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August 12, 2015

**VIA UPS OVERNIGHT DELIVERY**

Honorable Douglas K. Wolfson, J.S.C  
Middlesex County Superior Court Courthouse  
56 Paterson Street  
New Brunswick, NJ 08903-0964

**Re: In re Petition of the Township of Woodbridge for a Declaratory  
Judgment  
Docket No.: MID-L-3862-15**

Dear Judge Wolfson:

Kindly accept this letter in lieu of a more formal brief on behalf of Petitioner Township of Woodbridge (“the Township” or “Woodbridge”) in reply to the Opposition of Plaintiff Fair Share Housing Center (“Fair Share” or “FSHC”) to Woodbridge’s Motion for Temporary Immunity and in response to FSHC’s Cross-Motion for “scarce resource restraints,” or an injunction upon the Township’s legislatively delegated authority to regulate land use. FSHC apparently brings this Cross-Motion pursuant to Rule 4:52-2 seeking a temporary restraint or interlocutory injunction. See, FSHC Letter Brief in Support of Cross-Motion (“FSHC Brief”) at 5.



We respectfully urge that, because granting FSHC's Cross-Motion requires the Court to make an ultimate finding that the Township is in violation of its *Mount Laurel* obligation to provide for affordable housing, (despite having addressed its affordable housing responsibilities with court approval at various stages in the process), that no basis exist for the Court to render such a judgment, and FSHC's Cross-Motion for a moratorium should be denied. An injunction should not issue, here or in any case, unless there are utterly compelling circumstances which warrant such relief – and such is not the case here. Likewise, because the Township has properly attended to its affordable housing responsibilities, it is entitled to a grant of temporary immunity while it prepares a housing element and fair share plan under procedures provide by the Supreme Court.

**Extraordinary Relief Requires Clear and Convincing Evidence of Extraordinary Wrongdoing**

Fair Share requests, 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) (“the Supreme Court Decision”) are 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 granting of such extraordinary relief requires a finding of extraordinary wrongdoing – something that FSHC cannot demonstrate. This is particularly so given the Township's longstanding history, policy and practice of providing for and cultivating affordable housing.

As a result of these policies, extending over nearly 50 years, 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. (Verified Complaint at Paras. 25, 29)<sup>1</sup>. Upon this basis, and other detailed evidence the Township will present to the Court, it seeks a declaratory judgment that it is not an exclusionary community, or at a minimum, has overcome the apparent presumptive determination of *Mount Laurel*<sup>2</sup> all towns are exclusionary, and hence it is not subject to the presumptive liabilities imposed by the *Mount Laurel Doctrine*. (Verified Complaint, Count One). Consequently, the claim that Woodbridge's authority to regulate land use must be taken over by the Court is preposterous.

Even beyond this, however, no basis exists for the Court to otherwise enjoin Woodbridge from exercising its land use powers granted to it by the Legislature as sought by FSHC in its overreaching application.

### **Standard for Relief**

FSHC's Cross-Motion is for a temporary restraint or interlocutory injunction pursuant to Rule 4:52-2. (See, FSHC Brief at 5). Thus its recitation of the standards set forth in Paternoster v. Shuster, 296 N.J. Super. 544 (App. Div. 1997), associated case law, and the incorporated Restatement of Torts, and analysis based thereon, is inapplicable here as those cases address permanent injunctive relief. ("When we review an order granting *permanent injunctive relief*,

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<sup>1</sup>Moreover, the Special Master has recognized that "Most of Woodbridge Township's existing housing stock, which is available to families, is relatively affordable compared to other housing in the Middlesex/Hunterdon/Somerset County region," in endorsing the Township's efforts to provide for senior affordable housing. (See, Special Master Report at 33; Certification of Marta Lefsky, dated July 20, 2015, ("Lefsky Cert.") **Exhibit B**).

<sup>2</sup>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) and S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II), 92 N.J. 158 (1983) (together with *Mount Laurel I*, the *Mount Laurel Doctrine*).

however, we are guided by the precepts discussed in Sheppard v. Township of Frankford, 261 N.J.Super. 5, 10 (App.Div.1992), in which we adopted the guidelines for permanent injunctive relief, as set forth in the *Restatement (Second) of Torts* § 936 (1977)” (Emphasis supplied) Paternoster v Shuster, *supra.*, at 556.

Instead, this matter is governed by the standards applicable to a preliminary injunction. 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 Tp. of Sparta v. Service Electric Cable T.V., 198 N.J. Super. 370, 379 (App. Div. 1985) (emphasis added) (citation omitted). As the court long ago recognized in Light v. National Dyeing & 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.”

Consistent with these principles, injunctive relief should only be entered upon a showing, by **clear and convincing evidence**, of entitlement to the 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, 610-11 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., Inc. 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, 132-34 (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).

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 Dev. Co. v. Bernards Twp. in Somerset Cnty., 103 N.J. 1 (1986) (“*Mount Laurel III*”). There, the 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 “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. In other municipalities there may be sewerage capacity that, if used, will prevent future lower income housing, or transportation facilities, or water lines, or any one of innumerable public improvements that are necessary for the support of housing but are limited in supply. **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 Court made clear in considering such matters that COAH (and now the courts) should carefully scrutinize the record and background of the matter: “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 so doing, and the ability to enforce the

condition. **Some cases may require further fact-finding to make these determinations.** Id., at 62. (Emphasis supplied).

### **Fair Share's Legal Argument is Inadequate and its Proffered "Facts" Inaccurate**

Distinct from the studied consideration necessary for a scarce resource restraint, FSHC asks the Court to simply accept as true its allegations and impose a far-reaching injunction despite that it cannot meet the Crowe criteria. Principal among these is that FSHC cannot establish the second prong of the criteria that "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."

Fair Share's allegations are primarily twofold: (1) that because the Court granted the Township a vacant land just adjustment an injunction must presumptively issue; and (2) because it claims that in "20 years" only 38 units have been provided (in apparent support of a contention that the Township has failed to properly provide for affordable housing).

The first point is without legal authority and Fair Share cites none. The Township's vacant land adjustment proceeds from the Court's initial grant of a conditional Judgment of Repose awarding 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"); Lefsky Cert., **Exhibit A**).

The June 17 1999 order was predicated upon the Special Master Report of Elizabeth C. McKenzie, dated January 29 1999 which the Court adopted in its June 17, 1999 Order. ("the 1999 Report;" **Exhibit B**).

Under the 1999 Report, the Special Master employed COAH's governing regulations, N.J.A.C 5:93-4.2, ("the Vacant Land Rules") and found that Woodbridge was entitled to a vacant land adjustment, a judgment the Court accepted. (Lefsky Cert., Exhibit B at 11)

Under the Vacant Land Rules, a municipality is *presumed* to have addressed its realistic development potential (RDP) awarded under the adjustment so long as it continues to implement the terms of the approval:

A municipality that received an adjustment due to lack of vacant land in addressing its 1987-1993 need obligation shall be presumed to have addressed its RDP, provided the municipality continues to implement the terms of its previous substantive certification.

N.J.A.C. 5:93-4.2(f)

Fair Share does not allege that Woodbridge has failed to abide by the June 17, 1999 Order in any respect. That order provided the means for the Township to address its RDP and it has done so, (including acquiescing to developer requests for modification of inclusionary sites), and at all times upon Court approval. (See, Lefsky Cert. at Paras. 8-13). Indeed, the projects denominated to address the RDP have been approved or constructed to provide 58 units, including credits, to address the 53 unit RDP. (See, Lefsky Cert. at Paras. 26).

FSHC cannot demonstrate a "legal right" which is "well-settled" to support the second prong of Crowe authorizing an injunction. It simply argues with the grant of the adjustment and the approved plan to address the RDP. That is inadequate to establish a legal claim for such wide-ranging restraints and the relief it seeks.

This leads to FSHC's second, unsupported contention. Irrespective of the Township's compliance with the June 17, 1999 Order, Fair Share maintains, again without any applicable legal authority, that in "more than 20 years" Woodbridge has only provided 38 affordable family units and that this should then provides an independent basis (aside from the vacant land

adjustment) for a moratorium on development. Such a contention is legally insufficient and factually groundless.

To start with, instead of 38 units, 367 affordable housing 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 of more units are the subject of firm, well-developed plans by the Township. Attached as **Exhibit A** is an updated chart identifying the status of the Township's affordable housing units.

Hence, contrary to what FSHC inaccurately alleges, that only 38 units have been provided, the Township has made substantial progress to actually create affordable housing. Additionally, the Township continues to prepare an affordable housing plan which will be the subject of review and comment by both the Special Master and Intervenor under the preemptive procedures established by the Supreme Court. Therefore FSHC's motion for restraints should be rejected, as its factual assertions are inaccurate. Further, substantial evidence exist for the Court to grant the Township's application for temporary immunity while it continues to prepare its fair share plan.

Finally, the circumstances presented by the Township's compliance with its affordable housing obligation contrast strikingly with one of the few cases Fair Share relies on, Tocco v. New Jersey Council on Affordable Hous., 242 N.J. Super. 218, 221-22 (App. Div. 1990), to justify an injunction.

Tocco involved a long-standing *Mount Laurel* case involving the township of Cherry Hill. The initial case was transferred to COAH and, *after a year*, COAH found the township's

housing element deficient. Because the municipality failed to correct the deficiencies a scarce resource restraint was entered. Moreover the primary ruling of that case, brought by a property owner, is that a moratorium for *Mount Laurel* purposes is not an unconstitutional taking of property for which the owner is entitled to compensation: “In a comprehensive oral opinion, Judge Gibson ruled that COAH's imposition of an eighteen-month moratorium on the development of certain lands in Cherry Hill Township was not an unconstitutional taking of plaintiff's affected property. *U.S. Const.*, Amend. V and XIV; *N.J. Const.* (1947), Art. I, ¶ 20. We agree and affirm.” Tocco v. New Jersey Council on Affordable Hous., *supra.*, at 220.

Here, no finding has been made that Woodbridge's housing plan is deficient in any respect. Indeed, over the years, the Township has repeatedly sought court approval, and obtained it, when it recrafted its plan to meet COAH's ever changing methodology and to address new opportunities when presented. (See, Lefsky Certification at Paras. 2-15; 20-22; 37). Indeed, Tocco reinforces the proposition that Woodbridge is entitled, in the first instance to prepare a fair share plan subject to the procedures established by the Supreme Court Decision. It does not provide the legal authority FSHC seeks, and cannot point to, for the imposition of an injunction.

**An Appropriate Provision of Affordable Senior Housing is not Exclusionary – and not a Basis for an Injunction**

Fair Share also complains that the Township has unduly provided for senior affordable housing (although it does not dispute the actual need for such housing) and urges that this aspect of the Township's plan somehow demonstrates that an injunction must issue. While this type of contention may be appropriate for comments to be made upon the Township's housing plan, as part of the review process established by the Supreme Court, together with an analysis of the need for such housing (which Woodbridge welcomes), it does not reflect a well-settled “legal right” which FSHC may advance as a reason for the Court to enter an injunction.

Beyond that, as Woodbridge will demonstrate once it is afforded the opportunity to do so, as provided under the Supreme Court Decision, its affordable housing plan must *necessarily include* a substantial amount of senior units if the Township is to faithfully address the actual regional need for affordable housing. (Indeed, in considering the Township's obligation in her 1999 Report, the Special Master recommend that the Court not employ COAH's limitation on senior housing, in recognition of the housing need of low and moderate income seniors and noting that COAH has granted waivers from the cap on senior housing in towns receiving a vacant land adjustment, so long as some family units are also provided. (1999 Report at 32 – 33; Exhibit B)).

Further, Fair Share's reliance upon In re Adoption Of N.J.A.C. 5:94 & 5:95 By New Jersey Council On Affordable Hous., 390 N.J. Super. 1 (App. Div. 2007), for the proposition that senior housing is *per se* exclusionary (and thus provides a basis for an injunction), if it exceeds a regulatory cap, is misplaced and not an accurate statement of law. That case dealt with COAH's generic regulations regarding a cap on senior housing not whether a particular municipal plan is valid (or not) because it provides senior affordable housing predicated upon a demonstrated need for such housing. Indeed in In re Adoption Of N.J.A.C. 5:94 & 5:95 the Appellate Division goes to great lengths to distinguish the object of its holding – a review of a government regulation - from the Supreme Court's consideration in Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 80 N.J. 6, 50-51 (1976), of the effect; on the municipal level, of senior housing and whether such housing in a specific instance is exclusionary. Predictably, the Supreme Court held that such an assessment must be made on a case-specific basis and particularly upon a consideration of the general land use regulation of a municipality:

Nothing stated above warrants the conclusion that zoning for planned housing developments for the elderly is presumptively invalid as exclusionary. It may be used for improper exclusionary purposes, but it also has valid

nonexclusionary uses. Our decision in Mt. Laurel requires developing municipalities to provide, by their land use regulations, the opportunity for an appropriate variety and choice of housing for all categories of persons who may desire to live there. *Id.*, 67 N.J. at 179, 336 A.2d 713. This task would be impossible if the municipality could not design its land use regulations to provide for the unsatisfied housing needs of specific, narrowly defined categories of people. While we were specifically concerned in Mt. Laurel with the needs of younger families with children, the elderly are also a segment of the population whose needs and desires are appropriate considerations for municipal land use planning. *Therefore, to the extent that such needs exist, planned housing developments for the elderly may serve an inclusionary, rather than exclusionary function.* Accord, *Maldini v. Ambro*, supra, 36 N.Y. at 485-486, 369 N.Y.S.2d at 389-90, 330 N.E.2d at 406.

*Furthermore, as suggested above, the true character of this zoning device must be assessed against the background of general land use regulation by the municipality. If it substantially contributes to an overall pattern of improper exclusion, the fact that the ordinance may also benefit the elderly is neither an excuse nor a justification to sustain a challenge to a zoning provision*

*Id.*, at 50-51. (Emphasis supplied).

Plainly, therefore, the provision of affordable senior housing is not presumptively exclusionary, and Woodbridge is entitled to put forth a plan to provide such housing if that is the need to be addressed. FSHC's allegations to the contrary are not supported by law and certainly cannot form the basis for the issuance of an injunction.

In any event, Fair Share's attack on senior housing is better suited for the review process established by the Supreme Court. The Township will demonstrate that good and substantial reasons exist for the Court to not slavishly employ a restriction upon such types of housing given the actual need. But this will be an issue for the Court to address in its consideration of the Township's housing plan, in the exercise of its discretion.

Indeed, the process established by the Supreme Court was intended to promote housing plans generally which actually address the specific need faced by a municipality and its region, instead of requiring lock-step adherence to generic agency regulations:

The courts that will hear such declaratory judgment applications or constitutional compliance challenges will judge them on the merits of the records developed in individual actions before the courts. However, certain guidelines can be gleaned from the past and can provide assistance to the designated *Mount Laurel* judges in the vicinages.

...

Second, many aspects to the two earlier versions of Third Round Rules were found valid by the appellate courts. In upholding those rules the appellate courts highlighted COAH's discretion in the rule-making process. *Judges may confidently utilize similar discretion when assessing a town's plan, if persuaded that the techniques proposed by a town will promote for that municipality and region the constitutional goal of creating the realistic opportunity for producing its fair share of the present and prospective need for low- and moderate-income housing.*

In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous., 221 N.J. 1, 29 - 30 (2015) (Emphasis supplied).

Thus the Township's provision of senior affordable housing does not provide a basis for the issuance of an injunction.

### **Conclusion**

We respectfully urge that the Township is entitled to a grant of temporary immunity while it prepares a housing element and fair share plan under procedures provide by the Supreme Court.

We further urge that the Court should deny FSHC's Cross-Motion for a scarce resources injunction because it has failed to demonstrate that it is entitled to such relief under governing law. The issuance of a vacant land adjustment does not afford a *per se* basis to support such restraints and Fair Share has not demonstrated a legal right to such extraordinary relief under the Crowe standards – particularly given the preemptive procedures established by the Supreme Court which affords municipalities an opportunity to craft their own housing plans. Moreover, Woodbridge's historical housing policies demonstrate that it is uniquely situated as a

municipality which is not, under any reasonable measure, an exclusionary municipality – to the contrary, those polices over 50 years have cultivated the creation of affordable housing.

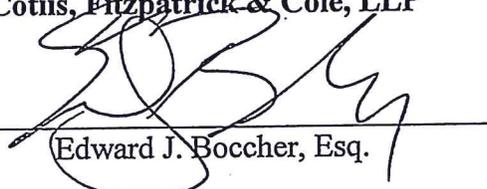
A fair and reasonable assessment of the actual state of affordable housing in Woodbridge, and the Township's efforts to otherwise comply with its *Mount Laurel* obligation, including obtaining court approval of those efforts, demonstrates at the very least, that the imposition of restraints is unwarranted and justifies the award of temporary immunity.

Therefore, the Township of Woodbridge respectfully requests that it be granted Temporary Immunity and that the Cross-Motion of Fair Share Housing Center for the imposition of a scarce resource injunction be denied.

Respectfully Submitted,

**DeCotiis, Fitzpatrick & Cole, LLP**

By: \_\_\_\_\_

  
Edward J. Boccher, Esq.

EJB/jp

Enclosures

cc: Clerk (via Hand Delivery)  
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