that if it creates a *realistic opportunity* for satisfaction of its *RDP*, it has done all that can reasonably be required of it with respect to its new construction obligation. If a municipality that satisfies its RDP must still face developers seeking to use the Mount Laurel doctrine to leverage it and strip it of its discretions in planning, a judgment of repose will not actually create repose at all. Moreover, a requirement that municipalities periodically update their vacant land studies will ensure that if land unavailable at the point the RDP is set subsequently becomes available, the municipality will take that into account and will address the RDP attributable to the newly available site on its own terms, not that of a developer.

Second, the FHA provides further support for a Round 1 approach. Section 307 provides: "It shall be the duty of the council to..." determine housing regions; estimate the present and prospective need for low and moderate income housing at the State and regional levels; and adopt criteria and guidelines for 1) the allocation of regional need at the municipal level and 2) adjustments of that municipal allocation based "upon available vacant and developable land, infrastructure considerations or environmental or historic preservation factors." See, N.J.S.A. 52:27D-307. There was no requirement as to "unmet need" specifically because the whole point of the adjustment was to restore home rule. Otherwise, the opportunity to plan, including maintaining what already exists in the municipality, would be upended.

Third, legislative history provides further support for a Round 1 approach. Indeed, the Legislature enacted the FHA in large part to restore home rule:

> The entire Mount Laurel process **really is a legal advance on local home rule.** Previously, zoning legislation carried with it a strong presumption of validity, whereby a town was almost guaranteed insulation against developer attack. With the recalcitrance of many municipalities – and I stress, not all municipalities – the courts felt it necessary to put aside the presumption of validity and, thus, the onslaught of litigation that now comprises the Mount Laurel issue.
>
> [Legislative Transcript of the Public Hearing before the Senate State Government, Federal, and Interstate Relations and Veterans' Affairs Committees, dated September 17, 1984 ("Legislative Transcript"), pertinent portions of which are attached hereto as Exhibit C at page 11 (emphasis added)]. [3]

To advance the restoration of home rule, the Legislature "want[ed] the Housing Council to be able to offer the municipality a very strong presumption of validity" if the municipality submitted a compliant plan based on the regional estimate of need but incorporating reductions for vacant land and other individual considerations. Ibid. The Legislators also wanted to preserve the ability of municipalities to secure adjustments if they lacked sufficient land while still maintaining home rule through the presumption of validity: "Where there is a limit on the amount of developable land available for the construction of low and moderate-income housing, that is a factor that must be considered." Id. at 19. Thus, the very purpose of the vacant land adjustment, as envisioned in the FHA and consistent with COAH's Round One regulations, was to allow land-poor towns to achieve compliance and maintain home rule while remaining compliant with their constitutional obligations for affordable housing. Instead of imposing an obligation on a land-poor municipality with respect to its unmet need, the court should require such a municipality to update its RDP on a regular basis. It should not force the municipality to create a realistic opportunity for satisfaction of an obligation greater than the realistic development potential, which represents the number that defines what is realistically possible.

Fourth, the Supreme Court's rationale in In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 215 N.J. 578 (2013) provides further support for COAH's power to take a Round One approach. In this decision, the majority rejected "growth share" because it viewed the FHA as

[3] If the Court requests the full transcript of the legislative history we will be pleased to provide it.

incorporating the principles the Court had established in Mount Laurel II and it viewed growth share as a violation of those principles. By the same token, in Mount Laurel II, the Supreme Court also established the principle that "[o]ur society may not be willing to rip down what we now have in order to right the wrongs of the past, . . ." Mount Laurel II, 92 N.J. at 302 n. 51. Since the Supreme Court views the FHA as the embodiment of principles it established in Mount Laurel II, then the Court should apply those principles, not just the ones that rendered the growth share regulations *ultra vires*. A Round One approach that forgives the requirement that a municipality address an affordable housing obligation greater than the RDP relieves municipalities of the obligation "to rip down buildings to right the wrongs of the past".

Fifth, N.J.S.A. 52:27D-313.1, adopted in 1989 (the "Fanwood Bill") provides additional partial support for the proposition that municipalities should have no obligation to generate affordable housing on developed land and that, therefore, COAH should use a Round One approach that imposed no obligations with respect to developed land. In this regard, the Fanwood Bill prohibits COAH from considering "for substantive certification any application of a housing element submitted which involves the demolition of a residential structure, which has not been declared unfit, or which was within the previous three years negligently or willfully rendered unfit, for human occupancy or use pursuant to P.L. 1942, c. 112 (C.40:48-2.3 et seq.), and which is situated on a lot of less than two acres of land or on a lot formed by merging two or more such lots . . ." Id.

Notwithstanding the foregoing, we recognize that circumstances may change and a site that was not available for development at the time the municipality secured a vacant land adjustment may become available. Under these circumstances, COAH's policy has always been to preserve the right of a municipality to address the obligation that may be generated by the availability of the previously unavailable site. It is submitted that the Court should continue this policy. It should not permit

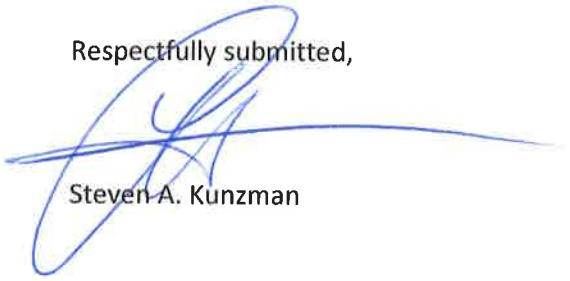
developers force redevelopment of sites that contribute to the adjusted obligation and thereby infringe on municipal prerogatives.

We therefore submit that the Court should to take a Round One approach to municipalities that lack sufficient land to meet their obligation. Only if a site that was not available when a municipality obtained an adjustment becomes available should a municipality possibly have an obligation. Under such circumstances, however, the municipality and not the developer should have the power to decide how to address the increased RDP.

CONCLUSION

A significant aspect of this issue will be driven by the determination of the Court of the present and prospective need of the Municipalities. Since there are no current rules that respond to and address the current conditions in New Jersey, the Court should take into account the various options for bonuses and credits when evaluating the plan to be proposed by any municipality.

Respectfully submitted,



Steven A. Kunzman

Dated: January 11, 2016

EXHIBIT A

FILED

NOV 19 2015

PREPARED BY THE COURT

SUPERIOR COURT OF NJ
MERCER VICINAGE
CIVIL DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

In the Matter of the Application of the Township of East Windsor

In the Matter of the Application of the Township of Lawrence

In the Matter of the Application of the Township of Robbinsville

In the Matter of the Application of the Municipality of Princeton

In the Matter of the Application of the Borough of Pennington

In the Matter of the Application of Ewing

In the Matter of the Application of the Township of Hopewell

In the Matter of West Windsor Township

In the Matter of the Application of the Borough of Hightstown

In the Matter of the Application of the Township of Hamilton

Petitioners.

Civil Action
(Mt. Laurel)

ORDER ON USE OF BONUS CREDITS

DOCKET NUMBERS:
MER-L-1522-15
MER-L-1538-15
MER-L-1547-15
MER-L-1550-15
MER-L-1555-15
MER-L-1556-15
MER-L-1557-15
MER-L-1561-15
MER-L-1568-15
MER-L-1573-15

THIS MATTER having come before the court for consideration of the various arguments put forth by the parties regarding compliance issues unrelated to the methodology for determining the extent of the municipalities' affordable housing obligations; and the court having considered the arguments put forth in the briefing and at oral argument; and for good cause shown and for the reasons set forth in the attached decision:

IT IS this 19th day of November, 2015, **HEREBY ORDERED** that:

1. The municipalities may choose to implement the bonus credit structure from either the Second Round Rules or the Third Round Rules as part of their compliance programs, but may not combine provisions from different Rounds.
2. All other matters are deferred until the court has received a full expert analysis.
3. The municipalities are permitted to utilize affordable housing obligation numbers calculated by Dr. David Kinsey in his expert report or the numbers calculated by Special Methodology Master Richard Reading in his spreadsheet attached to the court's decision as "Appendix A" in preparing their preliminary plans for court review.

Mary C. Jacobson, A.J.S.C.
Hon. Mary C. Jacobson, A.J.S.C.

NOT FOR PUBLICATION WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS

PREPARED BY THE COURT

In the Matter of the Application of the Township of East Windsor

In the Matter of the Application of the Township of Lawrence

In the Matter of the Application of the Township of Robbinsville

In the Matter of the Application of the Municipality of Princeton

In the Matter of the Application of the Borough of Pennington

In the Matter of the Application of Ewing

In the Matter of the Application of the Township of Hopewell

In the Matter of West Windsor Township

In the Matter of the Application of the Borough of Hightstown

In the Matter of the Application of the Township of Hamilton

Petitioners.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

Civil Action
(Mt. Laurel)

DECISION ON COMPLIANCE ISSUES

DOCKET NUMBERS:
MER-L-1522-15
MER-L-1538-15
MER-L-1547-15
MER-L-1550-15
MER-L-1555-15
MER-L-1556-15
MER-L-1557-15
MER-L-1561-15
MER-L-1568-15
MER-L-1573-15

November 19, 2015

JACOBSON, A.J.S.C.

Factual and Procedural History

The present matter has arisen out of the New Jersey Supreme Court's 2015 decision reinstating the courts as "the forum of first instance for evaluating municipal compliance with Mount Laurel obligations." In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 20 (2015). That role had previously been held by the Council on Affordable Housing ("COAH"), which was authorized by the Fair Housing Act ("FHA"), N.J.S.A. 52:27D-301 to -329, to guide municipalities in meeting their affordable housing obligations. Having concluded that COAH was "not capable of functioning as intended by the FHA," In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 19, the Court directed the trial courts both to establish the present affordable housing obligations for New Jersey's municipalities and to certify municipal plans to meet those obligations through declaratory judgment actions. Id. at 24-29.

Pursuant to the Supreme Court's directive, eleven of the twelve Mercer County municipalities filed declaratory judgment actions with this court: Hamilton, East Windsor, West Windsor, Lawrence, Robbinsville, Princeton, Pennington, Ewing, Hopewell Township, Hightstown, and Hopewell Borough.[1] In addition, the municipalities have been joined by several intervenors: Fair Share

[1] On November 10, 2015, Hopewell Borough voluntarily dismissed its declaratory judgment action, citing the expense of participation.

Housing Center ("FSHC"), New Jersey Builders Association ("NJBA"), OTR East Windsor Investors, LLC, Thompson Realty Company of Princeton, Inc., CF Hopewell, LLC, Howard Hughes Corp., The Blackpoint Group, LLC, and Avalon Watch, LLC.

Like some other courts enforcing Mount Laurel obligations, this court has treated certain common issues among the parties in a consolidated manner. In an effort to establish some guidelines for all of the municipalities to follow as they prepare preliminary affordable housing plans for judicial review, the court invited the parties to submit briefs addressing any compliance issue they thought could be decided as a matter of law. On September 25, 2015, the court established a briefing schedule and oral argument for the compliance issues. Given the municipalities' representation that their expert report on methodology would not be available until the end of 2015, the court determined not to address the mechanism for calculating the affordable housing obligation at this time.

That decision was prompted by the fact that the court had only received expert reports on methodology from two intervenors. First, and most prominently, FSHC submitted a report from its expert, Dr. David Kinsey. Dr. Kinsey's report both presented an affordable housing calculation methodology and then applied that methodology to assign numerical affordable housing obligations for

all Mercer County municipalities. In addition, NJBA submitted a report from Art Bernard supporting and endorsing Dr. Kinsey's work.

Conversely, the municipalities had initially selected Dr. Robert Burchell to provide an alternate methodology for calculating the affordable housing obligation for each town. But due to Dr. Burchell's unexpected incapacity last summer, he was unable to complete this task. The municipalities subsequently retained a replacement, Econsult Solutions, Inc. ("Econsult"), both to critique the expert report of Dr. Kinsey and to provide a separate calculation of each town's fair share burden. While Econsult submitted its critique of Dr. Kinsey's report to the court in October, it is not anticipated that it will provide its affordable housing methodology and calculations until December 2015 at the earliest. Without the benefit of expert testimony on behalf of the municipalities, the court was reluctant to evaluate and then determine the appropriate methodology to calculate affordable housing needs.[2]

Nevertheless, the court anticipated that there might be a set of legal issues relevant to the towns' compliance obligations but unrelated to the methodology of determining the number of units

[2] On October 30, 2015, Special Methodology Master Richard Reading, appointed to assist the courts in Ocean, Monmouth, and Mercer Counties (COAH Region 4), issued a report discussing both the Kinsey Report as well as Econsult's critique. This report included a preliminary, total affordable housing number for the whole of Mercer County, but did not provide preliminary numbers for each town. Upon this court's request, however, Mr. Reading's office recently provided preliminary affordable housing calculations for each municipality in Mercer County. These numbers are attached as "Appendix A" to this decision.

necessary to meet those obligations that were ripe for decision. The court hoped that inviting the presentation of such issues and releasing a decision on such matters would have a positive impact on the compliance process by assisting municipalities in drafting their compliance plans and fostering mediation by reducing uncertainty. Although the oral argument proved so divisive that the court's hopes for mediated settlements early in the process were dashed, the court nonetheless concludes that some clarity in the compliance process may ultimately contribute to mediated resolutions in some of the Mercer County towns. Notably, however, the court will address only a small subset of the panoply of arguments made by the parties because most of the issues were too intertwined with the methodology for calculating the obligations to be decided at this point absent full expert input.

For example, the validity of the Kinsey Report and his calculation methodology was argued by many of the parties. FSHC's extensive briefing sought to defend the Kinsey approach. A similar defense was a prominent feature of briefs submitted by OTR East Windsor Investors, LLC, and Thompson Realty Co. of Princeton, Inc. Conversely, briefing from Mason, Griffin, & Pierson, on behalf of various municipalities, presented arguments directly contesting the Kinsey methodology. The court is persuaded that the merits of these arguments cannot be properly reviewed without the benefit of expert input on each side.

In addition, East Windsor argued extensively against Dr. Kinsey's inclusion of senior citizen households in his affordable housing calculations. This argument was disputed by FSHC, NJBA, OTR East Windsor Investors, LLC, and Thompson Realty Co. of Princeton, Inc. Here again, the court has determined that the appropriate consideration of senior citizen households in calculating affordable housing obligations is too closely related to methodology to be decided at this time. This sentiment was echoed by Special Master Richard Reading in his October report, in which he noted that, while East Windsor's concerns were legitimate, the precise degree to which the calculation needed adjustment could only be determined after further expert input on methodology. While Mr. Reading opined that some adjustment was necessary and he incorporated an adjustment into his preliminary report, East Windsor seemed to suggest that senior citizen households should be excluded from consideration in the methodology altogether. The court thus has decided that this issue cannot appropriately be decided at this time.

Almost all of the parties commented on whether a 1,000-unit cap should be used to limit each municipality's affordable housing obligation pursuant to N.J.S.A. 52:27D-307(e). While the Honorable Douglas Wolfson, J.S.C., released a decision on this issue on October 5, 2015, Middlesex County Mt. Laurel Litigation, MID-L-

3365-15, et al., this court has decided not to address the matter at this time.

Firstly, it remains unclear how many Mercer County towns will be eligible to claim the 1,000-unit cap. Mr. Reading's preliminary calculations, for example, utilize the cap for only one Mercer County town. If that analysis or a similar one is adopted by this court, the issue can be reviewed in the one case where it may be relevant. Moreover, the court was persuaded (particularly by arguments put forth in the Mason, Griffin & Pierson brief) that analysis of the 1,000-unit cap issue may very well be intertwined with questions regarding methodology. For example, the court will likely need to determine the applicability of the 1,000-unit cap to the sixteen-year gap in regulatory action from the expiration of the Second Round Rules in 1999 to the present declaratory judgment actions. Before considering this issue, the court may require expert input to determine whether, for example, the inclusion of this regulatory "gap period" would result in any double counting.

After considering the numerous arguments put forth by the parties in response to its September 25 order, the court has decided to issue a ruling only on the limited subject of the appropriate bonus credits Mercer County municipalities may use in

their plan proposals.[3] This decision is provided in an effort to clarify some compliance issues to assist the municipalities in developing their preliminary plans and perhaps to help foster some mediated settlements.

Legal Analysis

After reviewing the arguments of the parties, the court concludes that Mercer County municipalities may choose either the Second Round or Third Round framework regarding bonus credits, but may not combine approved bonus credits from both rounds. This limited discretion comports with Mount Laurel case law and the specific guidance provided by the Supreme Court in its 2015 order to the courts.

The Mount Laurel doctrine places a constitutional requirement on each municipality to provide a realistic opportunity for the construction of its fair share of the present and future regional housing needs for low and moderate income households. S. Burlington County NAACP v. Twp. of Mount Laurel, 67 N.J. 151, 174 (1975) (Mt. Laurel I); In re adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 15 (App. Div. 2007), certif. denied, 192 N.J. 72 (2007). The Supreme Court's opinion in S. Burlington County NAACP v. Twp. of

[3] The court also notes, for clarity's sake, that "bonus credits" are distinct from "construction credits." See In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 81 (App. Div. 2007). The latter pertains to the subject of the extension of affordability controls and will not be covered by this decision.

Mount Laurel, 92 N.J. 158 (1983) (Mt. Laurel II) provided the basic framework for establishing whether a municipality has met its Mount Laurel obligations. The Court directed that municipalities must first establish their housing need by calculating a concrete number of housing units. Id. at 215-16. Following enumeration of the need, municipalities must create housing plans that provide a "realistic opportunity" to meet that housing need. Id. at 221.

The latter requirement entailed an entirely practical review of a plan's effect on a municipality and developer incentives: municipalities need to demonstrate that there "is in fact a likelihood—to the extent economic conditions allow—that the lower income housing will actually be constructed." Id. at 222. Indeed, subsequent courts have struck down rules that inadequately incentivize development or dilute a town's obligation. See In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. at 73-74 (noting that such inadequate incentives "provide[ ] municipalities with an effective tool to exclude the poor by combining an affordable housing requirement with large-lot zoning and excessive demands for compensating fees in lieu of providing such housing").

These goals were largely adopted by the Legislature when it created an administrative mechanism for enforcing affordable housing requirements through the FHA and the State Planning Act. N.J.S.A. 52:18A-196 to -207. Most notably, the FHA created an administrative agency, COAH, which would be required to promulgate

periodic rules to guide municipalities in both ascertaining their fair share housing obligation and in developing an appropriate compliance program to meet that obligation.

COAH twice carried out this task successfully—passing the First Round Rules in 1986, N.J.A.C. 5:92-1.1 to -18.20, which covered housing obligations from 1987 to 1993, and the Second Round Rules in 1994, N.J.A.C. 5:93-1.1 to -15.1, which covered housing obligations accrued from 1987 through 1999. These Rules largely withstood various legal challenges levied against them. The Third Round Rules, by contrast, failed on two separate attempts to secure judicial approval. See In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. 1 (overturning the first iteration, codified at N.J.A.C. 5:94-1.1 to -9.2); In re Adoption of N.J.A.C. 5:96, 215 N.J. 578 (2013) (overturning the second iteration, codified at N.J.A.C. 5:96-1.1 to -20.4). When COAH failed to adopt a third iteration, leaving a fifteen-year regulatory gap, the Supreme Court decided to remove COAH from its role and reinstate the courts as the primary enforcement mechanism for affordable housing obligations. In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 19-20. Despite the fact that the Third Round Rules were rejected by the Appellate Division in 2007 and again in 2010, those courts explicitly endorsed specific features of the Rules in each review. See, e.g., In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 495-98 (App. Div. 2010), aff'd sub nom. In re Adoption

of N.J.A.C. 5:96, 215 N.J. 578 (2013). The Supreme Court explicitly acknowledged these determinations as potential sources of guidance for the trial courts in carrying out their current task. In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 30-33. (The 2010 Appellate Division rulings were also largely endorsed by the Supreme Court in 2013. In re Adoption of N.J.A.C. 5:96, supra, 215 N.J. at 619).

The usage of bonus credits in affordable housing plans has repeatedly been approved by courts as a proper incentive to foster the creation of affordable housing units. See, e.g., Mount Laurel II, supra, 92 N.J. at 217; Calton Homes v. Council on Affordable Housing, 244 N.J. Super. 438, 456-58 (App. Div. 1990), certif. denied 127 N.J. 326 (1991) (permitting the use of rental bonus credits to ensure that such units are constructed). Their use was among the provisions of the Third Round Rules that were explicitly endorsed by the Appellate Division. See, e.g., In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. 1, 81-84 (App. Div. 2007); In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 495-97. Bonus credits supply incentives by rewarding towns that approve the construction of specific types of affordable housing units. The bonuses encourage towns to approve affordable developments because the bonuses assist the municipalities in meeting their affordable housing obligations. Thus, for example, a two-for-one bonus credit for rental housing would double-count

each rental unit constructed in satisfying a municipality's overall obligation.

COAH implemented different systems of bonus credits in both the Second Round Rules and the Third Round Rules. In the Second Round, there was only one type of bonus credit authorized to incentivize the construction of rental units. See N.J.A.C. 5:93-5.15(d). The Rules required municipalities to provide 25% of their housing obligations in the form of rental units. Id. In order to incentivize the construction of such units, the Rules permitted the municipalities to receive bonus credits for each rental unit constructed in meeting that 25% minimum. Id. Specifically, the Rules provided a two-for-one credit for family rental units and a 1.33-for-one credit for age-restricted and alternative living units. Id.

The Third Round Rules endorsed significant changes to the bonus credit structure. First, COAH altered the rental bonus so that municipalities could only receive it *after* having met the 25% mandatory minimum for rental units. N.J.A.C. 5:97-3.6(a). Second, COAH introduced four new types of bonuses: (1) a 1.33-for-one bonus for each affordable unit constructed in housing areas designated as most desirable for development by the State Planning Commission (the so-called "Smart Growth" bonus), N.J.A.C. 5:97-3.18; (2) a 1.33-for-one bonus for each affordable unit constructed in redevelopment or rehabilitation areas designated by the Local

Redevelopment and Housing Law (the "Redevelopment" bonus), N.J.A.C. 5:97-3.19; (3) a two-for-one bonus for each affordable unit constructed for very low income households (i.e., those members of the public earning no greater than 30% of the median income), N.J.A.C. 5:97-3.7; and (4) a two-for-one bonus for municipalities that had followed the iteration of the Third Round Rules in effect between 2004 and 2008 (the "Compliance" bonus). N.J.A.C. 5:97-17. In addition, COAH limited the aggregate of all bonuses permitted to 25% of a municipality's overall housing obligation. N.J.A.C. 5:97-3.20. In 2007, the Appellate Division affirmed the very low income credit bonus. In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. at 81-84. In 2010, the Appellate Division affirmed both the Smart Growth and Redevelopment bonuses. In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 495-98. These conclusions were explicitly cited with favor by the Supreme Court in its 2015 decision. In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 31-32. The Appellate Division also overturned the Compliance bonus, In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 497-98, but the Supreme Court expressed no opinion on this point. See In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 31-32.

It is important to note that the courts did not merely rubber-stamp COAH's bonus credits; rather, they closely inspected each provision to ensure that it properly incentivized the development

of affordable housing. The courts were well aware that bonuses and credits that do not incentivize construction could result in an unconstitutional dilution of housing obligations, providing rewards without requiring action. See, e.g., In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 493-95 (invalidating rental bonus credits awarded to municipalities for units that had been planned in the prior round but had not yet been constructed). Thus, the bonus credits of the Second and Third Round Rules that were upheld by the courts were only accepted after a rigorous legal analysis to ensure their validity.

The present inquiry does not require the court to determine whether new bonuses properly incentivize construction without unduly diluting the affordable housing need. Rather, the Supreme Court directed the trial courts to utilize, at their discretion, the available Second and Third Round Rules. Thus, this court's task is simply to determine which of the already accepted bonus credits from the previous rounds may be applied by the Mercer County towns as they prepare preliminary affordable housing plans due to the court in December 2015.

The municipalities argued that the court should permit the use of the Second Round bonus structure in conjunction with the specific Third Round bonuses approved by the Appellate Division—e.g. the Redevelopment and Smart Growth bonuses—as well as the Compliance bonus credit that was expressly struck down. By

contrast, FSHC argued that the court should use only the bonus credit structure of the Third Round. To further highlight the diversity of opinions proffered, the court also notes that NJBA seems to find almost any combination of bonus credits acceptable, so long as the court maintains the aggregate 25% cap on all bonus credits contained in the Third Round Rules.

Having reviewed the arguments of the parties and applicable case law, the court will authorize the municipalities to choose either the bonus credit structure of the Second Round Rules or that of the Third Round Rules except for those provisions, such as the Compliance Bonus, that were expressly rejected by the Appellate Division. This court does not see the need to revisit the in-depth analysis of prior appellate courts regarding the Rules. The municipalities should not be deprived of policies that have been permitted by the courts in the past.

On the other hand, the court will not permit the municipalities to select any combination of bonus credits previously authorized. The court shares the concern expressed by FSHC at oral argument and in its briefing—namely, that combining bonuses and credits from both rounds could dilute the municipalities' obligations to a degree COAH sought to avoid. Notably, COAH itself never aggregated the bonus credits in the manner advocated by the municipalities. To the contrary, as noted above, COAH maintained a certain balance in the credits between

the Second and Third Rounds: while the Third Round Rules increased the number and type of bonus credits available, COAH limited the use of the rental bonus credit from the Second Round and established an overall cap for bonus credits.

Notably, the court is concerned that a significant *imbalance* could result if the court were to permit municipalities to choose bonuses from either Round. For example, such an order would permit a municipality to maintain the Second Round's allowance for rental bonus credits for each unit constructed in meeting the municipality's obligation (rather than permitting such bonuses only after that obligation has been met, as provided in the Third Round), plus the three new credits implemented in the Third Round, with no limit on their aggregate use. The court agrees with the concerns voiced by FSHC that such an imbalanced system would impermissibly dilute the Mercer County municipalities' constitutional obligations. Accordingly, the municipalities may choose either one or the other approach in developing their plans, but may not combine both.

Moreover, the municipalities' position is unsupported by the case law. A close examination of the applicable opinions shows that the courts evaluated the impact of each bonus credit within the broader context of the then current Rules as a whole. E.g. Calton Homes, supra, 244 N.J. Super. at 457 ("The rental bonus rule is part of a comprehensive scheme to encourage municipalities

and developers to build affordable rental units in the future."). In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. at 83 (noting in its analysis of the bonus credit structure in the Third Round Rules that "[t]he third round rules do not dilute satisfaction of the housing need to the same degree as first or second round rules"). In other words, the rulings regarding bonus credits were purposefully contained within the context of the broader Round of rules in which they were found. The court is not persuaded that the appellate courts intended that specific bonus credits be divorced from the context in which they were adopted. Consequently, the court will apply the discretion afforded it by the Supreme Court as a "forum of first instance for evaluating municipal compliance with Mount Laurel obligations," In re N.J.A.C. 5:96 & 5:97, supra, 221 N.J. at 20, by providing the Mercer County municipalities with the choice described above.

In adopting this approach, the court has tried to remain cognizant of the Supreme Court's direction that the "judicial role . . . is not to become a replacement agency for COAH." Id. at 29. The Court explicitly eschewed "creat[ing] an alternate form of statewide administrative decision maker for unresolved policy details of replacement Third Round Rules." Id. On the other hand, the Court emphasized the courts' "flexibility in assessing a town's compliance" and explicitly endorsed the use of creative means to achieve it. Id. at 33. Thus, the courts have been ordered to use

the same tools that were used in the prior rounds in flexible ways to assure satisfaction of each town's constitutional obligation to provide affordable housing.

In addition, the Supreme Court's directive gives trial courts the discretion to utilize both Second Round and Third Round Rules in various combinations as they adjudicate affordable housing obligations. While the Supreme Court did ban the use of the Third Round's "growth share" methodology, stating instead that "previous methodologies employed in the First and Second Round Rules should be used to establish present and prospective statewide and regional affordable housing need," Id. at 30, the Court did not simply condemn the Third Round Rules *in toto*. Quite to the contrary, the Court explicitly enumerated with positive endorsement several Third Round Rules that had been upheld by the Appellate Division in 2007 and 2010. Id. at 30-33. This list included the new bonus credits discussed above, as well as other Third Round alterations relating to the methodology for calculating affordable housing obligations (which are not presently before the court). Id.

The Supreme Court's positive view of aspects of the accepted Third Round Rules demonstrates the flexibility the Supreme Court provided to the trial courts to use rules from either the Second or the Third Round. First, the list itself is presented in permissive terms. See Id. at 33 (noting that the list is meant to "guide" courts). Thus, although it explicitly endorses the use of

Third Round bonuses and credits that were approved by the Appellate Division, the Court quite strikingly did not *require* that these bonuses be used. Second, the list itself was also not meant to be exhaustive; rather, it simply provides a sample of Third Round Rules that may be used.

Thus, this court is satisfied that permitting the municipalities to choose from bonus structures that have already withstood judicial scrutiny will allow them to select the option best suited to each municipality's circumstances without risking the dilution condemned by the appellate courts. Moreover, the approach falls within the flexibility that the Supreme Court afforded to the trial courts in reviewing municipal efforts to meet their Mount Laurel obligations.

In short, the court concludes that by permitting the use of either the Second Round or Third Round bonus credit structure, the municipalities' compliance plans will—as required by the Mount Laurel doctrine—appropriately incentivize development without diluting their affordable housing obligations. The court now leaves it to the Mercer County municipalities to select which of the bonus credit structures they will utilize as they develop their plan proposals.

Other Matters

Finally, the court will continue to require submission of preliminary plans from each town that has an active declaratory judgment action by December 7, 2015. In preparing the plans, each town may utilize either the Kinsey numbers or the preliminary numbers proposed by Special Methodology Master Richard Reading and provided to the court on November 13, 2015. These numbers are attached to this decision as "Appendix A," and were calculated based on the approach contained in Mr. Reading's report of October 30, 2015, which has already been circulated to the parties.

Appendix A – Prospective Need Calculations for Mercer Municipalities

Muni Code	Municipality	Gross Prospective Need, 1999-2025 (units)	Secondary Sources (units)			Calculated Prospective Need, 1999-2025 (units)	Prospective Need 20 Percent Cap, 1999-2025	20 Percent Cap Applies?	Prospective Need Obligation, 1999-2025 (units after 20% and 1000 unit caps) (1)	Prospective Need Obligation, 1999-2025 (units)
			Demolitions, 1999-2025	Filtering, 1999-2025	Conversions, 1999-2025					
1101	East Windsor Township	356	32.0	(83)	56	415	1,850	N	415	415
1102	Ewing Township	377	33.3	424	80	0	2,510	N	0	0
1103	Hamilton Township	855	187.5	1342	273	0	6,705	N	0	0
1104	Hightstown Borough	57	16.2	(7)	26	54	400	N	54	54
1105	Hopewell Borough	66	17.9	(4)	10	78	163	N	78	78
1106	Hopewell Township	828	54.6	(24)	15	891	1,100	N	891	891
1107	Lawrence Township	501	46.5	145	53	339	2,159	N	339	339
1108	Pennington Borough	90	6.8	(6)	7	96	203	N	96	96
1114	Princeton	480	196.9	319	134	424	1,874	N	424	424
1111	Trenton City	0	542.0	982	670	0	5,687	N	0	0
1112	Robbinsville Township	475	32.4	21	5	481	815	N	481	481
1113	West Windsor Township	970	124.9	(32)	32	1095	1,456	N	1,095	1,000
		5,054	1,391	2,877	1,370	3,873	25,161		3,873	3,778

EXHIBIT B

NOT FOR PUBLICATION WITHOUT APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MIDDLESEX COUNTY
(MT. LAUREL LITIGATION)

IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENT FOR THE TOWNSHIP OF MONROE AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES.	**DOCKET NO. MID-3365-15**
IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE TOWNSHIP OF SOUTH BRUNSWICK AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES.	**DOCKET NO. MID-3878-15**
IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE TOWNSHIP OF EDISON AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES.	**DOCKET NO. MID-L-3944-15**
IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE BOROUGH OF SOUTH PLAINFIELD AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES.	**DOCKET NO. MID-L-3994-15**
IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE TOWNSHIP OF OLD BRIDGE AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES.	**DOCKET NO. MID-L-3997-15**
IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE TOWNSHIP OF PLAINSBORO AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES.	**DOCKET NO. MID-L-4010-15**

IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE BOROUGH OF SAYREVILLE AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES.	**DOCKET NO. MID-L-4010-15**
IN THE MATTER OF THE ADOPTION OF THE HOUSING ELEMENTS FOR THE TOWNSHIP OF EAST BRUNSWICK AND THE FAIR SHARE PLAN AND IMPLEMENTING ORDINANCES	**DOCKET NO. MID-L-4013-15**

CIVIL ACTION
OPINION

Decided October 5, 2015

Jerome Convery, Esq. and Marguerite Schaffer, Esq. *(Shain, Schaffer & Rafanello, P.C.)*, appeared on behalf of Township of Monroe

Donald Sears, Esq., appeared on behalf of the Township of South Brunswick.

Leslie London, Esq. *(McManimon Scotland & Baumann)*, appeared on behalf of the Township of Edison.

Steven Kunzman, Esq. *(DiFrancesco Bateman)*, appeared on behalf of the Township of East Brunswick, the Township of Old Bridge, and the Borough of South Plainfield.

Michael Herbert, Esq. (*Herbert, Van Ness Cayci & Goodell, P.C.*), appeared on behalf of the Township of Plainsboro.

Lawrence Sachs, Esq., appeared on behalf of the Borough of Sayreville.

Stephen Eisdorfer, Esq. and Thomas F. Carroll, III Esq. (*Hill Wallack LLC*), appeared on behalf of Intervenor Monroe 33 Developers LLC.

Kenneth D. McPherson, Jr., Esq. *(Waters, McPherson, McNeill)*, appeared on behalf of Intervenor South Brunswick Center, LLC.

Robert A. Kasuba, Esq. *(Bisgaier Hoff)*, appeared on behalf of Intervenor Tices Developers, LLC.

Kevin D. Walsh, Esq. and Adam Gordon Esq., appeared on behalf of Intervenor Fair Share Housing Center, Inc.

Henry Kent-Smith Esq. *(Fox, Rothschild)*, appeared on behalf of Intervenor Richardson Fresh Ponds and Princeton Orchard Associates

WOLFSON, J.S.C.

I. Statement Of The Case

Following the Supreme Court's decision in In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1, (2015) ("Mount Laurel IV"), several municipalities moved before this court for a declaration that their respective fair share numbers should be capped at 1000 units in accordance with the Fair Housing Act (the FHA) and with existing regulations of the Council on Affordable Housing ("COAH"). See N.J.S.A. 52:27D-307(e); N.J.A.C. 5:97-5.8.[1]

Consequently, the novel issues to be adjudicated here concern: (1) the availability, applicability, and manner of implementation of the "1000 unit cap" as to each of the municipalities' respective Third Round obligations; (2) whether and to what extent those obligations must address, in the aggregate, both the unmet need for lower income housing that had been generated between 1999 and today (the "gap period"), as well as their fair share of the region's prospective need for such housing as calculated from today through 2025; and (3) how credits for affordable units constructed during those prior cycles shall be applied.

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[1] These municipalities include the following: Monroe; South Brunswick; East Brunswick; Old Bridge; Plainsboro; Edison; South Plainfield; and Sayreville (collectively, the "Municipalities") Each of these Municipalities have pending, separate declaratory judgment actions seeking declarations that their respective housing elements and fair share plans are constitutionally compliant. For purposes of efficiency, I have consolidated these cases for oral argument only, and have allowed interested parties to file briefs and supplemental briefs and also participate in the oral argument.

II. Relevant History Of The 1,000 Unit Cap

In response to the first two Mount Laurel decisions,[2] the Legislature enacted the FHA, which created the Council on Affordable Housing ("COAH"). That administrative agency was empowered to "define housing regions within the state and the regional need for low and moderate income housing, along with the power to promulgate criteria and guidelines to enable municipalities within each region to determine their fair share of that regional need." Hills Dev. Co. v. Bernards, 103 N.J. 1, 20 (1986) (hereinafter "Mount Laurel III"); see N.J.S.A. 52:27D-305 (establishing the Council on Affordable Housing). In addition, the Legislature bestowed upon COAH, instead of the courts, the power "to decide whether proposed ordinances and related measures of a particular municipality will, if enacted, satisfy its Mount Laurel obligation," thereby embracing and codifying a municipality's constitutional obligation to provide a realistic opportunity for the construction of its fair share housing for lower and moderate income households. Id.; see also Sod Farm Associates v. Twp. of Springfield, 366 N.J. Super. 116, 123 (App. Div. 2004) (COAH established "as an alternative method of review to be used by municipalities for challenges, review of zoning regulations and for protection from future challenges").

In a concerted effort calculated to protect municipalities from onerous fair share burdens that could cause a "radical transformation" of the municipality,[3] the Legislature directed COAH to adopt guidelines that would "adjust" the present and prospective fair share if "[t]he established

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[2] Southern Burlington County NAACP v. Twp of Mount Laurel, 67 N.J. 151 (1975) (hereinafter "Mount Laurel I"); Southern Burlington County NAACP v. Twp of Mount Laurel, 92 N.J. 158 (1983) (hereinafter "Mount Laurel II").

[3] The genesis of the phrase "radical transformation" stems from the Mount Laurel II decision itself. See, 92 N.J. at 219 (where the construction of the requisite housing would "radically transform the municipality overnight," trial courts were authorized to "relieve a municipality of its duty" to satisfy its obligation immediately).

pattern of development in the community would be drastically altered." N.J.S.A. 52:27D-307(c)(2)(b). Pursuant to N.J.S.A. 52:27D-307(e), COAH was authorized in its discretion to:

> place a limit, based on a percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the council deems appropriate, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing.

Consistent with this directive, COAH enacted N.J.A.C. 5:92-7.1, which provided:

> (a) After receiving the crediting provided in Subchapter 6, Credits, where a municipality's present and prospective fair share exceeds 20 percent of its total occupied housing stock as estimated as of July 1, 1987, the municipality may adjust its fair share to 20 percent of its estimated 1987 occupied housing stock.
> (b) After receiving the crediting provided in N.J.A.C. 5:92-6, Credits, where a municipality's present and prospective fair share exceeds 1,000 low and moderate income housing units, the municipality may adjust its fair share to 1,000.

Three years after these regulations were promulgated, the Appellate Division invalidated them. Calton Homes, Inc. v. Council on Affordable Housing, 244 N.J. Super. 438, 450 (App. Div. 1990), certif. denied, 127 N.J. 326 (1991) (hereinafter "Calton Homes") (COAH's determination that a fair share number exceeding 1,000 per se constitutes a drastic alteration of the established pattern of development in all New Jersey municipalities deemed arbitrary and unreasonable). Because a per se cap did not properly account for the fact that "certain municipalities may have a fair share obligation more than double the 1,000-unit cap", the Appellate Division predicted that a substantial fair share disparity might well arise among municipalities within the same housing region, id. at 450, 553, prompting it to remark that the Legislature "could not have intended to convey unbridled discretion to select an absolute cap on the number of units to be built without first considering the burden imposed on the petitioning municipality and its relationship to other

municipalities sharing the burden of providing regional and statewide housing needs." Id. at 448.[4]

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

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

Instead of a "per se" 1,000 unit cap, the Legislature "add[ed] criteria correlating a 1,000 unit cap with a municipality's capacity to absorb a substantial amount of affordable housing." In re Application of Tp. of Jackson, 350 N.J. Super. 369, 373 (App. Div. 2002) (hereinafter "Jackson"). Among "the facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units... shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the ten-year period preceding the petition for substantive certification." N.J.S.A. 52:27D-307(e).[5]

In accordance with its administrative authority, COAH promulgated N.J.A.C. 5:93-14.1, which directly paralleled § 307(e) of the FHA:

> No municipality shall be required to address a fair share beyond 1,000 units within six years from the grant of substantive certification, unless it is demonstrated, following an objection and an evidentiary hearing, based

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[4] The Legislature quickly responded to the Calton Homes decision by adopting an amendment to the FHA designed to cure the deficiencies adjudicated to exist in the prior version. See Sponsor's Statement to Senate Bill No. 858 (Jan. 29, 1993) ("[t]he courts declared the regulation illegal because it imposed a cap that was not based upon the facts and circumstances of the municipality").

[5] Whether, and to what extent any of the moving or affected municipalities qualify, or are otherwise entitled to the benefit of the 1000 unit cap, is not before me, and has not, except in general terms, been addressed in this decision. In point of fact, various factual disputes may well exist, precluding any determination of eligibility as a matter of law. To the extent that such eligibility is contested, based upon the established criteria and parameters of the regulations, a plenary hearing regarding such eligibility will likely be required.

> upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within the six year period. The facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the six year period preceding the petition for substantive certification. [6]

In 2002, the Legislature increased the "certification" period from six to ten years, but the Legislature did not otherwise alter § 307(e) of the FHA. See N.J.S.A. 52:27D-307(e); see also Sponsor's Statement to Senate Bill No. 1319 ("This bill would increase from six to ten years the certification period under" the FHA) (May 18, 2000). Consistent with that amendment, COAH promulgated N.J.A.C. 5:97-5.8, which provides:

> (a) No municipality shall be required to plan for a projected growth share obligation beyond 1,000 units within 10 years from the grant of substantive certification, unless it is demonstrated, following an objection and an evidentiary hearing, based upon the facts and circumstances of the affected municipality, that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low- and moderate- income units within the ten year period. The facts and circumstances which shall determine whether a municipality's projected growth share shall exceed 1,000 units shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the ten year period preceding the petition for substantive certification.[7]

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[6] COAH's interpretation that the 1,000 unit cap applied to "calculated" and not "pre-credited" need, was upheld in the Jackson, supra, 350 N.J. Super. at 375-76. "Pre-credited need" is defined as "the municipal low and moderate income housing obligation resulting from subtracting filtering, residential conversion and spontaneous rehabilitation from the sum of indigenous need, reallocated present need, prior cycle prospective, prospective need and demolitions." N.J.A.C. 5:93-1.3. "Calculated need" is defined as "the result of subtracting adjustments, reductions, credits, bonuses, prior cycle credits and the 20 percent cap from the precredited need. To the extent that the Council has knowledge of prior cycle credits and eligible reductions, these credits and reductions have been applied to the municipal housing obligation." Id.

[7] Other than extending the certification period from six to ten years, N.J.A.C. 5:97-5.8 replaced "fair share" with the term "projected growth share," both of which are undefined. Although the "growth share" methodology originally adopted for calculating Third Round obligations has been deemed unconstitutional, In re Adoption of N.J.A.C. 5:96 and 5:97, 215 N.J. 578, 620 (2103), the validity of N.J.A.C. 5:97-5.8 has not been raised, and is not before me.

III. Application of the 1,000 Unit Cap to Third Round Compliance.

Because COAH failed to adopt its Third Round rules by 1999, it has been left to the designated trial courts to discern as a matter of first impression, the manner and method by which the 1000 unit cap should be applied going forward, beginning in 2015. See Mount Laurel IV, supra, 221 N.J. at 5; see also In re Adoption of N.J.A.C. 5.96, 416 N.J. Super. 462, 473 (App. Div. 2010). In doing so, two vastly disparate legislative interests must be weighed: first - insuring that municipalities meet their constitutional obligations to provide their fair share of affordable housing on the one hand; and second - sensitivity to, and recognition of the reality that the imposition of a large or onerous municipal housing obligation in a relatively short time span may well cause a "sudden and radical transformation" in many municipalities, on the other. See N.J.S.A. 52:27D-307(e); N.J.A.C. 5:97-5.8; see also, Mount Laurel II, supra, 92 N.J. at 280.

In this regard, the municipalities maintain that the FHA and COAH's implementing regulations are clear and unambiguous, and based thereon, if their Third Round fair share obligation is greater than 1,000 units, then they are statutorily "entitled" to have their respective fair share obligations limited to 1000 units over the ten year period following their anticipated judgments of compliance.[8] In contrast, the Intervenors argue that had COAH functioned as

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[8] Whether or not the issue is framed as a question of statutory interpretation, the court must still base its decision on the legislative intent and purpose. See DiProspero v. Penn, 183 N.J. 477, 492 (2005) ("The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language."). The court must "ascribe to the statutory words their ordinary meaning and significance," Id. at 492, and must be "guided by the legislative objectives sought to be achieved by the statute." Shelton v. Restaurant.com, Inc., 214 N.J. 419, 429 (2013).

intended, Third Round rules would have been adopted in 1999, Fourth Round rules would have been adopted in 2009, and Fifth Round rules would be adopted in 2019. Assuming that the 1000 unit cap was applicable during those time periods, and that COAH had granted substantive certification for each of those Rounds, Intervenors contend that the "cap" would have been aggregated and would have been 2,600 units, because the true compliance period for these declaratory judgment actions is actually twenty six years (from 1999 to 2025), and not the single 10 year period going forward from the anticipated 2015 judgment of compliance. To conclude otherwise, they urge, would result in an unconstitutional "dilution" of the actual affordable housing need, contrary to the mandates of the Mount Laurel decisions.[9]

In striving to resolve this controversy and to achieve an equitable and lawful result, it is not the job of the trial court to become a "replacement agency for COAH." Mount Laurel IV, 221 N.J. at 29. Nevertheless, in the absence of a current administrative format within which to operate, the Supreme Court in Mount Laurel IV has suggested that the designated Mount Laurel trial judges "track" the processes provided for in the FHA "as closely as possible," so as to create "a system of coordinated administrative and court actions." Id. In doing so, it is helpful to examine COAH's past practices and regulatory framework (both as enacted and proposed) as well as the Supreme Court's treatment of these issues in an effort to glean some assistance, insights and guidance in crafting a workable construct that tracks "as closely as possible' the probable manner in which COAH, if tasked to do so today, would address these competing concerns and policies. Id. at 29.

In pertinent part, N.J.S.A. 52:27D-307(e) states, "No municipality shall be required to address a fair share of housing units affordable to households with a gross household income of

[9] Intervenors have not challenged the 1000 unit cap on its face, but rather, contend that the municipal interpretation and suggested application of a single 1000 unit cap covering only the period from 2015-2025 would render the regulation unconstitutional as applied.

less than 80% of the median gross household income beyond 1,000 units within ten years from the grant of substantive certification." Unquestionably, the Legislature intended the 1,000 unit cap to be applied to a single ten year compliance period. What the Legislature could not have foreseen was that COAH would cease to function, leaving the courts, literally, to fill the 15 year gap period from 1999 until today.

The constitutional obligation to provide affordable housing is a strong one, and has been a bedrock principle of our judicial fabric for nearly 45 years[10] and has, likewise, been firmly embraced by our Legislature for nearly 20. Indeed, the Supreme Court only recently demonstrated the strength of its resolve to enforce this constitutional imperative in both In re Adoption of N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 588, and Mount Laurel IV, supra. However, balanced against this constitutional imperative, is an equally strong sensitivity to, and interest, historically exhibited by both the Legislature and the courts, that municipalities deserve protection from a sudden, dramatic influx of housing units (both affordable and market rate), which, potentially could drastically alter the landscape of, and/or radically transform a given municipality. See N.J.S.A. 52:27D-307(e); see also Mount Laurel II, supra, 92 N.J. at 219.

Nonetheless, I cannot abide the result urged by the municipalities. Not only is it abundantly clear that the Legislature never intended the cap period to extend beyond one single 10 year period, but a contrary interpretation would undoubtedly lead to an untenable and unconstitutional result, (see e.g. Calton Homes), which should, where possible, be avoided. See Schierstead v. Brigantine, 29 N.J. 220, 230 (1959) (If reasonably possible, statutes should be accorded a construction that is

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[10] See e.g., Oakwood at Madison, Inc. v. Madison Twp. 117 N.J. Super. 11 (Law Div. 1971), 128 N.J. Super. 438 (Law Div. 1974), aff'd, 72 N.J. 481, 494 (1977) ("[T]he basic rationale embraced by Judge Furman in both of his opinions in the case is substantially that adopted by this court in Mount Laurel").

sensible and consonant with reason and good discretion, rather than one that leads to absurd consequences); see also State Farm Mut. Auto Ins. Co. v. State, 124 N.J. 32, 61 (1991) (courts should avoid interpretation of a statute that would render it unconstitutional).

While the municipalities before me may well have good intentions, and are no doubt blameless for COAH's inaction, the well-documented failures of that Agency neither relieved nor absolved these towns from fulfilling (or at least attempting to fulfill) their respective fair share responsibilities. Regrettably, these constitutional obligations have been accumulating for the past sixteen years with little evidence of significant statewide compliance. Interpreting the FHA and COAH regulations so as to ignore that unmet need would be squarely at odds with the constitution and the Legislature's overarching intent to produce affordable housing. See In re Adoption of N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 588 (stating that the main purpose of the FHA and the Mount Laurel decisions is to fulfill a constitutional, moral, and general welfare obligation to provide housing to the less fortunate in our society); see also Calton Homes, supra, 244 N.J. Super. at 460-461 (cautioning that, in some instances, the 1,000 unit cap may result in a dilutionary effect, which could, itself, unconstitutionally interfere with the FHA's overall purpose).

IV. Implementing Outstanding Fair Share Housing Obligations

Notwithstanding the inevitable conclusion that the municipal fair share obligation must, in some fashion, include the unmet need that accumulated during the prior 16 year gap period, [11] I must still endeavor to give effect to the competing legislative and judicial concerns and cautions

[11] This analysis, of course, assumes that one or more of the municipalities before me would have qualified under COAH regulations to be eligible for the cap during that 16 year gap period. Otherwise, the accumulated unmet need, like the "capped" need (less credits) would be carried forward as well.

to avoid drastically altering the landscape and/or causing a radical transformation by allowing an excessively onerous or burdensome influx of housing.[12]

In attempting to strike an equitable balance between these competing imperatives and policies, it is appropriate to examine the Supreme Court's treatment of the "radical transformation" issue as well as COAH's own responses and conduct relative thereto. See Mount Laurel IV, 221 N.J. at 29 (instructing that "certain guidelines can be gleaned from the past and can provide assistance to the designated Mount Laurel judges in the vicinages").

In Mount Laurel II, the Supreme Court indicated that courts were authorized to "relieve a municipality of its duty to immediately satisfy its present need in a situation when the construction of the requisite housing would be in such quantity as would radically transform the municipality overnight." (Mount Laurel II, supra, 92 N.J. at 219), but cautioned that such relief was to be granted "sparingly". Id. The Appellate Division has, likewise, weighed in, concluding that under a "judicially supervised plan," when the danger of radical transformation exists, the "[t]rial courts should have the discretion, under those circumstances, to moderate the impact of such housing by allowing the present need to be phased in over a period of years." Calton Homes, supra, 244 N.J. Super at 449-50 (quoting Mount Laurel II, supra, 92 N.J. at 219) (emphasis supplied).

On the regulatory front, before its demise, COAH was in the midst of considering a new substantive rule, N.J.A.C. 5:99,[13] which, essentially, would also have allowed participating

[12] See Sponsor's Statement to Senate Bill No. 858 (Jan. 29, 1993) (stating that COAH intended "to avoid the imposition of onerous burdens on municipalities by adopting a regulation capping the fair share of each municipality at 1000."); see also Mount Laurel II, 92 N.J. at 219.

[13] If adopted, N.J.A.C. 5:99 would have repealed 5:97. See 46 N.J.R. 924.

Municipalities to phase in their "Unanswered Prior Obligation"[14] over subsequent compliance cycles: "[m]unicipalities shall be governed by the standards in N.J.A.C. 5:93 to address Unanswered Prior Obligations but shall not be required to address more than 50 percent of the Unanswered Prior Obligation, except as constrained by the Positive Prior Cycle Buildable Limit column in chapter Appendix D." 46 N.J.R. 931 (emphasis added).

Inasmuch as the proposed Rule would have protected a municipality seeking substantive certification against being forced to provide for "more than 50 percent" of its prior round obligation, it is logical to infer that COAH contemplated that these units would not be lost, but rather, would presumptively, have been phased in and addressed in no less than two future rounds of compliance. (See 46 N.J.R. 931 (municipalities "not required to address more than 50 percent" during their current compliance cycle).

Even though N.J.A.C. 5:99 was never adopted by COAH, it does provide a window into the mindset of that Agency, and demonstrates a concern about superimposing a significant "Unanswered Prior Obligation" onto a municipality's prospective need number. As proposed, a municipality's prior unmet need would not have been lost or eliminated, but rather, the impact of its inclusion would be softened, by phasing it in over at least two consecutive compliance cycles. Nor can it be said to facially offend the Constitution, inasmuch as the Supreme Court and Appellate Division have both concluded that a "phasing in" of the present need over time is appropriate where necessary to avoid a radical transformation. See Mount Laurel II, supra, 92 N.J. at 219; Calton Homes, supra, 244 N.J. Super at 449-50. To the contrary, the trial courts were specifically

[14] "Unanswered Prior Obligation" is "the sum of the 1987 through 1999 and the 1999 through 2014 prior obligations as determined in chapter Appendix D reduced by past affordable housing completions and publicly subsidized affordable housing that is eligible for crediting pursuant to N.J.S.A. 52:27d-307.e(1) and N.J.S.A. 5:93. Reductions for a sending municipality's completed RCA units are not included in the Unanswered Prior Obligation numbers." 46 N.J.R. 924.

authorized to "moderate the impact" of a burdensome or onerous influx of housing by allowing the accumulated present need to be phased in "over a period of years." Id., 91 N.J. at 219.

So too, here, N.J.S.A. 52:27D-307(e) and N.J.A.C. 5:97-8 should be applied in a manner that gives effect to the intent and dual purposes of both the Legislature and the Supreme Court – providing affordable housing without any unnecessary dilution, while at the same time, minimizing the potential for a "radical transformation" through a "phasing in" of the housing need generated during the gap period over several cycles. Such an interpretation avoids an absurd, untenable or unconstitutional result, and is, entirely consistent with the discretion and flexibility expressly afforded the trial courts under Mount Laurel IV, Mount Laurel II and Calton Homes. [15]

In order to effectuate these principles, those municipalities qualifying for the 1000 unit cap for the 2015-2025 period, shall also be required to include in their housing element and fair share plans, the affordable housing need attributable to the gap period, but they will not be required to do so entirely during the first 10 year period following an adjudication of compliance. Instead, those units attributable to the gap period will presumptively be divided equally, and shall be required to be provided during 3 separate, consecutive 10 year cycles, starting with the 10 year period following their anticipated 2015 grant of compliance. The presumptive use of 3 cycle periods[16] may be subject to a downward modification if a moving party demonstrates by clear and convincing evidence that a given municipality could reasonably create more units than the presumptive 1/3 of the aggregate need from the prior cycles, or can reasonably do so in fewer than

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[15] See e.g. Mount Laurel IV, supra, 221 N.J. supra, at 33 (emphasizing that the courts "should employ flexibility" in assessing a town's constitutional compliance).

[16] While I cannot foreclose the possibility that a particular municipality with unique physical or environmental constraints, could, in good faith, seek to extend the presumptive 3 cycle period within which to absorb its unmet prior obligations, given the likely constitutional challenge, and the questionable likelihood of success, the viability of such a request seems highly doubtful.

three 10 year cycles, based upon sound environmental and planning principles, as well as those "facts and circumstances" contemplated in N.J.A.C. 5:97-5.8.[17]

All municipal requests for credits, (whether "cap" eligible or not), shall be addressed in the manner authorized by COAH, as upheld by the Appellate Division in Jackson, supra, 350 N.J. Super. at 374-77, and implicitly sanctioned by the Supreme Court in Mount Laurel IV, 221 N.J. at 30 (previous methodologies and aspects of COAH's rules found valid by the appellate courts may be utilized "confidently" by trial judges). Excess credits that were earned during prior rounds (1987-1999), or since 1999, are to be applied first to the 16 year gap period between 1999 and 2015, after which a municipality's affordable housing obligation would be capped at a maximum of 1600 units,[18] and (if not exhausted), thereafter, against the prospective need obligation for the next 10 year cycle (2015-2025).

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[17] Although the issue is not presently before me, some municipalities that cannot qualify for the 1000 unit cap may still have a "substantial" affordable housing obligation based upon their prior unmet and prospective need obligations. Such municipalities may contend that imposing upon them a fair share obligation that is composed of the entire accumulated prior unmet need in addition to the 2015 prospective need number would likewise constitute an unfair burden, and would similarly result in a "radical transformation" entitling them, in fairness, to phase in their obligations over time as well. There may be merit to this contention. See Mount Laurel II, supra, 92 N.J. at 219 (although such relief should be granted "sparingly", trial courts have discretion to phase in the "present" need over a period of years to avoid a radical transformation). Accordingly, for any municipality that cannot qualify for the 1000 unit cap, there will be a presumption against phasing in its prior unmet need. However, that presumption may be overcome if, by clear and convincing evidence, the "facts and circumstances" demonstrate that satisfying the entirety of its fair share obligation during the 2015-2025 cycle, would, based on sound environmental and planning principles, cause that municipality to undergo a radical transformation.

[18] Consistent with the Jackson case, all credits are to be applied first to the calculated need for the gap period (1999-2015), and if, after having applied these credits, excess credits still remain, they would be applied against a municipality's prospective need obligation covering the 2015 to 2025 cycle. See also, n. 6, supra.

V. Conclusion

For the reasons set forth above, I am satisfied that the accumulated need that developed during the gap period must be included as a component of a municipality's affordable housing obligation, but that allowing it to be phased in over this and future compliance cycles, where warranted by the "facts and circumstances", properly balances the compelling public policies and constitutional interests promoted by, and embodied in, both the FHA and the Mount Laurel decisions. Likewise it fairly reconciles these constitutional protections with the competing interests of those municipalities, whether eligible for the 1000 unit cap or not, that their respective towns not be radically transformed "overnight", while tracking "as closely as possible", the intent and purposes of the FHA and COAH regulations, while remaining true to the spirit of Mount Laurel.

Intervenor Fair Share Housing Center shall submit an appropriate form of order, incorporating this opinion by reference under the 5 day Rule. No costs.

EXHIBIT C

P U B L I C H E A R I N G

before

SENATE STATE GOVERNMENT, FEDERAL AND INTERSTATE RELATIONS
AND VETERANS' AFFAIRS COMMITTEE

on

SENATE BILL 2046

(DESIGNATED THE "FAIR HOUSING ACT")

Held:
September 17, 1984
Room 114
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator Wynona M. Lipman (Chairwoman)
Senator Gerald R. Stockman
Senator Richard J. Codey
Senator Gerald Cardinale
Senator H. James Saxton

ALSO PRESENT:

Senator S. Thomas Gagliano

Joseph Capalbo, Research Associate
Office of Legislative Services
Aide, Senate State Government Federal and Interstate Relations
And Veterans' Affairs Committee

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SENATE, No. 2046

STATE OF NEW JERSEY

INTRODUCED JUNE 28, 1984

By Senators LIPMAN, STOCKMAN and LYNCH

Referred to Committee on State Government, Federal and Interstate Relations and Veterans Affairs

AN ACT concerning housing, amending P. L. 1968, c. 49, and making an appropriation.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) This act shall be known and may be cited as the "Fair Housing Act."

2. (New section) The Legislature finds that:

a. The New Jersey Supreme Court, through its rulings in *South Burlington County NAACP v. Mount Laurel*, 67 N. J. 151 (1975) and *South Burlington County NAACP v. Mount Laurel*, 92 N. J. 158 (1983), has determined that every municipality in a growth area has a constitutional obligation to provide a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families.

b. In the second Mount Laurel ruling, the Supreme Court stated that the determination of the methods for satisfying this constitutional obligation "is better left to the Legislature," that the court has "always preferred legislative to judicial action in this field," and that the judicial role in upholding the Mount Laurel doctrine "could decrease as a result of legislative and executive action";

c. The interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation:

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.
Matter printed in italics thus is new matter.

d. There are a number of essential ingredients to a comprehensive planning and implementation response, including the establishment of a Statewide fair share housing guidelines and standards, the determination of fair share at the municipal level and the preparation of a municipal housing element, State review of the local fair share study and housing element, and a continuing source of State funding for low and moderate income housing to replace the federal housing subsidy programs which have been almost completely eliminated.

e. The State can maximize the number of low and moderate income units provided in New Jersey by allowing its municipalities to adopt six-year phasing schedules for meeting their fair share, so long as the municipalities permit the immediate construction of a substantial amount of the fair share, and so long as the Legislature funds a housing subsidy program for each year of the phasing schedule.

3. (New section) As used in this act:

a. "Affordable housing" means housing for which a household is not required to pay more than 25% of its gross household income for principal, interest, taxes, insurance and homeowners fees or not more than 30% of its gross household income for rent and utilities.

b. "Council" means the Council on Affordable Housing established in this act.

c. "Low income housing" means housing affordable to, and occupied by, households with a gross household income equal to 50% or less of the median gross household income for households of the same size within the region in which the housing is located.

d. "Moderate income housing" means housing affordable to, and occupied by, households with a gross household income equal to more than 50% but less than 80% of the median gross household income for households of the same size within the region in which the housing is located.

e. "Region" means the general area which constitutes the housing market area of which a municipality is a part.

f. "Resolution of participation" means a resolution adopted by a municipality in which the municipality chooses to prepare a fair share study and housing element in accordance with this act.

g. "Inclusionary development" means a residential housing development in which at least 20% of the housing units are low and moderate income housing.

4. a. (New section) There is established in, but not of, the Department of Community Affairs a Council on Affordable Housing to consist of seven members appointed by the Governor with the

advice and consent of the Senate, of whom two shall represent the interests of municipal government, two shall represent the interests of households in need of low and moderate housing and who shall have an expertise in land use practices and housing issues, and three shall represent the public interest, of whom one may be a State official. Not more than four of the seven shall be members of the same political party.

b. The members shall serve for terms of six years, except that of the members first appointed, two shall serve for terms of four years, two for terms of five years, and three for terms of six years, and except that any State official shall serve only while the official continues to hold the office held at the time of appointment. All members shall serve until their respective successors are appointed and shall have qualified. Vacancies shall be filled in the same manner as the original appointment, but for the remainder of the unexpired term only.

c. The members shall be compensated, except for any State official, at the rate of $150.00 for each six-hour day, or prorated portion thereof for more or less than six hours, spent in attendance at meetings and consultations and all members shall be eligible for reimbursement for necessary expenses incurred in connection with the discharge of their duties.

d. The Governor shall designate a member to serve as chairman throughout the member's term of office and until his successor shall have been appointed and qualified.

e. Any member may be removed from office for misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for the office, or for incompetence. A proceeding for removal may be instituted by the Attorney General in the Superior Court. A member or employee of the council shall automatically forfeit his office or employment upon conviction of any crime. Any member or employee of the council shall be subject to the duty to appear and testify and to removal from his office or employment in accordance with the provisions of P. L. 1970, c. 72 (C. 2A:81-17.2a et seq.).

5. a. (New section) The council may establish, and from time to time alter, such plan of organization as it may deem expedient, and may incur expenses within the limits of funds available to it.

b. The council shall elect annually by a majority of its members one of its members, other than the chairman, to serve as vice-chairman for a term of one year and until his successor is elected. The vice-chairman shall carry out all of the responsibilities of the chairman as prescribed in this act during the chairman's absence, disqualification or inability to serve.

d. The council shall appoint and fix the salary of an executive director who shall serve at its pleasure. The council may employ such other personnel as it deems necessary. All employees of the commission shall be in the unclassified service of the Civil Service and shall be deemed confidential employees for the purposes of the "New Jersey Employer-Employee Relations Act" (P. L. 1941, c. 100; C. 34:13A–1 et seq.). The council may employ legal counsel who shall represent it in any proceeding to which it is a party, and who shall render legal advice to the council. The council may contract for the services of other professional, technical and operational personnel and consultants as may be necessary to the performance of its duties. Members and employees shall be enrolled in the Public Employees Retirement System of New Jersey (P. L. 1954, c. 84: C. 43:15A–1 et seq.).

6. (New section) It shall be the duty of the council to ascertain the housing needs of, and formulate a fair share plan for the distribution of, low and moderate income housing units in the various regions of the State as it shall delineate for the period ending nine months after the effective date of this act and every six years thereafter. The plan shall include, but need not be limited to:

a. Housing regions, which may be different for purposes of present and prospective need:

b. An analysis of the present and prospective need for low and moderate income housing in the State and in each region and the indigenous need:

c. Population and household projections: and

d. Criteria for allocating present and prospective fair share of the housing need among the municipalities in each region and guidelines for municipal adjustments based upon vacant land, infrastructure considerations or other municipal matters.

7. (New section) Within nine months after the effective date of this act, the council shall, in accordance with the "Administrative Procedure Act" P. L. 1968, c. 410 (C. 52:14B–1 et seq.), adopt rules and guidelines relating to the municipal obligation to provide a realistic opportunity for a municipality's fair share of low and moderate income housing, including such matters as a. the elimination of excessive restrictions and exactions which operate as barriers to the construction of low and moderate income housing and b. affirmative measures which provide a realistic possibility for the construction of low and moderate income housing. In adopting these rules and guidelines, the council shall give appropriate weight to pertinent research center studies, government reports and decisions of other branches of government.

8. (New section) Within three months after the effective date of this act, each municipality which so elects shall, by a duly adopted resolution, notify the council of its participation in the council's fair share housing plan and shall, within six months after the council's adoption of its rules, guidelines and plan, prepare and file with the council a housing element, based on the council's rules, guidelines and plan, and any adopted ordinance revisions which implement the housing element.

9. (New section) A municipality's housing element shall be designed to achieve the goal of access to affordable housing to meet present and future housing needs, with particular attention to low and moderate income housing, and shall contain, at least:

a. An inventory of the municipality's housing stock by age, condition, purchase or rental value, occupancy characteristics, and type, including, but not necessarily limited to, habitable floor area and number of rooms, bedrooms and bathrooms, and including the number of units affordable to low and moderate income households;

b. A projection of the municipality's housing stock, including the probable future construction of low and moderate income housing, for the next three, six and twelve years, taking into account, but not necessarily limited to, construction permits issued, approvals of applications for development and probable residential development of lands;

c. An analysis of the municipality's demographic characteristics, including, but not necessarily limited to, household size, income level, race, ethnicity and age;

d. An analysis of the existing and probable future employment characteristics of the municipality;

e. An analysis of demographic and housing projections as published by the council;

f. An analysis of the municipality's present and prospective fair share for low and moderate income housing;

g. An analysis of the municipality's capacity to accommodate its present and prospective housing needs, including its fair share for low and moderate income housing;

h. An analysis demonstrating that the land use element of the municipality's master plan is suitable for the purpose of accommodating its present and prospective fair share for low and moderate income housing;

i. A determination of how the municipality's present and prospective fair share of low and moderate income housing will be met, including, but not necessarily limited to:

(1) Affirmative measures and incentive zoning devices designed to ensure construction of low and moderate income housing;

(2) Consideration of the lands that are most appropriate for construction of low and moderate income housing, including a specific consideration of lands of developers who have expressed a commitment to provide low and moderate income housing;

(3) The minimum densities necessary to assure the economic viability of the inclusionary developments;

(4) Determination of the overzoning necessary to ensure that the municipality's fair share is achieved;

(5) Determination of measures that the municipality will take to ensure that low and moderate income units remain affordable to low and moderate income households over a 30-year period;

(6) A plan for infrastructure expansion if necessary to ensure the construction of the municipality's fair share of low and moderate income housing;

(7) Any plan the municipality may wish to adopt whereby residential, industrial or commercial developers are given the right to higher densities or intensity of uses in exchange for the construction of a percentage of low and moderate income housing or a pro-rata payment into a trust fund for low and moderate income housing; and

(8) Any phasing schedule for construction of low and moderate income housing which the municipality may wish to adopt which is not more restrictive than the schedule provided in section 22 of this act.

10. (New section) Within 15 business days of the receipt of a municipality's housing element, the council shall make a determination as to whether the element is in compliance with the filing requirements of this act. If the council determines that the filing requirements have been met, the council shall provide the municipality with a certification of filing. If the council finds otherwise, it shall notify the municipality of any filing deficiencies. If, within 45 days of the council's notification, the municipality shall refile its housing element with a correction of the deficiencies to the council's satisfaction, the council shall within 15 business days of the refiling issue a certification of filing.

11. (New section) A municipality which has received a filing certification may at any time during the six year period established in section 6 of this act petition the council for a substantive certification of its element and ordinances. The municipality shall publish notice of its petition in a newspaper of general circulation within the municipality and region and shall make available to the public information on the element and ordinances in accordance with such procedures as the council shall establish. The council shall also

establish a procedure for providing public notice of each petition which it receives.

12. (New section) Unless an objection to the substantive certification is filed with the council by any person within 45 days of the publication of the notice of the municipality's petition, the council shall review the petition and shall issue a substantive certification if it shall find that:

a. The municipality's fair share methodology is consistent with the rules and criteria adopted by the council;

b. Any reductions in the municipality's fair share from the fair share number produced by using the council's criteria which are based on local municipal constraints such as lack of vacant developable land or public facilities are necessary and not fundamentally inconsistent with achievement of the region's housing needs; and

c. The combination of the elimination of cost generating features and the affirmative measures in the housing element and implementation plan make the construction of the municipality's fair share of low and moderate income housing realistically possible.

In conducting its review, the council may meet with the municipality and may deny the petition or condition its certification upon changes in the element or ordinances. If, within 60 days of the council's denial or conditional approval, the municipality refiles its petition with changes satisfactory to the council, the council shall issue a substantive certification.

13. a. (New section) If an objection to the municipality's petition for substantive certification is filed with the council within the time specified in section 12 of this act or a request for mediation and review is made pursuant to section 14 of this act, the council shall conduct a mediation and review process in which objectors or aggrieved parties shall have the right to present their objections in the form of written submissions or expert reports, and a reasonable opportunity shall be given to the objectors and their experts to be heard, but the review process shall not be considered a contested case as defined in the "Administrative Procedure Act," P. L. 1968, c. 410 (C. 52:14B-1 et seq.). The mediation and review process shall commence as soon as possible after the filing of the housing element as provided in section 8 of this act.

b. In mediation and review processes instituted in accordance with section 14, a, of this act, the council shall attempt to mediate a resolution of the dispute between the developer and the municipality, provided that no agreement shall be entered by which a developer provides less than 20% low and moderate income housing in the development. The mediation process shall commence as soon

as possible after the time established in section 8 of this act for the filing of the housing element. In the event that the mediation between the litigants is successful, the municipality shall have the option of choosing whether to also seek substantive certification as provided in section 11 of this act. If mediation is not successful, the council shall promptly determine whether the municipality is entitled to substantive certification.

14. a. (New section) Any court of competent jurisdiction shall have discretion to require the parties in any lawsuit challenging a municipality's zoning ordinances with respect to the opportunity to construct low or moderate income housing, which lawsuit was instituted either on or before June 1, 1984, or prior to six months prior to the effective date of this act, to exhaust the mediation and review procedure established in section 13 of this act. No exhaustion of remedies requirement shall be imposed unless the municipality has filed a timely resolution of participation. In exercising its discretion, the court shall consider:

(1) The age of the case;

(2) The amount of discovery and other pre-trial procedures that have taken place;

(3) The likely date of trial;

(4) The likely date by which administrative mediation and review can be completed; and

(5) Whether the transfer is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing.

b. Any person who has instituted litigation challenging a municipality's zoning ordinances with respect to the opportunity to provide for low or moderate income housing, which litigation was instituted after June 1, 1984, or after six months prior to the effective date of this act, whichever is later, shall file a notice to request mediation and review with the council within 60 days of the municipality's resolution of participation pursuant to section 8 of this act. If the municipality filed a resolution of participation prior to the institution of exclusionary zoning litigation against it, a person who brings such litigation shall exhaust the mediation and review proceedings of the council before being entitled to a trial on his complaint.

15. (New section) In any exclusionary zoning case filed against a municipality which has a substantive certification and in which there is a requirement to exhaust the mediation and review process pursuant to section 14 of this act, there shall be a presumption of validity attaching to the housing element and ordinances imple-

menting the housing element. To rebut the presumption of validity, the complainant shall have the burden of proof to demonstrate that the housing element and ordinances implementing the housing element do not provide a realistic opportunity for the provision of low and moderate income housing.

16. (New section) If a municipality which has adopted a resolution of participation pursuant to section 8 of this act fails to meet the deadline for submitting the material required for filing certification, the obligation to exhaust administrative remedies contained in subsection b. of section 14 of this act automatically expires. The obligation also expires if the council rejects the municipality's request for filing or substantive certification or conditions its certification upon changes which are not made within the period established in this act.

17. (New section) If the council has not completed its mediation and review process for a municipality within one year of receipt of a request by a party who has instituted litigation, the party may file a motion with a court of competent jurisdiction to be relieved of the duty to exhaust administrative remedies. In reviewing the motion, the court shall consider any information received from the council regarding its expected timetable for completing the review process. If the court denies the motion, it may establish a reasonable deadline for the council's completion of the process and relieve the party of the duty to exhaust if the deadline is not met.

18. (New section) The Pinelands Commission established pursuant to the "New Jersey Pinelands Protection Act" (P. L. 1979, c. 111) and the Hackensack Meadowlands Development Commission established pursuant to the "Hackensack Meadowlands Development Act" (P. L. 1968, c. 404) shall have 60 days after the enactment of this act to elect to administer this act for municipalities which have at least 25% of their area within the jurisdiction of the respective commission. A commission which so elects shall have the same responsibilities as the council with respect to the municipalities within its jurisdiction and shall coordinate its policies with the council, and municipalities which chose to adopt a resolution of participation shall submit their fair share plans and housing elements to their respective commission. The council shall retain jurisdiction if a commission does not elect to administer this act.

19. (New section) There is established in the State General Fund an account entitled the "Low and Moderate Income Housing Trust Fund Account." The treasurer shall credit to this account all funds paid to the State Treasurer by each county treasurer pur-

suant to P. L. 1968, c. 49 (C. 46:15-8). Funds in the account shall be maintained by the State Treasurer and may be held in depositories as the State Treasurer may select and invested and reinvested as other funds in the custody of the State Treasurer in the manner provided by law, provided that all revenues from investments shall be credited to the fund.

20. (New section) Funds in the Low and Moderate Income Trust Fund Account shall be transferred to the council upon appropriation from time to time by the Legislature, and shall be used solely by the council for awards of assistance loans or grants to or on behalf of public or private housing projects which will provide affordable low and moderate income housing in such manner, but not limited to, as the following:

a. Rehabilitation of substandard housing units occupied or to be occupied by low and moderate income households pursuant to contractual guarantees for at least 20 years following the awarding of the loan or grant;

b. Accessory conversions for housing units occupied or to be occupied by low and moderate income households pursuant to contractual guarantees for at least 20 years following the awarding of the loan or grant;

c. Conversion of nonresidential space to residential purposes provided at least 20% of the resulting housing units are occupied by low and moderate income households pursuant to contractual guarantees for at least 20 years following the awarding of the loan or grant;

d. Inclusionary developments of which at least 20% of the housing units will be occupied by low and moderate income households for at least 20 years pursuant to contractual guarantees; and

e. Shelters for the homeless.

The council shall ensure that a reasonable percentage of the loan or grant awards shall be made available to projects in those municipalities receiving State aid pursuant to P. L. 1978, c. 14 (C. 52:27D-178 et seq.) which have a disproportionately high amount of low and moderate income residents.

The council shall establish rules and regulations governing the qualifications of applicants, the application procedures, and the criteria for awarding grants and loans and the standards for establishing the amount, terms and conditions of each grant or loan.

21. (New section) If the Legislature does not appropriate to the council from the Low and Moderate Income Trust Fund in any one of the six fiscal years commencing with the fiscal year in which this act is effective an amount substantially equivalent to the revenues

accruing to the fund in that fiscal year, then sections 15 and 22 of this act shall terminate on the last day of that fiscal year.

22. (New section) A municipality which has a judgment entered against it after the enactment of this act, or which had a judgment entered against it prior to the enactment of this act and from which an appeal has been filed, shall upon municipal request not be required by any court to phase in the issuance of building permits for low and moderate income housing in inclusionary developments at a rate greater than 25% as soon as possible but no later than one year after entry of the judgment and 15% at 12 month intervals thereafter of the municipality's original fair share of low and moderate income housing.

The court shall also implement a phase-in schedule for the market units in the inclusionary development which are not low and moderate income, giving due consideration to the schedule for low and moderate income housing established in this section and the need to maintain the economic viability of the development.

In entering the phase-in order, the court shall consider whether it is necessary to enter a phase-in order for the construction of commercial, industrial and residential development in the municipality to minimize an imbalance between available housing units and available jobs, or to prevent the sites which are the most appropriate or the only possible sites for the construction of low and moderate income housing to be used for other purposes.

The court may modify the phase-in schedule if it determines that the fair share number is so small that literal compliance with this schedule would make the construction of low and moderate income housing economically or practically unfeasible. A development with 50 or fewer low and moderate income units shall not be required to adhere to any phase-in schedule after receiving its building permit.

23. (New section) The New Jersey Housing and Mortgage Finance Agency shall adopt rules and regulations to provide that at least 50% of the proceeds of its tax exempt bond issues in the four years following the effective date of this act shall be used to assist in the financing of low and moderate income housing.

24. Section 3 of P. L. 1968, c. 49 (C. 46:15-7) is amended to read as follows:

3. In addition to the recording fees imposed by P. L. 1965, c. 123, s. 2 (C. 22A:4-4.1) a fee is imposed upon grantors, at the rate of [$1.75] *$3.50* for each $500.00 of consideration or fractional part thereof recited in the deed, which fee shall be collected by the county recording officer at the time the deed is offered for recording. Every deed subject to the additional fee required by this act, which is in fact recorded, shall be conclusively deemed to have

been entitled to recording, notwithstanding that the amount of the consideration shall have been incorrectly stated, or that the correct amount of such additional fee, if any, shall not have been paid, and no such defect shall in any way affect or impair the validity of the title conveyed or render the same unmarketable; but the person or persons required to pay said additional fee at the time of recording shall be and remain liable to the county recording officer for the payment of the proper amount thereof.

25. Section 4 of P. L. 1968, c. 49 (C. 46:15-8) is amended to read as follows:

4. The proceeds of the fees collected by the county recording officer, as authorized by this act, shall be accounted for and remitted to the county treasurer. An amount equal to 28.6% of the proceeds *from the first $1.75 for each $500.00 of consideration or fractional part thereof recited in the deed* so collected shall be retained by the county treasurer for the use of the county and the balance shall be paid to the State Treasurer for the use of the State. Payments shall be made to the State Treasurer on the tenth day of each month following the month of collection.

26. There is appropriated to the Council on Affordable Housing from the General Fund the sum of $250,000.00 to effectuate the purposes of this act.

27. This act shall take effect immediately, except that sections 19, 20, 24 and 25 shall take effect on the 30th day following enactment.

STATEMENT

This bill provides a mechanism for implementing the constitutional obligation to provide a realistic opportunity for low and moderate income housing as enunciated in the Mount Laurel doctrine. It establishes a Council on Affordable Housing to set fair share guidelines for municipalities and to review the housing plans and ordinances of those municipalities who elect to participate in the council's fair share program. Those municipalities whose plans and ordinances are certified by the council are entitled to a presumption of validity in any exclusionary zoning challenge. The council will also act as a mediator between developers and participating municipalities in an attempt to reach out-of-court settlements.

The bill also provides for a six-year phase-in of any judgments requiring a municipality to issue building permits in inclusionary developments.

The bill also establishes a Low and Moderate Income Housing Trust Fund with revenues derived from an increase in the realty transfer tax from $1.75 to $3.50 per $500.

SENATOR WYNONA M. LIPMAN (Chairman): Good morning. Senator Gagliano, do you want to sit up here, please? I have to get all the Senators into place, dissenting and consenting.

Ladies and gentlemen, I would like to introduce the Senators who are here. I understand Senator Saxton is on his way. On my right is Senator Tom Gagliano of Monmouth County. Next to me is Joe Capalbo, our Committee Aide. I am Wynona Lipman, Chairman of the State Government Committee. On my left is Senator Gerald Stockman, and to his left is Cathy Crotty, who is on the Senate staff.

We are here today to continue the process of receiving public input on the Mount Laurel legislation. We know that there have been many discussions on this bill. We know that the ad hoc committee has been discussing possible amendments to it. We have not decided what kind of bill this will be, so that is why we are taking testimony today.

The Legislature has received a lot of criticism for not doing something very quickly on this matter, but since this is such a complicated and complex issue, we want to fashion the best legislation possible. That is the reason why we have called this public hearing. I hope you are ready to give us your points of view.

Senator Saxton, a member of the State Government Committee is now present.

SENATOR SAXTON: Senator Saxton was here at 10:00, right on time.

SENATOR LIPMAN: Yes, I know; I heard.

I understand that the Senators want to speak. Senator Gagliano, we will start with you.

SENATOR THOMAS S. GAGLIANO: Madam Chairman, members of the Committee, as you know, I am not a member of the State Government Committee, but I have been, for a long time, vitally concerned about the Mount Laurel II issue. I am here today to listen, because I believe -- I hope, at least -- that the Committee is getting to the point where it will start to accept some amendments to the bill. We can then decide whether or not we can support the bill.

I think it is true that the Legislature is being criticized for a lack of activity; frankly, that is the reason why I suggested the moratorium, or staging, earlier, so that the Legislature would be able to give this entire issue due deliberation, and at the same time hold back some of the flow of litigation that has been started all over the State.

However, the Legislature, in its wisdom, chose not to go with the moratorium, and not to go with staging. So, I think we are still in an emergency type situation with respect to Mount Laurel II.

I feel very strongly that it is up to this Committee to recommend legislation which will bring rationale back to this issue.

I want to point out to you the Warren Township decision, which requires Warren Township to provide zoning for 900-plus low and moderate-income housing units. The only way they can be funded now is through the so-called "density donors." That is the only way that I know of, because I don't think Warren Township has a lot of money; certainly, the State hasn't offered them any money to provide for this housing on a one-on-one basis.

So, the density bonus would mean that Warren Township has to multiply their number times five. If you multiply the number times five, you come up with four or five thousand new housing units for Warren Township, and a situation where that is probably three times larger than the town is right now, in terms of numbers of housing units. I don't know the number of housing units in Warren Township. Maybe the attorneys here, representing Warren Township, will know the number of units in the township. But, this is happening all over the State because of this bonus density issue.

When one has to multiply times five, this type of growth is going to have a severe impact on the size of New Jersey, the infrastructure of New Jersey, neighborhoods, and, as we have heard -- and I believe this also -- on the urban areas, because these people have to come from some place. I think that many of them will come from urban areas and, therefore, disturb neighborhoods on that basis.

So, I think the Legislature has to act, and act quickly. It definitely has to face up to the formula that has been enunciated by

the courts. I think the formula must be reworked, and I am here to work with you in any way that I can on this issue. I think I have attended just about all of the meetings on this issue, and I will continue to attend them if I can be of help. Thank you.

SENATOR LIPMAN: Thank you, Senator. We certainly appreciate your attendance and your comments each time.

Senator Saxton?

SENATOR SAXTON: Madam Chairlady, I had written a statement for this morning. Apparently I lost it and Senator Gagliano found it, so I will withhold my comments for a few minutes. As the day goes on, I guess we will all have a chance to give our input. Thank you.

SENATOR LIPMAN: Senator Stockman?

SENATOR STOCKMAN: No, not at this time.

SENATOR LIPMAN: No? All right, we will now begin the hearing. Mr. Harry Pozycki, Chairman of the Ad Hoc Committee, will be our first witness.

SENATOR GAGLIANO: Madam Chairman, there are several people who are outside. I don't know if they have been invited in, but I understand they are people who are interested in this issue. They are outside, and I think they should be inside.

MEMBER OF AUDIENCE: Garry Stein is now addressing them.

SENATOR GAGLIANO: If I may, I know this is not my Committee, but they are here for this Committee hearing. They should be invited in because the meeting has started.

SENATOR LIPMAN: Maybe I should have come in at 11 o'clock instead of 10 o'clock? (laughter)

SENATOR GAGLIANO: It is just that I think Mr. Pozycki's testimony is important.

MEMBER OF AUDIENCE: I think they intended to come in as soon as Mr. Stein finished talking with them.

SENATOR LIPMAN: All right, we will wait a few minutes.

(at which time there is a pause in hearing)

We are glad to have you. (Senator Lipman welcoming aforementioned people) We are glad you are here to talk about the Mount Laurel situation and the legislation, if you care to.

I had just introduced the Senators who are here to listen to your comments today. They are Senator Stockman, of the State Government Committee; Senator Sexton, of the State Government Committee; and, Senator Gagliano, who has a very lively interest in this issue. They all made their opening statements, and we were about to hear the first person who is going to testify this morning. He is Mr. Harry Pozycki, Chairman of the Ad Hoc Committee which has been been proposing amendments to Senate Bill 2046.

HARRY POZYCKI: Senator, what I hope to do today is to give you a review of the Committee's most recent meetings and their proposals, some of which are in hard copy form for amendment, others which are really more in the form of recommendations, based on a consensus reached by the Committee. These will be put into hard copy by the subcommittees which are now working on them.

SENATOR LIPMAN: Are you all familiar with S-2046? This is the legislation Mr. Pozycki will be addressing. If not, perhaps you better make all points as clear as possible when discussing the issues as well as the amendments, Mr. Pozycki.

MR. POZYCKI: I will attempt to give an outline of the bill as I go through the amendment proposals.

SENATOR LIPMAN: Very good.

MR. POZYCKI: May I begin?

SENATOR LIPMAN: Yes, please.

MR. POZYCKI: Madam Chairwoman, members of the Senate Committee: As has been indicated, I represent what has been called the Committee on Fair Housing. So that we understand what this Committee is, I would like to point out that they are a group of representatives of at least four essential constituencies: the poor who are in need of housing; the municipalities who, while willing to accept housing, are concerned about disruptive growth; the planners of our State who wish to see housing built in a way which is coordinated with overall municipal and statewide development; and, the builders who want to see remedies that are realistic in terms of the economics of today.

The Committee has been painfully pushing its way through the intricacies of the Mount Laurel dilemma in search of a legislative

solution which is fair to all parties concerned, fair to the poor who lack the dignity of a home, and fair to the municipalities who fear disruptive growth.

We don't pretend that we have a perfect solution. The Governor's office has been working -- as far as I am aware, from the time of the Cahill Administration's blueprint for housing -- for nearly 20 years now on the problem. The Supreme Court of this State has worked for more than 10 years, from the onset of the Fair Housing suits to the present time, without a solution that we can all embrace at this time. And, I do not pretend that we are submitting the perfect solution to you here today. But, I do want to strongly recommend the consensus approach which allows the grafting of good ideas onto a balanced legislative proposal.

I am sure, in testimony that will follow this morning, there will be new ideas brought before this Committee which can be grafted onto this legislation. Our approach is to keep an open mind and to try to accommodate all parties concerned in an effort to avoid the constant bickering and adversarial relations that prevent a workable solution to the Mount Laurel problem.

Thus far, it appears that some of the other proposals, such as ACR-24, do not hold any immediate resolution to the problem. I understand that that constitutional amendment cannot even take place until 1985, at the earliest. That is certainly not an imminent solution.

Just by way of introduction, I would like to compliment Senator Lipman for the genius of her approach in avoiding the adversarial process and looking for consensus. She has had the courage to work toward a solution that would be fair to all parties concerned.

The Fair Housing Act, S-2046, which Senator Lipman held up just a few moments ago, is based upon two fundamental elements. One concerns itself with planning as an alternative to ad hoc injection of large-scale developments into the towns of our State.

The second concerns itself with a guarantee that implementation of fair housing development will, in fact, occur, and not simply be discussed.

I would like to direct myself, first, to the matter of planning. As many of you are aware, in Section 9 of the bill, the legislation provides for a municipal option, and I underscore the word option. Each town in this State, if it wishes, can adopt a housing element in accordance with this bill; certain benefits attached to the housing element, such as the ability to have mediation instead of court intervention; the ability to have solutions other than the builders' remedy; and the ability, ultimately, to gain subsidization from the State for the construction of low and moderate-income housing.

The Committee felt that the housing element, as was originally developed, was perhaps too rigid and we wanted to include flexibility so that local municipal considerations could be reviewed by the Housing Council.

First of all, a Housing Council will be established, according to the bill, in State government for the review of housing elements which municipalities might opt to prepare. That Housing Council will define the regions of the State. This is a difficult problem right now, one which is absorbing the courts and the lawyers on both sides of the issue. It doesn't seem to have an easy solution. I believe the Housing Council can define the regions and at least move us closer to the solutions by such a defining.

The Housing Council will then estimate for each of the regions what their fair share should be. In the present draft of S-2046, there was simply an indication that the Housing Council should determine a fair share for the regions. This appeared to lock the Housing Council into a hard and fast number which would remain inflexible, and which would be imposed upon the local municipalities.

In an effort to recognize that as times change population projections change, we tried to incorporate more flexibility into the development of a regional fair share number. We incorporated such words as "estimate" the fair share number, and we incorporated references to published data pertaining to population projections. So, as population projections change and different types of housing studies, government reports, and census facts change, we will have the ability to modify the regional fair share estimates. These estimates

are not mandated on a municipality, but are merely provided as a support data base for municipal computation of local fair share obligations.

I want to stress that the bill, from the onset -- and even as it is presently drafted -- permits the municipalities to calculate their own fair share, rather than have that fair share number calculated by the State and imposed upon them. There is a review by the Housing Council in the State of those fair share numbers, but that is a matter for discussion within the context of the implementation process.

To the issue of planning, we have now incorporated language, by reference, in the bill which will permit consideration of local infrastructure capacity; the availability of undeveloped land within a given municipality; and the fiscal capacity of a municipality to meet its responsibilities with regard to fair share.

We have also recommended the incorporation of language. We do not have hard copy on this at this time, but it will include in the findings a recognition that some of the parts need not equal the whole. What I mean by that is, once the Housing Council has been able to come up with an estimate of the fair share of a given region, the Housing Council will not be reviewing local computations of fair share as though each one of those local parts of a region must add up to the overall regional fair share. This was done in consideration of the fact that individual towns may have justifiable constraints on being able to accommodate their fair share obligations. Therefore, if there is an adjustment made for a local municipality, in recognition of fiscal or infrastructure constraints, there need not be a fair share allocation which, when combined with the other municipalities in the region, will equal the fair share estimate of the Housing Council.

Next, with regard to the planning element -- the housing element in S-2046 -- we have given recognition to the fact that there are many ways to respond to the fair share obligation, aside from the builders' remedy, which was referenced by Senator Gagliano just a few moments ago. As you are all aware, the focus of Mount Laurel's solution at the present time seems to be on the bonus zoning, or

density bonus as it has been referred to. In this type of a solution, for every one unit of low or moderate-income housing, there must be four units of conventional housing. This creates a burden on the municipalities, in that it forces them to incorporate five times the amount of housing they would otherwise have to incorporate if they were to fulfill their own obligations toward the low and moderate end of the housing.

We have given recognition in our Committee discussions to the fact that there are ever-increasing new solutions to the implementation of a Mount Laurel solution in a given municipality. I would like to list some of those for you. Again, we do not have hard copy on this. Our Committee has been meeting from week-to-week, and I had telephone calls as late as midnight last night from various Committee members, making sure that I incorporated some of their suggestions today.

To give you just a few: One is the locally initiated development of fair share housing. This is the case when the municipality takes upon itself the building of low and moderate-income housing so that it need not accommodate four conventional units for every low and moderate-income unit it builds.

A modification of this approach permits a municipality not to build but to subsidize a developer who would build low and moderate-income housing. By providing the subsidization, the municipality can avoid giving the developer the extra four units that a density bonus would require.

We have also incorporated another avenue of relief, and that is the voluntary contributions of commercial developers who might receive an increase in intensity of development, permitted by a municipality if they make a contribution to a local housing trust fund. A given office developer might be able to build an extra 1,000 square feet in an office building proposed before a Municipal Land Use Board. In return for the additional 1,000 square feet, the commercial developer might make a voluntary contribution to the municipality for its housing trust fund, permitting the municipality to build or subsidize the low and moderate-income units; thereby, again, avoiding the extra four conventional units.

I see some of you smiling at the idea a developer might voluntarily contribute to a municipal housing trust fund. Please be aware that the voluntary contribution is to the developer's benefit, the benefit being his ability to build additional square footage. As an attorney who represents both municipalities and developers, I can tell you that land for commercial development is often priced on the square footage of permissible development; therefore, the developer gains a real tangible economic benefit in return for his or her contribution to a local housing trust fund.

We have also incorporated another avenue of solution, and that is the conversion of oversized existing residential units, and even in some cases the conversion of industrial factories to low and moderate residential development. Conversion is an avenue that has not nearly been fully explored. This country provides far more square feet of housing per individual than many of the most successful economic countries in the world today, such as Germany and Japan. Many of the houses that were built in times of large families are now substantially oversized, and municipalities can provide for conversions in appropriate areas of their municipality that would allow larger housing to be broken up for low and moderate-income housing. This solution also avoids the necessity of having to take the four additional conventional units that come with the builders' remedy that the courts are now mandating in most Mount Laurel cases.

Finally, we have left open the option of municipalities to develop their own solutions, even outside these recommended solutions. So, as towns become more creative in responding to their affirmative obligation, these creative solutions can be incorporated. Flexibility has been the byword in the Committee's deliberations.

Moving on to the second essential element of the bill, we come to the area of ensuring implementation. While, from the municipal perspective, I am sure that a planned rational approach that takes into consideration the fact that individual towns have individual constraints on the development of housing is certainly a welcome approach. Those advocates of fair housing, those who would see the poor have the dignity of a home, must also have the comfort that there

will, in fact, be housing developed and not simply more and more planning for housing. In this instance we, therefore, have addressed the matter of ensuring implementation of the housing.

The Housing Council, once a municipality has optionally determined that it will construct a housing element, will review that element to see if there has been a good faith calculation of fair share by the given town. The Council will offer review on a case-by-case basis. We want to actually incorporate this, by language, into S-2046. The purpose of this reference to a case-by-case basis is to put the Housing Council on notice that individual towns are quite different from each other, and that the Housing Council must give consideration to the individual town's specific fiscal capacities, infrastructure capacities, and the like.

In the implementation process, the first step is the filing of a resolution by the Town Council, offering to comply with the housing element provision in S-2046. Once that is done, the town becomes, at least for the time being, insulated against future litigation. There is a mediation procedure established. If notice is published by the municipality that it is going to adopt a housing element, developers and advocates of fair housing who would normally have gone to the courts to challenge the town, will now be called in before the Housing Council for a mediation session, and the Housing Council will be able to bring the parties together on a case-by-case basis, taking into consideration those local constraints on development, and, hopefully, handing down a solution which will bring about the development of the housing rather than the continuation of argument, appeal, and the adversarial process which does not seem to give solace to either the municipalities or to the fair housing advocates.

One of the major areas for proposed amendment that our Committee has been working on, Senators, has been in the area of review once mediation has been completed. It is the purpose of the Housing Council to ultimately grant or deny a strong presumption of validity to the municipalities who opt to accord with the housing element requirements. Previously, the legislation allowed what could have been

a rather long and tortuous process. As was pointed out to us by a number of municipalities, there may be the possibility that a town which takes the time to construct a housing element, comes before the Housing Council, and attempts to mediate its problem, would then be forced to go through a lengthy review process, offering testimony, paying for experts, permitting long, extended cross-examination and, only after a long process, getting a presumption of validity, which then might be challenged in the courts and brought back into the area of litigation. We wanted to avoid a dragging out of the process. We wanted to avoid a doubling up of hearings on the part of the Council and the courts.

In substitution, what we have designed is a streamlined procedure for the hearing process, where the municipality and any other concerned party can submit their reports, together with the housing element, to the Housing Council. A hearing will then be held which will last, in most cases, no more than one day. We propose to set in legislation a maximum of two days for the hearing process. We do not intend to permit full and extensive cross-examination because we feel this would be a duplication of the court process and it would only extend the time for implementation.

Instead, we would permit the Housing Council to entertain limited questions from concerned parties, as well as their own questioning of the municipality concerning the proposed housing element. In the event that the Housing Council after this, in most cases, one-day review procedure felt that the municipality had made a good-faith effort to reach its own fair share obligation, through a housing element that truly was geared to implement the fair share, the Housing Council would then be empowered to grant that the presumption of validity be strengthened.

The entire Mount Laurel process really is a legal advance on local home rule. Previously, zoning legislation carried with it a strong presumption of validity, whereby a town was almost guaranteed insulation against developer attack. With the recalcitrance of many municipalities -- and I stress, not all municipalities -- the courts felt it necessary to put aside the presumption of validity and, thus, the onslaught of litigation that now comprises the Mount Laurel issue.

If the Housing Council, proposed in this legislation, review a local town's effort at designing a workable housing element and i feels that the town has made a good-faith effort, that it has made a appropriate calculation of fair share, and that it has an appropriat methodology for implementation, we want the Housing Council to be abl to offer the municipality a very strong presumption of validity. Thi will not be an absolute guarantee against future litigation but i certainly will be a warning to any developer who would challenge th municipality that the heretofore strong presumption of validity th town had enjoyed with regard to their zoning ordinances has now bee restored and that it would be a most difficult process to overturn suc a presumption.

Certainly, this would be an advantage to a town, and we hop that it will encourage municipalities to plan for the incorporation c low and moderate-income housing by virtue of a housing element, rathe than to simply be caught as sitting ducks for developers who woul challenge, and for court intervention that would create ad hoc housir developments without the kind of planning that a bill, such as Senato Lipman's, could prescribe.

One final element of the implementation process relates t phasing. Phasing is most important because it also takes int consideration local constraints on development. In this instance, have recommended phasing be applicable not only to municipalities wh heretofore have not not been sued by developers or fair housir advocates, but to municipalities that have already settled, or who hav had Mount Laurel judgments imposed against them by the courts. We hav removed, by recommendation to this Committee, the former phasi schedule, which was rather rigid and which required certain percentag in each given year. We are now recommending a phasing schedule th will be based upon a review of local infrastructure, fiscal capacit and similar considerations.

If in the event a municipality can show that there should h a phasing schedule different from that which is proposed in th legislation now, we want the Housing Council to be authorized to gi consideration to the local needs of a given town. As a protection f

the fair housing advocates, we would also like to recommend the option of a decertification process. If a municipality has argued that the phasing of development should be slower than was already ordered either by the courts or by the Housing Council, we want a developer, or a fair housing advocate, to have the opportunity for appeal to the Housing Council to decertify the municipality -- that is, to strip it of its presumption of validity if the phasing is not working as proposed by the given town. So, there is both the opportunity for fair consideration on a town-by-town basis, and also the protection against a town merely planning and not truly implementing the development of low and moderate-income housing.

These two areas, planning as an alternative to large-scale housing developments imposed by the courts, with five times the amount of housing than the low and moderate fair share might indicate, and an implementation process that is flexible enough to take into consideration local needs and local characteristics, while still giving the ability to fair housing advocates to ensure the development of the housing, we think constitutes an advance in the improvement of S-2046.

There are a number of other relatively minor and technical modifications which I would just like to put on the record. We will then submit a copy of the bill with hard copy amendment proposals to achieve these ends.

The first is a recommendation that the subsidy provisions contained in S-2046 be removed from the bill, except for reference to the housing trust fund. We have been advised that subsidy provisions are more appropriately taken up in the Assembly, where such such appropriations are usually considered.

Second, we have reincluded, by recommendation, the HMDC -- the Hackensack Meadowlands Development Corporation -- and the Pinelands Commission, under the review of the Housing Council, if a municipality, within its borders, should opt for a housing element. It was recommended to us that these Commissions have responsibility to meet their fair share obligations, and, therefore, we cannot ask them to be their own judges. We need them to come before the Housing Council, in fairness to low and moderate-income advocates.

Third, we have recommended an increase in the appropriation in this bill, from $250 thousand to $1 million. If we are to take up consideration of the individual needs of every municipality on a more flexible basis, rather than abide by rigid guidelines, there has to be sufficient funding for the Housing Council to operate. Certainly, if we had rigid guidelines which simply mandated that a municipality meet certain hard numbers and which provided for less mediation and less flexibility, the appropriation could be lowered. But, if we are to engage in extensive mediation to achieve a solution, and if we are to take into consideration the details of individual municipal needs, there has to be a larger appropriation for the Housing Council.

Finally, we are recommending in the bill that the Department of Community Affairs be incorporated, or we should at least incorporate an administrative agency to oversee eligibility requirements for low and moderate-income housing, and future resale approval for low and moderate-income housing. It is enough of a burden on the municipalities to build the low and moderate-income housing and to spend the money that we are recommending for the planning of housing elements. We felt that the expense attached to qualifying potential purchasers or tenants of new low and moderate-income housing -- the eligibility matter -- should be handled by the Department of Community Affairs.

Finally, when these units are either re-rented or re-sold, in order to guarantee that the units remain low and moderate-income housing and that they do not reduce the fair share compliance of a municipality, opening it to future litigation, we felt that the Department of Community Affairs should administer the re-sale to ensure that the units remain low and moderate-income units.

Madam Chairwoman, members of the Committee, this constitutes the recommendations of the Fair Housing Committee for modification to the bill. As I indicated to you, those I have most recently outlined are in hard copy; the rest are a matter of consensus which subcommittees of the Fair Housing group are now working on, and we hope to be able to submit them to you within the next 30 days.

The gist of our recommendation, in sum, is to provide the kind of flexibility that will invite a municipality to drop efforts at fighting the litigation and to plan for a rational absorption of low and moderate-income units that can become a real thriving part of their communities; and, to provide an implementation process that will get the housing built for those in need of a home within the State of New Jersey, rather than subjecting that constituency to continuing litigation, appeals, threats, and the constitutional moratoriums against housing that have been a matter of recent record.

I thank you for your patience in hearing me out. On behalf of the Committee, I want to thank the Committee members who are not present here today for their hard work. We have been involved in lengthy sessions virtually every week, with take-home work, the likes of which you can't imagine.

Finally, I would again like to compliment Senator Lipman on her courage in standing firm for a reasonable solution to this issue, as opposed to the adversarial process, which seems to be continuing.

Thank you, Senators.

SENATOR LIPMAN: Thank you, Mr. Pozycki. I am glad the ad hoc committee adopted a name, the Fair Housing Committee. I am glad you did that.

Senator Saxton?

SENATOR SAXTON: Mr. Pozycki, do you envision that the draft you are going to submit to us will include amendments reflecting the basic structure of this bill, or will it be significantly different?

MR. POZYCKI: It essentially reflects the structure of this bill, in that there is an optional provision for a standardized housing element, there is an implementation process which includes mediation, and, finally, there is a presumption of validity awarded to a municipality that complies.

SENATOR SAXTON: The reason I asked that is, in this bill, in Section 6, it sets forth a criteria which the Fair Housing Council would use to ascertain the housing needs for the fair share formula. The criteria in paragraph (d) of that section includes guidelines for municipal adjustments, based on vacant land, infrastructure

considerations, and other municipal matters. There is no mention ir that criteria of the need for low and moderate-income housing, not until we get over to section 9, where the municipality itself is developing a plan, do we get to the concept of a need for housing. I wonder if you think the Council ought to have some consideration as to the municipality's need set forth in their criteria as well?

MR. POZYCKI: Well, in section 6 (b) of the legislation, there is a requirement that the Housing Council, under our proposed amendment, establish the estimated present and prospective need for low and moderate-income housing. The criteria that are to be established by the Housing Council are a part of section 6.

It was our feeling that what we had to do was to have the need estimated, rather than fix the Housing Council into a hard and fast number for the region.

Once the Housing Council has a regional perspective of the estimated need for low and moderate-income housing, and once, under section (b) -- which you referred to -- it has established guidelines for a local municipality to look at these numbers and determine how they might accommodate their fair share, then a municipality will have enough instruction, we would hope, to be able to make its own calculation of fair share, and the Housing Council will have enough reference to make an appropriate review of the municipal calculation.

SENATOR SAXTON: Thank you.

SENATOR LIPMAN: Mr. Pozycki, I would like to ask a question here. From a regional point of view, and an estimate of the region's number, how in your plan will you prevent municipalities from disagreeing, saying, "I don't deserve to have 600. I am smaller than another municipality, which only has to provide 200?"

MR. POZYCKI: That is really the thrust of our recommended amendments. We have provided, as Senator Saxton has pointed out, the opportunity for an adjustment by the Fair Housing Council of what might otherwise be a hard fair share for the local municipality, based upon the municipality's proof that infrastructure constraints, fiscal capacity constraints, lack of available developable land, lack of access to transportation facilities for the new low and moderate-income

residents, and other factors such as these, will bring about a need for adjustment in the fair share calculations for the individual town.

We don't believe that this would be a watering down of the process. We don't intend it to be such. But, we do want to encourage municipalities to come in and make a good-faith effort to accommodate their fair share. We felt that the best way to do this was to permit a municipality to be able to argue for adjustment if, in fact, there are very realistic constraints on immediate accommodation of fair share numbers.

SENATOR LIPMAN: Gerry, do you want to say something? Excuse me, let me just introduce Senator Gerry Cardinale, as opposed to Senator Gerry Stockman.

SENATOR SAXTON: They are usually opposed.

SENATOR LIPMAN: Yes, they are constantly opposed. Senator Cardinale has just arrived. He is a member of the State Government Committee, and I have not introduced him up to this point. Right now we will hear from Gerry Stockman, who is Vice Chairman of the State Government Committee.

SENATOR STOCKMAN: Thank you very much, Madam Chairlady. Before I ask Harry Pozycki a couple of questions about his testimony, I would like to take the opportunity, publicly, to compliment him, especially, and the ad hoc committee, generally, for its work in this area.

Harry Pozycki is a rare individual. Most of you haven't had the opportunity, as I have had, to get to know him. I have worked closely with him as he helped me fashion the State Planning Commission bill, which hopefully is about to become law. While it doesn't directly deal with Mount Laurel and its dilemmas, it will have an impact on the growth and development, hopefully, of the State of New Jersey in a sensible way, as we go into the 21st Century.

But, you know, from time to time private citizens kind of spring up who are willing to put in tremendous amounts of time, thought, and effort in the public interest. We elected officials have an ulterior motive. Every time we involve ourselves and sit before public gatherings, such as this, we get some publicity. We get our names in the papers, and maybe these things help us to get reelected.

Harry Pozycki isn't running for office. To my knowledge, he isn't getting paid for the tremendous amount of time and effort he has put into this issue. I think he speaks with great reason. I think he speaks with great balance. I think when the history of this phase of New Jersey's movement in both the area of planning and particularly in the area, the sensitive area, of meeting our housing needs, Harry Pozycki's name ought to be one of the major figures in resolving that problem. So, Harry, I wanted to take this opportunity to say that to you. Now I will try to put you on the spot a little bit and ask you a couple of tough questions -- not really; I guess they won't be too tough for you.

I did want to ask you, Harry -- and I tend to agree with the direction of the amendments the Committee is taking -- about the Warren Township decision, which I know has disturbed a lot of people. I know you are basically familiar with it, and I also know that some of my colleagues think it really is an irrational step. I wonder, can you briefly tell us what you think that Warren Township decision is, and whether you think this bill can deal with it in a time frame and in a manner that will not wreak havoc in that particular municipality? That seems to be becoming one of the crying corners, or cause celebre, as Senator Lipman says, in this struggle. I think maybe there is some misunderstanding about it. Can you just discuss that with us?

MR. POZYCKI: I would be happy to, Senator, but before I begin, may I thank you for your compliment. It is the kind of encouragement that you have offered me all along which has really drawn me into this process and made me put in the kind of hours you referred to. It is that kind of stroking that makes volunteers, like myself, work and come back to meetings again and again. You are far too kind.

The Warren Township decision, for those of you who may be unfamiliar with it, adopted what has been referred to as the Lehrman formula. Many people have cringed in fear of the at least perceived rigidity of the Lehrman formula. I know that municipalities, at least some of those I am familiar with, have pulled out the opinion, excerpted the formula from it, ran a quick calculation, and then have gone into a state of almost permanent shock.

I think the legislation that is under consideration today, S-2046, provides for flexibility and adjustments to be made to the Lehrman formula. I don't want to degrade the formula. I think the courts, without the kind of resources that the Legislature has, were forced to make some sort of calculation. They were also forced to act within the constraints of ongoing litigation. They reached out to the planning community, and their best effort at constructing a formula, to calculate fair share.

But, the proposals we are making to amend S-2046 speak to the need for flexibility. We want to be able to provide adjustments if there are bona fide infrastructure constraints, and not simply a town saying, "Well we don't have the sewer capacity right now to build fair share; let it go elsewhere." Where there is an inability to get the infrastructure built -- even if one were to start tomorrow -- in a sufficient time frame to accommodate new housing, that is a serious constraint that has to be considered.

Where there is a limit on the amount of developable land available for the construction of low and moderate-income housing, that is a factor that must be considered. And, if a municipality's fiscal capacity is so tight that it cannot bond for sufficient funds to construct its own housing, that is a factor which must be considered.

This legislation will begin to respond to the need for adjustments, flexibilities, and perhaps improvements upon the Lehrman formula. I don't think it will provide an immediate solution because there probably still has to be substantial debate and amendment to the legislation, and before a legislative consensus comes about it may be several months before a bill can, even with the greatest hope, be adopted.

But, I do think that if there is legislation, around which consensus is forming, which provides a flexible formula, the courts themselves, by reference to the formula, may adjust the Warren Township decision. The courts have shown an open mind in considering new ideas regarding the Mount Laurel arena, and they have actually specifically called for, in the Mount Laurel opinion, a legislative response that would take them out of the game.

So, I think that once we are able to provide an adjustable formula, the courts will give deference to it. I think that will go a long way toward relieving many of the municipalities concerns about the Warren Township decision.

SENATOR STOCKMAN: Thank you, Harry. You referred to the fiscal restraints on local municipalities, and you also suggested that subsidization, perhaps by local municipalities, may be a partial or a total answer to the builders' remedy, which is a troublesome concept and one that I don't think anyone thinks is the ultimate best solution. What about some role by the State in this area? And, in particular, what about the question of -- because of the peculiar pressures and the immediate pressures some municipalities face at this time -- the apparent possible available revenue at the State level? At least at this point there is an open debate, or discussion, as to whether this revenue should be used in the form of a homestead rebate a reduction in the sales tax, or in a direction of that sort. Do you think there is more than coincidence in the fact that we have this immediate pressure on some municipalities because of the court decision -- whether some have it through their own fault or not; nevertheless it is there -- which threatens five times more development than would otherwise occur, and possibly some resources at the State level which could be directed towards this problem and towards these municipalities? Has the Committee talked at all about that? Have you given that any thought? Do you think it makes any sense?

MR. POZYCKI: Well, the Committee has deferred the matter subsidization, at least State subsidization, of the construction of low and moderate-income housing to the Assembly, upon advice to us that that is the proper forum for such an appropriation. However subsidization, I might point out from my own personal perspective, can come from three different sources. The first is, the given municipality can float its own bond ordinance and provide some funding to either directly build low and moderate-income units, or to offer developers a subsidy, as opposed to a density bonus of four additional conventional units, for the construction of the low and moderate-income units.

A second source would be voluntary relationship with commercial developers, whereby a commercial developer would receive a bonus in square footage for development, and in return they would pay into a municipal trust fund, which would then be used to either build the units or to subsidize a developer, without the need for giving them an additional four conventional units.

But, my own studies of this have come to the conclusion that there would be a need for substantial subsidization funding if we are to accommodate, in the six-year time frame that is in most master plans and zoning ordinances that are operative, a sufficient number of low and moderate-income units to satisfy the needs of our State. I have heard numbers as large as $200 thousand in subsidy funds needed over the next six years. I certainly think that the two sources I--

SENATOR STOCKMAN: Two hundred thousand?

MR. POZYCKI: I mean $200 million, excuse me. I think we can handle $200 thousand. I stand corrected. Two hundred million dollars is a number the likes of which I don't think can be met by local funding or even by local funding in addition to commercial developer contributions.

So, your point is well taken, that the State will have to play a major role in providing the subsidies which, it has been said, can buy down the conventional units that come with the density bonus. I think that if there are any funds immediately available in the State, those funds should be allocated forthwith to the municipalities that are now trying to figure out how to face the prospect of five times the amount of their fair share numbers.

For each unit a municipality can either subsidize or build of its own accord with State funds, the municipality enjoys a reduction of four conventional units. I think that is a benefit which any municipality that faces a Mount Laurel settlement, a Mount Laurel order, or even the threat of litigation, would certainly be well served to support.

SENATOR STOCKMAN: Thank you. I have no further questions.

SENATOR LIPMAN: Senator Cardinale.

SENATOR CARDINALE: Mr. Pozycki, let not Gerry Stockman be the only one to give you a few nice words at the outset. I want to say that, despite some basic disagreement, I can sense in what you have been presenting, a moderation in the prior positions some of those who have been involved in the initial drafting and initial input, with respect to this whole question, have taken.

Despite all of that, I think it still contains a number of features which I find will probably be objectionable to a great portion of the population of this State. Quoting back to you some language you just used, you mentioned the recalcitrance of some municipalities. I think, inherent in all of what has led us to the point we are at today is an attitude on the part of those who pursued these policies that the municipalities, as some sort of detached entity, are reluctant to do what is right. Yet, those municipalities are made up of people who are represented by elected officials, officials who were elected by an electorate that has greater knowledge of the policies they were going to follow than those who elect us, or, indeed, than those who elected most of the people -- if any of them are elected -- who are part of your ad hoc committee. I still find a great deal lacking, probably because of a lack of consideration regarding the interests of the people at the lowest level of our government, in what you have proposed.

Rather than take each individual portion of that proposal, I would like to center on one subject. You have indicated that there is a lack of resources on the municipal level to enact the policies which your group considers to be fair. As I look at this issue, I see that the Public Advocate, the courts, and many other aspects of government have used the resources which are available to them to promote this policy. Whereas, the municipalities -- many of them individually, and collectively -- have done very, very little, but those who have done something have had to call upon the very limited resources available to them. Many of them are volunteer governments that do not have full-time elected officials serving in those governments; therefore, they have had to volunteer a great deal of time. Most of the opposition to this policy could be characterized as opposition from the grass roots, not from government.

I recognize that some of the movement toward this policy is also a grass roots movement. To that extent, I applaud it. However, since you already recognize that there is a limit on the resources of the municipalities, would your group consider, or have you considered, allowing the municipalities some funding from the State, which would allow them to match the resources that have been used to promote the policies that are now, through an attempt in this bill, to be institutionalized in our State? As a second matter, this will give those very municipalities and grass roots people an opportunity to express themselves -- in the democratic form of government which we enjoy -- by putting on the ballot SCR-24, which is an alternate policy that we are going to discuss here today. If you do not support either of these alternatives, I would just like you to explain to me why you can still consider yourselves -- and the Public Advocate has had a great deal to do with your group -- as advocates of the public, or as advocates of a democratic form of government. Because what is at the heart of what I see back in my own district I could not agree with more, and that is that this seems to be a policy which cannot stand on its own, which does not have public support, and which can only be put in place by some group acting in a dictatorial fashion and imposing it on the rest of society. (applause)

MR. POZYCKI: First of all, let me suggest that the word recalcitrance was not a word which I had a hand in creating. It was used by the courts. I am merely referring to the decision of the courts over the past 10 years, and their estimate of municipal inaction in terms of the construction of low and moderate-income housing.

Second, I would like to point out, Senator, that I have served as an elected official, and I have great sympathy for the municipal position, having been one of those volunteers serving in a small municipality that did not have a great deal of funds. Therefore, I have a very close understanding of the problems you have outlined. I am certainly not insensitive to them.

I would like to point out further that there are representatives on our Committee from municipal government who have been helping to fashion the kind of moderation you referred to earlier

-- the kind of compromise which is necessary to pull the Mount Laurel issue out of the arena of the courts and place it in the hands of the people, be they the people represented by the State Legislature or by local government.

As was indicated in my previous remarks, the Mount Laurel opinion stripped the local municipalities of their presumption of validity, the presumption that they understood their towns well enough to devise a rational course of development for their municipalities. This legislation seeks to restore the presumption of validity to each municipality that wishes to comply.

I think if blame needs to be placed, it should not be placed on those who seek to develop a workable response to Mount Laurel; it should be placed on those legislators who are not willing to grapple with an immediate legislative solution. Every day that we waste in not trying to work with the kind of legislation that is before this Committee today, results in further court orders and court settlements that impose five times the amount of housing a municipality may be prepared to absorb in relation to its fair share obligations.

I don't think that the municipalities have acted as conscious demons, recalcitrant against their affirmative obligations. Planning is a new and emerging science. Some even refer to it as an art. As little as ten years ago, I think it was almost one of the ten commandments of municipal governments that high density housing meant a tax burden, rather than something that could support a municipal tax base. Recent studies that have been developed by the State, and by the various universities of this State, have pointed out that apartment development is not necessarily a tax burden, and it can often even generate a tax surplus. We are all just coming to recognize that we can accommodate different forms of housing, from large-scale, single-family houses on large lots-- I mean, previously, if you rode through the State of New Jersey you could hardly go a few miles without seeing a given town's name, saying such-and-such municipality invites industry. You never saw one that said it invited housing.

However, today we are coming to realize that we have sufficient capacities in our schools and the tax ratable that comes