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DiFRANCESCO, BATEMAN, COLEY, YOSPIN, KUNZMAN, DAVIS, LEHRER & FLAUM, P.C.
15 Mountain Boulevard
Warren, New Jersey 07059-5686
(908) 757-7800
Attorneys for the Borough of Watchung

FILED
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CIVIL CHAMBERS

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* **ORDER GRANTING TEMPORARY IMMUNITY FROM EXCLUSIONARY ZONING LITIGATION TO BOROUGH OF WATCHUNG**

THIS MATTER having come before the Superior Court of New Jersey, Law Division, upon the application of the Borough of Watchung (Steven A. Kunzman, Esq., of DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis, Lehrer & Flaum, P.C., appearing) and the Court having considered the materials supplied by the parties and other pleadings filed in this action, and good cause having been shown:

IT IS ORDERED this 25th day of August, 2015, as follows:

The Borough of Watchung is granted immunity from exclusionary zoning litigation pending further order of the Court. cont'd Dec 8, 2015.

IT IS FURTHER ORDERED that a copy of this Order be served upon all interested parties within seven (7) days of its receipt by counsel for the Borough of Watchung.

THOMAS C. MILLER, P.J.Cv. , J.S.C.

Opposed ____

Unopposed ✓

See attached Statement of Reasons dated _____

IN THE MATTER OF THE APPLICATION OF BOROUGH OF WATCHUNG, A Municipal Corporation of the State of New Jersey, Petitioner.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY DOCKET NO. SOM-L-902-15 CIVIL ACTION (Mount Laurel)

I. PRELIMINARY STATEMENT

This matter comes to the Court as a Declaratory Judgment action brought by the Borough of Watchung pursuant to the Fair Housing Act, N.J.S.A. 52:27D-301, et seq. and the Supreme Court's decision in In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 20 (2015). The Borough has filed a Verified Complaint which it requests the following relief:

1. The Borough be granted a Judgment of Compliance;
2. The Third Round Plan meets the Borough's constitutional obligation under Mount Laurel and the FHA;
3. The Borough is entitled to immunity and repose from litigation challenging any aspect of its Third Round Plan, including any claim for builder's remedy at least until June 30, 2025, or as otherwise directed by the Courts of New Jersey;
4. The Fee Ordinance and Spending Plan meet the Borough's requirements under the FHA and further fulfill the Borough's constitutional obligation under Mount Laurel and the FHA;
5. The Fee Ordinance is approved;
6. The Spending Plan is approved;
7. Any development fees collected by the Borough not be forfeited to the New Jersey Affordable Housing Trust Fund;
8. Any development fees collected by the Borough are permitted to be used in accordance with the Spending Plan.

Watchung contends that since it has steadfastly pursued administrative approval of its housing plan, received substantive certification from Council on Affordable Housing (COAH)

under the now invalidated COAH Third Round Rules, and seeks to further advance its obligation under the *Mount Laurel* Doctrine it respectfully requests that the Court enter an Order granting it temporary immunity.

II. PLAINTIFF'S PROCEDURAL HISTORY AND FACTUAL BACKGROUND[1]

1. The Borough is a municipal corporation of the State of New Jersey.

2. The Borough has been diligent in its efforts to fulfill its constitutional obligation to provide realistic opportunities for low and moderate income housing as set forth in So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) and its progeny ("Mount Laurel"), and the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. ("FHA").

3. On September 26, 1988, the Borough received Substan-tive Certification from the Council on Affordable Housing ("COAH") for the Borough's First Round fair share obligation under Mount Laurel and the FHA.

4. The Borough's First Round Substantive Certification obligation was 132 units and included inclusionary zoning for 60 affordable units, a 9 unit rehabilitation program, 6 rental bonus credits and a 57 unit Regional Contribution Agreement with the Town of Phillipsburg.

5. On July 1, 1998, the Borough received Substantive Certification from COAH for the Borough's Second Round obligation under Mount Laurel and the FHA.

6. The Borough's Second Round Substantive Certification obligation was 206 units, subject to a Vacant Land Adjustment ("VAL") establishing the Borough's Realistic Development Potential at 169 units. The VLA reduced the Borough's obligation by 37 units from the original COAH calculation of 206 units. These 37 units became Unmet Need.

7. The Borough's Second Round Substantive Certification obligation was met except for 19 units. The Borough's Third Round Housing Element and Fair Share Plan ("Third Round Plan") provided for the construction of these 19 units as part of a planned 100% affordable family rental development on municipal property.

8. The Borough's First and Second Rounds cumulative obligation of 206 units was met as follows:

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[1] For the purpose of this application, the Court has adopted the Procedural History and Factual Background from the Plaintiff's submissions.

First and Second Round Obligation			206
Realistic Development Potential after Vacant Land Adjustment			169
The 169 obligation met as follows:			
a.	Johnston Drive Group Homes	3	
	Group Homes (Rental bonus)	3	
b.	Villa Dominico Age-Restricted for Sale Units	8	
c.	Regional Contribution Agreement to Town of Phillipsburg	57	
d.	Kings Crossing (now AvalonBay Communities) Inclusionary Development	40	
	Inclusionary Development (Rental bonus)	39	
	Total existing credits	150 (including 42 bonus credits)	
	Proposed Municipal Development	19	
	Total		169

9. The Planning Board, on December 2, 2008, adopted the Borough's Third Round Plan ("Third Round Plan") to meet the Borough's Third Round fair share obligation under Mount Laurel and the FHA.

10. The Borough Council, on December 11, 2008, adopted a Resolution endorsing the Third Round Plan and authorized the submission of a Petition for Third Round Substantive Certification to COAH.

11. On December 30, 2008, the Borough submitted the Petition for Third Round Substantive Certification.

12. On February 9, 2009, COAH declared the Borough's Petition for Third Round Substantive Certification complete.

13. On July 20, 2010, after mediation, the Borough adopted an Amended Third Round HEFSP which included a proposed Affordable Housing Overlay Zone to address the Unmet Need. The 2010 Amended Third Round HEFSP was filed as a re-petition with COAH on September 26, 2011. On January 26, 2012, Watchung published notice of the repetition; on April 5, 2012, Local Planning Services (substitute for COAH during effective period of Reorganization Plan No. 001-2011) acknowledged the Borough's re-petition and stated that at the end of the 45-day no objections were received.

14. The Borough indicates that it is prepared to supplement the Third Round Plan, if necessary, to comply with the Borough's constitutional obligation to provide for the realistic opportunity for the development of its fair share of low and moderate income housing consistent with all credits, adjustments, including physical and environmental factors.

15. The Borough indicates that it is working diligently to determine its fair share obligation under Mount Laurel. To that end, the Borough retained the services of an expert to assist the Borough in calculating the extent of its Third Round fair share obligation.

III. COURT'S DECISION

IS THE BOROUGH ENTITLED TO TEMPORARY IMMUNITY AS IT RECRAFTS A FAIR SHARE PLAN?

A. Regarding the Supreme Court's *Mount Laurel* Process

i) The *Mount Laurel Doctrine*

The New Jersey Supreme Court prohibited the discriminatory use of zoning powers and mandated that each developing municipality "must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income." S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I), 67 N.J. 151, 179, 187, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975)

Thereafter, in 1983, the New Jersey Supreme Court reaffirmed the constitutional obligation that towns provide "a realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing." S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II), 92 N.J. 158, 205 (1983) (citing Mount Laurel I, supra, 67 N.J. at 174), (together with Mount Laurel I, the *Mount Laurel Doctrine*).

"The *Mount Laurel* series of cases recognized that the power to zone carries a constitutional obligation to do so in a manner that creates a realistic opportunity for producing a fair share of the regional present and prospective need for housing low- and moderate-income families." In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 3-4 (2015); (footnote omitted).

It is the intent and purpose of the *Mount Laurel Doctrine* to prohibit the discriminatory use of zoning powers and zoning practices which have the exclusionary effect of making housing unavailable to persons of low and moderate income and to provide remedies to address such practices when they are proven to exist.

ii) Regarding the Council on Affordable Housing and 3rd Round Rules

The Legislature codified the *Mount Laurel Doctrine* in the Fair Housing Act ("the Act"), N.J.S.A. 52:27D-301, et seq. and further established COAH as the administrative agency charged with implementing and administering the Act.

Under the Act, COAH is empowered, through its procedural and substantive rules to establish municipal affordable housing obligations, and review and approve housing plans submitted to it by granting "substantive certification" if they create a realistic opportunity for the creation of affordable housing. N.J.S.A. 52:27D-313. Under a grant of substantive certification, a municipality is insulated to a substantial extent from exclusionary zoning litigation for a period of ten years[2]. Ibid.

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[2]COAH initially adopted substantive rules, governing the period from 1987 to 1993, ("The First Round Rules"), N.J.A.C. 5:92-1.1 to -18.20, Appendices A to F. It thereafter adopted substantive rules governing the period from 1987 to 1999, ("The Second Round Rules"), N.J.A.C. 5:93-1.1 to -15.1, Appendices A to H. After a lengthy period of study and review ultimately characterized by the New Jersey Superior Court - Appellate Division as "dramatic and inexplicable," In re Six Month Extension of N.J.A.C. 5:91 et seq., 372 N.J. Super. 61, 95-96 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005), COAH proposed Initial Third Round Rules on October 6, 2003.

Upon receipt of voluminous comments, COAH re-proposed Third Round Rules which were adopted on December 20, 2004. 36 N.J.R. 5895(a). These Initial Third Round Rules, which contained a "growth share" approach, were designed to address a cumulative municipal affordable housing obligation beginning 1987 and ending 2014.

The Initial Third Round Rules were invalidated in a significant number of respects, and the matter remanded to COAH, by the Superior Court - Appellate Division on January 25, 2007. In Re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, (App. Div. 2007), certif. den. 192 N.J. 71 (2007).

On October 20, 2008, COAH adopted Third Round Rules intended to assess municipal affordable housing obligations for the period from 1999 to 2018 utilizing a "growth share" methodology. N.J.A.C. 5:96 and 5:97. The revised Third Round Rules were initially invalidated by the Appellate Division on October 8, 2010, in In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 416 N.J. Super. 462 (App. Div. 2010). That ruling was ultimately affirmed and modified by the Supreme Court on September 26, 2013, In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578 (2013), and COAH was ordered to promulgate new rules, utilizing a First and Second Round methodology, within five months of that decision. Upon COAH's requests, the Court extended the time for adoption under an Order entered on March 14, 2014. Ultimately, however, COAH failed to adopt regulations in a stale-mated 3-3 vote. In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 10 (2015).

Consequently, an application was made to the Supreme Court by the Fair Share Housing Center (FSHC), (a party which had challenged COAH's rules), to enforce litigants' rights under Rule 1:10-3. On March 10, 2015, in In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015), the Court granted FSHC's application, finding that "There is no question that COAH failed to comply with this Court's March 2014 Order that was designed to achieve the promulgation of Third Round Rules and the maintenance of a functioning COAH," such that "the administrative forum is not capable of functioning as intended by the [Fair Housing Act] due to the lack of lawful Third Round Rules assigning constitutional obligations to municipalities," and, accordingly, "the courts may resume their role as the forum of first instance for evaluating municipal compliance with *Mount Laurel* obligations. . . " Id. at 19 – 20.

iii) Jurisdiction of this Court and Authority to Enter Order

The Law Division of the Superior Court, Somerset County, has jurisdiction over the within matter which seeks a Declaratory Judgment of Third Round Mount Laurel Compliance and Repose pursuant to R. 4:42-3, R. 4:3-1(a)(4), N.J.S.A. 2A:16-53, J.W. Field v. Twp. of Franklin, 204 N.J. Super. 445, 456-458 (Law Div. 1985), favorably referenced in Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 29-30 (1986), N.J.S.A. 52:27D-313(a), and In re Adoption of N.J.A.C. 5:96 & 5:97, 221 215 N.J. 1 (2015), and venue of the action is before the designated Mount Laurel Judge for

Vicinage 13 in accordance with paragraph 10 of the implementing order accompanying the 2015 Decision. Id. at 36.

As the Court held in In re Adoption of N.J.A.C. 5:96 & 5:97, 221 215 N.J. 1 (2015) (the "2015 Decision"), part of the process of judicial review of a municipal Third Round Housing Plan Element and Fair Share Plan ("HPE&FSP") includes the Mount Laurel trial courts providing municipalities with temporary immunity from exclusionary zoning litigation during the period when the court is reviewing the HPE&FSP. As the Court explained:

> "Because municipalities that received a grant of substantive certification promulgated housing plans in compliance with the invalidated growth share based Third Round Rules, additional court review of such towns' housing plans will be necessary. The ordinances adopted by any such municipality, in furtherance of an approved housing element, must be evaluated to determine if they provided for a realistic opportunity for the municipality to achieve its "fair share of the present and prospective regional need for low and moderate income housing." Mount Laurel II, supra, 92 N.J. at 205, 456 A.2d 390 (citing Mount Laurel I, supra, 67 N.J. at 174, 336 A.2d 713). Supplementation of a plan may be necessary to ensure to the court's satisfaction that the town has provided a realistic opportunity for its fair share or present and prospective regional affordable housing need in keeping with prior rounds' methodologies. The consideration to be employed in that analysis are addressed in Part V., infra.
>
> That said, towns in this category may choose affirmatively to seek, through a declaratory judgment action filed on notice to FSHC and interested parties, a court order declaring its housing element and implementing ordinances – as is or as to be supplemented – constitutionally sufficient. We also acknowledge that a municipality that had received a grant of substantive certification may elect to wait to be sued. In either case, **while not entitled to the statutory presumption of validity the FHA normally would provide, these towns deserve an advantage in the judicial review that shall take place.** Implemented ordinances should not be lightly disturbed unless necessary; supplemental actions to secure compliance with newly calculated prospective need may provide a preferred court for obtaining constitutional compliance.
>
> **While reviewing for constitutional compliance the ordinances of a town that achieved substantive certification, courts should be generously inclined to grant applications for immunity from subsequently filed exclusionary zoning actions during that necessary review process,** unless such process is unreasonably protracted. As courts adapted processes to manage the multiplicity of pre-FHA filed Mount Laurel actions, see, e.g. J.W. Field, supra, 204 N.J. Super. 445, 449 A.2d 251, the present day courts handling these new matters should employ, similar flexibility in controlling and prioritizing litigation. We repose such flexibility in the Mount Laurel trust designated judges in the vicinages, to whom all Mount Laurel compliance-related matters will be assigned post-order, and trust

> those courts to assiduously assess whether immunity, once granted, should be withdrawn, if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance. Review of immunity orders therefore should occur with periodic regularity and on notice."

Id. at 25-26 (emphasis supplied)

B. Construction of the Statutes in Question In A Manner Which Advances The Legislative Policy And Purpose

In construing a statute, the court's "fundamental duty is to effectuate the intent of the Legislature." Merin v. Maglaki, 126 N.J. 430, 435 (1992). Judges must also consider the **legislative policy** underlying the statute and "any history which may be of aid." State v. Madden, 61 N.J. 377, 389 (1972) (emphasis added).

"It is a **fundamental duty** of this court to construe a statute in a manner which **advances the legislative policy** and purpose." Royal Food Distributors, Inc. v. Dir., Div. of Taxation, 15 N.J.Tax 60, 73 (1995) (emphasis added) citing Lesniak v. Budzash, 133 N.J. 1, 8 (1993); Voges v. Bor. of Tinton Falls, 268 N.J. Super. 279, 285 (App. Div. 1993), certif. denied, 135 N.J. 466 (1994). As eloquently stated by Justice Heher in discussing the meaning of Section 18 of the "Unsatisfied Claim and Judgment Fund Law:"

> The sense of a law is to be collected **from its object** and the nature of the subject matter, the contextual setting, and the statutes *In pari materia*; and the import of a particular word or phrase is controlled accordingly. Isolated terms cannot be invoked to defeat a 'reasonable construction.' Wright v. Vogt, 7 N.J. 1 (1951). See also State v. Brown, 22 N.J. 405 (1956). The statute is to be liberally construed to advance the remedy, due regard being had to the protection of the Fund against fraud and abuse **and to the fulfillment of the essential legislative policy**. The literal sense of terms is not to have ascendancy over the **reason and spirit** of the expression as a whole.
>
> [Giles v. Gassert, 23 N.J. 22, 33-34 (1956) (emphasis added).]

The Court's goal is to fulfill "**the essential legislative policy**" of the FHA and to give meaning to its "**reason and spirit**."

i) Purpose of The FHA

To understand the purpose of the FHA, it is important to understand the facts and circumstances that gave rise to the legislation. In January of 1983, a few years prior to the enactment of the FHA in July of 1985, the Supreme Court decided Mount Laurel II. That landmark

decision precipitated a flood of over 100 Mount Laurel suits. See Frizell, 36 N.J. Prac., Land Use Law § 18.4 (2d ed.); see also J.W. Field Co. v. Tp. of Franklin, 204 N.J. Super. 445, 54-55 (Law Div. 1985) (wherein Hon. Judge Serpentelli stated that "[t]he experience of this court demonstrates that the level of Mount Laurel litigation ***has increased dramatically*** since Mount Laurel II and **every suit has been brought by a builder rather than a nonprofit or public agency**.") (emphasis added).

Given the flood of builder's remedy lawsuits precipitated by Mount Laurel II, it is understandable why the Legislature intervened and enacted a law that targeted the builder's remedy and so vigorously sought to curtail its role.[3]

The Legislature clearly stated its purpose in Section 303, entitled: "Legislative ***Declarations and Intention***." In this section, the FHA states:

> The Legislature **declares** that the State's preference for the resolution of existing and future disputes involving exclusionary zoning ***is*** the mediation and review process set forth in this act and ***not litigation***. . . .
>
> [Ibid. (emphasis added).]

The Legislature followed its declaration with its express intent:

> **[I]t is the *intention* of this act** to provide ***various alternatives*** **to the use of the builder's remedy as a method of achieving fair share housing**.
>
> [Ibid. (emphasis added).]

It is evident that the FHA represented the Legislature's declaration that "New Jersey has seen way too much builder's remedy litigation. We need to restrict such litigation and facilitate the ability of a municipality to comply voluntarily without such litigation. That is how we intend to implement the affordable housing policies of our state."

As the bill worked its way through the legislative process,[4] former Governor Thomas H. Kean expressed his understanding of the purpose of the legislation:

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[3]An examination of J.W. Field Co., Inc. v. Tp. of Franklin, 204 N.J. Super. 445 (Law Div. 1985), reveals that no less than ***eleven*** developers had brought builder's remedy suits against the Borough.

[4] Senators Lipman, Stockman, and Lynch initially introduced the FHA on June 21, 1984 as S-2046. See Legis. History of the FHA at http://repo.njstatelib.org:8080/handle/10929.1/22933

> [I]s designed to provide an administrative mechanism to resolve exclusionary zoning disputes **in place of protracted and expensive litigation.** The expectation is that through these procedures, municipalities operating within State guidelines and with State oversight will be able to define and provide a reasonable opportunity for the implementation of their Mt. Laurel obligations.
>
> To accomplish this the bill establishes **a voluntary system** through which municipalities can submit plans for providing their fair share of low and moderate income housing to a State Council on Affordable Housing which would certify the plan…
>
> [State of New Jersey Executive Department Veto Message for the Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334, April 26, 1985 (emphasis added).]

One of the purposes of the Legislation is clear. The Legislature sought to limit builder's remedy lawsuits and facilitate voluntary municipal compliance.

ii) The Legislature Advanced The Purpose of the FHA By Empowering Municipalities To Obtain Immunity Easily So They Could Pursue Plan Approval Free From The Considerable Burden Of Exclusionary Zoning Lawsuits

The Legislature sought to limit the role of the builder's remedy so clearly that it imposed a ***moratorium*** on the remedy and created a variety of ways for municipalities to obtain immunity from exclusionary zoning litigation. Consider the following:

1. The Legislature imposed a moratorium on trial judges awarding builder's remedies from July 2, 1985, the effective date of the Act, until five months from when COAH established its criteria and guidelines through the rulemaking process. N.J.S.A. 52:27D-328 (referencing the five-month time frames established in N.J.S.A. 52:27d-309).

2. The Legislature also created two classes of municipalities -- (a) municipalities subject to ongoing builder's remedy litigation, and (b) municipalities not engaged in such litigation -- and took special measures to protect each class from builder's remedy lawsuits. N.J.S.A. 52:27D-309 and 316.

3. *As to municipalities embroiled in ongoing Mount Laurel litigation*, the Legislature established a very soft standard - the "manifest injustice" standard – for municipalities to obtain immunity by securing a transfer of their lawsuits from the courts to COAH.[5]

[5] In interpreting N.J.S.A. 52:27D-316, the Supreme Court refers to "the Act's clear and strong preference for Council rather than court treatment" and notes that "the "preference" is set forth explicitly [in N.J.S.A. 52:27D-303]; the Act as a whole is better described as a "mandate" for administrative resolution." Mount Laurel III, 103 N.J. at 48.

Through such transfers, municipalities embroiled in litigation not only secured immunity, but also, to the extreme consternation of developers, secured the right to vacate any builder's remedies previously awarded by the trial judge. N.J.S.A. 52:27D-316. Mount Laurel III, 103 N.J. at 54-55.

4. *As to municipalities **not** embroiled in Mount Laurel litigation*, the Legislature established an **extraordinarily** easy way to obtain immunity from builder's remedy lawsuits. All such a municipality would have to do to obtain immunity would be to file a "resolution of participation" within four months from the enactment of the FHA. N.J.S.A. 52:27D-309. A "Resolution of Participation" is a resolution adopted by a municipality in which the municipality chooses to prepare a fair share plan and housing element in accordance with the Act. N.J.A.C. 5:93-1.3.

5. Regardless of whether the municipality obtained immunity by securing an early transfer of its case from the court or by adopting a resolution of participation within four months from the enactment of the FHA, that municipality could obtain additional immunity from builder's remedy lawsuits by filing a housing element and fair share plan with COAH within five months from COAH's adoption of "criteria and guidelines." N.J.S.A. 52:27D-309 and 316.

6. If a municipality failed to file a plan within this five month window following COAH's adoption of "criteria and guidelines", it could obtain immunity thereafter if it filed a housing element and fair share plan with COAH before an exclusionary zoning lawsuit is filed in Court. N.J.S.A. 52:27D-309 and 316.

Those summaries highlight the Legislature's desire to diminish the role of the builder's remedy in existing and future Mount Laurel disputes and explains the lengths to which the Legislature went to achieve these goals.

Two additional facts further demonstrate that the Legislature intended to limit the builder's remedy and facilitate voluntary compliance. First, the Legislature made it easier to obtain immunity than prior to the enactment of the FHA. Before the enactment of the FHA, a municipality had to "stipulate noncompliance and obtain the court's approval of a proposed fair share number." J.W. Field, supra, 204 N.J. Super. at 456. After the enactment of the FHA, a municipality that had not been sued merely had to adopt a "resolution of participation." N.J.S.A. 52:27D-309. Even if a municipality had already been sued, it could easily transfer the matter to COAH, thereby ***vacating any builder's remedy orders*** and securing immunity from additional lawsuits, provided that the case had not reached a final and unappealable judgment. See Mount Laurel III, 103 N.J. at 54-55 (interpreting the term "manifest injustice" in N.J.S.A. 52:27D-309 so narrowly that a municipality could easily transfer and obtain immunity provided that the case had not proceeded to a final and

unappealable judgment). Since the Legislature was presumptively aware of the immunity procedure (see Farmers Mut. Fire Ins. Co. of Salem v. New Jersey Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 543-44 (2013)), this Court should give great weight to the fact that the FHA drastically ***lowered*** the bar to secure and retain immunity. Indeed, such action shows that the Legislature was ***not content*** with the common law immunity standard. See Farmers Mut., supra, 215 N.J. at 543 ("If the Legislature were content with the [court's] decision . . . **there would have been little point to** [amend the relevant statute.""") (emphasis added).

Second, not only did the Legislature radically lower the common law pre-immunity requirements, the initial enacted version of the FHA allowed towns that secured COAH's jurisdiction ***to take up to six years*** to do nothing before deciding whether to petition the agency to certify its Housing Element and Fair Share Plan. See Jedziniak Cert. at Exhibit J, Page 12. Although a subsequent amendment to the FHA reduced this period to two years, **providing automatic immunity and six years of immunity without any additional action**, those actions illustrate the Legislature's determination to curtail the builder's remedy cause of action.

iii) The Scope and Nature of the Judicial Process

The Supreme Court thus reinstituted a judicial mechanism to address municipal *Mount Laurel* obligations. The Supreme Court's decision indicates that municipalities will be reviewed against the First and Second Round Rules and the mechanisms those rules permit.

The mechanisms permitted under the Prior Round Rules include the following:

a. Rehabilitation (N.J.A.C. 5:93-5.2)

i. Rehabilitation Program requires municipalities to spend $10,000 per unit ($8,000 hard costs, $2,000 soft costs).

ii. Alternatively, this requirement can be satisfied with a new construction credit or an Elder Cottage Housing Opportunity (ECHO), which is a conditional use in all three of the Borough's residential districts: Agricultural Residential ("AR-1") Zone (Ordinance Section 11-286 (F); Farmland Preservation ("FP") Zone (Ordinance Section 11-300(F); and the Village Residential ("VR") Zone 11-303(F).

b. Municipally Sponsored Construction & Gut Rehabilitation (N.J.A.C. 5:93-5.5), Four requirements:

i. Must have municipal control of the site.

ii. Administrative mechanism to construct the proposed housing.

iii. Funding plan and evidence of adequate funding capacity.

iv. Timetables for construction of the units.

c. Inclusionary Development Zoning (N.J.A.C. 5:93-5.6)

i. Must conform to requirements of N.J.A.C. 5:93-5.3 - "Developable site" means a site that has access to appropriate water and sewer infrastructure, and is consistent with the applicable area-wide water quality management plan (including the wastewater management plan) or is included in an amendment to the area-wide water quality management plan submitted to and under review by DEP.

ii. Single-family developments – 4 units/acre, 15% set-aside.

iii. 5 units/acre, 17.5% set-aside.

iv. 6 units/acre, 20% set-aside.

d. Alternative Living Arrangements (N.J.A.C. 5:93-5.8)

i. "Means a structure in which households live in distinct bedrooms, yet share kitchen and plumbing facilities, central heat and common areas. Alternative living arrangement includes, but is not limited to: transitional facilities for the homeless, Class A, B, C, D, and E boarding homes as regulated by the New Jersey Department of Community Affairs; residential health care facilities as regulated by the New Jersey Department of Health; group homes for the developmentally disabled and mentally ill as licensed and/or regulated by the New Jersey Department of Human Services; and congregate living arrangements."

ii. Credit issued per bedroom.

iii. Minimum affordability controls of 10 years. To be eligible for a rental bonus, controls must be in effect for at least 30 years.

e. Accessory Apartments (N.J.A.C. 5:93-5.9), which are permitted as conditional uses in all three of the Borough's residential zones: the Single Family Agricultural Residential Zone (Ordinance Section 11-291(H)), Village Residential Zone (Ordinance Section 11-308(E), and the Farmland Preservation Zone (Ordinance Section 11-300 (G)).

i. Up to 10 accessory apartments may be used to address a housing obligation.

ii. Must provide at least $10,000 per unit to subsidize the creation of the apartment.

iii. Minimum affordability controls of 10 years. To be eligible for a rental bonus, controls must be in effect for at least 30 years.

f. Purchase Existing Homes (N.J.A.C. 5:93-5.10) - Purchase homes that have been vacant for at least 18 months and resell them at affordable prices and/or rents.

g. Write-down/Buy-down (N.J.A.C. 5:93-5.11) - (Most recently known as market to affordable)

i. Up to 10 units may be converted.

ii. Buy and resell homes at an affordable price.

iii. Must spend at least $20,000 per unit.

iv. Place a 30-year deed restriction on the home.

h. Assisted Living Residence (N.J.A.C. 5:93-16)

i. Apartments in these facilities qualify if the resident qualifies as a low/moderate income household or if the resident is the recipient of a Medicaid waiver.

ii. 30 year deed restriction shall be placed on the assisted living residence.

Under that system, municipalities that have complied with the *Mount Laurel Doctrine* may initially seek a declaratory judgment, and are entitled to immunity from exclusionary zoning lawsuits, before being subject to challenges by developers and interest groups. In that regard, the Supreme Court held, in part, that: "[W]e establish a transitional process before allowing exclusionary zoning actions against towns that had sought to use the [Fair Housing Act] mechanisms in recognition of the various stages of municipal preparation that exist as a result of the long period of uncertainty attributable to COAH's failure to promulgate Third Round Rules." In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 20 (2015).

The process developed by the Supreme Court seeks to track the process established under the Fair Housing Act:

> Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes, where appropriate, that are similar to those which would have been available through COAH for the achievement of substantive certification. Those processes include conciliation, mediation, and the use, when necessary, of special masters. The end result of the processes employed by the courts is to achieve adoption of a municipal housing element and implementing ordinances deemed to be presumptively valid if thereafter subjected to challenge by third parties. Our approach in this transition is to have courts provide a substitute for the substantive

> certification process that COAH would have provided for towns that had sought its protective jurisdiction. And as part of the court's review, we also authorize, as more fully set forth hereinafter, a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court's review proceedings, even if supplementation of the plan is required during the proceedings.
>
> Id., at 23-24.

The process devised by the Supreme Court plainly directs that only municipal declaratory judgment actions will be received by the courts for consideration during a transitional period:

> During the first thirty days following the effective date of our implementing order, the only actions that will be entertained by the courts will be declaratory judgment actions filed by any town that either (1) had achieved substantive certification from COAH under prior iterations of Third Round Rules before they were invalidated, or (2) had "participating" status before COAH.
>
> Id. at 5-6.

Only upon the expiration of the thirty day period may a party institute a "constitutional compliance" action against a municipality: "*After that thirty-day period expires*, a challenge to a town's constitutional compliance may be filed against a municipality by FSHC or any other interested party." Id. at 27; (emphasis supplied). Even then, no "builder's remedy" action may proceed until a court ultimately finds that a municipality's plan does not adequately meet its affordable housing obligation. Only after a court has had the opportunity to fully address constitutional compliance and has found constitutional compliance wanting shall it permit exclusionary zoning actions and any builder's remedy to proceed. Id. at 29.

D. The Court's Authorization of Temporary Immunity

The Court directed that moving forward, the process developed is meant "to track the progress provided for in the [Fair Housing Act]." Id. at 29. Drawing from the Fair Housing Act, the Court noted that with regards to municipalities that had received substantive certification "[o]rdinarily, *N.J.S.A.* 52:27D-313 and -317 would afford the ordinances implementing the housing elements of such municipalities a strong presumption of validity in any exclusionary zoning action" however, providing "that same presumption of validity based solely on substantive certification in these circumstances would be to ignore [the Court's] acknowledgement of the problems with the 'growth share' methodology on which the invalidated Third Round Rules were premised." Id. at 24. Therefore, the Court determined that because "municipalities that received a grant of substantive certification promulgated housing plans in compliance with the invalidated

growth share based Third Round Rules, additional court review of such towns' housing plans will be necessary." Id. at 25

The Court also noted that certified towns "may choose affirmatively to seek, through a declaratory judgment action filed on notice to FSHC and interested parties, a court order declaring its housing element and implementing ordinance – as is or as to be supplemented – constitutionally sufficient." Id. at 26. Moreover, the Court noted that although a certified municipality may not be "entitled to the statutory presumption of validity the FHA normally would provide, [certified] towns deserve an advantage in the judicial review that shall take place" and "[i]mplemented ordinances should not be lightly disturbed unless necessary" Id. Rather, the Court prefers a course in which "supplemental actions" are taken "to secure compliance with newly calculated prospective need…for obtaining constitutional compliance." Id.

As such, the Court directed that in reviewing the ordinances of a town that received substantive certification, "courts should be generously inclined to grant applications for immunity from subsequently filed exclusionary zoning actions during that necessary review process, unless such process is unreasonably protracted." Id. Further, the Court direct that no builder's remedy are authorized to proceed against a town with substantive certification "unless a court determines that the substantive certification that was granted is invalid or that no constitutionally compliant supplementing plan is developed and approved by the court after reasonable opportunity to do so, and the court determines that exclusionary zoning actions, including actions for a builder's remedy, are appropriate and may proceed in a given case." Id. at 26-27.

Even though the Borough submitted its Housing Element and Fair Share Plan on January 6, 2010 along with the Borough's Petition for Substantive Certification, its Petition was deemed complete by COAH on April 16, 2010. No objections were filed to the Petition. The Petition was not acted upon by COAH so the Borough did not receive substantive certification.

i) Court's Role in Determination of Need and Review of Housing Plans

Finally, upon submission of a municipal housing element and fair share plan, courts are to conduct an individualized assessment of the submission based on the court's determination of present and prospective regional need for affordable housing as allocated to the municipality using mechanisms outlined in the Act and the assistance of "interested parties." Id. at 29-30.

ii) **The Judicial Process is Preemptive**

The Supreme Court has established a detailed, and preemptive, process for the judiciary's consideration of *Mount Laurel* matters. It provides for a series of steps for judicial consideration of *Mount Laurel* following an initial period reserved for municipalities to trigger court jurisdiction. Those steps likewise proceed from municipal applications for immunity for lawsuits and the development of municipal fair share plans. Where a town has availed itself of the procedural mechanism crafted by the Supreme Court, that mechanism is exclusive and no other actions or related efforts to circumvent the process should be tolerated.

E. Plaintiff's Request for Temporary Relief

Watchung requests that the Court order that:

1. The Borough is entitled to immunity and repose from litigation challenging any aspect of its Third Round Plan, including any claim for builder's remedy at least until June 30, 2025, or as otherwise directed by the Courts of New Jersey.[6]

In making that request of the court, Watchung acknowledges that it will need to assess to the continued viability of the accessory apartment and special needs components of its Fair Share Plan and perhaps even develop additional mechanisms to ensure that additional be provided. Watchung acknowledges that it will also need to devise strategies to address the rehabilitation obligation that has not been previously identified and to compensate for the loss of any bonus credits.

Watchung also indicates that its 2010 Housing Element will be revised within the five month immunity period that the Town has requested from the Court. Watchung indicates that this will provide the Borough with the necessary time to update some of the basic data in the plan such as demographics, as well as address whatever affordable housing obligation and/or methodology the Court determines is appropriate for the Borough.

F. Should the Court Grant the Borough and the Board Temporary Immunity from any and all Exclusionary Zoning Lawsuits to Allow the Court to Review the Borough's Affordable Housing Plan Undaunted by the Filing of Exclusionary Zoning Lawsuits?

After the Mount Laurel II decision, 92 N.J. 158 (1983), and prior to the 1985 adoption of the Fair Housing Act, N.J.S.A. 52; 27D-301 et seq. (the "FHA"), Judge Serpentelli, one of the original three Mount Laurel judges, established an immunity procedure to be utilized in Mount

[6] The Court interprets the Plaintiff's request to include one for temporary immunity as well.

Laurel litigation,[7] which he explained in J.W. Field v. Twp. of Franklin, 204 N.J. Super. 445, 456-458 (Law Div. 1985). After balancing all of the "overriding policy objectives" established by the New Jersey Supreme Court in Mount Laurel II, Judge Serpentelli determined that "immunity" from Mount Laurel lawsuits, including but not limited to builder's remedy lawsuits, should be conferred upon any municipality that committed to comply voluntarily with its affordable housing obligations through either stipulating to noncompliance and agreeing to comply in an on-going lawsuit or filing a Declaratory Judgment action seeking a judgment of compliance and repose. Id.

The immunity mechanism was created to encourage municipal voluntary compliance and to refocus efforts away from unnecessary and expensive litigation and towards voluntary compliance. Although the Supreme Court never expressly reviewed this type of order, the Court favorably referenced this immunity procedure in Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 29-30, 62-64 (1986) as a creative and effective management tool in a Mount Laurel case, noting that this innovative procedure had been used and praising the trial judges for developing innovative techniques to implement the Mount Laurel doctrine. To repeat from above, after balancing all seven "overarching policy objectives" established by the Court in Mount Laurel II, Judge Serpentelli in J.W. Field conferred immunity from Mount Laurel lawsuits upon any municipality that committed to comply voluntarily. More specifically, if a municipality had been sued, the immunity would insulate the municipality from subsequent suits. If the municipality had not been sued, the immunity would attach upon the filing of a Declaratory Judgment action to empower the municipality to comply free from any Mount Laurel lawsuits. J.W. Field, 204 N.J. Super. at 456.

The 2015 Decision formally approves a temporary immunity procedure as part of the process of judicial review of a municipal Third Round HPE&FSP. As set forth above in this opinion, the Court held in the 2015 Decision that part of the process of judicial review of a Third Round HPE&FSP includes the Mount Laurel trial court providing the municipality with temporary immunity from exclusionary zoning litigation during the period when the court is reviewing the

[7] "Mount Laurel litigation" or a "Mount Laurel lawsuit" refers to exclusionary zoning litigation filed against a municipality and includes (a) "constitutional compliance actions" challenging a municipality's ordinances as unconstitutional under the Mount Laurel doctrine and usually brought by public interest plaintiffs and (b) "builder's remedy" actions in which a plaintiff developer (as distinguished from a public interest plaintiff) seeks not only a declaration that a municipality's ordinances are unconstitutional under the Mount Laurel doctrine but also seeks a site specific re-zoning of its property, which must include a substantial amount of low and moderate income housing which has been defined by the Supreme Court as a minimum of 20% of the project. See, Mount Laurel II, 92 N.J. at 279.

HPE&FSP, even if supplementation of the HPE&FSP is required during the proceedings. 221 N.J. at 24.

As the Court explained, "towns that had submitted their HPE&FSP and had petitioned for substantive certification and had obtained substantive certifications" and that now affirmatively seek to obtain a court declaration that their affordable housing plans are presumptively valid should have no more than five months in which to submit their supplemental housing element and affordable housing plan [and] [d]uring that period, the court may provide initial immunity preventing any exclusionary zoning actions from proceeding." Id. at 27-28. As the Court held, "as part of the court's review [of a municipality's Third Round HPE&FSP], . . . we authorize . . . a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court's review proceedings, even if supplementation of the plan is required during the proceedings." Id. at 24. "[T]he trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court's determination of the municipality's presumptive compliance with its affordable housing obligation." Id. at 28.

The Borough has now filed a Declaratory Judgment action seeking to voluntarily comply with the Borough's Third Round Mount Laurel affordable housing obligation, and intends for its Board to adopt and the Borough subsequently to endorse an amended Third Round HPE&FSP, the 2015 HPE&FSP, which will be submitted to the court for review and approval.

Two of the FHA's criteria for securing immunity are relevant in this case, and they illustrate that the Legislature sought to facilitate the ability of municipalities to obtain immunity.

First, merely by adopting a "resolution of participation" within four months from the effective date of the Act, a municipality not subject to a builder's remedy suit at that point could achieve immunity. N.J.S.A. 52:27D-309(a). Second, any municipality could obtain immunity by filing a Housing Element and Fair Share Plan with COAH prior to the institution of exclusionary zoning litigation in court. N.J.S.A. 52:27D-309 and 316.

The Court is satisfied that the Borough of Watchung satisfied both these criteria.

In addition to securing Round 2 substantive certification from COAH, Plaintiff has also satisfied the "resolution of participation" criterion by recently adopting a "catalyst resolution" (Resolution 15-040), which directs its Mount Laurel professionals to take all reasonable actions to maintain the Borough's immunity and to help it achieve compliance as expeditiously as possible.

Plaintiff's Exhibit B. In the Court's view, the Resolution clearly satisfies the "resolution of participation" requirement.

The filing of the Plaintiff's Declaratory Judgment corroborates that action. A municipality that files a Declaratory Judgment action is not simply promising to participate at some future date and preserving the possibility that it may change its mind in the interim. Rather, the action ***fulfils the promise*** contemplated by a "resolution of participation" by actually participating. Moreover, such action exposed the municipality to the potential draconian "remedies for non-compliance" established by the Supreme Court in Mount Laurel II if it later chose to renege on its commitment to comply voluntarily. Mount Laurel II, 92 N.J. at 285-86. No such risk or burden attaches to a municipality that merely adopted a resolution of participation.

The Plaintiff has also satisfied the second criterion, which requires a town to file an Affordable Housing Plan prior to the filing of a builder's remedy suit. In fact, contemporaneously with the filing of this action, the Plaintiff attached its adopted Housing Element and Fair Share Plan. See Plaintiff's Exhibit A to the Declaratory Judgment Complaint, incorporated herein by reference. Since Watchung has filed its duly adopted and endorsed Affordable Housing Plan with this Court before a developer instituted a builder's remedy lawsuit in court, the Borough satisfied this second statutory criterion to secure immunity. N.J.S.A. 52:27D-316.

Moreover, by filing an amended plan within the five months allotted by the Supreme Court, the Borough represents that it will reaffirm its entitlement to immunity based upon the standards established by the Legislature in the FHA.

Since Watchung passes both statutory criteria under the FHA for immunity, this Court will enter an Order which fulfills "**the essential legislative policy**" of the FHA and to give meaning to its "**reason and spirit**" by temporarily immunizing the Plaintiff from exclusionary zoning litigation. Giles v. Gassert, 23 N.J. at 33-34.

The Court will enter an Order in accordance with this opinion.

CONCLUSION

Watchung has participated in the COAH process to produce realistic and achievable plans for meeting its affordable housing obligations in full compliance with COAH requirements. Certification of the most recent 2008 plan is clear evidence of this. The Borough continues in good faith to honor and implement those plans and add to its stock of affordable housing.

Going forward, the Borough represents that it will continue to assess the continued viability of the rehabilitation, accessory apartment and special needs components of its plan and develop additional mechanisms if necessary to ensure that affordable units are provided.

The Court GRANTS the Borough's Motion for Temporary Immunity.

Counsel for Plaintiff is directed to prepare an appropriate Order in accordance with the Court's decision.