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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART

DOCKET NO.: OCN-L-2640-15
(Consolidated Action)

IN RE DECLARATORY JUDGMENT ACTIONS FILED BY VARIOUS MUNICIPALITIES, COUNTY OF OCEAN, PURSUANT TO THE SUPREME COURT'S DECISION IN In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015)

Civil Action

OPINION

Decided February 18, 2016

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Steven A. Kunzman, Esquire for the firm of DiFrancesco Bateman Kunzman, PC on behalf of the Township of Toms River

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Andrew Bayer, Esquire for the firm of Gluck Walrath, LLP on behalf of the Township of Ocean

Kevin D. Walsh, Esquire and Adam M. Gordon, Esquire on behalf of Fair Share Housing Center, Intervenor in the Borough of Pine Beach

Edward J. Buzak, Esquire for the Buzak Law Group, LLC on behalf of the League of Municipalities, Intervenor in the consolidated matter

Richard J. Hoff, Jr. and Robert A. Kasuba for the firm of Bisgaier Hoff, LLC on behalf of Highview Homes, LLC, and Oaklane Little Egg Harbor, LLC, Intervenor in the matter of the Township of Jackson and the Township of Little Egg Harbor

Tracy A. Siebold, Esquire for the firm of Nehmad Perillo Davis on behalf of Volunteers of America Delaware Valley, Intervenor in the Township of Ocean matter

Thomas F. Carroll, III, Esquire and Stephen M. Eisdorfer, Esquire for the firm of Hill Wallack, LLP on behalf of New Jersey Builders Association, Intervenor in the matter of the Borough of Pine Beach

Daniel S. Eichorn, Esquire for the firm of Sokol Behot, LLP on behalf of Ocean Mews, 2015, LLC, Intervenor in the matter of the Township of Stafford

Richard T. O'Connor, Esquire for the firm of O'Connor and O'Connor on behalf of Manchester Development Group, Intervenor in the matter of the Township of Manchester

MARK A. TRONCONE, J.S.C.

NATURE OF THE PROCEEDING

This matter concerns the court's continuing review of various Declaratory Judgment actions filed by thirteen (13) Ocean County municipalities in accordance with the procedure established by the New Jersey Supreme Court in In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015) ("Mount Laurel IV").1

The primary issue addressed in this opinion is whether the court has the authority to impose an obligation upon municipalities to satisfy the affordable housing need which arose from 1999 to the present – the so-called "gap period" commencing from the end of the second

1 Those municipalities include: Township of Barnegat, Borough of Beach Haven, Township of Berkeley, Township of Brick, Township of Jackson, Township of Lacey, Township of Little Egg Harbor, Township of Manchester, Township of Ocean, Borough of Pine Beach, Borough of Point Pleasant, Township of Stafford and Township of Toms River

round housing cycle. Since 1999, New Jersey's Council on Affordable Housing ("COAH") has, on three occasions, attempted and failed to adopt third round rules. This opinion will also address the circumstance of how this unanswered prior obligation would be resolved in those municipalities whose third round obligation, with the inclusion of this "gap" obligation, will exceed the statutory cap of a 1000 units for any one housing cycle.

For the reasons set forth below, the court is satisfied there exists a rational methodology to calculate and determine the affordable housing need which arose during the "gap period" of 1999 to 2015.2 The court finds municipalities are constitutionally mandated to address this obligation. This "gap period" need is to be calculated as a separate and discrete component of a municipality's fair share obligation. This component together with a municipality's unmet prior round obligations 1987 to 1999 and its present need and prospective need shall comprise its "fair share" affordable housing obligation for the third housing cycle. Municipalities may petition the court during its review of their individual plans to defer up to 50 percent of its gap period component obligation to the fourth round housing cycle.

The court finds, however, it is constrained by the clear language of the FHA relating to the 1000 unit cap and thus no municipality shall be required to address a fair share obligation beyond 1000 units for the upcoming ten (10) year third round cycle. Therefore, the 1999 to 2015 gap component coupled with the present and prospective need components are subject to the 1000 unit cap.

THE PARTIES

In addition to the thirteen municipalities, a number of interested parties have intervened in the various individual municipal cases or in the in the consolidated proceeding established by

2 The court acknowledges the gap period will now extend into 2016. However, for ease of reference the year 2015 will be used throughout the opinion as the end year of the gap period.

the court to determine the regional housing need and the allocation of that need to the constituent Ocean County municipalities.

The non-municipal parties involved in this aspect of the litigation include: Fair Share Housing Center ("Fair Share" or "FSHC"), a non-profit entity which advocates for the development of affordable housing throughout New Jersey; The New Jersey League of Municipalities ("NJLM"), an association created by state statute to assist and serve New Jersey municipalities and their officials; New Jersey Builders' Association ("NJBA"), a trade organization promoting the interests of its members. In addition to the organizations listed above, various private land development companies have also intervened in this matter. They, together with NJBA, will collectively be referred to as "the builders" throughout this opinion. The individual municipalities and NJLM will collectively be referred to as "the municipalities" or "towns."

PROCEDURAL HISTORY TO DATE OF THE MOUNT LAUREL CASES PENDING BEFORE THIS COURT

In order to fully explain the context of this matter, a brief recitation of the procedural history to date is helpful. On March 10, 2015, the New Jersey Supreme Court issued its decision in "Mount Laurel IV." That action was commenced by Fair Share by the filing of a motion in aid of litigants' rights due to the failure of COAH to promulgate the third round rules as directed by the Court in its decision, issued the preceding year, in In re Adoption of N.J.A.C. 5:96, 215 N.J. 578 (2014). Because of COAH's inability or reluctance to act, the Court in Mount Laurel IV dissolved FHA's exhaustion-of-administrative-remedies requirement and opened the courts to actions by parties concerned about municipal compliance with constitutional affordable housing

obligations. 221 N.J. at 5. Providing for an orderly procedure for such actions, the Supreme Court established a process whereby municipalities could obtain substantive certification from the courts provided that such towns either 1) achieved substantive certification from COAH under prior iterations of third round rules which were subsequently struck down by the Court or 2) had "participating" status before COAH, i.e., they were actively seeking approval of their affordable housing plans from COAH. The Court delayed the effective date of its order for ninety (90) days. Towns which sought continued protection from Mount Laurel lawsuits were then required to file declaratory judgment actions within thirty (30) days of the effective date.

Pursuant to the Court's decision in Mount Laurel IV, qualified towns had five (5) months from the expiration of the thirty (30) day filing period, i.e., December 8, 2015, to prepare and submit their plans for judicial review. During this five (5) month period, the trial courts assigned to these cases could grant a period of temporary immunity from Mount Laurel lawsuits while the towns went about the business of preparing their affordable housing plans.

Soon after the commencement of the declaratory judgment actions by the Ocean County municipalities, this court appointed Philip B. Caton and John D. Maczuga, New Jersey-licensed professional planners with extensive experience in Mount Laurel matters, to assist the court and the municipalities as "special local masters." Mr. Caton and Mr. Maczuga were each assigned individual municipalities.

During the court's initial hearings with the parties, it soon became apparent the towns needed some direction from the court regarding the development of an appropriate methodology to determine their respective third round obligation. To that end, the court in consultation with its special local masters, established a procedure by which the court could determine, on a preliminary basis, the affordable housing obligation for each Ocean County municipality and

address those municipal compliance issues so as to provide a rational basis that would allow the towns to file its affordable housing plan to the court by the deadline imposed by the Supreme Court of December 8, 2015.

The procedure established by the court was based on the language in Mount Laurel IV where the Supreme Court stated:

> In the end, a court reviewing the submission of a town that had participation status before COAH will have to render an individualized assessment of the town's housing element and affordable housing plan based on the court's determination of present and prospective regional need for affordable housing applicable to that municipality. **A preliminary judicial determination of the present and prospective need will assist in assessing the good faith and legitimacy of the town's plan, as proposed and as supplemented during the processes authorized under the FHA-conciliation, mediation, and use of special masters-and employed in the court's discretion.** The court will be assisted in rendering its preliminary determination on need by the fact that all initial and succeeding applications will be on notice to FSHC and other interested parties. 221 N.J. at 29. (emphasis supplied)

Accordingly, the court consolidated the thirteen individual municipal cases for the purpose of determining the towns' present and prospective needs. As directed by the Supreme Court in Mount Laurel IV, it was also decided in making this determination the court would, wherever possible, follow COAH's past methodology to calculate statewide housing need and then allocate that need to the housing regions previously established by COAH.3 Once the regional need was determined then the same would be allocated to the constituent Ocean County municipalities.4 This work required special expertise. Therefore, after inviting the submission of resumes by interested experts and upon the advice of the two local masters, the court appointed Mr. Richard B. Reading as the "Special Regional Master" to assist the court in making

3 Mount Laurel IV at p. 30
4 Ocean County is situated in COAH Region 4, together with Monmouth and Mercer Counties.

the preliminary determination envisioned by the Supreme Court of the present and prospective needs.5 A case management order was then entered by the court on September 17, 2015, which provided for an expedited process culminating in a plenary hearing following which the court would make a determination of the regional housing need and the allocation of that need to the municipalities which would serve as the basis for the preparation of the municipal housing plans. All parties consented to this procedure.

The case management order provided for two mediation sessions with all the masters and parties outside the presence of the court. The parties were to then submit expert reports setting forth a proposed fair share methodology for review by the regional master. After the receipt of these reports, Mr. Reading issued an initial draft of a report entitled "Preliminary Review and Assessment of Low and Moderate Income Housing Needs of Ocean County Municipalities" ("Preliminary Assessment") which set forth the regional fair share number and allocated the same to every Ocean County municipality. The parties were then invited to submit their comments to this initial draft and after consideration of these comments, Mr. Reading would issue the final draft of his Assessment.

However, before he could complete his final draft, Mr. Reading became ill and was unavailable for several months. Faced with this unexpected turn of events, the court, with the consent of the parties, directed the municipalities to utilize the fair share housing numbers set forth in Mr. Reading's initial draft as the basis upon which to prepare and submit their plans. This was done with the understanding that these numbers were subject to modification once Mr. Reading returned to health and could complete his work.

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5 Mr. Reading was subsequently retained as the Special Regional Master by the Monmouth and Mercer County Superior Courts.

Accordingly, all thirteen municipalities, utilizing these preliminary numbers, completed their plans and submitted their proposed housing plans in advance of the December 8, 2015 deadline. At a hearing conducted on December 8, 2015, the court acknowledged the receipt of the towns' plans and directed local masters, Caton and Maczuga, to conduct a preliminary review of the submitted plans to determine whether the same constituted a good faith effort by the individual municipalities to meet their constitutional obligations. During this review, the court granted a one (1) month extension of the immunity period. On January 7, 2016, the court considered the reports of Mr. Caton and Mr. Maczuga and granted, with one exception, a further extension of immunity to July 31, 2016 to, first, allow time for Mr. Reading to complete his final report; second, for the court to then conduct a plenary hearing to decide compliance issues and determine the regional fair share number and allocation of the same to the constituent municipalities in Ocean County; and, finally for the towns to perfect their affordable housing plans and submit the same to the court for approval.

It was during Mr. Reading's absence that the issue of the so-called "gap period" came to the fore. Most experts agreed the "gap period" housing need, if included, would constitute anywhere from 40 to 60 percent of a municipalities affordable housing need obligation for the third round housing cycle. Important too, was the application of the 1000 unit cap to the "gap period" obligation for the third round. The parties also questioned that if a "gap period" obligation was to be included in a town's obligation for the third round cycle, would it be subject to the FHA's 1000 unit cap or would such an obligation be outside the cap?

All parties agreed that these issues needed to be addressed before the court made a ruling on the regional and municipal needs. Accordingly, the court invited the parties to submit briefs and reports from their respective experts on these issues and the court heard oral argument of

counsel. During oral argument, the court raised its concern whether the passage of time did not preclude the development of a methodology that could reliably calculate the sixteen (16) year "gap" obligation. Accordingly, the parties submitted additional expert reports addressing the same. All expert reports were to be reviewed by Mr. Reading. The court received the critique of these reports from Mr. Reading in advance of this opinion.

ARGUMENTS OF THE PARTIES

The parties to this action have extensively briefed and argued these issues before the court and their positions are clearly defined. The municipalities assert there can be no such gap obligation and point to the provisions of the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 to 329 ("FHA") which provide a municipality's fair share obligation has only two (2) components, i.e. present and prospective need. Present need is the number of low and moderate households residing in substandard units. Prospective need is a future projection of how many new low and moderate income households will form or move into the community during the next ten years. The municipalities argue that since the FHA is silent on the issue of how to address an obligation which would arise during the period or "gap" between the end of one housing cycle and the start of another, the courts do not have the authority to create what in essence would be a new component of a municipality's fair share obligation.

The municipalities advance other arguments for not including a new "gap" component. First, they assert the gap obligation would be accounted for within the present need calculation and that any attempt to add a component for a need arising during the gap period would result in some degree of double counting of affordable households. Second, the towns contend no methodology exists and none could be developed which accurately calculates the gap need. Any

attempt to do so would result in speculation. Finally, at oral argument the municipalities argued that to impose an obligation to address what is essentially a twenty six (26) year need within a ten (10) year housing cycle is unduly burdensome and therefore runs counter to the protections afforded the towns by the FHA to ensure the orderly development of affordable housing.

Regarding the application of the 1000 unit cap in those towns where a new gap component would push a municipality's fair share obligation over 1000 units or in those towns whose third round number already exceeds 1000 units, the municipalities again rely on the plain language of the FHA which states no municipality shall be required to address a fair share obligation beyond 1000 units within any ten (10) year housing cycle. N.J.S.A. 52:27D-307(e). This unambiguous language, in the opinion of the municipalities, bars COAH, and by implication, this court from exempting the "gap" obligation from the operation of a 1000 unit cap. In other words, if the court were to find a gap obligation exists and should therefore be addressed during the third round, this component should be subject to the cap just as the present and prospective need components are. Moreover, the municipalities urge this court to reject any formula or requirement which seeks to preserve the entire calculated gap obligation or a large portion of it by deferring the obligation to the next housing cycle or cycles as had been ordered by another New Jersey trial court.

In opposition to these arguments, Fair Share and the builders assert that basic fairness to those families in need of affordable housing mitigates in favor of including the gap period in the calculation of affordable housing need. They reject municipal claims that to do so would be overly burdensome to the towns. The courts must ensure the goal of providing affordable housing so that the actual need which arose during the 1999 to 2015 gap period is accomplished to the greatest extent possible. Further, Fair Share and the builders argue COAH and the

municipalities had previously recognized the need for affordable housing is cumulative, i.e., it accrues year by year and therefore there can be no "gaps." The builders also claim that COAH and the municipalities represented to the courts that any such gap need would be folded into the third round's prospective need. With regard to the 1000 unit cap, Fair Share and the builders argue that the gap period should be outside the FHA 1000 unit cap or alternatively be capped by the procedure adopted by another New Jersey trial court.

As noted above, the court raised the concern, shared by Regional Master Richard Reading, whether the need which arose during the gap period could be accurately "recaptured." This concern was first voiced by the Appellate Division nearly twelve years ago in In re Six Month Extension of N.J.A.C., 372 N.J. Super. 61 (App. Div. 2004) ("In re Six Month Extension"). Thus, even if this court was satisfied in theory that an affordable housing need arose during the gap period and should be accounted for in the determination of a municipality's fair share obligation, could such a need be accurately and reliably calculated by a rational methodology.

LEGAL ANALYSIS AND FINDINGS

A.
THE AFFORDABLE HOUSING NEED WHICH AROSE DURING THE "GAP PERIOD" CAN BE RELIABLY CALCULATED AND MUST BE INCLUDED IN THE DETERMINATION OF A MUNICIPALITY'S FAIR SHARE OBLIGATION FOR THE THIRD ROUND CYCLE

In So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983), ("Mount Laurel II"), the New Jersey Supreme Court found the "obligation to meet the prospective lower income housing need of the region is, by definition, one that is met **year after year** in the future,

throughout the years of the particular projection used in calculating prospective need." Mount Laurel II, 92 N.J. at 218, 219. (emphasis supplied). Therefore, New Jersey's affordable housing need is cumulative and there can be no gaps in time left unaddressed. This obligation is clear and, moreover, one that has been acknowledged without objection by both COAH and the municipalities themselves in the past.

Despite this, the municipalities now argue that the courts and COAH have historically limited a town's affordable housing obligation to two (2) components, i.e., present and prospective need. The present need, also known as "rehabilitative share," is the number of identifiable deficient housing units occupied by low and moderate income households. That number is generated by a calculation based upon the most recent census data. Prospective need is forward-looking. It is the number of low and moderate income households expected to be formed within the next ten (10) year housing cycle. N.J.S.A. 52:27D-304 (j).

Never before, the municipalities assert, have the courts or COAH attempted to recapture a past "gap" need to calculate the fair share obligation. Any attempt to do so would be constitutionally suspect since the FHA does not authorize the courts to recapture such a need. If it were to do so, the court would be acting either as a "super-legislature", thus violating basic notions of separation of powers or acting as a replacement agency to COAH – something the Supreme Court expressly directed the court to avoid in Mount Laurel IV:

> The judicial role here is not to become a replacement agency to COAH. The agency is *sui generis* – a legislative created, unique device for securing satisfaction of Mount Laurel obligations. In opening the courts …, it is not this court's province to create an alternate form of statewide administrative decision maker for unresolved policy details of replacement third round rules…. Mount Laurel IV at 29.

On the more practical side, the municipalities and their expert, Econsult Solutions, Inc., contend any attempt to recapture a past "gap" would inflate their obligation by double counting some households already included in the present need. Further, Econsult maintains it is a "practical impossibility" to develop a reliable methodology to determine the "gap" need. Therefore, municipalities should be able to rely upon the only process used in the past to determine their fair share obligation.6

For their part, the builders argue the municipalities should be "judicially estopped" from asserting their constitutional fair share housing obligation is not cumulative and therefore no obligation exists for the period from 1999 to 2015. They point to the municipalities' position asserted before the Appellate Division in In re Six Month Extension.

Indeed, it is ironic that both parties (or interests) appearing in the 2004 Appellate Division case are now advancing arguments before this court they vehemently opposed in 2004. On one hand, the builders and Fair Share's predecessors asserted:

> By granting extended certifications and not finalizing third round numbers or releasing interim obligations that would quantify the municipalities' continuing realistic obligation during the gap period, COAH has effectively excused New Jersey municipalities from meeting the obligations to provide their fair share of affordable housing, which obligations continue to accrue in the intervening time period. Appellants argue that the Mount Laurel doctrine's fair share requirement **cannot be phased in or satisfied after the fact**.
> 372 N. J. Super. at 89. (emphasis supplied)

And, on the other hand, COAH together with the municipalities successfully contended:

> [t]hat the gap between the Second Round and third round methodologies is less significant than it appears. The urge that the delay is not indefinite and that the third round methodology will be **cumulative and recapture** any obligation. Id. at 96 (emphasis supplied)

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6 Econsult Solutions, Inc., "Analysis of the Gap Period (1999-2015)", dated February 8, 2016, page 7

Further in the opinion, the Appellate Division noted both COAH and the municipalities stressed the FHA itself and the regulations adopted in accordance therewith contemplate municipalities would be able to adopt appropriate phasing schedules for meeting their fair share.

> COAH and the municipal respondents contend… that N.J.A.C. 5:91-14.3 realistically – and properly – recognizes and deals with the gap between the expiration of the second round standards and COAH's adoption of its third round methodology and rules. They stress that when the same type of gap occurred between the first and second rounds, COAH retroactively incorporated in succeeding methodology the statewide need for the period commencing with the end of the prior regime; thus achieving a cumulative result. Id. at 90.

The Appellate Division also noted COAH had steadfastly maintained its view that:

> [t]he Council's third-round methodology and rules, once adopted, will comply with the requirements of the FHA and the Mount Laurel doctrine. The third-round methodology will continue the work of the first- and second-round methodologies and implementing regulations by fairly and accurately determining the state-wide affordable housing need and by assigning that need to the State's municipalities. The mere fact that there may be a "gap" between the second and third round compliance periods, does not violate the Mount Laurel doctrine. In fact there was a similar gap between the first and second round compliance periods as well as the first-round compliance period was from 1987 to 1993, yet the second round rules were not adopted until June 6, 1994. Nonetheless, the affordable housing need was calculated from July 1987 through July 1999, creating a continuous calculation period upon which the first and second-rounds were based. Likewise, the third-round numbers will ultimately capture the full housing need projected through 2010. Based upon this history, the Council saw fit to provide compliant towns with some degree of protection from a builder's remedy lawsuit during this "gap" period by adopting rules which extend second round substantive certification. Id. at 82.

Although the Appellate Division struck down COAH's regulations for extending second round substantive certifications on procedural grounds, the court there was satisfied with COAH's stated position that the gap period obligation would be ultimately captured in the third

round rules. Clearly, the Appellate Division's decision in In re Six Month Extension was based upon both the COAH and municipal assertion there would be a seamless transition in the second to third round methodologies accounting for the affordable housing obligation arising in the gap period.

It is this court's view therefore that the municipalities are estopped from now abandoning the position, presumably made in good faith before the Appellate Division in 2004, that there should be no gap period obligation. New Jersey courts have ruled a party, who is successful in asserting a position upon which a court bases its decision, may not assert a contradictory position thereafter. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 2004). Clearly the Appellate Division relied on representations of COAH and the municipalities that there would be no gaps when assessing a town's fair share.

Even if the municipalities were not to be estopped from advancing their position and despite their efforts here to distinguish both the position they forcefully advocated before the Appellate Division in In re Six Month Extension and that court's subsequent opinion in reliance of the same, the court finds the underlying principles in that case, as first enunciated by the Supreme Court in Mount Laurel II, are the same as the matter here. A municipality's fair share obligation is cumulative; to the extent it has not been addressed during the gap period it must be and, so long as this obligation can be reliably calculated by rational means, it is to be included in the third round cycle.

The court further notes all three iterations of COAH's proposed third round rules provided the gap need would be incorporated into the towns' third round obligation.

The first version of COAH's third round rules provided:

> The "growth share" for the period January 1, 2004 through January 1, 2014 shall initially be calculated based on municipal

> growth projections pursuant to N.J.A.C. 5:94-2.2. Projections of population and employment growth shall be converted into projected growth share affordable housing obligations by applying a ratio of one affordable unit for every eight new market-rate residential units projected, plus one affordable unit for every 25 newly created jobs as measured by new or expanded non-residential construction within the municipality in accordance with Appendix E, as projected in the municipality pursuant to N.J.A.C. 5:94-2.4. The growth share projections shall be converted into actual growth share obligation when market-rate units and newly constructed and expanded non-residential developments receive permanent certificates of occupancy, pursuant to N.J.A.C. 5:94-2.5. **Although the overall statewide need calculations are figured from the last year of the prior round (1999) to the last year of the new round (2014), the municipality's portion of the statewide need is compressed into a delivery period that runs from January 1, 2004 to January 1, 2014. N.J.A.C. 5:94-2.1(d).** (Emphasis supplied).

The second version stated:

> The actual growth share obligation shall be based on permanent certificates of occupancy issued within the municipality for market-rate residential units and newly constructed or expanded non-residential developments in accordance with chapter Appendix D. Affordable housing shall be provided in direct proportion to the growth share obligation generated by the actual growth. However, if the actual growth share obligation is less than the projected growth share obligation, the municipality shall continue to provide a realistic opportunity for affordable housing to plan for the projected growth share through inclusionary zoning or any of the mechanisms permitted by N.J.A.C. 5:97-6. The municipality may submit an implementation schedule as detailed in N.J.A.C. 5:94-3.2(a) that sets forth a detailed timetable for affordable units to be provided within the period of substantive certification that demonstrates realistic opportunity and a timetable for the submittal of all information and documentation required for each mechanism. The implementation schedule shall consider the economic viability of the proposed mechanism, including the availability of public subsidies, development fees and other source of financing. **Although the overall Statewide and regional need calculations are figured from the last year of the prior round (1999) to the last year of the new round (2018), the municipality's portion of the statewide need is compressed into a delivery period that runs from January 1, 2004 to December 31, 2018. N.J.A.C. 5:97-2.2(e).** (Emphasis supplied).

The third version prepared for COAH by Dr. Robert Burchell also incorporated the then 1999-2014 gap period into local municipality's affordable housing obligation for the third cycle. N.J.A.C. 5:99-2.1(a). Dr. Burchell's proposed rules, however, allowed the towns to equally split the delivery of these units over the third and fourth cycles. See, Appendix D to N.J.A.C. 5:98 and 5:99.

Therefore, although each version of the proposed third round rules differed in their approach in delivering the gap obligation, all three iterations required each municipality to account for all or a portion of these units in the upcoming third round. While the first two iterations of COAH's round three rules were invalidated by the courts, no reviewing court has struck down COAH's attempts to recapture the gap need. The only issue remaining therefore is whether the gap number can be reliably calculated.

It is this issue, raised by this court, and the one expressed below by the Appellate Division nearly twelve years ago which presents the greatest challenge:

> We are constrained to observe that the permissive approach to the passage of time connoted by Mount Laurel II and Hills Dev. Co. …. was applied when the subject matter was new and COAH was only an idea or in its infancy. The passage of so much time since then places a different perspective on the principle. Nevertheless, although factual figures, when ultimately developed, might never provide an adequate basis for recapturing the gap-time obligations of particular municipalities, to conclude so now, on the records before us would be speculations. We are obliged to accept COAH's intentions and goals as stated and leave for future development and remediation … any idea that real opportunity for affordable housing have been irretrievably lost during the gap in ways that do not comport with the policies and principles underlying the process. In re Six Month Extension at page 97 in the upcoming housing cycle.

In addition to, once again, confirming the "gap" need is to be addressed, the Appellate Division clearly foresaw the potential difficulties in determining the gap period need and suggested that this task would be left to those with the expertise to develop the "factual figures."

THE REPORT OF SPECIAL REGIONAL MASTER RICHARD B. READING

To that end, the court here acknowledges the report of its Regional Master, Mr. Reading, a copy of which accompanies this opinion as "Appendix A", who has received, reviewed and critiqued the detailed "gap period" methodology developed by Dr. David Kinsey on behalf of Fair Share and the reports of Econsult and other experts either criticizing or supporting that methodology.

The point of the court's inquiry here was not to determine whether the gap methodology proposed by Dr. Kinsey is flawless or appropriate. The details relating to the proper methodology will be determined at the upcoming plenary hearing. Rather, the inquiry is twofold – first, can a "gap methodology" be developed so as to provide a rational, reasonable and reliable basis to calculate the gap need and, second, to determine whether the gap need should be incorporated into a single 1999 to 2025 "prospective need," as originally proposed by Dr. Kinsey, or whether the gap need is more accurately recaptured when calculated as a separate and discrete component of a town's fair share. On these two questions, the court must necessarily rely on expert opinion.

In his report, Mr. Reading concedes there is a challenge in arriving at a methodology for the gap period. This, is not because the calculation is any more difficult than that used in determining present or prospective need but due primarily to the lack of any pre-existing methodology.

> The calculation of the current needs of the affordable households formed during the sixteen year Gap Period is not a process that is imbedded in the Prior Round methodology, is not a projected (Prospective) need, but should be undertaken as a separate and discrete component of affordable housing need. Prior submissions provided by FSHC and Econsult on December 8, 2015 contended that the calculation of the Gap Period affordable housing needs were unnecessary because they were properly a part of the 1999-2015 Prospective Need (FSHC) or were unnecessary altogether because the FHA does not make any provision for a retrospective need (Econsult). Furthermore, it was argued that the precise identification of the LMI households formed during the Gap Period that have a continuing need for affordable housing may be so speculative that it would appear to defy empirical calculation. The continuing needs of LMI households formed during the Gap period are different and distinct from the measurement of deficient housing units or the projection of future LMI households.
> Accordingly, the Gap Period would necessitate a different methodology than those used for Present and Prospective Need.
> Reading Report, page 14.

Mr. Reading further provides:

> The fact that a task may require a different form of analysis should not preclude its attempt. Assertions that a determination of Gap Period affordable housing needs cannot be reduced to a precise mathematical calculation devoid of all assumptions and estimates is not distinctly different than the preparation of estimates for the other components of housing need. In this regard, the other components of affordable housing need, including Present Need and Prospective Need are likewise predicated upon estimates that are structured as calculations. The different nature of time frame encompassed by the Gap Period should not be an impediment to its quantification., **and a methodology that utilizes the actual data and yields a realistic outcome would, in reality, be no more impaired than the estimates of the Present and Prospective components of affordable housing need.**
> Id. at page 14-15. (emphasis supplied).

Thus, Mr. Reading states the gap period methodology may actually be more reliable. In this regard, Mr. Reading notes that unlike prospective need which necessarily relies on assumption estimates and projections, the gap period will be based on data from actual events

"that is less subjective and yields results that are trustworthy and readily verifiable." Id. at page 17.

Next, Mr. Reading found in reviewing the two alternatives presented by Dr. Kinsey, the method which calculates the gap need as a separate and discrete calculation is the preferable approach.

> FSHC has presented two alternative methodologies for the calculation of Gap Period LMI housing needs. The first method (Alternative 1) follows their position that a Prospective Need period from 1999 and 2025 is the correct approach, but contends that this 26 year projection can readily be broken down into two projections; one from 1999 to 2015 (Gap Period) and one from 2015 to 2025 (Prospective Need). In the first alternative, the same projection methodology is used for both components, and despite the fact that the 1999-2015 Gap Period has already passed and has available data, is still treated as a projection from 1999. The second methodology advanced by FSHC is based upon a 1994 recalculation by COAH of the prior round (1987-1993) housing obligations due to more up to date information (1990 Census) that reflected a slower rate of population and housing growth.
>
> The second alternative presented by FSHC is preferable to the first alternative to the extent that its addresses the housing needs in a prior period by utilizing actual data rather than projections and estimates. The second alternative is a move in the right direction, but needs to be further refined to incorporate more factual data and to include more information to accurately identify the LMI households formed, but not satisfied during the Gap Period. Of greater significance than FSHC's specific calculations is the fact that FSHC has acknowledged that a separate and discrete methodology can be prepared and utilized for the determination of Gap Period affordable housing needs. In this latter regard, one of the competing methodologies has recognized the existence of the Gap Period and, despite the rejection of COAH's last approach for its calculation, has confirmed that an alternative methodology could be developed and utilized for the Gap Period calculations.
> Id. at page 16.

Finally, the court notes Mr. Reading's report addresses the potential of double counting of low and moderate-income households in both the gap period and the present need – a fear raised by the municipalities. As part of his recommendations for developing a methodology, Mr. Reading agrees the methodology ultimately employed must "adjust the Gap Period LMI households for 2015 LMI Present Need households…" Reading Report, "Recommended Procedure," item 4, page 17. Again, the purpose here is not to adopt a specific methodology at this juncture. However, the court is confident that Mr. Reading will further address this concern and resolve it satisfactorily prior to recommending any methodology to the court.

The court finds Mr. Reading's report to be both comprehensive in its scope and clear in its recommendations. Accordingly, his recommendations as to the methods and processes to be employed in developing an accurate and reliable methodology to determine the gap period need is adopted by the court and shall be utilized by the parties when preparing their suggested methodologies to the court in advance of the upcoming trial.

B.

THE 1999 to 2015 GAP PERIOD NEED TOGETHER WITH A MUNICIPALITY'S PRESENT NEED AND 2015 TO 2025 PROSPECTIVE NEED CONSTITUTE THE COMPONENTS OF A MUNICIPALITY'S THIRD ROUND FAIR SHARE OBLIGATION WHICH ARE THEREFORE SUBJECT TO THE 1000 UNIT CAP PROVISION OF THE FHA

With the inclusion of the gap period, there are four components of a municipality's affordable housing obligation. The first component, in time, is the town's unmet or unsatisfied obligation, to the extent there remains one, from the first and second housing cycles. Next, as determined above, is a town's gap period obligation from 1999 to 2015. The third component is

the municipality's present need. The fourth and final component is the town's prospective need from the present to the end of the upcoming ten-year housing cycle. All but the first component is subject to FHA's 1000 unit cap.

The first component is clearly not. In Mount Laurel IV, the Supreme Court identified certain guiding principles that the trial courts should follow. The very first principle was that a town's prior affordable housing obligations of the first two rounds must be satisfied. Specifically, the Court stated "our decision today does not eradicate the prior round obligations. As such, prior unfulfilled housing obligations should be **the starting point** for a determination of a municipality's fair share responsibility." Mount Laurel IV at page 30 (emphasis supplied). Given this clear directive, these obligations must be met in full with no further abatement.7

The question then becomes which of the remaining components are subject to FHA's 1000 unit cap limitation. That statute provides that COAH and the courts cannot impose a fair share obligation on a municipality in excess of 1000 units per each ten-year housing cycle.

> No municipality shall be required to address a fair share beyond 1000 units within ten years form the grant of substantive certification, unless it is demonstrated, following objection by an interested party and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that is likely that the municipality through its zoning power could create a realistic opportunity for more than 1000 low and moderate income units within that ten-year period. N.J.S.A. 52:27D-307(e)

The FHA then specifies what those facts and circumstances would be:

> For purposes of this section, the facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units, as provided above, shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the ten-year period preceding the petition for substantive certification in connection with the objection filed.
> Ibid.

7 This prior round obligation may already have been subject to adjustment by operation of the 1000 unit cap or the 20 percent cap.

The municipalities argue the FHA's 1000 unit cap should be applied to a municipality's entire fair share obligation, i.e., the present need and the prospective fair share for 2015 to 2025 **and** any "gap period" obligation determined to be applicable by the court.

The builders, on the other hand, urge the court to adopt the approach recently taken by the trial court in the recently reported case of In the Matter of the Adoption of the Housing Element of Monroe Township, Dkt. No. MID–3665-15 (Law Div. Middlesex Cty, October 5, 2015) ("Monroe Township"). In that case, the court determined it was never the intent of the Legislature to cap what in essence is a twenty six (26) year obligation at 1000 units. Instead, the court in Monroe Township split the town's obligation into two components, i.e., a 2015-2025 component and a gap period component. If the municipality's fair share obligation for the 2015-2025 period exceeded the 1000 unit cap, it could utilize the cap as provided for in the statute. The gap period obligation however was moved "outside" the statutory cap. In its place, the Monroe Township court created a pro-rated gap need cap of 1600. However, in order to lessen the impact on municipalities, the Monroe Township court allowed the municipality to spread its gap obligation equally over three cycles. Thus, for example, if a municipality had a present and prospective need obligation for 2015 to 2025 of 1200 units and a "gap" need for 1999 to 2015 of 1800 units, the town's 1200 unit present and prospective need would be capped at 1000 and the 1800 gap need would be separately capped at 1600 units. These gap units would then be spread over the next three cycles in three equal installments of approximately 533 units per cycle. Therefore, in this example, the municipality would be obligated to provide 1533 fair share units during the 2015-2025 third cycle plus 533 units in each in the next two cycles in addition to their then-calculated fair share need.

The builders argue by raising the cap for the gap obligation to 1600 but allowing the towns to phase in that obligation, the Monroe Township court was attempting to balance the legislative concerns of lessening the impact of such a large obligation upon towns but recognizing the intent of the Mount Laurel doctrine to preserve a town's past gap obligation, where possible, to thereby produce the most affordable housing units allowable. The municipalities however assert the Monroe Township court failed to observe the plain meaning of the FHA's 1000 unit cap provision. They further assert that the prorated 1600 unit gap obligation cap has no basis in law whether that be prior court decisions, prior COAH regulations or the FHA. They ask the court therefore to adhere to the plain language of the FHA.

The beginning point for determining the intent of a statute is the language of the statute itself. Courts must be bound by the axiom that when a legislature speaks by drafting a statute, the law says what the legislature meant. Thus, if the words of a statue are plain, clear and unambiguous , the "judicial inquiry is complete." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). In this state, the New Jersey Supreme Court has ruled:

> When interpreting statutory language, the goal is to divine and effectuate the Legislature's intent. In furtherance of that goal, we begin each such inquiry with the language of the statute, giving the terms used therein then ordinary and accepted meaning. When the Legislature's chosen words lead to one clear and unambiguous result, the interpretative process comes to a close, without the need to consider further intrinsic aids. We seek out extrinsic evidence, such as legislative history, for assistance when statutory language yields "more than one plausible interpretation." (citations omitted). State v. Shelley, 205 N.J. 320, 323 (2011) citing to and quoting DiProspero v. Penn, 183 N.J. 477, 492-93.

The specific language of the FHA relative to the cap is precise, clear and unambiguous, i.e., no municipality is to have a fair share obligation beyond 1000 units in any ten (10) year cycle. The only possible ambiguity perhaps is the meaning of the term "fair share" in the context

of a sixteen (16) year gap. Does it refer only to the "present need and prospective need" calculation for the period of 2015 to 2025 thereby excluding the "gap period?" If so, then the argument advance by the builders and adopted by the court in Monroe Township would be compelling.

Surprisingly, the FHA does not specifically define either the term "fair share" or "present need." It does, however, define "prospective need" which could lead to a question as to whether "present need" is subject to the 1000 unit cap. However, Section 307 of the FHA in defining the duties of COAH specifically authorizes COAH to consider the municipality's "fair share of the regions **present and prospective need**" when applying the 1000 unit cap. N.J.S.A. 52D-307(e). (emphasis supplied). The court is satisfied the present need is part of a town's "fair share" and thus subject to the cap.

This court also finds the term "fair share" applies to a municipality's present need and prospective need for 2015 to 2025 and to its 1999 to 2015 gap period. As noted above, COAH and the municipalities have previously asserted that any gap would be included in the next round's prospective need and the Appellate Division had agreed with this assertion. Therefore, whether the gap period is folded into a new round's prospective need or calculated as a separate and discrete component, the gap period is part of the fair share need. Moreover, in the unadopted third iteration of COAH's third round rules, the 1999 to 2014 "gap period" is denoted as the "1999-2014 unanswered prior obligation" and involves projections for the years 1999 to 2014. "Fair Share of Prospective Need" or "Fair Share" is defined in those same rules as "a projection of affordable housing needs based upon the development and growth that is reasonably likely to occur in the region or municipality during the period of 2014 to 2024." Thus, the unanswered prior obligation or gap obligation appears to be qualitatively the same as "prospective need" and

thus both are components of a municipality's "fair share." Therefore, both of these components constitute "fair share" and are subject to and within the cap.

In the final analysis, the court finds it is constrained by the clear language of the FHA and therefore the fair share obligation of any municipality, constituting the gap period from 1999 to 2015, the present need and the upcoming third round prospective needs, is subject to that statute's 1000 unit cap.

C.

A MUNICIPALITY MAY DEFER, SUBJECT TO THE DISCRETION OF THE COURT UP TO 50 PERCENT OF ITS "GAP NEED" OBLIGATION TO THE FOURTH ROUND HOUSING CYCLE

The court notes that most municipalities in Ocean County and the overwhelming majority of New Jersey municipalities do not, even when including the "gap period", have fair share obligations exceeding 1000 units for the third round. In some circumstances, their surviving "gap" obligation after the cap is applied may be substantial. Such towns would be obligated to provide their entire fair share within the next ten (10) year third round housing cycle. Such a result, in many cases, may unduly strain municipal services or otherwise detrimentally impact these towns. Mr. Reading, in his report, recommends the court consider a two cycle phase-in period for a town's gap period obligation. Mr. Reading notes such a deferral was proposed in COAH's unadopted third round rules. The court agrees with this approach and therefore such municipalities may petition the court to defer up to 50 percent of its "gap" obligation to the fourth round. This determination will be made during the court's review of the individual

municipal plans and will be based upon objective factors to be developed by the court with the assistance of its local masters.

Finally, the court acknowledges there may be a circumstance in Ocean County where a town's obligation may, with the inclusion of the gap period, be pushed beyond the 1000 unit cap. Indeed, Mr. Reading approximates there may be anywhere from thirty to forty municipalities throughout the state facing such an eventuality. The question thus presented is which component is capped. In those rare circumstances, and if it were to occur in Ocean County, the regional master, when allocating the regional need to such a town would first account for the present and prospective needs. This need will be given first priority. Then, the gap need units, 50 percent of which may be eligible to deferral, would be added and then the cap applied. For example, if a town's housing need is determined to be as follows: present need – 200 units; prospective need – 500 units; gap need – 400 units, the master is to first add the present and prospective need (200 units plus 500 units) and then add that portion of the gap need (300 units) to arrive at the 1000 unit cap. The remaining 100 gap units are eliminated and one half of the surviving 300 gap units (150 units) may be deferred to the fourth cycle.

CONCLUSION

Based upon the findings of this opinion, the Special Regional Master is hereby ORDERED to prepare his final report so as to:

1. Include, as a separate and discrete component, the affordable housing need which arose during the "gap period" encompassing the period from the end of the second round housing cycle in 1999 to the present into his methodology in determining the statewide and regional housing need and the allocation of that need to the constituent Ocean County municipalities.

2. Apply FHA's 1000 unit cap provision as directed by this opinion. A municipality's present and prospective need for the third round housing cycle

together with the gap period need shall all be subject to the cap. A municipality's present and prospective need shall be accounted for first and then the gap period need is to be added.

3. Include in his methodology a mechanism whereby all municipalities may seek to defer up to 50 percent of its gap period need to the fourth round housing cycle. The court's determination on the requested deferral shall be determined during the court's review of the individual affordable housing plans. The Special Local Masters shall prepare a report to the court and Mr. Reading within forty-five days setting forth suggested factors to be utilized in such a determination.

MARLENE LYNCH FORD, A.J.S.C., concurs with and joins in the opinion of the court.