IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF CRANFORD, COUNTY OF UNION

SUPERIOR COURT OF NEW JERSEY
UNION COUNTY – LAW DIVISION

Docket No.: UNN-L-003976-18

Mt. Laurel
CIVIL ACTION

BRIEF OF DEFENDANT-INTERVENORS, HARTZ MOUNTAIN INDUSTRIES, INC., H-CRANFORD CONDUIT LP, and H-CRANFORD CREDIT LP, IN OPPOSITION TO THE NOVEMBER 2019 SETTLEMENT AGREEMENT ENTERED INTO BY THE TOWNSHIP OF CRANFORD AND THE FAIR SHARE HOUSING CENTER

HILL WALLACK LLP
21 Roszel Road
Princeton, New Jersey 08540
(609) 924-0808
Attorneys for Defendant -Intervenors, Hartz Mountain Industries, Inc.,
H-Cranford Conduit LP, and
H-Cranford Credit LP

On the brief:
Thomas F. Carroll, III, Esq.
Attorney ID: 022051983
tcarroll@hillwallack.com

TABLE OF CONTENTS

PRELIMINARY STATEMENT

On February 19, 2020, this Court will hold a fairness hearing concerning the Settlement Agreement entered into by the Township of Cranford ("Township") and the Fair Share Housing Center ("FSHC"). The Settlement Agreement is grossly unfair to low and moderate income households, and it does not bring the Township into full compliance with its Mount Laurel obligations. It should be rejected by this Court.

Defendant-Intervenors, Hartz Mountain Industries, Inc., H-Conduit LP, and H-Cranford Credit LP (collectively "Hartz"), submit this Brief in support of their objections to the finding of fairness being sought by the Township. In further support of their objections, Hartz is filing herewith a Report from Art Bernard, P.P., a renowned professional planner in the field of affordable housing. Hartz will further support these objections at the February 19, 2020 hearing in this matter.

PROCEDURAL AND FACTUAL BACKGROUND

On November 20, 2018, the Township filed this declaratory judgment action, captioned In the Matter of the Application of the Township of Cranford, County of Union, Docket No. UNN-L-3976-18 ("DJ Action").

Hartz is the owner of a 30.5-acre property designated as Block 541, Lot 2 on the official tax map of the Township, located at 750 Walnut Avenue (the "Property"). Hartz has proposed to develop the entire Property with inclusionary development at a density of 30 units per acre. Hartz has been granted status as defendant-intervenor in this matter. Hartz filed its Answer in this DJ Action on December 19, 2018.

The Hartz Property is fully developed with nonresidential uses, including office buildings. However, the Property is vacant, as the attractiveness of the Property for the permitted nonresidential uses has vanished as market considerations have changed over time.

The Township has entered into a Settlement Agreement with the Fair Share Housing Center ("FSHC"), which was signed by the FSHC on November 8, 2019, and was signed on behalf of the Township on November 12, 2019. That Settlement Agreement is the subject of the February 19, 2020 fairness hearing. The Settlement Agreement acknowledges that, under the standards established by the Law Division of Superior Court in In the Matter of the Application of the Municipality of Princeton, Dkt. No. MER-L-1550-15 (Super. Ct. Mercer Cty., March 8, 2018), the Township's "third round" (post-1999) fair share obligation is 440 affordable units. However, the Settlement Agreement purports to provide a realistic opportunity for the creation of only 157 affordable units per the proposed vacant land adjustment, with the balance of the Township's obligation being considered "unmet need."

The within Report from Art Bernard, P.P. ("Bernard Report") analyzes the Settlement Agreement in detail, and concludes that the Settlement Agreement is not fair to low and moderate income households, and should therefore be rejected by this Court. We will not repeat the contents of that Report in this Brief, but will, at this juncture, highlight some of the central deficiencies in the Settlement Agreement, as follows:

1. The Township seeks a very large downward adjustment of its fair share obligations due to a lack of developable land, but it does so in a way that is contrary to the New Jersey Fair Housing Act, N.J.S.A. 52:27D–301 to –329 ("FHA"), and the "second round" regulations of the Council on Affordable Housing ("COAH"), N.J.A.C. 5:93-1, et seq.

2. The Township proposes sites to meet its asserted realistic development potential ("RDP") that do not provide realistic opportunities as required by the FHA and the COAH regulation standards.
3. The Township's proposed plan proposes to take "credits" toward the Township's RDP obligation, whereas the applicable law, addressed in the Bernard Report, provides that any such credits should be applied toward the Township's fair share obligation of 440 affordable units, with the RDP to be met with actual affordable housing units going forward; not through the use of "credits."
4. The Township does not propose a legally sufficient "unmet need plan" to address the very large unmet need obligations resulting from the vacant land adjustment it seeks.
5. The Township labels the Hartz site an "RDP site" (as opposed to an unmet need site) in violation of the applicable COAH regulations. It does so in an effort to avoid a rezoning of the Hartz site at a density that is required given a proper application of COAH regulations and accepted standards of professional planning.
6. The subject Settlement Agreement asserts that RDP from the Hartz site should be calculated on the basis of 18 units per acre, whereas other sites are actually rezoned for far higher densities, and there is no planning rationale to justify the disparate treatment. There is no legitimate basis to assert that the Hartz site is not suitable for development for anything less than 30 units per acre.
7. Having "lowballed" the RDP of the Hartz site (assuming that it can lawfully be considered an RDP site, as opposed to an unmet need site), the Settlement Agreement then proposes to rezone the site at a density of approximately half of the density recognized as an appropriate density for RDP purposes. The proposed plan does that

in a discriminatory fashion, proposing that the site be rezoned for inclusionary development at a density of 9 units per acre if Hartz were to develop the site, with the density being 10 units per acre if the Township condemns the land and it is developed by another developer.

8. The Settlement Agreement simply assumes that approximately 6 acres of the Hartz property is not available for development, and it therefore declines to rezone that acreage for inclusionary development. This is done in an effort to both unjustifiably decrease the Township's RDP, assuming that the Hartz is properly included within RDP calculations, and to decrease the amount of affordable housing that would be produced on the site if it were to be developed. The Township "deducts" those 6 acres based upon an alleged proposed sale of the Hartz site to PSE&G for the construction of PSE&G facilities. However, the Township has opposed that PSE&G facility, and PSE&G has withdrawn its interest in the site. Thus, the Township's plan unjustifiably "shrinks" the Hartz site.

9. As explained in the Bernard Report, the Hartz site is neither a vacant site nor a site developed with a low density use and, thus, the Township labels the site as an RDP site contrary to COAH's regulations. It does so because it proposes that COAH regulations allow the Township to satisfy RDP generated by the site on other sites (a municipal maneuver sometimes referred to as "the shell game"). However, the Bernard Report notes that, because the site is fully developed, it is not an RDP site when applying COAH regulations, but should instead be considered an unmet need site that should be developed at the maximum density that can be applied given sound planning and environmental considerations. Indeed, the Settlement Agreement itself

acknowledges that the Hartz site is suitable for inclusionary development. Only if properly labeled an unmet need site can the Property be fully utilized to meet what would otherwise be "lost need" that will never be addressed.

At the upcoming fairness hearing, Hartz will establish through testimony that the Settlement Agreement deficiencies summarized above compel a conclusion that the Settlement Agreement is not fair to low and moderate income households. To the contrary, it grossly short changes those households, due to the grossly inadequate proposed use of the Hartz site, and for numerous additional reasons, including those reasons summarized above. By way of further support for the Hartz objections, we also provide the following legal analysis.

LEGAL ARGUMENT

POINT I

THE COURT SHOULD CONCLUDE, FOLLOWING THE FAIRNESS HEARING, THAT THE SETTLEMENT AGREEMENT IS NOT FAIR TO LOWER INCOME HOUSEHOLDS, AND IS NOT COMPLIANT WITH THE TOWNSHIP'S MOUNT LAUREL OBLIGATIONS, INCLUDING ITS OBLIGATION TO PROVIDE FOR SATISFACTION OF THE TOWNSHIP'S RDP AND UNMET NEED OBLIGATIONS

The February 19, 2020 fairness hearing is critically important as it will be the only opportunity for any party to offer evidence that the Settlement Agreement is not fair and reasonable to low and moderate income households. To determine that the settlement is fair and reasonable to low and moderate income households, this Court must find as a matter of fact and law that the Settlement Agreement creates sufficient realistic opportunities for the provision of safe, decent affordable housing to satisfy the Township's housing obligations. The creation of realistic opportunities for safe, decent affordable housing is the core of the Mount Laurel mandate:

> Satisfaction of the Mount Laurel obligation shall be determined solely on an objective basis: if the municipality has in fact provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the Mount Laurel obligation to satisfy the constitutional requirement; if it has not, then it has failed to satisfy it. [Southern Burlington NAACP v. Mount Laurel Township, 92 N.J. 158, 221 (1983)("Mount Laurel II").]

A municipality must satisfy its entire housing obligation – satisfaction of only some portion of that obligation does not suffice:

> The municipal obligation to provide a realistic opportunity for low and moderate income housing is not satisfied by a good faith attempt. The housing opportunity provided must, in fact, be the substantial equivalent of the fair share. [Id. at 216].

Even where a municipality seeks a vacant land adjustment, and especially in such cases, municipalities must meet their entire obligation as governed by the RDP to be established by this Court, and must also propose an unmet need plan allowing the municipality to meet as much of its unmet need obligation as it can reasonably be expected to meet. The Township's plan does not meet these standards.

Indeed, the opportunity created must be "realistic," not merely theoretical or hypothetical. Id. at 260. Whether the opportunity provided by a municipality is "realistic" is measured solely by whether the municipality has made it likely that the requisite number of low and moderate income housing units will actually be built. Id. at 222.

To find that a settlement agreement is fair to low and moderate income households, a court must, among other things, find that, based upon these constitutional standards, it in fact creates sufficient realistic opportunities for the provision of safe, decent housing affordable to low and moderate income households to satisfy the negotiated housing obligation.

As our courts have recognized:

> While there are substantial considerations favoring settlement of *Mount Laurel* litigation, it also must be recognized that the improvident entry of a judgment of compliance would be harmful to the lower income persons on whose behalf the litigation is brought. As noted previously, such a judgment ordinarily will insulate a municipality from further

> *Mount Laurel* litigation for a period of six years. Therefore, there must be assurance that a settlement is consistent with the best interests of lower income persons before a judgment of compliance is issued.
>
> The risks of improvidently approving a settlement and issuing a judgment of compliance are most acute in *Mount Laurel* litigation brought by developers. A plaintiff developer and defendant municipality have complementary objectives in settlement negotiations which are likely to result in an agreement which does not advance the goals of *Mount Laurel.* A municipality's objective is to be assigned a small fair share of lower income housing. A developer's objective is to secure approval of his project. If a judgment of compliance is entered approving a settlement which advances both of these objectives, the result would be the construction of a small number of lower income housing units while insulating the municipality from further *Mount Laurel* litigation for six years.
>
> The danger of entering a judgment of compliance which does not adequately protect the interests of lower income persons is substantially reduced when a *Mount Laurel* claim has been brought by the Public Advocate or other public interest organization, since it may be assumed that generally a public interest organization will only approve a settlement which it conceives to be in the best interests of the people it represents. **However, even a public interest organization may incorrectly evaluate the strengths and weaknesses of its claim or be overly anxious to settle a case for internal organizational reasons**.
>
> Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 367-368 (Law Div. 1984), aff'd mem. on opinion below, 209 N.J. Super. 108 (App. Div. 1986).
>
> See also East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 326-27 (App. Div. 1996); Livingston Builders, Inc. v. Livingston, 309 N.J. Super. 370, 380 (App. Div. 1998).

In this respect, the role of a court in reviewing a proposed settlement agreement is similar to that of COAH under the FHA, N.J.S.A. 52:27D–301 to –329. In re Adoption of N.J.A.C. 5:96, 221 N.J. 1, 29 (2015) ("Mount Laurel IV"). Under the applicable statutory standard, COAH could lawfully grant a municipal petition to certify a Housing Element and Fair Share Plan only if it made an affirmative finding that "the combination of the elimination of unnecessary housing cost-generating features from the municipal land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible."

N.J.S.A. 52:27D-314(b). A failure by COAH to make such affirmative findings required the reviewing court to reverse the decision by COAH granting a municipal petition. In re Petition for Substantive Certification, Twp. of Southampton, 338 N.J. Super. 103 (App. Div. 2001); In re Denville, 247 N.J. Super. 186, 200 (App. Div. 1991); In re Township of Warren, 132 N.J. 1 (1993) (no finding that the site designated for construction of public housing is "suitable"); Elon Associates, L.L.C. v. Howell, 370 N.J. Super. 475, 480 (App. Div. 2004) (site zoned for inclusionary development lacks sewer service).

As set forth in the decision of the Appellate Division in Livingston Builders, Inc. v. Twp. of Livingston, supra, a court reviewing a settlement agreement for the purpose of determining whether it is fair to low and moderate income households should, where appropriate, utilize COAH's criteria in determining whether the agreement creates sufficient realistic housing opportunities to satisfy the negotiated housing obligation:

> By adoption of the Fair Housing Act, N.J.S.A. 52:27D–301 to –329, the Legislature, with the Supreme Court's approval, has designated the Council on Affordable Housing, acting pursuant to the Act, to establish the criteria for defining what a municipality must do to comply with its constitutional obligation to "provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families." N.J.S.A. 52:27D–302a; see Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 25, 31–32, 510 A.2d 621 (1986). COAH has established those criteria, see N.J.A.C. 5.93–1.1 to –15.1, and the courts should ordinarily defer to them. Hills Dev. Co., supra, 103 N.J. at 63, 510 A.2d 621; East/West Venture, supra, 286 N.J.Super. at 334 n. 6, 669 A.2d 260. If the relevant evidence presented at a fairness hearing held on proper notice to all interested parties shows that a proposed settlement satisfies those criteria, the settlement is entitled to the court's preliminary approval. [Id.]

Thus, for this Court to conclude that the subject Settlement Agreement should be approved, this Court must make a factual finding that the municipality has created sufficient realistic opportunities for the construction of safe, decent housing affordable to low and

moderate income households to satisfy the municipality's fair share of the unmet regional need. Mount Laurel II, supra, 92 N.J. at 221, 290.

Objectors like Hartz are in a unique position to bring to the Court's attention factual evidence, expert opinion, and legal analysis that may reveal deficiencies in a settlement agreement requiring that the court reject the agreement, or that it be modified. See, e.g., The Allan-Deane Corp. v. Bedminster, 205 N.J. Super. 87 (Law. Div. 1985)(court required modification of settlement agreement in response to objections), see generally, Federal Judicial Center, Manual for Complex Litigation at §21.643 at p. 326 (4th ed. 2004).

Given the deficiencies in the proposed fair share plan identified above, as well as for the reasons set forth in the Bernard Report, Hartz submits that this Court should find, following the fairness hearing, that the proposed Settlement Agreement is not fair to low and moderate income households and the same should be rejected.

POINT II

THE ISSUE OF WHETHER COAH RULES ARE STRICTLY BINDING IF THEY LEAD TO ILLOGICAL AND/OR UNCONSTITUTIONAL RESULTS GIVEN THE CONSTITUTIONAL SCOPE OF THE MOUNT LAUREL OBLIGATION AT ISSUE.

The Township concedes the suitability of the Hartz site, but due to the Township's interpretation of a COAH regulation governing towns, like the Township, that seek downward vacant land adjustments, it seeks to avoid the construction of affordable housing on the Hartz Property at its full development potential. More specifically, that regulation, N.J.A.C. 5:93-4.2, provides, in pertinent part:

> **5:93-4.2 Lack of land**
>
> (a) Municipalities that request an adjustment due to available land capacity shall submit an existing land use map at an appropriate scale to display the land uses of each parcel

> within the municipality. Such a map shall display the following land uses: single family, two-to-four family, other multi-family, commercial, industrial, agricultural, parkland, other public uses, semipublic uses and vacant land.
>
> (b) Municipalities that request an adjustment due to available land capacity shall submit an inventory of vacant parcels by lot and block that includes the acreage and owner of each lot.
>
> (c) Municipalities shall exclude from the vacant land inventory [sites bearing the characteristics in the rule]:
>
> ***
>
> (f) The Council shall consider sites, or parts thereof, not specifically eliminated from the inventory described in (d) above, for inclusionary development. The Council shall consider the character of the area surrounding each site and the need to provide housing for low and moderate income households in establishing densities and set-asides for each site, or part thereof, remaining in the inventory…
>
> (g) 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.

The Township acknowledges that the Hartz Property is suitable for inclusionary development, and it places the site within the category of "RDP sites" generating an RDP. As noted above and in the Bernard Report, Hartz submits that the site is not an "RDP site" because it is neither vacant nor developed with a low intensity use. However, the Township contends that the Hartz Property is an RDP site and that, due to the provisions of N.J.A.C. 5:93-4.2(g), quoted above, the Township can refuse to rezone the site for its full RDP because it contends it can meet much of the RDP the site generates, if it is considered an RDP site, through other "acceptable means.[1]" Hartz submits that the Township has not satisfied its full RDP through acceptable means but, even assuming *arguendo* that it could theoretically do so, we further submit that any such reading and application of N.J.A.C. 5:93-4.2 would be unconstitutional, for the reasons further detailed below.

[1] This municipal practice to avoid rezoning a suitable site is sometimes referred to as "the shell game."

Having proposed a plan that proposes satisfying much of the RDP generated by the Hartz site on other sites, assuming that the site is an RDP site, the Township takes its interpretation of the COAH regulation a step further and submits that it need not even apply unmet need overlay zoning to the suitable Hartz Property sufficient to meet its full development potential, for the same reason, and only for that reason, even though the above-quoted regulation relied upon only references RDP.

Hartz submits that the Township, which seeks a very substantial downward fair share adjustment due to lack of developable land, cannot constitutionally refuse to rezone the only significant tract of land in the Township that can meet a significant percentage of the Township's fair share obligations for its full development potential. We further submit that, should the Township's reading and interpretation of N.J.A.C. 5:93-4.2 be deemed plausible, that regulation should be disregarded by the Court. The obligation in question is based in our Constitution and, as such, the ultimate issue in this case is whether the Township's proposed plan satisfies the obligations imposed by the Constitution, regardless of any interpretation of COAH's regulations.

Indeed, the municipal obligation to provide affordable housing is rooted in the Supreme Court's 1975 decision in So. Burlington Cty. NAACP v. Twp. of Mount Laurel, 67 N.J. 151 (1975) ("Mount Laurel I"). There, the Court held that "every municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor." Id. at 174. It decided that zoning regulations that prevented certain groups from gaining access to adequate housing violated the New Jersey Constitution.

Id. As a result, the Court affirmatively required "each . . . municipality to affirmatively plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Id. at 179. It prohibited the adoption of "regulations or policies which thwart or preclude that opportunity." Id. at 180.

Later, after acknowledging "from experience . . . that unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals," the Court directed a mechanism by which to calculate and allocate fair share. So. Burlington Cty. NAACP v. Twp. of Mount Laurel, 92 N.J. 158, 199, 248-258 (1983) ("Mount Laurel II"). In Mount Laurel II, the Court reaffirmed that municipalities must affirmatively provide a realistic opportunity for the provision of their fair share of the regional need for low and moderate income housing, and clarified the affirmative obligation set out in Mount Laurel I to adopt zoning that would actually, rather than theoretically, produce affordable housing:

> Despite the emphasis in *Mount Laurel I* on the *affirmative* nature of the fair share obligation, 67 *N.J.* at 174, the obligation has been sometimes construed (after *Madison*) as requiring in effect no more than a theoretical, rather than realistic, opportunity. . . . It was never intended in *Mount Laurel I* that this awesome constitutional obligation, designed to give the poor a fair chance for housing, be satisfied by meaningless amendments to zoning or other ordinances. "Affirmative," in the *Mount Laurel* rule, suggests that the *municipality* is going to do something, and "realistic opportunity" suggests that what it is going to do will make it *realistically* possible for lower income housing to be built. Satisfaction of the *Mount Laurel* doctrine cannot depend on the inclination of developers to help the poor. It has to depend on affirmative inducements to make the opportunity real.
>
> It is equally unrealistic, even where the land is owned by a developer eager to build, simply to rezone that land to permit the construction of lower income housing if the construction of other housing is permitted on the same land and the latter is more profitable than lower income housing. One of the new zones in Mount Laurel provides a good example. The developer there intends to build

> housing out of the reach of the lower income group. After creation of the new zone, he still is allowed to build such housing but now has the "opportunity" to build lower income housing to the extent of 10 percent of the units. There is absolutely no reason why he should take advantage of this opportunity if, as seems apparent, his present housing plans will result in a higher profit. There is simply no inducement, no reason, nothing affirmative, that makes this opportunity "realistic." For an opportunity to be "realistic" it must be one that is at least sensible for someone to use.
>
> [Mount Laurel II, 92 N.J. at 260-261]

In sum, compliance with the affirmative constitutional obligation to provide a realistic opportunity for the creation of a municipality's fair share of the regional need for low and moderate cost housing requires more than hopeful rezoning – real incentives to change landowners' plans for their properties are necessary to spur the type of investment required to produce affordable housing.

In requiring those choices, the Court cautioned that while the mandate to enable affordable housing was not to create a free-for-all, it was necessary for municipalities to eliminate virtually all impediments to doing so. In particular, the Court noted that

> Subject to the clear obligation to preserve open space and prime agricultural land, a builder in New Jersey who finds it economically feasible to provide decent housing for lower income groups will no longer find it governmentally impossible. Builders may not be able to build just where they want — our parks, farms, and conservation areas are not a land bank for housing speculators. But if sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor. And if the area will accommodate factories, it must also find space for workers.
>
> [Mount Laurel II, 92 N.J. at 211]

The Court was clear that when a municipality is required to address its fair share, only very specific types of lands could be excluded from development.

Shortly thereafter, in 1985 and in response to Mount Laurel II, the Legislature adopted the FHA, N.J.S.A. 52:27D-301 et seq. The FHA charged COAH with allocating regional fair

share amongst New Jersey's municipalities. N.J.S.A. 52:27D-307(c)(1). It also authorized COAH to provide for adjustments to municipal obligations when, among other reasons, "[v]acant and developable land is not available in the community." N.J.S.A. 52:27D-307(c)(2)(f).

In Hills Development Company v. Tp. of Bernards, 103 N.J. 1 (1986), our Supreme Court upheld the constitutionality of the FHA. In doing so, the Court made clear that it would defer to COAH as a matter of comity, but only so long as COAH continued to implement the constitutional obligations imposed by the Mount Laurel doctrine. Id. 103 N.J. at 65. The Court also envisioned that trial courts managing Mount Laurel cases would, to the extent deemed appropriate at the discretion of the trial courts, apply the not-then-adopted COAH regulation standards to court cases. Id. at 63.

Similarly, in Mount Laurel IV, our Supreme Court envisioned that certain second round COAH regulations of a substantive nature, especially those regulations detailing a method for the allocation of regional fair share obligations, would be used by the trial courts as a guide. Mount Laurel IV, supra, 221 N.J. at 30. The Court also held that trial courts could, in their discretion, allow for the application of certain COAH "third round" regulation standards. Id. at 30-33.

Our courts have made it clear that, to the extent that COAH regulations do not faithfully allow for satisfaction of the constitutional obligations at issue, those regulations are invalid. See e.g. In re Adoption of N.J.A.C. 5:96 & 5:97, 215 N.J. 578 (2013).

Reading the above-cited cases collectively, certain principles emerge: (1) municipalities have a constitutional duty to satisfy their entire fair share obligations or, if unable to do so due to lack of vacant land or some other legitimate factor, as much of their fair share obligations as reasonably possible; (2) the adoption of the FHA and the creation of COAH did not modify the scope of those constitutional obligations; and (3) trial courts have the discretion to apply COAH

regulation standards to the extent that they do not unconstitutionally dilute the constitutional obligations at issue.

As noted above, the Township reads N.J.A.C. 5:93-4.2 to provide that the Township may refuse to rezone the Hartz Property for inclusionary development at its full development potential, either as a site to meet the Township's RDP or as an unmet need overlay zoning site, despite the fact that the site is suitable and despite the fact that the Township has a very sizeable unmet need obligation even if the site is zoned for inclusionary development at its full potential. For the reasons expressed above, Hartz respectfully submits that, assuming that the Township correctly reads and interprets N.J.A.C. 5:93-4.2 so as to allow the Township to evade its constitutional obligations in the way it proposes, that rule should not be applied by this Court. The Township's proposed interpretation of N.J.A.C. 5:93-4.2 is inconsistent with the constitutional obligations at issue. Simply put, the Constitution overrides any such administrative regulation which is, at most, merely a guide in these trial court proceedings.[2]

POINT III

LEGAL PRINCIPLES GOVERNING THE ADEQUACY OF THE TOWNSHIP'S FAIR SHARE PLAN AND THE RELATIONSHIP BETWEEN THE MAGNITUDE OF THE TOWNSHIP'S UNMET NEED RELATIVE TO THE QUESTION OF HOW ROBUST ITS UNMET NEED/OVERLAY ZONING PLAN MUST BE TO PASS CONSTITUTIONAL MUSTER.

Per Judge Jacobson's opinion and the Settlement Agreement, the Township cumulative third round fair share obligation is 440 units of lower income housing. The Township must address both its RDP and its unmet need. We next address those components in turn.

[2] We further note that, while it is not necessary to reach the issue given the constitutional precepts that control, N.J.A.C. 5:93-4.2 is at variance in numerous respects with the FHA provision governing vacant land adjustments, N.J.S.A. 52:27D-310.1.

The Settlement Agreement Provisions Concerning Alleged Satisfaction of the RDP

Through its fair share plan that is to be the subject of the upcoming fairness hearing, the Township contends that it has an RDP of 157 units, with an unmet obligation of 283 lower income units given the Township's total fair share obligation of 440 units.

The Bernard Report first notes that the proposed plan violates both the FHA and COAH regulations as it proposes to subtract "credits" from the Township's RDP obligation, whereas the foregoing law required that credits first be deducted from the Township's overall fair share obligation of 440 units. Thus, all of the credits for past housing activity proposed in the plan should be rejected as applied to the Township's RDP.

Moreover, it will be submitted at the fairness hearing that, for the reasons identified in the Bernard Report, the Township's plan does not even propose 157 creditable units in a realistic way. We will respectfully submit at the fairness hearing that a realistic opportunity for satisfaction of the Borough's RDP is woefully lacking.

The Settlement Agreement Provisions Concerning Unmet Need/Overlay Zoning

As set forth in the Bernard Report, the Hartz site should, given the applicable FHA and COAH regulation provisions, be considered an unmet need site; not an "RDP site." Under the COAH regulations, if an "unmet need" exists, the municipality is obligated to do more than merely create sufficient housing opportunities to satisfy its RDP. A municipality is expected to take affirmative steps toward meeting its unmet need. N.J.A.C. 5:93-4.1(b) provides:

> Where the RDP is less than the precredited need minus the rehabilitation component **the municipality shall provide a response toward the obligation not addressed by the RDP**.

[(emphasis added); see also N.J.A.C. 5:97-5.2(b) ("Municipalities shall provide a response to the unmet need in accordance with N.J.A.C. 5:97-5.3.)]

A municipality must exercise its powers to create additional housing opportunities to the extent possible, despite the lack of vacant land, so as to come as close as possible to meeting its entire fair share housing obligation. Specifically, it must identify land in the municipality that, although not vacant under N.J.A.C. 5:93-4.2(c), may "develop or redevelop." N.J.A.C. 5:93-4.2(h). In explaining its rules to the public in various manuals over the years, COAH described the entire unmet need as a goal to be addressed.

Having identified such lands, the municipality must take steps to assure that any development or redevelopment on such land results in the production of affordable housing. The COAH regulations in this regard noted that COAH, when it was functional, may require: 1) "zoning amendments that permit the construction of apartments;" 2) "zoning amendments that permit the construction of accessory apartments;" 3) zoning amendments that establish overlay zones that require any development or redevelopment include low and moderate income housing; or 4) zoning amendments to impose development fees on any development or redevelopment. N.J.A.C. 5:93-4.2(h); N.J.A.C. 5:93-4.1(b). Because COAH is no longer functional, that obligation now rests with this Court.

In its 2008 regulations, COAH reaffirmed this regulatory standard as to prior round obligations. N.J.A.C. 5:97-5.3(b). In reaffirming this standard, COAH made its purpose unambiguously clear. In its official response to a comment to its proposed regulations by a municipality urging that N.J.A.C. 5:97-5.7 not be adopted, COAH declared:

> RESPONSE: The Council does not consider unmet need as a permanent adjustment to municipal affordable housing obligations. Municipalities are still required to provide a response to the unmet need in accordance with N.J.A.C. 5:97-5.3. The Council requires meaningful plans for unmet need. [Response to Comments on Proposed N.J.A.C. 5:97-5.1(b), 40 N.J. Reg. 6005 (October 20, 2008).]

This regulatory mandate implemented the holdings Mount Laurel II concerning developed municipalities. The Supreme Court stressed that under the constitutional principles enunciated in Mount Laurel II, any distinctions between developed, developing, and non-developed municipalities are "irrelevant" to the constitutional obligation. Mount Laurel II, 92 N.J. at 240 n. 15. It recognized, however, that compliance by fully developed communities with these housing obligations would pose "difficult problems" and would require special "creativity and cooperation" on the part of the municipality. Id.

Furthermore, New Jersey courts have repeatedly reaffirmed these holdings and interpreted COAH rules in a manner that requires a municipality to undertake affirmative actions to satisfy its remaining unmet need. Fair Share Housing Center, Inc. v. Twp. of Cherry Hill, 173 N.J. 393, 407-08 (2002); see Holmdel Builders Association v. Holmdel, 121 N.J. 550, 562-63 (1990). Indeed, it could not require less of municipalities without violating those holdings.

In Fair Share Housing Center, Inc v. Twp. of Cherry Hill, Cherry Hill claimed that it lacked sufficient vacant land to meet its entire fair share housing obligation, as determined by COAH. 173 N.J. 393, 395 (2002). Based upon a determination that the town lacked sufficient vacant land to meet its entire fair share obligation through inclusionary zoning, the trial court reduced the municipality's housing obligation and approved a housing plan to meet that reduced obligation. Id. at 401 and 401 n.7. A developer subsequently proposed to redevelop the site of the former Garden State Racetrack which was not previously included in Cherry Hill's fair share

plan. Id. at 404. The trial court held that Cherry Hill was not required to rezone the property for inclusionary development because it already had a plan to satisfy its housing obligation as reduced by the court. See id. at 415-16. The municipality could instead simply require the payment of a fee to subsidize municipal implementation of its existing court-approved housing plan. Id.

The Supreme Court reversed this holding. Id. at 415-16. It first reaffirmed its holding in Mount Laurel II that every municipality, even those claiming to be fully developed, must create sufficient housing opportunities to satisfy their fair share housing obligation. Id. at 407-08. It held that a municipality that has been permitted to reduce its housing obligation because of lack of vacant land cannot avoid utilizing sites that subsequently become available for development to address its entire housing obligation. Id. The Court held that municipal compliance with the constitutional mandate, as codified in the Fair Housing Act, "would be undermined irreparably if a municipality could, in effect, exempt choice parcels of land from its affordable housing obligation by the simple expedient of imposing a development fee." Id. at 416.

Fair Share Housing Center, Inc v. Twp. of Cherry Hill supports the general proposition that a municipality claiming a lack of vacant land must take advantage of all development opportunities that can actually create affordable housing, so as to come as close as possible to meeting its entire fair share housing obligation. A clear preference exists for actual construction of affordable housing units over alternative mechanisms when a municipality has not satisfied its entire fair share obligation.

Indeed, courts have limited attempts by municipalities to avoid meeting their unmet need when presented with development opportunities through the use of "shell games" and other

evasive practices. See Joseph Kushner Hebrew Acad., Inc. v. Twp. of Livingston, No. A-5797-10T1, 2013 WL 4607526, at *2 (App. Div. Aug. 30, 2013); see also In re Fair Lawn Borough, Bergen Cty., Motion of Landmark at Radburn, 406 N.J. Super. 433, 441 (App. Div. 2009).

In Joseph Kushner Hebrew Acad., Inc. v. Twp. of Livingston, No. A-5797-10T1, 2013 WL 4607526, at *2 (App. Div. Aug. 30, 2013), Livingston was granted a judgment of compliance and repose that approved its housing plan meeting a reduced second round obligation based on a vacant land adjustment. Id. Livingston implemented all mechanisms to meet its RDP but an unmet need of 182, which was later reduced to 66, continued to exist. Id. Importantly, a property known as the "Squiretown property" was used to calculate Livingston's second round RDP but was not used to meet that RDP. Id. Livingston failed to file a petition for third round substantive certification and a builder's remedy suit followed. Id. at 3. Site specific relief was sought for two properties, including the Squiretown property. Id.

Livingston first argued that a builder's remedy was not appropriate because it remained in compliance with its second round obligation given that it met its RDP and sought to capture additional affordable housing obligations through redevelopment proposals with two builders. Id. at 11-12. The Appellate Division rejected this argument, reasoning that Livingston possessed a continuing obligation to satisfy its entire unmet need and the redevelopment proposals alone did not fulfill that need. Id .at 13-14. "Given the amount of affordable housing opportunities that were available in the Township, defendants could have done more to address unmet need before plaintiffs filed suit." Id. at 12; see also Tomu Dev. Co. v. Borough of Carlstadt, No. BER-L-5894-03, 2006 WL 1375222, at 4 (N.J. Super. Ct. Law Div. May 19, 2006), aff'd, No. A-5512-05T1, 2008 WL 4057912 (App. Div. Sept. 3, 2008) (Municipality found to be noncompliant with

its constitutional fair share obligation for failing to do more than adopt a general overlay zone to address the unmet need).

Livingston also argued that the Squiretown property was not required to be included in its third round housing plan because it was previously accounted for in the second round RDP and the affordable housing obligation associated with the property was already addressed. Id. at 17-18. The Appellate Division also rejected this argument. Id. at 18. The Appellate Division adopted Special Master McKenzie's reasoning that this argument was irrelevant "in light of COAH's current rules, which require that any unmet need from the prior round be addressed in addition to the calculated realistic development potential. [I]f a plaintiff in a Mount Laurel lawsuit proposes a suitable site for inclusionary residential development and such a development will address part of the unmet need, it cannot be exempted from consideration merely because the site was not needed to meet the court-approved reasonable development potential." Id.

Thus, when a proposed development will address a part of the unmet need, a municipality may not exempt the property from its housing plan merely because it was not needed to meet its RDP. Permitting this conduct under any circumstance would run counter to the goal of achieving constitutional compliance with a municipality's entire affordable housing obligation. In this case, the entire Hartz Property simply must be rezoned for inclusionary development at the site's full development potential which, as noted above, is 30 dwelling units per acre. There is no legitimate reason for the Township to refuse to do so.

In In re Fair Lawn Borough, Bergen Cty., Motion of Landmark at Radburn, 406 N.J. Super. 433, 441 (App. Div. 2009), COAH reduced Fair Lawn's housing obligation based upon a

determination that Fair Lawn lacked sufficient vacant land to meet its entire fair share obligation through inclusionary zoning. Id. at 437. An unmet need existed. Id.

Fair Lawn received second round substantive certification on the condition that it adopt an overlay zone over certain property located within the municipality in an effort to address its unmet need. Id. at 437-38. After years of delay and a "last chance" threat from COAH to dismiss its fair share plan, Fair Lawn finally adopted an overlay zoning ordinance at 6 units per acre for the subject property, which was later challenged as inadequate and invalidated by the trial court. Id. at 438. Fair Lawn did not adopt a new overlay ordinance in response to its unmet need and, after filing a third round petition, it expressed its intent to exclude the subject property from the plan entirely. Id. In light of Fair Lawn's long history of general non-compliance, refusal to adopt an overlay zone over the subject property, and non-compliance with the condition of its second round substantive certification, COAH dismissed Fair Lawn's petition. Id. at 439-440.

Fair Lawn appealed, contending that COAH should have permitted it to submit an amended petition proposing to meet its fair share requirement without using the subject property. Id. at 440. The Appellate Division held that Fair Lawn could not exclude the subject property from its plan unless it proved that it already had enough existing affordable housing units to satisfy its fair share obligations without the need for the subject property. Id. at 441. The Appellate Division provided as follows:

> The Fair Housing Act, N.J.S.A. 52:27D–301 to –329, contemplates the provision of actual affordable housing, not endless promises of future compliance. See Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1, 43–44 (1986). The FHA grants a municipality significant discretion in structuring its housing element. See N.J.S.A.52:27D–311(a); In re Montvale Petition for Substantive Certification, 386 N.J. Super. 119, 133 (App. Div. 2006). But the statute does not require COAH to sanction the playing of "shell games," in

> which towns include properties in their fair share plans for decades, only to seek their removal from the plans when the developers are close to building the affordable housing. [Id. (emphasis added)]

Absent proof that the property was no longer appropriate for inclusion, the Appellate Division found that there was no obligation on COAH's part to permit removal of the subject property from the plan "**based only on the town's policy preference to meet its fair share obligation in another way.**" Id. at 443 (emphasis added). The Appellate Division reaffirmed the principle "that COAH did not intend 'unmet need' to become 'a permanent adjustment to municipal affordable housing obligations' " and that municipalities receiving a vacant land adjustment should be required to satisfy their unmet need should the opportunity for development present itself. Id. at 444 (citations omitted).

While Fair Lawn's non-compliance with the conditions of its second round substantive certification influenced the court's holding, it is apparent that both COAH and the courts forbid "shell games" when a municipality permits its unmet need to persist in the face of real development opportunities.

In conclusion, courts will not deem a municipality constitutionally compliant when it either completely fails to or insufficiently addresses its affordable housing obligation whether that obligation is labelled as unmet need or RDP. Courts will require a municipality receiving a vacant land adjustment to take advantage of proposed development opportunities when the municipality's fair share obligation remains unsatisfied.

As noted above, the Township submits that its RDP is 157 units of affordable housing. Given the Township's 440 unit affordable housing obligation, the Township therefore requests a downward adjustment, due to lack of developable land, of 283 lower income units. In an

ostensible effort to meet that unmet need, the proposed fair share plan proposes an unmet need plan on a number of sites, excluding the Hartz Property, in a manner that, in the opinion of Mr. Bernard, is unlikely to yield any appreciable affordable housing.

We have noted above that the Township has refused to propose unmet need overlay zoning allowing full development of the Hartz Property, despite the Township's concession that the site is suitable for inclusionary development. It refuses to do so solely on the basis of its reading of N.J.A.C. 5:93-4.2. In other words, the Township refuses to do so solely because it "doesn't want to do so." It has been held that, when an unmet need exists, properties utilized to calculate the RDP but not used to meet the RDP generated by a site are generally required to be utilized in order to address the unmet need when there are no other alternative means exist to satisfy the unmet need. See Joseph Kushner Hebrew Acad., Inc. v. Twp. of Livingston, No. A-5797-10T1, 2013 WL 4607526, at *2 (App. Div. Aug. 30, 2013).

As we submit above, the Township's interpretation of COAH rules are constitutionally infirm and indefensible to the extent that they would allow the Township to refuse to rezone the Hartz Property for inclusionary development at a density of 30 units per acre. [3]

In sum, the unmet need/overlay zone plan proposed through the Settlement Agreement does not provide a realistic opportunity for the provision of any meaningful affordable housing development, and it is constitutionally indefensible in a municipality that proposes an unmet need of 283 affordable units. Indeed, there is no constitutionally permissible reason to exclude

[3] The Township's plan also asserts that the Township's "mandatory set-aside ordinance" should be counted as part of its unmet need plan. As noted in the Bernard Report, such ordinances, which impose set-aside obligations under certain circumstances if a zoning board or a governing body decides in the future, at their sole discretion, to allow for high density development, are not recognized as legitimate unmet need plan devices, through COAH regulations or otherwise. They are unrealistic compliance measures that are completely reliant on the good will of Township officials, as they give property owners no rights to rezonings.

the Hartz Property from full development at a density of 30 units per acre through overlay zoning. The provisions of the Settlement Agreement identifying the Property as suitable for inclusionary development, but not utilizing the property to its full potential, are indefensible.

CONCLUSION

For the aforementioned reasons, as well as those set forth in the Bernard Report, to be elaborated upon at the fairness hearing, the Court should declare that the Settlement Agreement is not fair to lower income households, and does not provide a realistic opportunity for the development of affordable housing within the Township sufficient to meet the Township's RDP or its unmet need obligations.

Thank you for your kind attention to this matter.

Respectfully submitted,

Thomas F. Carroll, III

Dated: 1/13/20