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September 9, 2015

Joseph H. Orlando, Clerk
Superior Court of New Jersey, Appellate Division
Richard J. Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625-0006

**Re: In the Matter of the Application of Woodbridge, County
of Middlesex
Docket No.: MID-L-3862-15**

Dear Sir/Madam:

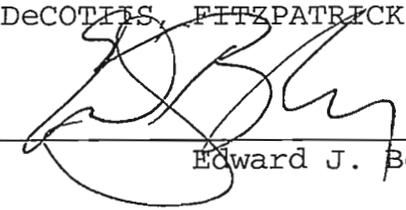
Enclosed for filing are an original and five (5) copies a Brief in Support of Motion for Leave to Appeal and Certification of Service by Kendall W. Harmeyer.

Please return a "filed" copy of each enclosed item in the self-addressed envelope. Kindly charge our Superior Court Account #141020 for any filing fees.

Thank you.

Very truly yours,

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EJB/kh
Encls.



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IN RE PETITION OF THE TOWNSHIP
OF WOODBRIDGE, MIDDLESEX
COUNTY, NEW JERSEY, FOR A
DECLARATORY JUDGMENT

Petitioner.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:MIDDLESEX COUNTY

DOCKET NO.: MID-L-03862-15

Civil Action

**CERTIFICATION OF
SERVICE**

I, KENDALL W. HARMEYER, of full age, hereby certifies:

1. I am a Legal Assistant with the law firm of DeCotiis, FitzPatrick & Cole, LLP,
Attorneys for the Petitioner, in the above-captioned matter.

2. On September 9, 2015, I caused to be filed, via Hand Delivery, original and five
copies of a Brief in Support of Motion for Leave to Appeal and Certification of Service to:

Joseph H. Orlando, Clerk
Superior Court of New Jersey, Appellate Division
Richard J. Hughes Justice Complex
25 West Market Street
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3. On September 9, 2015, I cause to be served, via UPS Overnight Delivery, two
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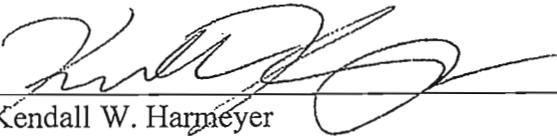
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I hereby certify that the foregoing statements made by me are true. I am aware that if any of the above statements made by me are willfully false, I am subject to punishment.


Kendall W. Harmeyer

Dated: September 9, 2015.

In the Matter of
the Application of the
Township of Woodbridge,
County of Middlesex

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.

ON APPEAL FROM: LAW DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MIDDLESEX COUNTY
DOCKET NO. MID-L-3862-15

**PETITIONER-APPELLANT TOWNSHIP OF WOODBRIDGE'S
BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL**

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PRELIMINARY STATEMENT

This is a motion for leave to appeal the August 20, 2015 Order (the "August 20, 2015 Order") of the New Jersey Superior Court, Law Division, Middlesex Vicinage, Honorable Douglas K. Wolfson presiding, whereby Judge Wolfson granted an injunction against the Township of Woodbridge, New Jersey (the "Township" or "Woodbridge") which was requested by the Fair Share Housing Center ("Fair Share" or "FSHC"). The August 20, 2015 Order, effective on August 14, 2015, has severely harmed the Township by imposing a scarce resource restraint which has effectively stripped the municipality of all Legislatively-delegated planning, zoning and land use authority.

The Court imposed the injunction without any regard to the legal standards governing the exercise of such power, and should be reversed. Prior to granting the Order, the trial court heard oral argument from the Township and FSHC on August 14, 2015.

During the colloquy, the trial court refused to acknowledge, despite clear legal precedent, that a scarce resource restraint restricting all land use decisions within a municipality is injunctive relief, and further refused to apply the Crowe v. DeGioia factors which the Supreme Court has mandated temper this extreme form of relief. Without the required analysis under Crowe, or any equivalent careful examination or balancing of the hardships and equities, the

trial court imposed the injunction on Woodbridge. Notwithstanding that the Township has historically demonstrated its good faith compliance to address affordable housing before the Council of Affordable Housing and the courts, Woodbridge has been stripped of the ability to regulate land use since August 14, 2015.

PROCEDURAL HISTORY

The matter arises within the context of a Declaratory Judgment Action, Docket No. DJ-3862-15, filed by the Petitioner Township under the procedures established by the Supreme Court in In re: Adoption of N.J.A.C. 5:96 & 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015). Under the Supreme Court's ruling, municipalities are afforded an opportunity to prosecute declaratory judgment actions to validate their affordable housing plans as compliant with *Mount Laurel* obligations. Id. Upon initiating the action, the Township filed a Motion for Immunity from lawsuits while it prepared its fair share housing plan. FSHC opposed the Township's motion, and filed a Cross-Motion to Intervene and seeking the imposition of a scarce resource restraint. A hearing was held on the motions on August 14, 2015 before Hon. Douglas K. Wolfson, J.S.C.

At the conclusion of the hearing, the Court asked the Township and FSHC to finalize an order reflecting the colloquy. T93-22 to T94-5; 66a-67a. Counsel for Fair Share, invoking fairness to the Township, requested several days for the Parties to draft the language of the Order rather than preparing and

submitting a draft order at the courthouse. T102-15 to T102-21; 71a. On August 20, 2015, the Court signed an Order imposing a scarce resource restraint on Woodbridge with the following conditions:

The Township of Woodbridge is prohibited from developing land and from acquiring, conveying and disposing of land or interests in land without prior court approval.

The Township of Woodbridge, Township of Woodbridge Planning Board, and the Township of Woodbridge Zoning Board, and any official bodies and persons, agents or employees there, who have the authority to grant any type of development approvals, or modifications thereof (including the municipal construction official and zoning officer), are hereby restrained from granting sub-division, site plan and variance approvals, waivers and substantial amendments involving parcels of privately or publicly owned land under the terms and conditions hereafter set forth herein. Order Imposing Scarce Resource Restraints, In the Matter of the Application of the Township of Woodbridge, County of Middlesex, Docket No. L-3862-15, dated August 20, 2015, See also, "Opposed Order Filed 8/20/15," 75a-81a.

The Township now appeals the August 20, 2015 Order.

STATEMENT OF FACTS

A. Petitioner Township of Woodbridge's Motion for Temporary Immunity

On August 14, 2015, a hearing on the Township of Woodbridge's motion for Immunity, Fair Share's cross-motion to

Intervene and for a Scarce Resource Restraint, and two related matters involving developers in Woodbridge was held before the trial court. The three matters were consolidated for the purpose of motion hearing, but remained separate for the purposes of the resultant orders. T4-15 to T4-18; 22a. Mr. Edward Boccher, Esq., of the law firm DeCotiis, Fitzpatrick and Cole LLP appeared on behalf of the Township of Woodbridge. Mr. Kevin Walsh, Esq., appeared on behalf of the Fair Share Housing Center. Also on record were counsel for defendant developers in the two separate but related matters, and Elizabeth C. McKenzie, AICP/PP, Court Appointed Special Master. T4-20 to T4-25; T5-1 to T5-25; 22a.

Mr. Walsh, who opposed the granting of immunity to Woodbridge while it developed a compliant fair share plan, argued that "land was a scarce resource," T34-8; 37a, in the Township, that the Township "was in between plan approval," T34-9; 37a, and that the municipality "hasn't met its obligations," T46-13; 43a, with regard to affordable housing. During his colloquy with the court, Mr. Walsh claimed "[Woodbridge hasn't] satisfied standards for immunity, because they've - they have not met their obligations with regard to family housing, they have not - they've approved developments." T11-9 to T11-13; 25a. Mr. Walsh identified Woodbridge as a "vacant land adjustment municipality" without qualification or support. T10-14 to T10-15; 25a. Mr. Walsh concluded his arguments with what he called a

"final pitch," focusing not on the deficiencies of Woodbridge's affordable housing, but on the operations of Fair Share: "When you have a public interest organization that has made a good faith effort to be diligent, no actual notice -- and -- and, you know, a clear reality that the municipality hasn't met its obligations, I think there's a higher burden that has to be met..." T46-7 to T46-14; 43a.

Despite Fair Share's objection, the Court granted the Township temporary immunity. During the colloquy with the Parties, the Court acknowledged that it was "satisfied that [Woodbridge] sufficiently demonstrated [its] good faith efforts in compliance to warrant the five months immunity from the filing date of the complaint going forward." T14-4 to T14-10; 27a. The court-appointed Special Master agreed "that what [Woodbridge] has done historically," and what it has "in the works," passed the "test" for good faith efforts. T13-25 to T14-3; 26a-27a. Later, when Counsel for Woodbridge indicated that the municipality hadn't "close[d] its eyes," to affordable housing obligations, the Court agreed, stating: "I've already indicated strongly that I believe the contrary to be so by virtue of my granting you the five months' immunity. So you need not spend a lot of time trying to justify to me that you're a good guy versus a bad guy. You're at least presumptively a good guy." T59-1 to T59-10; 49a.

B. Intervenor Fair Share Housing Center's Cross-Motion for a Scarce Resource Restraint

Following Fair Share's portion of the colloquy, the Court also indicated that it was inclined to grant Fair Share's cross-motion for a scarce resource restraint to be imposed on Woodbridge. T48-3 to T48-7; 44a. The colloquy then shifted to Township Counsel, who expounded upon the factual and legal bases for the Township's opposition to the scarce resource restraint:

Mr. Boccher: Judge, the phrase scarce resource restraint is kind of loosely thrown around in --

The Court: Not by me.

Mr. Boccher: -- Mount Laurel issues. And we're talking about an injunction. We're talking about the imposition --

The Court: No we're not. We're talking about a scarce resource restraint, which has been acknowledged both in case law and statutorily. **It's not an injunction in the same sense as the Crowe versus [DeGioia] injunction.** This is to protect constitutional rights and it's to make sure that the irreparable harm of and loss of resources that would otherwise enable you to comply with those constitutional obligations are not lost irretrievably. So **I reject categorically any analysis that suggests that I need to treat the scarce resource constraint the same way that as I would an application for a TRO or a preliminary injunction in a non-Mount Laurel context. This is different.**

Mr. Boccher: Okay, well, we would state our objection to that interpretation --

The Court: I got it.

Mr. Boccher: -- of the law, Your Honor. We think Crowe --

The Court: It's on the record.

Mr. Boccher: We think Crowe v. DeGioia absolutely applies. And in any event, in any event --

The Court: Never been applied by any judge in a case when I was a lawyer, and I'm not aware of any judge that has ever done it, and I never did it, so --

T48-24 to T50-5; 44a-45a(emphasis supplied).

Counsel for the Township discussed, without conceding, that even if the Court disagreed with the appropriateness of applying the Crowe factors, a legal standard must still guide the Court's final decision:

The Court: ...I think that any town that asks me for a vacant land adjustment is going to be subject, presumptively subject, to a scarce resource constraint.

Mr. Boccher: Which is not what the COAH regulations governing scarce resource rest--

The Court: I'm not COAH

Mr. Boccher: -- Yeah, governing -- governing --

The Court: Yeah, I'm not COAH.

Mr. Boccher: I understand that, Judge.

The Court: And I don't - see, COAH has their numbers; I don't. So I don't know what your number is going to be and COAH does. So, when COAH is functional and they say your -- Woodbridge's number is, you know, 12 or 2 million or whatever it is. So they have a different context and framework within which to assess whether and to what extent they should enter a scarce resource restraint. I don't know what your number is going to be, so I can't be in a position where I lose land that's necessary for compliance without knowing what the number is yet. So my rule of thumb is likely going to be in this and any other case, that if you're going to come in looking for a scarce resource constraint -- I'm sorry -- a vacant land

adjustment -- you will be hit with a scarce resource constraint...

Mr. Boccher: And my argument, Judge, is that a vacant land adjustment does not per se provide valid reasons and grounds to support a scarce resource injunction. My -

-
The Court: I think it does...

T60-8 to T61-19; 50a(emphasis supplied).

C. The Court's Consideration of a Vacant Land Adjustment in Ordering a Scarce Resource Restraint

Throughout the colloquy, references were made to a "vacant land adjustment" as the reason the Court believed a scarce resource injunction was appropriate against Woodbridge. The Township had received a vacant land adjustment, 16 years earlier, under an order approving the Township's housing plan, on June 17, 1999 (the "June 19, 1999 Order"). It had not applied for any further adjustments since. T51-4 to T51-9; 45a. The June 17, 1999 Order provided the means for the Township to address its realistic development potential ("RDP") and the Township has done so, at all times and upon Court approval, with 58 units and credits to over-satisfy a 53-unit requirement. T51-7 to T51-9; 45a, See also, "Order Filed 6/17/99," 82a-90a; "Certification of Marta Lefsky, AICP, PP, 7/20/15," 82a-96a; "Woodbridge Township Fair Share Units, Status as of 7/9/15," 97a.

During the motion hearing, Township Counsel clarified that Woodbridge had not asked for, or received, any vacant land

adjustments since the June 17, 1999 Order. T66-10 to T66-19; 53a. The Court acknowledged that the Township was not operating with a vacant land adjustment and that "they don't have a vacant land adjustment yet. I have to be the one to give it to them." T21-9 to T21-10; 30a. Nevertheless, Mr. Walsh referred to the Township as a "vacant land adjustment municipality," T10-10 to T10-15; 25a, and the Court indicated that it was guided by the belief that the Township would be applying for a vacant land adjustment, T50-22 to T50-25; 45a, T52-19 to T52-20; 46a, T75-18 to T75-24; 57a. Township Counsel explained to the Court that he did not know whether or not the Township would be applying for a vacant land adjustment after the Court insisted that he admit that the Township planned to apply in the future¹:

The Court: So while you're fencing with me -
- and I don't mean that in a pejorative way
- about the idea that you are not going to
be seeking a vacant land adjustment, I don't
understand. You know you're going to do it.
I don't know why you won't just say that you
will do it.

Mr. Boccher: Well, I'm not the planner. I
haven't put together the plan. I would
expect a vacant land adjustment would be --

The Court: Okay.

Mr. Boccher: -- a component of that plan.

The Court: So, as long as you're going to be
seeking a vacant land adjustment, I have an
obligation to make sure that what land is
left is at least looked at for the purposes
of a Mount Laurel inclusionary development
or at least somehow related to promoting the

¹ The Township is exploring all options as it assembles a Fair Share plan. Included among these is a plan which does not include a request for a "vacant land adjustment."

Mount Laurel obligation that you will likely have...
T52-8 to T52-25; 46a.

In addition to no facts being offered to indicate that Woodbridge was a so-called "vacant land adjustment municipality," there was no law cited, by the Court or the Parties, indicating that a vacate land adjustment automatically triggers a scarce resource restraint. Contrarily, when the vacant land adjustment was effectuated as part of the June 17, 1999 Order, no scarce resource restraint accompanied it, a point Township Counsel made during his colloquy with the Court. T62-24 to T63-2; 51a.

D. The Court's Lack of Consideration of the Township's Good Faith Efforts to Provide Affordable Housing in Ordering a Scarce Resource Restraint

Throughout the August 14, 2015 motion hearing, Counsel for the Township directed the Court to facts showing Woodbridge's compliance with its affordable housing obligation. "We've made substantial progress to address that unmet need as well." T51-16 to T51-17; 45a. "What I am suggesting is that with respect to [the] MetroPark [redevelopment], there's an ordinance in place and that they abide by the ordinance. The ordinance is written under the prior version of the COAH third round rules." T56-1 to T56-7; 48a. "Woodbridge has - 40 percent of the housing in Woodbridge is affordable to low and moderate income people. This is a municipality which has not engaged in...historically

exclusionary practices." T59-13 to T59-19; 49a. In its brief to the Court, the Township directly refuted one of numerous unsupported claims by FSHC that in "20 years" Woodbridge has only provided 38 affordable family units with demonstrative evidence of its efforts:

To start with, instead of 38 units, 367 affordable units have actually been completed with an additional 311 units to be shortly provided - 261 of those units at the Bunns Lane and Hopelawn VFW projects (if the Court approves of the Township's pending request to reallocate affordable housing trust funds) and 50 units at the Avenel project. Combined this results in a total of 678 units which have either been constructed or will soon be under construction. Of this total, 283 units are family rental units. Hundreds or more units are the subject of firm, well-developed plans by the Township. Record, Motion Hearing dated 8/14/15.

Indeed, the Township's motion to the Court set forth a detailed inventory of the Township's developed or planned affordable housing units. See, "Certification of Marta Lefsky, AICP, PP, 7/20/15," 82a-96a; "Woodbridge Township Fair Share Units, Status as of 7/9/15," 97a. Importantly, no evidence was adduced before the Court to challenge these Township efforts. Township Counsel implored the Court to consider these facts demonstrating affordable housing compliance while considering Fair Share's cross-motion for a scarce resource restraint: "I do think it's appropriate and relevant to the Court's consideration of whether or not to restrain further development within the municipality given the

past history." T59-24 to T60-3; 49a-50a. The Court stated that it was unwilling to consider evidence of the Township's good faith efforts (though stating on the record that the Township had shown good faith, T6-5 to T6-6; 23a, T9-10 to T9-11; 24a, T14-4 to T14-6; 27a, T59-3 to T59-10; 49a): "today, I am not going to get into that, because that's for you to prove to me in the context of your DJ action. And at the end of the day, I may give you a gold star, but not today." T59-20 to T59-23; 49a.

E. The Impact of a Scarce Resource Restraint on the Township

The Township also argued before the trial court that the imposition of an injunction was unnecessary, overbroad, and would have far-reaching impacts:

Mr. Boccher: And perhaps I'm misunderstanding what it is that the relief the Court is contemplating, Judge. Because as I understand it the resource -- the scarce resource restraint, is that the municipality is going to be barred from considering any applications for development until those applications for development are --

The Court: You can consider anything you want. You just can't grant a vested property approval without my permission or without a showing that it's either consistent with an affordable housing component or a good reason why it shouldn't be.
T64-21 to T65-7; 52a.

Mr. Boccher: But then, Judge, it shuts down development in the town. You're just shutting down development in the town.

The Court: Get me a compliant ordinance fast then.
T70-25 to T71-4; 55a.

Mr. Boccher: --- the planning --- so a planning board or a zoning board could go forward and consider applications for development under this proposed order and that the final agency action would then be made or be required to be made subject to the Court's review.

The Court: Absolutely correct. I don't care if you go forward or not...If you want to have a hearing and you actually have an applicant that's willing to spend that money and time and commitment in order to do something that there is no guarantee that if he gets approved or she gets approved it's going to work, knock yourself out, but you and I both know that's not going to happen.
T74-3 to T74-19; 57a.

ARGUMENT

A. Standard of Review for Interlocutory Appeals

The Appellate Division "may grant leave to appeal; in the interests of justice, from an interlocutory order." R. 2:2-4. To avoid injustice, this Court has been vested with the discretion to grant leave where "interlocutory review of non-final judgments is necessary." Moon v. Warren Nursing Home, 182 N.J. 507, 513 (2005). Interlocutory review is appropriate "in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of the final judgment." DiMarino v. Wishkin, 195 N.J. Super. 390, 394-395 (App. Div. 1984). "Although leave to file an

appeal is to be granted sparingly, in certain circumstances, the general judicial policy against piecemeal litigation must give way to the predominant interests of justice." DiMarino, supra, 195 N.J. Super. at 395.

Leave to appeal is necessitated in this case because "grave danger or injustice" is being caused to the Township of Woodbridge by the order below. Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008) (quoting Romano v. Maglio, 41 N.J. Super. 561, 568 (App. Div. 1956), certif denied, 22 N.J. 574 (1956), cert denied, 353 U.S. 923 (1957)). This case does not present the "minor injustices, such as those commonly granting or denying interrogatories or discovery," that often compel the Court to deny leave to appeal. Romano, supra, 41 N.J. Super. at 568. The injustices here are substantial, as all duly-appointed land use officials in the Township of Woodbridge have been rendered powerless to grant vested development rights by the Court's August 20, 2015 Order, bringing development to its knees in a community which has been historically compliant with the mandates of both the Council on Affordable Housing and the courts.

B. Standard of Review for Interlocutory Injunctions

As courts long ago recognized in Light v. National Dyeing and Printing Co., 140 N.J. Eq. 506, 510 (Ch. Div 1947), "[t]he power to issue injunctions is the strongest weapon at the command of

the Court...and its use, therefore, requires the exercise of great caution, deliberation and sound discretion." It is well established that a preliminary injunction "is an extraordinary equitable remedy utilized primarily to forbid and prevent irreparable injury, and it must be administered with sound discretion and always upon consideration of justice, equity and morality in a given case." Zoning Board of Adjustment of Township of Sparta v. Service Electric Cable T.V., 198 N.J. Super. 370, 379 (App. Div. 1985). In this case, the Court's exercise of its "strongest weapon" has resulted in a complete moratorium on development in the Township of Woodbridge, without proper deliberation over the available facts. As such, the matter is governed by the standards applicable to a preliminary injunction.

Consistent with the aforementioned principles, injunctive relief should only be entered upon a **showing, by clear and convincing evidence**, of entitlement to relief. See Dolan v. DeCapua, 16 N.J. 599, 614 (1954) ("Injunctive judgments are not granted in the absence of clear and convincing proof"); American Employers' Insurance Co. v. Elf. Atochem N.A., Inc. 280 N.J. Super. 601, 610-611 n. 8 (App. Div. 1995) ("there must be clear and convincing proof in order to grant an injunction"); Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 639 (App. Div. 1997) and B&S Ltd. v. Elephant & Castle

International, Inc., 388 N.J. Super. 160, 168 (Ch. Div. 2006) (same).

Under the well-known standards of Crowe v. DeGioia, 90 N.J. 126 (1982), a party seeking a preliminary injunction must demonstrate that: (1) irreparable harm will result in the absence of an injunction; (2) the legal right underlying the applicant's claim is well-settled and the material facts are not substantially disputed and concomitantly, the movant has a reasonable probability of ultimate success on the merits; and (3) the relative hardship to the parties favors the issuance of the requested relief. 90 N.J. 126, 132-134 (1982), certif. den. 176 N.J. 74 (2003). See, also, Rinaldo v. RLR Investment, LLC, 387 N.J. Super. 387, 395 (App. Div. 2006) (same).

C. Scarce Resource Restraint Orders are Injunctions and the Crowe v. DeGioia Factors Apply

The fundamental authority to impose "scarce resource restraints," in the context of a *Mount Laurel* matter, proceeds from the Supreme Court's decision in Hills Development Company v. Bernards Township in Somerset County, 103 N.J. 1 (1986) ("Mount Laurel III"). There, the Supreme Court determined, in construing the authority of the Council on Affordable Housing (COAH):

We have concluded that the Council has the power to require, as a condition of its exercise of jurisdiction on an application

for substantive certification, that the applying municipality take appropriate measures to preserve the "scarce resources," namely, those resources that will probably be essential to the satisfaction of its *Mount Laurel* obligation. In some municipalities it is clear that only one tract or several tracts are usable for lower income housing, and if they are developed, the municipality as a practical matter will not be able to satisfy its *Mount Laurel* obligation... **It is only after a careful examination of the many circumstances that surround such matters** that one can make an informed decision on whether further development or use of these facilities is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future. Id. at 61-62 (emphasis supplied).

Thus the Supreme Court made clear in considering such matters that COAH (and now the courts) should carefully scrutinize the record and background unique to each municipality:

We would deem it unwise to impose specific conditions in any of these cases without a much more thorough analysis of the record, including oral argument in each case on what conditions would be appropriate. 'Appropriate' refers not simply to the desirability of preserving a particular resource, but to the practicality of doing so, the power to do so, the cost of doing so, and the ability to enforce the condition. Some cases may require further fact-finding to make these determinations. Id. at 62 (emphasis supplied).

In Morris County Fair Housing Council, et. al v. Boonton Township, COAH Docket No. 86-2 (Decided November 3, 1986), the

Council first established the standards that it would employ in determining whether to impose scarce resource restraints:

Any conditions or restraints imposed by the Council must be limited both in nature and duration. The conditions should be imposed only where necessary to preserve resources which may otherwise be exhausted, and which are necessary for the satisfaction of the constitutional obligation. Morris County Fair Housing Council, supra at *3-4.

Recognizing the injunctive-like effects of its restraint power, COAH determined to rely upon established judicial standards in considering whether restraints were necessary:

Such authority is analogous to the equitable powers of the courts to "prevent some threatening, irreparable mischief, which should be averted until the opportunity is afforded for a full and deliberated investigation of the case. Morris County Fair Housing Council, supra at *4, citing Crowe v. DeGioia, 90 N.J. 126, 132 (1982), quoting Thompson, Attorney General v. Paterson, 9 N.J. Eq. 624, 625 (E.&A. 1854) (emphasis supplied).

In Crowe, the New Jersey Supreme Court noted four general principles which have traditionally guided the judiciary in determining whether to issue a preliminary injunction. **The considerations set forth in Crowe largely parallel the criteria set forth by the Supreme Court in Hills.** Morris County Fair Housing Council, supra at *4 (emphasis supplied).

In Crowe, the Court recounted that an injunction should only issue when necessary

to prevent irreparable harm, upon a balancing of the relative hardship to the parties in granting or denying relief, and should not issue where all material facts are controverted or where the legal right to relief is unsettled. Morris County Fair Housing Council, supra at *4, citing Crowe, supra, 90 N.J. at 132-133. **Central to a determination under the standards enunciated in both Hills and Crowe, is the finding that absent an issuance of restraints, irreparable harm will occur...** Morris County Fair Housing Council, supra at *4 (emphasis supplied).

The Morris County Fair Housing Council COAH decision is part of an ongoing line of decisions recognizing scarce resource restraint orders as injunctive relief with an exacting standard. In Tomu Development Co., Inc. v. Borough of Carlstadt, et. al, the Law Division noted that its scarce resource restraint against Carlstadt and other towns was an injunction:

This [housing element and fair share] plan shall be completed, adopted, and presented to the Court no later than February 28, 2006. In default thereof, all development regulations in East Rutherford and Carlstadt shall be permanently invalidated and a scarce resource order **enjoining** all land use development applications in East Rutherford and Carlstadt...shall become automatically effective. Tomu Dev. Co. v. Borough of Carlstadt, No. BER-L-5894-03, 2006 WL 1375222, at *2 (N.J. Super. Ct. Law Div. May 19, 2006) aff'd, No. A-5512-05T1, 2008 WL 4057912 (N.J. Super. Ct. App. Div. Sept. 3, 2008) (Unpub.) (emphasis supplied, italics included in the original opinion).

In Larkin Associates, L.L.C. v. P&H Clinton Partnership, the Appellate Division cited an earlier case, Samaritan Center,

Inc. v. Borough of Englishtown, for the principle that a scarce resource restraint request for a sewerage hookup required a Crowe v. DeGioia analysis. The Court stated:

In deciding whether Englishtown should be required to supply sewerage to the Manalapan Mount Laurel development, the Samaritan Court was **careful to weigh the hardships to the affected**. The court **only compelled Manalapan to assist after it balanced the equities**. Larken Associates, L.L.C. v. P&H Clinton P'ship, No. A-4164-09T4, 2012 WL 1537421, at *4 (N.J. Super. Ct. App. Div. May 3, 2012) (Unpub.) (emphasis supplied).

Hence, there can be no doubt but that the imposition of an injunction must abide by careful and exacting standards.

POINT I

LEAVE TO APPEAL SHOULD BE GRANTED IN THE INTEREST OF JUSTICE BECAUSE THE COURT FAILED TO ACKNOWLEDGE THAT A SCARCE RESOURCE RESTRAINT IS AN INJUNCTION AS A MATTER OF LAW

Fair Share Housing Center requested, on the basis of a limited record, and before any of the procedures established by the Supreme Court in In re Adoption of N.J.A.C. 5:96 & 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) were employed to afford the municipality an opportunity to prosecute is declaratory judgment action, that the Court enter an order granting the extraordinary preliminary relief of enjoining all municipal action on land use matters delegated to it by the Legislature under the Municipal Land Use Law N.J.S.A. 40:55D-1 et seq. and related enactments such as the Local Redevelopment and Housing Law, N.J.S.A 12A:12A-1, et seq., among

others. The trial court refused to acknowledge that the extraordinary form of relief inhered in a scarce resource restraint order is an injunctive form of relief, resulting in a grave miscarriage of justice for the Township of Woodbridge. During colloquy, Township Counsel indicated to the Court that a scarce resource restraint was an injunction requiring a Crowe v. DeGioia analysis, a principle which the Court rejected "categorically" from the outset. T49-14; 44a. The Court's rejection was contrary to the seminal Hills decision, whereby the Supreme Court acknowledged the power of COAH to grant scarce resource restraints, but blunted the tip of this awesome equitable "weapon" by requiring COAH conduct a thorough analysis before ordering restraints. In Hills, the Supreme Court held that restraints were appropriate "only after a careful examination of the many circumstances that surround such matters." Hills Development Company, supra, 103 N.J. at 61-62. To order a scarce resource restraint, COAH must undertake "a thorough analysis of the record." Id. at 62. The Supreme Court focused on tempering the scarce resource restraint power, by requiring that a factual finding of 'appropriateness' - including necessity, practicality, enforceability, and cost to the municipality - accompany each scarce resource restraint order that issued. Id. at 62. In this case, no careful examination or thorough analysis was undertaken by the trial

court, and no record of findings was made. In light of the Supreme Court's Hills mandate, COAH has long applied the Crowe v. DeGioia factors test for the granting of scarce resource restraint injunctions. This established legal standard would have informed the record, but was summarily dismissed by the trial court. T60-14; 50a.

POINT II
LEAVE TO APPEAL SHOULD BE GRANTED BECAUSE THE COURT FAILED TO
APPLY THE CROWE V. DEGIOIA FACTORS BEFORE GRANTING THE
INJUNCTION

In Morris County Fair Housing Council, et. al v. Boonton Township, the Council on Affordable Housing adhered to the Supreme Court's Hills mandate by adopting the equitable standards of Crowe v. Degioia when determining whether to impose scarce resource restraints. COAH unequivocally noted "the considerations set forth in Crowe largely parallel the criteria set forth by the Supreme Court in Hills." Morris County Fair Housing Council, supra at *4, citing Crowe, supra, 90 N.J. at 132-133. Though both COAH and the Law Division have followed this legal precedent on numerous occasions, the Court chose not to follow it, stating that "no judge" or "no lawyer" had ever invoked a Crowe analysis when determining whether a scarce resource restraint was appropriate. While consideration of Mount Laurel issues has been assumed by the courts this year, there was certainly no indication by the Supreme Court in In re:

Adoption of N.J.A.C. 5:96 & 5:97 by the New Jersey Council on Affordable Housing that courts should disavow all previous authority and 'start from scratch' when making affordable housing decisions. Further, as the standards for scarce resource restraints have been applied by COAH for some three decades, justice requires that the Court give credence to this long-established precedent.

Although the trial court never permitted a Crowe analysis to occur, Fair Share clearly would have failed its burden had there been one. One of Fair Share's numerous unsupported allegations was that in more than "20 years," Woodbridge had provided only 38 affordable family units and this should provide an independent basis for a moratorium on development. The Township refuted this allegation with actual facts and an affordable housing inventory that indicated that 678 units had been either planned or built, and that of the units, 238 were family rental units. Despite Fair Share's bald assertion that Woodbridge "hasn't met its obligations," T46-7 to T46-14; 43a, Township Counsel provided facts to the contrary, showing that the municipality had made "substantial progress," T51-16 to T51-17; 45a, on affordable housing, was home to compliant development, T56-1 to T56-7; 48a, and that 40 percent of housing stock was currently affordable, T59-13 to T59-19; 49a. Though Fair Share alleged that Woodbridge was a "vacant land adjustment municipality," T10-14 to T10-15; 25a, the Township also refuted this allegation with evidence, demonstrating to the Court that it had not been granted a vacant land

adjustment since the June 17, 1999 Order, was compliant with that Order, and had neither requested nor received vacant land adjustments in the intervening years. T51-4 to T51-9; 45a; "Certification of Marta Lefsky, AICP, PP, 7/20/15," 82a-96a; "Woodbridge Township Fair Share Units, Status as of 7/9/15," 97a. Based on the record, there can be no argument that FSHC would have failed the "clear and convincing evidence" standard that Crowe requires.

POINT III
THE TRIAL COURT'S GRANTING OF A SCARCE RESOURCE RESTRAINT WAS
ARBITRARY AND HAS CAUSED WOODBRIDGE TO SUFFER
A MANIFEST INJUSTICE

Further failing Crowe, the Court conducted no "careful examination," and no "thorough analysis of the record," to warrant the Draconian relief it granted. When Counsel for the Township asked the Court to consider evidence of Woodbridge's good faith efforts before imposing scarce resource restraints, the Court replied "today, I am not going to get into that." T59-20 to T59-21; 49a. Despite Township Counsel's repeated attempts to infuse the record with facts as required, the Court halted his efforts, stating "you need not spend a lot of time trying to justify to me that you're a good guy." T59-1 to T59-10; 49a.

In granting the Township's Motion for Temporary Immunity, the Court found that the Township had "sufficiently demonstrated good faith efforts," T14-5 to T14-6; 27a, in the realm of affordable housing. Along with the lack of findings, this makes even more paradoxical the Court's granting of a scarce resource

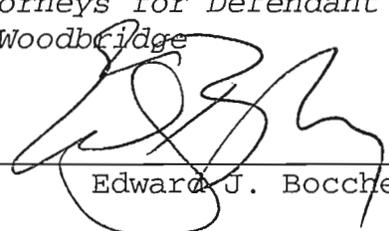
restraint which creates uncertainty for developers who have invested time and money in developing in Woodbridge and removes from duly-appointed land use professionals all authority to grant vested development rights. As Counsel for the Township predicted, the trial court's order has effectively "shut down all development within the town." T70-25 to T71-1; 55a. This has resulted in a grave injustice to Woodbridge, without a factual finding or legal conclusion to warrant the harsh effects under which the municipality is now suffering.

CONCLUSION

For all the foregoing reasons, the trial court's decision should be reversed, with judgment entered in the Township's favor.

Respectfully submitted,

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By: 

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Dated: September 9, 2015

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SUPERIOR COURT
MIDDLESEX COUNTY
RECEIVED & FILED

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GREGORY EDWARDS
DEPUTY CLERK
OF SUPERIOR COURT

IN THE MATTER OF THE
APPLICATION OF THE TOWNSHIP OF
WOODBIDGE, MIDDLESEX
COUNTY, NEW JERSEY, FOR A
DECLARATORY JUDGMENT,

Petitioner.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:MIDDLESEX COUNTY

DOCKET NO.: **MID-L-03862-15**

CIVIL ACTION
Mount Laurel Action

**VERIFIED COMPLAINT FOR
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF**

Petitioner Township of Woodbridge, County of Middlesex, New Jersey, by way of
Verified Complaint for Declaratory Judgment and for Injunctive Relief says:

1. Petitioner, Township of Woodbridge (“Woodbridge” or “the Township”), a
Municipal Corporation of the State of New Jersey, located at 1 Main Street, Woodbridge New
Jersey 07095.

BACKGROUND

The Mt. Laurel Doctrine

2. Forty years ago, in 1975, the New Jersey Supreme Court declared that the
discriminatory use of zoning powers was illegal and provided, as a matter of constitutional law,

that each developing municipality “must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income.” In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 6 (2015), citing S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I), 67 N.J. 151, 179, 187, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975)

3. Thereafter, in 1983, the New Jersey Supreme Court reaffirmed the constitutional obligation that towns must provide “a realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing.” In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 6 (2015), citing S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II), 92 N.J. 158, 205 (1983) (citing Mount Laurel I, supra, 67 N.J. at 174), (together with Mount Laurel I, the *Mount Laurel Doctrine*).

4. Deterring exclusionary zoning practices and encouraging the development of affordable housing where it is needed are the goals of the *Mount Laurel Doctrine*. In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578, 610 (2013).

The Fair Housing Act and COAH

5. The Legislature codified the *Mount Laurel Doctrine* in enacting the Fair Housing Act, N.J.S.A. 52:27D-301, et seq. (“the Fair Housing Act” or “FHA”) and established the Council on Affordable Housing (“COAH”) as the entity charged with implementing and administering the legislative mandates of the Act.

6. COAH initially adopted substantive rules, governing the period from 1987 to

1993, (“The First Round Rules”), N.J.A.C. 5:92-1.1 to -18.20. It thereafter adopted substantive rules governing the period from 1987 to 1999, (“The Second Round Rules”), N.J.A.C. 5:93-1.1 to -15.1.

7. COAH has not promulgated valid, effective rules since the Second Round Rules expired in 1999.

8. The New Jersey Supreme Court, in the matter of In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015), (“the Supreme Court Decision”), held that “There is no question that COAH failed to comply with this Court’s March 2014 Order that was designed to achieve the promulgation of Third Round Rules and the maintenance of a functioning COAH,” such that “the administrative forum is not capable of functioning as intended by the [Fair Housing Act] due to the lack of lawful Third Round Rules assigning constitutional obligations to municipalities,” and, consequently “the courts may resume their role as the forum of first instance for evaluating municipal compliance with Mount Laurel obligations.”

9. The Supreme Court Decision has accordingly provided for a judicial mechanism for municipalities to seek a declaratory judgment that the municipality has complied with the *Mount Laurel Doctrine* and is entitled to immunity from exclusionary zoning lawsuits.

10. The process developed in the Supreme Court Decision is intended to track the process established under the Fair Housing Act.

11. The judicial mechanism devised by the Supreme Court Decision contemplates that municipalities be afforded an initial opportunity to craft housing plans to address their affordable housing obligation consistent with the *Mount Laurel Doctrine*.

12. Participating municipalities are afforded five months to submit a housing element and fair share plan under the Supreme Court Decision.

13. Participating municipalities may obtain immunity from exclusionary zoning actions pending the development of a housing element and fair share plan under the Supreme Court Decision.

14. Upon submission of a municipal housing element and fair share plan, courts are to conduct an individualized assessment of such submission based on the court's determination of present and prospective regional need for affordable housing applicable to the municipality.

COUNT ONE

(Declaratory Judgment – Woodbridge is Not Exclusionary)

15. Petitioner repeats and incorporates herein as if restated at length each and every allegation of paragraphs 1- 14 of the Verified Complaint as if fully set forth herein.

16. It is the intent and purpose of the *Mount Laurel Doctrine* to prohibit the discriminatory use of zoning powers and zoning practices which have the exclusionary effect of making unavailable housing to persons of low and moderate income and to provide remedies to address such practices when they are proven to exist.

17. Every municipality has a presumptive obligation to plan and provide, by its land use regulations, the opportunity for an appropriate variety and choice of housing, including affordable housing, and may not adopt regulations or policies which thwart or preclude that opportunity. *Mount Laurel I* at 179 -180.

18. To the extent the *Mount Laurel Doctrine* constitutes or has been construed to constitute a presumption that a municipality is exclusionary, that presumption may be overcome upon a showing of (a) non-exclusionary zoning practices and policies (b) which have resulted in the creation of affordable housing.

19. A municipality which has not engaged in exclusionary zoning practices and has

provided for the development of affordable housing has not contravened the intent and purpose of the *Mount Laurel Doctrine* and is accordingly not subject to the remedial provisions of Mount Laurel II.

20. A municipality which has not engaged in exclusionary zoning practices and has provided for the creation of affordable housing, and consequently has not contravened the intent and purpose of the *Mount Laurel Doctrine*, and/or has overcome the presumption that a municipality is exclusionary, is not subject to the imposition of a quota to produce a prescribed amount of affordable housing under the remedial provisions of *Mount Laurel II*.

21. There is no constitutional requirement that affordable housing units produced in accordance with non-exclusionary zoning practices and policies must be deed restricted in order that a municipality may demonstrate that it is not exclusionary and therefore not in violation of the precepts of the *Mount Laurel Doctrine*.

22. Woodbridge has historically engaged in a comprehensive land-use planning and zoning process to, among other things, guide the appropriate use or development of lands which will promote the public health, safety, morals, and general welfare.

23. The Township is a "regional municipality" in the sense that its economic and social base has influence outside of its borders and, consequently, Woodbridge has historically crafted land use policies which address the responsibility associated with a municipality of regional significance by, among other things, responsibly addressing the regional need for affordable housing.

24. Moreover, the Township has, through its land use policies, promoted the market for affordable housing and the market has accordingly responded as evidenced by the private sector development of a strong stock of affordable housing which, albeit not deed restricted, addresses the municipal and regional need for such housing.

25. Thus, the Township has engaged in a land-use planning and zoning process, for nearly 50 years, to address the affordable housing needs of individuals within Woodbridge as well as those residing outside of the municipality and within the region that contributes to the housing demand within Woodbridge.

26. By way of example only, prior to the *Mount Laurel I* decision in 1975, the Township had provided for the creation of at least 360 affordable housing units. By 1980, 420 additional affordable units were completed and occupied in the Township. None of these units were recognized under COAH regulations as in existence and evidence of the Township's production of affordable housing.

27. The Township's varied social and economic character, which contributes to its status as a "regional municipality," is reflected in its population of persons of varying economic means, race and ethnic backgrounds which have been cultivated by, among other things, a progressive housing policy.

28. Woodbridge's zoning provides for a variety of housing types in the Township including one low-density single family zone, two medium-density single family zones, four high-density single family zones, six multifamily residential zones, a townhouse residential zone, planned development options, and redevelopment areas allowing a variety of housing types. In fact, over a quarter of the housing stock consists of multifamily structures containing three or more units.

29. The Township's varied population includes a substantial number of person of low and moderate income. Using housing cost calculators that are available from the Housing Support Services Unit of the New Jersey Department of Community Affairs (i.e., COAH) and data from the most recent American Community Survey (ACS) estimates (2009-2013 ACS 5-Year Estimates) the Township has analyzed the value of owner-occupied housing units and

contract rent in the Township to determine the number of housing units that would be affordable to low and moderate income households. Based on this analysis, approximately, 41.1 percent of the housing stock in Woodbridge Township is affordable to households earning 80 percent or less than the median income in the region.

30. A statistical analysis demonstrates that the Township has not engaged in exclusionary land use practices, but has implemented a comprehensive land use policy that has resulted in a housing stock consisting of a substantial number of units affordable to low and moderate income households.

31. The Township's land use policies, as reflected in its master plan and zoning ordinances, provide for a range and appropriate variety and choice of housing for all categories of people who may desire to live there, including those of low and moderate income.

32. The Township's land use policies presumptively make realistically possible an appropriate variety and choice of housing taking into account, among other things, a long view of housing demand patterns in the market.

33. The Township is entitled to a declaratory judgment that it is not an exclusionary municipality and consequently is not subject to the municipal exclusionary presumption, if any, of the *Mount Laurel Doctrine* nor subject to the remedial provisions of *Mount Laurel II*.

WHEREFORE, the Township demands judgment in the form of a declaratory judgment and temporary, preliminary and permanent injunctive relief and ordering:

A. That the within matter be set down for trial upon the Township's application for declaratory judgment that it is not an exclusionary municipality.

B. That the Township is not an exclusionary municipality and not subject to the imposition of a quota to provide for affordable housing under the remedial provisions of *Mount Laurel II*.

C. That the Township is immune for exclusionary zoning, or constitutional compliance, litigation under the Mount *Laurel Doctrine*.

COUNT TWO

(Declaratory Judgment and for Injunctive Relief)

34. Petitioner repeats and incorporates herein as if restated at length each and every allegation of paragraphs 1- 33 of the Verified Complaint as if fully set forth herein.

35. The Township has long addressed its affordable housing obligation under the *Mount Laurel Doctrine* since at least June 17, 1999 when, in the consolidated matters of Mocci v. Township of Woodbridge, Docket No. L-7843-91 and Pirates Cove Marina v. Township of Woodbridge, Docket No. L-7847-91, the court awarded the Township a conditional Judgment of Repose granting the Township immunity from litigation challenging affordable housing compliance for a period of six years beginning in February 1999 and terminating on February 19, 2005.

36. On July 19, 2005, the court entered a further Order in Mocci v. Township of Woodbridge, *supra*, extending the period of repose until December 20, 2005, retroactive to February 19, 2005.

37. On December 20, 2005, the Township filed a petition for substantive certification, together with its Housing Element and Fair Share Plan (“the 2005 HE/FSP”), with COAH.

38. Because COAH failed to take any action, on December 12, 2007, the Township filed a motion with the trial court requesting that it assume jurisdiction over the Township’s 2005 HE/FSP.

39. The court granted the Township’s motion by Order entered on January 9, 2008.

40. Woodbridge, in consultation with the Special Master who had been appointed in

the Mocci litigation, developed a comprehensive 2008 Housing Element and Fair Share Plan (“the 2008 HE/FSP”) consistent with COAH’s newly adopted third round rules.

41. On December 16, 2008, the Township Council endorsed the 2008 HE/FSP.

42. On December 16, 2008, the Township Council also authorized that a declaratory judgment action be instituted seeking court approval of the 2008 HE/FSP.

43. On December 30, 2008 the Township filed a Complaint for Declaratory Judgment at In the Matter of The Township of Woodbridge, Docket No. L-17-09 seeking approval of the Township’s 2008 HE/FSP.

44. Under an Order entered on March 5, 2009, the court granted Woodbridge immunity from builder’s remedy lawsuits, appointed a Special Master and directed that the court would retain jurisdiction of the matter.

45. On June 12, 2012, the Township Council adopted an Amended Housing Element and Fair Share Plan (“the 2012 HE/FSP”) developed in consultation with the Special Master consistent with COAH’s then-effective regulations which allocated municipal affordable housing obligations upon a “growth share” methodology. See, N.J.A.C. 5:96 and 5:97.

46. Because a significant part of the Township’s 2012 HE/FSP involved administrative and financial issues within the expertise of other State agencies, and also because courts typically refer consideration of such matters to those agencies, the Township moved to have jurisdiction over the 2012 HE/FSP transferred to the Department of Community Affairs, Council on Affordable Housing.

47. On April 22, 2013 the Court granted the application, directed the Township to file its Housing Element and Fair Share Plan with COAH and provided that COAH’s jurisdiction over the Township’s Housing Element and Fair Share Plan would “relate back to December 30,

2008, the original date that the Township filed the Complaint for Declaratory Judgment.” In the Matter of The Township of Woodbridge, Docket No. L-17-09.

48. On May 1, 2013 the Township submitted its 2012 HE/FSP to COAH as directed by the April 22, 2013 Order.

49. Accordingly, since April 22, 2013 the Township has been within the jurisdiction of the Council on Affordable Housing and the Township has been a “participating” municipality before that agency.

50. Because the Township is a “participating” municipality in the administrative process before COAH it is entitled to the protections afforded such municipalities under the Supreme Court Decision.

51. The Township is entitled to a period of five months to prepare and submit a housing element and fair share plan.

WHEREFORE, Woodbridge demands judgment in the form of a declaratory judgment and temporary, preliminary and permanent injunctive relief ordering:

A. The Township is a “participating” municipality in the administrative process before COAH and is entitled to the protections afforded such municipalities under the Supreme Court Decision.

B. The Township is awarded temporary immunity and entitled to a minimum period of five months to prepare, update, revise and submit to the court a housing element and fair share plan.

C. For such other relief as the court deems just.

COUNT THREE

(Declaratory Judgment of Compliance and Judgment for Repose)

52. Petitioner repeats and incorporates herein as if restated at length each and every allegation of paragraphs 1- 51 of the Verified Complaint as if fully set forth herein.

53. Upon submission of its fair share plan, the Township requests that the court conduct an individualized assessment of its plan based on the court's determination of present and prospective regional need for affordable housing applicable to the Township and upon a consideration of those lands which are available, suitable and developable for affordable housing.

54. The Township requests that the court determine and declare that its fair share plan is in compliance with the requirements of the *Mt. Laurel Doctrine* and issue a judgment of repose insulating the Township from exclusionary zoning lawsuits for a period of ten (10) years.

WHEREFORE, the Township demands judgment in the form of a declaratory judgment and temporary injunctive relief:

A. Approving the Township's fair share plan as in compliance with the municipal obligation under the *Mt. Laurel Doctrine* and issuing a judgment of repose for a period of ten (10) years.

B. For such other relief as the court deems just.

COUNT FOUR

(Spending Plan/Trust Fund Approval)

55. Petitioner repeats and incorporates herein as if restated at length each and every allegation of paragraphs 1- 54 of the Verified Complaint as if fully set forth herein.

56. The Fair Housing Act was amended effective July 17, 2008 ("the 2008

Amendments”) to provide, among other things, that a municipality which has petitioned COAH for a substantive certification of its Fair Share Plan may be authorized by the Council to adopt a Development Fee Ordinance to impose and collect development fees. N.J.S.A. 52:27D-329.2a.

57. The 2008 Amendments also provided that a municipality may not spend or “commit to spend” any affordable housing development fees without first obtaining COAH’s approval of the expenditure. Ibid.

58. The 2008 Amendments further required that the Council promulgate regulations regarding the establishment, the administration and the enforcement of the expenditure of affordable housing development fees by municipalities. Ibid.

59. Pursuant to the 2008 Amendments, COAH was to establish a time by which all development fees collected within a calendar year are to be expended and that, in any event, all fees shall be committed for expenditure within four years from the date of collection. N.J.S.A. 52:27D-329.2d.

60. Under the 2008 Amendments, if a municipality “fails to commit to expend the balance required in the development fee trust fund by the time set forth” under the Act it “shall be required by the [C]ouncil to transfer the remaining unspent balance at the end of the four year period to the New Jersey Affordable Housing Trust Fund. Ibid.

61. Substantially similar provisions of the 2008 Amendments govern trust funds collected as payments in lieu of construction, except that the deadline for expenditure of such funds within four years of collection may be expressly extended by COAH upon a showing of prescribed conditions. N.J.S.A. 52:27D-329.3b.

62. COAH has not promulgated regulations, with respect to either development fees or payments in lieu of construction, which establish how such amounts are to be “committed for

expenditure” within four years of collection or which set forth a time by which all development fees collected within a calendar year are to be expended.

63. Because COAH has failed to establish valid procedures respecting the commitment and forfeiture of municipal trust funds, the Superior Court-Appellate Division has enjoined COAH or any other part of the executive branch from engaging in any attempt to seize affordable housing trust funds and provided that the use and disposition of those funds will be decided, in the first instance, by Mount Laurel-designated trial judges. In re Failure of the Council on Affordable Housing to Adopt Trust Fund Commitment Regulations, 440 N.J. Super. 220 (App. Div. 2015).

64. Woodbridge has long maintained a development fee ordinance, and affordable housing trust fund, approved by the court and COAH, authorizing the imposition, collection and expenditure of affordable housing trust funds.

65. Woodbridge currently maintains an affordable housing trust fund balance.

66. Woodbridge has adopted resolutions and ordinances and has otherwise timely “committed for expenditure” all amounts held within its affordable housing trust fund, which is to be so committed, as required, if at all, by the 2008 Amendments.

67. The Township will further undertake to commit for expenditure trust funds consistent with a fair share plan and spending plan to be approved by the court.

WHEREFORE, Woodbridge demands judgment in the form of a declaratory judgment and temporary injunctive relief:

A. Determining that the Township has timely “committed for expenditure” all funds held within its affordable housing trust fund as required, if at all, by the 2008 Amendments.

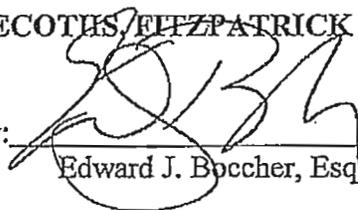
B. To the extent the Township has not has timely “committed for expenditure” all funds held within its affordable housing trust fund as required, if at all, by the 2008

Amendments, it could not do so because no standards or regulations providing how such funds may be committed for expenditure have been promulgated by COAH as required by the 2008 Amendments.

C. Temporarily, preliminarily and permanently enjoining COAH or any other instrumentality of the State from directing the Township to transfer, or otherwise seeking to transfer, any trust funds held by the Township to the New Jersey Affordable Housing Trust Fund or other State-maintained account.

D. Approving the Township's spending plan, upon its completion, for disposition of all or part of its trust fund.

DECOTIS, FITZPATRICK & COLE, LLP

By: 

Edward J. Boccher, Esq

Dated: June 30, 2015

CERTIFICATION AS TO OTHER PROCEEDINGS

I hereby certify, pursuant to R. 4:5-1, that this matter is not the subject of any other action pending in any Court or any pending arbitration proceeding except for:

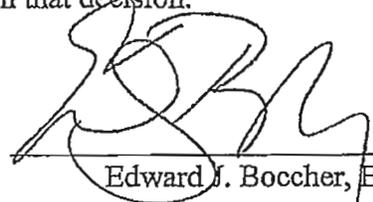
1. Fair Share Housing Center, Inc. v. Township of Woodbridge, Docket No. MID-L-8633-11,

and the following actions for which a motion to dismiss is pending:

2. Fair Share Housing Center, Inc. v. Township of Woodbridge, the Planning Board of the Township of Woodbridge and Station Village at Avenel Urban Renewal, LLC, Docket No. MID-L-2112-15.

3. Fair Share Housing Center, Inc. v. Township of Woodbridge the Planning Board of the Township of Woodbridge and HPFVII Metropark II, LLC, Docket No. MID-L-1469-15.

I further certify that I am unaware of any non-party who should be joined in this action pursuant to R. 4:28, or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party based on the same transactional facts except that the Supreme Court in In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) has identified parties who are to receive notice of declaratory judgment actions filed pursuant to the process set forth by the Court in that decision.


Edward J. Boccher, Esq.

Dated: June 30, 2015

DESIGNATION OF TRIAL COUNSEL

Edward J. Boccher, Esq. is hereby designated as trial counsel.

DECOTUS, FITZPATRICK & COLE, LLP

Dated: June 30, 2015

By: _____

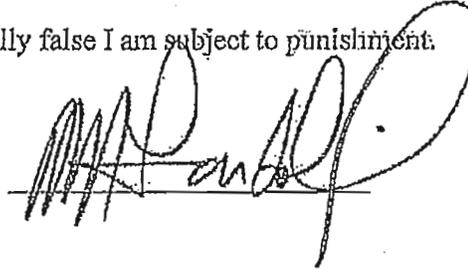


Edward J. Boccher, Esq.

VERIFICATION

1. I, Robert M. Landolfi, am the Administrator for the Township of Woodbridge.
2. I have reviewed the contents of the above Verified Cross-Claim for Declaratory Judgment and Preliminary Injunctive Relief and certify that the allegations contained therein are true, except where the allegations, if any, are made upon information and belief. As to those allegations, I believe them to be true to the best of my knowledge, information and belief

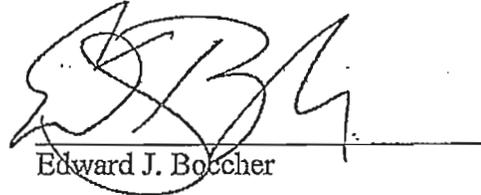
I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false I am subject to punishment.

A handwritten signature in black ink, appearing to read "R. Landolfi", is written over a horizontal line. The signature is stylized and cursive.

Dated: June 26, 2015

CERTIFICATION PURSUANT TO R. 1:4-4(c)

I certify that Robert M. Landolfi acknowledged the genuineness of the facsimile of his signature on his Verification, and that the Verification bearing his original signature will be filed if requested by the Court or a party.



Edward J. Boccher

Dated: June 30, 2015

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MIDDLESEX COUNTY
DOCKET NOS. MID-L-003862-15
MID-L-002112-15
MID-L-001469-15
APP. DIV. NO. _____

IN RE PETITION OF THE :
TOWNSHIP OF WOODBRIDGE :
FOR A DECLARATORY JUDGMENT :
:-----: :
FAIR SHARE HOUSING CENTER, :
INC. :
Plaintiff, :
v. :
THE TOWNSHIP OF WOODBRIDGE, :
et al., :
Defendants. :
:-----: :
FAIR SHARE HOUSING CENTER, :
INC. :
Plaintiff, :
v. :
THE TOWNSHIP OF WOODBRIDGE, :
et al., :
Defendants. :

TRANSCRIPT
OF
MOTION HEARING

Place: Middlesex County Courthouse
56 Paterson Street
New Brunswick, NJ 08903

Date: August 14, 2015

BEFORE:

HONORABLE DOUGLAS K. WOLFSON, J.S.C.

TRANSCRIPT ORDERED BY:

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FitzPatrick & Cole, LLP)

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Attorney for Defendant Station Village at Avenel
Urban Renewal, LLC

ELIZABETH C. MCKENZIE, AICP/PP
Court-Appointed Special Master

I N D E X

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1 (Hearing commenced at 10:10 a.m.)

2 THE COURT: I need a caption just for the
3 record.

4 THE LAW CLERK: Which one are you doing
5 first?

6 THE COURT: Well, I guess we'll put them all
7 on the record. I'm going to hear them all at the same
8 time.

9 THE LAW CLERK: The three files are there.

10 THE COURT: Okay. These are the Woodbridge
11 matters. The petition for DJ is 3862-15, Fair Share
12 versus Station Village at Avenel is 2112-15, and
13 what's the third one? Fair Share versus what I'm
14 going to call Metropark, 1469-15.

15 I'm consolidating them for the purposes of
16 argument only, because I think they're related all to
17 each other, but I am not consolidating by way of any
18 kind of formal order.

19 Can I have the appearances and on which case
20 you are appearing? I guess we'll start with the
21 township attorney.

22 MR. BOCCHER: Good morning, Your Honor.
23 Edward Boccher, B-O-C-C-H-E-R, DeCotiis, FitzPatrick
24 and Cole, on behalf of the Township of Woodbridge in
25 all the matters.

1 MR. PANTEL: Good morning. Glenn Pantel
2 from the law firm of Drinker, Biddle and Reath, for
3 the defendant HPF, Roman Numeral Seven, Metropark II,
4 LLC, in the case of Fair Share Housing Center versus
5 the Township of Woodbridge Planning Board, the
6 Township of Woodbridge, and my client Docket Number
7 MID-L-1469-15.

8 MS. JENNINGS: Donna Jennings from the law
9 firm of Wilentz, Goldman and Spitzer. I'm appearing
10 on behalf of Station Village at Avenel Urban Renewal,
11 LLC in Docket MID-L-2112-15.

12 MR. WALSH: Good morning, Judge. Kevin D.
13 Walsh with Fair Share Housing Center on behalf of the
14 center, which is a plaintiff in the Avenel and
15 Metropark matters and is a proposed movant -- proposed
16 intervenor in the declaratory judgment action, not yet
17 in.

18 With me is Adam M. Gordon, but I'll thus far
19 be doing the arguing for Fair Share.

20 THE COURT: Okay. The record should reflect
21 that the special master appointed in this case is also
22 in the courtroom.

23 MS. MCKENZIE: Oh, yes. I'm sorry. I was
24 busy looking for the docket numbers. Elizabeth C.
25 McKenzie, special master. I apologize.

1 THE COURT: No need.

2 Here's a question that I have at the outset.
3 Mr. Boccher, on the DJ action for which you're seeking
4 five months of immunity, and -- and I've reviewed Ms.
5 Lefsky's certification -- I'm reasonably satisfied as
6 to the good faith efforts Woodbridge has been making
7 over the course of its history. Of which I have some
8 familiarity, since I think I was the original Mount
9 Laurel judge that validated the original ordinances in
10 the '90s. And then was the hearing officer by
11 appointment of Judge Hurley on the Mocci and one other
12 or two other building remedy -- builder remedy cases.

13 But here is the question. In my Monroe
14 opinion, Monroe filed their motion for their DJ action
15 and their motion for immunity within the time frames
16 set forth by the Supreme Court in terms of their stay
17 of anybody doing anything until 30 days after the 90
18 days. You did not come within that time period. And
19 that doesn't bar you. You're certainly entitled and
20 the court made it very clear that you could even wait
21 to be sued before you seek your immunity.

22 But the question I have for you is, when do
23 you think immunity starts?

24 MR. BOCCHER: Initially, Judge, we filed a
25 declaratory judgment action with a request for an

1 order to show cause and a brief in support. And we
2 were informed that the Court wouldn't recognize it and
3 proceed in that fashion. So, for purposes of
4 safeguarding, if you will, our participation and our
5 request for a meeting within the 30 days, we would
6 respectfully urge that the filing --

7 THE COURT: *Nunc pro tunc* --

8 MR. BOCCHER: -- of the order to show cause --

9 THE COURT: -- to that filing date.

10 MR. BOCCHER: Yes, sir.

11 THE COURT: And that precedes the
12 prerogative writ suits filed by Fair Share Housing
13 Center?

14 MR. BOCCHER: No, the prerogative writ suits
15 were filed in March, three days after the Supreme
16 Court decision. We filed our declaratory judgment
17 action within the 30-day June 8 to July 8 window,
18 together with order to show cause and a request for
19 immunity. We subsequently transformed the order to
20 show cause into a motion returnable for today.

21 THE COURT: What was the filing date of the
22 DJ action? It was within the 30 days?

23 MR. BOCCHER: Yes. Oh, yes, Your Honor.

24 THE COURT: Okay. All right. So the filing
25 date of the DJ action would be --

1 MR. BOCCHER: July 1st.

2 THE COURT: -- based on Monroe, would be the
3 date for you to start your immunity. Correct?

4 MR. BOCCHER: July 1st. July 1st. Yes.
5 Yes, Judge.

6 THE COURT: And that's what you're asking?

7 MR. BOCCHER: Yes, Your Honor.

8 THE COURT: Okay. Because some have asked
9 that -- and I have rejected -- but some have asked
10 that their five-month period start after the fair
11 share numbers are determined and I have not accepted
12 that, what I am going to call the Surenian argument or
13 the Buzak argument.

14 MR. BOCCHER: But we're aware of the Court's
15 rulings on those and have, frankly, conformed our
16 request for immunity to track what it is you have
17 already ruled, Judge.

18 THE COURT: Okay. All right. Ms. McKenzie,
19 are you in a position to weigh in on your review of
20 Ms. Lefsky's certification and the good faith efforts
21 with regard to Woodbridge's attempts to comply --

22 MS. MCKENZIE: Yes, Your Honor. I do
23 believe that Woodbridge Township is a participating
24 municipality and that they transferred to the Council
25 on Affordable Housing, so they -- and that transfer is

1 tantamount to a petition for substantive
2 certification. So they were clearly a participating
3 municipality and I also believe, based on Marta
4 Lefsky's certification and my own knowledge of what
5 has been happening in Woodbridge lo these many years,
6 that they have in fact, you know, promoted their
7 affordable housing plans and --

8 THE COURT: Do you believe --

9 MS. MCKENZIE: -- towards other --

10 THE COURT: -- they have acted in sufficient
11 good faith consistent with my ruling in Monroe to --

12 MS. MCKENZIE: Yes.

13 THE COURT: -- warrant the five months'
14 immunity?

15 MS. MCKENZIE: Yes, I do, Your Honor, and I
16 would cite Ms. Lefsky's certification in support of
17 that, --

18 THE COURT: Yeah.

19 MS. MCKENZIE: -- as well as my own --

20 THE COURT: Yeah, me too.

21 MS. MCKENZIE: -- knowledge of that.

22 THE COURT: Does Fair Share have a position
23 on the immunity question, separate and apart from
24 their own cases?

25 MR. WALSH: We took a position, Judge,

1 opposing immunity. And it was for a few reasons.

2 One is that the municipality is fairly
3 blatantly attempting to ignore the Appellate
4 Division's decision on age-restricted housing
5 prohibiting more than 25 percent from going to --
6 toward the fair share.

7 THE COURT: But does that not then just go
8 to whether and to what extent they need to do
9 additional --

10 MR. WALSH: It does. I think it goes to
11 immunity, as well.

12 The second one is they have approved two
13 developments, one especially troubling from a Mount
14 Laurel standpoint, given that it's a vacant land
15 adjustment municipality that -- and they approved it
16 within -- with no set-aside at a time when I think the
17 special master herself would have urged them to
18 include a set-aside and -- and in fact was doing so
19 before they fled to COAH. And so --

20 THE COURT: Before they what?

21 MR. WALSH: Fled to COAH. And -- and so --

22 You know, and then I think the third one is
23 this -- this, from what I can tell, sort of made up
24 foreclosure program that has -- that was 300 units and
25 Ms. Lefsky's most recent filing for the first time

1 says it's now down to 16 units, but doesn't even claim
2 there's a single one that has been completed. And
3 that is what was -- was -- provided the basis for them
4 to go to COAH for the -- for the -- you know, based on
5 their alleged claim that they -- that they needed to
6 work with the administration or something. Which has
7 no -- you know, there's no support for that anywhere.
8 It's just their claims.

9 And so, from our view, they haven't
10 satisfied standards for immunity, because they've --
11 they have not met their obligations with regard to
12 family housing, they have not -- they've approved
13 developments --

14 THE COURT: Well, I don't require anybody to
15 show me that they have satisfied, because we don't
16 know what that means yet. What standard I have
17 utilized, as you know from the Monroe case, is good
18 faith efforts toward compliance.

19 MR. WALSH: We know what it means --

20 THE COURT: And there's certainly a lot of
21 stuff --

22 MR. WALSH: -- in the prior round --

23 THE COURT: -- and there's certainly a lot
24 of things included in Ms. Lefsky's certification.
25 Which, on the face of it, makes it look like they made

1 the effort. Whether they've satisfied their
 2 obligation or not or whether I'm going to give them a
 3 vacant land adjustment or not, or to what extent, or
 4 how I will react in their application for compliance,
 5 in light of what they have done in the two cases to
 6 which you filed the prerogative writs, is not part of
 7 that -- to me is not part of that decision.

8 The question of what ultimately they will be
 9 required to do and how they will be required to do it
 10 and what protect -- and what benefits they'll get
 11 from, as you described it, you know, using up their
 12 vacant land with non-Mount Laurel stuff, how I will
 13 react to that and what the consequences of that will
 14 be will relate to their compliance, not, from my end,
 15 whether they're immune during the process. But I
 16 understand your positions on that.

17 MR. WALSH: Thank you, Judge.

18 THE COURT: Okay. Ms. McKenzie, did you
 19 want to respond in some fashion?

20 MS. MCKENZIE: Yes. I just wanted to say
 21 that my recommendation that -- for immunity is not a
 22 finding that their plan to date, which was basically
 23 the 2012 plan, was compliant in any way. That's --
 24 that was a finding that they -- that they had
 25 submitted that plan to COAH with the hope that COAH

1 would make a finding, and that is the same situation
 2 for all participating municipalities. There is no --
 3 the threshold is whether they were participating and
 4 whether they have done anything to try to --

5 THE COURT: Right.

6 MS. MCKENZIE: -- implement the plan that
 7 had been presented to COAH for approval, not whether
 8 COAH would have approved it.

9 I am making no -- I mean, I'm sympathetic to
 10 the points that are raised by Mr. Walsh, and I am
 11 making no recommendation to the Court as to whether
 12 the plan that was submitted necessarily would have
 13 been approved.

14 THE COURT: No, I -- and there are serious
 15 positions that I will --

16 MS. MCKENZIE: I agree with you.

17 THE COURT: -- give a lot of weight to at
 18 the appropriate time, but I am not convinced that they
 19 undermine the determination of whether immunity is
 20 appropriate under all the circumstances.

21 I was relatively persuaded by Ms. Lefsky's
 22 certification as to the efforts that they have made.
 23 I was hoping that your view was consistent, that I
 24 didn't misread that in any way, and that your view of
 25 what they have done historically and what she has

1 indicated is in the works, to use the vernacular,
2 passed the smell test from your perspective.

3 MS. MCKENZIE: Yes, Your Honor.

4 THE COURT: Okay. All right. I'm satisfied
5 that they sufficiently demonstrated their good faith
6 efforts at compliance to warrant the five months of
7 immunity from the filing date of the complaint going
8 forward. And I am not sure what that date is, but
9 we'll get that and that will be in whatever order we
10 enter today.

11 MS. MCKENZIE: Apparently, Your Honor, it
12 was July 1st that they filed the DJ action.

13 THE COURT: Okay. So five months from
14 September -- from July 1 would be, what, December 1?

15 THE LAW CLERK: Yes.

16 THE COURT: Okay. Now, there's two motions
17 to dismiss filed by clients of Mr. Pantel and Ms.
18 Jennings.

19 MR. WALSH: Judge, if I may? One -- just
20 this is a --

21 THE COURT: Go ahead.

22 MR. WALSH: -- housekeeping matter.

23 THE COURT: Sure.

24 MR. WALSH: On the immunity, we filed a
25 cross-motion for restraints, so there's a way in which

1 that's linked to that. I don't -- it's fine with me
2 if you go out of order, I just don't want to lose -- I
3 don't want you to put that folder away yet, if that's --

4 THE COURT: No, no, no. You'll fare better
5 on that issue.

6 MR. WALSH: Okay.

7 THE COURT: On the motions to dismiss, Mr.
8 Pantel and Ms. Jennings, I'm unable to find in the
9 research any case that suggests that I have the power
10 to invalidate what otherwise would be vested rights
11 under the MLUL for this purpose, for the purpose which
12 you have raised it today, that I should extend the 45
13 days, I guess in one case, years. What's the date of
14 -- Ms. Jennings, yours is '06? Or was it Mr. Pantel
15 who was --

16 MR. PANTEL: Yes, it was mine. In our case,
17 the redevelopment plan was approved on September --
18 or, excuse me -- the redevelopment area designation
19 was made in September 2014 and the redevelopment plan
20 ordinance was adopted in May 2014, and this suit was
21 filed in March, I believe, of 2015, just about a year
22 later after we adopted --

23 THE COURT: And what about your situation,
24 Ms. Jennings?

25 MS. JENNINGS: Our redevelopment plan was

1 originally 2009 and then amended in 2011.

2 THE COURT: And when is your approval?

3 MS. JENNINGS: Our approval is this year.
4 February 2015.

5 THE COURT: And you've submitted an
6 affidavit as to the expenditures, Mr. Alan --

7 MS. JENNINGS: Shaw.

8 THE COURT: -- Shaw.

9 MS. JENNINGS: Correct.

10 THE COURT: In excess of two million.

11 MS. JENNINGS: That's just for the
12 demolition, but my client is closing the property and
13 has paid \$10 million dollars for the property. And
14 they're -- and cleaning up the environmental clean up
15 is about eight million.

16 THE COURT: I am unable to find authority
17 for the proposition that I should allow a collateral
18 attack on those approvals at this date. I actually
19 thought there might have been a case, either in the
20 Appellate Division or the Supreme Court, that
21 discussed doing something like that, but I am unable
22 to find one and I don't think anybody cited me to one.

23 MR. WALSH: I did, Judge.

24 THE COURT: Which one? Cherry Hill?

25 MR. WALSH: No, no. The Tri-State Ship

1 Repair. In that case, the Appellate Division
2 permitted a challenge to a plan two years after it was
3 adopted, which certainly indicates the Metropark,
4 which has a zero percent set-aside, would be
5 applicable, which is only nine months I think from the
6 plan adoption. With -- because it was -- it was in
7 the public interest. And so I think that there is --

8 THE COURT: The public interest is, as I
9 understand your position, the affordable housing and
10 the municipality's obligation to satisfy its
11 obligation, as determined by the Court. And I am not
12 unmindful of that, but it's not the project itself
13 that interferes with or promotes the public interest,
14 it's the fair share plan that would do that.

15 Don't I have the ability to make sure that
16 they do the right thing, notwithstanding what they
17 did, as your view is that they did ther wrong thing,
18 on those cases by adjusting their compliance number at
19 some point to reflect what was lost?

20 MR. WALSH: Judge, you know, I think that at
21 that point you get into a -- you get into an issue
22 that is addressed by Justice Stein's decision in Fair
23 Share, which is maybe, there may be a way for that to
24 happen, but that could --

25 THE COURT: Well, I've got complete control

1 over that, don't I?

2 MR. WALSH: You do, but --

3 THE COURT: I mean, if you say that Ms.
4 Jennings' project only gave us -- what's it --

5 MS. JENNINGS: Ten percent..

6 THE COURT: -- 50 units, 10 percent?

7 MR. WALSH: Yeah.

8 THE COURT: And it should have been another
9 50 units? If the fair share number that's adjusted to
10 cause Woodbridge to obtain compliance is 50 units
11 higher, does that not take into account the public
12 interest that you're prompting? And at the same time,
13 weighing against the prejudice that would occur, it
14 seems to me that that's a safer, sounder, more
15 equitable way to go.

16 MR. WALSH: Yeah, I --

17 THE COURT: On both promoting your public
18 interest argument, but at the same time I am
19 protecting the vested rights of not only the owners of
20 the property, but the sellers of the property or the
21 banks that have loaned money on the property or the
22 financial integrity of the project itself. But I am
23 doing so in a manner that will not deprive the low and
24 moderate income persons of an ordinance that takes
25 that into account.

1 MR. WALSH: Yeah, I --

2 THE COURT: It seems to me, on balance,
3 that's a fair way to go.

4 MR. WALSH: Yeah. Judge, I think at that
5 point -- I mean, they're playing from motion to
6 dismiss standpoint. I haven't had -- you know, it's --
7 it's one -- there may be some facts that sort of get
8 in on that, but I don't -- I don't have any -- I
9 haven't had discovery on any of the claims that
10 they're making and --

11 THE COURT: Well, you wouldn't get any in a
12 PW.

13 MR. WALSH: Well, you might when they're --
14 you should -- you could get something when they're
15 introducing facts, especially in a motion to dismiss,
16 that are so far outside the record. It is, you know, --

17 THE COURT: Well, let's assume that I'm
18 ignoring, as I would, in a motion to dismiss -- in
19 fact, one of the notes I made is that the motion to
20 dismiss -- you know, I'm not going to take into
21 consideration all these other arguments that are being
22 made as to what the prejudice was or wasn't, although
23 I am certainly -- I would take judicial notice that
24 there would be some prejudice from the delay.

25 But it seems to me that the only public

1 interest -- the only exception for enlarging the 45
2 days would be it's in the public interest to do so.
3 And it seems to me that the harshness of opening up
4 what's otherwise a vested right which the
5 municipalities are -- which the MLUL has authorized
6 giving to owners and recipients of approvals, is a
7 very important right, because a lot of people rely on
8 that. Banks rely on it, buyers and sellers rely upon
9 it.

10 So I have to weigh that against what's the
11 benefit that you think would accrue if I were to
12 expand 45 days. And as I understand it, the -- what
13 we're losing by not doing it is the potential -- the
14 development potential for affordable housing on these
15 two sites. And what I'm suggesting to you is I'll
16 take care of that.

17 MR. WALSH: Yeah, I don't -- so --

18 THE COURT: Or I can take care of that.

19 MR. WALSH: Yeah. I -- you know, I --

20 Judge, I think that the -- you know, what the -- what
21 Justice Stein's decision in Cherry Hill says is that
22 it's not allowed to allow choice parcels to go. And
23 they're not talking about a 45-day thing there,
24 admittedly, but what they say is that Mount Laurel, in
25 the -- in when -- when towns are supposed to be

1 planning to meet Mount Laurel, they're not proposing
2 on a sub-cert, they're -- they're not allowed to have
3 choice parcels go.

4 And it doesn't mean that every site has to
5 have affordable housing, but it also means that when
6 you've got a vacant land adjustment, you can't just
7 say we'll take care of it later.

8 THE COURT: And I don't disagree with that,
9 but they don't have a vacant land adjustment yet. I
10 have to be the one to give it to them.

11 MR. WALSH: Well, they have -- they had one.

12 THE COURT: Yeah, but --

13 MR. WALSH: Just like Cherry Hill did.

14 They're in the same exact --

15 THE COURT: Yeah, but they're -- but as I
16 understand it, they may have got a vacant land
17 adjustment, but their unmet need isn't wiped out.

18 MR. WALSH: True.

19 THE COURT: And the question of whether and
20 to what extent I'm going to continue to give them a
21 vacant land adjustment will be colored by this
22 conduct. Right?

23 MR. WALSH: Yeah.

24 THE COURT: You're going to make the
25 argument that they shouldn't have a vacant land

1 adjustment, because they're redeveloping and approving
2 and issuing permits for all kinds of stuff that they
3 supposedly had no land for over the last however many
4 years; and, Judge, don't give them a vacant land
5 adjustment to that extent or don't give them one at
6 all.

7 And I certainly -- and I'll have this
8 conversation with Mr. Boccher at this point -- but I'm
9 going to say to them, hey, you know, don't cry to me
10 you're an orphan after you killed your father.

11 MR. WALSH: Mm-hmm.

12 THE COURT: You know, your situation -- you
13 put yourself in a bad spot. You may end up with a
14 fair share number a lot bigger than you thought you
15 were going to get, because I am not going to ignore
16 the fact that these lands were there and not utilized
17 to the fullest development potential that they had.

18 MR. WALSH: Yeah. Well then, Judge, in
19 order for the -- for that remedy to be complete,
20 Woodbridge would have to provide the units
21 simultaneous with the other units being put in there.
22 That -- the harm -- let me just assume, for purposes
23 of argument, that Your Honor has that power. And I
24 think you do, to a substantial extent. I suspect the
25 municipality may fight it, but let's assume they do

1 and they lose.

2 At that point, the question becomes one of
3 timing and one of scarce resources. And the manner in
4 which -- you know, the -- from a weighing of the
5 public interest, if I lose here, I'm going to take --

6 THE COURT: Going forward --

7 MR. WALSH: -- up that argument --

8 THE COURT: Going forward, I can take
9 control of that via a scarce resource restraint. And
10 as I indicated to you a moment or two ago, you will
11 fare better on that issue than the immunity issue.

12 But it seems on the dismissal issue the
13 balances that I have are the public interest to expand
14 the 45 days -- which you're outside, admittedly --
15 versus the prejudice that would occur and the
16 presumption that the vested rights under the MLUL, if
17 not sacrosanct, are pretty sacrosanct.

18 So all I'm suggesting is when I do that
19 weighing, as heavy as I think that public interest is,
20 I can take that into account and protect that in a way
21 that doesn't cause the kind of harsh result to the
22 plaintiff, while at the same time giving effect to
23 that public interest.

24 So, in terms of whether or not I'm going to
25 give these land owners the protection that they want

1 versus the municipality, don't lose sight of the fact
2 that I still have control over the municipal
3 obligation.

4 MR. WALSH: I understand that, Judge, and
5 what I'm saying is the -- that -- that in terms of a --
6 in terms of what -- you know, in order to really
7 recreate this opportunity, it would take -- it's going
8 to take money and land. It's going -- and --

9 THE COURT: Well, I get that.

10 MR. WALSH: And Woodbridge doesn't have that
11 much money in its affordable housing trust fund. So,
12 are they going to bond to recreate that opportunity?
13 It's --

14 THE COURT: I don't know the answer to that
15 and I don't know what the plan ultimately that they
16 present to me will show and whether or not, after I
17 say, if it has deficiencies, what they need to do to
18 correct it, whether they will do so. They may say,
19 you know what? We can't do it. And, therefore, their
20 immunity lapses and then people who have
21 redevelopment-able sites may file lawsuits under Mount
22 Laurel and get it done that way.

23 The timing issue is not one that I am
24 insensitive to. But on the other hand, it seems clear
25 to me, whether it's a matter outside the pleadings or

1 not, that this is a -- at least in Ms. Jennings' case,
2 it's a polluted site and they're not going to proceed
3 under any circumstances with the kind of set-aside
4 that they had, because the financial requirements of
5 developing that site wouldn't justify it. So they --
6 somebody else would have to buy that site or somebody
7 else would have to redesign the site, or they may have
8 to do it with the higher densities. But even if all
9 those things happen in the way that you would have
10 wanted them to do it, so that they got maybe 700 units
11 and 140 Mount Laurels, you'd start from scratch also.

12 MR. WALSH: Well, Judge, but it's hard to
13 argue that -- that they can't do more affordable
14 housing when they are paying a million dollars for an
15 art center. It's hard -- you know, it's -- it's hard
16 for them to come in and say 10 percent is all we could
17 do, while the town is taking a million dollars to put
18 towards an art center. That's not the normal thing
19 you see in the Mount Laurel context.

20 And as to the Metropark matter, to the
21 extent Your Honor just talked about the equities for
22 Ms. Jennings' client at the Avenel site, I don't see
23 them. I don't see them in the record as to the
24 Metropark site, which is doing zero, which is not a
25 ground field site and which has a much earlier period

1 of time during which -- and I don't think has
 2 information in the record, if I am recalling
 3 correctly, about the extent of funding that has been
 4 put in there. To the point that Mr. Pantel has even
 5 told the Court that he wanted to withdraw during the
 6 first case management conference, because it was their
 7 intent to change the project.

8 And so -- so the ---

9 THE COURT: Well, that will eliminate any
 10 problem.

11 MR. WALSH: Well, --

12 THE COURT: Because there's going to be a
 13 scarce resource order.

14 MR. WALSH: Well, so, it -- so the way in
 15 which -- as whatever the equities -- without conceding
 16 any equities to Avenel in that way, they don't -- they
 17 don't apply in the same way to Metropark, which is
 18 doing zero. And any developer that goes into a town
 19 with an unmet need is on notice that their development
 20 presumptively would be required to provide affordable
 21 housing. That is -- and it may be --

22 THE COURT: Maybe. Maybe. And perhaps
 23 their -- that any approval that is obtained from a
 24 municipality like that in Middlesex County will result
 25 in you filing a timely 45-day appeal. I mean, there

1 were issues, a I understand it, in this record that
 2 indicate that Fair Share was aware of the
 3 redevelopment plan being proposed or the redevelopment
 4 and what it provided. It's a public record of any
 5 event. The fact that it didn't contain, in the
 6 Metropark case, any Mount Laurel set-aside or -- not
 7 even a contribution; right? It was, like, nothing?

8 MR. PANTEL: There is a monetary
 9 contribution.

10 THE COURT: How much was it?

11 MR. PANTEL: It's pursuant to whatever --

12 THE COURT: Oh, to the ordinance. Yeah.

13 MR. PANTEL: -- applicable ordinance is in
 14 place and a two-and-a-half percent for the --

15 THE COURT: Yeah, I mean, --

16 MR. PANTEL: -- non-residential portion.

17 THE COURT: -- there's a lot of water under
 18 this bridge for me to allow the resurrection, you
 19 know, of the prerogative writ right that would have
 20 been available to you at various stages. The
 21 redevelopment plan itself could have been appealed,
 22 the designation of the redeveloper theoretically could
 23 be appealed, and approval under the redevelopment plan
 24 could be appealed. So there's a lot of times within
 25 which you are --

1 MR. WALSH: Which that's what we did. We
2 approved it under the -- we did appeal that. The site
3 plan approval we appealed.

4 Your Honor, Judge, what I'd urge you to --

5 THE COURT: But not within 45 days.

6 MR. WALSH: Yes, we did. These cases, from
7 the planning board, the approvals -- the appeals are
8 with the -- the appeals are timely. There is no
9 assertion we did not appeal the planning board
10 approvals timely.

11 THE COURT: Yeah, but -- I'm sorry. I
12 misspoke. You appealed them within 45 days, but you
13 appealed them not based upon an ordinance that
14 existed. The other cases that I looked at -- you're
15 not saying the approval is no good, because they
16 needed a variance they didn't get or that they have a
17 use that wasn't permitted. You're saying that they
18 were approved under an ordinance that I should
19 invalidate.

20 MR. WALSH: That's correct.

21 THE COURT: Okay. I --

22 MR. WALSH: Yeah, I mean, the redevelopment
23 plan is an ordinance --

24 THE COURT: I haven't found any authority
25 that would allow me to do that.

1 MR. WALSH: Well, and there's no authority
2 that says you can't do it either. And --

3 THE COURT: Well, but there is an MLUL
4 provision that says they're invested once they're
5 approved.

6 MR. WALSH: And the --

7 THE COURT: And their -- and the standards,
8 in terms of reviewing -- on a prerogative writ, I am
9 limited to looking at the record and the law that's in
10 effect at the time of either the application or the
11 approval, depending on whether the time-of-decision
12 rule applies or not.

13 So I am not -- I don't think I am authorized
14 -- I don't think I'm authorized to presume or
15 invalidate an approval, because I don't like the
16 ordinance under which it was adopted.

17 MR. WALSH: There's no case law that --

18 THE COURT: I don't think I have that
19 authority.

20 MR. WALSH: There is no case law that you
21 don't and --

22 THE COURT: Well, the case law says I am
23 required to apply the ordinance that's in effect. As
24 opposed to the one that I'd like to see in effect or
25 the one --

1 MR. WALSH: No, the --

2 THE COURT: -- that might be in effect.

3 MR. WALSH: Yeah, Judge, I don't think that
4 simply because an ordinance is before a -- if a
5 planning board relies on an unconstitutional
6 ordinance, that planning board action isn't
7 sacrosanct. It's not beyond challenge simply because
8 -- there's no case that says that. And to the
9 contrary, the case law suggests that a redevelopment
10 plan is simply --

11 THE COURT: I think if you challenge -- if
12 you have a suit challenging the ordinance that exists,
13 and somebody makes an application for approval under
14 that, they're at their own risk. But if they go under
15 an ordinance that has not been challenged and they get
16 an approval, that approval is good.

17 MR. WALSH: There's not a case that says
18 that, Judge. There will be --

19 THE COURT: There's no case that says you
20 can undo that and the MLUL says it's good, it's good,
21 it's good, it's good for three years or two --

22 MR. WALSH: Well, but the case --

23 THE COURT: -- extensions.

24 MR. WALSH: The case law also suggests that
25 an ord -- you know, this is not -- this is a

1 redevelopment plan which functions as an ord -- this
2 is zoning.

3 THE COURT: Well, there's still an ordinance.
4 They adopt an ordinance.

5 MR. WALSH: There's still an ordinance.
6 That's right. This is zoning.

7 So -- so for purposes of our argument, the --
8 the -- it shouldn't be different. If a redevelopment
9 plan is an ordinance and an ordinance can be
10 challenged at any time, simply because somebody has
11 proceeded under that ordinance does not in -- and I
12 haven't seen a case that suggests that that -- that
13 that in any way -- that the time -- if one can
14 challenge an ordinance at any point simply because
15 somebody walked into the planning board, wouldn't --

16 THE COURT: Well, I'm not sure I even agree
17 with that statement that you could challenge an
18 ordinance at any time. You lose the right to
19 challenge an ordinance on any sub -- on any procedural
20 basis 45 days --

21 MR. WALSH: Right.

22 THE COURT: -- after it is adopted. You can
23 challenge an ordinance as it applies to you, but you
24 have to have -- there has to be a justiciable
25 controversy.

1 MR. WALSH: Sure.

2 THE COURT: So, an applicant who gets turned
3 down could then challenge not only their approval, but
4 could challenge the ordinance as unconstitutional as
5 it applied to them, in which that 45-day against the
6 ordinance wouldn't apply. But if you want to
7 challenge the constitutionality of a zoning ordinance,
8 you can do that as an interested party, because the
9 Supreme Court has given you sort of special status.

10 MR. WALSH: And that's what we're doing.

11 THE COURT: Okay. And you can challenge
12 that ordinance.

13 MR. WALSH: That's --

14 THE COURT: But it's after the approvals
15 have already been obtained.

16 MR. WALSH: The approvals have -- the 45
17 days hasn't run on the approvals though.

18 THE COURT: But the ord -- but when they
19 went out on their application there was no challenge
20 to the ordinance.

21 MR. WALSH: Yes, but so Honor -- so, Your
22 Honor, what's interesting, Your Honor, is the way
23 you're parsing it is that if I got in there the day --
24 the harm that Your Honor is suggesting exists isn't
25 the harm from the redevelopment plan to -- because of

1 delay, isn't the harm from the adoption of the
2 redevelopment plan to the -- the approval, it is the
3 harm that went in from the day they went in -- if I
4 got in -- under Your Honor's approach, if I got in the
5 day before they filed at the planning board, I would
6 be okay.

7 THE COURT: I think that if you filed a
8 challenge to an ordinance under which they are trying
9 to get approval and they have actual constructive
10 notice that the ordinance under which they are
11 proceeding is under attack as to the validity of it,
12 on the respects that you've described, I think the
13 result might be different.

14 MR. WALSH: Yeah, well, to that end, we were
15 challenging their Mount Laurel ord -- we were saying
16 that their whole zoning ordinances were invalid.

17 THE COURT: Right, but not a particular
18 provision of it.

19 MR. WALSH: Yeah.

20 THE COURT: That -- the fact of the matter
21 is, your argument is, on the merits, they don't comply
22 with the contribution obligation. They have the right
23 to comply in whatever fashion they choose to do so, as
24 long as they comply. So they can approve projects
25 without affordable housing, they can approve non-

1 residential products, as long as they have an
2 ordinance that's constitutional. And I guess,
3 ultimately, at the end of the day that's the issue.

4 MR. WALSH: But --

5 THE COURT: They can do all kinds of other
6 things with it.

7 MR. WALSH: Well, I don't think they can do
8 that, Judge, when land is a scarce resource and when
9 they have -- they are in between plan approval.

10 You know, I might have a hard -- I actually
11 -- we actually got scarce resource restraints in the --
12 against a municipality that had sub-cert, because
13 things had changed. And but let's just set that to
14 the side.

15 THE COURT: Right, but I made it pretty
16 clear to you that the problem that you've identified
17 is one that I can fix. Well, not fix, but I can
18 certainly address --

19 MR. WALSH: Mm-hmm.

20 THE COURT: -- in the context in the scarce
21 resource constraint. And redevelopment has taken on a
22 whole new life in the last few years. And certainly
23 Woodbridge and other municipalities have taken a lot
24 of redevelopment effort and there's no doubt in my
25 mind that the compliance package that they're going to

1 have to put together is going to have to take that
2 into account in some fashion. And it will relate to
3 what their fair share obligation is going to be.

4 And the credits that they are going to seek
5 under the vacant land adjustment, I'm anticipating,
6 will not be received the same way they would be in a
7 town that didn't do the things that you're complaining
8 about.

9 MR. WALSH: Yeah.

10 THE COURT: And as I understand, your issue
11 with that is that it's a timing issue, because --
12 among other things, because we're now having to go
13 back to start, to square one. And all I've said with
14 regard to that was I really don't see that as a big
15 difference, because, if you are right, you'd still
16 have to go back to square one.

17 MR. WALSH: Well, it could also be a funding
18 issue. I mean, they are now pushing off -- they are
19 now pushing off on a -- on the public to fund these
20 things through other forms rather than --

21 THE COURT: They get a -- but they get a
22 right to decide how they want to do their ordinance.
23 And if they want to raise taxes or pass bonds that
24 they have to pay interest on, on the public dime, to
25 do so, they're the elected officials, --

1 MR. WALSH: Well, just as long --

2 THE COURT: -- that's the risk they run.

3 MR. WALSH: Just as long as Your Honor's --
4 just as long as Your Honor -- the -- the -- Your Honor
5 conceives of your power to correct the harm down the
6 line as one that includes the power to bond, to order
7 bonding, because they are the ones who have exposed
8 themselves to --

9 THE COURT: Well, I can't -- I don't know --
10 I don't -- I don't think that -- I'm not deciding that
11 issue, but I don't think --

12 MR. WALSH: I know, Your Honor.

13 THE COURT: -- I have that authority. My
14 authority is the ordinance is no good. That's my
15 authority. That you didn't comply and then you'll
16 have -- you no longer have immunity and you're subject
17 to builder remedy lawsuits.

18 MR. WALSH: Mm-hmm.

19 THE COURT: That's really the extent that --

20 MR. WALSH: Well, --

21 THE COURT: -- they're okay or they're not
22 okay.

23 MR. WALSH: Yeah, but I think that you have
24 -- I think you actually have more powers than that. I
25 don't want to concede that.

1 THE COURT: Perhaps.

2 MR. WALSH: Your powers include --

3 THE COURT: But if I --

4 MR. WALSH: -- ordering -- your powers
5 include taking over their ordinance, it's not just a
6 declaration that they can't do it.

7 THE COURT: I don't want to decide that
8 today. But it seems to me that the ultimate hammer
9 here is telling every person, every builder or
10 developer in New Jersey that Woodbridge is now
11 vulnerable and all you've got to do is buy up some old
12 dilapidated areas and redevelop it yourself, you don't
13 need a redevelopment plan to redevelop it on your own,
14 and propose, you know, a high rise or an apartment
15 complex or some other kind of thing.

16 That's the hammer and the Supreme Court gets
17 that --

18 MR. WALSH: Yeah.

19 THE COURT: -- and that's why they're doing
20 what they're doing in the way they're doing it. And,
21 in fact, I think as soon as a few of these things
22 happen, the Fair Housing Act will get revitalized in
23 some fashion, because the very reason it was passed
24 back in '86 was because builder remedies started
25 getting awarded by the Mount Laurel judges.

1 So I think it's all cyclical, but we're
2 going to end up in the same place we were in '86 at
3 some point and the question is, you know, what's going
4 to happen between now and that point.

5 MR. WALSH: Yeah. My final point, Judge, is
6 that, you know, I don't view the substantiation of
7 harm. While I disagree with Avenel's claims regarding
8 that and I don't want to concede anything there, I
9 don't believe the Metropark development has approached
10 the claim of harm, shorter amount of time, not doing
11 any units. It's especially -- especially --

12 THE COURT: I would agree the weighing might
13 be different, but the ult -- in terms of the weights,
14 but the ultimate result, their invested rights, their
15 expectations, the importance of which the municipality
16 -- the Municipal Land Use Law gives approvals -- the
17 fact that the MLUL was amended to specifically provide
18 vested rights for site plan approvals was really a
19 function of the banks lobbying the legislature.

20 MR. WALSH: See, that's -- that -- yeah,
21 Judge, --

22 THE COURT: Because the -- you know, before
23 the MLUL and I don't -- whether it's '76 or '84 --
24 there were no vested rights for site plan approvals.

25 MR. WALSH: Well, but there's no --

1 THE COURT: On the subdivisions.

2 MR. WALSH: -- vestiture for a redevelopment
3 plan. A redevelopment plan could be --

4 THE COURT: Well, once you have your
5 approval, you're vested.

6 MR. WALSH: Yeah, but they don't have their
7 approval, because I am challenging their approval.

8 THE COURT: Well, but you're challenging it
9 based upon something that I can't conceive of if you
10 have the right challenge.

11 MR. WALSH: Yeah, that's --

12 THE COURT: You're not saying they didn't
13 comply with the ordinance. You didn't say that their
14 approval -- on a PW, I'm limited to determining
15 whether or not the action of the board that you're
16 appealing from, whether it's zoning or planning, is
17 arbitrary and unreasonable. That's my limitation.

18 MR. WALSH: We're -- and that -- and that --
19 you know, it's -- it's just like, you know, the --

20 THE COURT: And I'm guided by the ordinance
21 that was in effect at the time they made their
22 decision. So, all I'm allowed to do under all the
23 case law that I am aware of -- and I'm old enough to
24 have a lot of experience now on those issues -- is was
25 their decision arbitrary, capricious and unreasonable.

1 Is it consistent with the ordinance that was adopted?
2 Did they have a variance that they forgot to ask for
3 that might invalidate it? Did they have a use that
4 wasn't permitted? But if they complied with the
5 ordinance and the findings of the board are adequate
6 with regard to that -- and that's not your challenge --
7 I'd have to uphold it.

8 MR. WALSH: Yeah, I --

9 THE COURT: You know, I am not allowed to
10 substitute my judgment for that of the board.

11 MR. WALSH: Let me just -- let me just
12 analogize what Your Honor just said, respectfully, to
13 a slightly different situation. A state agency adopts
14 rules. I could come in and challenge the statute
15 under which those rules are adopted and I could
16 challenge -- the -- the standard of review that the
17 Appellate Division applies is both arbitrary and
18 capricious, but it also looks at the underlying claim
19 of authorization.

20 THE COURT: I think it's substantial
21 credible evidence for agencies.

22 MR. WALSH: It is, but -- but the -- but a --
23 but it's a *de novo* review on whether the act according
24 to which the state agency acted is valid. And so
25 there's no --

1 THE COURT: I don't understand what you just
2 said. And I'm not -- and I'm sorry. State agencies
3 exist by virtue of statutory authorities and grants.

4 MR. WALSH: Right.

5 THE COURT: They are created, there's a
6 statutory scheme, the agencies are compelled to adopt
7 regulations consistent with implementation of the act.
8 Those regs can be challenged if they are perceived to
9 be inconsistent with the purposes of the act.

10 MR. WALSH: And the act --

11 THE COURT: And the act itself can be
12 challenged.

13 MR. WALSH: Exactly.

14 THE COURT: But the act itself is being
15 challenged on constitutional bases.

16 MR. WALSH: Exactly. That's what I am doing
17 here. I -- we are challenging an act of the
18 Woodbridge council on constitutional bases, just like
19 we could as what -- something the state legislature
20 did through a ruling --

21 THE COURT: But you could do that within the
22 confines of the DJ action, just like you're doing in
23 Monroe.

24 MR. WALSH: But -- and I'm -- and I'm doing
25 that. The point is -- that -- that's why it -- the

1 point is, Judge, that you're saying, but they have
2 vested rights, and they don't have vested rights if I
3 appeal their planning board decision within 45 days.
4 They --

5 THE COURT: But I can't -- I -- you can't
6 win that case. You can't win that prerogative writ.
7 Because I am constrained in my review of what the
8 board did to make sure that the board abided by its
9 own ordinances.

10 MR. WALSH: And so what I -- you know, I
11 think it would be helpful for -- for purposes of this,
12 if Your Honor were to indicate what case you believe
13 is constraining you, because I am not aware of any
14 case law that says that you can't appeal a
15 redevelopment plan --

16 THE COURT: I am -- well, I'm -- you and I
17 are not saying the same thing. What I'm saying is the
18 case law -- and there are a legion of cases --

19 MR. WALSH: Mm-hmm.

20 THE COURT: -- that say that my authority to
21 review a zoning board or a planning board action is
22 limited to the record below and the extent to which
23 it's arbitrary, capricious or unreasonable. On a
24 planning board action, it's realistically limited to
25 whether or not the planning board abided by its own

1 ordinances and whether the plan that was proposed and
2 approved is consistent with those ordinances.

3 And I think -- I don't know, I can't give
4 you the name of any case off the top of my head, but
5 it's every case.

6 MR. WALSH: Understood.

7 THE COURT: So that's that. So they could
8 not have denied a plan legitimately that complied with
9 their ordinances. And nor could I set one aside. So
10 -- and you're not saying that it's arbitrary,
11 capricious and it violated the ordinance, you're
12 saying the ordinance itself is no good.

13 MR. WALSH: Well, I don't think any action
14 that vi -- that -- that is based on an unconstitutional
15 ordinance cannot be --

16 THE COURT: Here's my problem with what you
17 are saying. Suppose I represent an applicant I get in
18 the 2000 and I get an approval.

19 MR. WALSH: Mm-hmm.

20 THE COURT: All right? I have three years
21 to get my final. I've got two years to -- of
22 extensions. I then get -- you know, four or five
23 years later, I'm building, I'm starting the
24 construction. Somebody comes in later and declare --
25 and has the ordinance declared unconstitutional. Is

1 my project valid? Nine of my houses -- my --

2 MR. WALSH: Yes, it is, because -- because
3 your approval wasn't challenged based on the validity
4 of the ordinance. Your -- the difference -- the
5 difference in the --

6 THE COURT: But you're saying the ordinance
7 was invalid under which it was -- you know, it was
8 granted.

9 MR. WALSH: No, but you -- but the question,
10 Your Honor, is at what point vesting occurs. And I'd
11 have a much harder -- if I came in two years after
12 they --

13 THE COURT: Well, the MLUL says it's vested
14 as soon as there's an approval.

15 MR. WALSH: That's right. But if that
16 approval is challenged based on the validity of the
17 ordinance, then the vestiture would be denied and --

18 THE COURT: You can't challenge the
19 approval, I don't think, based on the validity of the
20 ordinance. You can only challenge the ordinance.
21 Your ability to challenge the approval is limited to
22 what the ordinance -- remember, they're a local
23 developmental agency created by the MLUL. They have
24 discrete and limited power. And any power not
25 delegated to them by the MLUL they don't have. So the

1 planning board is constrained by Section 62, the power
2 of the zone, and -- and whatever authority is
3 delegated to them in terms of their review.

4 That's all they can do. Even if they
5 thought the ordinance was unconstitutional, they're
6 still obliged to follow it. They can't pretend that
7 the ordinance should be something different. They
8 have to give that approval.

9 So, I mean, if you -- like I said, if you
10 challenge the ordinance before they do their thing, a
11 different result might abide from my perspective,
12 because then they're going -- they're proceeding at
13 their own risk at that point.

14 MR. WALSH: Well, and I -- and then I'll sit
15 down with this final point, Judge. They knew. They --
16 they were proceeding at their own risk, because they
17 knew there was Mount Laurel litigation pending
18 against --

19 THE COURT: Right, but the litigation is
20 whether the township is compliant or not, not whether
21 their site has to be in the plan.

22 MR. WALSH: I understand. You know, the --
23 the difficulty with this thing is that it's hard to be
24 in every place at once and that's why we made a motion
25 before Judge Hurley for that very purpose, because we

1 saw the municipality as being recalcitrant, we made
 2 the motion, we sought to avoid -- you know, we sought
 3 -- I think we were diligent and we sought to do the
 4 right thing. We said there's something going wrong
 5 here and we attempted to put something in place to
 6 address it.

7 There -- there is no argument that there was
 8 actual notice provided to Fair Share that -- and it --
 9 my -- my final pitch is, in the context when you have
 10 a public interest organization that has made a good
 11 faith effort to be diligent, no actual notice -- and --
 12 and -- and, you know, a clear reality that the
 13 municipality hasn't met its obligations, I think
 14 there's a higher burden that has to be met, rather
 15 than just we -- we've spent some money, so --

16 THE COURT: I don't know that I disagree
 17 with that, but I think that I can protect those
 18 interests in a way that it doesn't result in such a
 19 harsh impact on third parties that are not -- they are
 20 not given the obligation that the municipality has.
 21 It's not their obligation to provide fair share its --
 22 fair share affordable housing, it's the municipality's
 23 obligation.

24 And I don't have any, you know, evidence
 25 like in the Cherry Hill case where as soon as somebody

1 goes in to make an application for a development, they
 2 condemn the property like Jerry Hockey's (phonetic)
 3 firm did back in the day to -- in order to, you know,
 4 defeat the Mount Laurel property.

5 MR. WALSH: Well, --

6 THE COURT: But I understand your point. As
 7 always, you make a good one and I know arguing with
 8 you is always a challenge for me. And the truth of
 9 the matter is, you can be --

10 MR. WALSH: It's -- it's mutual.

11 THE COURT: -- you can be right, but from,
 12 like I said to Ms. Callahan before, for the time being
 13 at least I get to make the first decision and then
 14 we'll see what happens.

15 MR. WALSH: And I respect that. Thank you,
 16 Judge.

17 THE COURT: I know you do and I do
 18 appreciate the manner in which you conduct yourself.

19 Ms. Jennings, do you want to be heard?

20 MS. JENNINGS: No, I learned long ago, when
 21 you think you might be winning, sit down and shut up,
 22 so that's what I am going to do.

23 THE COURT: Well, I wouldn't have said shut
 24 up, but I would have agreed with the sit down part.

25 Mr. Pantel?

1 MR. PANTEL: Likewise, Judge, I don't have
2 anything to add at this point.

3 THE COURT: Okay. Mr. Boccher, I'm sort of
4 inclined, as you can tell from my colloquy with Mr.
5 Walsh, to allow these approvals to go through, but not
6 without imposing a scarce resource constraint or
7 restraint against the municipality so that this, going
8 forward, we don't lose the redevelopment or other
9 means any ability of the municipality to comply with
10 its fair share obligation and perhaps whatever its
11 unmet need was from its original vacant land
12 adjustment back in the second round.

13 And I am going to hear from Ms. McKenzie on
14 this issue, but I suspect that she will support the
15 application for the scarce resource restraint. But do
16 you oppose that?

17 MR. BOCCHER: Absolutely.

18 THE COURT: Okay.

19 MR. BOCCHER: May I be heard?

20 THE COURT: In good faith?

21 MR. BOCCHER: Absolutely, Your Honor.
22 Absolutely. May I be heard on that?

23 THE COURT: You can.

24 MR. BOCCHER: Judge, the phrase scarce
25 resource restraint is kind loosely thrown around in --

1 THE COURT: Not by me.

2 MR. BOCCHER: -- Mount Laurel issues. And
3 we're talking about an injunction. We're talking
4 about the imposition --

5 THE COURT: No we're not. We're talking
6 about a scarce resource restraint, which has been
7 acknowledged both in case law and statutorily. It's
8 not an injunction in the same sense as the Crowe versus
9 DeGioia injunction. This is to protect constitutional
10 rights and it is to make sure that an irreparable harm
11 and loss of resources that would otherwise enable you
12 to comply with those constitutional obligations are
13 not lost irretrievably.

14 So I reject categorically any analysis that
15 suggests that I need to treat the scarce resource
16 constraint the same way as I would an application for
17 a TRO or a preliminary injunction in a non-Mount Laurel
18 context. This is different.

19 MR. BOCCHER: Okay. Well, we would state
20 our objection to that interpretation --

21 THE COURT: I got it.

22 MR. BOCCHER: -- of the law, Your Honor. We
23 think Crowe --

24 THE COURT: It's on the record.

25 MR. BOCCHER: We think Crowe versus DeGioia

1 absolutely applies. And in any event, in any event --
 2 THE COURT: Never been applied by any judge
 3 in any case when I was the lawyer, and I'm not aware
 4 of any judge that has ever done it, and I never did
 5 it, so --

6 MR. BOCCHER: But in any event, Your Honor,
 7 if it's something less than an injunction that we're
 8 talking about, then there still has to be standards --

9 THE COURT: It's not an injunction. It is a
 10 restraint that you cannot approve anything without my
 11 permission first. That's all.

12 MR. BOCCHER: That's an injunction, Judge.

13 THE COURT: No. An injunction says you
 14 can't do it at all.

15 MR. BOCCHER: No, I could always come in and
 16 ask for relief on an injunction if there's --

17 THE COURT: Well, --

18 MR. BOCCHER: -- if there's a --

19 THE COURT: But it's part --

20 MR. BOCCHER: -- an injunction that's in
 21 place.

22 THE COURT: You can approve anything that
 23 has an affordable housing component. You can't use up
 24 your land. You are asking me for a vacant land
 25 adjustment. True or untrue?

1 MR. BOCCHER: We haven't put together our
 2 plan yet.

3 THE COURT: True or untrue?

4 MR. BOCCHER: We haven't put together our
 5 plan yet, Your Honor. We're relying on a 1999 order
 6 that Your Honor entered that granted us a vacant land
 7 adjustment and set forth what our RDP is. We've
 8 satisfied that RDP. There has been no allegation at
 9 all that we haven't --

10 THE COURT: Well, there's still --

11 MR. BOCCHER: -- that we haven't complied
 12 with --

13 THE COURT: There's still an unmet need.

14 MR. BOCCHER: That's correct, Your Honor.

15 THE COURT: Okay.

16 MR. BOCCHER: And we've made substantial
 17 progress to address that unmet need as well. And the
 18 whole point of the Supreme Court's decision was to
 19 afford municipalities an opportunity to put together a
 20 plan that would come before Your Honor and the
 21 master --

22 THE COURT: Okay.

23 MR. BOCCHER: -- to demonstrate how we're
 24 meeting the unmet need and our obligation --

25 THE COURT: You know that --

1 MR. BOCCHER: -- going forward.

2 THE COURT: -- your fair share number is
3 going to be huge without those adjustments.

4 MR. BOCCHER: Well, but I am not -- I am not
5 surprised, because it's huge in --

6 THE COURT: Okay.

7 MR. BOCCHER: -- a number of municipalities.

8 THE COURT: So while you're fencing with me
9 -- and I don't mean that in a pejorative way -- about
10 the idea that you are not going to be seeking a vacant
11 land adjustment, I don't understand. You know you're
12 going to do it. I don't know why you won't just say
13 that you will do it.

14 MR. BOCCHER: Well, I'm not the planner. I
15 haven't put together the plan. I would expect a
16 vacant land adjustment would be --

17 THE COURT: Okay.

18 MR. BOCCHER: -- a component of that plan.

19 THE COURT: So, as long as you're going to
20 be seeking a vacant land adjustment, I have an
21 obligation to make sure that what land is left is at
22 least looked at for the purposes of a Mount Laurel
23 inclusionary development or at least somehow related
24 to promoting the Mount Laurel obligation that you will
25 likely have. And you're downward adjustment to which

1 you may very well be entitled to will have to take
2 into effect what you've got and what you've done.

3 And although I am not deciding that case, I
4 think it's pretty clear from my colloquy with Mr.
5 Walsh, while I'm not excessively critical of what the
6 boards have done with regard to Ms. Jennings and Mr.
7 Pantel's clients, you certainly allowed significant
8 property to be utilized in a fashion that, on the face
9 of it, doesn't look like it promotes the Mount Laurel
10 obligation as much as it might have.

11 MR. BOCCHER: You're talking about the
12 Metropark application, Judge?

13 THE COURT: Well, Metropark is zero. I'm
14 not so sure about Ms. Jennings' piece, because I don't
15 know what the economics of the clean up would have
16 been and whether and to what extent you could do it.
17 But I'm certainly -- and I'm not foreclosing any
18 argument that there should be no adjustment whatsoever
19 with regard to hers or even Mr. Pantel's client.

20 But certainly on the face of it, the
21 Metropark project has not included any Mount Laurel
22 development. And if you got funding for it, you know,
23 to the extent that there is development as a result of
24 that funding, maybe it won't be -- I don't want to use
25 the word punish -- but it won't -- you won't be -- you

1 won't suffer as a result of that if there's an
2 equivalent, you know, *quid pro quo*, so to speak for
3 the approvals.

4 But that's in play. You've got to
5 understand that. From my perspective, that's now in
6 play.

7 MR. BOCCHER: Well, insofar as Metropark is
8 concerned -- and Avenel, you know, I think the facts
9 will clearly demonstrate that the --

10 THE COURT: And they may.

11 MR. BOCCHER: -- the financial feasibility --

12 THE COURT: I'm not deciding that today, --

13 MR. BOCCHER: Okay. The --

14 THE COURT: -- Mr. Boccher.

15 MR. BOCCHER: But the Metropark case, Judge,
16 there's an affordable housing ordinance in place.
17 There's a requirement under their approvals that they
18 abide by the affordable housing ordinance.

19 THE COURT: Yeah, it may be --

20 MR. BOCCHER: The affordable housing
21 ordinance --

22 THE COURT: -- that there will be no
23 adjustment necessary as a result of that when we play
24 that out.

25 You're -- look. You're going to come in

1 with a plan. You're going to say my fair share is X,
2 here's how I got there, X, Y and Z, here are these
3 adjustments, these credits, this is what I propose.
4 My special master is going to look at it, and perhaps
5 Mr. Walsh will look at it. It will be presented to
6 me. If there's no agreement, I'll adjudicate whatever
7 is required. Your plan will be approved by me or it
8 will say it's deficient, here's what you need to do.
9 You'll either go out and fix it or you'll be one of
10 those municipalities that are determined to be non-
11 compliant.

12 At the end of the day, whatever that number
13 is we'll take into consideration all these things.
14 You're certainly going to be able to argue that you
15 shouldn't be treated detrimentally as a result of what
16 you did, because of these other factors. They may
17 argue to the contrary. I don't know which way,
18 obviously, I would rule, because I don't know what
19 those facts will show.

20 But to the extent that you're looking for
21 vacant land adjustments, I am going to make sure that
22 between now and then that no land disappears without
23 me or the special master at least taking a look at
24 whether or not we're going to need that to satisfy
25 your fair share obligation.

1 MR. BOCCHER: And, Your Honor, what I'm
2 suggesting is, is that with respect to Metropark
3 there's an ordinance in place and there's a
4 requirement that they abide by the ordinance. The
5 ordinance is written under the prior version of the
6 COAH third round rules, provides for one affordable
7 for every eight market units --

8 THE COURT: Are you arguing that, because
9 you are afraid I'm going to disturb their approval?

10 MR. BOCCHER: No.

11 THE COURT: Oh, okay.

12 MR. BOCCHER: No, Judge, I'm just -- I'm
13 just saying, it's being tossed out that there's no
14 affordable housing component to that project. What
15 I'm saying is, is that that's not a settled -- that's
16 not a settled issue from the township's perspective.

17 THE COURT: Right. I don't think that Mr.
18 Walsh suggested that there was nothing coming from
19 that project. He was suggesting there's nothing being
20 built on that site. And having money is great if
21 you've got no -- but if you've got no place to build
22 the units with the money, it's the same as no units.
23 So -- and I'm not sure that that's true, but that's
24 what I sort of gleaned from his argument.

25 And I don't mean to state your argument for

1 you, but I at least got that much from it.

2 MR. BOCCHER: No.

3 MR. WALSH: No, I don't know if I had just
4 mis -- did I mis -- I thought I heard Mr. Boccher say
5 that they -- there might be units on site? Maybe I
6 misunderstood that.

7 THE COURT: No. He said there's money.

8 MR. WALSH: Oh.

9 MR. BOCCHER: No, I didn't say money, Judge.
10 I said --

11 THE COURT: Oh, I thought you did.

12 MR. PANTEL: There's a housing component.

13 MR. BOCCHER: I said that there's a --
14 there's a -- that the Metropark site, there's going to
15 be an application to amend that approval and there is
16 a requirement in the redevelopment plan that the site
17 accommodate affordable housing in accordance with the
18 ordinance.

19 THE COURT: To comply with the affordable
20 housing ordinance.

21 MR. BOCCHER: To provide affordable housing --

22 THE COURT: So you're saying that new
23 approval that's going to come in and that may very
24 well contain an inclusionary component.

25 MR. BOCCHER: Yes, Your Honor.

1 THE COURT: Okay. That will be --
 2 MR. BOCCHER: That hasn't been de --
 3 THE COURT: -- helpful from Mr. Walsh's --
 4 MR. BOCCHER: That hasn't been --
 5 MR. WALSH: We would support that.
 6 THE COURT: -- perspective, I'm sure.
 7 MR. BOCCHER: That's hasn't been decided and
 8 that's -- that's my advice to the client --
 9 THE COURT: Okay.
 10 MR. BOCCHER: -- is to enforce the
 11 affordable housing ordinance that's on the books.
 12 THE COURT: So it may be that --
 13 MR. BOCCHER: There's --
 14 THE COURT: -- the fact that I would dismiss
 15 the case to PW against Mr. Pantel's client, will
 16 actually be not moot on a technical sense, but
 17 meaningless if they're going to go in for a new
 18 approval and you're going to have a conclusionary --
 19 an inclusionary development component of it.
 20 MR. BOCCHER: And I can't prejudge what the
 21 board is going to do on that respect, because there's
 22 also provisions in the ordinance for relief from the
 23 requirements of affordable housing. But I'm just
 24 putting that out there, Judge, that this is not a
 25 instance or a circumstance -- and it hasn't been --

1 for the township that it simply closes its eyes to
 2 development and allows projects to move forward.
 3 THE COURT: Well, you know that I agree with
 4 that, because -- and the special master agrees with
 5 that, because I've already indicated strongly that I
 6 believe the contrary to be so by virtue of my granting
 7 you the five months' immunity. So you need not spend
 8 a lot of time trying to justify to me that you're a
 9 good guy versus a bad guy. You're at least
 10 presumptively a good guy.
 11 MR. BOCCHER: Right. And, Your Honor, I
 12 think it has been more than a good guy, because
 13 Woodbridge has -- 40 percent of the housing in
 14 Woodbridge is affordable to low and moderate income
 15 people. This is not a municipality which has engaged
 16 in --
 17 THE COURT: Okay. I --
 18 MR. BOCCHER: -- historic exclusionary
 19 practices.
 20 THE COURT: Today I am not going to get into
 21 that, because that's for you to prove to me in the
 22 context of your DJ action. And at the end of the day,
 23 I may give you a gold star, but not today.
 24 MR. BOCCHER: But again, Your Honor, I do
 25 think it's appropriate and relevant to the Court's

1 consideration of whether or not to restrain further
2 development within the municipality, given the past
3 history, which I do think is relevant, and I --

4 THE COURT: Yeah.

5 MR. BOCCHER: -- and I appreciate what the
6 Court has already ruled, and given the actual
7 circumstance that exists on the ground in Woodbridge.

8 THE COURT: Yeah. See, I think that any
9 town that asks me for a vacant land adjustment is
10 going to be subject, presumptively subject to a scarce
11 resource constraint.

12 MR. BOCCHER: Which is not what the COAH
13 regulations governing scarce resource rest --

14 THE COURT: I'm not COAH.

15 MR. BOCCHER: -- yeah, governing --
16 governing --

17 THE COURT: Yeah, I'm not COAH.

18 MR. BOCCHER: I understand that, Judge.

19 THE COURT: And I don't -- see, COAH has
20 their numbers; I don't. So I don't know what your
21 number is going to be and COAH does. So, when COAH is
22 functional and they say your -- Woodbridge's number
23 is, you know, 12 or 2 million or whatever it is. So
24 they have a different context and framework within
25 which to assess whether and to what extent they should

1 enter a scarce resource restraint.

2 I don't know what your numbers is going to
3 be, so I can't be in a position where I lose land
4 that's necessary for compliance without knowing what
5 that number is yet. So my rule of thumb is likely to
6 be, in this and any other case, that if you're going
7 to come in looking for a scarce resource constraint --
8 I'm sorry -- a vacant land adjustment, you will be hit
9 with a scarce resource constraint to say, okay, if you
10 don't have enough land -- if you know you don't have
11 enough land to give your fair share, then I'm not
12 going to let the land go that you've got until we know
13 how you're going to -- intend to comply and the extent
14 to which you are seeking your vacant land adjustment.

15 MR. BOCCHER: And my argument, Judge, is
16 that a vacant land adjustment does not per se provide
17 valid reasons and grounds to support a scarce resource
18 injunction. My --

19 THE COURT: I think it does. I think I have
20 to look at it as it comes in on each case, but I think
21 it require -- if I don't do it, then I don't get to
22 see it.

23 MR. BOCCHER: Well, but Your Honor --

24 THE COURT: If I don't do it, and you --
25 you're asking for a vacant land adjustment. If Mr.

1 Walsh isn't there at any other town in this county or
 2 any other county, you're free to approve whatever
 3 limited vacant land you have left in a situation and
 4 then you're going to come in and argue I've got a
 5 vested right and approval, I bought the property based
 6 on that. You know, I spent a million dollars, I
 7 cleaned it up, or I knocked it down. I can't have
 8 that happen.

9 MR. BOCCHER: No. But, Your Honor, but a
 10 vacant land adjustment imposes a responsibility upon
 11 the municipality as well. Now, first off, we haven't
 12 made the application for a vacant land adjustment.

13 THE COURT: Except you did in -- you did
 14 under the first one.

15 MR. BOCCHER: We did -- we did in 1999, yes,
 16 but there's no -- there is no --

17 THE COURT: Did you get extra land? Did you
 18 annex another town's vacant land?

19 MR. BOCCHER: No, Your Honor.

20 THE COURT: Okay.

21 MR. BOCCHER: Not that I'm aware of.

22 THE COURT: And you gave away the golf
 23 course.

24 MR. BOCCHER: But I -- but I would also
 25 note, Judge, that in 1999 there was not a scarce

1 resource restraint imposed at that time either. And
 2 what I am suggesting, Judge, is that --

3 THE COURT: Nobody asked for it.

4 MR. BOCCHER: But what I am suggesting,
 5 Judge, is that the imposition of a -- of a -- or the --
 6 the grant of a vacant land adjustment, which we
 7 haven't asked for at this point in time, but the grant
 8 of --

9 THE COURT: What's the downside?

10 MR. BOCCHER: -- but the grant of -- because,
 11 Your Honor, I think it's --

12 THE COURT: If I don't grant -- if I grant
 13 you a vacant -- if I grant Mr. Walsh's request for a
 14 vacant -- for a scarce resource restraint, how does
 15 that hurt you?

16 MS. JENNINGS: It hurts applicants.

17 MR. BOCCHER: Your Honor, it hurts -- well,
 18 it hurts other developers and other property owners
 19 throughout the town who haven't --

20 THE COURT: No, it doesn't. They just have
 21 to --

22 MR. BOCCHER: -- who haven't received notice
 23 of -- of this --

24 THE COURT: No. They just have to --

25 MR. BOCCHER: -- of this request.

1 THE COURT: -- make an application. You're
2 going to tell them that you can't grant any approvals
3 that would give them any vested rights, because
4 there's a scarce resource restraint, if they don't
5 have an affordable housing component. And if they do,
6 you'll make the request for relief.

7 MR. BOCCHER: But more to the point --

8 THE COURT: What's the downside?

9 MR. BOCCHER: Well, more to the point,
10 Judge, is that the Court is now acting as the super
11 agency within the municipality, requiring the town to
12 abdicate its own responsibilities and it's the --

13 THE COURT: No abdicate -- you can still
14 make your approvals. I am not stopping your
15 approvals. I'm basically saying you've got no vested
16 rights at that point. Everybody knows going forward
17 that they don't have a vested right unless, you know,
18 they get approvals.

19 MR. BOCCHER: Your -- but --

20 THE COURT: And --

21 MR. BOCCHER: And perhaps I'm
22 misunderstanding what it is that the relief the Court
23 is contemplating, Judge. Because as I understand the
24 resource -- the scarce resource restraint, is that the
25 municipality is going to be barred from considering

1 any applications for development until those
2 applications for development are --

3 THE COURT: You can consider anything you
4 want. You just can't grant a vested approval without
5 my permission or without a showing that it's either
6 consistent with an affordable housing component or a
7 good reason why it shouldn't be.

8 MR. BOCCHER: But Your Honor is going to
9 have to have a hearing on each individual case then
10 that comes up for development approvals to make a
11 judgment, A, as to --

12 THE COURT: But --

13 MR. BOCCHER: -- whether or not that site
14 can accom --

15 THE COURT: That may be.

16 MR. BOCCHER: -- can accommodate affordable
17 housing, but, B, also what the obligation is in the
18 blind, before any of the obligations are established.

19 THE COURT: Well, that -- do you know if --
20 I don't -- unless I -- I don't think I agree with
21 that, but as a -- even if I am incorrect -- from a
22 practical perspective, it's a non-issue. You're going
23 to have five months from July 1 to get me a plan.
24 There's nobody who is going to be filing an
25 application for development that will be approved

1 within that time frame that wouldn't be -- as a
2 practical reality. So I'm not --

3 MS. JENNINGS: Except for one case.

4 THE COURT: I'm not worried about that and I
5 don't think you should either.

6 MR. BOCCHER: Well, Your Honor, and -- and
7 I'm assuming you will be heard --

8 MS. JENNINGS: Yes, I am not biting at the --
9 go ahead.

10 MR. BOCCHER: But, Your Honor, I get back to
11 the fundamental question here, and that is the
12 imposition of a restraint -- it's a restraint, it's an
13 injunction -- upon a municipality's ability and
14 authority to exercise legislatively delegated powers
15 under the land use law and the redevelopment law on
16 the face of no record in front of the Court other than
17 what the municipality has done since 1999, which the
18 Court has already demonstrated and agreed has been
19 done in good faith.

20 So I'm suggesting, Judge, that on that
21 basis, unless there is some showing of recalcitrance,
22 some showing that this municipality has acted --

23 THE COURT: There's no requirement --

24 MR. BOCCHER: -- improperly --

25 THE COURT: -- for recalcitrance in a scarce

1 resource restraint or constraint. Just that it's a
2 practical, pragmatic result necessary to protect the
3 low and moderate income people from having a place to
4 go.

5 MR. BOCCHER: And we are suggesting that we
6 are doing that. That we're giving low and moderate
7 income people a place to go --

8 THE COURT: Then you have nothing to worry
9 about.

10 MR. BOCCHER: -- and have, historically.

11 THE COURT: Then you have nothing to worry
12 about. See, it doesn't hurt you in any way. The fact
13 that you're resisting so hard on this, so that the
14 Court doesn't have any oversight, suggests to me that
15 there's evil motive. And I know you better than that.
16 So why are you fighting so hard?

17 MR. BOCCHER: Because, Judge, I do view it
18 as an injunction. I do view it as a Crowe versus
19 DeGioia question and I do view it was --

20 THE COURT: Well, you're asking me for
21 relief. You're saying I should get a lower number,
22 because I don't have enough land. So I'm saying,
23 okay, so that's fine, and I'm -- you may be right
24 about that and I'm probably going to give you some
25 adjustment as a result of that, but I'm not going to

1 keep giving you a lower and lower and lower and lower
2 adjustment because you keep using up, using up, using
3 up your land. You're going to -- if you have land you
4 want to approve for --

5 MR. BOCCHER: But --

6 THE COURT: -- for non-Mount Laurel
7 purposes, you're going to have to explain to me why.
8 That's all.

9 MR. BOCCHER: But, Your Honor, we have an
10 affordable housing ordinance in place. We have an
11 ordinance in place --

12 THE COURT: It's --

13 MR. BOCCHER: -- that requires --

14 THE COURT: By definition, it doesn't
15 comply. So you know that.

16 MR. BOCCHER: But it --

17 THE COURT: So the fact of the matter is
18 that -- and you know you're getting a vacant land
19 adjustment and you know you have unmet need, so where
20 are we going with that?

21 MR. BOCCHER: Because there's standards in
22 place where a developer has to provide for affordable
23 housing. Whether it's a set-aside of 20 percent or
24 not is -- is not -- not to point.

25 THE COURT: I'm not worried about that. And

1 you -- and I don't really understand why you are
2 either. The fact of the matter is, this does not hurt
3 you. If you want to entertain an application for
4 development, you can entertain an application for
5 development, but everybody knows going forward that
6 this application for development doesn't get you any
7 vested rights, because whether that land is or is not
8 being used for Mount Laurel purposes may be an issue
9 for me in the compliance phase.

10 Now, if you show up -- if you grant an
11 approval to the XYZ corporation for a residential
12 development that doesn't contain any apartment -- any
13 affordable housing and you present to me a plan which
14 ultimately is approved without it, then that approval
15 will be okay.

16 MR. BOCCHER: Your Honor, I apologize for
17 being thick, but I am trying to wrap my hands around
18 the process and the procedure as to what it is the
19 municipality may or may not do and what it is that --

20 THE COURT: You grant an approval that would
21 vest anybody's rights under the MLUL without court
22 approval.

23 MR. BOCCHER: The planning board, for
24 example, would go forward and consider an application
25 and --

1 THE COURT: If it wanted to.

2 MR. BOCCHER: -- and -- and grant an
3 approval, subject to --

4 THE COURT: Nobody is going to do --

5 MR. BOCCHER: -- court review?

6 THE COURT: A, nobody is going to do it. No
7 applicant, no builder is going to go to the town with
8 a scarce resource constraint in place and say I want
9 to all the engineering, I want to do all the
10 architecture, I want to get my commitment from the
11 bank, I'm going to sign a contract to purchase this
12 property without knowing his vested rights. They're
13 not going to do it.

14 MR. BOCCHER: Right, because they're --

15 MS. JENNINGS: What if they already did?

16 THE COURT: But if they --

17 MR. BOCCHER: Because they -- because the
18 development --

19 THE COURT: But if they do it going forward,
20 then you're going to say to them, hey, you want to
21 make this? The Judge has imposed a -- it's a non-Mount
22 Laurel job, you got this piece of vacant land, the
23 Judge may not allow us to give you that approval that
24 vests.

25 MR. BOCCHER: But then, Judge, it shuts down

1 development in the town. You're just shutting down
2 development in the town.

3 THE COURT: Get me a compliant ordinance
4 fast then. I am not letting you develop the town
5 without an affordable housing component if you're
6 seeking a vacant land adjustment. I can't say it any
7 more simply than that.

8 MR. BOCCHER: And for non-residential
9 projects as well?

10 THE COURT: Especially. Especially.

11 MR. BOCCHER: So commercial projects.

12 THE COURT: You've got vacant land or
13 redevelopment property that's going to go through and
14 it doesn't have an affordable housing component,
15 you're going to have to justify that to me.

16 MR. BOCCHER: Okay.

17 THE COURT: You may be able to, but you're
18 going to have to justify it.

19 MR. BOCCHER: A commercial project zoned for
20 particular use or under a redevelopment plan is not
21 going to be able to go forward under any -- in any
22 respect until the Court rules upon whether or not that
23 project is permissible.

24 THE COURT: Like any other vacant land
25 adjustment town that seeks to use its vacant land for

1 non-residential, non-Mount Laurel purposes, yes.

2 MR. BOCCHER: And, Your Honor, it would be
3 my understanding then that every municipality that has
4 a vacant land request --

5 THE COURT: In Middlesex County, if they're
6 looking for a vacant land adjustment, that means that
7 they know that they don't have enough to meet their
8 fair share, I'm not letting them use up their land.
9 That's correct.

10 That's advisory as to everybody else, but
11 the word will go out I'm sure after today that if
12 you've got a vacant land adjustment town, you can
13 anticipate, if somebody files that motion, that it's
14 going to be granted.

15 MR. BOCCHER: Okay. Well, we would like to
16 ask the Court to stay that order if the Court is going
17 to enter that order. And also, Your Honor, --

18 THE COURT: Why would I stay it? The point
19 of it is to do it. The point of it is to make sure
20 that nobody else besides Mr. Pantel and Ms. Jennings'
21 clients get approvals on property that's potentially
22 available for you to satisfy your fair share
23 obligations.

24 MR. BOCCHER: No. Because, Your Honor, it's
25 not fair to any other property owner who wants to have

1 some notice that this may have been coming down the
2 pike. And secondly, Your Honor, because we -- we do --

3 THE COURT: Get me a compliant plan fast
4 then. Get me a compliant plan. There's no -- if you
5 can give me -- if you can give me a plan next week,
6 I'll schedule you for a trial. If you're worried
7 about everybody else in town, get your ordinance in
8 front of me, --

9 MR. BOCCHER: I'm -- I'm --

10 THE COURT: -- I'll adjudicate it.

11 MR. BOCCHER: I'm worried about property
12 rights. I'm worried about a -- you know, an
13 individual being able to move forward with contracts
14 that have been signed. I'm worried about projects
15 where people have sought to get financing. I'm
16 worried about all the sorts of interests and concerns
17 and constitutional rights that are inherent within an
18 individual being able to fairly alienate and develop
19 his own property.

20 THE COURT: If somebody out there in your
21 town or another town where this ordinance -- where
22 this order is entered wants to take issue with it,
23 they have rights, they'll do whatever they want to do,
24 and I or some other judge will deal with it.

25 MR. BOCCHER: All right. Oh, and I

1 apologize, Judge, but --

2 THE COURT: What for?

3 MR. BOCCHER: -- the planning -- so a
4 planning board or a zoning board could go forward and
5 consider applications for development under this
6 proposed order and that the final agency action would
7 then be made or be required to be made subject to the
8 Court's review.

9 THE COURT: Absolutely correct. I don't
10 care if you go forward or not. It doesn't -- as long
11 as the rights of the low and moderate income persons
12 are not affected by what you do until I say otherwise,
13 that's adequate protection. If you want to have a
14 hearing and you actually have an applicant that's
15 willing to spend that money and time and commitment in
16 order to do something that there is no guarantee that
17 if he gets approved or she gets approved it's going to
18 work, knock yourself out, but you and I both know
19 that's not going to happen.

20 MR. BOCCHER: And as I have expressed, that
21 is a concern as well, Judge. Shutting down
22 development in the municipality.

23 THE COURT: You have nobody to blame but
24 yourself for that.

25 MR. BOCCHER: I -- I -- Your Honor, I -- I

1 really have to take issue with that statement. We
2 have -- this municipality has done everything that it
3 was --

4 THE COURT: I don't mean it that way.

5 MR. BOCCHER: -- required to do.

6 THE COURT: I don't mean it that way. I
7 mean, you can move forward with your plan and get it
8 approved. And once you get it approved, everybody
9 that's not in your plan can go ahead with their
10 business and do whatever they want to do. Commercial,
11 non-residential, doesn't matter. As long as you have
12 a compliant plan, you know that the courts, the cases
13 and I won't interfere with your ability to do anything
14 else anywhere else. But you don't have a compliant
15 plan. You know you don't have a compliant plan.

16 MR. BOCCHER: And there's not even a number
17 to address in a complying plan.

18 THE COURT: Well, you -- that's your
19 obligation to present to me what you think your fair
20 share is and it's my obligation to rule whether you're
21 right or you're wrong. So, you know, and you know
22 that the third round numbers are out and you know
23 you're going to be seeking a vacant land adjustment.
24 So, you know, you have to get that stuff to me.

25 Like I said, as fast as you're ready to go,

1 that's as fast as I'll try your case.

2 MR. BOCCHER: Well, and again --

3 THE COURT: And you've got to do it by
4 December anyway.

5 MR. BOCCHER: Well, that's what I was going
6 to say, Judge. I mean, the -- I believe the Supreme
7 Court contemplated the five-month period of time for a
8 municipality to have the exclusive right to put
9 together a plan not with a gun to its head. Where
10 it's -- where it's --

11 THE COURT: Not with what?

12 MR. BOCCHER: Gun to its head.

13 THE COURT: Yes, it is. That's why it's
14 five months.

15 MR. BOCCHER: But -- but it's -- but it's --
16 yes, it's five months, but not within that five-month
17 period time where it now can do absolutely nothing,
18 where it cannot act --

19 THE COURT: Because you're looking for an
20 adjustment. You are looking to have -- to do less
21 than your fair share, because you say you don't have
22 land. And I'm going to say, okay, you probably are
23 entitled to that, but I'm not going to make it worse
24 by letting you use up the land that you say you don't
25 have very much of in the first place.

1 Like I -- my favorite phrase: that would be
2 jarringly anomalous to allow you to do that. I do
3 credit -- that's Judge D'Annunzio in the Eagle Rock
4 case. My favorite phrase.

5 So, anyway, like I said, unless somebody
6 else has something to say with regard to that, my view
7 of the scarce resource is you can do whatever you want
8 to do, but it's all subject to whether or not there --
9 the ordinance is ultimately adopted that's consistent
10 with the constitutional obligation that would permit
11 that to happen. So, like I said, I don't see anybody
12 going forward, but if you want to go forward under
13 those circumstances, you -- you're -- you certainly
14 may.

15 MR. BOCCHER: I think I've made my
16 arguments, Judge.

17 THE COURT: Do you need to be heard any
18 further?

19 MR. WALSH: Judge, we have an order,
20 actually, that I proposed. I didn't address it much
21 in my brief. It's the order that was used for -- from
22 2008 until recently in the Cherry Hill case and it is
23 -- it provides a process for the special master to
24 issue recommendations that the Court -- if Your Honor
25 -- you know, their -- if we didn't object and no one

1 else objected, the -- it sort of became a binding
2 decision. It could be accompanied with an order that
3 there could be a --

4 THE COURT: What will be a binding decision?
5 You mean a planning board approval?

6 MR. WALSH: No, no. The -- so the special
7 master, somebody would come to the -- what happened in
8 Cherry Hill, somebody would come to the special master
9 and say I've got this light industrial zone, it's not
10 appropriate, it's four acres, but, look, it's
11 surrounded by a trucking company, a bus company,
12 nobody is going to want to build housing here. And
13 the plaintiffs in that case -- in that case, the two
14 local NAACP branches and Fair Share would say we
15 agree, release it, and then it could go on its way and
16 the special master would write a letter to the judge,
17 and if the judge for some reason didn't agree with the
18 special master, she could -- she could not go along
19 with it. So it -- so there's a more informal process
20 that doesn't require a hearing.

21 In the Meadowlands right now --

22 THE COURT: I'm certainly in favor of that,
23 especially if everybody could agree as to the form of
24 it.

25 MR. WALSH: Yeah. And in the Meadowlands

1 right now, the -- another approach they have taken is,
2 in the -- in the heavy industrial zone, in the entire
3 Meadowlands District there's a restraining order. In
4 the heavy industrial zone, they have said you can do
5 what you want, because no -- we don't -- that -- we
6 know outright that's not appropriate for housing.

7 And that's another approach. If there's
8 areas in the town where there's applications coming in
9 that Fair Share and Ms. McKenzie would agree in no
10 situation are we going to --

11 THE COURT: Well, I want to hear from my
12 special master: one, with regard to her -- even
13 though I have put my view of the world on the record,
14 I know Ms. McKenzie well enough to know that she'll
15 tell me what her opinion is even if it's different
16 from mine.

17 What's your view of the world with regard to
18 the scarce resource issue?

19 MS. MCKENZIE: Your Honor, I don't -- I
20 don't disagree as to the fact that, A, it's not an
21 injunction, it is a scarce resource restraint. And
22 the justification for it isn't in the fact that they
23 may apply for a vacant land adjustment, it's the fact
24 that already have a vacant land adjustment. And the
25 question is, you know, hand-in-hand with a vacant land

1 adjustment is the recognition that there's an unmet
2 need out there, which in Woodbridge's case is
3 substantial.

4 They have, as evidenced by the lawsuits
5 brought by Fair Share Housing Center, there's evidence
6 that developments have been approved that don't
7 contain either a 20 percent set-aside for for-sale
8 housing or a 15 percent set-aside for rental
9 affordable housing, which is what would be considered
10 a valid ordinance. Their ordinance -- Woodbridge's
11 ordinance has an old sort of growth share calculation
12 of what a developer should be doing in terms of
13 affordable housing which is no longer valid.

14 It seems to me that the purpose of a scarce
15 resource restraint is to allow projects that want to
16 propose the -- you know, the valid set-aside for
17 affordable housing to go forward and not have to come
18 to the Court at all. So if somebody proposes to do a
19 20 percent set-aside for for-sale housing or a 15
20 percent set-aside for rental housing, they would go
21 straight through the process in Woodbridge and the
22 Court would never have to deal with them.

23 THE COURT: Well, assuming that there's an
24 ordinance that allowed it. Right now, I don't know
25 that that's true.

1 MS. MCKENZIE: Well, the scarce resource
2 restraint order could stipulate that those projects --
3 see, I think the purpose of crafting the scarce
4 resource restraint order is to address the issue of
5 what's covered by the restraints. So you would exempt
6 projects that proposed a 20 percent set-aside for
7 for-sale housing, a 15 percent set-aside --

8 THE COURT: Are there any zones --

9 MS. MCKENZIE: -- for rental affordable
10 housing.

11 THE COURT: -- in Woodbridge where that
12 happens?

13 MS. MCKENZIE: Excuse me?

14 THE COURT: Are there any zones in
15 Woodbridge where that's the zoning?

16 MS. MCKENZIE: The zoning right now in
17 Woodbridge does not require that.

18 THE COURT: Oh.

19 MS. MCKENZIE: However, if the developer
20 proposes that, that would -- it might -- it might
21 require some departure from Woodbridge's ordinances,
22 but Woodbridge has total control over that. The Court
23 would not need to see that.

24 The other thing is that when you craft a
25 scarce resource --

1 THE COURT: Well, I'm not sure I'm --

2 MS. MCKENZIE: -- restraint order --

3 THE COURT: -- following that. Because of
4 somebody has got a piece of property that's in a --
5 I'm going to say a commercial or industrial zone and
6 they want to do a redevelopment plan and they're going
7 to buy and knock down buildings and create land to
8 build their stuff, it's not zoned residential. So
9 they --

10 MS. MCKENZIE: But they'd need variance in
11 Woodbridge.

12 THE COURT: Okay, but they'd have to make
13 their application for a variance to do that. Or in an
14 area where they -- it's residential, you know, any
15 developer can add affordable housing even if the
16 ordinance doesn't require it.

17 MS. MCKENZIE: Correct.

18 THE COURT: But there would have to be zones
19 that allow for those things. I'm not sure whether
20 there are zones --

21 MS. MCKENZIE: Again, --

22 THE COURT: -- left where there's actual
23 vacant land --

24 MS. MCKENZIE: There isn't vacant land --

25 THE COURT: -- to do it.

1 MS. MCKENZIE: -- in Woodbridge. I mean,
2 that -- I -- there -- there is little -- there -- only
3 vacant land that has been made to be vacant, because a
4 building that has been taken down.

5 THE COURT: Right.

6 MS. MCKENZIE: Basically, Woodbridge doesn't
7 have vacant --

8 THE COURT: Right. So I don't --

9 MS. MCKENZIE: -- developable land remaining.

10 THE COURT: As a practical matter, I don't
11 see anybody going into the zoning board for variances
12 for that.

13 MS. MCKENZIE: Well, what I'm saying is that
14 Woodbridge can amend its ordinances or not. If they
15 adopt a redevelopment plan for an area, presumably, if
16 they want the redevelopment approvals to sail through
17 without it coming to the Court, they build into the
18 redevelopment plan --

19 THE COURT: All right. And that I get.

20 MS. MCKENZIE: -- the 15 and 20 percent
21 set-aside.

22 THE COURT: I -- and -- and --

23 MS. MCKENZIE: They can also amend their --

24 THE COURT: Yeah.

25 MS. MCKENZIE: -- ordinance. If they don't

1 amend the ordinance and developers are not proposing a
2 15 or 20 percent set-aside, then their -- they have to
3 come to court.

4 THE COURT: Well, I like Mr. Walsh's idea
5 that you review it and to the extent that there's an
6 ordinance that's either adopted or it's already
7 permitted that includes those component parts and
8 everybody agrees, I don't have to sign off on it. You
9 can submit a consent order and you can sign it and,
10 unless someone appeals it, it becomes the order of the
11 court.

12 MS. MCKENZIE: I would go one step further.
13 I would say that when you craft a scarce resource
14 restraints order there are certain types of
15 applications that you know you're going to
16 automatically exempt, such as, you know, people who
17 have existing developed property if they want to add a
18 pool or a deck or, you know, a porch to the side --
19 that's in the side yard or something like that. Those
20 kinds of things don't need to come before the Court
21 and we can spell those out.

22 I had suggested to Mr. Boccher informally
23 some time ago that what he might want to do is go
24 through with Ms. Lefsky the nature of applications
25 that boards are facing right now, both the planning

1 board and the board of adjustment, because there are
2 some types of applications that, by their very nature,
3 you know, really can be just exempted out of this
4 entire process.

5 What you're really looking for is exactly
6 what Your Honor stated, and that is to capture
7 properties that are getting developed or redeveloped,
8 even if it's with a small R, that could be providing
9 affordable housing instead of whatever is proposed on
10 those sites. And I think that's the purpose of the
11 scarce resource restraints, is to make sure that those
12 properties aren't slipping through.

13 In Haddonfield, where we were under scarce
14 resource restraints, because they had had a zero RDP
15 in the second round, but development was occurring and
16 so COAH imposed scarce resource restraints, and in
17 Haddonfield there was an issue about, you know, they --
18 they -- there was a parking lot proposed on a small
19 triangular lot. Well, that was ultimately approved.
20 It was allowed to go through, because the parking lot
21 was needed and the lot was too small to support
22 affordable housing.

23 Those are the kinds of decisions that the
24 Court or its agent, if you prefer to do it that way,
25 can make, but there are also certain types of

1 applications that could be specifically exempted out.
2 You have already, on this record today, essentially
3 exempted out the applications that already have vested
4 rights. Now, I don't know what that does if they come
5 in with an amended application. That's a different
6 question. But in terms of, you know, applications
7 that are already vested, you're not saying that they
8 can't get their building permits and can't proceed.

9 THE COURT: No.

10 MS. MCKENZIE: What you're really talking
11 about is things that the planning board will be
12 considering.

13 THE COURT: Well, anything that requires a C
14 variance that doesn't require site plan approval, I am
15 not looking to stop.

16 MS. MCKENZIE: Correct.

17 THE COURT: That takes care of all of that.

18 MS. MCKENZIE: Yes.

19 THE COURT: Anything that requires a
20 subdivision approval or a site plan approval has got
21 to be looked at.

22 MS. MCKENZIE: Agreed.

23 THE COURT: C variances with no subdivision
24 or site plan.

25 MS. MCKENZIE: And --

1 THE COURT: Decks, side yards --

2 MS. MCKENZIE: -- construction permits that
3 don't require variances.

4 THE COURT: -- all those things, they are
5 not part of the restraint.

6 MS. MCKENZIE: Right. The subdivisions and
7 site plans. Right.

8 THE COURT: All right. Let me make some
9 rulings for the record --

10 MS. MCKENZIE: Okay.

11 MS. JENNINGS: Can I just ask a quick
12 question?

13 THE COURT: -- purposes and -- sure.

14 MS. JENNINGS: Your analysis is really based
15 on the fact that you don't think anybody would go
16 forward once the temporary restraints are put into
17 place, but what about the applicant who has already
18 purchased property that they didn't own, have a
19 redevelopment plan, a redevelopment agreement,
20 designed all the plans and they're ready to go to a
21 planning board hearing? And do not inclusionary. Is
22 that the type of case that you're going to then hear?
23 Like -- like, where they go before the planning board,
24 get the approval, they have a fully conforming
25 application, no variances.

1 THE COURT: The planning board is no longer
2 permitted as of today to approve anything that would
3 have -- that the applicant would require vested rights
4 for.

5 MS. JENNINGS: So what happens with that
6 application?

7 THE COURT: I can't answer that question.
8 That's not before me and I don't know the answer to it
9 and I haven't thought about it.

10 MS. JENNINGS: Okay, but --

11 THE COURT: Whether or not I would let them
12 go through at that point may be a function of the
13 balancing of the equities.

14 MS. JENNINGS: So, can I just ask one more
15 question? So would, procedurally, on behalf of that
16 applicant, would I then come to court, like a
17 declaratory judgment? I'm just trying to figure out
18 how we --

19 THE COURT: Well, we're going to try to
20 figure out a way that you can come to a consensus as
21 to what the procedure should be.

22 MS. JENNINGS: Okay.

23 THE COURT: Either utilizing what Mr. Walsh
24 has already done effectively in other towns or what
25 Ms. McKenzie is suggesting, and what I added to the

1 mix in terms of the C variances without site plans --

2 MS. JENNINGS: Right.

3 THE COURT: -- or subdivision. But as of
4 this date, the planning and the zoning boards of
5 Woodbridge Township are no longer permitted to approve
6 anything that would require vested rights and every
7 applicant must be put on notice of that effect
8 immediately.

9 So, whether and to what extent in a
10 particular case the hardships or the equities would
11 militate against the restraint and in favor of the
12 approval, that will be decided on that basis at that
13 time. But right now Woodbridge is no longer
14 permitted --

15 MS. JENNINGS: Right.

16 THE COURT: -- to give vested rights to
17 anybody. No applicant is entitled to get vested
18 rights. Any approvals --

19 MS. JENNINGS: Right.

20 THE COURT: -- that they grant will be
21 subject to the approval of the Court. No rights will
22 vest.

23 MS. JENNINGS: Okay.

24 THE COURT: It may be easier for me to just
25 to say stop everything, but I am not planning on doing

1 that, because I am assuming that there are some
2 applications that could be approved where the plan
3 wouldn't require their properties to be used.

4 MS. JENNINGS: Right.

5 THE COURT: I mean, I don't know what
6 Woodbridge will and won't do. And they get the
7 opportunity in the first instance to prepare their
8 plan and it may be that they will be able to come up
9 with a compliant plan that has for all kinds of
10 redevelopment in non-residential or non-affordable
11 housing components.

12 As long as they otherwise comply, I don't
13 care what else they do elsewhere in the town. So
14 those applications, if they want to proceed on the
15 theory that they'll ultimately be okay, that's --
16 they're at their own risk. But everybody has to
17 understand that going forward everybody is at their
18 own risk.

19 Mr. Pantel?

20 MR. PANTEL: Yeah. Yes, Judge. One
21 clarification, if I could?

22 I assume, in light of the ruling that's
23 being made on our motion to dismiss, --

24 THE COURT: I didn't make them. I was
25 trying to.

1 MR. PANTEL: Understood. This ruling that
2 might very well be made on our motions to dismiss, if
3 the Court grants those motions, that I assume that the
4 matter in which we appear today, Docket Number 1469-15,
5 would be -- have an order entered dismissing the
6 matter with prejudice. Based upon the filing --

7 THE COURT: I am not sure what that means,
8 but the complaint against you that was filed by them
9 as a PW has been -- is being dismissed.

10 MR. PANTEL: Would be dismissed with
11 prejudice.

12 THE COURT: Well, what do you think that
13 gets you that a dismissal without prejudice doesn't
14 get you?

15 MR. PANTEL: Well, it's a ruling on the -- I
16 think in light of the underlying basis for the motion,
17 which is a ruling on the merits based upon the
18 redevelopment plan issues, et cetera, that were
19 discussed here earlier this morning, I think that
20 certainly warrants entry of an order based upon that
21 adjudication which should be a dismissal of the matter
22 with prejudice, Docket Number 1469-15.

23 THE COURT: I don't know what other
24 complaints could be filed, what other defects there
25 may exist, whether there are other issues that could

1 come up.

2 MR. PANTEL: Mm-hmm.

3 THE COURT: What I am saying is that the

4 complaint that they filed against your case --

5 MR. PANTEL: Will be dismissed.

6 THE COURT: -- will be dismissed.

7 MR. PANTEL: Will be dismissed. Understood.

8 THE COURT: Well, I would like to enter that

9 order.

10 MR. PANTEL: Right.

11 THE COURT: So, my order on the Docket

12 Number -- what's the -- what's the Metropark docket

13 number?

14 MR. PANTEL: Fourteen sixty-nine dash

15 fifteen is ours, Judge.

16 THE COURT: All right. And so the Fair

17 Share Housing complaint bearing that docket number

18 against Metro -- what I'm going to call the Metropark

19 is dismissed, for the reasons set forth in my colloquy

20 with Mr. Walsh.

21 And Docket Number 2112-15, Fair Share versus

22 The Township of Woodbridge Planning Board and Station

23 Village at Avenel is dismissed for the same reasons as

24 set forth in my colloquy with Mr. Walsh. That those

25 matters cannot proceed for those reasons.

1 The --

2 MR. PANTEL: All right. So those -- those

3 case -- those two cases are dismissed in their

4 entirety.

5 THE COURT: They're dismissed and there will

6 be an order of judgment dismissing the case. And

7 that's a final judgment. And that's appealable by Mr.

8 Walsh.

9 MR. PANTEL: Okay. Understood.

10 THE COURT: The request for a scarce

11 resource -- for the immunity is granted. For the five

12 months starting from July 1 going forward.

13 And the request in the motion to intervene

14 by Fair Share into the Woodbridge case is granted on

15 the same terms and conditions as was granted in

16 Monroe.

17 And, in addition, their application as a now

18 intervenor in that case for a scarce resource

19 restraint is also granted, for the same reasons and to

20 the extent described by me in my colloquy with Mr.

21 Boccher.

22 And I would ask counsel within the next --

23 at least for the next few minutes or up to 12:30-ish

24 or so, to see if you can come up with a form of order

25 that's consistent with what you've already described

1 that provides for the process, provides for the notice
 2 to any applicants as to the inability to obtain vested
 3 rights or the ability to come to the Court to seek
 4 relief from the restraint, and as well as those things
 5 that are exempt from our review. And I would ask you
 6 to sit down with Mr. Boccher and Ms. McKenzie, Mr.
 7 Walsh, and see whether you can come to some agreement
 8 with regard to that.

9 And if there is a dispute, identify what the
 10 limits of those disputes are and I'll have to make
 11 some ruling of my own as to what I think is
 12 appropriate, in terms of what I meant -- intended and
 13 what I meant.

14 MR. PANTEL: And that will obviously be
 15 entered, Judge, in the declaratory judgment action,
 16 the scarce resource restraint.

17 THE COURT: Yeah. You're getting --

18 MS. MCKENZIE: Separate --

19 THE COURT: -- a judgment --

20 MS. MCKENZIE: Separate orders.

21 THE COURT: You're getting a judgment --

22 MR. PANTEL: Separate order.

23 THE COURT: -- of dismissal, you're getting --

24 MR. PANTEL: Yeah, I understand.

25 THE COURT: -- a judgment of dismissal, Ms.

1 Jennings.

2 MR. PANTEL: Okay. And then we would hope,
 3 too, that if there were -- there's a --

4 THE COURT: And then you're -- and then gone
 5 and I don't --

6 MR. PANTEL: Right. Understood.

7 THE COURT: -- have to worry about your
 8 clients anymore.

9 MR. PANTEL: Right. Understood. And I
 10 appreciate --

11 MS. JENNINGS: Until another -- the next
 12 client.

13 MR. PANTEL: -- I appreciate that, Judge.
 14 And there's reference to --

15 THE COURT: Unless you would like me to
 16 bring you back in.

17 MS. JENNINGS: No.

18 MR. PANTEL: No. No. Definitely, Judge, we
 19 would want to clarification that, you know, since the
 20 dismissal of our case was based upon, you know, the
 21 underlying redevelopment plan, that obviously if
 22 there's a minor amendment of a location, if a building
 23 shifted or something like that, --

24 THE COURT: I'm not making any rulings on
 25 what goes forward.

1 MS. MCKENZIE: On your amended application.
2 MR. PANTEL: Fine. Okay.
3 THE COURT: And the fact of the matter is,
4 if you go back for an amended approval, --
5 MR. PANTEL: Right.
6 THE COURT: -- I am not saying you're not
7 subject to this order.
8 MR. PANTEL: Right. I understand.
9 THE COURT: What I'm saying is your
10 approvals are valid.
11 MR. PANTEL: Right. Understood.
12 THE COURT: That's all I'm saying.
13 MR. PANTEL: Okay.
14 THE COURT: That the applications were not
15 timely made. I'm not -- the applic -- the appeals
16 were not timely made and that balance, as I understand
17 it, rules from the 45 days, that the hardships were
18 sufficiently weighty to overcome the benefit to the
19 public, which I can take into account and better honor
20 within the context of the DJ action, so that the
21 relative harm to the public and the -- and the low and
22 moderate income population can be lessened, mitigated
23 or eliminated.
24 MR. PANTEL: Understood.
25 THE COURT: Yes, sir?

1 MR. BOCCHER: Your Honor, I am certainly
2 going to abide by the Court's direction and work with
3 Mr. Walsh and the special master. I don't want that
4 to be construed as a consent to the order, that it's a
5 consent order and that --
6 THE COURT: No, you'll be consenting as to
7 form only or not. I mean, if you decide you can't and
8 you wanted to have a sort of unofficial role in
9 advising Mr. Walsh and Ms. McKenzie as to things you'd
10 like to see, but if they don't include them, you'll
11 object to the form of order.
12 I'm okay. You -- I'm not intending by this
13 to cause you to waive or give up any rights you
14 believe you have.
15 MR. BOCCHER: And, Your Honor, I --
16 THE COURT: And you have a right to file an
17 interlocutory appeal. I don't know what they'll do
18 with those these days, but --
19 MR. BOCCHER: And it was -- I'm assuming,
20 Judge, that -- and that was the next thing I was going
21 to ask for, is that you would stay this order, because
22 I believe I'm required to ask you to stay your order
23 as a condition of moving forward --
24 THE COURT: Just include in the order that
25 your request for a stay is denied and that that gives

1 you whatever key you need to make your application for
2 a stay to the next level of court, if you think that
3 that's where you want to go.

4 MR. BOCCHER: Yeah, I have to consult with
5 the township on that, obviously.

6 THE COURT: Okay. I don't take offense of
7 people that appeal. I learned a long time ago, it's
8 40 years ago June 8th when I got married, that I'm not
9 perfect. And in my house, there's a constitutional
10 basis for my being reversed. It's called a supremacy
11 clause.

12 MR. WALSH: Judge, just one -- probably
13 paranoia on my side, but the -- you know, it makes me
14 nervous when judgment is entered as to their develop --
15 as to Ms. Jennings and Mr. Pantel's clients, and then
16 I have, like, an entire controversy sort of thing,
17 given that there were issues that were -- that now
18 Your Honor has said you're going to consider in the
19 declaratory judgment action. And so I just want to
20 make sure --

21 THE COURT: What I'm saying is you're not
22 foreclosed from arguing that the loss of those
23 properties from the inventory of land has an impact in
24 the compliance package or their fair share number or
25 whatever adjustment they're entitled to.

1 MR. WALSH: Yeah.

2 THE COURT: But you're no longer entitled to
3 go after those properties in the context of trying to
4 stop those developments.

5 MR. WALSH: Understood. And I -- based on
6 the current approvals, Your Honor is saying, and based
7 on these --

8 THE COURT: I have -- I make no ruling --

9 MR. WALSH: -- you're not making any other
10 ruling --

11 THE COURT: -- on what happens if either one
12 of those clients go in front of the court to -- for
13 redevelopment of their plan or would ask for an
14 amendment to the redevelopment ordinance or -- I don't
15 -- you know, I'm not --

16 MR. WALSH: Understood.

17 THE COURT: I am not deciding any of those
18 issues.

19 MR. WALSH: Understood. But so what -- you
20 know, one way to procedurally view what Your Honor has
21 done -- and I just want to be clear that this isn't
22 what you're doing and it doesn't prejudice us. I'm
23 not asking you to do it, because I like appealable
24 judgments. If -- if -- I'd rather have an appealable
25 judgment rather than one that's hanging, you know, in

1 between.

2 But you -- but one thing that Your Honor
3 could have done procedurally is sort of transferred
4 some paragraph or something of an allegation to the
5 declaratory judgment action. You are not doing that.
6 You're dismissing them -- you're dismissing the
7 complaints, --

8 THE COURT: Yeah, your PW --

9 MR. WALSH: -- but we're not prejudiced.

10 THE COURT: -- against them is dismissed,
11 because you're outside the 45 days and I have declined
12 to relax it, essentially.

13 MR. WALSH: Yes. And it -- and there's some
14 -- the township, by comparison, we can address those
15 issues in the -- in the declaratory judgment
16 proceeding.

17 I just -- the dismissal -- I just don't want
18 to -- I just want to be clear that the dismissal is
19 not intended in any way to reflect a limitation on
20 arguments that we can make in the declaratory judgment
21 proceeding.

22 THE COURT: I'm perfectly find if you
23 include that very language in the order.

24 MR. WALSH: Understood.

25 THE COURT: There's no intent by me to

1 foreclose any arguments that you have relative to
2 compliance, because that's what you're entitled to do
3 under the Supreme Court decision and my own decision
4 in Monroe.

5 MR. WALSH: Well, if Your Honor -- if Your
6 Honor is doing -- if you -- are you going to sign
7 their orders? Is that something you write in?

8 THE COURT: If you craft something up, we'll
9 type it up, I'll sign it today.

10 MR. WALSH: Okay. Thanks, Judge.

11 THE COURT: Anything else we need?

12 I actually may have orders already that
13 exist on the dismissal, but we may want to modify it
14 to include that language.

15 MR. WALSH: Yeah, that's what I was
16 thinking. If it -- I don't want to make more work
17 than --

18 THE COURT: See if you can pull up the forms
19 of order submitted by Ms. Jennings and Mr. Pantel,
20 give them to Mr. Walsh, write that language in,
21 everybody sign off as to consent as to the form, and
22 then I'll sign them.

23 MR. WALSH: Okay. And then, Judge, would it
24 be helpful to do a -- and Your Honor probably has
25 other matters -- but would it be helpful to -- to --

1 from a -- we have -- we have thought about doing a
2 case management at -- after this and I think it might
3 be helpful from a case handling standpoint on --

4 THE COURT: Well, I don't have another
5 matter this morning; right? But I want you to do
6 those orders. So we could -- you can either do the
7 case management conference now after a short break,
8 and then you can work on the orders later today and
9 get them to me, or we could do the orders now and do
10 the case management order -- case management
11 conference this afternoon or another date.

12 I don't -- whatever -- there's a lot of
13 people here. I want to accommodate your schedules and
14 I don't know what else you all have.

15 MR. WALSH: It strikes me that the -- my
16 preference actually on the order would be give --
17 would be to give Mr. Boccher a chance to think about
18 the order and what he would -- what he wants in it,
19 because -- and then to work on it in a -- back in our
20 offices and send Your Honor something on Monday or
21 Tuesday.

22 THE COURT: I'm okay with that.

23 MR. WALSH: I think that would be the --

24 MS. MCKENZIE: That would be my
25 recommendation as well, because I think it's only fair

1 for Mr. Boccher to have conversations with the
2 township staff about what's pending and --

3 THE COURT: I am perfectly fine with that.

4 MS. MCKENZIE: -- what kinds of categories
5 they might need to be looking at. And --

6 THE COURT: Perfectly fine with that.

7 MS. MCKENZIE: I mean, I can give him
8 suggestions, but, you know, I think he needs to wrap
9 his arms around what this means.

10 THE COURT: Makes sense to me.

11 MR. WALSH: Yeah. As long as the order is
12 in effect today, we'll --

13 THE COURT: Yeah, it's as of --

14 MR. WALSH: -- whatever the --

15 THE COURT: It's as of today.

16 MR. WALSH: -- the ruling is -- yeah.

17 THE COURT: And Mr. Boccher will inform
18 Mayor McCormac and the Director of Planning, Ms.
19 Lefsky, as to the Court's decision on the scarce
20 resource issue, so that, you know, they can notify
21 anybody who is filing an application or has one
22 pending that that has occurred.

23 MR. WALSH: Yeah. And we'll aim to get an
24 order prepared by next week and -- and if not, we'll
25 submit one --

1 THE COURT: Yeah, I don't want it to linger
 2 too long.
 3 MR. WALSH: Yeah.
 4 THE COURT: But, yeah, I'm not in a rush.
 5 It doesn't have to be today. It can be next week.
 6 MR. WALSH: Okay.
 7 MR. BOCCHER: Your Honor, there's one other
 8 issue. We submitted a proposed consent order --
 9 MR. WALSH: Oh, yeah.
 10 MR. BOCCHER: -- which had been previously
 11 submitted to the special master for allowing
 12 reallocation of trust funds for two projects.
 13 THE COURT: Yeah, I -- didn't I sign that?
 14 MR. BOCCHER: Substantial --
 15 THE LAW CLERK: No, you didn't sign it,
 16 because we wanted to make sure that -- because Fair
 17 Share Housing wasn't -- they weren't in that case, but
 18 they didn't sign off on it, so I had talked to Kevin --
 19 THE COURT: Do you know what we're talking
 20 about?
 21 MR. WALSH: Yeah, Judge. We don't have --
 22 THE LAW CLERK: He -- I think they wanted to
 23 discuss it at the conference.
 24 MR. WALSH: We don't have a problem with one
 25 comp -- we don't -- I think overall we don't have a

1 problem with the order, but I want to be clear in one
 2 -- there's representations in the order that I just
 3 don't -- I don't know. I don't disagree with them, I
 4 don't agree with them, I don't have knowledge of them.
 5 There's -- the overwhelming majority of the
 6 money is going to family housing, which is good.
 7 There is a proposal for \$250,000 to go to senior
 8 housing. And there's an incongruity there, because
 9 we're saying they have enough senior housing in their
 10 plan. I don't mean to interrupt -- interfere with a
 11 development that's going to provide affordable housing
 12 for seniors, because that's a good thing, but I just
 13 don't want the township to be able to come along --
 14 THE COURT: All right. So you'll sign
 15 consent and you'll say it's without prejudice to your
 16 right to claim that these shouldn't be counted towards
 17 their fair share obligation. Right?
 18 MR. WALSH: Yeah, that's -- that is what we
 19 intend -- and Ms. McKenzie echoed something along
 20 those lines in her --
 21 THE COURT: Yeah. I am not --
 22 MS. MCKENZIE: My recommend -- excuse me,
 23 Your Honor.
 24 THE COURT: Go ahead.
 25 MS. MCKENZIE: My recommendation -- I concur

1 with Mr. Walsh. My recommendation made no finding as
 2 to the validity of these credits, it simply accepted
 3 the fact that --
 4 THE COURT: Here, give this to --
 5 MS. MCKENZIE: -- they were -- that --
 6 THE COURT: Add that to the order, that --
 7 MS. MCKENZIE: -- that it was reasonable to --
 8 THE COURT: -- that you're saying -- you're --
 9 MS. MCKENZIE: -- reallocate funds.
 10 THE COURT: Because you're now in the case.
 11 MR. WALSH: Yes.
 12 THE COURT: So you'll sign the consent as
 13 well and you'll -- and you'll say it's without
 14 prejudice to anybody's rights to contend that they
 15 should or shouldn't get credits for these, but --
 16 MR. WALSH: Yes.
 17 THE COURT: -- that we're not opposing the
 18 use of the money for that.
 19 MR. WALSH: It's housing, so they can spend
 20 -- it's affordable housing, so they can spend it.
 21 THE COURT: Right.
 22 MR. WALSH: That's the extent of --
 23 MS. MCKENZIE: It --
 24 THE COURT: Do you want to go ahead --
 25 MR. WALSH: -- of our consent.

1 MS. MCKENZIE: It's a legitimate expenditure.
 2 MR. BOCCHER: And likewise --
 3 THE COURT: And Jerry is not challenging
 4 you, so --
 5 MR. BOCCHER: Not yet.
 6 MR. GORDON: Not yet.
 7 MR. BOCCHER: And -- and --
 8 MS. MCKENZIE: Spend it first.
 9 MR. BOCCHER: And likewise, Your Honor,
 10 those projects would then be exempt from the scarce
 11 resource restraint order.
 12 THE COURT: The intent of that would be,
 13 certainly, anything that's done for Mount Laurel
 14 purposes would be exempt.
 15 MS. MCKENZIE: Those projects have --
 16 THE COURT: Unless -- unless there is going
 17 to be argument that it shouldn't be, but I don't hear
 18 that.
 19 MR. WALSH: I mean, I -- look. I think this
 20 is the sort of thing that I don't want say this
 21 doesn't go through the process. It should go through
 22 the process and I'm sure it will get out the other end
 23 very quickly, is what -- the way -- but it -- but do
 24 they already have approval? Isn't there -- they must
 25 have approvals if they're applying for tax credits.

1 Yeah.
 2 MS. MCKENZIE: Excuse me. Here's the issue.
 3 They are 100 percent affordable projects.
 4 MR. BOCCHER: Right.
 5 MS. MCKENZIE: They are -- those projects,
 6 100 affordable projects, are projects that are
 7 inclusionary, that have a 20 percent, or in the case
 8 of rental affordable units, a 15 percent set-aside.
 9 Those projects should be able to go forward. There
 10 should be no having to return to the board. If those
 11 -- if projects --
 12 THE COURT: I'm --
 13 MS. MCKENZIE: -- meet that threshold --
 14 THE COURT: I'm agreeing with that.
 15 MS. MCKENZIE: Okay.
 16 THE COURT: But I -- you know, if --
 17 MS. MCKENZIE: And --
 18 MR. BOCCHER: I jut want to carve out an
 19 exemption in the scarce resource order --
 20 MR. WALSH: We can put that in the order
 21 that these are exempt.
 22 THE COURT: Fine. There you go.
 23 All right. So, all right. Is everybody
 24 available to meet for a few minutes on a case
 25 management?

1 MR. WALSH: Yes. I am, Your Honor.
 2 THE COURT: All right. So let's take a few
 3 minutes and then we'll meet in the jury room.
 4 MR. WALSH: Thanks, Judge.
 5 (Hearing concluded at 11:46 a.m.)
 6
 7

8 CERTIFICATION
 9

10 I, TERRY L. DeMARCO, the assigned transcriber, do
 11 hereby certify the foregoing transcript of proceedings
 12 on CourtSmart, Index Nos. from 10:10:20 to 11:46:40 is
 13 prepared to the best of my ability and in full
 14 compliance with the current Transcript Format for
 15 Judicial Proceedings and is a true and accurate
 16 compressed transcript of the proceedings, as recorded.
 17

18		
19	<u>/s/ Terry L. DeMarco</u>	<u>AD/T 566</u>
20	Terry L. DeMarco	AOC Number
21		
22	<u>KLJ Transcription Service</u>	<u>08/22/15</u>
23	Agency Name	Date
24		
25		

FILED

AUG 20 2015

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Fair Share Housing Center
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In the Matter of the Application
of the Township of Woodbridge,
County of Middlesex

SUPERIOR COURT
Law Division
Middlesex County

DOCKET NO: MID-L-3862-15

CIVIL ACTION

ORDER

This matter having been brought before the Court on the motion of Movant Fair Share Housing Center, through its counsel, Kevin D. Walsh, Esq., through a motion for intervention and for scarce resource restraints;

And the court having considered all filed written submissions and having heard and considered the oral argument of all counsel, which occurred on August 14, 2015, the effective date of the provisions of this Order;

IT IS on this 20th day of August, 2015

ORDERED as follows:

1. The motion of Fair Share Housing Center (FSHC) seeking intervention in this matter is hereby granted. FSHC is hereby granted leave to file the Answer in Intervention and the Counterclaim in the form submitted with this motion by forwarding a

copy of that document to the Clerk of the Superior Court. Service of the answer and counterclaim authorized to be filed by this order shall be accomplished through the forwarding of a signed copy of the document to Edward Boccher, Esq., counsel for Woodbridge, by regular mail. The answer to the complaint shall be filed within 10 days of receipt of the signed copy of the complaint.

2. The Township of Woodbridge is prohibited from developing land and from acquiring, conveying, and disposing of land or interests in land without prior court approval.

3. The Township of Woodbridge, the Township of Woodbridge Planning Board, and the Township of Woodbridge Zoning Board, and any official bodies and persons, agents or employees thereof, who have the authority to grant any type of development approvals, or modifications thereof (including the municipal construction official and zoning officer), are hereby restrained from granting sub-division, site plan and variance approvals, waivers, and substantial amendments involving parcels of privately or publicly owned land under the terms and conditions hereafter set forth herein.

4. Pending any further Order of the Court, the restraints in this order will remain in effect until Woodbridge has prepared and adopted, and the Court has reviewed and approved, a housing element and fair share plan that satisfies Woodbridge's Prior Round and Third Round fair share housing obligations, at

which time the scarce resource restraints will automatically dissolve, unless they are previously dissolved by Court Order.

5. Applications for approvals that are not declared complete or that are not acted upon within the statutory time period for acting on complete applications for site plan, subdivision, conditional use and variance approvals shall not constitute a decision favorable to the applicant if the parcel(s) that is/are the subject of the application(s) is/are subject to this Order.

6. The Woodbridge Township Planning Board and the Woodbridge Township Zoning Board, and any of their official bodies, agents, officers and employees, may receive and process, hear and vote on applications for development approvals that are covered by this Order as provided under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. The Woodbridge Township Planning Board and the Woodbridge Township Zoning Board shall advise all applicants that any Board action or approval will not confer "vested rights" upon the applicant without the Court's review and approval. Only after an Order has been entered releasing an application from the restraints imposed by this Order will an applicant acquire "vested rights" pursuant to the MLUL. Notwithstanding the foregoing, any approval by a Board may be challenged or appealed as provided by law and this Order shall not be deemed to toll the time for such challenge.

7. The Woodbridge Township Planning Board and the Woodbridge Township Zoning Board shall provide at least 7 days' written notice to the Special Master and Fair Share Housing Center, in addition to any other interveners, of any applications for development approvals that are covered by this Order that will be heard or voted on by the Planning Board or Zoning Board. The Woodbridge Township Planning Board and the Woodbridge Township Zoning Board shall provide notice of votes taken by the Board on applications for development approvals that are covered by this Order, including votes involving the adoption of memorializing resolutions, within 7 days of such votes occurring. Notices required by this paragraph may be provided by email.

8. Any party or person affected or potentially affected by the restraints imposed by this Court Order may apply, with notice to all parties and to Special Master Elizabeth McKenzie, for relief from this Order prior to or during the pendency of a development application. The form of application shall be a letter with appropriate supporting documentation. The Special Master shall render a decision within 15 business days of receipt of the aforesaid application. If the Special Master determines that relief from the restraints imposed herein is appropriate, she shall authorize the relief from the restraints in writing, with a copy to the Court and all parties, and the applicant may pursue an application for development approvals and the appropriate Board may consider and grant or deny development approvals, with vesting, in

accordance with governing law. If Ms. McKenzie fails to timely decide or declines to authorize the release, or any party or applicant objects to her decision within 10 days of the decision being made, the party or applicant may move before the Court on notice to Ms. McKenzie and all parties for relief from the within restraints.

9. The following applications for development are exempt from this Order and may be considered by the appropriate Board which may render a decision upon the application, without the reservation that it does not confer "vested rights," as provided by law:

- a. "c" variances not involving a site plan or subdivision or conditional use approval;
- b. Site plans for improvements to existing sites and/or buildings not involving any change of use or residential density (i.e. warehouse to warehouse, retail to retail, or residential to residential);
- c. Permits for improvements to existing single or two-family dwellings, provided no additional dwelling units are being created.
- d. Any inclusionary development with a 15% set aside for affordable rental housing or a 20% set aside for affordable for sale housing, provided none of the affordable units are age-restricted.

e. A residential development that provides more than a 20% set-aside for affordable housing that is not age-restricted.

f. The following two 100% affordable developments:

- i. Jacobs Landing Project, a two-phase redevelopment of Woodbridge Gardens, a 150-unit public housing project, which will be demolished and replaced with 202 units of 100% family affordable rental housing; and
- ii. Dalina Manor project, a 57-unit 100% affordable senior development involving the acquisition and redevelopment of a former VFW Hall in the Hopelawn section of Woodbridge Township.

10. Prior to Woodbridge developing land or acquiring, conveying, or disposing of land, or interests in land, a request for leave to perform these actions shall be provided to the Special Master and counsel for Fair Share Housing Center. Such request shall be provided in writing. The Special Master shall render a decision within fifteen (15) business days of receipt of the request. In the event there is no objection from the Master or any party, the Township may proceed. In the event the Master or any party objects, the Township may move for the relief it seeks before the Court.

11. The Township's application for a stay of this Order, which was made orally on August 14, 2015, is denied.

12. Counsel for FSHC shall forward a copy of this Order to the special master and all counsel of record within five (5) days of receipt.



Hon. Douglas K. Wolfson, J.S.C.

OPPOSED

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IN THE MATTER OF THE
APPLICATION OF THE TOWNSHIP OF
WOODBIDGE, MIDDLESEX
COUNTY, NEW JERSEY, FOR A
DECLARATORY JUDGMENT,

Petitioner.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:MIDDLESEX COUNTY

DOCKET NO.: MID-L-03862-15

CIVIL ACTION
Mount Laurel Action

**CERTIFICATION OF MARTA
LEFSKY, AICP, PP**

I, Marta Lefsky, AICP, PP, hereby certify:

1. I am the Director of the Department of Planning & Development for Petitioner, Township of Woodbridge (“the Township” or “Woodbridge”). I have direct responsibility for and knowledge of land use and affordable housing matters in the Township. As such, I have personal knowledge of the matters set forth in this certification.

2. I make this certification in support of the Township’s Motion for Temporary Immunity.

The 1999 Order and the Township’s Compliance Thereunder

3. The Township of Woodbridge (the “Township” or “Woodbridge”) has long addressed its affordable housing obligation under the *Mt. Laurel Doctrine* since at least June 17,

1999 when, in the consolidated matters of Mocci v. Township of Woodbridge, Docket No. L-7843-91 and Pirates Cove Marina v. Township of Woodbridge, Docket No. L-7847-91, (collectively referred to as “the Mocci Litigation”) the Court awarded the Township a conditional Judgment of Repose granting the Township immunity from litigation challenging affordable housing compliance for a period of six years beginning in February 1999 and terminating on February 19, 2005. (See, Order Granting Remedies Pursuant to Compliance Hearing and Granting Conditional Judgment of Repose, Mocci v. Township of Woodbridge, Docket No. L-7843-91 and Pirates Cove Marina v. Township of Woodbridge, Docket No. L-7847-91, entered June 17, 1999, (“the June 17, 1999 Order”); **Exhibit A**). The June 17 1999 order was predicated upon a Special Masters report dated January 29 1999. (“1999 Report;” **Exhibit B**).

4. The 1999 Report recognized that the Township is a substantially developed community with little land available for development. Accordingly the Special Master recommended that the Township be granted a vacant land adjustment. Further, the Special Master concluded that the Township’s realistic development potential was 53 affordable units. (1999 Report at 18).

5. The 1999 Report also addressed the sites proposed by plaintiff for development for affordable housing in the Mocci Litigation, a proposed regional contribution agreement and for the imposition of development fees.

6. The recommended inclusionary sites are known as Hyde Park Village, Camel Creek, Pirates Cove and Harriott Street.

7. The recommendations of the Special Master were substantially adopted by the Court in the June 17 1999 Order which granted a conditional judgment of repose and provided for land use procedures to govern the inclusionary sites.

8. Thereafter, on July 19, 2005, the Court in the Mocci Litigation entered a further Order extending the period of repose until December 20, 2005, retroactive to February 19, 2005. (See, July 19, 2005 Order, **Exhibit C**). This Order was based upon a May 19, 2005 Special Master Letter Report and Recommendation.

9. In the interim, as provided under the June 17, 1999 Order, jurisdiction over the land development applications respecting the four sites in the Mocci Litigation remained with the Court. The Court established a process whereby applications for development approvals were submitted to a Court appointed Special Master and Hearing Officer for recommendation to the Court. (See, for example, Mocci Litigation, November 1, 2006 Order; **Exhibit D**).

10. Likewise, the Court approved the Township's spending plan. (See, Mocci Litigation, Order October 23, 2007; **Exhibit E**).

11. Thereafter, because certain components of the inclusionary projects set forth in the June 17 1999 order had changed, (notably that the Harriott Street site was now owned by two separate entities, Sterling Heights LLC and Intersection Developers LLC) the court entered a further order on August 31 2006 revising the terms of the June 17 1999 order and granting development approvals for the Sterling Heights LLC site. (**Exhibit F**).

12. On November 1 2006 the court entered an order granting final major site plan approval to the Camel Creek inclusionary site project.

13. Thereafter, because a portion of the Sterling property was acquired by the New Jersey Turnpike Authority, the Township and Sterling entered into an agreement for the development of the property which was approved by the court on December 23 2008. On February 5, 2010 the court granted preliminary and final site plan approval, together with associated variances, for the Sterling Heights LLC project. (**Exhibit G**).

The Township's 2005 Fair Share Plan

14. On December 20, 2005, upon the expiration of the Court's 1999 Judgment of Repose, the Township filed a petition for substantive certification, together with its 2005 Housing Element and Fair Share Plan ("2005 HE/FSP"), with the Council on Affordable Housing (COAH).

15. The December 20, 2005 filing was made pursuant to COAH's first version of its "Third Round Rules," under a "growth share" methodology, and which were adopted on December 20, 2004. N.J.A.C. 5:94; 36 N.J.R. 5895(a).¹

16. In the meantime, as COAH had not promulgated valid rules and was taking no action on the Township's fair share plan, on December 12, 2007 the Township filed a motion with the trial court requesting that it assume jurisdiction over the Township's 2005 HE/FSP. The Court granted the Township's motion by Order entered on January 9, 2008. (**Exhibit H**).

17. Thereafter, COAH finally proposed and adopted new regulations, again pursuant to a "growth share" methodology, which became effective on June 2, 2008 with amendments effective October 2, 2008. N.J.A.C. 5:96 and 5:97. Those rules provided that municipalities which file a third round housing element and fair share plan by December 31, 2008 with COAH would come within the agency's jurisdiction which affords statutory protection from exclusionary zoning lawsuits as set forth under the Fair Housing Act. N.J.A.C. 5:96-16.2.

The Township's 2008 Fair Share Plan

18. During this time, Woodbridge had been consulting with the Special Master who had been appointed in the Mocci Litigation, to develop a comprehensive 2008 Housing Element

¹ This initial version of the Third Round Rules was overturned by the Appellate Division, on January 25, 2007 in In Re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, (App. Div. 2007), certif. den. 192 N.J. 71 (2007). The Court remanded the matter to COAH to promulgate valid rules within six months (i.e., by July 2007). Id., at 88. COAH failed to meet this deadline and the Appellate Division would grant it two extensions.

and Fair Share Plan (2008 HE/FSP) consistent with COAH's newly adopted third round regulations.

19. After public hearings, on November 25, 2008 the Woodbridge Planning Board adopted the Township's 2008 HE/FSP. On December 16, 2008 the Township Council endorsed the 2008 HE/FSP and further authorized that a declaratory judgment action be instituted seeking Court approval of that Plan.

20. On December 30, 2008 the Township filed a Complaint for Declaratory Judgment seeking approval of the Township's 2008 HE/FSP. (See, In the Matter of the Township of Woodbridge, Docket No. L-17-09).

21. On March 5, 2009, the Court entered an Order granting Woodbridge immunity from builder's remedy lawsuits. (Order, dated March 5, 2009; **Exhibit I**). Also under the March 5, 2009 Order, the Court appointed the same Special Master as the Court had retained in the Mocci Litigation and directed that the Court would retain jurisdiction of the matter. Ibid.

The Township's 2012 Fair Share Plan

22. On June 12, 2012, the Township Council adopted an Amended Housing Element and Fair Share Plan developed in consultation with the Special Master and consistent with COAH's then-effective regulations which allocated municipal affordable housing obligations upon a "growth share" methodology. See, N.J.A.C. 5:96 and 5:97. ("The 2012 HE/FSP," attached, comprised of an April 2012 plan and May 2012 plan; **Exhibit J**)

23. The 2012 HE/FSP addresses the Township's rehabilitation obligation, remaining prior round obligation for the period 1987 to 1999 and the prospective need obligation for the period from 2004 to 2018.

24. The Township's rehabilitation obligation, calculated under the 2012 HE/FSP, is 300 units. The Township operated a HUD funded housing rehabilitation program from 1999 through June 2008 which completed, at the time of the plan, 94 housing rehabilitations.

25. The Townships rehabilitation program is ongoing.

The Township's RDP

26. The Townships prior round obligation is 955 units with a realistic development potential ("RDP") of 53 units. This obligation is addressed in developments within the Township that have been approved or completed consisting of 22 family units and 31 age restricted units:

Compliance with the Adjusted 1987 to 1999 Obligation

<i>Realistic Development Potential (RDP)</i>	
RDP	53
COMPLIANCE WITH ADJUSTED PRIOR ROUND OBLIGATION (1987 ~ 1999) (Obligation is 53 Units)	
New Construction	
Harriott Street/Sterling Heights (Site 7A ~ Family Rental ~ New Construction)	4
Intersection Developers (Site 7B ~ Family Rental ~ New Construction)	5
Subtotal	9
Autumn Hills (Site 5 ~ Family Rentals ~ New Construction)	13
Maple Tree Manor (Site 6 ~ Age-Restricted Rental ~ New Construction)	31
Pirates Cove (Site 12 - Family Rental - New Construction)	5
Subtotal	49
Total Units/Credits (9 + 49)	58

27. The Pirates Cove site is set forth in the 2012 HE/FSP because it is part of the June 17 1999 Order. However the plaintiff developer has not sought development approvals and consequently the project has not been constructed.

Unmet Need

28. The Township's Prior Round obligation is 955 units. Since 53 units are addressed in the Township's RDP, Woodbridge has undertaken to plan for an additional 902 units together with prior cycle credits. The locations of the projects are set forth on the attached map, **Exhibit K**.

Reconstruction

29. The 2012 HE/FSP provided for a program of "gut rehabilitation" or reconstruction for which the Township is entitled to credit, notably for two projects:

- a. **Cooper Towers Bl. 442.16 Lot 4 1422 Oak Tree Road (Site E) (Reconstruction Credits)**. This project provides for the reconstruction of seventy-five (75) public housing units for seniors and the disabled with the use of \$2.25 million of trust funds. The project was approved, upon the recommendation of the Special Master, by court Order entered on September 11, 2011, (**Exhibit L**), and has been completed.
- b. **Olsen Towers Bl. 59.08 Lot 6.02 555 New Brunswick Ave (Site D) (Reconstruction Credits)**. This completed project was for the reconstruction of forty (40) public housing units for seniors and the disabled.

Prior Cycle Credits

30. The Township is entitled to Prior Cycle credits for housing. The following have been undertaken by the Woodbridge Housing Authority as recounted in the 2012 HE/FSP:

- a. **Finn Towers 19 Martin Terrace (Site A)**. Finn Towers provides housing for the elderly and the disabled. It is located in proximity to Main Street and the train station. It is attached to Adams Towers by a breezeway. It has 70 dwelling units including 6 units for the disabled.
- b. **Adams Towers 555 Rahway Avenue (Site B)**. Adams Towers provides housing for the elderly and the disabled. It is located in proximity to Main Street and the train station. It is attached to Finn Towers by a breezeway. It has 65 dwelling units including 6 units for the disabled.
- c. **Stern Towers 55 Brook Street (Site C)**. Stern Towers provides housing for the elderly. It is located in proximity to Main Street and is across the street from the train station. It has 60 dwelling units.

- d. **Greiner Towers 460 Inman Avenue (Site F).** Greiner Towers provides housing for the elderly and the disabled. It is located in the Colonia section of the Township. It has 70 dwelling units including 4 one bedroom units and 4 efficiency units for the disabled.

New Construction

31. The Township has also embarked upon a program of new construction as provided under the 2012 HE/FSP:

- a. **Bunns Lane/Woodbridge Garden Apartments Bl. 250 Lot 1.02 (Site 1).**
The Woodbridge Affordable Housing Corporation and the Woodbridge Housing Authority will undertake the redevelopment of the existing 150 unit Bunns Lane/Woodbridge Gardens Project as part of a Rental Assistance Demonstration ("RAD") conversion project through the United States Department of Housing and Urban Development. The Authority will demolish the existing development and construct a new multi-family rental development of 202 units and once completed, the new project would be known as "Jacobs Landing." The Township is committing \$1.25 million of its affordable housing trust fund for the project to be undertaken by Ingerman Development Company. (See, Jacobs Landing Rehabilitation Plan; **Exhibit M**).
- b. **Warden's Home Site Bl. 908.01, Lot 10 (Site 3)**
The Township acquired the "Warden's Home" site from the State, by Deed dated June 6, 2015, which will be redeveloped for up to 100 affordable apartments with a component for special needs housing for individuals with developmental disabilities. The use and conditions for development of the site is restricted by the Deed from the State. (See, Deed dated June 6, 2015 and preceding resolution to study the area as in need of redevelopment; **Exhibit N**). The Township may further seek to allocate trust funds towards the development to facilitate the project.
- c. **Plaza 440 Bl. 21.01 Lot 1.01 (Site 4).** Plaza 440 is a site owned by Plaintiff Developer Mocchi which was approved by the Township as an inclusionary 24 unit age restricted rental housing development with a 20% set-aside for affordable housing. The developer applied for conversion of the site to family housing with a 20% set-aside for affordable housing, which has been granted.
- d. **General Dynamics Site (Now, Station Village at Avenel Urban Renewal, LLC) Bl.859.01 Lot 1.01 and Bl. 867, Lot 1.081. (Site 5).** This is a redevelopment project for a site with substantial environmental and cleanup issues which makes a 20% set-aside for affordable housing economically unfeasible. A redevelopment plan is adopted, an agreement executed and planning board approval obtained for a 500 unit project with a 10% set aside for 50 affordable units.
- e. **Maple Tree Manor Bl. 871 Lot 1 (Site 6).** This is a Housing Authority 87 unit affordable age-restricted rental project at Maple Tree Manor. This complex was completed and first

occupied in 2003. It was constructed with tax credit financing through the New Jersey Housing Mortgage Finance Agency (NJHMFA) and funding from the Middlesex County Home program. Thirty one of the units are used to address the Township's RDP; the remaining 56 units are addressed to the Township's unmet need.

- f. **Autumn Hills Bl.182.03 Lot 2 (Site 9).** Autumn Hills is a multifamily housing development initially approved as age-restricted housing and subsequently approved by the Township Zoning Board of Adjustment in October 2011 as family rental housing pursuant to the 2009 conversion act with 120 units total and a 20% set-aside for affordable housing for 24 affordable units. The project is completed. Thirteen of the units are used to address the Township's RDP; the remaining 11 units are addressed to the Township's unmet need.
- g. **Woodbridge Child Diagnostic and Treatment Center Bl. 875 Lot 1 (Site 10).** The Woodbridge Child Diagnostic and Treatment Center is a developed site owned by the State of New Jersey which the Township seeks to acquire. The Township has begun the process of declaring the site as a redevelopment area and, on June 10, 2015, commissioned the planning board to undertake a study to determine if the site is an area in need of redevelopment. (**Exhibit O**). The Township intends to adopt an Overlay Zone to permit the reuse and development of the property as an inclusionary site for 300 dwelling units with a 20% set-aside for affordable family housing to generate 60 units of affordable housing.
- h. **"Preston Trucking" Proposed Congregate Care Site Bl. 396.28 Lot 1.03 (Site 11)** The Township will adopt an overlay zone for the reuse of the 8.09 acre Route 35 Trucking Company as a 200 unit congregate care facility with a 20% set-aside of affordable units restricted to low and moderate income households. The Township has completed a site suitability analysis of the property. The Township will apply the 40 affordable set-aside units to the unmet need.

The Foreclosure and Reinvestment Programs

32. As a result of the Great Recession, more than 1200 properties in Woodbridge, many of them occupied by low and moderate income persons, received a notice of intent to foreclose from their lenders. The Township sought under the 2012 HE/FSP to develop and implement a program, in conjunction with the New Jersey Department of Community Affairs (DCA), to reclaim foreclosed homes and return them to the community as owner occupied affordable housing units.

33. To finance the cost of acquisition of the foreclosed properties, Woodbridge is prepared to issue bond anticipation notes under the Redevelopment Law in an amount up to \$10,000,000 to create a revolving fund that would be re-invested to acquire additional properties and eventually re-paid in full at the conclusion of the program. Woodbridge also sought to commit funding from its Affordable Housing Trust Fund to the renovation and sales of the properties, including administrative and other soft costs associated with the program.

34. The Redevelopment Agency, the DCA and the New Jersey Housing Mortgage Finance Agency (HMFA) were to collaborate to market the available affordable units to qualified, income-eligible purchasers and thereafter assist in securing the financing required to purchase the homes under affordable housing guidelines, including assistance with down payments, if necessary.

35. To facilitate the program, representatives of the Township met with the DCA Commissioner and Deputy Commissioner who encouraged the Township to pursue the program and submit it to the DCA and HMFA for further development and implementation.

36. Partly because of the involvement of DCA and HMFA, the Township moved to have jurisdiction over its 2012 HE/FSP transferred to the Department of Community Affairs, Council on Affordable Housing.

37. On April 22, 2013 the Court granted the application, directed the Township to file an Amended Housing Element and Fair Share Plan with COAH and provided that COAH's jurisdiction over the Township's Housing Element and Fair Share Plan would "relate back to December 30, 2008, the original date that the Township filed the Complaint for Declaratory Judgment." In the Matter of The Township of Woodbridge, Docket No. L-17-09, Order dated April 22, 2013; **Exhibit P**).

38. Ultimately, the Township was unsuccessful in obtaining a meaningful review of the Foreclosure and Reinvestment Program by COAH in order for it to be further considered by DCA and HMFA.

This led to the Township determining to undertake a more streamlined program. Accordingly, the Township has entered into an agreement with Community Capital Fund LLC ("CCF") (**Exhibit Q**) to undertake a program of reconstruction or rehabilitation of properties CCF has acquired from the Federal Housing Administration under a distressed mortgage pool purchase. Under the agreement the Township will initially allocate \$25,000 for each of 16 units, up to \$400,000, for CCF to undertake reconstruction or gut rehabilitation. Upon completion the affordable units will be affirmatively marketed to income eligible persons (subject to the waiver of such requirement to guard against displacement).² Should the program prove successful, the Township will seek to broaden its scope to address the substantial stock of foreclosed properties within the community.

The 2013 HE/FSP

39. The Township supplemented the 2012 HE/FSP in 2013 to add one additional site:

a. **Hopelawn Bl. 20 Lots 1.07, 1A5 1A6, 1F2 (Site 13).** This is a designated redevelopment area within the Township. The site requires remediation and cleanup to prepare it for residential development. The Township will adopt a redevelopment plan for Hopelawn. The redevelopment plan will provide for the inclusionary development of family sale units with a 20% set-aside for affordable housing. A total of 131 units will be constructed. There will be 104 market rate units and 27 moderate-income units. (This site is included as an addendum to the 2012 HE/FSP at Exhibit J.

The 2014 HE/FSP

40. The Township supplemented the 2012 HE/FSP in 2014 to add two additional sites:

² "Waiver of affirmative marketing requirements under certain circumstances. Under any rental or purchase program implemented to prevent the homelessness of persons who have experienced or may experience the foreclosure and loss of their personal residence, or any program which addresses the needs of low and moderate income households residing within the municipality including, but not limited to, State, federal or local programs, if the persons benefitting from the program are otherwise income qualified to occupy such housing under federal or State law, then affirmative marketing requirements under regulations promulgated to effectuate the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-301 et al.) shall be waived to permit such persons to occupy, rent or purchase the housing units which they may have previously occupied or owned." N.J.S.A. 45:22A-46.15.

a. Hopelawn VFW Bl. 4.08, Lot 9 (Site 14)

The Woodbridge Affordable Housing Corporation is in the process of acquiring from Hopelawn Memorial Post #1352, Veterans of Foreign Wars property located at 113 James Street, (“VFW Property”), to develop a 57-unit senior citizen affordable housing project. The Township will commit \$200,000.00 in affordable housing trust funds for the project to be undertaken by Ingerman Development Company. Site Plan approval for the project was obtained on May 20, 2015. (See, Planning Board Resolution, memorialized June 17, 2015; **Exhibit R**).

b. Reinhard Manor Bl. 425.05, Lot 8 (Site 15)

The site is located in the Colonia section of Woodbridge Township, and has frontage on Outlook Avenue and Fairview Avenue. It is currently developed with two public schools that are no longer in use. The Woodbridge Affordable Housing Corporation currently owns the site. Redevelopment of the site includes the conversion of the former school buildings into a 100% affordable housing site with a minimum of 62 senior rental units. Preliminary and Final Site Plan approval was granted on May 15, 2013. (**Exhibit S**). The project is now complete.

41. The Hopelawn/VFW and Reinhard sites are set forth in a further housing element and fair share plan amendment adopted in 2014 (“the 2014 HE/FSP,” **Exhibit T**).

42. A Summary of the Township’s affordable housing plan is set forth on the attached chart which demonstrates that the Township has substantially addressed its affordable housing obligation. (**Exhibit U**).

The Township Will Seek a Waiver from the Applicability of COAH’s Rule Imposing a Cap on Senior Units

43. Due to the unique demographic characteristics of the Township and of the immediate region of which it is a part, the Township will seek a waiver from COAH regulatory requirements which impose a cap upon the amount of senior affordable housing units a municipality may include in its fair share plan.

The Township’s “10/10 Program”

44. The Township is analyzing whether to adopt a Township-wide program to provide for affordable housing whereby new construction or redevelopment projects are to

provide a 10% set aside for constructed affordable units (either on site or off site) and also make a contribution in lieu of construction for the value of an additional 10% of the units constructed. Waivers from these requirements will be granted if, among other things, a project is rendered financially not feasibility if all or parts of the affordable requirements are imposed.

45. This draft program will be the subject of more detailed study and analysis as part of the Township's process to develop a new Housing Element and Fair Share Plan as contemplated by In Re: Adoption of N.J.A.C. 5:96 and 5:97 by NJ Council on Affordable Housing 221 N.J. 1 (2015).

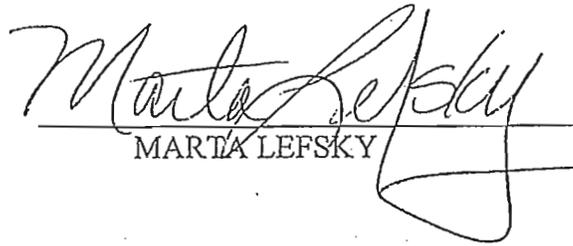
Conclusion

46. Since April 22, 2013 jurisdiction of the Township's Housing Element and Fair Share Plan has been pending before the Council on Affordable Housing and the Township has been a "participating" municipality before that agency.

47. Accordingly, because the Township has undertaken substantial efforts to provide for affordable housing to meet the unique needs of low and moderate income persons both within the Township and within the region and because it is in the process of developing a fair share plan to further address those needs, it is respectfully requested that the court grant the within application for immunity for a period of five months in order to afford the Township the opportunity to craft such a plan

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

Dated: 7/20/15


MARTA LEFSKY

CERTIFICATION PURSUANT TO R. 1:4-4(c)

I certify that MARTA LEFSKY acknowledged the genuineness of the facsimile of her signature on her Certification, and that the Certification bearing her original signature will be filed if requested by the Court or a party.

A handwritten signature in black ink, appearing to be 'EJ Boccher', written over a horizontal line. The signature is stylized and cursive.

Edward J. Boccher

Dated: July 20, 2015

Woodbridge Township Fair Share Units, Status as of July 9, 2015

ID in Housing Plan Element and Fair Share Plan	Development Name	Location	Block/Lot	Type of Development	Credits per 2012 Plan/Subsequent Amendment	Status as of 07/2015 (Units Complete)	Comment	Applied to Unmet Need/Adjusted Obligation
D	Olsen Towers	555 New Brunswick Ave	59.08/6.02	Senior Rental	115	115		Unmet Need
E	Cooper Towers	1422 Oak Tree Road	442.16/4	Senior Rental	See Comment	See Comment	Included with Olsen Towers	Unmet Need
F	Greiner Towers	460 Inman Avenue	509/1.02	Senior Rental	70	70		Unmet Need
1	Bunns Lane	30 Bunns Lane	250/1.02	Family Rental	150	—	Project revised to be 200 Units (Expected from 2016)	Unmet Need
3	Warden Home Site	Rahway Avenue	908.01/10	Family Sale	80	—	Redevelopment Study in Progress; "Credits per 2012 Plan" Assumes 100% Affordable. 2012 Housing Plan Provided	Unmet Need
3	Warden Home Site	Rahway Avenue	908.01/10	Special Needs	28	—	Redevelopment Study in Progress; "Credits per 2012 Plan" Assumes 100% Affordable. 2012 Housing Plan Provided	Unmet Need
4	Plaza 440	99 Florida Grove Road	21.01/1.01; 20.01/1.021	Senior Rental	5	—	Fire Onsite	Unmet Need
5	General Dynamics	150 Avenel Street	859.01/1.01; 867/1.081	Family Sale	50	—	Original Building Demolished, Housing Not Yet Constructed	Unmet Need
6	Maple Tree Manor	1255 Rahway Avenue	871/1; Vacated Portion of Taylor W	Senior Rental	87	87		31 to Adjusted Obligation; 56 to Unmet Need
7A	Sterling Heights	133 Harriot Street	551/1.10; 551.03/103.02-107.02	Senior Rental	4	4		Adjusted Obligation
7B	Intersection Developers	414 Rahway Avenue	551/1.07	Family Rental	5	5		Adjusted Obligation
9	Autumn Hills	1 Hoover Way	182.03/2	Family Rental	24	24		13 to Adjusted Obligation; 11 to Unmet Need
10	Woodbridge Child Diagnostic and Treatment	15 Paddock Street	875/1	Family Rental	60	—	Redevelopment Study in Progress	Unmet Need
11	Congregate Care	821 Saint Georges Ave	396.28/1.03	Congregate Care	40	—	Redevelopment Study in Progress	Unmet Need
12	Pirate's Cove	Cliff Road	753/1-6, 19-29, 30.01, 35-42, 44-48	Family Rental	5	—	No Approval as of July 9	Adjusted Obligation
13	Hopelawn	New Brunswick Avenue	20/1.07; 31.08/3, 4	Family Sale	27	TBD	Status TBD	Unmet Need
14	Hopelawn VPW	113 James Street	4.09/10	Senior Rental	64	—	Financing in Progress	Unmet Need
15	Reinhard Manor	Outlook Avenue	425.05/8	Senior Rental	62	62		Unmet Need
—	Foreclosure Program	—	—	Family Sale	325	TBD	Program Started; Exact Unit Count TBD	Unmet Need
Total:					1201	967		

automatically recorded as a statewide lien. To do so, forward it to the Clerk of the Superior Court in Trenton along with a \$25.00 fee.

FILED

JUN 17 1999

JUDGE DOUGLAS K. WOLFSON

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RALPH MOCCI, JUNRICH CO.,)
INC., and HIGH PARK)
DEVELOPERS, OF ISELIN, INC.,)
doing business as HYDE PARK)
ASSOCIATES, a Joint Venture, and)
METRO-STAR PLAZA)
ASSOCIATES, a partnership)

Plaintiffs,

-vs-

TOWNSHIP OF WOODBRIDGE, A)
Municipal Corporation of the State of)
New Jersey, located in Middlesex)
County, New Jersey, the TOWNSHIP)
COUNCIL of the Township of)
Woodbridge and the PLANNING)
BOARD of the Township of)
Woodbridge,)

Defendants.

PIRATES COVE MARINA, a)
General Partnership, et als.)

Plaintiffs,

-vs-

TOWNSHIP OF WOODBRIDGE,)
et als.)

Defendants.

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

DOCKET NO. L-7843-91

Civil Action
(MOUNT LAUREL II)

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

DOCKET NO. L-7847-91

CIVIL ACTION

ORDER GRANTING REMEDIES
PURSUANT TO COMPLIANCE
HEARING AND GRANTING
CONDITIONAL JUDGMENT OF
REPOSE

A-2

12/22/09

THIS MATTER having been the subject of a Mount Laurel Compliance Hearing held before the Court on Friday, February 19, 1999 ("Compliance Hearing") in the presence of counsel for plaintiffs, Hutt & Shimanowitz, P.C.; Ronald L. Shimanowitz, Esq. appearing; counsel for defendants, Wayne Peck, Esq.; the Court having heard the arguments of counsel; and the Court having heard the testimony of the Court-appointed Special Master, Elizabeth C. McKenzie, P.P., AICP (the "Master"); the Court having reviewed a report entitled "Planning Master's Report to the Court" dated January 29, 1999 prepared by Elizabeth C. McKenzie, P.P., P.A. ("Master's Report"); the Court having reviewed pertinent papers and reports including but not limited to plaintiffs' motion for Builders Remedy filed July 13, 1998; good cause having been shown and the following facts having been found to exist:

1. The Court received into evidence as Exhibit "J-1" proof of publication of notice of Compliance Hearing dated _____, 1999 evidencing public notice having been given by publication in the Home News Tribune on _____, 1999 (Exhibit J-1 is incorporated herein by reference).
2. Adequate notice of the Compliance Hearing has been given.
3. The Court received into evidence as Exhibit "Court-1" the Master's Report (Exhibit "Court-1" is incorporated herein by reference).
4. The Court adopts and accepts the factual findings set forth in the Master's Report except as modified and/or supplemented by the transcript of the Compliance Hearing

and by this Order.

5. The Plaintiffs instituted *Mount Laurel* actions against Woodbridge Township, et als. ("Township") in 1991, challenging the Township's zoning as exclusionary and unconstitutional and seeking the right to builder's remedies;

6. The Township has neither a judgment of repose from Superior Court signifying compliance with the *Mount Laurel* doctrine nor substantive certification from the New Jersey Council on Affordable Housing ("COAH") demonstrating compliance with the Fair Housing Act;

7. In 1994, COAH estimated the fair share housing obligation of the Township, its "pre-credited need," at 1,351 units of low and moderate income housing needed in the Township for 1987-1999, consisting of a rehabilitation component of 396 units and an inclusionary/new construction component of 955 units;

8. The Court has heard the arguments concerning the Township's constitutional obligation to create a realistic opportunity for its fair share of its region's needed low and moderate income housing construction and finds that plaintiffs are entitled to builders remedies.;

9. The Plaintiffs own or control four sites in Woodbridge, known as Hyde Park Village, Camel Creek, Pirates Cove, and Harriot Street and have proposed same for residential development (plus marina-commercial development at the Pirates Cove site), including a substantial amount of housing that will be affordable to low and moderate income households.

10. Plaintiffs sought inclusionary rezoning of these four sites.

11. The Master has found all four of the Plaintiffs' sites to be "available, developable, suitable, and approvable," as COAH defines these four terms, and in conformance with the 1992 *State Development and Redevelopment Plan*;

12. The Master has found the development proposals for all four of the plaintiffs' sites to be in accordance with generally-accepted principles of sound land use planning;

NOW, THEREFORE, it is on this 17th day of June, 1999;

ORDERED as follows:

A. The Master's Report is hereby adopted by the Court in its entirety as a complete and appropriate remedy to satisfy the affordable housing compliance obligations of township, including but not limited to the specific builders remedies recommended in the Master's Report for the four plaintiff sites.

B. The parties shall be bound by the Master's Report as same is modified and/or supplemented by the Transcript of Compliance Hearing and by this Order.

C. The Master's Report shall be amended and supplemented as follows:

(i) the "Special Development Review Procedures" set forth on pages 34-39 of the Master's Report shall be modified such that jurisdiction over land development applications for the four plaintiff sites shall be removed from the Township's local approving boards and shall rest solely and completely in the Court. Notice of public hearing

of land development applications shall be given in accordance with the Municipal Land Use Law; however, public hearing and workshop sessions may be held in the courthouse or such other place as the Master deems appropriate. The Court, through the management, review, dispute resolution and approval of the Master, shall hear and decide the land development applications for the four plaintiff sites.

(ii) The Master is hereby given leave to hire consultants as the Master, in her discretion, deems necessary for the proper review of the land development application for the four plaintiff sites. The fees of the consultants retained by the Master shall be paid by the plaintiffs. Such consultants shall submit invoices to the Master for review and approval. The Master shall submit the approved invoices to plaintiffs for direct payment by plaintiffs. Payment of such invoices shall be made by plaintiffs within thirty (30) days of submission by the Master. All costs, expenses and fees associated with the services of the Master shall be borne solely by the Township.

(iii) The initial Professional Technical Review Group ("PTRG") shall be comprised as follows:

- a) Site Engineer: Daphne Galvin, P.E.
- b) Traffic Engineer: Henry Ney, P.E.

c): Landscape Architect/Site Planner: Joseph Perilla, L.S.

The Master shall, in her reasonable discretion and with the advice of the Township and plaintiffs, have the right to modify the members of the PTRG.

(iv) In the event the Township chooses to have its own professionals undertake a review of plans and application materials, in accordance with Section 4, page 36 of the Master's Report, then Plaintiffs shall be responsible for the costs associated with that review. In such case, the Master shall establish a reasonable escrow review amount to be paid by Plaintiffs to Township to be utilized to satisfy the costs associated with review, if any, by Township professionals.

(v) No formal ordinance revisions shall be required in order to allow the development of plaintiffs' four sites in accordance with the Master's Report. This Order shall serve as a Court ordered re-zoning, such that the development for the four plaintiffs' sites, as ultimately approved by the Master, shall be deemed permitted uses.

(vi) Notwithstanding the provisions of Section 3(e) of "Actions Required by the Township" of the Master's Report (page 41), the Camel Creek site shall not be exempted from the payment of affordable housing Development Fees. The Development Fee required

from the thirty (30) units contemplated at the Camel Creek Site shall be one-half of one percent (0.5%) of equalized assessed value for each and every unit constructed at Camel Creek. None of the units constructed at Camel Creek shall be deemed bonus units subject to a Development Fee of six percent (6%) of equalized assessed value.

(vii) Notwithstanding the provisions of Section 1 of "Plaintiffs' Proposals" of the Masters Report (pages 18-19), the commercial portion of the Pirates Cove Site shall be subject to a development fee equal to one (1%) percent of equalized assessed value. Recognizing that due to parking constraints the entire commercial structure at Pirates Cove may not be utilized (i.e. a portion of the commercial structure may remain vacant), the development fee shall be assessed only on that square footage which is utilized for commercial purposes regardless of the total square footage of the commercial structure.

(viii) Notwithstanding the provisions of Section 3 of "Plaintiffs' Proposals" of the Master's Report (page 20), each of the ten (10) single family homes to be constructed at the Hyde Park Site, shall be subjected to a development fee equal to one-half of one percent (0.5%) of equalized assessed value.

(ix) Development Fees shall be collected and administered in accordance with COAH regulations governing same.

(x) Township shall be entitled to commence collecting development fees (but not spending same until a revised Spending Plan has been reviewed and approved by the Court) provided that Township makes the revisions to the Development Fee Ordinance which revisions are set forth in the Master's Report and provided that the Master issues a written certification that such revisions have been satisfactorily made.

(xi) The number of affordable housing units to be sent out of the Township pursuant to a Regional Contribution Agreement ("RCA") is twenty-two (22), notwithstanding that the Master had inadvertently testified at the Compliance Hearing, that twenty-four (24) affordable housing units are to be sent out the Township, in recognition of the two rental bonus credits the Township is eligible to receive.

D. The Township, Township Council, and Township Planning Board shall cooperate with the Plaintiffs to insure expedited implementation of the builder's remedies, including but not limited to: (1) making expedited input to the Master and PTRG on all development applications for the Plaintiffs' four sites; (2) executing any required State or County agency applications for development approvals; (3) applying as necessary for related infrastructure improvements, such as traffic lights, road improvements (at Plaintiffs' sole cost

and expense); (4) authorizing the use of existing regional stormwater management facilities; (5) cooperating with the Plaintiffs in obtaining any necessary NJDEP permits and approvals, such as Waterfront Development Permits and Tidelands conveyances; (7) Vacate Right-of-Way and re-foreclose certain lots in accordance with Section 8 of Masters Report (Page 45); and (8) generally cooperating in implementing the intent and purposes of this Order.

E. Township is hereby granted a Conditional Judgment of Repose conditioned upon Township timely satisfying all of the recommendations of the Master's Report herein adopted by the Court. Upon satisfaction of the recommendations of the Master's Report, Township shall be entitled to apply by motion to the Court for an Order granting Final Unconditional Judgment of Repose. The period of repose during which Township shall be immune from litigation challenging affordable housing compliance shall run for a period of 6 years commencing on Feb. 1999 and terminating on Feb 19, 2005.


DOUGLAS K. WOLFSON, J.S.C.

RLSPATTYMOCCI.ORD

2006 WL 1375222

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Law Division, Bergen County.

TOMU DEVELOPMENT CO., INC., Plaintiff,

v.

BOROUGH OF CARLSTADT, Planning
Board of Carlstadt, and the New Jersey
Meadowlands Commission Defendants,
Tomu Development Co., Inc., Plaintiff,

v.

Borough of East Rutherford, Planning Board
of East Rutherford, and the New Jersey
Meadowlands Commission Defendants.

Decided May 19, 2006.

Attorneys and Law Firms

Robert A. Kasuba and Thomas Jay Hall (Sills Cummis
Epstein & Gross, P.C., attorneys) argued the cause for
plaintiff.

Richard J. Allen, Jr. (Kipp & Allen, LLP, attorneys) argued
the cause for defendant Borough of Carlstadt and Planning
Board of Carlstadt.

Beverly M. Wurth (Calo Agostino, A Professional
Corporation, attorneys) argued the cause for defendant
Borough of East Rutherford and Planning Board of East
Rutherford.

Robert L. Gambell and Christine Piatek (Zulima V. Farber,
Attorney General, attorney) argued the cause for defendant
New Jersey Meadowlands Commission.

Sills Cummis Epstein & Gross P.C., Newark, New Jersey, for
Plaintiff, Tomu Development Co., Inc.

HARRIS, J.

PREFACE

*1 More than six months have elapsed since I unequivocally
declared that Carlstadt and East Rutherford had neglected

their constitutional obligations under the *Mount Laurel*¹
doctrine and their statutory duties under the Fair Housing Act.
No responsible local official is unaware of the responsibilities
that these principles have imposed. Yet, ignoring my order
to comply fully by February 28, 2006 (110 days from the
November 10, 2005 opinion), the defendant municipalities
have again disappointed the citizens of the State of New
Jersey. I start my analysis of the situation with the following
thoughts in mind:

If not you, who? If not now, when?

(Paraphrased from the Talmud)

Given the importance of the societal interest in the
Mount Laurel obligation and the potential for inordinate
delay in satisfying it, presumptive validity of an
ordinance attaches but once in the face of a Mount Laurel
challenge. Equal treatment requires at the very least that
government be as fair to the poor as it is to the rich
in the provision of housing opportunities. That is the
basic justification for Mount Laurel. When that clear
obligation is breached, and instructions given for its
satisfaction, it is the municipality, and not the plaintiffs,
that must prove every element of compliance. *It is not
fair to require a poor man to prove you were wrong the
second time you slam the door in his face.*

Mount Laurel, supra, 92 N.J. at 190-191.

(Emphasis added.)

INTRODUCTION

This is the compliance portion of a *Mount Laurel* II builder's
remedy action that now requires the defendant municipalities
to comply tangibly with their constitutional obligations
regarding affordable housing. On November 10, 2005, in a
written opinion, I declared that Carlstadt and East Rutherford
had engaged in conduct unbecoming local government in
New Jersey. In addition to awarding plaintiff a builder's
remedy, I gave the municipal defendants one last chance each
to legislate frameworks that would constitute compliance
with their obligations to ensure reasonable opportunities for
the actual construction of low and moderate income housing
within their borders. Notwithstanding being painfully aware
that such tasks would be complicated in light of the mutual
exclusivity of zoning authority attributable to the New Jersey
Meadowlands Commission's control of vast lands in East
Rutherford and Carlstadt, they have incompletely performed.
Accordingly, I must reluctantly employ drastic steps to fulfill

the judiciary's duty to vouchsafe fidelity to constitutional norms. *Mount Laurel II* commands such actions in the face of such longstanding and blatant disregard for the unhoused and underhoused poor.

II. FACTUAL BACKGROUND

The factual background of this case is documented in the prior opinion dated November 10, 2005, and familiarity with that opinion is assumed. Following the builder's remedy phase of the case, I ordered the following:

*2 East Rutherford's and Carlstadt's land use regulations remain invalid and unconstitutional insofar as they continue past exclusionary practices. The East Rutherford and Carlstadt Planning Boards and the respective governing bodies shall immediately prepare comprehensive compliance plans (including appropriate strategies to address the indigenous and unmet needs) for each municipality, together with zoning and planning legislation to satisfy the fair share obligations of rounds one and two, and the unmet need, all in compliance with COAH regulations. They shall draft meaningful Housing Element and Fair Share Plans, together with fee ordinances (if appropriate) and spending plans that are consonant with COAH rules. They shall exercise planning discretion in deciding whether to employ a program of rehabilitation grants, regional contribution agreements, accessory apartments, mobile homes, overlay zones, or any other incentive devices to meet the fair share and unmet need. This plan shall be completed, adopted, and presented to the court no later than February 28, 2006. In default thereof, *all* development regulations in East Rutherford and Carlstadt shall be permanently invalidated and a scarce resource

order enjoining *all* land use development applications in East Rutherford and Carlstadt (whether before the Planning Board or Board of Adjustment or the NJMC) shall become automatically effective. On the other hand, if the municipalities, or either of them, comply, they will be entitled to a six-year judgment of repose commencing no earlier than February 28, 2006.

For its first and second round obligations as derived by the Council on Affordable Housing (COAH) under the Fair Housing Act, *N.J.S.A. 52:27D-301 et. seq.* (FHA), East Rutherford was obligated to provide 70 units of new construction and 34 units of rehabilitated housing. Since the builder's remedy provided for 60 affordable units on the Tomu site, East Rutherford did not have far to stretch to find the additional ten units to fulfill its complement of new construction. Carlstadt, on the other hand, had a COAH-generated obligation of 186 units of new construction and 12 units of rehabilitated housing. The builder's remedy provided 80 affordable units in Carlstadt, thereby producing an unmet need for new construction of 106 units.

In order to meet the mandate of this court's order to rezone, both municipalities engaged in legislative activities. East Rutherford proposes three zoning changes. The first, implementing a mandatory 20% set aside for affordable units, will apply in its Neighborhood Commercial District. The second, an overlay zone providing for the redevelopment of industrial properties, will affect an 18-acre site known as the Star-Glo site and a separately owned 7.44-acre site. Third, a "Mixed Residential Overlay Zone," will affect a 4.79-acre site known as the Sequa site. The evidence presented regarding these zoning changes vis-à-vis site suitability and feasibility of development within the next six years was scanty and unpersuasive. Additionally, East Rutherford intends to implement a development fee ordinance. Conspicuously missing from East Rutherford's plan is any treatment of its rehabilitation obligation. Furthermore, East Rutherford eschews its COAH round three obligations, claiming that they are irrelevant to this proceeding.

*3 In addition to adopting its own development fee ordinance, Carlstadt created two overlay zones in what it calls "upland Carlstadt" to fulfill its unmet need of new construction. One overlay zone affects Carlstadt's entire residential district and the other affects a light industrial area.

In addition, Carlstadt claims that it has committed itself to redevelop municipally owned land (the former Washington School) to 100% affordable senior housing, but the details are conspicuously ambiguous. As with East Rutherford, Carlstadt has taken no meaningful steps to address its rehabilitation obligation and has ignored its round three obligations.

III. DETERMINATIONS OF LAW

At this stage of proceedings, the municipalities bear a tremendous burden of persuasion. Not only have they lost the builder's remedy portion of the litigation, but also their land use regulations have been found constitutionally wanting. This latter deficiency is required to be fixed as part of a unitary piece of litigation. Although the Special Master finds some salvation in East Rutherford's compliance effort, I cannot agree with him. With regard to Carlstadt, its thinly veiled half-baked offering was rightly rejected by the Special Master, a conclusion that is well supported by the record.

When a municipality has been found to have failed in its constitutional mandate to provide realistic opportunities for low and moderate income housing within its borders, the court, as here, gives it one last chance. With that last-chance opportunity, the municipality must hew to applicable COAH regulations. At the very least, a municipality must conform its conduct to meet its new construction obligation, its rehabilitation obligation, and if a vacant land adjustment is granted (as here with Carlstadt), its unmet need. The easiest determination to make in this case relates to the utter failure and continued deafening silence of both municipalities to provide resources for their indigenous rehabilitation obligations. This is peculiarly significant because providing housing opportunities for rehabilitation purposes affects homegrown local citizens, not newcomers. Such efforts, usually to be applicable on a micro-local scale, are noteworthy for improving neighborhoods and individual qualities of life. Rehabilitation efforts do not implicate the more-feared large scale intrusions of mixed use or multifamily developments containing both market rate and affordable housing units. Although each defendant professes false piety that it is willing to participate in a recognized rehabilitation program administered by a county agency, no affirmative steps toward that end appear to have been seriously contemplated, much less planned for. This, again, is especially egregious because the rehabilitation obligation relates to existing residences and will most likely affect existing residents. The failure to address proactively a rehabilitation program for each municipality's indigenous need leaves their current low and moderate income populace

at grave risk to all of the ills associated with substandard housing.

*4 Under past and present COAH rules, the municipalities were required, by the compliance due date of February 28, 2006, at least to designate an administrator to administer a rehabilitation program, submit a marketing plan, provide a framework of affordability controls for between six and ten years, fund up to \$10,000 per unit of rehabilitation, submit a rehabilitation manual, and agree to submit to COAH monitoring. See *N.J.A.C. 5:93-5.2*; *N.J.A.C. 5:94-4.3*. It is no answer to their default that the municipalities plan to do all of this in the future. Their obligation was to comply before this litigation even commenced, and in the face of that initial failure, to comply by the date ordered in my November 10, 2005 written opinion.

Much more provocative is the failure of East Rutherford and Carlstadt to comply adequately with their recalculated new construction obligations and unmet need. East Rutherford must identify the reasonable likelihood that at least ten affordable units can be distilled from its revamped zoning regulations. In order to do this, it must designate sites and prove that they meet the criteria of *N.J.A.C. 5:93-5.3(b)* (availability, suitability, developability, and approvability). Instead of that painstaking proof, East Rutherford merely casts a blanket of a 20% set-aside upon a land mass without demonstrating the likely yield of affordable units therefrom. Anecdotal information about the plans of developers and ongoing, incomplete applications is no substitute for the firm evidence required by COAH regulations. In addition, East Rutherford's planning efforts to encourage redevelopment for affordable residential use in an industrial district ignores whether any of the hoped-for sites are qualified to be counted under *N.J.A.C. 5:93-5.3(b)* as likely candidates for actual construction of affordable housing.

Carlstadt's efforts toward compliance stand on a different footing than East Rutherford's because it received a vacant land adjustment, and the Tomu builder's remedy will fulfill its new construction obligation. However, under *N.J.A.C. 5:93-4.1*, the difference between the initial new construction obligation and the recomputed (after a vacant land adjustment) obligation must be the subject of planning initiatives to ensure that if developable land becomes available in the future, there will be a firm mechanism in place to capture affordable housing opportunities on that land. Thus, the municipality must plan for this unmet need

by legislative devices such as a redevelopment ordinance, a development fee ordinance, or an apartments-in-a-developed-area ordinance. *N.J.A.C.* 5:93-4.1(b). None of these strategies was used. Instead, Carlstadt uses a simplistic overlay zone technique that does not reveal the likely yield of units as to any potential properties in the future. In addition, however, Carlstadt trumpets its plan to convert a former school into an affordable housing facility for seniors. None of the details of the proposal complies with *N.J.A.C.* 5:93-5.5, leaving the court and poor seniors in the dark as to the nature, scope, and timetable of the not-even embryonic development.

*5 The missing link in all of the municipalities' compliance efforts has been the land in the jurisdiction of the New Jersey Meadowlands Commission. Contrary to plaintiff's view that East Rutherford and Carlstadt are required to lobby *affirmatively* for housing within their borders but beyond their control, I think that the municipalities should not be required to advocate purposefully positions that their elected officials deem contrary to the local public interest. This is especially so if it turns out that the New Jersey Meadowlands Commission is itself someday authoritatively obligated to ensure compliance with the *Mount Laurel* doctrine. However, recalcitrant municipalities, such as the defendants here, should not be allowed to inflict damage to affordable housing opportunities by either their active discouragement of such housing opportunities or by silence. As I will outline later, as part of the remedies section of this opinion, a Mount Laurel Implementation Monitor shall be appointed to speak on behalf of each municipality on matters affecting affordable housing in the New Jersey Meadowlands District in order to ensure that the inertia engendered by each municipality will no longer impede appropriate affordable housing opportunities on lands in these municipalities under the control of the New Jersey Meadowlands Commission.

Among the remedies available to the judiciary if a municipality fails or refuses to comply with a court-ordered *Mount Laurel* rezoning effort is to enjoin all further development within the municipal borders. Another is to suspend all legislative barriers that prohibit multi-family uses while at the same time ensuring that any such development includes affordable housing. It is no answer that the court should give East Rutherford and Carlstadt one more chance to comply; that they misunderstood the court's direction; and now they will get it right. The reason for the absence of this last bite of the apple remedy is two-fold. First, the Supreme Court in *Mount Laurel II* would not countenance such a transparent delay tactic. Second, any further lag would

only increase the detriment to plaintiff and the third party beneficiaries of plaintiff's builder's remedy by delaying the entry of a final, appealable judgment, again putting off into the future the ultimate disposition of this litigation. I must act *now* to end this litigation in a way that protects and preserves the interests of all concerned. One remedy that I have considered and rejected is the use of contempt proceedings against individual governmental actors or the municipal corporations themselves. Although monetary sanctions might well incite the defendant municipalities into action, and I truly understand the power of the wallet, I intend to avoid the replication of local government errors that were committed in the past. Another reason I have eschewed the traditional contempt mode of ensuring compliance is to avoid the martyrdom syndrome that some public officials exploit. Rather than involve those governmental actors who have failed the public in the past, I have elected to simply remove them from the process and substitute a court-appointed monitor to oversee land development activities in East Rutherford and Carlstadt for the foreseeable future.

*6 Here is my plan, to be effective on June 1, 2006, and continuing until further order of the court:

1. There are hereby created, as independent judicial officers, a Mount Laurel Implementation Monitor for the Borough of East Rutherford and a Mount Laurel Implementation Monitor for the Borough of Carlstadt (collectively called Monitor). All reasonable fees, costs, and expenses of the Monitor shall be borne by the Boroughs of East Rutherford and Carlstadt in proportion to the work done on behalf of each municipality by the Monitor. The Monitor shall have no role in local government affairs except as provided in this judgment. Excluding matters within the sole jurisdiction of the New Jersey Meadowlands Commission, no zoning permit, building permit, or any other authorization to use or develop land or structures within the Borough of East Rutherford or the Borough of Carlstadt shall be valid until and unless it is reviewed and approved by the Monitor who shall have the following additional powers:

- a. The Monitor shall have unfettered access to all documents and information the Monitor determines are necessary to assist it in the execution of its duties. The Monitor shall have the authority to meet with, and require reports on any relevant subject from any officer, agent, or employee of the Boroughs of East Rutherford and Carlstadt. The Monitor shall receive advance notice of, and have the option to attend, scheduled meetings

of the governing bodies, planning boards, and boards of adjustment.

- b. After giving due regard to the current (but now suspended) land use development legislation heretofore enacted by the municipalities, the Monitor shall forthwith adopt all necessary rules and regulations (including, if appropriate, interim or temporary rules and regulations)-in lieu of zoning, land use, and development ordinances-that will immediately provide reasonable opportunities for the creation of low and moderate income housing in accordance with the FHA and the rules and regulations of COAH. Each municipality shall immediately adopt by ordinance the Monitor's rules and regulations as the municipality's respective land use legislation. If a municipality fails or refuses to adopt the Monitor's rules and regulations as its respective land use legislation, said rules and regulations shall nevertheless substitute for and act as the land use laws of the respective municipality, to be enforced as such by the Monitor and the municipality's agents, officers, and employees.
- c. The Monitor shall oversee and review all applications for development, requests for land use or building permits, requests for interpretations, and appeals that would otherwise be within the jurisdiction of the boards of adjustment, planning boards, or administrative officials' jurisdiction under the Municipal Land Use Law. In order to validate any application for development, request for land use or building permit, request for interpretation, or appeal, the approval of the Monitor shall be required. The Monitor shall have the authority to disapprove, reverse, or reject any application for development, application for a land use or building permit, request for an interpretation, or appeal if it would frustrate, impede, or counteract the creation of low and moderate income housing in the municipality. Similarly, the Monitor shall have the authority to overrule and reverse the denial of an application for development, request for a land use or building permit, request for an interpretation, or appeal if, in the exercise of the Monitor's discretion and judgment, such application for development, request for a land use or building permit, request for an interpretation, or appeal would foster the creation of low and moderate income housing opportunities.
- *7 d. The Monitor shall prepare a formal Housing Element and Fair Share Plan (Affordability Plan) for each municipality. The Affordability Plan shall

comply with the FHA and all current rules and regulations of COAH, and shall include provisions to meet all obligations relating to indigenous need, new construction, unmet need, and COAH's third round rules. The Monitor shall be permitted to utilize and implement any technique authorized by the FHA or COAH including but not limited to regional contribution agreements, accessory apartments, and mobile homes to achieve compliance. Each municipality shall be required to adopt the Affordability Plan of the Monitor and shall take all appropriate actions, including appropriating funds and executing all necessary documents, to implement the provisions of the Affordability Plan.

- e. The Monitor shall act in the place and stead of the municipality or its designated agent (as provided by statute, regulation, or common practice) in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission. In this capacity, the Monitor shall advocate, either district-wide or on an application-by-application basis, for the creation of affordable housing opportunities within each municipality even if the New Jersey Meadowlands Commission has sole jurisdiction over the matter. The Boroughs of East Rutherford and Carlstadt, together with their agents, officers, and employees, are enjoined and barred from taking any action, whether orally or in writing, in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission unless such action is approved by the Monitor in writing in advance.
 - f. The Monitor shall apply to COAH, when the instant litigation is concluded, for substantive certification pursuant to then extant statutes, rules, and regulations.
 - g. The Monitor shall take such other actions, including but not necessarily limited to the hiring of experts, agents, and employees, that are reasonably necessary for conducting the activities of the Monitor. Additionally, the Monitor shall have authority to require the municipalities and their agents, officers, and employees to take any actions the Monitor believes are necessary for compliance with this judgment.
2. All zoning, land use, and development ordinances of the Borough of East Rutherford and the Borough

of Carlstadt, including site plan and subdivision ordinances, are hereby suspended and rendered ineffectual relating to any and all future land use, construction, or development efforts in the municipalities. Such ordinances shall be treated as advisory only and shall serve as commentary to serve the Monitor. Until the Monitor adopts the rules and regulations as required by this judgment (whether interim, temporary, or permanent) 1)no development applications shall be reviewed by the municipalities' boards of adjustment or planning boards and 2)no building or other land use permits shall be issued by any officer, agent, or employee of the defendant municipalities, except those necessary to avoid imminent peril to life or property. Said ordinances, however, shall continue in full force and effect for all uses and structures that currently exist (meaning that there is a valid certificate of occupancy or building permit in effect) in order to prevent the illegal use of land and structures. Uses and structures that have been approved by a local construction official, zoning officer, board of adjustment, or planning board but have not yet commenced operation or begun construction are prohibited from commencing operation or beginning construction until reviewed and approved by the Monitor for compliance with this judgment.

*8 3. The terms and conditions of the Order Imposing Scarce Resource Restraints dated May 13, 2005 (annexed to this opinion) are continued until further order of the court.

4. Robert T. Regan, Esq. is appointed the Monitor. If the Monitor resigns or is unable to serve, a successor shall be appointed by the court within thirty days. The Monitor shall serve until further order of the court or until final substantive certification is obtained from COAH, whichever is sooner.

5. All elected officials of the Boroughs of East Rutherford and Carlstadt shall be required to certify in writing, and submit their certifications to the Monitor no later than December 31, 2006, that they have read the Preface (pp. xi to xiv), Prologue (pp. 3 to 11), and Chapter XI (pp. 175 to 185) of *Suburbs Under Siege* by Charles M. Haar (Princeton University Press 1996).²

6. The municipalities are not entitled to a judgment of repose because they have not met their constitutional

obligations and have not complied with the FHA, including the COAH third round obligations. In lieu of a judicial judgment of repose, I contemplate that upon conclusion of this case, the municipalities will obtain substantive certification through COAH's procedures.

IV. CONCLUSION

I request that Mr. Regan prepare the appropriate final judgment to memorialize this decision and submit it to opposing counsel and to the court as soon as possible pursuant to R. 4:42-1(c).

ORDER IMPOSING SCARCE RESOURCE RESTRAINTS

This matter has been brought to the Court upon the application of Plaintiff, Tomu Development Co., Inc. ("Tomu") for a scarce resource order in the above-captioned litigation, and the Court having heard oral argument on February 18, 2005 and requested the court-appointed Master to issue a report on this motion. The court-appointed Master has reviewed the parties' submissions and approved of the issuance of a scarce resource order as set forth in his report dated April 13, 2005, and the Court having considered the submissions of the parties regarding the master's report finds that good cause exists for this Order to be entered,

IT IS on this 13 day of May, 2005, ORDERED as follows:

1. The Borough of Carlstadt's motion objecting to the report of the Special Master dated April 13, 2005 is DENIED.

2. The New Jersey Meadowlands Commission's objections to the report of the Special Master dated April 13, 2005 is DENIED in part and GRANTED in part, as set forth below.

3. The report dated April 13, 2005 of Mr. Regan, the court-appointed Master, is APPROVED except as MODIFIED below.

4. Land, public potable water supply and sewerage capacity are hereby declared to be a scarce resource within the Borough of East Rutherford ("East Rutherford") and the Borough of Carlstadt ("Carlstadt"), including the portions of both municipalities that are under the jurisdiction of the New Jersey Meadowlands Commission ("NJMC").

5. a. Subject to Paragraph 9 of this Order, public sewerage is hereby declared a scarce resource in Carlstadt and East Rutherford (collectively, "Municipal Defendants"). Any and all public sewer capacity in Carlstadt and East Rutherford, other than gallonage currently allocated to serve existing uses, is hereby placed under the control of the Court. No new sanitary sewer connections can be granted for any development and/or redevelopment project in Carlstadt and/or East Rutherford, including those portions of both municipalities that are located within the jurisdiction of New Jersey Meadowlands Commission ("NJMC"), without the prior approval of the Court.

*9 b. Notwithstanding the provisions of Paragraph 5.a above, any new sanitary sewer connection, which is estimated to generate less than 1,500 gpd of wastewater, shall be automatically exempted from the restraints on the further depletion of the sewerage system as set forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8.

6. a. Subject to Paragraph 9 of this Order, potable water is hereby declared a scarce resource in East Rutherford and Carlstadt. Any and all potable public water supply in East Rutherford and Carlstadt, other than that supply serving existing uses, is hereby placed under the control of the Court. No new connections to public water supply can be granted for any development and/or redevelopment project in East Rutherford and/or Carlstadt, including those portions of both municipalities that are located within the jurisdiction of the NJMC, without prior approval of the Court.

b. Notwithstanding the provisions of Paragraph 6.a above, any new connection to the public potable water supply, which is estimated to use less than 1,500 gpd of potable water, shall be automatically exempted from the restraints on further depletion of the public water supply as set forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8.

7. a. Subject to Paragraph 9 of this Order, land whether currently vacant or redevelopable, is hereby declared a scarce resource in Carlstadt and East Rutherford, including those portions of both municipalities that are located within the jurisdiction of the NJMC. No application for development and/or redevelopment, including any application under the regulations of the NJMC (specifically N.J.A.C. 19:4-1.1 *et seq.* and 19:5-1.1 *et seq.*) of any parcel of land larger than 20,000 square feet may be approved by the NJMC

or the Municipal Defendants, acting either through their Planning Boards or Zoning Boards of Adjustment, without prior approval of the Court. Prior court approval is not necessary for the approval of any application involving minor applications for existing uses related to already developed properties, such as the addition of rooms or decks to existing housing, modifications of an existing commercial or industrial site for continuation of existing uses, or minor subdivisions of land which do not result in any new structures or uses. All other applications for development or redevelopment, not otherwise exempt under this Order, shall require the prior approval of the Court before any land use approvals may be granted by the Municipal Defendants' Planning Boards or Zoning Boards or the NJMC.

b. Notwithstanding the provisions of Paragraph 7.a above, an application for final site plan or subdivision approval shall be automatically exempted from the restraints on the development and redevelopment of land as set forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8 provided that the application for final site plan or subdivision approval only seeks to ensure that the ordinance standards for final approval have been complied with and the conditions of the preliminary approval have been complied with subject to minimal deviations as set forth in N.J.S.A. 40:55D-50.a.

*10 8. Applications for relief from any of the aforementioned scarce resource restraints shall be made as follows:

a. A full and complete description of the resource being sought to be released, along with the justification for the release of such resource shall be provided to the court-appointed Master and all parties to this litigation. An inclusionary or contributory affordable housing development, such as that sought by Tomu would be appropriate for such release.

b. The court-appointed Master may request such additional information as necessary in order to fully understand the nature of the relief requested and the impact such request would have on the production of affordable housing within Carlstadt and East Rutherford.

c. Within thirty days following receipt of all necessary information, the court-appointed Master shall supply to the Court, all parties in the litigation and anyone requesting such relief a copy of a report and recommendation, setting forth,

in detail, the Master's position with respect to any release of any said resource.

d. The entity seeking release of such restraints shall thereafter file a motion on notice of all parties in this litigation for said relief with the Court, which has jurisdiction to allocate or withhold the requested relief. Notwithstanding the foregoing, if the Master recommends that the resource be released and no party in the litigation filed an objection with the Master, a formal motion shall not be required, and the entity seeking such restraints shall submit an Order to the Court and to all parties in this litigation under the five-day rule.

e. All costs for such requested relief, production of the Master's report, and court costs shall be borne by the entity seeking to obtain such relief. No such relief can be granted if in the determination of the Court, granting the relief will impede the construction of the Municipal Defendants' fair share of affordable housing units.

9. a. Any development and/or redevelopment project located within the jurisdiction of the New Jersey Sports and Exposition Authority shall be exempt from this Order and is not required to apply for relief from this Order under the procedures set forth in paragraph 8.

b. Any development and/or redevelopment project located on Block 104, Lots 1, 1.01, 1.02, 2 and 3 in the Borough of East Rutherford shall be exempt from this Order and is not required to apply for relief from this Order under the procedures set forth under the procedures set forth in paragraph 8.

10. A copy of this Order shall be served upon all counsel of record within seven (7) days of the date hereof.

All Citations

Not Reported in A.2d, 2006 WL 1375222

Footnotes

1 *So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp.*, 92 N.J. 158 (1983).

2 Available at the Ridgewood Public Library, Ridgewood, New Jersey under call number 344.73 HAA. See <http://www2.bccls.org/> (last visited on May 19, 2006) and <http://www.ridgewoodlibrary.org/> (last visited on May 19, 2006).

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2012 WL 1537421

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

LARKEN ASSOCIATES, L.L.C., JLB
Associates, L.L.C and Readington
Commons II, L.L.C., Plaintiffs–Appellants,

v.

P & H CLINTON PARTNERSHIP, Pulte Homes of
New Jersey, L.P. and Pulte Home Corporation of
the Delaware Valley, Defendants–Respondents.

Larken Associates, L.L.C., JLB Associates,
L.L.C., Readington Commons II, L.L.C. and
Lawrence Gardner, Plaintiffs–Appellants,

v.

Hill Wallack L.L.P., Thomas Carroll III, Stephen
Eisdorfer, Estate of Henry Hill, Esq., and
Kenneth Meiser, Defendants–Respondents.

Argued Dec. 20, 2011. | Decided May 3, 2012.

On appeal from Superior Court of New Jersey, Law Division,
Somerset County, Docket Nos. L–998–05 and L–2276–09.

Attorneys and Law Firms

Bobby Kasolas argued the cause for appellants (Brach
Eichler, L.L.C., attorneys; Charles X. Gormally, of counsel
and on the brief with Mr. Kasolas).

Kenneth E. Meiser argued the cause for respondents in A–
4164–09T4 (Hill Wallack L.L.P., attorneys; Mr. Meiser and
Henry T. Chou, on the brief).

Patrick B. Minter argued the cause for respondents in A–
5344–09T4 (Graham Curtin, attorneys; Christopher J. Carey,
of counsel; Mr. Minter and Loren L. Speziale, on the brief).

Before Judges PAYNE, SIMONELLI and HAYDEN.

Opinion

PER CURIAM.

*1 These are back-to-back appeals, which we address in a single opinion. In A–4164–09, plaintiffs Larken Associates, L.L.C., JLB Associates, L.L.C. and Readington Commons II, L.L.C. (hereafter, plaintiffs or Larken) appeal from an order of summary judgment, dated April 28, 2010, dismissing plaintiffs' claims against defendants P & H Clinton Partnership, Pulte Homes of New Jersey, L.P. and Pulte Home Corporation of the Delaware Valley (hereafter, P & H) of malicious use of process, malicious abuse of process, tortious interference with economic advantage, and tortious interference with a contractual relationship. Plaintiffs also appeal orders denying their motions to disqualify P & H's counsel, Hill Wallack, L.L.P., and to pierce the attorney-client privilege between Hill Wallack and P & H in order to permit the depositions of certain Hill Wallack attorneys. In A–5344–09, plaintiffs Larken Associates, L.L.C., JLB Associates, L.L.C., Readington Commons II, L.L.C., and Lawrence Gardner, Larken's chief executive officer, (hereafter, Larken or plaintiffs) appeal a May 28, 2010 order of summary judgment dismissing their claims against defendants Hill Wallack, L.L.P. and attorneys Thomas Carroll, III, Stephen Eisdorfer, the Estate of Henry Hill, Esq., and Kenneth Meiser (hereafter, Hill Wallack) for abuse of process, malicious use of process, tortious interference with contractual relations and prospective economic advantage, and legal malpractice. We affirm.

I.

The background to these cases is lengthy and complex. In 1999, Larken contracted to purchase approximately eleven acres of undeveloped land in Readington with the intention of building a multi-use commercial development, called "Readington Commons," and consisting of a child care center, medical and general office buildings, and associated parking. At the time, Readington's sewer capacity, which was managed by the Readington–Lebanon Sewerage Authority (hereinafter, RLSA) was fully allocated, leaving no capacity for Larken's proposed development.

However, in January 1999, the RLSA began construction of a Department of Environmental Protection (DEP)-approved expansion of its sewage treatment facility that would enable it to accommodate an additional 400,000 gallons of sewage per day. As a result, 320,000 gallons per day would be added to Readington's existing allocation, and 80,000 gallons would be added to Lebanon's allocation. In March 2000, Larken paid \$143,635.24 to Readington for a specific allocation

of Readington's increased municipal capacity, which was deemed ready for use in August 2000.

In early January 2001, Larken hired Hill Wallack attorney, Thomas Carroll, III, for the limited purpose of obtaining preliminary site plan approval for Readington Commons. In that connection, Carroll attended two hearings before Readington's Planning Board on February 13 and April 9, 2001. The Board granted the requested approval on April 9, 2001, and its action was memorialized in a resolution dated May 14, 2001. The attorney-client relationship between Carroll and Larken ended on June 4, 2001 when Larken directed Carroll not to perform any additional legal work for it.

*2 By October 1, 2003, Larken had commenced and was "well into" the construction of site improvements for Readington Commons, having spent \$2.94 million on the project. In January and March 2004, Readington issued Larken Uniform Construction Code (UCC) construction permits for some of the proposed buildings.

In the meantime, P & H was planning to build a mixed residential development, called "Windy Acres," in nearby Clinton. The site was listed by Clinton in its substantive certification to the Council on Affordable Housing (COAH) as fulfilling nearly fifty percent of its inclusionary zoning obligation in accordance with the Court's *Mount Laurel* decisions.¹ Running through the tract upon which Windy Acres was to be built was the South Branch of the Rockaway Creek, which at the time was categorized by the DEP as a Fresh Water 2 (FW-2) trout maintenance stream and as containing Category Two waters for anti-degradation purposes.

Because Clinton's sewer capacity had been exhausted, in 1999, the municipality proposed building a new sewage treatment plant near Windy Acres that would discharge effluent into the South Branch, and in February 2000, Clinton and P & H entered into an allocation agreement granting P & H 300,000 gallons per day in sewerage capacity in return for payment, by P & H, of its pro rata share of construction costs. Thereafter, P & H applied to Clinton's Planning Board for preliminary site plan approval. However, following intense opposition to the development, the Board denied P & H's application. That denial was challenged by P & H in an action in lieu of prerogative writs and, accepting a special master's determination that the Board's action was arbitrary, unreasonable and indefensible, the court remanded P & H's

application to the Board for further proceedings as to, among other things, potable water and sewerage issues. *P & H Clinton P'ship v. Planning Bd. of Clinton Twp.*, Docket No. HNT-L-342-01 (Law Div. Feb. 4, 2004), *appeal dismissed*, Docket No. A-4179-03 (App. Div. April 9, 2007).

In the meantime, opposition was mounted to the construction by Clinton of the sewage treatment plant. In apparent response to that opposition, effective May 2003, the DEP reclassified the South Branch from a Category Two to a Category One waterway, thereby providing heightened protection to the South Branch's water quality and effectively precluding the construction of the plant as the result of the degradation in the quality of the water in the South Branch that would be caused by effluent discharges from the treatment facility. The DEP suggested that connection to a regional sewerage system was one of the alternatives to disposal in the stream.

Although Windy Acres was not within the RLSA's established sewer service area, the trunk line from Lebanon to the RLSA's plant ran immediately adjacent to the Windy Acres site. Thus, P & H requested an allocation from the RLSA of a portion of its sewerage capacity. When the RLSA refused, stating that P & H was not within its service area and its capacity was fully allocated, on July 23, 2003, P & H filed an action in lieu of prerogative writs seeking declaratory and injunctive relief against Clinton, the DEP and the RLSA and its constituent members, Readington and Lebanon, to compel access to and allocation of the RLSA's sewer capacity for Windy Acres. *P & H Clinton P'ship v. Twp. of Clinton*, Docket No. HNT-L-375-03 (Law Div. January 20, 2004), *aff'd as modified*, Docket No. A-2997-03 (App.Div. May 25, 2006), *certif. denied*, 189 N.J. 103 (2006).

*3 In that action, P & H alleged that because the DEP had reclassified portions of the South Branch, the only feasible way to construct Windy Acres, which was an integral part of Clinton's plan to meet its *Mount Laurel* obligations, was to obtain sewer service through the RLSA sewage treatment plant. In its complaint, P & H alleged Clinton's reliance upon Windy Acres to satisfy 182 units of its fair share *Mount Laurel* housing obligation; the lack of any other feasible means of disposing of Windy Acres' sanitary sewage; the existence of excess capacity at the RLSA sewage treatment facility; and the accessibility of RLSA sewerage lines to Windy Acres. It further alleged:

Under the New Jersey Constitution,
provision of safe, decent housing for

low and moderate income households is a regionwide obligation. All public entities whose action[s] affect land use have an affirmative judicially enforceable duty to facilitate the provision of low and moderate income housing so as to satisfy the unmet regional housing need, including facilitating the provision of sanitary sewage service. This duty extends to state agencies, sewage authorities, and municipalities, including defendants NJDEP, the Readington Lebanon Sewage Authority, Reading Township, Lebanon Borough, and the Lebanon Borough Sewerage Authority as well as Clinton Township.

P & H thus requested a declaratory judgment and injunctive relief enforcing the rights that it articulated, regardless of the fact that the development was not within the RLSA's sewer service area. None of the developers or landowners that had purchased or contracted for capacity in the RLSA's expansion was named in the suit.

Following the filing of suit, P & H was granted an order, dated October 1, 2003, requiring that defendants show cause why temporary restraints should not be entered enjoining the RLSA, Readington and Lebanon from permitting new connections or allocations of treatment capacity to any end user without first obtaining court approval, with the exception of developers of affordable housing. The order also required Readington Township and the Lebanon Borough Sewerage Authority to provide notification of the action to individuals and entities that had received an allocation commitment in connection with the expansion of the RLSA treatment facility or had received site plan or subdivision approval or had such approvals pending for developments that would require sewer treatment at the RLSA's facility.

In response, in November 2003, numerous developers, including Larken, then intervened to protect their allocation claims. Thereafter, the RLSA, Readington, Lebanon, and many of the intervenors moved to dismiss P & H's complaint, claiming that the capacity at the RLSA's plant was fully used, allocated or reserved. Additionally Larken moved to disqualify Hill Wallack as counsel for P & H, alleging a conflict of interest and violations of *Rules of Professional Conduct (RPC)* 1.9 and 1.7. The dismissal motion was

granted by the trial court, which dismissed P & H's complaint with prejudice.

*4 In an oral decision, placed on the record following argument on December 19, 2003, the court first addressed Larken's motion to disqualify Hill Wallack as P & H's counsel. It found that, although the two matters in which Hill Wallack provided representation were substantially related, Larken had not alleged that Carroll was privy to confidential information. Larken had conceded that it entered into its sewage capacity agreement in March 2000, nine months before Carroll's representation commenced. And "Mr. Carroll certifie[d] that his involvement was strictly limited to the environmental and traffic concerns and had nothing to do with the sewage capacity." Further, the court found that the interests of P & H and Larken were not materially adverse because the second form of order submitted by P & H in its action created an exemption from its effect for property owners that had previously received an allocation of sewer capacity in the RLSA plant and had received final site plan approval and/or subdivision approval and had building permits that allowed commencement of construction—conditions that Larken had met.

Addressing the motion to dismiss P & H's complaint, the court noted that the RLSA plant had a 1.6 million gallon per day capacity, and that the DEP presently authorized discharge flows of up to 1.45 million gallons per day on a staggered basis. Although the current average daily flow ranged from 580,000 to 730,000 gallons per day, usage was trending upward. Further, one report provided that 883,409 gallons per day of unused capacity had been allocated to end users. Thus, very little, if any, unused sewage capacity remained that could be redirected to Windy Acres. In these circumstances, the court maintained, plaintiff could not make the required showing, pursuant to *Crowe v. DeGioia*, 87 N.J. 412 (1981), of a probability of success on the merits thereby justifying injunctive relief.

In reaching that conclusion, the court acknowledged the scarce resources doctrine, recognized in a Mount Laurel context in *Hills Development Co. v. Bernards Township*, 103 N.J. 1, 61–63 (1986), which empowered the courts, pending the outcome of proceedings before COAH, to impose conditions or restraints upon the actions of a municipality designed to assure the municipality's future ability to comply with its *Mount Laurel* obligations. The court further noted that scarce resource principles were utilized by a trial court in *Samaritan Center, Inc. v. Borough of Englishtown*, 294

N.J. Super. 437 (Law Div.1996) to justify the issuance of a mandatory injunction to compel neighboring Englishtown to permit a nonprofit *Mount Laurel* developer to tap into its water and sewer lines because of their proximity to the developer's proposed low and moderate income housing development in Manalapan. However, the *P & H* court held:

In deciding whether Englishtown should be required to supply sewerage service to the Manalapan *Mt. Laurel* development, the *Samaritan* court was careful to weigh the hardships to the affected parties. The court only compelled Manalapan to assist after it balanced the equities—the public interest facilitated by requiring Manalapan to provide for Englishtown's *Mt. Laurel* construction versus any impact on Manalapan's water quality.

*5 Specifically, the court noted that the sewer line connection at issue was relatively unused. Further, the court noted that proper engineering could ensure that neither community experienced a deterioration in water quality. The court only agreed to grant the relief because a carefully drafted order “could include appropriate conditions” that would prevent negative impacts on end consumers in the area.

In contrast, the *P & H* court noted that, in *Bi-County Development of Clinton, Inc. v. Borough of High Bridge*, 174 *N.J.* 301 (2002), the Supreme Court determined not to extend the scarce resource doctrine to a developer that had paid a fee in lieu of constructing affordable housing. The Court noted, “as a general rule, a municipality that provides services for the benefit of its residents is under no obligation to extend its services to those beyond its borders. [*Id.* at 316.]” The *P & H* court further explained:

The Court held compelling circumstances should exist in order to justify under *Mt. Laurel* principles disturbing the general rule that a municipality may exclude another municipality or its residents from using or connecting to its sewer system. [*Id.* at 328.]

The Court continued, “we anticipate that general rule will be disturbed only in the case of developments that substantially and directly serve important regional and environmental interests. The Bi-County development is not in that category.” [*Ibid.*]

In addition, the Court held that compelling circumstances did not exist in that case, in part because the success of the proposed project was not at stake as plaintiffs had an alternate means of acquiring sewer services.

Applying the cited precedent to the present circumstances, the *P & H* court found that if it were to grant the requested relief, “numerous third parties will be negatively impacted.” It held: “[T]he relief sought is not ‘appropriate’ within the meaning of *Hills* because there's absolutely no legal precedent for a court to seize sewerage capacity previously allocated to private parties in favor of a *Mt. Laurel* developer.” While New Jersey's courts have gone to great lengths to effectuate *Mt. Laurel* policy, even requiring a municipality to provide sewer capacity for an inclusionary development in an adjoining municipality, “the courts have remained mindful of the effects of these efforts on third parties and have stopped short of divesting private third parties of previously allocated scarce resources.” Further, the court rejected *P & H*'s argument that the development was necessary to the fulfillment of Clinton's *Mt. Laurel* obligation, determining that the municipality could satisfy those obligations through approval of the development of another site.

The *P & H* court “found instructive” COAH's policies and administrative decisions in which the agency “expressly stopped short of divesting private third parties of scarce resources.” The court also found that *P & H* was “a sophisticated home builder,” and had “assumed the risk that logistical and environmental limitations might ultimately prevent the proposed development.” Thus, the court concluded that *P & H*'s “predicament is not deserving of the extraordinary relief requested,” and “even taking all of the facts and allegations in the complaint as true,” it concluded that “the relief requested is totally without legal basis.” The court therefore found that *P & H* had failed to state a claim upon which relief could be granted, and it granted dismissal pursuant to *Rule* 4:6–2(e) and *Rule* 4:46.

*6 Upon appeal, we affirmed the order of the trial court dismissing the complaint against the intervenors and the DEP with prejudice. We affirmed the dismissal of the complaint against the remaining defendants, but modified the order to render the dismissal “without prejudice to allow [*P & H*] to reinstate its complaint in the event that COAH determines that Windy Acres is necessary for Clinton's certified affordable housing plan and [*P & H*] is unable to negotiate a resolution with Clinton and/or RLSA to provide sewer capacity for Windy Acres.” *P & H Clinton P'ship, supra*, Docket No. A–2997–03 (slip op. at 33–34). We dismissed as moot Larken's cross-appeal of the court's refusal to disqualify Hill Wallack. *Id.* at 32–33. The Supreme Court denied certification. *P & H Clinton P'ship, supra*, 189 *N.J.* at 103.

II.

During the period prior to the conclusion of appeals from the trial court's ruling in *P & H*, Provident Bank wrote a February 3, 2005 letter to Larken refusing construction financing for its project, stating:

In light of the pending law suit regarding the possible loss of sewer allocation for the project, we are not in a position to give due consideration to your request for construction financing at this time.

The Bank would be in a position to consider construction financing on the project once the pending litigation has been satisfactorily resolved.

Consequently, in mid-2005, Larken filed a complaint and first-amended complaint against P & H Clinton Partnership and associated entities, Pulte Homes of New Jersey, L.P., and Pulte Home Corporation of the Delaware Valley (the underlying action), the dismissal of which forms the basis for one of the present appeals. In it, Larken contended that P & H's prior suit against the RLSA and other entities constituted malicious use of process, malice, tortious interference with economic advantage and tortious interference with contract. A lengthy period of discovery and motion practice followed.

In November 2007, more than two years after Larken filed its first-amended complaint, it moved to disqualify Hill Wallack from its representation of P & H. The motion was heard by Judge Accurso and denied, as was a subsequent motion for reconsideration² and a motion for leave to appeal. Judge Accurso held that the present action by Larken alleging that P & H's suit was maliciously instituted without probable cause and that it constituted interference with Larken's contractual relationships and its prospective economic advantage was not substantially related to Hill Wallack's limited five-month representation of Larken in connection with its application for preliminary site plan approval, and that no confidential information was imparted. Additionally, the court held that any objection to the representation had been waived by Larken's failure to assert the conflict for more than two years after its suit was filed.

Thereafter, Larken filed a second-amended complaint alleging in four counts tortious interference with contractual relations, tortious interference with prospective economic

advantage, abuse of process, and malicious use of process. In January 2009, Larken again moved to disqualify Hill Wallack, and in September 2009, it moved to pierce the attorney-client privilege in order to take the depositions of Hill Wallack attorneys. In support of the disqualification motion, Larken submitted as proof of Carrol's knowledge of its sewer capacity allocation the transcript of the February 13, 2001 hearing before Readington's Planning Board. That transcript disclosed that, after the Board determined to carry the Larken matter to April 9, Gardner introduced himself, stated that he had paid approximately \$150 thousand for sewer rights,³ and that Larken's contract to purchase the Readington property expired in May. As a consequence, he sought a final decision at the April meeting, which in fact occurred.

*7 Judge D'Annunzio determined to defer the disqualification and discovery issues until the parties filed summary judgment motions on the "core issue" of "whether [P & H's] attempt to get relief from the sewer problem was a legitimate reaction [to] the DEP[s] reclassifying the stream as a Category One stream."

P & H then moved for summary judgment, and Larken filed a cross-motion for "summary judgment on the element of lack of probable cause" in connection with counts three and four of the complaint alleging abuse of process and malicious use of process. In a letter opinion dated March 11, 2010, the court granted summary judgment to P & H on counts three and four, finding that P & H had probable cause to file its underlying lawsuit seeking a sewerage allocation from the RLSA and its participating municipalities.

In doing so, the court discussed *Dynasty Building Corporation v. Borough of Upper Saddle River*, 267 N.J.Super. 611 (App.Div.1993), certif. denied, 135 N.J. 467, 468 (1994), a decision requiring the Borough of Ramsey to provide sewage treatment capacity, if sufficient service and capacity existed, to Dynasty's inclusionary *Mt. Laurel* development to be built in Upper Saddle River pursuant to a revised intermunicipal agreement governing the provision of sewer services by Ramsey. The court then discussed *Bi-County*, the *Bi-County* Court's approval of the rationale of *Samaritan* as consistent with the Court's holdings in *Mt. Laurel I and II*, and the *Bi-County* Court's limitation of remedies such as granted in *Samaritan* to instances in which "[c]ompelling circumstances" justified an exception to the general rule that a municipality could exclude another municipality from using or connecting to its sewer system.

The court then observed that *Bi-County* was decided in 2002 and that, in the following year, its holding had not been subsequently construed. It held:

Thus, when P & H filed the underlying action in July 2003, the law was that where there are “compelling circumstances” a *Mt. Laurel* developer could petition a court to require a public sewage treatment facility in another jurisdiction to accept and treat the development's sewage, provided the development built affordable housing. Although the Supreme Court did not define “compelling circumstances” or the range of remedies that would be available, its approval of *Samaritan* suggested that failure of a *Mt. Laurel* project in the absence of a sewerage system qualified as compelling circumstances.

The court then noted that it was unlikely that Windy Acres could be built if it could not obtain capacity from the RLSA. It found that, although a factual issue existed as to whether P & H could have built a DEP-compliant sewage treatment plant, in bringing suit, P & H was nonetheless entitled to rely upon the fact that it reasonably believed it was unable to do so.

An issue in the underlying litigation, the court held, “would have been whether the RLSA had the capacity to serve Windy Acres and, if not, whether a *Bi-County* remedy could include an order to expand the capacity, at the developer's expense.” Although that issue had not been previously resolved, the court found it “appropriate for P & H to test *Bi-County's* application and limits through litigation.”

*8 The court held:

P & H was caught in a collision between the state policy in support of the provision of affordable housing, which P & H was attempting to advance, and the state policy to protect its waters. In light of *Bi-County*, *Dynasty* and *Samaritan*, a reasonably prudent person could reasonably believe that the circumstances in which P & H found itself constituted “compelling circumstances” within the meaning of *Bi-County* and that resort to litigation to establish whether or not RLSA had or could develop the capacity to serve Windy Acres was justifiable. Viewed objectively, there

was a “good or sound chance of establishing the claim to the satisfaction of the court...” *LoBiondo* [*v. Schwartz*], 199 N.J. [62,] 93 [(2009)].

The court rejected Larken's claim that the trial court's decision dismissing P & H's suit established a lack of probable cause as a matter of law. The court noted that on P & H's appeal of the dismissal of its underlying action, we set aside the trial court's with-prejudice dismissal of the complaint as to the RLSA and its participating municipalities, holding that it should have been without prejudice pending further action by COAH. The court reasoned that, by modifying the trial court's judgment, we “recognized a potential legal and factual basis for the underlying action, contrary to the trial court's statement that it was solely without foundation.”

The court also found erroneous the view that the underlying suit was an attempt to permanently seize capacity previously allocated to Larken and others. The court held, “P & H requested no such relief in the complaint, and the injunctive relief sought on the return date of the order to show cause was interim relief to maintain the status quo, but subject to a specifically defined safety valve and the general safety valve of ‘good cause.’” “As a final matter, the court held that we had effectively narrowed *Bi-County* by holding that “compelling circumstances” would exist to compel the RLSA to provide sewerage service only if there were no other sites that could meet the township's fair share obligation, and that such a narrowing could not have been reasonably anticipated by P & H when it commenced the underlying suit.

The court ended its opinion by stating:

The court concludes that probable cause existed to file the underlying action, that the law and the facts supported an arguable case of “compelling circumstances” within the meaning of *Bi-County*, that P & H had a “good or sound chance” of establishing its claim, and that the filing of the underlying action was an objectively reasonable exercise by P & H of its right to seek judicial intervention to resolve the problem created by the DEP's reclassification of South Branch of Rockaway Creek.

The court did not address the tortious interference claims directly because of the absence of briefing, but observed that

its determination regarding probable cause “would appear to preclude” the remaining claims.

*9 In a supplemental written opinion, dated April 28, 2010, the court granted summary judgment on Larken's remaining claims of tortious interference with business advantage and contract arising out of the underlying action. The court concluded that “1) defendants were privileged to file the litigation; and 2) the court's determination in the malicious process case that defendants were justified in filing the underlying action eliminates the ‘malice’ element of tortious interference.” The court thus entered an order of summary judgment in P & H's favor on all four counts. An appeal followed.

While motions for summary judgment in Larken's action against P & H were pending, on December 17, 2009, Larken filed its action against Hill Wallack, alleging abuse of process, malicious prosecution/malicious misuse of process, tortious interference with contractual relations, tortious interference with prospective economic advantage, and legal malpractice.

In lieu of filing an answer, on or about February 18, 2010, Hill Wallack moved to dismiss the complaint. In response, Larken's counsel filed a certification, to which he attached a transcript of the February 13, 2001 public hearing before Readington's Planning Board. That transcript disclosed that, when the Board indicated that it was carrying Larken's application for preliminary site plan approval to April 9, Lawrence Gardner, the chief executive officer of Larken, requested that the Board make a final decision at the April meeting. He disclosed that he had paid “150 some odd thousand dollars to the sewer authority to acquire the sewer for this property” and that he was under a contract to purchase the property that would expire in May. Therefore, timing was of concern to him. According to counsel, this transcript confirmed that Carroll knew Larken was relying heavily on its sewer capacity reservation in seeking site plan approval and purchasing the property for its project.

Although issue was joined, the parties in Larken's action against Hill Wallack agreed to defer Hill Wallack's motion to dismiss until Judge D'Annunzio had issued a final decision in Larken's action against P & H, which occurred on April 28, 2010. Following oral argument before Judge Goodzeit on Hill Wallack's motion against Larken, she granted summary judgment, finding in a written decision dated May 28, 2010, Larken's action for legal malpractice to be barred by the statute of limitations and its remaining causes of action

barred by application of collateral estoppel as the result of Judge D'Annunzio's decision. An order dismissing Larken's complaint against Hill Wallack with prejudice was entered on June 21, 2010.

III.

On appeal from the orders for summary judgment, we adopt the same legal standard employed by the trial court. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995); *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 N.J.Super. 162, 167 (App.Div.), *certif. denied*, 154 N.J. 608 (1998). We thus examine the competent evidentiary materials presented in a light most favorable to Larken to determine if there exists any genuine issue as to any challenged material fact, and if there is not, whether P & H and Hill Wallack are entitled to judgment as a matter of law. *Brill, supra*, 142 N.J. at 529, 539–41. Having done so, we conclude that summary judgment was properly entered in these matters.

*10 We first address issues raised in A–4164–09, Larken's appeal from the order of summary judgment in favor of P & H. We commence with the appeal from the dismissal of Larken's claim of malicious use of process, a claim that is disfavored because of its potential to chill free access to the courts. *LoBiondo v. Schwartz*, 199 N.J. 62, 91 (2009). To establish a cause of action, Larken must prove (1) a civil action was instituted by P & H against it;⁴ (2) the action was motivated by malice; (3) probable cause to bring the underlying suit was lacking; (4) the action was terminated favorably to the party bringing the malicious use of process claim; and (5) that party had suffered a special grievance. *Id.* at 90.

Determining whether probable cause has been demonstrated is generally an issue for the court, unless the facts giving rise to probable cause are themselves in dispute. *Id.* at 93. Whether there is probable cause is determined by means of an objective analysis. *Ibid.* (citing *Westhoff v. Kerr S.S. Co.*, 219 N.J.Super. 316, 321 (App.Div.), *certif. denied*, 109 N.J. 503 (1987)). “The question to be decided is whether, in the prior suit, the facts supported the actor's ‘honest belief’ in the allegations.” *Ibid.* (citing *Westhoff, supra*, 219 N.J.Super. at 321). In other words, using a reasonably prudent person standard, whether “there was a good or sound chance of establishing the claim to the satisfaction of the court[.]” *Ibid.* (citing *Westhoff, supra*, 219 N.J.Super. at 321–22).

"Malice ... is defined as the 'intentional doing of a wrongful act without just cause or excuse.'" *Id.* at 93–94 (quoting *Jobes v. Evangelista*, 369 N.J. Super. 384, 398 (App. Div.), certif. denied, 180 N.J. 457 (2004)). Malice can "be inferred from a finding that a defendant has neither probable cause nor a reasonable belief in probable cause." *Id.* at 94.

Our review of the record in this matter satisfies us that Larken failed to offer evidence that P & H lacked probable cause to bring its action against the parties to that suit. We therefore affirm substantially on the basis of the sound and well-articulated opinion of Judge D'Annunzio. We add only the following to address the particular arguments raised by Larken on appeal.

Larken raises the broad argument that no legal authority supports the trial court's finding that P & H had probable cause to file the underlying action. It supports that position first by reviewing nine COAH rulings reached between 1977 and 1995 and arguing that they demonstrate that not even the agency would order a municipality to give its own developers access to already allocated resources. It also relies on N.J.A.C. 5:93–3.4(c)(2), a regulation that controls COAH's substantive certification review when a municipality has sufficient land to support an inclusionary development but insufficient sewer and water. The regulation permits the municipality's housing obligation to be deferred until adequate sewer and water are made available and does not provide for a remedy such as envisioned in *Samaritan* and *Bi-County* or for interference with existing allocations. Finally, it relies on a 2003 certification submitted in the underlying action by Art Bernard, COAH's policy writer from 1986 to 1993 and its former director from 1993 to 1994, stating that COAH had never interfered with any previously committed sewer allocations, even if it could have done so.

*11 However, when the *Bi-County* Court asked COAH to file an amicus curiae brief addressing the issue of "[w]hether COAH views the [Fair Housing Act] and its implementing regulations as permitting an inclusionary development to demand access to a neighboring community's water/sewer system if such access will result in substantial cost savings while presenting no public health or safety concerns to the neighboring community[.]" 174 N.J. at 314–15, COAH responded: "it lacked the jurisdiction to decide whether an inclusionary developer in one municipality can compel another municipality to allow access to its sewer system and declined to take any position on that issue." *Id.* at 315. Additionally, COAH recognized that its regulations did not

apply to neighboring municipalities or sewer authorities in municipalities that were not seeking substantive certification, and that it lacked statutory authorization to grant relief from restrictions imposed by a neighboring municipality. *Id.* at 325–26. The Supreme Court found, therefore, that COAH's policies could not assist it in resolving the issue of whether a developer of an inclusionary development could demand access to a neighboring community's water and/or sewer systems. *Id.* at 326.

As a consequence, we find the administrative evidence upon which Larken relies to have no relevance in determining the legal issue of whether P & H had probable cause to file the underlying action, which challenged whether a developer of an inclusionary development could demand access to a neighboring community's sewer system. Indeed, as P & H notes in its brief, COAH announced in one of its agency decisions, *Morel & Segal, Inc. v. Lopatcong Township*, COAH Docket No. 94–646 (Oct. 11, 1995), that it did not have jurisdiction to adjudicate third-party rights in scarce resource matters, and the parties would have to seek relief in the courts. Slip op. at 16–20.

Larken argues additionally that no published case supports the premise that a developer, promising to construct affordable housing, can demand sewage capacity in a neighboring municipality that has contractually allocated all or most of its own capacity to local developers, and for that reason, P & H could not have had a reasonable expectation or honest belief that it could obtain that capacity. However, even if we accept the proposition that P & H knew all capacity had been allocated,⁵ it was clear that not all allocated capacity had been used, and the evidence did not establish when use, if ever, would occur. Thus, an issue existed as to the appropriate use of that unused capacity in circumstances when it was needed by a developer of affordable housing, and a further issue existed as to whether the RLSA could be compelled to engage in a further expansion of its facilities at P & H's expense. While these issues had not been addressed in any of the cases decided to date, we concur with Judge D'Annunzio's view that the breadth of the undefined term "compelling circumstances," used in *Bi-County* to justify relief to *Mt. Laurel* developers faced with inadequate sewerage facilities in the municipality in which construction was planned, and the absence of any discussion in that opinion of specific remedies, reasonably left open to P & H the opportunity to test the outermost bounds of that decision. See N.J.S.A. 2A:16–52, a part of the Declaratory Judgment Act, N.J.S.A. 2A:16–50 to 62; *N.J. Ass'n for Retarded Citizens, Inc. v. N.J. Dep't*

of Human Servs., 89 N.J. 234, 242 (1982); *In re Ass'n of Trial Lawyers of Am.*, 228 N.J. Super. 180, 183 (App.Div.), *certif. denied*, 113 N.J. 660 (1988).

*12 We disagree with Larken's position that the remedies available to P & H were limited by the Court's decision in *Mongiello v. Borough of Hightstown*, 17 N.J. 611 (1955). That decision's holding that "[a] municipal [utility] system should be so operated as to serve effectively the municipality and its residents," *id.* at 618 and that "non-residents can incidentally be served as an accommodation and without endangering the local service ... but such incidental service to non-residents may not fairly be converted into an obligation to render additional non-resident service tending to jeopardize the service within the municipality," *ibid.*, was rendered long before the decisions in *Mt. Laurel* and *Bi-County* and in a different context. The decision is thus not dispositive here.

Additionally, we reject Larken's argument, based on the operation of the doctrines of *res judicata* and collateral estoppel, that the trial court's decision dismissing P & H's action, together with our decision affirming that dismissal, effectively barred Judge D'Annunzio from finding that P & H had probable cause to commence that action. *Res judicata* bars repetitive litigation when there has been a final judgment and the causes of action, issues, parties, and the relief sought are substantially alike. *Culver v. Ins. Co. of N. Am.*, 115 N.J. 451, 460 (1989). For collateral estoppel to apply,

the party asserting the bar must show that:

(1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

[*In re Estate of Dawson*, 136 N.J. 1, 20 (1994) (citations omitted).]

We do not regard either doctrine as barring Judge D'Annunzio from opining as he did. P & H's underlying action for non-resident sewer access and Larken's action for malicious use of process cannot be considered the same controversy, or as having the same issues. In P & H's underlying action, which was not filed against Larken, the issue was whether P & H presented sufficient compelling circumstances for a non-resident allocation of the RLSA's sewer capacity and for

an order imposing restraints on the RLSA's disposition of scarce sewer resources. Here, the issue is whether P & H had probable cause to commence the action in the first place. Moreover, the fact that P & H lost in the underlying action is not evidence that it brought those proceedings without probable cause to do so. *Westhoff, supra*, 219 N.J. Super. at 322.

The court's decision in *Bellemead v. P & H Clinton Partnership*, Docket No. HNT-L-22-04, denying P & H's motion to dismiss the complaint on the pleadings pursuant to *Rule 4:6-2* is similarly non-dispositive. The judge in that matter did not have the advantage of the evidence presented in this matter. Moreover, because the matter settled, no final disposition on the merits was ever reached.

*13 In summary, the undisputed evidence demonstrates that, in July 2003 when the underlying action was filed by P & H, its Windy Acres development constituted a major component of Clinton's substantive certification in support of its affordable housing obligation. At that time, no other developer had come forward to propose an alternative to the Windy Acres site that would offer as many affordable housing units. However, because the DEP, seemingly bowing to pressure, determined to raise the water purity classification for the South Branch, it became all but impossible for Clinton to build the sewage treatment plant that was envisioned as the facility that would handle Windy Acres' waste. Acting in accordance with the DEP's recommendation that it connect to a regional wastewater treatment facility as an alternative to disposal utilizing the South Branch, P & H filed suit against the RLSA and its participating municipalities. At that time, although the RLSA's treatment capacity had been expanded, and allocations of that capacity had been made, the plant was not operating at full capacity and, although usage was incrementally increasing, it was not known when or if capacity would be reached.

In these circumstances, we are satisfied, as was Judge D'Annunzio, that, utilizing a reasonably prudent person standard, P & H had a "reasonable belief that there was a good or sound chance of establishing [its] claim to the satisfaction of the court." *LoBiondo, supra*, 199 N.J. at 93.

We are similarly satisfied that, in seeking a temporary injunction, P & H did not engage in an abuse of process—a claim that, to succeed, requires proof that P & H performed an additional act during the underlying action that represented an illegal, improper or perverted use of legal process, or a

use neither warranted nor authorized by that process, and that P & H had an ulterior motive and used its action as a means to coerce or oppress Larken. *Wozniak v. Pennella*, 373 N.J. Super. 445, 461 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005). In this regard, we agree with Judge D'Annunzio's rejection of any perception that P & H sought to use the underlying suit to seize permanently the capacity relied upon by Larken and others. The judge held, and we agree: "P & H requested no such relief in the complaint, and the injunctive relief sought on the return date of the order to show cause was interim relief to maintain the status quo, but subject to a specifically defined safety valve and the general safety valve of 'good cause.'" "

Further, because of the uncertain parameters of the law after the Court rendered its decision in *Bi-County*, we cannot conclude upon de novo review that P & H abused the motion process by attempting to restrain the use of allocated, but physically unused, scarce resources at the RLISA's sewage treatment plant for its own inclusionary development in neighboring Clinton or that Judge D'Annunzio erred by not giving dispositive effect to our affirmance of the trial court's dismissal of P & H's order to show cause.

*14 Similarly, we affirm the dismissal of Larken's claims of tortious interference with contract and business relationships, determining that it failed to demonstrate, as it must have shown, *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 751 (1989), that P & H was motivated by malice to interfere with Larken's sewer allocation contract or its anticipated economic benefits, because P & H was justified in challenging the state of the law after *Bi-County*.

IV.

As a final matter in connection with the appeal in A-4164-09, we address Larken's argument that Judge Accurso and Judge D'Annunzio erred in failing to disqualify Hill Wallack from representing P & H in the underlying litigation and that Judge D'Annunzio erred by refusing to grant Larken's motion to pierce the attorney-client privilege between Hill Wallack and P & H before ruling on the parties' cross-motions for summary judgment. Larken alleges that, as the result of Hill Wallack's prior representation of the company, Hill Wallack knew of Larken's sewer capacity reservation and used that "confidential" information against Larken when it represented P & H in the underlying and current actions, creating a conflict of interest in violation of *RPC* 1.9 and 1.7.

The issue of Hill Wallack's disqualification was raised by Larken in the underlying action instituted by P & H against the RLISA and others, and the order denying Larken's disqualification motion was the subject of a cross-appeal by Larken in that matter. Larken argued in that connection that Hill Wallack's representation of P & H had violated *RPC* 1.9. Upon review, we found the issues raised to be moot under *Rule* 2:8-2. *P & H Clinton P'ship, supra*, Docket No. A-2997-03 (slip op. at 32-33). As a consequence, we will not address that matter further, and will focus upon Larken's present suit.

In that regard, our review of the record in this matter satisfies us that Judge Accurso did not abuse her discretion in determining, among other bases for denying Larken's motion, that Larken's motion to disqualify Hill Wallack, filed in November 2007, more than two years after it had commenced its suit against P & H and issue had been joined, was not timely filed, and as a result Larken's objections to the representation had been waived. As a consequence of the judge's initial order and subsequent order upon reconsideration after examination of additional evidence, the issue became settled, and there was no reason for its further reconsideration by Judge D'Annunzio in January and September 2009.

As Judge Accurso recognized, Larken had raised the alleged conflict of interest in 2003, and again in its cross-appeal after dismissal of P & H's action. In 2005, Larken instituted its own action, and despite its evident knowledge of conduct that it claimed constituted a conflict of interest, it sat back without objection while Hill Wallack appeared for and actively represented P & H for a period of two years before filing its disqualification motion.

*15 To disqualify Hill Wallack, Larken was required to prove that "the matters between the present and former clients [were] 'the same or ... substantially related,' and the interests of the present and former clients [were] 'materially adverse.'" *City of Atl. City v. Trupos*, 201 N.J. 447, 462 (2010) (quoting *RPC* 1.9(a)). The party seeking to disqualify counsel also "bears the burden of proving that disqualification is justified." *N.J. Div. of Youth & Family Servs. v. V.J.*, 386 N.J. Super. 71, 75 (Ch. Div. 2004) (internal quotations and citation omitted). "[B]ecause 'the appearance of impropriety' standard no longer has any vibrancy when gauging the propriety of attorney conduct, surmise alone cannot support an order of disqualification." *City of Atl. City, supra*, 201

N.J. at 469. Our review of a trial court's decision on a disqualification motion is de novo. *Id.* at 463.

Given the nature of the allegations in Larken's suit against P & H, we have difficulty perceiving a basis for Hill Wallack's disqualification. Nonetheless, even assuming a disqualifying conflict existed as the result of Hill Wallack's representation of P & H in this case, we agree that the conflict was waived.

In *Dewey v. R.J. Reynolds Tobacco Co.*, 109 *N.J.* 201, 215 (1988), the Supreme Court "conclude[d] that under RPC 1.9 a mandatory disqualification is no longer required." Similarly, in *Alexander v. Primerica Holdings, Inc.*, 822 *F.Supp.* 1099, 1115 (D.N.J.1993), writ of mandamus granted, 10 *F.3d* 155 (3d Cir.1993), the federal district court declared that "[w]aiver is a valid basis for the denial of a motion to disqualify." In that case, the court held that a motion seeking disqualification, filed three years after commencement of the litigation and in circumstances in which facts regarding the conflict had been known from the outset, was untimely. The court stated:

[A] finding [of waiver] is justified ... when a former client was concededly aware of the former attorney's representation of an adversary but failed to raise an objection promptly when he had the opportunity. In [this] circumstance, the person whose confidences and secrets are at risk of disclosure or misuse is held to have waived his right to protection from that risk.

[*Id.* at 1115.]

Likewise, in *Chattin v. Cape May Greene, Inc.*, 243 *N.J.Super.* 590 (App.Div.1990), *aff'd o.b.*, 124 *N.J.* 520 (1991), we held that the trial court had not abused its discretion when denying a motion to disqualify opposing counsel, because the movant had "unduly delayed raising the issue until shortly before the retrial, even though it was aware of the facts relevant to the alleged conflict for several years." *Id.* at 609.⁶

In *Alexander*, the federal court set forth five factors relevant to a determination whether the moving party seeking disqualification of an opponent's counsel had waived the right to that relief: "(1) the length of the delay in bringing the motion to disqualify, (2) when the movant learned of the conflict, (3) whether the movant was represented by counsel during the delay, (4) why the delay occurred, and (5) whether disqualification would result in prejudice to the non-moving party." *Alexander, supra*, 822 *F.Supp.* at 1115. Particularly

important was whether the movant appeared to be using the motion as a technical maneuver. *Ibid.* (citing *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436, 105 S.Ct. 2757, 2763, 86 *L. Ed.2d* 340, 350 (1985) (expressing a concern for the "tactical use of disqualification motions to harass opposing counsel"))).

*16 Application of the test articulated by the court in *Alexander* to the present facts suggests that the court's denial of Larken's disqualification motion was properly justified. As we have noted, Larken waited two years after Hill Wallack's appearance in the matter to seek the firm's disqualification. Yet, it was aware of what it perceived to be a conflict from the outset and had supporting evidence in hand or available to it throughout the litigation. Moreover, Larken was a sophisticated developer that was vigorously represented by competent counsel at all stages of the litigation.

Turning to Larken's final attempts to disqualify Hill Wallack and to pierce the attorney-client privilege, we find Judge D'Annunzio's decision to defer Larken's motions pending a determination of the substantive issues raised by the litigation to have been proper, given Hill Wallack's continuous representation of P & H since 2003 and the imminent filing of dispositive motions. In particular, we note that, pursuant to our prior analysis of the probable cause issue in light of the decisions in *Samaritan* and *Bi-County*, any confidential information that P & H possessed as the result of Hill Wallack's representation of Larken was immaterial to whether P & H had probable cause to bring its underlying action.

V.

We next address the issues raised in A-5344-09 by Larken in its appeal from the order of summary judgment entered by Judge Goodzeit in favor of the Hill Wallack defendants. In that regard, we agree with Judge Goodzeit that Larken's claims against the Hill Wallack defendants for malicious prosecution/ malicious misuse of process, tortious interference with economic advantage and tortious interference with contract were barred by collateral estoppel. The identical issues were decided in Larken's action against P & H; the issues were clearly litigated in that proceeding, resulting in an order of summary judgment in P & H's favor; and the issues were central to the court's determination. *In re Estate of Dawson, supra*, 136 *N.J.* at 20. Further, the party against which the doctrine was to be asserted, Larken, was essentially the same as the plaintiff in the action against P &

H. The only difference was the addition of Lawrence Gardner as a plaintiff in the present matter, and he was clearly in privity with Larken. Similarly, Hill Wallack, as P & H's agent, was in privity with P & H.

We recognize, as did Judge Goodzeit, that even when, as here, all the essential elements required for the application of collateral estoppel are found to exist, the doctrine should not be applied when it is unfair to do so. *Fama v. Yi*, 359 N.J.Super. 353, 359 (App.Div.), *certif. denied*, 178 N.J. 29 (2003). "In all cases in which collateral estoppel is sought to be invoked, the court must, in the exercise of its discretion, weigh economy against fairness." *Barker v. Brinegar*, 346 N.J.Super. 558, 566 (App.Div.2002). In conducting that weighing process, Judge Goodzeit stated:

*17 [W]ith the exception of the legal malpractice claim ..., plaintiffs seek to pursue their claims against Hill Wallack based on Hill Wallack's representation of P & H. In New Jersey, "an attorney acts as an agent for his client." *Hewitt v. Allen Canning Co.*, 321 N.J.Super. 178, 184 (App.Div.1999) [*certif. denied*, 161 N.J. 335 (1999)]. This proposition reflects the redundancy of plaintiffs' pursuit of their previously-litigated abuse of process, malicious prosecution, tortious interference with contractual relations, and tortious interference with prospective economic advantage claims; for purposes of those claims, *Hill Wallack is the same party as P & H*. In other words—and again, leaving aside the malpractice claim—given that Hill Wallack was an agent for P & H, plaintiffs are pursuing these claims for a second time against virtually the same party against whom such claims were already pursued. In short, plaintiffs are seeking a second bite at the apple by prosecuting the same claims against agents of P & H.... [T]he very purpose of collateral estoppel is to prevent parties from relitigating identical claims determined adversely as to the party against whom collateral estoppel is asserted. Accordingly, it is not unfair to preclude plaintiffs from pursuing these claims....

Further, the judge observed, given the length of the previous litigation, it was likely that protracted litigation would ensue here, as well. And given the existence of an attorney-client relationship between P & H and Hill Wallack, the judge would anticipate many assertions of the attorney-client privilege, followed by multiple motions seeking to defeat that privilege. Thus, the invocation of collateral estoppel would not only avoid repetitious litigation, it would conserve judicial resources. Additionally, the judge found that any substantive review of the merits of Larken's non-malpractice

claims would require inquiries identical to those already conducted by Judge D'Annunzio.

We concur with Judge Goodzeit's reasoning. We reject Larken's argument that, because summary judgment was entered in its action against P & H before discovery was complete, it was deprived of a full and fair opportunity to litigate its claims against that entity. The issue before Judge D'Annunzio was a purely legal one—whether, judged objectively, P & H had probable cause to commence the underlying action to test the boundaries of the "compelling circumstances" required by *Bi-County*, *supra*, 174 N.J. at 328, for a non-resident to demand allocation of sewer capacity from a neighboring sewerage authority. Since the disposition of that issue involved only a review of law that was current at the time P & H filed its sewer access suit, no facts or witness credibility would have affected or been material to the judge's decision. Thus, Larken was not precluded from a full and fair opportunity to litigate the issues relevant to its suit as the result of the timing of the parties' dispositive motions. Accordingly we affirm Judge Goodzeit's order of summary judgment substantially on the basis of her written opinion in the matter.

VI.

*18 As a final matter, we address the dismissal, by order of summary judgment, of Larken's claim against Hill Wallack of legal malpractice on statute of limitations grounds.

In finding the cause of action to be barred, Judge Goodzeit appropriately applied the six-year statute set forth in *N.J.S.A. 2A:14-1*. *Vastano v. Algeier*, 178 N.J. 230, 233 (2003). "Ordinarily, a cause of action 'accrues when an attorney's breach of professional duty proximately causes a plaintiff's damages.'" *Ibid.* (quoting *Grunwald v. Bronkesh*, 131 N.J. 483, 492 (1993)). Pursuant to New Jersey's discovery rule, "a cause of action [for legal malpractice] accrues when a client suffers actual damages and knows or should reasonably know that the lawyer has breached a professional duty owed to the client." *Id.* at 232. Actual injury and knowledge of fault are both required. *Olds v. Donnelly*, 150 N.J. 424, 439 (1997). However, the statute of limitations begins to run "when a plaintiff knows or should know the facts underlying [injury and fault], not necessarily when a plaintiff learns the legal effect of those facts." *Ibid.*

In this matter, Judge Goodzeit properly found that Larken knew or should have known of Hill Wallack's alleged fault at the time that it moved to intervene in the action filed by the firm on behalf of P & H against the RLSA seeking a sewer allocation and potentially threatening the allocation previously given to Larken. At that time, Larken retained counsel, and thus commenced to incur attorney's fees to protect its right to the allocation that it had purchased. Precedent holds that the incurring of attorney's fees, prior to any decision in a matter, constitutes damages sufficient to commence the running of the statute of limitations. *Grunwald, supra*, 131 N.J. at 495.

[A] client may suffer damages, in the form of attorney's fees, before a court has announced its decision in the underlying action. "It is not necessary that all or even the greater part of the damages have to occur before the cause of action arises." *United States v. Gutterman*, 701 F.2d 104, 106 (9th Cir.1983) (applying California law) (quoting *Bell v. Hummel & Pappas*, 136 Cal.App.3d 1009, 186 Cal.Rptr. 688, 694 (Ct .App.1982)).

[*Ibid.*]

Larken filed its action against Hill Wallack on December 17, 2009. Larken moved to intervene in the P & H matter on December 10, 2003—a date more than six years prior to Larken's commencement of its action against the firm and its lawyers. As a consequence, we find that Judge Goodzeit properly dismissed Larken's malpractice claim, correctly recognizing that a legal malpractice claim may accrue while the underlying claim is being litigated. *Id.* at 499–500.

We reject Larken's argument that its cause of action against Hill Wallack did not accrue until P & H's suit was dismissed on January 20, 2004, until we rendered our decision on May 5, 2005, until the Supreme Court denied certification on December 8, 2006, at a later date when Larken received its first building permits, or thereafter when depositions commenced. As we have illustrated, precedent does not support Larken's position.

*19 Moreover, we note that Larken's own allegations in its complaint against Hill Wallack and its admissions in oral argument before the trial court reveal its knowledge of alleged malpractice at the time it intervened in P & H's action against the RLSA. In paragraphs 92 through 94 of its complaint, Larken alleged that as the result of Hill Wallack's representation of it for purposes of preliminary site plan approval, the firm and, particularly, Carroll, were aware that

Larken heavily relied upon the 7,628 gallons per day of sewer capacity that it had purchased from the RLSA in obtaining preliminary site plan approval, in determining to purchase the property for \$1 million for purposes of development, and in obtaining the governmental approvals necessary to develop Readington Commons. Larken continued:

95. Upon learning of Defendants' filing of the RLSA litigation and Order to Show Cause, Lawrence Gardner contacted Hill Wallack and Carroll and advised them that he believed Hill Wallack was in an ethical conflict of interest due to Hill Wallack's representation of P & H in a matter adverse to Larken involving the same or similar subject matter that Hill Wallack had represented Larken in. The ethical conflict of interest was obvious since under the Rules of Professional Conduct, a law firm is prohibited from representing a client against a former client where the present and former matters are "the same" or a "substantially related matter", [sic] or where the two matters are practically the same or where there is ... a patently clear relationship between them.

96. The RLSA lawsuit was the "same" or "substantially related" to Hill Wallack's representation of Plaintiffs in obtaining site plan approval for Readington Commons.

... In essence, Defendants were trying to undo the work they had been paid by Larken to previously perform.

....

99. As a direct and proximate result of the foregoing, Plaintiffs have been damaged and will continue to suffer damages.

Later, during oral argument, Larken's counsel declared that "it is very clear ... legal malpractice" occurred because Carroll knew that Larken had paid to secure sewer capacity and then "[a]ll of a sudden we have Hill Wallack representing [P & H] to try and take away the very foundation of all the work that they performed for [Larken.]" Thus, it is clear that Larken had knowledge of its alleged injury at the time that it retained counsel for the purpose of intervening in the RLSA matter more than six years before Larken instituted suit against Hill Wallack.

We are therefore satisfied that summary judgment was properly granted dismissing each of Larken's claims in its suits against P & H and Hill Wallack.

Affirmed.

All Citations

Not Reported in A.3d, 2012 WL 1537421

Footnotes

- 1 *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel*, 67 N.J. 151 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808, 96 S.Ct. 18, 46 L. Ed.2d 28 (1975) (*Mt. Laurel I*); *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel*, 92 N.J. 158 (1983) (*Mt. Laurel II*).
- 2 In that motion, Larken relied on CEO Gardner's certification that Larken's former attorney had sent Carroll his entire file on the project in 2001, including the site plan application and all expert reports. Gardner claimed, citing only to the 2001 cover letters from former counsel to Carroll, that the file contained "all confidential, pricing, sewage and other information concerning the project."
- 3 The information thus was no longer confidential, if it ever were.
- 4 We note the curious fact that Larken claims malicious use of process by Hill Wallack, yet P & H did not sue Larken. Neither party has addressed the significance of that fact, despite the trial court's acknowledgment that it created an "interesting issue."
- 5 For purposes of this argument, we accept that the capacity of the RLSA's plant was fully accounted for, Larken had paid for a portion of the plant's expansion as well as for an allocation of a portion of the expanded facility's capacity, and Larken had spent \$3 million in developing its site and had received preliminary and final approvals.
- 6 We expressed doubts that waiver had occurred in *Twenty-First Century Rail Corp. v. New Jersey Transit Corp.*, 419 N.J.Super. 343, 348 n. 2, 364 (App.Div.), *appeal granted*, 206 N.J. 37 (2011), but did not resolve the issue.

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