JEFFREY R. SURENIAN AND ASSOCIATES, LLC
Brielle Galleria
707 Union Avenue, Suite 301
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Attorneys for Defendant, Township of Cranford, et.al.
By: Jeffrey R. Surenian (Attorney ID: 024231983)
Michael J. Edwards (Attorney ID: 032112012)

CRANFORD DEVELOPMENT ASSOCIATES, LLC, et. al.

v.

TOWNSHIP OF CRANFORD, et. al.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY

DOCKET NO.: UNN-L-3759-08

CIVIL ACTION – *MOUNT LAUREL*

NOTICE OF MOTION FOR AN EXTENSION OF TEMPORARY IMMUNITY

PLEASE TAKE NOTICE that on the 7th day of December 2018 or as soon thereafter as counsel may be heard, the undersigned attorney for defendant, Township of Cranford, shall apply to the Honorable Camille M. Kenny, J.S.C., at the Union County Courthouse, 2 Broad Street, 14th Floor, Elizabeth, New Jersey 07207, for an Order granting the following relief:

1. Extension of immunity from Mount Laurel lawsuits currently granted to the Township of Cranford, the governing body of the Township of Cranford, and the Planning Board of the Township of Cranford by virtue of its 2013 Judgment of Compliance and Repose and/or the entry on a temporary immunity order having the same effect. In either event, the Township seeks an immunity order effective immediately until March 31, 2019.

2. Declaring that the protection from Mount Laurel lawsuits created by the Order commence no later than December 31, 2019.

3. Such other relief as the Court deems equitable and just.

PLEASE TAKE FURTHER NOTICE that the Township shall rely upon the supporting Brief, Certification of Michael Mistretta, P.P., A.I.C.P, Certification of Michael J. Edwards, Esq., and the proposed form of Order in support of this Motion filed simultaneously herewith.

JEFFREY R. SURENIAN AND ASSOCIATES, LLC
Attorneys for Defendant,
Township of Cranford, et. al.

By: _____
Michael J. Edwards

Dated: November 21, 2018

JEFFREY R. SURENIAN AND ASSOCIATES, LLC
Brielle Galleria
707 Union Avenue, Suite 301
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(732) 612-3100
Attorneys for Defendant, Township of Cranford, et.al.
By: Jeffrey R. Surenian (Attorney ID: 024231983)
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CRANFORD DEVELOPMENT ASSOCIATES, LLC, et. al

v.

TOWNSHIP OF CRANFORD, et. al.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY

DOCKET NO.: UNN-L-3759-08

CIVIL ACTION – *MOUNT LAUREL*

ORDER GRANTING TEMPORARY IMMUNITY

THIS MATTER having been opened to the Court by Jeffrey R. Surenian and Associates, LLC, Jeffrey R. Surenian, Esq. and Michael J. Edwards, Esq. appearing on behalf of Defendant, Township of Cranford (hereinafter "the Township"); and the Cranford Planning Board (hereinafter "Planning Board") having previously secured a Judgment of Compliance and Repose, which granted the Township immunity from Mount Laurel lawsuits, which is still in full force and effect until December 31, 2018; and the Court having considered the pleadings and related papers filed in this matter and the arguments of counsel; and good cause appearing.

IT IS on this ____day of _____, 2018, ORDERED as follows:

1. The Court hereby enters this Protective Order entitling the Township of Cranford, the governing body of the Township of Cranford, and the Planning Board of the Township of Cranford to temporary immunity from the filing and serving of any Mount Laurel lawsuits until March 31, 2019.

2. This immunity order shall take effect no later than December 31, 2018.

3. Counsel for the Township shall provide all counsel of record with a copy of this Order within seven (7) days of receipt.

_____

HONORABLE CAMILLE M. KENNY, J.S.C.

JEFFREY R. SURENIAN AND ASSOCIATES, LLC
Brielle Galleria
707 Union Avenue, Suite 301
Brielle, NJ 08730
(732) 612-3100
Attorneys for Defendant, Township of Cranford, et.al.
By: Jeffrey R. Surenian (Attorney ID: 024231983)
Michael J. Edwards (Attorney ID: 032112012)

CRANFORD DEVELOPMENT ASSOCIATES, LLC, et. al. **v.** **TOWNSHIP OF CRANFORD, et. al.**	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION: UNION COUNTY DOCKET NO.: UNN-L-3759-08 CIVIL ACTION – *MOUNT LAUREL* **CERTIFICATION OF MICHAEL J. EDWARDS, ESQ. IN SUPPORT OF THE MOTION FOR TEMPORARY IMMUNITY**

Michael J. Edwards, Esq. of full age, does hereby certify as follows:

1. I am an attorney-at-law of the State of New Jersey and an associate in the law firm Jeffrey R. Surenian and Associates, LLC, attorneys for the defendant in the above-captioned matter.

2. I am submitting this certification to the Court in support of the Township's motion for Temporary Immunity.

3. I am familiar with the facts presented in this certification.

4. Attached hereto as **Exhibit A**, is a true copy of the unpublished Appellate Division Decision K. Hovnanian Shore Acquisitions v. Tp. of Berkeley, Docket No. A-594-01T1 (App Div. 2003).

5. Attached hereto as **Exhibit B**, is a true copy of the immunity order that was the subject of the KHSA lawsuit.

6. Attached hereto as **Exhibit C**, is a true copy of the State of New Jersey Executive Department Veto Message for the Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334, April 26, 1985.

I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By _____
Michael J. Edwards

Dated: November 21, 2018

EXHIBIT A

CERTIFICATION OF MICHAEL J. EDWARDS, ESQ.

673-0625

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-594-01T1

FILING DATE
JUL 01 2003

K. HOVNANIAN SHORE
ACQUISITIONS, L.L.C.,

Plaintiff-Appellant,

vs.

THE TOWNSHIP OF BERKELEY, in the County of Ocean, a Municipal Corporation, THE MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF BERKELEY, and THE PLANNING BOARD OF THE TOWNSHIP OF BERKELEY,

Defendants-Respondents.

Argued: November 6, 2002 - Decided: JUL 01 2003

Before Judges Cuff, Lefelt and Winkelstein.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, L-1120-01.

Thomas F. Carroll, III, argued the cause for appellant (Hill Wallack, attorneys; Mr. Carroll, on the brief).

Jeffrey R. Surenian argued the cause for respondents the Township of Berkeley and the Mayor and Township Council of the Township of Berkeley (Lomell Law Firm, attorneys; Mr. Surenian, of counsel and on the brief).

Edward F. Liston, Jr., attorney for respondent the Planning Board of the Township of Berkeley, relies on the brief filed by the Lomell Law Firm.

JUN 30 2003

PER CURIAM

In this Mount Laurel[1] matter, we review an order dismissing plaintiff's complaint against a municipality. Resolution of this appeal requires us to consider the use of a temporary immunity order obtained through an ex parte application by the municipality.

Plaintiff, K. Hovnanian Shore Acquisitions, L.L.C. (plaintiff or Hovnanian), is the contract purchaser of approximately 800 acres in the Township of Berkeley (the Township), Ocean County. The Township is a sprawling municipality south and east of Toms River with frontage on the Atlantic Ocean, Barnegat Bay and the Toms River. It hosts several large state and county parks, including Island Beach State Park. Major portions of the Township lie within the Pinelands and Coastal Management Area.

The Township's housing stock includes mostly single-family homes of post-war ranch and Cape Cod styles, with newer subdivisions and retirement communities. The housing includes a significant number of units used as seasonal second homes. About 93% of the housing stock is owner-occupied, and the median value of the housing stock is approximately $103,000. The boom in retirement housing construction caused the population of the Township to triple between 1970 and 1980 and to increase by another 65% between 1980 and 1990. Residents over sixty-five years of age comprise

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[1] Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975), and Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II), 92 N.J. 158 (1983).

50.89% of the population.

In 1986 the Council on Affordable Housing (COAH) adopted its first set of substantive rules which included calculations of municipal affordable housing obligations for the "first cycle," 1987-93. COAH later promulgated another set of rules for the "second cycle," covering the cumulative period 1987-99. In re Petition for Substantive Certification, Township of Southampton, 338 N.J. Super. 103, 106 n.1 (App. Div.) (citing N.J.A.C. 5:93-2.1 and -2.20 and Appendix A thereto), certif. denied, 169 N.J. 610 (2001); N.J.A.C. 5:92. COAH assigned to the Township a first cycle fair share of 699 units.

In January 1988, when real estate developer Lifetime Homes of New Jersey, Inc. (Lifetime) was threatening to bring a builder's remedy suit if the Township did not accede to Lifetime's non-Mount Laurel demands, the Township filed a complaint for declaratory judgment, seeking an order barring any builder's remedy litigation for a reasonable period while the Township developed a compliance plan.

On January 28, 1988, Judge Serpentelli entered an order barring any builder's remedy to any party instituting suit against the Township for the ninety-day period during which the Township would prepare its compliance plan. The order added that if the Township proved it took all the necessary actions, it could obtain an order of compliance that would be valid and binding for six years.

In 1988, Lifetime and another real estate developer, Foxmoor Berkeley Associates (Foxmoor), each filed an action against the Township claiming that it had failed to meet its obligation to provide for its fair share of the regional need for housing for lower income persons pursuant to the Mount Laurel II decision. The Township reached settlements with Foxmoor and Lifetime in 1991. Soon thereafter, it renegotiated its settlement with Lifetime.

In June 1994, COAH adopted its regulations for the second housing cycle. COAH assigned the Township a second cycle cumulative fair share of 663 units of affordable housing.

On July 18, 1994, the Township Council adopted a "fair share plan" (the July 1994 plan). The July 1994 plan described an ongoing survey that had, as of that date, identified 400 existing low and moderate income households within the Township which were claimed as "credits without control." The July 1994 plan further provided for settlement agreements, permitting Foxmoor 135 dwelling units and Lifetime 935 dwelling units, yielding 15 and 100 affordable units, respectively. The 100 affordable units to be built by Lifetime would be constructed on lots owned by the municipality in the Manitou Park section of the Township.

On October 31, 1994, Judge Gibson entered a judgment of repose in the actions brought by Lifetime and Foxmoor. Among other things, the judgment granted the Township a six-year period of immunity from all Mount Laurel litigation and required the Township to fully implement the July 1994 plan. The July 1994 plan was held

to constitute "an appropriate means to fully satisfy the Township's Mount Laurel obligation" subject to six conditions, including one that required the Township to "provide adequate documentation for at least 27 credits without controls over and above the 276 already found acceptable" to Philip B. Caton, the court-appointed Master in the case.

Lifetime applied to the New Jersey Department of Environmental Protection (DEP) for wetlands approvals and permits. Eventually, it became clear that environmental constraints would preclude construction of any new affordable housing units. Instead of waiting to take any further action in the next COAH housing cycle, the Township undertook a second "credits without controls" survey to determine whether its affordable housing goals were being met.

Township representatives met with Caton in January 2000 to discuss the anticipated shortfall of affordable housing units due to environmental problems on Lifetime's tract and the proposed survey. Caton considered the approach reasonable, and the Township representatives worked with him to develop the survey documents.

At around that time, the Township's Planning Board denied Lifetime's application for approvals related to its largest market unit tract. After Lifetime failed to obtain court approval in an application to "essentially take over the processing of Lifetime's development applications and remove the Planning Board from the process," Lifetime sold its property to Ocean County for use as open space. Judge Gibson granted Lifetime's request to dismiss its

litigation with prejudice, but declined to entertain the Township's request for approval of its approach to undertake a second survey. By order entered on May 15, 2000, Judge Gibson provided that the judgment of repose continue in full force and effect. The order further provided:

> 3. Prior to the expiration of the current Judgment of Repose, the Township shall be free to file a new Housing Element and Fair Share Plan (hereinafter "affordable housing plan") with [COAH] and to either bring a declaratory relief action in court seeking the Court's approval of said affordable housing plan or petition COAH to approve said affordable housing plan.

In May 2000 the Township's Planning Board and Township Council adopted a new housing plan (the May 2000 plan). The only significant difference from the July 1994 plan was the inclusion of references to a 91-unit gap in the May 2000 plan caused by Lifetime's inability to deliver affordable housing units. The 91-unit figure recognized that the Township had four new creditworthy units provided by a nonprofit entity. The May 2000 plan stated that the 91-unit shortfall was expected to be more than satisfied through a second "credits without controls" survey, particularly because over 2500 units were identified that were not included in the first survey. Indeed, the May 2000 plan noted that "[a]ny credits over and above these 91 credits will be 'banked' for use against any future fair share quotes."

In June 2000, the Township's counsel wrote to Judge Serpentelli seeking a declaration that the Township had adequately

covered the gap in its Mount Laurel obligations and also seeking to obtain temporary immunity to extend its repose from the period between October 30, 2000, the date that the judgment of repose would expire, and COAH's enactment of third cycle regulations. That letter set forth the requirements of COAH's "interim procedure" rules, N.J.A.C. 5:91-14.3(a), that permitted a municipality to extend its second round substantive certification "for up to one year after the effective date of the adoption of the Council's third round methodology [and] rules." The interim procedure required that the municipality's governing board adopt a resolution that: (1) requested the extension; (2) committed to continuing to implement the certified second cycle plan; and (3) committed to addressing the municipality's third cycle obligations with a new housing element and plan (N.J.A.C. 5:91-14.3(a)).

Pursuant to Judge Serpentelli's guidance in response to that letter, the Township filed a complaint on August 29, 2000. In the Matter of the Application of the Township of Berkeley, a municipal corporation of the State of New Jersey, L-2878-00.. In its complaint, the Township asked the court to: (1) take jurisdiction over its current housing plan; (2) determine whether the Township had adequately addressed the gap in its housing plan through the ongoing "credits without controls" survey; (3) determine the number of additional "credits without controls" that the Township can "bank" against future affordable housing obligations to the extent

the survey reveals more than 91 credits; (4) retain jurisdiction so that the court could grant any reasonable request to extend immunity beyond October 30, 2000, the final day of immunity under the judgment of repose; and (5) resolve any of the Township's other housing plan issues, including Foxmoor's proposal to enter into a 15-unit Regional Contribution Agreement. On October 27, 2000, the Township moved before Judge Serpentelli in the In re Berkeley action, on short notice, for temporary immunity to protect the Township from builder's remedy suits for the period through one year after COAH's new regulations covering the third housing cycle would take effect. The application was supported by Caton, the Special Master. On November 3, 2000, Judge Serpentelli entered an Order of Temporary Immunity, granting the immunity requested effective as of October 27, 2000.

On May 15, 2001, a consent order was entered amending the Foxmoor settlement. The Township agreed to accept $260,000, representing $20,000 per unit, as a contribution toward its trust fund, and agreed to take certain steps to devote some or all of those funds toward providing public water and sewer service for the Manitou Park section of the Township. On February 13, 2001, the Township Council passed a resolution to apply for and accept Homeownership Incentive Fund monies from the New Jersey Housing and Mortgage Finance Agency to enable Homes For All, Inc., to develop Township-owned land in the Manitou Park area by constructing units half of which would be moderate income units and the other half

market rate units. The resolution stated that the Township was committing 116 buildable lots for the project and $500,000 in "Mount Laurel funds," to be disbursed based upon completion levels of construction, and provision of water, sewer and recreation facilities.

Plaintiff filed its builder's remedy complaint on April 3, 2001. It alleged that the Township had not satisfied its Mount Laurel obligations as described in the October 1994 judgment of repose. Plaintiff also alleged that the Township's zoning ordinances failed to provide a realistic opportunity to achieve its affordable housing obligations and that its property was well-suited to meet those obligations. Plaintiff sought rezoning that would enable it to build 4800 dwelling units at a 6 unit per acre density with 960 of those units devoted to low and moderate income households.

In June and July 2001, plaintiff attempted to notice the deposition of the Township planner. The Township resisted discovery citing the temporary immunity order. Plaintiff moved to compel the deposition, and the Township moved to dismiss the complaint.

In his August 31, 2001 oral decision, Judge Serpentelli discussed the use of temporary immunity orders, noting that the device was first addressed in J.W. Field Co. v. Township of Franklin, 204 N.J. Super. 445 (Law. Div. 1985), and discussed favorably in Hills Dev. Co. v. Township of Bernards, 103 N.J. 1,

62-63 (1986). He observed that the device is novel but sensible because it allows a court to monitor and to expedite compliance. He further held that the temporary immunity order was appropriate in this case because the litigation initiated by Hovnanian would not contribute positively to the process "of bringing about finality of Berkeley Township's obligation for its present fair share number." He noted that Hovnanian could participate in the consideration of whether the Township's plan adequately addresses its affordable housing obligation and possibly achieve the same result as its builder's remedy action if the court determined that the Township plan is patently insufficient to meet its obligation. By order dated September 20, 2001, plaintiff's complaint was dismissed.

On appeal, plaintiff argues that its complaint was improperly dismissed because the temporary immunity order was entered without notice to it and without its participation, that the Township is not compliant with its Mount Laurel obligations, that the Township had failed to bring itself within COAH's jurisdiction, and the Township housing plan is so insufficient that the Township is not entitled to repose under COAH standards. The Township responds that Judge Serpentelli properly exercised the discretion reposed in him by the Supreme Court because the Township has clearly, unconditionally and formally committed itself to voluntarily comply with its affordable housing obligation.

In Mount Laurel II, the Court held that every New Jersey

municipality had a constitutional duty to provide "a realistic opportunity for the construction of its fair share of low and moderate income housing." Mount Laurel II, supra, 92 N.J. at 221. To aid in enforcement of the obligation, the Court held that developers who succeeded in Mount Laurel litigation and proposed "a project providing a substantial amount of lower income housing, a builder's remedy should be granted 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 279-80. The "substantial amount of lower income housing," ibid., is known as a "mandatory set aside." Hills, supra, 103 N.J. at 31 n.4. In addition to the mandatory set aside amount, the builder's remedy would permit construction of upper or middle income housing so that the potential for profit provided builders with an incentive to enforce Mount Laurel obligations. Mount Laurel II, supra, 92 N.J. at 279 n.37. To be eligible for a builder's remedy, the developer must have attempted to obtain relief without litigation and must prove that the municipality's zoning ordinance required revision in order to meet the Mount Laurel obligation. Id. at 218, 278-81.

The New Jersey Fair Housing Act of 1985, N.J.S.A. 52:27D-301 to -329 (FHA), was enacted in response to the Mount Laurel cases. In the FHA, the Legislature declared "that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth

in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing." N.J.S.A. 52:27D-303.

The FHA created COAH. N.J.S.A. 52:27D-305. Among its duties, COAH is to determine the State's housing regions, estimate the present and prospective need for low and moderate income housing at the State and regional levels, and adopt criteria and guidelines for determining each municipality's fair share of the regional housing need. N.J.S.A. 52:27D-307. COAH promulgated its substantive rules to be used by municipalities to address their affordable housing obligations for the first and second cycles at N.J.A.C. 5:92 and 5:93.

The FHA establishes primarily an administrative structure but also provides an alternative judicial course for municipalities to address their affordable housing obligations. It also provides an option for a developer to challenge the sufficiency of the housing element in the administrative process. Initially mediation is utilized, and if mediation fails to resolve the challenge, the matter is referred to the Office of Administrative Law. N.J.S.A. 52:27D-315(c). In Hills, supra, the Court expressed its preference for COAH-resolution of Mount Laurel disputes. 103 N.J. at 52. See also Toll Bros., Inc. v. Township of W. Windsor, 173 N.J. 502, 563 (2002). COAH may also receive a complaint filed in the Superior Court upon a referral from the court. N.J.A.C. 5:91-2.1. The

matter will be subject to mediation and returned to Superior Court if mediation fails and issues of fact must be determined. N.J.S.A. 52:27D-315(c); Toll Bros., Inc. v. Township of W. Windsor, 334 N.J. Super. 77, 92-93 (App. Div. 2000), certif. denied, 168 N.J. 295 (2001).

A municipality which files a housing element with COAH may alternatively institute an action for a declaratory judgment granting it repose in the Superior Court. N.J.S.A. 52:27D-313(a). A judgment of repose is defined by COAH as "a judgment issued by the Superior Court approving a municipality's plan to satisfy its fair share obligation." N.J.A.C. 5:93-1.3.

COAH has conducted two cycles of housing-need review and assessment of fair share units. Third cycle numbers have not been issued. In the meantime, COAH's substantive rules for the second cycle remain effective, and COAH has adopted interim rules. See 31 N.J.R. 578(a); 31 N.J.R. 1479(a).

Before the enactment of the FHA, the Court sought to establish procedures to expedite and monitor litigation commenced to enforce a municipality's affordable housing obligation. In doing so, the Court signaled that it was willing to depart from established litigation models. At the beginning of its opinion in Mount Laurel II, Chief Justice Wilentz wrote:

> The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals.

> We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.
>
> [Mount Laurel II, supra, 92 N.J. at 199.]

The Court then announced that one of the purposes of its opinion was to encourage voluntary compliance. Id. at 214. To encourage voluntary compliance, the Chief Justice selected three judges to oversee all Mount Laurel litigation throughout the State. Id. at 214, 253-55.

The Court also announced a "modification of the role of res judicata" for Mount Laurel cases. Id. at 291-92. The Court recognized that "[j]udicial determinations of compliance with the fair share obligation or of invalidity are not binding under ordinary rules of res judicata since circumstances obviously change." Id. at 291. The Court found, however, that judgments of compliance with Mount Laurel obligations "should provide that measure of finality suggested in the Municipal Land Use Law, which requires the reexamination and amendment of land use regulations every six years." Ibid. Accordingly, the Court held that Mount Laurel compliance judgments

> shall have res judicata effect, despite changed circumstances, for a period of six years, the period to begin with the entry of the judgment by the trial court. In this way, municipalities can enjoy the repose that the res judicata doctrine intends, free of litigious interference with the normal planning process.
>
> [Id. at 291-92 (footnote omitted).]

The Court noted, however, that a municipality's "substantial

transformation" could trigger valid litigation before the expiration of six years. Id. at 292 n.44.

Even after the adoption of the FHA, the three specially designated judges handled all Mount Laurel actions until approximately 1987. Judge Serpentelli, one of the originally designated Mount Laurel judges, issued the temporary immunity order at issue in this case. It was he who first utilized this device in the J.W. Field matter in 1985. Although neither this court nor the Supreme Court has ever expressly reviewed this type of order, the Court did refer approvingly in Hills to the creative and effective management of Mount Laurel cases by the specially designated judges. Chief Justice Wilentz stated:

> We would be remiss in not recognizing the very substantial contributions that the Mount Laurel judges have made in the interest of the just resolution of Mount Laurel cases. Their innovative refinement of techniques for the process of litigation has given credibility to the implementation of the Mount Laurel doctrine. Measured against one criterion, the advancement of the public interest, their achievements were extraordinary.
>
> [Hills, supra, 103 N.J. at 64.]

Indeed, in its review of the procedural history in Hills, the Court mentioned an immunity order. Id. at 29-30.

The law governing the Mount Laurel obligation has not remained static. The FHA has been amended on sixteen occasions, most recently in 2001 with various amendments effective January 2002. The Court has also recently addressed various issues in a trilogy of cases: Bi-County Dev., Inc. v. Borough of High Bridge, 174 N.J.

301 (2002); Fair Share Housing Ctr., Inc. v. Township of Cherry Hill, 173 N.J. 393 (2002); Toll Bros., supra, 173 N.J. 502. Notably, neither the Court nor the Legislature has criticized, limited or removed the power to utilize creative litigation management techniques, such as the temporary immunity order. Indeed, in Toll Bros., supra, in the context of affirming the grant of a builder's remedy and recognizing the continued need for the builder's remedy, the Court emphasized that voluntary compliance is preferred, should be encouraged, and that a builder's remedy action should be considered a remedy of last resort. It said:

> When enacting the FHA, the Legislature provided "various alternatives to the use of the builder's remedy as a method of achieving fair share housing," including the COAH mediation and review process, which was "the State's preference for the resolution of existing and future disputes involving exclusionary zoning. . . ." N.J.S.A. 52:27D-303. In Hills, supra, 103 N.J. at 52, we expressed our support for COAH-resolution of Mount Laurel disputes, anticipating that the COAH process might more effectively foster the construction of affordable housing.
>
> [Toll Bros., supra, 173 N.J. at 563 (footnote omitted).]

We hesitate to interfere with the remedy utilized by Judge Serpentelli in this case. Voluntary compliance is certainly the preferred mode to fulfill a municipality's fair share housing obligation. We recognize plaintiff's concern that the immunity order may be used simply as a device to stall efforts to compile a reasonable and feasible plan to provide affordable housing and that the cornerstone of the Township's housing plan, "credits without

control," may be a ruse to avoid construction of additional affordable housing units. Nevertheless, the municipality is also entitled to construct a plan to meet its affordable housing obligation with timely information. The promulgation of the third round housing numbers by COAH should assist the finalization of the Township's plan. We have been advised that COAH anticipates publication of the third round numbers in late 2003.

In the interim, plaintiff also has the opportunity to participate in the shaping and evaluation of the Township's plan. The Special Master is prepared to report on the Township's audit of existing housing units which may serve as credits towards the Township's affordable housing obligation. Plaintiff may participate in that review. Plaintiff's participation and the record developed during this review may be utilized to evaluate not only the Township's compliance with its housing obligation but also the bona fides of its efforts. Under these circumstances, we decline to interfere with the use of a technique designed to foster voluntary compliance by a township to meet its acknowledged Mount Laurel obligations, and affirm the dismissal of plaintiff's complaint.

Affirmed.

EXHIBIT B

CERTIFICATION OF MICHAEL J. EDWARDS, ESQ.

HILL WALLACK
202 Carnegie Center
Princeton, NJ 08543
(609) 924-0808
Attorneys for Plaintiff,
K. Hovnanian Shore Acquisitions, L.L.C.

K. HOVNANIAN SHORE ACQUISITIONS, L.L.C., Plaintiff, v. THE TOWNSHIP OF BERKELEY, in the County of Ocean, a Municipal Corporation of the State of New Jersey, THE MAYOR and TOWNSHIP COUNCIL OF THE TOWNSHIP OF BERKELEY, and THE PLANNING BOARD OF THE TOWNSHIP OF BERKELEY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION OCEAN COUNTY DOCKET NO. OCN-L-1120-01 CIVIL ACTION (MOUNT LAUREL II) **ORDER DISMISSING COMPLAINT**

THIS MATTER having been opened to the Court by Thomas F. Carroll, III, Esq., of the law firm of Hill Wallack, attorneys for plaintiff, on an application to compel the deposition of Daniel C. McSweeney, Jeffrey R. Surenian, Esq., of the law firm of Lomell Law Firm, Special Counsel for the Township of Berkeley, and Edward F. Liston, Jr., Esq., of the law firm of Edward F. Liston, PC, attorney for Planning Board of the Township of Berkeley, appearing; and the Township of Berkeley having also filed a motion seeking to reaffirm defendants' right to protection from builder's remedy suits and to dismiss plaintiff's suit accordingly; and the Court having considered the

pleadings filed in this matter and the arguments of counsel and good cause therefor appearing;

IT IS on this 20th day of September, 2001 ORDERED:

1. That the Complaint in this matter is hereby dismissed for the reasons set forth on the record.

2. That plaintiff's motion to compel discovery and for sanctions is hereby denied for the reasons set forth on the record.

3. That Berkeley is hereby directed to furnish counsel for K. Hovnanian Shore Acquisitions, L.L.C. with (a) notice of the date the Court schedules a compliance hearing in the matter encaptioned In the Matter of the Application of the Township of Berkeley, Docket No. L-2787-00 and (b) all information necessary for K. Hovnanian Shore Acquisitions, L.L.C. to prepare for the compliance hearing.

4. Copies of this Order shall be served upon all counsel within 5 days hereof.

Eugene D. Serpentelli

EUGENE D. SERPENTELLI, A.J.S.C.

EXHIBIT C

CERTIFICATION OF MICHAEL J. EDWARDS, ESQ.

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

April 26, 1985

SENATE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 2046 AND SENATE BILL NO. 2334

To the Senate:

Pursuant to Article V, Section I, paragraph 14 of the Constitution, I herewith return Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334 with my recommendations for reconsideration.

This bill sets forth a "Fair Housing Act" which addresses the New Jersey Supreme Court rulings in South Burlington County NAACP v. Mount Laurel, 67 N.J. 151 (1975) and South Burlington County NAACP v. Mount Laurel, 92 N.J. 158 (1983). It is designed to provide an administrative mechanism to resolve exclusionary zoning disputes in place of protracted and expensive litigation. The expectation is that through these procedures, municipalities operating within State guidelines and with State oversight will be able to define and provide a reasonable opportunity for the implementation of their Mt. Laurel obligations.

To accomplish this the bill establishes a voluntary system through which municipalities can submit plans for providing their fair share of low and moderate income housing to a State Council on Affordable Housing which would certify the plan. This certification would give the plan a presumption of validity in court. The presumption would shift the burden of proof to the complaining party to show that the plan does not provide a realistic opportunity for the provision of the fair share before a builder's remedy could be instituted.

In addition, the bill would permit regional contribution agreements whereby a municipality could transfer up to one-third of its fair share to another municipality within the same region. The bill also provides for a phasing schedule giving municipalities a time period, in some cases more than 20 years, to provide for their fair share.

The bill establishes a Fair Housing Trust Fund to provide financial assistance for low and moderate income housing. The Fund would be financed with a $25 million appropriation from the General Fund and with realty transfer tax revenues. This bill is tied to Assembly Bill No. 3117 which would increase the realty transfer tax revenues and places the State's portion of the realty transfer tax revenues in the Fair Housing Trust Fund account. The two bills are linked together through an effective date provision in Senate Bill No. 2046

which provides that Senate Bill No. 2046 will remain inoperative until Assembly Bill No. 3117 is enacted.

The bill also places a 12-month moratorium on the implementation of judgments imposing a builder's remedy. The Attorney General is required to seek a determination of the constitutionality of this provision in a declaratory judgment action to be filed within 30 days from the effective date of the act. If the action is not brought within that time frame, the moratorium expires. In addition, the bill contains a severability clause providing that if one portion of the act is found invalid, the remaining severable portions shall remain in effect.

This bill represents the Legislature's first attempt to address Mt. Laurel and reflects its desire, in which I heartily concur, of taking the issue out of the courts and placing it in the hands of local and State officials where land use planning properly belongs. While I am in accord with the basic approach set forth in this bill, I am compelled to return it for necessary amendments.

It is essential that the temporary moratorium on the builder's remedy be constitutionally sustainable in order to enable municipalities to take advantage of the procedures in this bill. The builder's remedy is disruptive to development and planning in a municipality. A moratorium for the planning period in this bill is needed. Unfortunately, the moratorium proposed by this bill would affect court judgments which have already been entered. This may represent an unconstitutional intrusion into the Judiciary's powers. I question whether the Legislature can, in effect, undo a court judgment in this way. Accordingly, I am recommending an amendment to make this moratorium prospective only by directing the courts not to impose a builder's remedy during the moratorium period in any case in which a final judgment providing for a builder's remedy has not been entered. I recommend that the moratorium commence on the effective date of this act and expire at the end of the time period in which municipalities have to file their housing element pursuant to section 9.a., a period of 12 months from the date the Council is confirmed.

I am also deleting the provision requiring the Attorney General to seek a declaratory judgment on the constitutionality of the moratorium. This provision suggests that the Legislature has some question about the constitutionality of

this provision. The change I have suggested should remove that uncertainty. In addition, a provision such as this is peculiar, since the Legislature should not be enacting laws which it believes might be unconstitutional.

In place of the Fair Housing Trust Fund and its $25 million appropriation from this bill, I propose at this time to work with existing programs, namely the New Jersey Housing and Mortgage Finance agency and the Neighborhood Preservation Program in the Department of Community Affairs. Until the Council is in operation and municipalities start receiving substantive certification and entering into regional contribution agreements, it is difficult to evaluate new funding programs. Accordingly, rather than set up a new housing funding mechanism, I believe it would be more administratively and economically efficient to work with existing State programs to provide housing for low and moderate income households. I propose to fund this Mt. Laurel housing program with $100 million of bond funds, and a total of $25 million from the General Fund.

The New Jersey Housing and Mortgage Finance Agency will set up a Mt. Laurel housing program to help finance Mt. Laurel housing projects. The Agency's programs will include assistance for home purchases and improvement through interest rate, down payment and closing cost assistance as well as capital buy downs; rental programs including loans or grants for projects with low and moderate income units; moderate rehabilitation of existing rental housing; congregate care and retirement facilities; conversions, infrastructure assistance, and grants and loans to municipalities, housing sponsors and community organizations for innovative affordable housing programs.

The Agency's program will be funded with a set aside of 25% of the Agency bond revenues; the set aside is estimated to be $100 million per year. I am also recommending a State appropriation of $15 million to the New Jersey Housing and Mortgage Finance Agency for its Mt. Laurel housing program.

The Neighborhood Preservation Program would be appropriated in total approximately $10 million to assist municipalities in Mt. Laurel housing programs. I propose to dedicate the increase in the Realty Transfer Tax proposed by the companion bill, A-3117, to the Neighborhood Preservation Program. An outright appropriation of $2 million from the General Fund is intended to bring the total to $10 million.

These funds would be used in neighborhood preservation areas for such things as rehabilitation, accessory conversions and conversions, acquisition and demolition costs, new construction, costs for technical and professional services associated with a project, assistance to qualified housing sponsors, infrastructure and other housing costs.

In addition, assistance would be limited to housing in municipalities with substantive certification of their housing elements or housing subject to a regional contribution agreement. However, in order that programs can get underway immediately, an interim provision is inserted to enable the funds to be used for Mt. Laurel housing before these determinations are made for a 12-month period following the effective date with the Council having the power to extend this time frame.

The amendments I have proposed for funding low and moderate income housing far exceeds the amounts appropriated in the original bill while utilizing existing State programs and agencies.

One key element in determining a municipality's "fair share" of low and moderate income housing is the estimate of "prospective need" in the region and municipality. This bill requires the Council to estimate the prospective need for the State and regions and to adopt criteria and guidelines for municipal determination of prospective need. When preparing its housing element, a municipality must determine its fair share of prospective and present need. Its housing element must provide a realistic opportunity for the provision of this fair share. Despite its importance, nowhere in the bill is a definition of "prospective need" provided. Accordingly, I am inserting such a definition which is designed to help assure that the prospective need numbers are realistic and not based on theoretical or speculative formulas.

The bill currently permits a municipality's fair share figure to be adjusted based upon "available vacant and developable land, infrastructure considerations or environmental or historic preservation factors." I would like to strengthen this language to assure that adjustments are provided in order to preserve historically or important architecture and sites or environmentally sensitive lands and to assure that there is adequate land for recreational, conservation, or agricultural and farmland preservation purposes and

open space. In addition, adjustments should be provided where there is inadequate infrastructure capacity and where the established pattern of development in the community would be drastically altered, or the pattern of development is contrary to the planning designations in the State Development and Redevelopment Plan prepared pursuant to P.L. c. (now pending before the Legislature as S-1464 of 1984).

As an additional check on excessive fair share numbers which would radically change the character of a community, I propose to authorize the council, in its discretion, to place a limit on a municipality's fair share. The limit would be based on a percentage of the municipality's housing units and any other relevant criteria, such as employment opportunities, selected by the council.

Another key element in determining a municipality's "fair share" of low and moderate income housing is an estimate of the condition of existing housing stock to determine the amount of substandard housing throughout the State. In order to achieve an accurate determination of the present and prospective housing needs of all the regions in the State, a thorough housing inventory should be performed by every municipality in the State. To require housing elements which include accurate housing inventories from only municipalities in growth areas, is to obtain only a limited picture of New Jersey's true housing needs. I am therefore recommending an amendment to the Municipal Land Use Law to require municipalities to prepare a thorough and accurate housing inventory as part of the housing element in their master plan.

The current Municipal Land Use Law requires municipalities to prepare master plans which may contain a housing element. I am recommending that the Municipal Land Use Law be amended to incorporate the housing element prepared under this statute. In this way, the housing element under the Municipal Land Use Law will be identical to the housing element prepared pursuant to this act. In addition, the Municipal Land Use Law requires that a municipality have a land use element in its master plan in order to have a valid zoning ordinance. I am adding to this requirement that the municipality have a housing element. In this way, every municipality in order to have a valid zoning ordinance would have to put together a housing element as defined in this act.

To assist municipalities in obtaining numbers that are realistic, I also suggest that language be inserted in the bill to enable the municipality when conducting its housing inventory to have access on a confidential basis to the local assessor's records. I am advised that statutory authorization is needed for this.

I am also recommending that certain language changes be made in the findings section of the bill. We should state that rehabilitation of existing housing stock in the urban centers must be encouraged. I also believe we should note that the Mt. Laurel obligation is limited to changes in land use regulations and clarify that municipalities need not expend their resources for Mt. Laurel housing.

The membership on the Council on Affordable Housing consists of four local officials (one of whom must be from an urban area and no more than one representing county interests), three representatives of households in need of low and moderate income housing (one of whom shall be a builder of low and moderate income housing) and two representing the public interest.

In order to have adequate representation of the public interest, I recommend that three members represent the public interest and two the needs of low and moderate income households. I also suggest that the executive director of the New Jersey Housing and Mortgage Finance Agency hold one of the positions in the latter category, due to the expertise of that Agency in low and moderate income housing finances and the numerous responsibilities the Agency is given in this bill.

The Council is required to adopt rules and regulations within four months from the bill's effective date. In addition, within seven months from the bill's effective date, the Council must: (a) determine the State's housing regions, (b) establish the present and prospective need estimates for the State and the regions, (c) adopt guidelines and criteria for municipal fair share determinations, adjustments to fair share and phasing, and (d) provide population and household projections. However, the Council cannot begin its work until its membership is confirmed. Since I am given 30 days to make the nominations and the Senate must thereafter confirm the nominations, the Council's time to perform these functions will be significantly eroded by the appointment

process. Accordingly, I am proposing amendments to provide that these time periods run from the date the Council members are confirmed or January 1, 1986, whichever is earlier.

With respect to pending litigation, the bill permits a party in current litigation to request the court to transfer the case to the Council on Affordable Housing for mediation procedures. When reviewing such a request, the courts must consider whether or not the transfer would result in a manifest injustice to one of the litigants.

The bill as currently drafted creates a novel mediation and review process and specifically provides that the review process should not be considered a contested case under the Administrative Procedure Act, subject to the procedures of that act and a hearing by an administrative law judge. If mediation and review by the housing council is unsuccessful, the matter will be heard in the trial court of the Superior Court.

I recommend, in place of the special procedures set forth in this bill, the regular administrative law procedure. Under this approach, if the mediation by the council is unsuccessful, the dispute will be transferred to the Office of Administrative Law as a contested case for a hearing pursuant to its rules. The ultimate decision will be made by the council and appeals will be taken from the council's decision to the Appellate Division of the Superior Court.

If a municipality receives substantive certification, its housing elements and ordinances are presumed valid. I am concerned that after going through the administrative process in this bill and receiving substantive certification, a municipality still may not have sufficient protection from a builder's remedy. I am therefore recommending that the presumption of validity be buttressed by an amendment providing that it may only be rebutted with "clear and convincing" evidence.

Senate Bill No. 2334 originally provided that a municipality could transfer up to one-half of its fair share to another municipality. In order to provide municipalities with more flexibility in their preparation of regional contribution agreements, I recommend that the one-third figure be returned to the original one-half number previously recommended by Senator Lynch, the sponsor of Senate Bill No. 2334.

In addition, I recommend that a municipality which has reached a settlement in Mt. Laurel litigation be granted a period of repose from further litigation and be deemed to have a substantively certified housing element. This period of repose will run six years from the bill's effective date.

I recommend the deletion of the provision in this bill which allows a municipality to employ condemnation powers to acquire property for the construction and rehabilitation of low and moderate income housing. I question the authorization of such a drastic power without some evidence of its necessity in resolving our State's housing needs.

The Senate Committee Substitute as originally drafted required the Council to report to the Governor and the Legislature in the implementation of this act within two years from its effective date. The Assembly amendments place this reporting requirement upon the New Jersey Housing and Mortgage Finance Agency rather than the Council. I recommend having both the Council and Agency report to the Governor and Legislature on an annual basis.

Accordingly, I herewith return Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334 and recommend that it be amended as follows:

Page 1, Title, Line 1: After "housing," omit "and"; after "appropriation" insert "and amending the Municipal Land Use Law, P.L. 1975, c. 291 (C. 40:55D-1 et seq.)"

Page 1, Section 2, Line 6: After "provide" insert "through its land use regulations"

Page 2, Section 2, after Line 43: Insert new subsections as follows:

"g. Since the urban areas are vitally important to the State, construction, conversion and rehabilitation of housing in our urban centers should be encouraged. However, the provision of housing in urban areas must be balanced with the need to provide housing throughout the State for the free mobility of citizens.

h. The Supreme Court of New Jersey in its Mount Laurel decision demands that municipal land use regulations affirmatively afford a reasonable opportunity for a variety and choice of housing including low and moderate cost housing, to meet the needs of people desiring to live there. While provision for the actual construction of that housing by municipalities is not required, they are encouraged but not mandated to expend their own resources to help provide low and moderate income housing."

Page 3, Section 4, After Line 43: Insert new subsection as follows:

"j. 'Prospective Need' means a projection of housing needs based on development and growth which is reasonably likely to occur in a region or a municipality, as the case may be, as a result of actual determination of public and private entities. In determining prospective need consideration shall be given to approvals of development application, real property transfers and economic projections prepared by the State Planning Commission established by P.L. c. (now pending before the Legislature as S-1464 of 1984)."

Page 3, Section 5, Line 10: Omit "three" and insert "two"

Page 4, Section 5, Line 11: After "housing" omit "at least"

Page 4, Section 5, Line 14: After "issues" insert "and one of whom shall be the executive director of the agency, serving ex-officio"; and omit "two" and insert "three"

Page 4, Section 5, Line 20: Omit "four" and insert "three"

Page 4, Section 5, Line 25: After "members" insert "excluding the executive director of the agency"

Page 5, Section 7, Line 2: Omit "effective date of this act" and insert "confirmation of the last member initially appointed to the council, or January 1, 1986, whichever is earlier"

Page 5, Section 7, Line 14A: After "factors" insert " and adjustments shall be made whenever:

(a) The preservation of historically or important architecture and sites and their environs or environmentally sensitive lands may be jeopardized,

(b) The established pattern of development in the community would be drastically altered,

(c) Adequate land for recreational, conservation or agricultural and farmland preservation purposes would not be provided,

(d) Adequate open space would not be provided,

(e) The pattern of development is contrary to the planning designations in the State Development and Redevelopment Plan prepared pursuant to P.L. c. (now pending before the Legislature as Senate Bill No. 1464 of 1984),

(f) Vacant and developable land is not available in the municipality, and

(g) Adequate public facilities and infrastructure capacities are not available, or would result in costs prohibitive to the public if provided"

Page 5, Section 7, After Line 18: Insert new subsection as follows:

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

Page 6, Section 7, Lines 31 through 32: Delete "the Fair Housing Trust Fund Account established in Section 20 of this Act or"

Page 6, Section 7, Line 33: Delete "other"

Page 6, Section 8, Line 1: Omit "effective date of this act" and insert "confirmation of the last member initially appointed to the council, or January 1, 1986, whichever is earlier"

Page 6, Section 9, Line 7: Omit "adopted" and insert "fair share housing"

Page 6, Section 9, Line 8: Omit "revisions" and insert "introduced and given first reading and second reading in a hearing pursuant to C.40:49-2" and omit "implement" and insert "implements"

Page 6, Section 10, Line 8: After "households" insert "and substandard housing capable of being rehabilitated, and in conducting this inventory the municipality shall have access, on a confidential basis for the sole purpose of conducting the inventory, to all necessary property tax assessment records and information in the assessor's office, including but not limited to the property record cards"

Page 8, Section 11, Lines 31 through 32: Delete "the Fair Housing Trust Fund Account established pursuant to Section 20 of this Act or"

Page 8, Section 11, Line 33: Delete "other"

Page 8, Section 12, Line 1: Delete "33 1/3%" insert "50%"

Page 9, Section 12, Lines 53 through 56: On line 53 delete "The", delete lines 54 and 55 in entirety and on line 56 delete "the regional contribution agreement."

Page 11, Section 12, Line 112: After "years" insert "and may include an amount agreed upon to compensate or partially compensate the receiving municipality for infrastructure or other costs generated to the receiving municipality by the development"

Page 12, Section 14, After Line 24: Insert "Once substantive certification is granted the municipality shall have 45 days in which to adopt its fair share housing ordinance approved by the council."

Page 12, Section 15, Lines 11 through 16: Delete "then the council" on line 11, delete lines 12 through 15 in entirety, delete "but the review process shall not be considered" on line 16 and insert "the matter shall be transferred to the Office of Administrative Law as"

Page 12 to 13, Section 15, Lines 19 through 53: Delete in entirety and insert:

"The Office of Administrative Law shall expedite its hearing process as much as practicable by promptly assigning an administrative law judge to the matter; promptly scheduling an evidentiary hearing; expeditiously conducting and concluding the evidentiary hearing; limiting the time allotted for briefs, proposed findings of fact, conclusions of law, forms of order or other disposition, or other supplemental material; and the prompt preparation of the initial decision. A written transcript of all oral testimony and copies of all exhibits introduced into

evidence shall be submitted to the Council by the Office of Administrative Law simultaneously with a copy of the initial decision. The evidentiary hearing shall be concluded and the initial decision issued no later than 90 days after the transmittal of the matter as a contested case to the Office of Administrative Law by the Council, unless the time is extended by the Director of Administrative Law for good cause shown."

Page 14, Section 17, Line 7: After "demonstrate" insert "by clear and convincing evidence"

Page 14, Section 17, Line 16: After "demonstrate" insert "by clear and convincing evidence"

Pages 14 and 15, Section 20, Lines 1 through 34: After "20." delete in entirety and insert:

"The Neighborhood Preservation Program within the Department of Community Affairs' Division of Housing and Development, established pursuant to the Commissioner of the Department of Community Affairs' authority under P.L. 1975, c. 248, Section 8 (C.52:27D-149), shall establish a separate Neighborhood Preservation Nonlapsing Revolving Fund for monies appropriated by Section 33 of this act.

a. The Commissioner shall award grants or loans from this Fund to municipalities whose housing elements have received substantive certification from the Council, to municipalities subject to builder's remedy as defined in Section 31 of this act or to receiving municipalities in cases where the Council has approved a regional contribution agreement and a project plan developed by the receiving municipality. The Commissioner shall assure that a substantial percentage of the loan or grant awards shall be made to projects and programs in those municipalities receiving State aid pursuant to P.L. 1978, c. 14 (C.52:27D-178 et seq.).

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

c. During the first twelve months from the effective date of this act and for any additional period which the council may approve, the Commissioner may assist affordable housing programs which are not located in municipalities whose housing elements have been granted substantive certification or which are not in furtherance of a regional contribution agreement; provided that the affordable housing program will meet all or part of a municipal low and moderate income housing obligation.

d. Amounts deposited in the Neighborhood Preservation Fund shall be targeted to regions based on the region's percentage of the State's low and moderate income housing need as determined by the Council. Amounts in the Fund shall be applied for the following purposes in designated neighborhoods:

(1) Rehabilitation of substandard housing units occupied or to be occupied by low and moderate income households;

(2) Creation of accessory apartments to be occupied by low and moderate income households;

(3) Conversion of nonresidential space to residential purposes provided a substantial percentage of the resulting housing units are to be occupied by low and moderate income households;

(4) Acquisition of real property; demolition and removal of buildings; and/or construction of new housing that will be occupied by low and moderate income households;

(5) Grants of assistance to eligible municipalities for costs of necessary studies, surveys, plans and permits, engineering, architectural and other technical services, costs of land acquisition and any buildings thereon, and costs of site site preparation, demolition and infrastructure development for projects undertaken pursuant to an approved regional contribution agreement;

(6) Assistance to a local housing authority, nonprofit or limited dividend housing corporation or association for rehabilitation or restoration of housing units which it administers which: (a) are unusable or in a serious state of disrepair; (b) can be restored in an economically feasible and sound manner; and (c) can be retained in a safe, decent and sanitary manner, upon completion of rehabilitation or restoration; and

(7) Such other housing programs for low and moderate income housing, including infrastructure projects directly facilitating the construction of low and moderate income housing not to exceed a reasonable percentage of the construction costs of the low and moderate income housing to be provided.

e. Any grant or loan agreement entered into pursuant to this section shall incorporate contractual guarantees and procedures by which the Division will ensure that any unit of housing provided for low and moderate income households shall continue to be occupied by low and moderate income households for at least 20 years following the award of the loan or grant except that the Division may approve a guarantee for a period of less than 20 years where necessary to ensure project feasibility."

Pages 15 to 17, Section 21, Lines 1 through 87: After "21." delete in entirety and insert:

"The agency shall establish affordable housing programs to assist municipalities in meeting the obligation of developing communities to provide low and moderate income housing.

a. Of the bond authority allocated to it under Section 24 of P.L. 1983, c. 530 (C.55:14K-24) the agency will allocate, for a reasonable period of time established by its board, no less than 25% to be used in conjunction with housing to be constructed or rehabilitated with assistance under this Act.

b. The agency shall to the extent of available funds, award assistance to affordable housing programs located in municipalities whose housing elements have received substantive certification from the council, or which have been subject to a builder's remedy or which are in furtherance of a regional contribution agreement approved by the council. During the first twelve months from the effective date of this act and for any additional period which the council may approve, the agency may assist affordable housing programs which are not located in municipalities whose housing elements have been granted substantive certification or which are not in furtherance of a regional contribution agreement provided the affordable housing program will meet all or in part a municipal low and moderate income housing obligation.

c. Assistance provided pursuant to this section may take the form of grants or awards to municipalities, prospective home purchasers, housing sponsors as defined in P.L. 1983, c. 530 (C. 55:14K-1 et seq.), or as contributions to the issuance of mortgage revenue bonds or multi-family housing development bonds which have the effect of achieving the goal of producing affordable housing.

d. Affordable housing programs which may be financed or assisted under this provision may include, but are not limited to:

(1) Assistance for home purchase and improvement including interest rate assistance, down payment and closing cost assistance, and direct grants for principal reduction;

(2) Rental programs including loans or grants for developments containing low and moderate income housing, moderate rehabilitation of existing rental housing, congregate care and retirement facilities;

(3) Financial assistance for the conversion of nonresidential space to residences;

(4) Such other housing programs for low and moderate income housing, including infrastructure projects directly facilitating the construction of low and moderate income housing; and

(5) Grants or loans to municipalities, housing sponsors and community organizations to encourage development of innovative approaches to affordable housing, including:

(a) Such advisory, consultation, training and educational services as will assist in the planning, construction, rehabilitation and operation of housing; and

(b) Encouraging research in and demonstration projects to develop new and better techniques and methods for increasing the supply, types and financing of housing and housing projects in the State.

e. The agency shall establish procedures and guidelines governing the qualifications of applicants, the application procedures and the criteria for awarding grants and loans for affordable housing programs and the standards for establishing the amount, terms and conditions of each grant or loan.

f. In consultation with the council, the Agency shall establish requirements and controls to insure the maintenance of housing assisted under this Act as affordable to low and moderate income households for a period of not less than 20 years; provided that the agency may establish a shorter period upon a determination that the economic feasibility of the program is jeopardized by the requirement and the public purpose served by the program outweighs the shorter period. Such controls may include, among others, requirements for recapture of assistance provided pursuant to the Act or restrictions on return on equity in the event of failure to meet the requirements of the program. With respect to rental housing financed by the agency pursuant to this act or otherwise which promotes the provision or maintenance of low and moderate income housing, the agency may waive restrictions on return on equity required pursuant to P.L. 1983, c. 530 (C.55:14K-1 et seq.) which is gained through the sale of the property or of any interest in the property or sale of any interest in the housing sponsor.

g. The agency may establish affordable housing programs through the use or establishment of subsidiary corporations or development corporations as provided in P.L. 1983, c. 530 (C.55:14K-1 et seq.). Such subsidiary corporations or development corporations shall be

eligible to receive funds provided under this act for any permitted purpose."

Pages 17 to 18, Section 22, Lines 1 to 32: After "22." delete in entirety and insert:

"Any municipality which has reached a settlement of any exclusionary zoning litigation prior to the effective date of this act, shall not be subject to any exclusionary zoning suit for a six year period following the effective date of this act. Any such municipality shall be deemed to have a substantively certified housing element and ordinances, and shall not be required during that period to take any further actions with respect to provisions for low and moderate income housing in its land use ordinances or regulations."

Page 21, Section 25, Line 2: Delete "condemn or otherwise acquire" and insert "lease or acquire by gift"

Page 22, Section 26, Line 1: Delete "24" insert "12"

Page 22, Section 26, Line 2: Delete "two years" insert "year" and after "agency" insert "and the council" after "report" insert "separately"

Page 22, Section 26, Lines 5 through 9: Delete "The report shall give specific" on line 5, delete lines 6 through 8 in entirety and on line 9 delete "not been sufficient in promoting this end." and on line 9 delete "report" and insert "reports"

Page 22, Section 26, Line 11: Delete "believes" and insert "and the council believe"

Pages 22 and 23, Section 28, Lines 1 through 15: After "28." delete in entirety and insert new section as follows:

"No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation which has been filed on or after January 20, 1983, unless a final judgment providing for a builder's remedy has already been rendered to that plaintiff. This provision shall terminate upon the expiration of the period set forth in section 9.a. of this act for the filing with the council of the municipality's housing element.

For the purposes of this section, 'final judgment' shall mean a judgment subject to an appeal as of right for which all right to appeal is exhausted.

For the purposes of this section 'exclusionary zoning litigation' shall mean lawsuits filed in courts of competent jurisdiction in this State challenging a municipality's zoning and land use regulations on the basis that the regulations do not make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people living within the municipality's housing region, including those of low and moderate income, who may desire to live in the municipality.

For the purpose of this section 'builder's remedy' shall mean a court imposed remedy for a litigant who is an individual or a profit-making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set asides or density bonuses which provide for the economic viability of a residential development by including housing which is not for low and moderate income households."

Page 23, Section 28, After Line 15: Insert new section 29 as follows:

"29. Section 19 of P.L. 1975, c. 291 (C.40:55D-28) is amended as follows:

19. Preparation; contents; modification.

a. The planning board may prepare and, after public hearing adopt or amend a master plan, or component parts thereof, to guide the use of lands within the municipality in a manner which protects public health and safety and promotes the general welfare.

b. The master plan shall generally comprise a report or statement and land use and development proposals, with maps, diagrams and text, presenting where appropriate, the following elements:

(1) A statement of objectives, principles, assumptions, policies and standards upon which the constituent proposals, for the physical, economic and social development of the municipality are based;

(2) A land use plan element (a) taking into account the other master plan elements and natural conditions, including, but not necessarily limited to, topography, soil conditions, water supply, drainage, flood plain areas, marshes, and woodlands, (b) showing the existing and proposed location, extent and intensity of development of land to be used in the future for varying types of residential, commercial, industrial, agricultural, recreational, educational and other public and private purposes or combination of purposes, (c) showing the existing and proposed location of any airports and the boundaries of any airport hazard areas delineated pursuant to the "Air Safety and Hazardous Zoning Act of 1983," P.L. 1983, c. 260 (C.6:1-80 et seq.), and (d) including a statement of the standards of population density and development intensity recommended for the municipality;

(3) A housing plan element pursuant to section 10 of P.L. , c. (C.) (now pending before the Legislature as Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334), including but not limited to, residential standards and proposals for the construction and improvement of housing;

(4) A circulation plan element showing the location and types of facilities for all modes of transportation required for the efficient movement of people and goods into, about, and through the municipality;

(5) A utility service plan element analyzing the need for and showing the future general location of water supply and distribution facilities, drainage and flood control facilities, sewerage and waste treatment, solid waste disposal and provision for other related utilities;

(6) A community facilities plan element showing the location and type of educational or cultural facilities, historic sites, libraries, hospitals, fire houses, police stations and other related facilities, including their relation to the surrounding areas;

(7) A recreation plan element showing a comprehensive system of areas and public sites for recreation;

(8) A conservation plan element providing for the preservation, conservation, and utilization of natural resources, including, to the extent appropriate, open space, water, forests, soil,

marshes, wetlands, harbors, rivers and other waters, fisheries, wildlife and other natural resources;

(9) An energy conservation plan element which systematically analyzes the impact of each other component and element of the master plan on the present and future use of energy in the municipality, details specific measures contained in the other plan elements designed to reduce energy consumption, and proposes other measures that the municipality may take to reduce energy consumption and to provide for the maximum utilization of renewable energy sources; and

(10) Appendices or separate reports containing the technical foundation for the master plan and its constituent elements.

c. The master plan and its plan elements may be divided into subplans and subplan elements projected according to periods of time or staging sequences.

d. The master plan shall include a specific policy statement indicating the relationship of the proposed development of the municipality as developed in the master plan to (1) the master plans of contiguous municipalities, (2) the master plan of the county in which the municipality is located and (3) any comprehensive guide plan pursuant to section 15 of P.L. 1961, c. 47 (C. 13:1B-15.52)."

Page 23, Section 28, After Line 15: Insert new section 30 as follows:

"30. Section 49 of P.L. 1975, c. 291 (C. 40:55D-62) is amended as follows:

49. Power to zone.

a. The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan [element] elements provided that the governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body with the reasons of the governing body for so acting recorded in its minutes when adopting such a zoning ordinance; and provided further that, notwithstanding anything aforesaid, the governing body may adopt an interim zoning ordinance pursuant to subsection 77 b. of this act.

The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land. The regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structures or uses of land, including planned unit development, planned unit residential development and residential cluster, but the regulations in one district may differ from those in other districts.

b. No zoning ordinance and no amendment or revision to any zoning ordinance shall be submitted to or adopted by initiative or referendum.

c. The zoning ordinance shall provide for the regulation of any airport hazard areas delineated under the "Air Safety and Hazardous Zoning Act of 1983," P.L. 1983, c. 260 (C.6:1-80 et seq.), in conformity with standards promulgated by the Commissioner of Transportation.

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

Page 23, Section 28, After Line 15: Insert new section 31 as follows:

"31. Until August 1, 1988, any municipality may continue to regulate development pursuant to a zoning ordinance in accordance with section 49 of the "Municipal Law Use Law," P.L. 1975, c. 291 (C.40:55D-62) as same read before the effective date of this act."

Page 23, Section 29, Line 1: Delete "29." insert "32."

Page 23, Section 30, Line 1: Delete "30." insert "33."

Page 23, Section 30, Line 3: Delete "to the Fair Housing Trust Fund Account"

Page 23, Section 30, Lines 4 and 5: After "sum of" delete remainder of line 4 and line 5 in entirety and insert "$17,000,000 to be allocated as follows:

"a. $2,000,000 to the Neighborhood Preservation Fund established pursuant to the Maintenance of Viable Neighborhoods Act (N.J.S.A. 52:127D-146 et seq.) which shall be used to effectuate the purposes set forth in section 20 of this act. b. $15,000,000 to the Housing and Mortgage Finance Agency to be used to effectuate the purpose of section 21 of this act.

Of the amounts herein appropriated a reasonable sum, approved by the Treasurer may be expended for the administration of this act by the Department of Community Affairs and the agency."

Page 23, Section 31, Line 1: Delete "31." insert "34."

Respectfully,
/s/ Thomas H. Kean
GOVERNOR

[seal]

Attest:
/s/ W. Cary Edwards
Chief Counsel

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CRANFORD DEVELOPMENT ASSOCIATES, LLC, et. al. **v.** **TOWNSHIP OF CRANFORD, et. al.**	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION: UNION COUNTY DOCKET NO.: UNN-L-3759-08 CIVIL ACTION – *MOUNT LAUREL*

BRIEF IN SUPPORT OF THE TOWNSHIP'S MOTION FOR TEMPORARY IMMUNITY

Date: November 21, 2018

Jeffrey R. Surenian, Esq.
Of Counsel and on the brief

Michael J. Edwards, Esq.
On the brief

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INTRODUCTION

In an area of the law as complex as affordable housing, it is rare indeed when all branches of government and decades of jurisprudence line up on one singular policy. However, in the Mount Laurel arena, such a phenomenon exists. All three branches of government seek to advance a fundamental principle: voluntary municipal compliance is preferable to compliance as a result of exclusionary zoning litigation. To facilitate this principle, Judge Serpentelli crafted a procedure in 1985 for municipalities committed to comply voluntarily to obtain immunity. The procedure advanced one of the Supreme Court's primary goals in Mount Laurel II – the fostering of voluntary municipal compliance.

Just a few years after Mount Laurel II, the Legislature enacted the New Jersey Fair Housing Act ("FHA") and thereby established an even more lenient path to immunity with broader protections. By so doing, the Legislature sought to promote the stated purpose of the FHA: "the State's preference for the resolution of existing and future disputes involving exclusionary zoning [through] the mediation and review process set forth in this act and ***not litigation***. . ." The FHA also created many avenues for municipalities to secure immunity from litigation by bringing themselves under the protective umbrella of COAH's jurisdiction.

One of the several paths to immunity established by the FHA was for the municipality to file an affordable housing plan with COAH prior to the institution of an exclusionary zoning lawsuit in court. N.J.S.A. 52:27D-309 and 316. The Township has taken appropriate actions within the parameters established by N.J.S.A. 52:27D-309 and 316. It has developed a detailed Summary of Plan aimed at accounting for changes in circumstances and satisfying all of its responsibilities under current laws. The Township has not only filed its existing affordable housing plan, along with this plan summary, detailing how the plan will be updated, but also

plans to adopt the updated plan after this Court rules on the pending motions concerning rental bonuses and before immunity expires under the current JOR on December 31, 2018. The Township has followed the procedures the FHA has established to obtain immunity by filing of its existing affordable housing plan coupled with a plan summary with the court – which stands in the shoes of COAH, prior to the institution of an exclusionary zoning suit. By filing an amended affordable housing plan with this Court in December prior to such time as an exclusionary zoning suit may be appropriately instituted, the Township will further comply with the statutory standards for obtaining immunity

In Mount Laurel IV, the Supreme Court embraced the immunity procedures crafted by Judge Serpentelli three decades earlier. It devised a procedure for municipalities to obtain immunity and to lose immunity. The Court held that municipalities should only be divested of immunity if they've "abused the process" by being "determined to be constitutionally non-compliant". No challenger can demonstrate that the Township is "determined to be constitutionally non-compliant" for a good reason. By its conduct, the Township has demonstrated its commitment to comply without the need to be sued. Therefore, instead of divesting the Township of immunity, it should extend the immunity that currently exists so that the Township can attempt to consummate a global settlement with FSHC or at least secure approval of an updated affordable housing plan from this Court through the DJ procedures the Court directed the Township to take. In this way, the Court can facilitate the Township's desire to comply voluntarily.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

1. On May 22, 2013, Honorable Lisa F. Chrystal, J.S.C. entered a Round 3 Judgment of Compliance and Repose ("JOR") in favor of Cranford Township.

2. The JOR conferred protection from all exclusionary zoning lawsuits until December 31, 2018, which means the Township is immune from such litigation until December 31, 2018

3. The Township seeks to extend immunity past December 31, 2018 so that it may enter into a settlement with FSHC resolving all issues and, if negotiations fail, secure approval of a housing element and fair share plan that fully satisfies its current affordable housing responsibilities.

4. The JOR approved a housing element and fair share plan that satisfied the Township's prior round responsibilities and memorialized the Court's finding that the Township had a realistic development potential ("RDP") of 5 at that time.

5. Since Judge Chrystal determined that the Township had an RDP of 5, various changed circumstances have occurred resulting in the Township's RDP climbing, according to its calculations, to 85.

6. Since Judge Chrystal entered the JOR, there has been a change to one of the sites that was used to satisfy the Township's obligations.

7. More specifically, the JOR memorialized the right of the builder's remedy plaintiff, Cranford Development Associates, LLC ("CDA") to construct a 360-unit inclusionary rental development that would include 54 affordable, deed restricted units on a parcel commonly referred to as the Birchwood site.

8. The project generated enormous controversy because the community felt overwhelmingly that the construction of 360 units on the Birchwood site was excessive.

9. Consequently, the developer and the Township negotiated an agreement by which the Township would buy the site so that the Township would then be in a position to downscale the proposed development of the site and satisfy the shortfall created by the downscaling.

10. More specifically, after the Township acquired the site leaving the developer with no further cognizable interests in the litigation, the Township negotiated an agreement with another developer to develop the site with 225 units instead of 360.

11. With the reduction in the total number of units came a commensurate reduction in the number of affordable units that the site would generate from 54 to 34 affordable units.

12. As a result of various changed circumstances, the Township has recalibrated its RDP and concluded that its RDP has climbed from 5 to 85. In addition, the Court may increase the Township's RDP to 105 depending upon its ruling on a pending motion involving rental bonuses.

13. The Township devised a plan to address the 20-unit shortfall; to amend its plan to account for changed circumstances that cause its RDP to increase from 5 to 85 and to obtain a JOR that would protect the Township until 2025. That Plan Summary is attached to the Township's Declaratory Judgment Complaint as Exhibit B and is incorporated herein by reference. Although the plan presumes the court will increase its RDP from 85 to 105, the final form of that plan must await the Court's determination on the rental bonuses to which the Township claims it is entitled. In this regard, the Township has claimed that it should not have to accept an increased RDP.

14. On July 14, 2017, the Township brought a motion pursuant to which it asked the Court to take the following procedural approach to amend Cranford's Round 3 Judgment of Compliance and Repose:

> a. Grant the Township leave to amend its Round 3 JOR;
>
> b. Direct Special Master McKenzie, in accordance with paragraph 7 of the JOR, to review the Township's RDP analysis and its claims to credits and advise the Court as to her recommendations as to the magnitude of the RDP and the number of credits to which the Township is entitled;
>
> c. Direct the Township to provide the Special Master with a preliminary plan on how to address the unmet need, without prejudice to any position the Township may have on this issue, by a date the Master specifies, and ask the Master to provide the Court with her recommendations;
>
> d. Require the Township to conform to COAH's procedural regulations at N.J.A.C. 5:91-13.1 through 13.6 to guide the Township, the Special Master, and any interested parties through the Affordable Housing Plan amendment process, the objection process, and the review and approval process culminating in a future Compliance Hearing.

15. On September 19, 2017, the Court denied the Township's motion; and directed the Township to bring a motion to explain how it would address the 20-unit gap created by the downscaling of the CDA project. The Court also directed the Township to bring a DJ action before the expiration of immunity on December 31, 2018 because the Court was familiar with and comfortable with this approach. See Order, dated September 19, 2017.

16. The Township followed the direction of the Court.

17. On May 2018, the Township brought a motion seeking the following relief:

> a. The Township fully addressed the 20-unit affordable housing crediting gap created by the Township's decision to decrease the permitted density on the parcel located at 215-235 Birchwood Avenue by way of "rental bonus credits" pursuant to N.J.A.C. 5:93-5.15(a).

b. The Court shall retain jurisdiction on this docket number until December 31, 2018 solely to enforce the Township's rights and responsibilities under the JOR.

18. Instead of ruling on the motion, the Court gave the Township the opportunity to explain why it should be permitted to provide 20 fewer affordable units than set forth in the JOR entered by Judge Chrystal in 2013.

19. Accordingly, on August 17, 2018, the Township filed supplemental papers, along with a proposed form of order seeking the following relief:

a. Cranford Township is entitled to an additional 34 rental bonus credits.

b. Cranford Township has the right to decide how to allocate its credits and bonuses between rounds.

c. Cranford Township can allocate the rental bonus credits as set forth in a chart provided in the Township's supplemental papers, dated August 17, 2018.

20. The Township's brief provided an alternative for the Court's consideration if it is disinclined to allow the Township to decide how to apply the additional 34 rental bonuses to which the Township is now eligible as a result of the construction of additional family rental units subsequent to the entry of the JOR. More specifically, the Township offered the following alternative for the court's consideration (a) to apply 20 affordable units to the 20-unit gap that had emerged in the affordable housing plan the Judge Chrystal had approved; (b) to reduce the recalibrated RDP by 34 to account for the 34 rental bonuses to which the Township is now entitled; and (c) to satisfy the RDP that remained after the 34-unit reduction in accordance with COAH standards. If the Court found the alternative acceptable, the Township's age-restricted cap and rental requirement and bonuses would be based upon the RDP that remained after the the 34-unit reduction.

21. On October 18, 2018, Hartz opposed the Township's motion and the Court has scheduled oral argument on the motion for November 30, 2018.

22. As a result of the foregoing, the Township presently remains uncertain as to how it will be able to apply the rental bonuses it can now claim since the rental units are now constructed.

23. Despite this uncertainty, the Township has aggressively sought to formulate a settlement proposal for the consideration of FSHC that would, if consummated, fully satisfy the Township's Mount Laurel responsibilities through 2025.

24. Although the Township has shared its proposal with the Master in her role as the facilitator of settlement; and although the Township has presented its proposal to FSHC, FSHC does not wish to entertain it until such time as the Township files this DJ action.

25. Therefore, pursuant to the direction of the Court to file a DJ action and in order to clear the way for the Township to attempt to achieve a global settlement with FSHC, the Township hereby is filing this DJ action with the intention of adopting a housing element and fair share plan after the Court's rulings on the pending motion concerning rental bonuses scheduled for November 30, 2018.

26. The Township has filed its existing housing element and fair share plan (see Exhibit A to the Declaratory Judgment complaint, incorporated by reference) and a plan summary explaining additional changes to update the plan (see Exhibit B to the Declaratory Judgment complaint, incorporated by reference).

27. In addition, after the court's ruling on the pending motion concerning but prior to the expiration of immunity on December 31, 2018 the Planning Board will adopt and the Township will endorse an amended affordable housing plan.

28. Finally, it should be noted that the Township has taken meaningful steps towards implanting its Round 3 plan and attempting to adapt to changes in circumstances and Mount Laurel IV, including, but not limited to the following:

a. Lehigh Acquisition Project (Block 511, Lot 1): Project is fully constructed and occupied.

b. Riverfront Developers, LLC (Block 481, Lots 1.02, 2.01 and 3-9): Project is fully constructed and occupied. Excess two (2) one-bedroom units have been addressed and offset by the upcoming Birchwood Project (formerly CDA), since both projects involve the same developer.

c. Township adopted a Mandatory Set-Aside Ordinance was adopted on September 12, 2017.

d. The Township has adopted a Redevelopment Plan and executed a Redevelopment Agreement for the Birchwood Site (formerly CDA site).

e. The Township has begun working with Monarch Housing to design and complete two supportive housing projects on municipally owned property.

f. The Township has completed a Summary of Plan outlining how the Township intends to remain compliant with their constitutional affordable housing obligation.

LEGAL ARGUMENT

POINT I

THE TOWNSHIP OF CRANFORD IS ENTITLED TO IMMUNITY UNDER THE COMMON LAW

In Mount Laurel II, the Supreme Court sought to promote voluntary municipal compliance and to avoid unnecessary litigation. Accordingly, Judge Serpentelli developed an immunity procedure to advance these goals announced in J.W. Field Co. v. Tp. of Franklin, 204 N.J. Super. 445 (Law Div. 1985) and affirmed by the Appellate Division in K. Hovnanian Shore Acquisitions v. Tp. of Berkeley, 2003 WL 23206281, (App. Div. July 01, 2003). Trial courts throughout the State have routinely utilized this procedure to allow municipalities to complete their efforts to achieve compliance voluntarily and render Mount Laurel litigation unnecessary.

The Township of Cranford is committed to comply voluntarily with its affordable housing obligations and seeks protections from exclusionary lawsuits so that it can attempt to achieve a global resolution of all affordable housing issues through a settlement with FSHC. If the Township cannot secure such a global settlement with FSHC, the Township seeks review and approval of a housing element and fair share plan, which the Planning Board will adopt and the Township will endorse prior to the expiration of immunity on December 31, 2018. The December 2018 Plan will be adopted with our without settlement terms with FSHC, if it needs to be later amended, supplemented or revised to account for a FSHC settlement, the Township will do so. In either event, the adoption of the plan awaits this Court's resolution of the outstanding issues on the application of rental bonus credits, which is anticipated on November 30, 2018.

The procedures for temporary immunity are well established and have only become a more important tool for trial judges in the evolution of the Mount Laurel doctrine. Indeed, in 1985 – 33 years ago – Judge Serpentelli announced the procedure in J. W. Field Co. v. Township

of Franklin, 204 N.J. Super. 445 (Law Div. 1985). In his capacity as a Mount Laurel judge charged with the responsibility of implementing Mount Laurel II, Judge Serpentelli evaluated all the objectives of our Supreme Court in Mount Laurel II and concluded, on balance, that those objectives would be best achieved by limiting "unnecessary litigation."[1] Accordingly, Judge Serpentelli devised a "temporary immunity" procedure that has been widely used by trial judges across the State. Pursuant to this procedure, a municipality can commit to comply voluntarily and thereby shield itself from builder's remedy lawsuits while it is initiating that process. See J.W. Field, supra, 204 N.J. Super. at 454.

In 1986, the Supreme Court decided Hills Dev. Co. v. Tp. of Bernards, 103 N.J. 1, 62-3 (1986) (commonly referred to as "Mount Laurel III") in which it praised the Mount Laurel judges for "[t]heir innovative refinement of techniques for the process of litigation…". The immunity procedure constituted just such a refinement. Id at 29-30.

In 2003, after Judge Serpentelli reaffirmed the immunity doctrine he had announced in 1985, the Appellate Division affirmed the propriety of granting municipalities immunity to facilitate voluntary compliance. See K. Hovnanian Shore Acquisitions v. Tp. of Berkeley, Docket No. A-594-01T1 (App Div. 2003), (recognizing the importance of voluntary compliance and affirming the propriety of the procedure Judge Serpentelli devised and based upon this principle). See Edwards Certification at Exhibit A (copy of the unpublished KHSA appellate opinion). In the opinion, the Appellate Division correctly concluded that **"[v]oluntary compliance is certainly the preferred mode to fulfill a municipality's fair share housing obligation"** and that compliance as a result of builder's remedy lawsuits should be a "last resort". See K. Hovnanian Shore Acquisitions, supra, at page 16. Consequently, the Appellate

[1] Interestingly, and perhaps rather tellingly, the Fair Housing Act mirrors many of the concepts and policies embodied in Judge Serpentelli's immunity procedures. The Supreme Court relied heavily on these procedures in Mount Laurel IV by deferring to the FHA and by specifically adopting a process for securing immunity.

Division affirmed Judge Serpentelli's dismissal of K. Hovnanian Shore Acquisitions, Inc.'s builder's remedy complaint pursuant to the temporary immunity order entered by the trial judge in favor of Berkeley Township.

In 2015, in In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1,5 (2015) (commonly referred to as Mount Laurel IV), the Supreme Court embraced the immunity doctrine devised by Judge Serpentelli to solve a problem it faced when COAH failed to do its job and became "moribund". As the Court is aware, in that decision, the Supreme Court needed to figure out a way to give municipalities the same protections in a court proceeding that they enjoyed in a COAH process since compliance through a COAH proceeding was no longer possible. The Court turned to the Serpentelli immunity doctrine as the means to achieve that protection. Thus, the Serpentelli immunity doctrine now has the stature of Supreme Court approval.

The temporary immunity procedure designed and implemented by Judge Serpentelli in 1985 has not remained static. Rather, over the decades that followed its invention, trial judges have tailored temporary immunity to the situation. To illustrate, the temporary immunity procedure described in J.W. Field envisioned that the municipality would concede noncompliance as a precondition to securing immunity. However, in the Berkeley Township matter, Judge Serpentelli awarded temporary immunity without requiring the Township to concede non-compliance, because Berkeley contended it was indeed compliant. Thus, Judge Serpentelli used the temporary immunity procedure to insulate the Township from litigation while the Court evaluated the Township's claim. See Edwards Certification, Exhibit B (containing the immunity order that was the subject of that lawsuit). Though the immunity doctrine has evolved, its premise remains the same: voluntarily compliance is preferable to

compliance as a result of exclusionary zoning litigation and, therefore, courts should give immunity to municipalities seeking to comply voluntarily to free them from litigious interference while a Court processes their applications.

Just as Judge Serpentelli tailored temporary immunity to the circumstances in order to best achieve voluntary compliance, this Court should do the same. As noted above, Cranford is in a circumstance where it received a JOR in 2013 and subsequently sought to amend that JOR by way of a motion dated July 14, 2017 so that it could establish a path to continue to comply and secure protection from exclusionary zoning suits through 2025. This Court indicated that the Township should file a DJ action as so many other municipalities had done following Mount Laurel IV and the Township has done just that. Moreover, it has crafted a summary of plan that it believes will fully resolve all of its obligations and submitted that proposal to the Master. The Township wishes to pursue a settlement with FSHC premised on that proposal. In the interim, it has plans for the Planning Board to adopt and the Township to endorse a housing element and fair share plan following this Court's rulings on rental bonuses, but prior to the expiration of immunity on December 31, 2018. If settlement efforts are successful, the Township will pursue approval of the settlement at a fairness hearing. If settlement efforts are not successful, the Township will seek approval of the December 2018 affordable housing plan as may be amended through the DJ process.

Regardless of whether the Township succeeds in its settlement efforts or not, the extension of immunity will facilitate voluntary municipal compliance -- the objective of all branches of government. See Mount Laurel II at 214 ("Our rulings today have several purposes. First, we intend to encourage **voluntary compliance** with the constitutional obligation. . . "(emphasis added); See also N.J.S.A 52:27D-303 ("The Legislature "declares that **the State's**

preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and **not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing**."

The extension of immunity will also help avert wasteful litigation, which the Supreme Court scorned and which the other branches of government sought to suppress through the enactment of the FHA. See Mount Laurel II at 200 (wherein the Supreme Court described the problems with the Mount Laurel doctrine as follows: "The waste of judicial energy involved at every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts. The length and complexity of trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue.").

This Court should adhere to these shared principles championed by all three branches of government by facilitating a procedure that fosters voluntary municipal compliance without the need for builder's remedy litigation.

In view of the powerful reasons for the immunity doctrine, which has only grown in stature since Judge Serpentelli created it in 1985, and in view of the Township's commitment to comply voluntarily, the Township urges this court to extend immunity past December 31, 2018, when it is scheduled to expire in order to give the Township an opportunity to achieve a global settlement with FSHC or at least to adopt an amended housing element and fair share plan, as may be supplemented and/or amended, for the Court's review and approval.

POINT II

SINCE NO CHALLENGER CAN MEET THE HEAVY BURDEN OF DEMONSTRATING THAT THE TOWNSHIP IS "DETERMINED TO BE CONSTITUTIONALLY NON-COMPLIANT", THE COURT SHOULD NOT RESCIND IMMUNITY, BUT SHOULD INSTEAD EXTEND IT TO FOSTER VOLUNTARY COMPLIANCE AND A GLOBAL RESOLUTION WITH FSHC

In general, courts must presume that a municipality "will act fairly and with proper motives and for valid reasons." Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296-97 (1965); see also Fanelli v. City of Trenton, 135 N.J. 582, 589 (1994). A "natural corollary to the presumption of validity of governmental action" is that "the ***objector must carry the burden*** of demonstrating" that the municipal body acted in bad faith. Berninger v. Bd. of Adj. of Midland Park, 254 N.J.Super. 401, 407 (App. Div. 1991) aff'd sub nom. Berninger v. Bd. of Adj. of Bor. of Midland Park, 127 N.J. 226 (1992)(emphasis added). Thus, a challenge to the validity of any municipal action or inaction "must overcome the presumption of validity -- **a heavy burden**." Bryant v. City of Atl. City, 309 N.J.Super. 596, 610 (App. Div. 1998)(citing 515 Assocs. v. City of Newark, 132 N.J. 180, 185 (1993); First Peoples Bank v. Medford Tp., 126 N.J. 413, 418 (1991))(emphasis added).

Consistent with the principles and law set forth above, the Supreme Court has placed a very heavy burden on those seeking to persuade a trial judge to rescind immunity. To warrant the rescission of immunity, a developer must prove that the municipality "abuse[d] the process":

> We repose such flexibility in the Mount Laurel-designated judges in the vicinages, to whom all Mount Laurel compliance-related matters will be assigned post-order, and trust those courts to assiduously assess whether immunity, **once granted, should be withdrawn if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance**. Review of immunity orders therefore should occur with periodic regularity and on notice.
>
> [Mount Laurel IV, 221 N.J. at 26 (emphasis added).]

Accord id. at 15 (wherein the Supreme Court stated that "[t]rial judges would be empowered **to rescind an immunity order** upon a showing that the municipality had **abused the process**.") Thus, the Supreme Court correctly placed the burden on would-be challengers to demonstrate that the municipality abused the process. Only in such cases should immunity be "withdrawn" or "rescind[ed]".

The Supreme Court was equally clear in defining the "abuse of the process" standard. It expressly ruled that trial judges should only consider exposing a town to Mount Laurel litigation in cases where an interested party proves that the municipality is "**determined to be constitutionally noncompliant.**" Specifically, the Court stated:

> Beyond those general admonitions, the courts should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations. If that goal cannot be accomplished, with good faith effort and reasonable speed, **and the town is determined to be constitutionally noncompliant**, then the court **may authorize exclusionary zoning actions** seeking a builder's remedy to proceed against the towns either that had substantive certification granted from COAH under earlier iterations of Third Round Rules or that had held "participating" status before COAH until this action by our Court lifted the FHA's exhaustion-of-administrative-remedies requirement.
>
> [Id. at 33-34 (emphasis added).]

Pursuant to this passage and the various legal principles articulated above, immunity orders should remain in force unless and until someone satisfies the heavy burden by proving to the Court's satisfaction that the town "abused the process" by proving that the municipality "**is determined to be constitutionally noncompliant."** Ibid.

In the case at bar, the Township is not "determined to be non-compliant". To the contrary, it is committed to comply voluntarily. Indeed, it wishes to pursue a global settlement with FSHC and, if settlement efforts fail, to secure approval of an affordable housing plan that

will be adopted in December after the Court rules on the outstanding issues concerning rental bonuses.

On July 14, 2017, the Township filed a motion to amend its JOR in an effort to secure approval of an updated plan without the need for any builder's remedy litigation. When the Court indicated its preference for the Township to proceed first with a motion to cure the 20-unit gap and then to file a DJ action, the Township has dutifully followed the Court's direction. The Township through its professionals expended a concerted effort to design a plan grounded in principles of sound planning which it presented first to the Master and then to FSHC in an effort to achieve a complete and final resolution of its obligations through 2025.

Clearly, these are not the actions of a municipality "determined to be constitutionally non-compliant." Rather, these are the actions of a municipality that seeks to comply voluntarily, thereby avoiding wasteful and costly litigation so that it can devote its resources exclusively to constitutional compliance.

POINT III

THE TOWNSHIP OF CRANFORD AND ITS PLANNING BOARD HAVE A STATUTORY RIGHT TO TEMPORARY IMMUNITY FROM MOUNT LAUREL LAWSUITS BASED UPON THE CLEAR PURPOSE AND PLAIN LANGUAGE OF THE FHA

The Supreme Court released its landmark Mount Laurel II opinion on January 20, 1983, in which it announced that trial judges would make builder's remedies "more readily available." 92 N.J. at 279. That opinion precipitated a flood of builder's remedy lawsuits. In direct response to that flood, the Legislature enacted the FHA to limit present and future builder's remedy lawsuits. Indeed, the Legislature made its purpose in enacting the FHA clear: to limit exclusionary zoning suits and facilitate the ability of municipalities to comply voluntarily "without litigation." N.J.S.A. 52:27D-303.

To diminish the existing and future volume of builder's remedy suits, the Legislature intentionally crafted very easy standards for municipalities to satisfy to immunize themselves from such suits. Pursuant to N.J.S.A. 52:27D-309 and 316, a municipality could obtain immunity by filing an affordable housing plan with COAH before the institution of an exclusionary zoning suit in Court. Indeed, it is the same premise that echoes throughout Mount Laurel jurisprudence, it's Legislation and regulations – protection from litigation for municipalities that seek to comply voluntarily. The Legislature took a similar approach to that of Judge Serpentelli with respect to immunity, but made it even more municipal friendly, streamlined and even less litigious. As explained below, Cranford satisfies the Legislative standards embodied in the FHA and, therefore, has a clear statutory right to immunity.

An elaboration of these points follows.

A. Courts Must Construe Statutes In A Manner Which Advances The Legislative Policy And Purpose.

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

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

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

Thus, this Court has an obligation to seek to fulfill "**the essential legislative policy**" of the FHA and to give meaning to its "**reason and spirit**."

B. The Legislature Enacted the FHA To Diminish The Role Of The Builder's Remedy In The Implementation Of The Doctrine So That Municipalities Could Achieve Constitutional Compliance Voluntarily "Without Litigation."

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

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

To make matters worse, attorneys for developers brazenly bragged to newspaper reporters how easily they could force municipalities to capitulate to their zoning demands. The late Henry Hill, one of the leading attorneys representing builder's remedy plaintiffs, compared towns to "**baby harp seals**" that developers could easily club to submission with builder's remedy lawsuits. See article written by Barbara L. Johnson, "Princeton Law Firm Represents The Developers In 14 Mt. Laurel Suits Against Municipalities," *Town Topics, Princeton's Weekly Community Newspaper*, December 18, 1984, at page 3.

Given the flood of builder's remedy lawsuits precipitated by Mount Laurel II and the voracious swarm of developers preying upon municipalities, it is understandable why the Legislature enacted a law that so squarely targeted the builder's remedy and so vigorously sought to curtail its role.

The Legislature clearly stated its purpose in Section 303, wherein "[t]he Legislature **declares** that the State's preference for the resolution of existing and future disputes involving exclusionary zoning ***is*** the mediation and review process set forth in this act and ***not litigation***. . .

The Legislature followed its declaration with its express intent:

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

See also id at 49 ("The legislative history of the Act makes it clear that it had two primary purposes: first, to bring an administrative agency into the field of lower income housing to satisfy the *Mount Laurel* obligation; second, **to get the courts out of that field**.")

In essence, the FHA represented the Legislature's declaration that New Jersey has seen way too many builder's remedy lawsuits – it is cumbersome, expensive and contrary to the public interest. We need to restrict such litigation and facilitate the ability of a municipality to comply voluntarily without litigious interference. That is how we intend to implement the affordable housing policies of our state.

As the bill worked its way through the legislative process,[2] former Governor Thomas H. Kean expressed an identical understanding of the purpose of the legislation:

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

By enacting this legislation and signing it into law, the Governor and Legislature so clearly sought to diminish the role of the builder's remedy that they could have just as easily titled the FHA "**The Anti-Builder's Remedy Act**."

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

In sum, the excessive builder's remedy litigation that created the impetus for the FHA; the statements of the Governor as the bill worked its way through the legislative process; and the Act's clear purpose all point to the same conclusion -- the Legislature urgently sought to severely limit builder's remedy lawsuits and facilitate voluntary municipal compliance.

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

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

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

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

3. *As to municipalities embroiled in ongoing Mount Laurel litigation*, the Legislature established a very soft standard - the "manifest injustice" standard – for municipalities to obtain immunity by securing a transfer of their lawsuits from the courts to COAH. Through such transfers, municipalities embroiled in litigation not only secured immunity, but also, to the extreme consternation of developers, secured the right to vacate any builder's remedies previously awarded by the trial judge. N.J.S.A. 52:27D-316. Mount Laurel III, 103 N.J. at 54-55.

4. As *to municipalities **not** embroiled in Mount Laurel litigation*, the Legislature established an **extraordinarily** easy way to obtain immunity from builder's remedy lawsuits. All such a municipality would have to do to obtain immunity would be to file a "resolution of participation" within four months from the enactment of the FHA. N.J.S.A. 52:27D-309. The FHA allowed a municipality to adopt a "resolution of participation" "to notify COAH of intent to

submit its fair share housing plan to COAH…" In re COAH, 221 N.J. at 22. The FHA also allowed a municipality to secure immunity by filing a plan with COAH prior to the filing of a builder's remedy suit.

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

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

It is this sixth standard that is applicable here as explained below.

The foregoing summary highlights the Legislature's desire to diminish the role of the builder's remedy in existing and future Mount Laurel disputes and explains the lengths to which the Legislature went to achieve these goals.

D. Cranford Satisfied At Least One Of The Criteria For Immunity That The Legislature Established.

Under the FHA, any municipality could obtain immunity by filing a Housing Element and Fair Share Plan with COAH prior to the institution of exclusionary zoning litigation in court. N.J.S.A. 52:27D-309 and 316. Yesterday, the Township filed a Declaratory Judgment complaint, incorporated by reference, which included two important exhibits: (1) an approved Housing Element and Fair Share Plan (See Exhibit A); and (2) a summary of plan accounting for changes in circumstances and an application of bonus credits (See Exhibit B). The carefully prepared summary evidences the Township's substantial will to comply voluntarily. Since Cranford filed its duly adopted and endorsed Affordable Housing Plan – and its Plan Summary – with this

Court before a developer instituted a builder's remedy lawsuit in court, the Township satisfied the principles embodied in N.J.S.A. 52:27D-309 and 316 to secure immunity. Since the JOR immunizes the Township through December 31, 2018 and since the Township will file a duly adopted and endorsed affordable housing plan prior to such time as when an exclusionary zoning lawsuit is permissible, this puts the Township squarely within the parameters established by N.J.S.A. 52:27D-309 and 316.

Since Cranford passes this statutory criteria under the FHA for immunity, this Court should seek to fulfill "**the essential legislative policy**" of the FHA and to give meaning to its "**reason and spirit**" by immunizing municipalities such as the Township from exclusionary zoning litigation. Giles v. Gassert, 23 N.J. at 33-34.

The Legislature adopted the FHA to severely diminish the role of the builder's remedy in the implementation of the Mount Laurel doctrine. This Court should seek to "effectuate the intent of the Legislature" to curtail builder's remedy lawsuits and to facilitate the ability of municipalities to comply voluntarily. Merin v. Maglaki, 126 N.J. 430, 435 (1992). It should do so by giving municipalities the same immunity from lawsuits that the FHA gave municipalities, like Cranford, that secured COAH's jurisdiction while it was still a functioning agency.

Moreover, since Cranford has satisfied at one of the Legislature's criteria to secure immunity and since granting immunity would advance the purpose of the FHA; this Court should grant the Township's Motion. It should not impose more stringent standards for immunity than the Legislature deemed appropriate in enacting the FHA.

For all the above reasons, Cranford has a statutory right to immunity.

Conclusion

The analysis set forth above provides three independent bases for the Court to grant the Township's motion to extend immunity.

First, the Township has demonstrated a commitment to comply voluntarily which is the foundation of the immunity doctrine announced by Judge Serpentelli in 1985 – a doctrine that has grown in stature and importance in the three decades that followed.

Second, no challenger can demonstrate that the Township is committed to constitutional non-compliance. To the contrary, the Township is committed to comply voluntarily. Therefore, the Court should extend immunity, not rescind it.

Finally, the FHA provides that if a municipality files an affordable housing plan prior to the institution of an exclusionary suit, the municipality secures protections from such a suit through the immunity created by being under the protective umbrella of the COAH's jurisdiction. Mount Laurel IV, 221 N.J. at 4. The Township has not only filed an affordable housing plan and summary of how that plan may be amended prior to the institution of suit, but also plans to file an amended affordable housing plan after the court resolves the dispute regarding rental bonuses and before immunity expires on December 31, 2018.

For all these reasons, the Court should grant the Township's motion to extend immunity.

JEFFREY R. SURENIAN AND ASSOC., LLC
Attorneys for the Movant, Township of Cranford

By: _____
Jeffrey R. Surenian (ID: 024231983)

By: _____
Michael J. Edwards (ID: 032112012)

Dated: November 21, 2018.

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Michael J. Edwards (Attorney ID: 032112012)

CRANFORD DEVELOPMENT ASSOCIATES, LLC, et. al.

v.

TOWNSHIP OF CRANFORD, et. al.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY

DOCKET NO.: UNN-L-3759-08

CIVIL ACTION – *MOUNT LAUREL*

CERTIFICATION OF MICHAEL MISTRETTA, P.P., IN SUPPORT OF THE TOWNSHIP'S MOTION FOR TEMPORARY IMMUNITY FROM MOUNT LAUREL LAWSUITS

Michael Mistretta, of full age, accordingly to law, duly certifies:

1. I am a licensed Professional Planner in the State of New Jersey and a Senior Principal of Harbor Consultants, Inc.

2. The Township of Cranford has retained Harbor Consultants as an affordable housing planning consultant. As such, I am fully familiar with the facts submitted herein.

3. This Certification is made in support of Cranford's Motion for Temporary Immunity. As the Township's affordable housing planner, I am fully familiar with the facts set forth below as they relate to this matter.

4. Cranford Township is largely built out community, having limited vacant land for accommodating affordable housing.

5. As described in detail below, the Township is fully committed to addressing its third round present need (rehabilitation share) and new construction obligations.

6. Cranford Township was subject to an exclusionary zoning law suit in 2008 brought by Cranford Development Associates, LLC (CDA) and that placed the Township under Jurisdiction of Superior Court.

7. That lawsuit resulted of a Final Judgment of Compliance and Repose of May 22, 2013, which accounted for the Prior Round obligation and a Court-approved 5-unit RDP and which provided immunity from exclusionary zoning lawsuits until December 31, 2018.

8. That JOR memorialized the Court's approval of the Township's 2013 Round 3 HEFSP (the HEFSP), which is attached to the Township's DJ Complaint as Exhibit A.

9. The 2013 Plan demonstrated that the Township would satisfy its Prior Round Obligation as follows:

Prior Round Affordable Credit Analysis per Table 19 of Cranford's Approved 2013 Housing Element		
Project	**Affordable Units/Credits**	**Unit/Credit Type**
Lincoln Apartments (Block 532, Lot 18.01)	50	Age-Restricted Rental
Riverfront Developers, LLC (Block 481, Lots 1.02, 2.01 and 3-9)	16	Non Age-Restriction Rental
SERVE Center of NJ (Block 514, Lot 3)	3	Special Needs Housing
Cranford Development Associates Project (Block 291, Lot 15.01, Block 292, Lot 2	54	Non Age-Restriction Rental
Lehigh Acquisition Project (Block 511, Lot 1)	22	Non Age-Restriction Rental
Subtotal	**145**	**-**
Rental Bonus Credits for 3 Group Home Bedrooms	3	Rental Bonus
Total	**148**	**Units/Credits**
Total for Prior Round Plan		
Total Obligation	**148**	**Units/Credits**
Credits Applied to Prior	**148**	**Units/Credits**

Round Obligation		

10. At the time of the issuance of the Township's JOR, there was not an assigned Third Round Number, so the 2013 Plan demonstrated how the Township would satisfy its Court approved RDP of 5 units in addition to its Prior Round obligations.

11. Since the issuance of the 2013 JOR, the Birchwood Project, previously referred to as the CDA project was reduced from a 360 unit inclusionary project, yielding 54 affordable units, to a 225 unit project, yielding 34 affordable units. Subject to the Court's ruling on the Township's pending motion regarding the application of rental bonus credits, the Township plans to "reshuffle" its units and use now available bonus credits to fully address its obligations.

12. Additionally, since the issuance of the 2013 JOR new properties have become available for development, and therefore, the Township's RDP has increased to 85.

13. Depending on the outcome of the Township's pending motion of rental bonus credits, this RDP may increase from 85 to 105. Table 2 of the Township's Summary of Plan included in Exhibit B assumes an RDP of 105, but is subject to the Court's ruling on the pending motion.

14. Since the issuance of the 2013 JOR the Township has completed the following actions:

- Lehigh Acquisition Project (Block 511, Lot 1): The project is fully constructed and occupied.
- Riverfront Developers, LLC (Block 481, Lots 1.02, 2.01 and 3-9): The project is fully constructed and occupied. Excess two (2) one-bedroom

units have been addressed and offset by the upcoming Birchwood Project (formerly CDA), since both projects involve the same developer.

- The Township adopted a Mandatory Set-Aside Ordinance on September 12, 2017.
- The Township has adopted a Redevelopment Plan and executed a Redevelopment Agreement for the Birchwood Site (formerly CDA site).
- The Township has begun working with Monarch Housing to design and complete two supportive housing projects on municipally owned property.
- The Township has completed a multiple iterations of a Summary of Plan outlining how the Township intends to remain compliant with their constitutional affordable housing obligation.

15. On March 10, 2015, the Supreme Court decided In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015)("Mount Laurel IV"). In this opinion, the Court noted the lack of effort by COAH to break the deadlock and found COAH to be a 'moribund' agency. The Court dissolved the FHA's requirement to exhaust administrative remedies, but established a procedure by which municipalities could file a declaratory judgment action to bring themselves under the jurisdiction of a court and seek immunity from exclusionary zoning litigation in the context of that action.

16. Because Cranford had a Round 3 JOR, which provided immunity until the year 2018, the Township did not file a DJ Action in 2015.

17. That did not, however, stop the Township from attempting to comply with its ill-defined post-Mount Laurel IV obligations.

18. The Township has a pending application to the Court attempting to resolve issues relating to (a) the 20 unit gap in its 2013 affordable housing plan resulting from the downscaling of the Birchwood project from 360 to 225 units; and (b) the Township's entitlement to additional rental bonuses as a result of the construction of additional affordable rental housing subsequent to the entry of the JOR in 2013.

19. Despite the Township's positions on those issues, the Township has prepared a summary of plan, attached as Exhibit B to the Township's DJ Complaint, which is the product of several revisions.

20. The Township has presented the Plan Summary to the Court's Special Master.

21. The Township has also presented the Plan Summary to FSHC in an effort to achieve a global settlement of all affordable housing issues facing the town..

22. The proposal accounts for the Special Master's recommendation as to the application of bonus credits, but the Township reserves its right to its positions pending the Court's November 30, 2018 decision on those issues.

23. The Township will adopt a HEFSP in December of 2018 that will be substantially consistent with Exhibit B, but which may be amended, supplemented or revised as a result of various factors such as public input.

24. The December of 2018 Plan may also be amended and supplemented as the DJ Action is processed.

25. The Township's immunity application should be viewed through the prism of the Fair Housing Act as the Supreme Court stated that "the process developed herein is one that seeks to track the processes provided for in the FHA."

26. In light of the above facts and standards, the Township's Round 3 JOR, and the Township's filing of a Declaratory Judgment Complaint, the Township of Cranford is indeed committed to comply voluntarily rendering any exclusionary zoning lawsuits unnecessary.

26. I am aware that the Superior Court will rely upon the facts set forth in this Certification and I am aware that, if any statements made by me are willfully false, I am subject to punishment as permitted under law.

27. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: November 21, 2018

Michael Mistretta, P.P., CLA

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November 21, 2018

VIA ECOURTS
Superior Court Clerk
Union County Superior Court
2 Broad St., 14th Floor Tower
Elizabeth, NJ 07207

RE: Cranford Development Associates, LLC, et al. v. Township of Cranford
Docket No. UNN-L-3759-08

Dear Sir/Madam:

Enclosed for filing, please find a copy of the Township of Cranford's Notice of Motion for Temporary Immunity, together with supporting brief, Certification of Michael J. Edwards, Esq., Certification on Michael Mistretta, .PP, and proposed form of order.

Kindly charge my firm's judiciary account for the applicable filing fee.

Very truly yours,

Michael J. Edwards

Michael J. Edwards

Enclosures
Kevin Walsh, Esq. *(via email & regular mail)*
Stephen Eisdorfer, Esq.*(via email& regular mail)*

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November 21, 2018

VIA ECOURTS & UPS OVERNIGHT
Honorable Camille M. Kenny, J.S.C.
Union County Superior Court
2 Broad St., 14th Floor Tower
Elizabeth, NJ 07207

RE: Cranford Development Associates, LLC, et al. v. Township of Cranford
Docket No. UNN-L-3759-08

In the Matter of the Application of the Township of Cranford
Docket No. UNN-L-3976-18

Dear Judge Kenny,

On November 20, 2018, pursuant to direction from Your Honor, the Township filed a Declaratory Judgment Action seeking court review of its Housing Element & Fair Share Plan ("HEFSP") as well as a "Summary of Plan" that will serve as the foundation for a December 2018 revised HEFSP. The December 2018 Plan will account for Your Honor's ruling on November 30, 2018 with respect to the application of rental bonus credits.

In addition, the Township filed two Motions for Immunity. Under the existing Builder's Remedy docket, the Township sought an extension of immunity stemming from the 2013 Judgment of Compliance and Repose. In addition, or in the alternative, the Township filed a motion seeking a temporary immunity order under the new Declaratory Judgment docket. In either event, the Township seeks immunity until March 31, 2018. While it may ultimately need an extension of immunity at a later date, the initial period should provide an opportunity for the adoption of the new plan and meaningful and substantial settlement negotiations with FSHC to attempt to resolve the Township's Round 3, post-Mount Laurel IV obligation without the need for litigation.

I thank Your Honor for your continued time and attention to this matter.

Respectfully Submitted,

Michael J. Edwards

Enclosures
Kevin Walsh, Esq. *(via email & regular mail)*
Stephen Eisdorfer, Esq.*(via email& regular mail)*