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CRANFORD DEVELOPMENT ASSOCIATES, LLC, an LLC organized under the laws of the State of New Jersey, SAMUEL HEKEMIAN, PETER HEKEMIAN, JEFFREY HEKEMIAN, and ANN KRIKORIAN as trustee for RICHARD HEKEMIAN and MARK HEKEMIAN **Plaintiff-Respondents/Cross-Appellants** **v.** **TOWNSHIP OF CRANFORD, MAYOR AND COUNCIL OF THE TOWNSHIP OF CRANFORD AND THE PLANNING BOARD OF THE TOWNSHIP OF CRANFORD** **Defendants-Appellants/Cross-Respondents**	**SUPREME COURT OF NEW JERSEY** **DOCKET NO. 077744** Appellate Division Docket No.: A-005822-12T2 Civil Action

PETITION FOR CERTIFICATION BY APPELLANT/PETITIONERS, TOWNSHIP OF CRANFORD, MAYOR AND COUNCIL OF THE TOWNSHIP OF CRANFORD, AND THE PLANNING BOARD OF THE TOWNSHIP OF CRANFORD

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On the Brief

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STATEMENT OF THE MATTER

This petition implicates three crucial facets of the highly-controversial "builders remedy," an anti-exclusionary zoning litigation tool unleashed by this Court in So. Burl. Cnty. N.A.A.C.P. v. Tp. of Mt. Laurel, 92 N.J. 158 (1983) ("Mount Laurel II"). Given the wide array of important public interests involved, this Court should grant certification and make the following three determinations:

1. A plaintiff that engages in demonstrably pretextual "***pre-suit negotiations***" has abused an important threshold aspect of the Mount Laurel process and therefore forfeits any right to a builders remedy.

2. Under Toll Brothers, Inc. v. Tp. of W. Windsor, 173 N.J. 502 (2002), a plaintiff must demonstrate that it is the "***catalyst for change***" to satisfy its burden under the first element of the builders remedy test. A plaintiff that cannot make such proofs is not entitled to a builders remedy.

3. "***Proposed project***" is a key term of art in the Mount Laurel arena. When a municipality proves that plaintiff's "proposed project" does not comport with principles of sound land use planning and is otherwise unsuitable for the site in question, it has ***satisfied its burden*** under the third element of the builders remedy test. In such a case, the plaintiff is not entitled to a builders remedy.

These issues directly implicate three of the four main aspects of the builders remedy test set forth in Mount Laurel II; namely, the ***pre-suit limitations***; the ***first element*** of the builders remedy test ("success in litigation"); and the ***third element*** of the builders remedy test (suitability of the plaintiff's "proposed project.") This appeal therefore provides

this Court with a ***rare*** opportunity to reinforce, rescind, and/or redefine the various parameters of the builders remedy. Given the current status of the Mount Laurel doctrine, the timing of this appeal could not be better.

An independent basis exists to certify the "catalyst for change" issue associated with the first element of the builders remedy test, because the Appellate Division's opinion below directly conflicts with the holding in Mount Olive Complex v. Mount Olive Tp., 356 N.J.Super. 500 (App. Div.), certif. denied, 176 N.J. 73 (2003). Given these two inconsistent published opinions, this Court should certify, and settle, the question of whether the first prong of the builders remedy test includes a causal element.

Finally, this petition also implicates the jurisdictional sanctity of municipal planning boards, another important public interest calling for Supreme Court review. Here, the trial judge improperly ***seized jurisdiction*** from the Cranford Planning Board -- without any provocation -- and shifted the Board's statutory duties to a "Special Hearing Examiner" (Douglas K. Wolfson, Esq.) who thereafter presided over, and approved, the plaintiff's development application.

As detailed below, these issues clearly satisfy the standards for Supreme Court review.

QUESTIONS PRESENTED

Appellant/Petition Township of Cranford urges this Court to certify the four (4) overarching legal issues identified above. To facilitate the analysis regarding the three Mount Laurel issues,[1] the Township provides background information before discussing the specific questions presented.

Background On The Mount Laurel Issues

On January 20, 1983, this Court issued Mount Laurel II. The most controversial feature of Mount Laurel II was the "builders remedy," which effectively weaponized exclusionary zoning litigation against municipalities that were unwilling to comply voluntarily. This Court unleashed the builders remedy because it felt compelled at the time "to fashion a remedy that was ***necessary to meet the urgency of the [exclusionary zoning] problem***. . . ." In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 584 (2013)(emphasis added).

This Court also wisely recognized that the lure of easy money would tempt even the most virtuous developer to abuse this novel legal power. To curb this abuse, it imposed numerous limitations on the builders remedy, such as: (1) requiring developers to make a good faith effort to obtain relief before resorting to litigation; (2) establishing a three-part test

[1] No background information is necessary regarding the Planning Board jurisdiction issue.

placing the burden on the plaintiff on the first two elements; and (3) imposing a number of additional limitations. However, this Court also stated: "Trial courts ***should guard the public interest carefully to be sure that plaintiff-developers do not abuse the Mount Laurel doctrine.***" See 92 N.J. at 281 (emphasis added). Clearly, this admonition sought to avoid swapping municipal zoning abuse with abuse by developers.

In addition to other limitations, the builders remedy test set forth in Mount Laurel II established three elements:

> We hold that where a developer [1] **succeeds in Mount Laurel litigation** and [2] proposes a project providing a ***substantial amount of lower income housing,*** a builders remedy should be granted [3] ***unless*** the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's ***proposed project*** is ***clearly contrary to sound land use planning.***"
>
> [Id. at 279-280 (emphasis and bracketed numbers added) (footnote 37 omitted).

Thus, a plaintiff seeking a builders remedy carries the burden on the first two elements: it must (1) "succeed" in litigation and (2) present a "proposed project" with a "substantial" amount of affordable housing. Ibid. If the plaintiff satisfies both elements, the burden shifts, and the municipality can defeat a builders remedy by proving that the "proposed project" violates principles of sound land use planning.[2] Ibid.

[2] This Court was especially concerned about the negative impact builders remedies might have on other legitimate planning concerns such as infrastructure, preservation of open space, natural resources, etcetera.

Predictably, opportunistic developers flooded the courthouses with builders remedy lawsuits. See Frizell, 36 N.J. Prac., Land Use Law §18.4 (2d ed.); J.W. Field Co. v. Tp. of Franklin, 204 N.J. Super. 445, 54-55 (Law Div. 1985) ("the level of Mount Laurel litigation has ***increased dramatically*** since Mount Laurel II and ***every suit*** has been brought by a builder [seeking a builders remedy]."") (emphasis added). Developers won these lawsuits so often and easily that one attorney bragged that "***municipalities were like 'baby harp seals***. They can slither and squeal, but no municipality seems to have won a Mount Laurel II lawsuit. The townships decide to give in fast because ***the killing is really much more merciful if it's quick.'***" Henry A. Span, "How the Courts Should Fight Exclusionary Zoning," 32 Seton Hall L. Rev. 1, 107 (2001).

On July 2, 1985, however, the Legislature enacted the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 to 329 (FHA), which substantially marginalized the builders remedy. Despite strident challenges by developers, this Court upheld every aspect of the FHA in Hills Dev. Co. v. Tp. of Bernards, 103 N.J. 1 (1986) ("Mount Laurel III").[3]

Therefore, it expressly sought to balance the need for affordable housing with the need for "sound land use planning" by synthesizing the Mount Laurel doctrine with the State Development Guide Plan. 92 N.J. at 213.

[3] Developers stridently urged this Court to invalidate the FHA due to the injustice it would cause. This Court flatly rejected that claim by reminding developers that the builders remedy was is intended to advance the interests of lower income households, not developers. 103 N.J. at 42 ("[T]he builder's

In 2002, this Court seized an opportunity in Toll to revisit the role of the builders remedy in Mount Laurel jurisprudence due, in part, to the New Jersey State League of Municipalities' argument that the remedy should be eliminated. The Court declined to take that measure but, in so doing, explained that the ***purpose*** of the builders remedy "is to accomplish ***what a municipality might otherwise have been unable or unwilling to do itself. . . .***" 173 N.J. at 562 (emphasis added). In light of this causal purpose, the Court ruled that, to "succeed in litigation" (and satisfy the ***first element*** of the builders remedy test) a plaintiff must prove that (1) the subject municipality violated the constitutional Mount Laurel obligation; "***and***" (2) its exclusionary zoning lawsuit ***caused*** the town to achieve compliance, and therefore was the "catalyst for change." 173 N.J. at 560. In fact, this Court found the causal aspect to be the "***critical point.***" Ibid.

A mere five months later, on certification and direct remand by this Court,[4] Honorable James M. Havey, P.J.A.D. issued Mount Olive Complex v. Mount Olive Tp., 356 N.J.Super. 500 (App.

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remedy [is not] part of the constitutional obligation" but is "simply a method for achieving the 'constitutionally mandated goal' of providing [the] lower income housing needed by the citizens of this state."); Id. at 55 ("***No builder with the slightest amount of experience could have relied on the remedies provided in Mount Laurel II*** in the sense of justifiably believing that they would not be changed, or that any change would not apply to the builders. (emphasis added).

[4] 174 N.J. 359 (2002) ("***Certification is granted***, and the matter is ***summarily remanded to the Appellate Division for reconsideration in light of Toll Brothers*** . . . .") (emphasis added) (internal citations omitted).

Div.), certif. denied, 176 N.J. 73 (2003), which specifically applied the "catalyst for change" principle and denied a builders remedy because the developer did not ***cause*** the Township to comply with its Mount Laurel obligations. Id. at 511 (finding that, unlike the facts in Toll Brothers, "[n]o such 'non-compliance,' 'success' or '***change***' in the Township's ordinance ***as a result of plaintiff's law suit***, has been demonstrated here.")(emphasis added). Clearly, by using the word "catalyst," Toll Brothers and Mount Olive shows that proof of noncompliance is insufficient to satisfy the first prong of the builders remedy test. The developer must ***also*** prove that its lawsuit was the "catalyst for change".

Since 2002, this Court has not certified any appeal that so squarely involves the legal burdens and limitations of the builders remedy. The temptation to abuse the power of the builders remedy has not waned, however, and the facts and circumstances of this case particularly support that conclusion. This petition therefore provides a ***perfect opportunity*** for this Court (1) to reevaluate the essential parameters of the builders remedy test; and (2) to provide guidance to all stakeholders in the Mount Laurel arena based on the realities in 2016 moving forward. Equally important, this case also provides this Court with a palette of facts to enable it, once again, to caution

developers and trial judges alike that abuse of the Mount Laurel doctrine will not be tolerated.

QUESTION #1 CONCERNING PLAINTIFFS' THRESHOLD OBLIGATION TO MAKE A GOOD FAITH ATTEMPT TO "OBTAIN RELIEF WITHOUT LITIGATION" BEFORE FILING A BUILDERS REMEDY LAWSUIT.

The law is settled that an interested party "is required to engage in good faith negotiations before filing a Mount Laurel lawsuit." Cranford Dev. Assocs., LLC v. Tp. of Cranford, 2015 WL 10715449, slip op. at 2 (citing Mount Laurel II, supra, 92 N.J. at 218; Oceanport Holding, L.L.C. v. Bor. of Oceanport, 396 N.J.Super. 622, 627, (App. Div. 2007)). In the wake of Mount Laurel II, Hon. Eugene D. Serpentelli, J.S.C. defined the parameters of the pre-suit obligation in J.W. Field Co., Inc. v. Tp. of Franklin, 204 N.J.Super. 445 (Ch. Div. 1985). Given the strong public interest in avoiding Mount Laurel litigation, J.W. Field conditions a builders remedy on the developer's ability to prove not only that it attempted to avoid litigation, but that it ***would have been futile to continue negotiations*** before it filed suit. Id. at 461. ("The plaintiff choosing to win the race to the courthouse ***by relying upon the futility defense*** had better be prepared to prove it ***or risk having won the race only to be disqualified for a false start.***")(emphasis added).

Thus, the first questions in this matter are whether the courts below (1) erred by holding that CDA made a good faith

attempt "to obtain relief without litigation" given the factual record preceding the lawsuit; (2) misapplied the "futility" principle set forth in J.W. Field; and (3) erred by faulting Cranford's governing body for seeking input from its Planning Board concerning CDA's request for its "proposed project" to be included in Cranford's impending Housing Element and Fair Share Plan.[5] An examination of that record plainly reveals that CDA's negotiations with the Township were purely pretextual and that CDA withheld material information that could have answered the questions raised concerning an extraordinarily intensive development proposal on an extraordinarily constrained site under circumstances where the developer was demanding a response to its proposal in an extraordinarily short time.

QUESTION #2 CONCERNING THE INTERPRETATION OF THIS COURT'S USE OF THE TERM "CATALYST FOR CHANGE" IN TOLL BROTHERS, AND THE CONFLICTING INTERPRETATIONS OF THAT TERM BY THE APPELLATE DIVISION IN THE MOUNT OLIVE AND CRANFORD OPINIONS.

The second overarching question asks this Court to settle conflicting interpretations of the term "catalyst for change" in the Mount Laurel context.

In Toll, this Court stated that the purpose of the builders remedy was to force compliance upon a town that was either

[5] The record shows that CDA openly recognized that the Township was literally on the cusp of filing its Plan (on or before December 31, 2008), which is precisely why CDA was so impatient, and why it filed its suit on November 12, 2008. Aa2957; 1302.

"unwilling or unable to do itself." 173 N.J. at 562. Accordingly, it built on that principle as follows:

> We find that Toll Brothers ***succeeded at trial.*** West Windsor's claim that it was already compliant and had instituted amendments to its fair share plan at the time Toll Brothers initiated its lawsuit ***ignores the critical point -- it was Toll Brothers [1] that served as the catalyst for change and [2] that successfully demonstrated West Windsor's non-compliance with its constitutional obligation.***
>
> [Id. at 560 (emphasis and bracketed numbers added).]

This language is unambiguous: to satisfy the burden on the first element of the builders remedy test, a plaintiff must prove ***not only*** that the municipality violated its Mount Laurel obligations ***but also*** that its suit was the "catalyst for change". If the test was not conjunctive, there would be no reason to use the word "and" nor would this Court have any reason to find this the "critical point." In addition, this Court soundly rooted the term "catalyst for change" with the very purpose of the builders remedy: namely, to create a tool for developer/plaintiffs "to accomplish ***what a municipality might otherwise have been unable or unwilling to do itself. . . .***" 173 N.J. at 562 (emphasis added).

Months later, in Mount Olive Complex v. Tp. of Mount Olive, 174 N.J. 359 (2002), this Court granted certification and immediately "remanded [the matter] to the Appellate Division ***for reconsideration in light of Toll Brothers . . . .***" (emphasis

added). On remand, the Appellate Division specifically applied the "catalyst for change" standard from Toll Brothers, and affirmed its denial of a builders remedy because the plaintiff was not the "catalyst for change." See Mount Olive Complex v. Tp. of Mount Olive, 356 N.J.Super. 500, 511 (App. Div. 2003). Such direct and parallel treatment by the Supreme Court **and** the Appellate Division eliminated **any question** of whether a developer must demonstrate that it was the "catalyst for change" in order to secure entitlement to a builders remedy.[6]

However, the panel below flatly ***rejected*** the notion that "in addition to winning the underlying exclusionary zoning lawsuit, a Mount Laurel plaintiff must also prove that it was a 'catalyst' for change, in order to qualify for a builders remedy." See slip op. at 4 (emphasis added). In fact, even though the very language it quoted is found in Toll Brothers and Mount Olive, the panel characterized the Township's position as a mere "red herring." Ibid. The Court ignored that Cranford was completely "willing" to comply and indeed was working on completing its affordable housing plan - an effort that began well before CDA showed up at the eleventh hour after it entered a contract -- so that the Township could file it with COAH by

[6] See also K. Hovnanian Shore Acquisitions v. Tp. of Berkeley, 2003 WL 23206281 (App. Div. 2003) (unreported) (Aa6486) (interpreting Toll Brothers and declaring that "a **builder's remedy action should be considered a remedy of last resort**.")

the end of the year. The court ignored what the record unambiguously reveals: that **CDA filed suit not to cause Cranford to comply, but because the Township was seeking to comply.** Instead, the court focused on problems that CDA found with the Township's plan after it filed suit, thereby ignoring that CDA was not the "catalyst for change".

Cranford therefore asks this Court to settle the conflict between the Mount Olive and Cranford opinions. Causation either matters in a builders remedy case, or not. If it matters, CDA is not the catalyst; nor did it even attempt to assert it was. Since the Mount Laurel doctrine seeks to benefit lower income households and not developers, see Mount Laurel III, supra, 103 N.J. at 55, imposing a catalyst requirement is reasonable and explains why this Court characterized causation as the "***critical point***" in Toll Brothers. 173 N.J. at 560 (emphasis added).

QUESTION #3 CONCERNING A MUNICIPALITY'S BURDEN TO PROVE THAT THE PLAINTIFF'S "PROPOSED PROJECT" IS "CONTRARY TO PRINCIPLES OF SOUND LAND USE PLANNING."

As stated above, if a plaintiff satisfies its burden on the first two elements of the builders remedy test, the burden shifts to the municipality to prove that the "plaintiff's ***proposed project*** is ***clearly contrary to sound land use planning.***" 92 N.J. at 280 (emphasis added). Here, the plaintiff's pre-suit "proposed project" called for the construction of 419 units including a 15 percent Mount Laurel

set aside. After years of litigation and weeks of trial, the Court found in effect that CDA's 419-unit proposed project was not suitable for its site. Aa3838-949. Under Mount Laurel II, that ***should have ended CDA's quest for a builders remedy.*** 92 N.J. at 280 & 331 (if a town proves that the proposed project "is contrary to sound planning principles, or represents a substantial environmental hazard, ***[ ] it should be denied.***")

However, instead of finding that Cranford satisfied its burden and denying a builders remedy, the trial court *sua sponte* awarded a builders remedy for a 360-unit project (substantially less that the 419-unit proposed project), which CDA never proposed, subjected to discovery, or subjected to the crucible of trial. Aa3944.

The question therefore is whether a trial judge can effectively reform a "proposed project" after a municipality satisfies its burden by proving that the plaintiff's "proposed project" was clearly contrary to sound land use principles. Sanctioning this approach would effectively nullify the third element of the test, and would allow developers to make unlimited demands without any real risk or consequences. After all, if builders remedy plaintiffs know the trial judge will substantially adjust the "proposed project" to comport with sound land use principles, a developer has everything to gain -- and nothing to lose -- by proposing excessive projects.

QUESTION #4 CONCERNING USURPATION OF THE PLANNING BOARD'S STATUTORY JURISDICTION OVER LAND USE DEVELOPMENT APPLICATIONS.

This Court has long recognized the value of the expertise of planning boards. See Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268, 296 (1965) (local planning boards "**are undoubtedly the best equipped to [render municipal land use decisions].**'") (quoting Ward v. Scott, 16 N.J. 16, 23 (1954)); Ibid. (**presuming** that municipal planning boards and governing bodies "**will act fairly and with proper motives and for valid reasons.**") (emphasis added). Identical principles apply in the Mount Laurel arena. See Mount Laurel II, supra, 92 N.J. at 280 (trial judges must "make sure that the municipal planning board is ***closely involved*** in the formulation of the builders remedy [and to] ***make as much use as they can of the planning board's expertise and experience*** so that the proposed project is ***suitable for the municipality.***") Citing "concerns about land use planning," this Court quoted this principle once again in 2002 in Toll Brothers. Toll Bros, supra, 173 N.J. at 513.

Notwithstanding such clear principles, on December 9, 2011, the trial court *sua sponte* appointed Douglas Wolfson, Esq. as the "Special Hearing Examiner" and directed him to "assume jurisdiction" over the Cranford Planning Board and to "conduct public hearings" on CDA's site plan application. Aa3702-08. Oddly, just before appointing the Examiner, the trial court

expressly noted in its July 29, 2011 opinion that: "[t]rial courts are urged to make as much use as possible of the municipal Planning Board expertise and experience. . . ." Aa3852.

Upon assuming this role,[7] Mr. Wolfson questionably conducted the CDA hearings at Union County Courthouse, in Elizabeth, during the day, instead of the normal location (Town Hall) and time (evening). These decisions effectively minimized input by Cranford citizens and other members of the public.

The salient question therefore is whether a trial judge has the general authority to seize jurisdiction from a Planning Board and, if so, whether such authority was properly applied under the circumstance of this case.

ERRORS COMPLAINED OF

With regard to **Question #1** ("pre-suit negotiations") the Appellate Division erred as follows:

1. By finding that CDA satisfied its burden, defined in Mount Laurel II, and made a good faith attempt to obtain Mount Laurel relief without litigation. 92 N.J. at 218.

2. By ignoring documented proof that CDA's pre-suit negotiations were wholly pretextual and in violation of the salutary objective that inspired this Court to impose such a burden on builders remedy plaintiffs in Mount Laurel II.

[7] The Examiner and the trial court both rejected several written objections by Cranford residents concerning the time and venue of the CDA hearings. 22T24:22-25:5. The Examiner responded to the objections by stating: "This is a judicial proceeding. It is not a Planning Board hearing at Town Hall. This is part and parcel of the litigation that is before [the trial court]." 22T24:22-25:5 (emphasis added).

3. By failing to properly apply the applicable "futility" test set forth in J.W. Field.

4. By wrongly concluding that Cranford "claim[ed] that CDA failed to exhaust administrative remedies by making a rezoning application to the Board."

5. By wrongly concluding that Cranford was "unwilling to negotiate" with CDA prior to the initiation of CDA's builders remedy lawsuit.

6. By wrongly concluding that Cranford "had no intention of ever allowing affordable housing to be constructed on the CDA site."

7. By erroneously comingling the threshold "pre-suit negotiations" ***burden*** with the proscription against using ***threats*** of builders remedy litigation as a "bargaining chip" in Mount Laurel negotiations.

8. By condemning the governing body for seeking feedback from the Cranford Planning Board regarding on CDA's proposed project, even though (a) CDA was seeking to be included in the Planning Board's Housing Element; (b) the Planning Board was uniquely qualified to opine on the suitability issues raised by CDA's extreme project; (c) the request conformed with Cranford's existing land use ordinance; and (d) such action had been previously taken vis-à-vis other proposed projects in town.

9. By drawing an inappropriate negative inference against the Township as a whole by wrongly assuming that "an application [by CDA] to the Planning Board for a rezoning ***recommendation*** would have been futile."

With regard to **Question #2** ("*catalyst for change*"), the Appellate Division erred as follows:

1. By misinterpreting this Court's declaration in Toll that a builders remedy plaintiff must prove it was the "catalyst for change" to satisfy the "success in litigation" element of the builders remedy test.

2. By misinterpreting the opinion written on direct remand from this Court in Mount Olive Complex v. Mount Olive Tp., 356 N.J.Super. 500 (App. Div.), certif. denied, 176 N.J. 73 (2003) ***which specifically*** **applied the "catalyst for change"**

language in Toll and denied a builders remedy based upon the facts of that case.

3. By ignoring the facts demonstrating (a) that the Township's Mount Laurel compliance efforts ***caused CDA to file a builders remedy suit***; and (b) that CDA's lawsuit did not cause the Township to comply.

4. By allowing, as a practical matter, developers to wait to file its builders remedy suit literally until the day before the municipality files its Fair Share Plan and then to secure a builders remedy solely because it "proved in the lawsuit that the municipality was currently not in compliance with its fair share obligations."

5. By eliminating the causal aspect of the first element of the builders remedy test as clearly articulated in Toll Brothers (based upon the express purpose of the builders remedy) by erroneously concluding that "proving that the existing municipal zoning ordinance is unconstitutional ***is*** the catalyst for change" and that context of the "catalyst for change" phrase in Mount Olive "was ***synonymous*** with success at trial resulting in a court-ordered zoning change. . . ." (emphasis added).

With regard to **Question #3** (the third element of the builders remedy test) the Appellate Division erred as follows:

1. By concluding that the Township failed to satisfy its burden on the third element of the builders remedy test by proving that CDA's "proposed project" is not suitable for the site in question and is therefore "contrary to principles of sound land use planning."

2. By failing to recognize that "proposed project" is a ***fundamental term of art*** in the Mount Laurel context because it creates a clear benchmark for courts to determine whether the municipality has satisfied its burden on the third element of the builders remedy test.

3. By effectively nullifying the third element of the builders remedy test by permitting the trial judge to award a builders remedy by substantially reforming a plaintiff's "proposed project" - *sua sponte* - after the municipal defendant proved at trial that it is unsuitable and violates principles of sound land use planning.

4. By affirming a ruling that, in effect, deprived the Township of the ability to prove its case by granting a builders remedy for a project that plaintiff ***never proposed, never subjected to discovery, and never presented at trial***.

5. By grossly mischaracterizing the Township's position as an "all or nothing approach" to the third element of the builders remedy test.

6. By finding that the trial judge had the discretion to award a remedy for a substantially different project after the Township proved its case.

With regard to **Question #4** (the sanctity of Planning Board jurisdiction) the Appellate Division erred as follows:

1. By affirming the trial court's *sua sponte* decisions to seize the Cranford Planning Board's jurisdiction over CDA's development application and to replace the Planning Board with Douglas K. Wolfson, Esq. as a so-called "Special Hearing Examiner," thereby usurping the Planning Board's statutory role in the land use planning process.

2. By concluding that a trial court's authority to appoint a "Special Master" in Mount Laurel matters is synonymous with the trial judge's decision to seize the Planning Board's jurisdiction and appointing a "Special Hearing Examiner."

3. By concluding that Cranford demonstrated a "record of obstructing affordable housing projects" notwithstanding that the record showed that, even before CDA owned property in town, the Township: (a) rehabilitated 170 existing affordable housing units in town despite its 104-unit "rehab obligation;" (b) *required* the development of affordable housing in its formal redevelopment zones; and (c) created 100 age-restricted affordable housing units.

4. By concluding that the Planning Board was "*not excluded* from the proceedings before the hearing examiner" solely based on a finding that the Special Master "sent an *initial procedural memo* to all parties instructing that five copies of the applicant's plans and all supporting documents *must be provided to the Board*." (emphasis added).

COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

No one can deny that Mount Laurel jurisprudence is complicated, controversial, and continually evolving. It appears that the appellate panel lacked broad experience in the Mount Laurel arena which, through no fault of their own, caused them to excuse or rationalize actions taken by CDA which, to a trained eye, clearly violated Mount Laurel principles set forth by this Court over the past three decades.

Lacking a comprehensive understanding of the nuance of Mount Laurel law evidently cause the panel to provide an overabundance of reliance on decisions made by the trial judge, who was equally inexperienced in Mount Laurel law. The various errors identified above result from this imprudent reliance. The Township therefore urges this Court to address the various substantial issues implicated in this appeal which will provide guidance to all judges and Mount Laurel stakeholders to be applied in future builders remedy cases.

REASONS WHY CERTIFICATION SHOULD BE GRANTED

Under Rule 2:12-4, this Court may grant certification if the appeal (1) "***presents a question of general public importance which has not been but should be settled by the Supreme Court;*** (2) "***is in conflict with any other decision of the same or a higher court;*** or (3) ***calls for an exercise of the Supreme Court's supervision [ ] if the interest of justice requires.***

(emphasis added). Based on this standard, this Court should grant certification for the following reasons:

1. Although Mount Laurel matters, by their very nature, present questions of general public importance, the controversy surrounding the "builders remedy" and the numerous substantial issues implicated make this appeal particularly suited for consideration by this Court.

2. This Court should settle the conflict between the opinion below and Judge Havey's opinion in Mount Olive, supra, regarding the meaning of the phrase "catalyst for change" used by this Court in the Toll Brothers matter.

3. In addition to the various Mount Laurel issues identified above, this appeal involves the sanctity of Planning Board jurisdiction and affords this Court the opportunity to determine whether trial judges have the general power to seize jurisdiction from the Planning Board under the circumstances of this case.

4. It presents another opportunity to bring the builders remedy into a 2016 context.

5. The record is exceptionally detailed, allowing this Court to render its decisions without necessarily requiring a remand for fact-finding.

CERTIFICATION

I hereby certify that this Petition For Certification presents a substantial question and is filed in good faith and not for the purposes of delay. I hereby certify that the foregoing statements made by me are true. I am aware if any of the statements made by me are willingly false, I am subject to punishment.

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