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October 5, 2015

Honorable Thomas C. Miller, P.J. Civ.
Superior Court of New Jersey
Somerset County Historic Court House
20 North Bridge Street
Ceremonial Courtroom 1, Second Floor
Somerville, NJ 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:

The Township of Warren, Borough of Watchung, Borough of Rocky Hill and Borough of Frenchtown ("Movants") submit this brief in support of a motion for an extension of the immunity period to allow for the submission of the report of the joint municipal expert, Econsult Solutions, Inc., which will provide a methodology for the determination of the critical

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issue of this case, the “present and prospective statewide and regional affordable housing need.”¹ This extension is warranted due to the extenuating circumstances caused by the sudden illness of the previously retained expert, Dr. Robert Burchell. As is set forth in the accompanying certification of counsel, the Movants are signatories to the Municipal Shared Services Defense Agreement (“MSSDA”), by which over 200 municipalities (“Municipalities”) joined together for the common interest in to retain the services of Dr. Burchell as a litigation expert to create a methodology and approach for the development of the fair share allocation. As set forth in the MSSDA (See Certification of Jonathan Drill Ex. A),² it was anticipated that a final report would be issued by Dr. Burchell on or before September 30, 2015. This would have enabled these matters to proceed towards resolution in accordance with the schedules as set by the trial court. Dr. Burchell, however, suffered a “mini-stroke” which has compromised his capacity to serve as the expert for MSSDA and, therefore, required that the Municipalities retain another common expert to develop an analysis that could be presented in Court supported by the appropriate testimony. This unfortunate event resulted in a delay of the development of the objective for compliance by the Movants, and the development of a

¹ See, In the Matter of the Adoption of N.J.A.C.5:96 AND 5:97 221 N.J. 1, 30 (2015) (hereinafter, Mount Laurel IV)

² Since it is anticipated that the motions filed by Mr. Drill will be considered at the same time as the present motions, in the interest of efficiency and to reduce the paper burdens on the Court, we have not attached the referenced certification. We would be happy to submit Mr. Drill’s certification to the Court or any interested party upon request for same.

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Housing Element and Fair Share Plan ("HEFSP") to be presented to the Court³. Accordingly this motion requests additional time for the preparation and submission of an expert report as would be commonly granted in any case where an expert becomes unavailable for reasons outside the control of the proponent, such as sickness or death. See, Nadel v. Bergarno, 160 N.J. Super. 213 (App. Div. 1978), O'Donnell v. Ahmed 363 N.J. Super. 44 (Law. Div. 2003) Under Mount Laurel IV the trial courts are to expeditiously develop a methodology that facilitates *compliance* by the municipalities and are not to punish them for the failure of COAH to enact acceptable rules for the past fifteen years. 221 N.J. at 23. The Supreme Court provided that municipalities can be provided temporary immunity and required that immunity orders not be open ended - that definitive time frames be provided - but also that extensions were warranted based upon the reasonable efforts of each municipality. 221 N.J. 28. It is inherent in the opinion of the Supreme Court that the management of the cases is to be directed towards fostering compliance; to continue to encourage success, not to create pitfalls for failure. In Mount Laurel IV the Supreme Court directed that there be an "orderly process" and gave the trial courts "flexibility in controlling and prioritizing litigation." 221 N.J. at 23, 26. The Court also provided that the judicial process that it authorized was to "reflect as closely as possible the

³ The Movants are in the process of developing a submission to the Court to demonstrate the efforts they have taken towards development of plans, despite the lack of a fair share number at this time. It is anticipated that this will be provided in advance of the end of the current temporary immunity period.

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FHA'S process"⁴ and is to track the processes of the FHA. Id. at 6, 29. Then, with a specific reference to section 316 of the FHA, the Court allowed the towns five months to submit their supplemental HEFSP during which "initial immunity" should be provided. Id. at 27-28. Section 316 provides that the period for submission of HEFSP should be "within five months from the date of transfer, or promulgation of criteria and guidelines by the council...*whichever occurs later...*" (emphasis added) Considering that the Supreme Court specifically referenced section 316 it should be evident that the towns should first be provided the benefit of the determination required by section 316, then be given the opportunity to develop a complying plan. Regardless of the sequence, the current dilemma faced by the Municipalities in obtaining a report to support their presentation of the present and prospective need requires delay of the process so that the presentation of evidence is in a fair and proper sequence. As good cause has been shown, it is reasonable to extend the immunity period and to adjust the schedule so that the matter can be presented and judged on a complete record. Accordingly, the Movants, and the other Municipalities require the opportunity to present their expert on the essential issue. Trial courts are permitted to construe the Rules of Court⁵ "to secure a just determination, simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay," and they are also permitted to relax or dispense with the rules "if adherence to it would result in injustice." R. 1:1-2. New Jersey courts favor justice over

⁴ Fair Housing Act, N.J.S.A.52:27D-1 et. seq. ("FHA")

⁵ The Rules of Court are also the result of an order of the Supreme Court.

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strict adherence to procedure. N.J. Highway Authority v. Renner, 18 N.J. 485, 495 (1955) (“[J]ustice is the polestar and the procedures utilized by the courts must be moulded and applied with that in mind.”) Here, the potential for an unjust result is manifest. In fact, providing the additional time requested is consistent with the flexibility that the Supreme Court specifically provided to the trial courts and warrants an adjustment to the schedule to permit an orderly and just result. Further, this is eminently consistent with the purpose of the process is to shepherd the municipalities through the compliance process as opposed to creating a conflict that presumes that the municipalities are attempting to avoid compliance. The Movants voluntarily entered in the process to achieve compliance by filing this declaratory judgment action. They just seek a fair opportunity to develop their case.

Although the Fair Share Housing Center (“FSHC”) and other interested or intervening parties may attempt to object to any such extension, such a position is contrary to the expressed intent of the Supreme Court and the Legislature as set forth in the Fair Housing Act: to foster compliance and avoid exclusionary zoning litigation. Acceding to the position of those entities would prevent this matter from having “simplicity in procedure,” would be inherently unfair, lacking in due process, and will undoubtedly result in increased expenses to the municipalities by requiring preparation of numerous iterations of HEFSPs. It is certainly in the

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interests of the parties – all representatives of the citizens of New Jersey⁶ – to have the court hear from the experts on both sides of the issue. Rushing the case to a decision without the expert for the municipalities is not only inefficient and would not proceed in a logical sequence; it would be fundamentally unfair and present an unjust result to the citizens of New Jersey. As the Appellate Division has stated: “Our ultimate goal is not, and should not be, swift disposition of cases at the expense of fairness and justice. Rather, our ultimate goal is the fair resolution of controversies and disputes. R.H. Lytle Co. v. Swing-Rite Door Co., Inc., 287 N.J. Super. 510, 513, 671 A.2d 602 (App.Div.1996). Not allowing the Movants to present their expert punishes the municipalities, which the Supreme Court said should not occur. 221 N.J. at 23. Further, such an approach will also require unnecessary expenditures by the taxpayers, another unnecessary burden on the citizens of the state.

The Supreme Court recognized that the municipalities were not the source of the delay, and the illness of Dr. Burchell was certainly not anticipated by the municipalities much less caused by them. Despite the continued protests by the builders and the FSHC that this will cause undue delay in vindicating the rights of those in need of housing, it is the expectation that the Econsult report will be available at the end of December. Such a delay is hardly significant

⁶ A municipality is created with the consent of its inhabitants and, in its corporate capacity, is to act as a representative of its inhabitants. See, Bergen Cty. v. Port of N.Y. Auth. 32 N.J. 303, 312 (1960), Boonton Mayor, etc. v. Boonton Water Co. 69 N.J. Eq. 23, 24 (Ch. 1905), aff'd 70 N.J. Eq. 692 (E&A 1906)

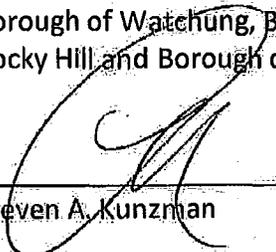
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considering the fifteen years that has lapsed because of the inability of COAH to develop rules that the Courts found acceptable.

For these reasons it is respectfully submitted that the Court enter an order extending the period of immunity for a sufficient period to permit the Econsult report to be completed and to allow movants to develop review the report and determine what, if anything, needs to be done to prepare a complying HEFSP.

Respectfully submitted,
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Borough of Watchung, Borough of
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By: 
Steven A. Kunzman

cc: All Counsel/Parties of Record via email