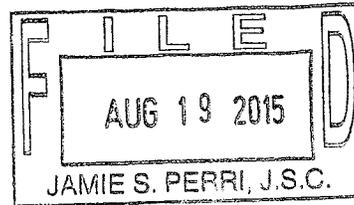


PREPARED BY THE COURT



SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MONMOUTH COUNTY  
DOCKET NO. L-2539-15

IN THE MATTER OF  
THE APPLICATION OF THE  
TOWNSHIP OF MIDDLETOWN,  
COUNTY OF MONMOUTH

CIVIL ACTION  
(Mt. Laurel)

ORDER

This matter having been opened to the court on August 7, 2015, on a motion on behalf of the Township of Middletown ("Township") by Archer & Greiner, PC (Brian M. Nelson, Esq., appearing), for an Order granting the Township temporary immunity from Mount Laurel lawsuits as more fully set forth in In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015) ("Mount Laurel IV"; and general opposition to the Township's motion having been filed on behalf of Fair Share Housing Center (Kevin D. Walsh, Esq., appearing); and the court having considered the papers submitted and the arguments of counsel as set forth on the record on August 7, 2015; and the reasons set forth in the attached Rider dated August 19, 2015, and for other good cause appearing;

IT IS on this 19<sup>th</sup> day of August, 2015;

ORDERED:

1. The Township of Middletown is granted temporary immunity

from exclusionary zoning actions for a period of five months from July 8, 2015, to December 8, 2015, and is further granted temporary immunity nunc pro tunc to the date of filing of its Complaint for Declaratory Judgment. This period of immunity shall be reviewed periodically by the court and may be extended as necessary to complete this matter consistent with the Township's status as a town which previously received substantive certification from the Council on Affordable Housing.

2. Interested parties who have not moved to intervene may make written submissions or comments to the court, on notice to all parties. Only those parties that have been joined in the litigation may be heard on motions or other court proceedings unless prior leave of court has been granted.
3. A case management conference shall be conducted in this matter on Wednesday, September 9, 2015, at 9:30 a.m., for the purpose of scheduling future benchmarks. The Township shall submit a proposed Case Management Order to the court at least three days in advance of the conference.
4. A copy of this Order shall be served on or otherwise made available to all interested parties as directed by the New Jersey Supreme Court in Mount Laurel IV within seven

days of the date hereof.



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JAMIE S. PERRI, J.S.C.

RIDER TO ORDER DATED 8/19/15

In the Matter of the Application of the Township of Middletown, Monmouth County  
Docket No. MON-L-2539-15

*The court makes the following findings of fact and conclusions of law regarding the motion(s) identified in the attached Order(s):*

The Township of Middletown (“the Township”) moves pursuant In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015), (hereafter “Mount Laurel IV”), for an Order granting temporary immunity from constitutional compliance claims and builder’s remedy litigation pending final determination of the Township’s constitutional affordable housing obligation and compliance therewith under the Fair Housing Act of 1985 (“FHA”), N.J.S.A. 52:27D-301, et seq. The Township filed its Complaint for Declaratory Judgment and motion on July 8, 2015, and has provided notice of its application to interested parties consistent with the Court’s direction in Mount Laurel IV.

No party has moved to intervene in this matter. The court has received and reviewed a letter submitted on behalf of Fair Share Housing Center (“FSHC”) as an interested party. FSHC raises no specific objections to the Township’s motion but generally argues that a grant of immunity should not be “automatic” and, if immunity is granted, it should run for no more than five months from the date of filing of the Complaint.

*Historical Perspective*

The “Mount Laurel” doctrine, embodied in a series of affordable housing cases and culminating in the Legislature’s adoption of the FHA, reflects New Jersey’s dedication to creating “a realistic opportunity for producing a fair share of regional present and prospective need for housing low-and moderate-income families.” Mount Laurel IV, supra, 221 N.J. at 4. The FHA established the Council on Affordable Housing (“COAH”), which was tasked with calculating the affordable housing obligation for each municipality within the State utilizing an accepted methodology for a given period of time (“rounds”).

COAH functioned as anticipated and established “First Round” Rules for the period 1987-1993 and “Second Round” Rules for the period 1993-1999. Following the completion of the Second Round Rules, however, COAH endeavored to change its methodology to include a “growth share” component. As legal challenges to COAH’s actions, and the subsequent abolition of COAH by Governor Chris Christie, worked their way through the courts, municipalities were left for a substantial period of time without any definitive guidance regarding their actual compliance goals or a functioning administrative framework capable of providing reliable guidelines.<sup>1</sup> With its March 10, 2015, decision in Mount Laurel IV, the

<sup>1</sup> The Appellate Division invalidated key aspects of COAH’s initial version of the Third Round Rules in In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1 (App. Div. 2007) and directed COAH to recalculate the State’s housing needs. COAH complied and in 2008 adopted revised Third Round Rules for the period January 1, 2004 to December 31, 2018. COAH’s action was again the subject of a court challenge. In In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 1 (App. Div. 2010), the Appellate Division again invalidated a substantial portion of COAH’s Third Round Rules and ordered COAH to adopt new regulations within five months of its decision. The Supreme Court granted petitions for certification, however, the matter was further delayed when, on

Supreme Court acknowledged that the delay in pursuing affordable housing due to a dysfunctional COAH could no longer be tolerated. The Court dissolved the FHA's exhaustion-of-administrative-remedies provision and directed the trial courts to resume their position as the forum of first resort for the determination of municipal compliance with the obligation to afford the "opportunity for producing a fair share of regional present and prospective need for housing low-and moderate-income families." *Id.* at 3-4. The Court's mandate to the trial courts in this regard is clear:

Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes, where appropriate, that are similar to those which would have been available through COAH for the achievement of substantive certification. Those processes include conciliation, mediation, and the use, when necessary, of special masters. The end result of the processes employed by the courts is to achieve adoption of a municipal housing element and implementing ordinances deemed to be presumptively valid if thereafter subjected to challenge by Third parties. Our approach in this transition is to have courts provide a substitute for the substantive certification process that COAH would have provided for towns that had sought its protective jurisdiction. And as part of the court's review, we also authorize, as more fully set forth hereinafter, a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court's review proceedings, even if supplementation of the plan is required during the proceedings. *Id.* at 23-24.

The judicial processes announced by the Court was intended to "reflect as closely as possible the FHA's processes and provide the means for a town transitioned from COAH's jurisdiction to judicial actions to demonstrate that its housing plan satisfies Mount Laurel obligations. *Id.* at 6. The Court explained:

We will establish a transitional process and not immediately allow exclusionary zoning actions to proceed in recognition of the various stages of municipal preparation that exist as a result of the long period of uncertainty attributable to COAH's failure to promulgate Third Round Rules. During the first thirty days following the effective date of our implementing order, the only actions that will be entertained by the courts will be declaratory judgment actions filed by any town that either (1) had achieved substantive certification from COAH under prior iterations of Third Round Rules before they were invalidated, or (2) had 'participating' status before COAH. Assuming any such town waits and does not file a declaratory judgment action during that thirty-day period, an action may thereafter be brought by a party against that town, provided the action's sole focus

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June 29, 2011, the Governor abolished COAH and transferred its functions to the Department of Consumer Affairs. The Appellate Division then invalidated the Governor's Order and the Supreme Court affirmed in *In re Plan for Abolition of Council on Affordable Housing*, 214 N.J. 444 (2013). Thus, two years after granting certification, the Court ultimately affirmed and modified the Appellate Division's decision and directed COAH to adopt Third Round Rules by February 26, 2014. See *In re Adoption of N.J.A.C. 5:96 and 5:97*, 215 N.J. 5781 (2013). After the grant of extensions of time in which to comply, COAH voted on the adoption of proposed Rules but reached a 3-3 stalemate. At this point, COAH essentially threw up its hands and took no further action.

is on whether the town's housing plan meets its Mount Laurel obligations (a constitutional compliance challenge). The court's evaluation of a town's plan that had received substantive certification, or that will be submitted to the court as proof of constitutional compliance, may result in the town's receipt of the judicial equivalent of substantive certification and accompanying protection as provided under the FHA. *Id.* at 5-6.

Pertinent to the issues presented in this motion, the Court crafted a procedure under which municipalities that had previously participated in the COAH process could obtain temporary immunity from enforcement litigation while the courts established the state and regional figures for compliance and the municipalities formulated revised housing plans in response thereto.

### *Immunity*

In assessing whether a municipality should be granted temporary immunity, the Court identified two categories or classes of towns:

There exist two classes of towns that sought to make use of the administrative remedy offered through the FHA. Some towns had acted quickly in response to the earlier versions of Third Round Rules (before invalidated) and had been granted substantive certification. Other towns were designated simply as 'participating' in the COAH process. Those two classes of municipalities require different treatment. *Id.* at 21.

With regard to the former, the Court explained that where municipalities received substantive certification based upon plans which conformed with the invalidated growth share methodology contained within the Third Round Rules, their plans should be reviewed and evaluated to determine if they "provide for a realistic opportunity for the municipality to achieve its "fair share of the present and prospective regional need for low and moderate income housing." *Id.* at 25, citing Southern Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel II), 92 N.J. 158, 174 (1983). Unlike "participating" towns, subject to a five month period of immunity as discussed below, municipalities that had obtained substantive certification are entitled to immunity from "subsequently filed exclusionary zoning actions during that necessary review process, unless such process is unreasonably protracted" and once granted, should be reviewed with "periodic regularity." Mount Laurel IV, *supra*, 221 N.J. at 26. The Court further advised that with respect to such towns, "courts should be generously inclined to grant applications for immunity from subsequently filed exclusionary zoning actions during that necessary review process, unless such process is unreasonably protracted." *Id.*

With regard to towns that had only "participating" status with COAH, the Court took a less expansive view, reasoning that such towns should receive treatment similar to that which was provided under the FHA to "towns that had their exclusionary zoning cases transferred to COAH when the Act was passed [and] received insulating protection due to COAH's jurisdiction provided that they prepared and filed a housing element and fair share plan within five months."

Id. at 27. Within the “participating” town class, the Court further delineated the deference to be given on an application for temporary immunity:

If a town had devised a housing element and took action toward adopting ordinances in furtherance of its plan, then we would expect a reviewing court to view more favorably such actions than that of a town that merely submitted a resolution of participation and took few or perhaps no further steps toward preparation of a formal plan demonstrating its constitutional compliance. Id. at 27.

The Court acknowledged the challenges that trial courts would face in determining whether a town with participating status, but which may not have well-developed plans to submit to the court, should nonetheless be provided with some period of temporary immunity. The Court thus did not foreclose courts from granting temporary immunity to towns that have not, as yet, proffered a fair housing plan but directed them to consider “the extent of the obligation and the steps, if any, taken toward compliance with that obligation. In connection with that, the factors that may be relevant, in addition to assessing current conditions within the community, include whether a housing element has been adopted, any activity that has occurred in the town affecting need, and progress in satisfying past obligations.” Id. at 28. This approach is consistent with the Court’s recognition that “it bears emphasizing that the process established is not intended to punish the towns represented before this Court, or those that are not represented but which are also in a position of unfortunate uncertainty due to COAH’s failure to maintain the viability of the administrative remedy.” Id. at 23.

In this matter, the Township seeks temporary immunity from constitutional compliance claims and builder’s remedy litigation on the basis that it was substantively certified by COAH in 2009 as to its Third Round obligations. The Township’s application is supported by the Certification of Anthony P. Mercantante, P.P., A.I.C.P., which discloses the following.

On March 14, 1994, the Township received Round One substantive certification from COAH. On March 13, 2000, the Township timely petitioned COAH for substantive certification for its Rounds One and Two obligations. Despite COAH’s inability to act on the Township’s Round Two plan, the Township continued to implement it, resulting in the development of a number of inclusionary projects. On December 20, 2005, the Township petitioned COAH for Round Three substantive certification based upon the original version of COAH’s Third Round Rules that were later substantially invalidated. Even though COAH was not able to act on the Township’s first Third Round plan, the Township continued to implement the plan.

On December 31, 2008, the Township filed for substantive certification under COAH’s revised Third Round Rules. On June 15, 2009, the Township adopted Ordinance No. 2009-2969 authorizing the acquisition and conveyance of “the Coe Property” with various parties, including Impact Oasis, to provide eight affordable supportive housing beds for autistic youth, and the later dedication of \$40,000 in affordable housing trust funds to bring the structure to code for such purposes. On July 20, 2009, the Township adopted Ordinance No. 2009-2979, rezoning highly developable properties commonly known as Meadowview, Mountain Hill, and Four Ponds, specifically to facilitate inclusionary development. On September 8, 2009, the Township

adopted Resolution No. 09-219, authorizing the execution of a Developer's Agreement with Mountain Hill LLC to provide for the development of eighty low and moderate income family rental units with at least fifty percent of the units being reserved as low income rentals. On September 29, 2009, COAH recommended that the Township receive substantive certification and concluded that the Township's 2008 Third Round plan created a surplus of 105 credits. On October 14, 2009, the Township became one of 68 municipalities in the State to be granted full substantive certification by COAH with its adoption of Resolution No. 42-09.

After receipt of substantive certification, the Township continued to expeditiously implement its housing plan. On November 16, 2009, the Township adopted Ordinance No. 2009-2991 conveying property for the development of affordable housing to Housing and United Services ("HUS"), and authorized and entered a Developer's Agreement with HUS for the development of eight supportive housing beds in two separate homes. On November 16, 2009, the Township adopted Ordinance No. 200-2992 further rezoning various properties throughout the Township, commonly known as the Laurel Avenue, Steiner, Atlantic Pier, and Taylor's Lane specifically for the purpose of facilitating inclusionary development as well as establishing a Residential Over Commercial program. On November 16, 2009, the Township also adopted Ordinance No. 2009-2994 establishing necessary rules for the administration of the Township's variety of affordable housing programs.

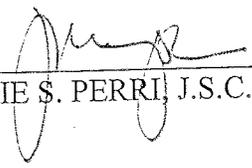
Since that time, the Township Planning Board has issued the following approvals:

- March 3, 2012 - Application of Meadowview LLC for the development of 38 condominiums, including nine affordable units for low to moderate income households, plus a payment to the Township's affordable housing trust fund for a 25% affordable set-aside. [On January 22, 2013, the Township adopted Ordinance No. 2013-3077 conveying property on Unity Road and authorizing the entry of a Developer's Agreement for the development of four affordable supportive housing beds as part of the Township's Scattered Sites program with HUS.]
- May 7, 2014 - Application of Atlantic Pier Company, Inc., for the development of 40 units, including 10 affordable family rental units for a 25% affordable set-aside.
- December 3, 2014 - Application of Bayshore Village LLC for the development of 110 one hundred percent affordable senior rental units to replace 96 units not previously credited or deed restricted by COAH that were substantially destroyed in Hurricane Sandy. [Bayshore Village is an entirely new inclusionary site not included in any prior Township housing plan, which adds 110 units to the Township's 105 credit surplus as determined by COAH in 2009 for Round Three compliance.]
- March 4, 2015 - Application of American Properties at Middletown, LLC, which was a significant inclusionary site in the Township's certified Round Three plan, for the development of 195 townhomes, plus 49 affordable units for sale.
- March 4, 2015 - Application of 190 Main Street LLC for the development of two affordable rentals over commercial as part of a mixed use building.
- July 1, 2015 - A General Development Plan ("GDP") for Village 35, LP and Toll Brothers as contract purchasers of the Mountain Hill site, a significant inclusionary site in the Township's certified Round Three plan to include up to 350 residential units, including 70 affordable rental units.

The record before the court shows that the Township, which obtained substantive certification from COAH, filed a timely Complaint for Declaratory Judgment and has demonstrated that it has taken significant steps as detailed above in an effort to voluntarily satisfy its affordable housing obligations for the Third Round despite COAH's failure to adopt constitutionally compliant Rules. Id. at 27-28. Its motion for immunity shall be granted.

The Township has reasonably argued that it cannot prepare a final supplemental housing element and fair share plan until regional need and methodology have first been determined by the courts. This court appreciates the immense task that must be undertaken by all concerned and is at the same time mindful of the urgency with which the Court expects these matters, which have laid dormant for such an extraordinary period of time, to be addressed. Five months have now elapsed since the Court released its decision in Mount Laurel IV and towns that wish to voluntarily comply have no doubt used this time to actively assess their anticipated affordable housing options. The court expects that once the state and regional figures have been established, the towns can move expeditiously to refine their plans to meet a more definite goal.

Although the Township enjoys the status of having obtained substantive certification, the court finds that to assist in the orderly administration of its pending Mt. Laurel matters, the Township shall be granted an initial five month period of temporary immunity from exclusionary zoning lawsuits which shall run from July 8, 2015, the last date upon which a Complaint for Declaratory Judgment could be filed, until December 8, 2015.<sup>2</sup> This period of immunity shall be reviewed periodically by the court and may be extended consistent with the Township's status as necessary to complete the process.<sup>3</sup>

  
JAMIE S. PERRI, J.S.C.

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<sup>2</sup> Although the court has set July 8, 2015, as the commencement date of the five month immunity period, the court finds that towns which filed more promptly should not be penalized or be at risk of being found at some future date to have lost their immunity during the interim period between the date of filing and the effective date of the five month period. Immunity shall therefore attach as of the date of filing of the Complaint.

<sup>3</sup> Note the Court's statement that "[t]hus, in all constitutional compliance cases to be brought before the courts, on notice and opportunity to be heard, the trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court's determination of the municipality's presumptive compliance with its affordable housing obligation. Immunity, once granted, should not continue for an undefined period of time; rather, the trial court's orders in furtherance of establishing municipal affordable housing obligations and compliance should include a brief, finite period of continued immunity, allowing a reasonable time as determined by the court for the municipality to achieve compliance. Id. at 28.