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# SUPREME COURT OF NEW JERSEY

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| IN THE MATTER OF THE ADOPTION OF N.J.A.C. 5:96 AND 5:97 BY THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING | Supreme Court Docket No. 67,126<br><br>On petition for certification to:<br><br>NEW JERSEY SUPERIOR COURT APPELLATE DIVISION<br><br>Docket No. A-005767-07T3<br>Lead Docket No. A-5382-07T3<br><br>CIVIL ACTION<br><br>On Appeal from the New Jersey Council on Affordable Housing |

## BRIEF OF THE BOROUGH OF ATLANTIC HIGHLANDS IN OPPOSITION TO FAIR SHARE HOUSING CENTER'S MOTION IN AID OF LITIGANT'S RIGHTS

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## INTRODUCTORY STATEMENT

This Motion asks the Supreme Court to impose an unprecedented "nuclear option" in the Mount Laurel world, and the Court literally has its finger on the red button that, if pushed, could expose many municipalities to the throes of builder's remedy lawsuits. Fortunately, however, there is a far preferable alternative available to this Court than unleashing developers hungry for profit on municipalities: namely, provide COAH a reasonable amount of time to ***finish*** the rulemaking process.

Putting aside COAH's well-documented issues, one important fact cannot be ignored: Municipalities like the Borough of Atlantic Highlands have demonstrated, beyond debate, that they are committed to complying with their "fair share" obligations voluntarily and without the need for the very litigation sought by Fair Share Housing Center ("FSHC"). Like over three hundred municipalities across the state, COAH's problems have forced Atlantic Highlands to waste considerable taxpayer funds, and the Borough is in no way responsible for COAH's failure to meet this Court's deadline. The relief sought by FSHC therefore would unfairly punish the Borough for actions far beyond its control.

On the other hand, deep-pocketed developers stand to gain the most from FSHC's unjustified proposed remedy. Ironically, these developers sit at the opposite end of the spectrum from

municipalities, in that they have done ***absolutely nothing*** to deserve the windfall they stand to gain from FSHC's motion. Simply stated, municipalities do not deserve the punishment; and developers do not deserve the incredible prize contemplated by this motion.

What everyone *does* deserve, however, is a stable body of regulations establishing municipal obligations, a reasonable set of compliance techniques to satisfy them, and a reasonable opportunity for municipalities to comply with the new standards. Thus, while FSHC seeks the nuclear option, the Borough asks this Court to make the fair, practical, and eminently more productive decision: Give COAH a reasonable amount of time to ***finish*** the rulemaking process. If, by chance, this is no longer an option, then this Court should not punish the Borough for COAH's problems. Instead, it should provide the opportunity, either automatically or through a reasonable process, for the Borough to maintain immunity from suit and to comply voluntarily as it has been trying to do for more than a decade.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Borough relies upon the procedural history and statement of facts of the New Jersey State League of Municipalities and adds the following important relevant facts germane to the Borough's unwavering commitment to voluntary compliance.

Between July 23, 2003 and December 29, 2008, the Borough petitioned COAH for approval of its Round 2 Housing Element and Fair Share Plan ("Affordable Housing Plan") and two iterations of its Round 3 Affordable Housing Plans.[1] COAH did not approve the two Round 3 plans because the Appellate Division invalidated the regulations upon which they were based while COAH staff reviewed the plans.

After this Court invalidated COAH rules in September of 2013, the Borough has awaited for COAH to promulgate new regulations so that it may, once again, achieve compliance under the protective umbrella of COAH's jurisdiction free from the enormous burdens and distraction of Mount Laurel litigation.

When this Court ordered COAH to meet a series of deadlines on March 14, 2014, at least **thirty** municipalities adopted resolutions urging COAH to meet the deadlines. Ra1-71.[2]

On October 20, 2014, COAH came within **one vote** of adopting new regulations. The Borough simply wants COAH to break the 3-3 deadlock and thereby complete the rulemaking process. As in the past, the Borough will adopt a plan responsive to the new requirements and seek approval free from burdensome litigation.

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[1] All facts set forth in this section are supported by documentation included in the Borough's Appellant's Appendix. To avoid burdening the Court with documents not necessary for adjudication of this motion, the Borough will supply any document immediately upon request.

[2] "Ra" refers to the Borough's Responding Appendix.

Despite its longstanding commitment to comply with whatever laws are established; and despite the Fair Housing Act's promise to protect towns that complied with its requirements; the Borough finds itself defending a motion that could hold it accountable for COAH's coming one vote short of adopting new regulations. Punishing Atlantic Highlands under this circumstance would be profoundly unfair.

## POINT I

### FSHC DID NOT SATISFY THE STANDARDS OF RULE 1:10-3 BECAUSE COAH DID NOT "WILLFULLY" OR "DEFIANTLY" VIOLATE THE ORDER IN QUESTION

FSHC relies on Rule 1:10-3 ("Relief to Litigant") as the basis for the relief sought and asserts that the Rule "only requires a showing that a noncompliant party is capable of carrying out the order and did not do so." Mb7.[3]

This statement mischaracterizes the standard. An order in aid of litigant's rights is a device that springs from the Court's contempt power. Abbott ex rel. Abbott v. Burke, 206 N.J. 332, 492 (2011)(Hoens, J. dissenting). Therefore, such an order "employs coercion in response to a specific kind of wrong, one that 'consists of a **defiance** of governmental authority.'" Ibid. (quoting Dep't of Health v. Roselle, 34 N.J. 331, 337 (1961)(emphasis added).

[3]"Mb" refers to FSHC's Moving Brief, dated October 31, 2014; "Ma" refers to FSHC's Appendix, dated October 31, 2014.

The purpose of proceedings under Rule 1:10-3 is therefore "to determine whether [the party in question was] in **willful disobedience** of previously entered court orders. Pasqua v. Council, 186 N.J. 127, 133 (2006), rev'd on other grounds, Turner v. Rogers, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011). As stated in Abbott, orders granted pursuant to Rule 1:10-3 are "a form of ***punishment*** for an act of contempt . . . ." Ibid. (emphasis added).

In this case, therefore, if this Court finds COAH to be in contempt, then any punishment meted out should focus singularly on the members of COAH, not on the 314 municipalities under its jurisdiction. See, e.g. Essex Cnty. Bd. of Tax. v. City of Newark, 340 N.J.Super. 432, 437 (App. Div. 2001)(noting that, by willfully refusing to abide by a court order and to allocate funds for a property tax revaluation, individual members of the governing body of Newark "will subject themselves to further charges of criminal contempt as well as to commitment under [R. 1:10-3] until the orders have been complied with." (quoting Essex Cnty. Bd. of Tax. v. City of Newark, 139 N.J.Super. 264, 276 (App. Div. 1976) modified, 73 N.J. 69 (1977)).

In light of this clear precedent, which focuses the punishment or coercive measures on the individuals violating the order, exposing towns to builder's remedy lawsuits in this case is akin to punishing the individual residents of Newark for the

contemptuous and willful refusal by members of the governing body to allocate the funds in question.

Exercise of this significant power rests on a number of findings only one of which is relevant here. Specifically, this Court must find that COAH has "failed and refused" to comply with the Order in question and has done so "although fully capable" of doing so. Abbott, supra, 206 N.J. at 492 (citing Pasqua v. Council, 186 N.J. 127, 141 n. 2 (2006) (requiring a finding that the litigant was capable of compliance "but **willfully refused to do so**")(emphasis added). "The sort of behavior that typically supports issuance of an order in aid of litigant's rights is an act or acts that bespeak '**clear defiance** of [a court's] specific and unequivocal orders.'" Id. at 493 (quoting Abbott v. Burke (Abbott VIII), 170 N.J. 537, 565 (2002) (LaVecchia, J., concurring in part and dissenting in part)(emphasis added).[4]

COAH's actions since March 14, 2014 hardly "bespeak clear defiance" or demand a conclusion that COAH "willfully refused to" comply with the Order. That is simply not the case, as the following facts clearly demonstrate.

Prior to reaching its deadlock on October 20, 2014, COAH met every interim deadline imposed in the Order entered by this

[4] See also Greer v. New Jersey Bureau of Sec., 288 N.J.Super. 69, 86 (App. Div. 1996)("We find **no contempt or willful disobedience** by the Bureau. . . .")(emphasis added).

Court on March 14, 2014 (hereinafter the "Order.") Specifically, the Order set deadlines for COAH (1) to formally propose Round 3 regulations; (2) to publish the proposed rules in the New Jersey Register; (3); to accept and consider public comments on the proposed regulations; and (4) to conduct a public hearing on the proposed regulations. COAH met every one of these deadlines. Notably, COAH also prepared responses to the roughly 3,000 public comments received. Indeed, other than reaching an unexpected deadlock at its meeting on October 20th, COAH took ***every single action specified*** by the Order up to the October 22nd deadline for adoption.

This series of events shows, beyond debate, that that COAH respected and honored this Court's directive and made a good faith attempt to achieve the goal of adopting new Round 3 rules by the Court's deadline.[5] Indeed, the Board members who cast the three affirmative votes refused to put off adoption so that they could meet this Court's deadline. See Ma42 (Transcript of

[5] FSHC's incessant substantive criticisms of COAH's proposed Round 3 rules are premature, inappropriate, and *should not be considered* by this Court. The issue concerning the validity of the rules will not ripen until COAH actually adopts them, and that debate requires a presumption that the rules are valid. In re Adoption Of N.J.A.C. 5:94 & 5:95, 390 N.J.Super. 1, 30 (App. Div. 2007)("Regulations of an administrative agency enacted pursuant to legislative authority and to implement legislative policy enjoy a presumption of validity.") FSHC unquestionably knows this axiomatic principle of law, and this Court should not allow itself to be lured into a preconceived bias against COAH's proposed through FSHC's repetitive yet premature criticisms.

COAH's October 20, 2014 Hearing, at p. 28, lines 5-13). Moreover, the Board members who cast the three negative votes did not vote that way to defy this Court. Rather, they merely sought additional time to give further consideration to almost 3,000 comments and to make proposals for changes that would, in their opinion, improve the affordable housing policies of our state. See Ma41-42 (Transcript at p. 24-28.) In light of their statements both in favor and against adoption of the proposed rules, the Board members clearly acted in good faith in an effort to meet the deadline. The fact that they deadlocked is nothing more than the result of honest debate in a democratic process.

Finally, there is a school of thought that "sanctions under R. 1:10-3 are intended to be **coercive, not punitive**. . . ." See Pressler and Verniero, New Jersey Court Rules, Comment 4.4.1. on R. 1:10-3 at 197 (Gann 2015)(emphasis added). Thus, if Rule 1:10-3 is coercive, then this Court should ***coerce*** the COAH board members into adopting rules. If the rule is punitive, then this Court should ***punish***[6] the COAH Board members for failing to meet the deadlines. See Essex Cnty. Bd. of Taxation, supra, 340 N.J.Super. at 437. Either way, this Court should not make

[6] Frankly, granting the relief sought by FSHC would not impact the individual members of COAH whatsoever. However, since any culpability for violating the March 14, 2014 Order rests solely on their shoulders, law, fairness, and common sense requires the focus to be on them, not on towns.

municipalities culpable for COAH's failure to meet a deadline in the March 14, 2014 Order.

In light of the above, this Court should deny FSHC's Motion and provide COAH additional time to permit the COAH board to complete the good faith process it has engaged in since March 14, 2014.

## POINT II

**PROVIDING COAH THE OPPORTUNITY TO BREAK A LEGITIMATE DEADLOCK IS FAR PREFERABLE TO EXPOSING BLAMELESS MUNICIPALITIES TO BUILDER'S REMEDY LAWSUITS.**

FSHC argues, in essence, that the only viable option is to expose municipalities under COAH's jurisdiction (hereinafter "COAH municipalities") to builder's remedy suits. This is not true. While the nuclear option is certainly *available*, the far preferable option is to provide COAH an opportunity to cure the 3-3 deadlock in an expeditious fashion. We urge this Court to exercise restraint and select that option.

Numerous compelling reasons support the proposition that the doctrine would benefit far more from allowing COAH to complete the rulemaking process than exposing COAH municipalities to builder's remedy suits. Indeed, exposing COAH municipalities to builder's remedy suits would

1. Squarely violate the stated purpose of the FHA;
2. Precipitate the excessive litigation this Court sought to avoid;

3. Punish municipalities for COAH's temporary deadlock;

4. Chill the voluntary compliance this Court sought to foster; and

5. Destroy the uniformity this Court deemed so important when affirming the constitutionality of the FHA.

Finally, practical considerations weigh heavily against granting FSHC's application and, thereby, imposing *enormous* burdens on trial judges to perform COAH's functions.

An elaboration of these points follows.

***A. Exposing COAH Municipalities To Builder's Remedy Suits Would Squarely Violate The Express Purpose Of The FHA.***

The Legislature enacted the Fair Housing Act, N.J.S.A. 52:27D-301 to -329 ("FHA") to ***curtail*** the excessive litigation precipitated by Mount Laurel II. In this regard, N.J.S.A. 52:27D-303 states that the purpose of the FHA was to create "alternatives to the use of the builder's remedy as a method of achieving fair share housing.") Indeed, the FHA "declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is [COAH's] mediation and review process set forth in this act and ***not litigation***". Ibid. (emphasis added).

This Court fully appreciated the Legislature's intentions when it stated:

> The legislative history of the Act makes it clear that it had two primary purposes: first, to bring an administrative agency into the field of lower income

> housing to satisfy the Mount Laurel obligation; second, **to get the courts out of that field**.
>
> [Hills Dev. Co. v. Tp. of Bernards, 103 N.J. 1, 49 (1986) ("Mount Laurel III")(emphasis added).]

Granting FSHC's motion would squarely thwart the express legislative intent of the FHA under circumstances where a single additional affirmative vote is the only obstacle to new rules.

***B. Exposing COAH Municipalities To Builder's Remedy Suits Would Precipitate The Excessive Litigation This Court Decried.***

In Mount Laurel II, this Court emphasized that excessive litigation has damaged the doctrine:

> The **waste of judicial energy** involved at every level is substantial and is matched only by the often **needless expenditure of talent** on the part of lawyers and experts. The **length and complexity of trials** is often outrageous, and the **expense of litigation is so high** that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue.
>
> [So. Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158, 200 (1983) ("Mount Laurel II")(emphasis added).]

See also J.W. Field Co., Inc. v. Tp. of Franklin, 204 N.J.Super. 445, 451 (Law Div. 1985) (wherein Judge Serpentelli noted that one of the overriding policy objectives of Mount Laurel II was to avoid excessive litigation).

Yet, granting FSHC's motion would unleash a statewide flood of builder's remedy lawsuits against municipalities that accepted the invitation of all three branches of government to

bring themselves under COAH's jurisdiction to obtain protection from just such suits so that they could comply free from litigation. See N.J.S.A. 52:27D-309 and 316 (inviting towns to achieve compliance under COAH's administrative process in exchange for protection from builder's remedy suits); see also Toll Bros., Inc. v. Tp. of West Windsor, 173 N.J. 502, 566-67 (2002)(reminding towns that they have to power to avoid the sword of the builder's remedy with the "shield" of COAH's jurisdiction).

Ruling as FSHC asks would force towns that accepted the invitation to comply under the protective umbrella of the COAH process to bear the enormous cost of litigation. Nobody can credibly dispute that those extraordinary expenses would be better spent on generating affordable housing and this Court has the power to facilitate that result through its rulings.

***C. Exposing COAH Municipalities To Builder's Remedy Suits Would Punish Blameless Municipalities For COAH's Deadlock.***

COAH bears responsibility for failing to meet this Court's deadline - not municipalities. Indeed, municipalities had a strong interest in COAH meeting the deadlines as evidenced in part by the 30 municipal resolutions referenced above. Ra1-71.

This Court should not compound the damage to municipalities by making them pay for COAH's deadlock. Many municipalities have already adopted two affordable housing plans in an effort

to comply with the first and second iteration of Round 3 rules. Indeed, the Borough adopted and petitioned COAH to approve ***three*** plans, and is no closer to securing plan approval than the day it adopted the first plan. This Court should not radically compound the burden on towns that have relentlessly pursued compliance voluntarily to *avoid* the burdens of builder's remedy lawsuits by forcing them to pay the price for COAH's problems.

In upholding the FHA, this Court acknowledged the importance of fostering public acceptance of the doctrine. Mount Laurel III, supra, 103 N.J. at 23 ("Most important of all to the success of the [FHA] is this public acceptance and, hence, the municipal acceptance that it should command.") Subjecting blameless municipalities to builder's remedy suits hardly advances this important goal.

***D. Exposing COAH Municipalities To Builder's Remedy Suits Would Chill The Voluntary Compliance This Court Sought To Encourage.***

This Court emphasized its desire to encourage municipalities to comply with their responsibilities voluntarily, without the need for builder's remedy lawsuits: "**First, we intend to encourage voluntary compliance** with the constitutional obligation. . . ." Mount Laurel II, supra, 92 N.J. at 214 (emphasis added); J.W. Field, supra, 204 N.J.Super. at 451, 45-59 (identifying voluntary compliance as one of the "overriding policy objectives" of Mount Laurel II). All 314

COAH municipalities have one common characteristic: They all sought to comply voluntarily under the protection of COAH's jurisdiction, thereby fulfilling one of this Court's overarching objectives. Exposing any of these municipalities to builder's remedy suits would severely damage the value of voluntary compliance and thereby undermine this important goal.

***E. Exposing COAH Municipalities To Builder's Remedy Suits Would* Destroy The Uniformity This Court Deemed So Important.**

The Legislature conferred COAH with "primary jurisdiction" and charged directed it to devise regulations from time to time. N.J.S.A. 52:27D-304(a) and 307. This created a ***single source*** to determine housing obligations and the mechanisms available to satisfy them. This Court praised the uniform standards emanating from a legislative design in which one entity would establish the state's affordable housing policy:

> This statutory scheme addresses the main needs delineated in our prior decisions on this matter, namely, the **consistency on a statewide basis** of the determination of regional need, fair share, and the adequacy of the municipal measures. Furthermore, the decisions and actions by the Council will follow the contours of the SDRP (when completed), explicitly designed for this purpose, among others. **Revisions, adjustments, fine tuning--all of the techniques available to an administrative agency--can be implemented on a statewide basis as experience teaches the Council what works and what does not.** The risk that **discordant development might result if *Mount Laurel* cases continue to be decided by the courts** is minimized by the considerations noted above, which lead to the conclusion that most municipalities will use the Council's procedures.

[Mount Laurel III, supra, 103 N.J. at 37 (emphasis added).]

FSHC's proposed remedy, which suggests appointing six judges for the six housing regions (Mb15), would completely eliminate the uniformity, predictability, and consistency sought by this Court and the Legislature. Instead of abandoning that salutary goal, this Court should preserve it by directing COAH to take the action necessary to achieve the affirmative vote of just one more COAH Board member.

***F. Practical Considerations Weigh Heavily Against Granting FSHC's Application and, Thereby, Imposing Enormous Burdens on Trial Judges To Perform COAH's Functions.***

This Court recognized, in no uncertain terms, that implementation of the Mount Laurel doctrine is a "**monumental social task.**" Mount Laurel III, supra, 103 N.J. at 61. FSHC, however, asks this Court to ignore that conclusion and suggests that transferring this "monumental task" to our courtrooms would miraculously put wind in the sails of the Mount Laurel doctrine. That suggestion is a fallacy.[7]

Foisting the burden of implementing the Mount Laurel doctrine onto the laps of our trial judges would be fraught with

[7] FSHC's proposed remedy is also a *non sequitur*. Clearly, the lack of viable rules is the problem. **Adoption of viable rules, therefore, is the solution.** A lack of builder's remedy lawsuits is **not** the problem. Therefore, unleashing a spate of Mount Laurel lawsuits (1) solves no problems; (2) creates many problems; and (3) benefits no one but developers and attorneys.

practical difficulties, to say the least. Indeed, it would be a disaster. COAH regulations embody a plethora of highly debatable policy decisions; rely on technical and extremely esoteric demographic data; and employ planning decisions made by COAH for over a quarter century through its "extremely broad" powers. Id. at 32. Such decisions are clearly best suited for a state agency filled with staff and professionals with the experience and necessary technical expertise to balance the interests of ***all*** stakeholders.

Since the three original Mount Laurel judges appointed by Justice Wilentz have retired, the current trial judges lack anything close to COAH's institutional expertise in establishing and implementing the state's policy on affordable housing. Thus, FSHC's so-called "solution" would force each trial judge (unlucky enough to be burdened with this assignment) to make the complicated and controversial policy and technical judgments that COAH has made for decades. These trial judges would suddenly find themselves presiding over interminable battles pitting FSHC and deep-pocketed developers against the towns thrust into this quagmire solely due to COAH's inability to secure one more affirmative vote. The burden on trial judges **and** the public would be enormous, and completely unwarranted.

Judicial resources and time are other important factors. The time even the most efficient and experienced trial judge

would need to resolve the myriad issues in every case would dwarf the time needed for COAH to break a 3-3 deadlock. In fact, chances are that COAH would resolve its deadlock long before trial courts come close to resolving the procedural and substantive issues they will face. Thus, the time and money spent in the interim would be, once again, utterly wasteful. In reality, if this Court granted FSHC's wish, and even assuming COAH fails to act shortly thereafter, lawsuits will be filed, both sides will commission extensive expert reports, and will engage in extensive discovery and motion practice before proceeding to a hearing, which will be lengthy and very expensive. The trial judge will ultimately issue a decision setting forth the rules that will apply to municipalities in his or her vicinage. An examination of AMG Realty Co. v. Warren Tp., 207 N.J. Super 388 (Law Div. 1984) illustrates how complicated the process will be merely to resolve the fair share issues.

Inconsistency is another factor. Even if a trial judge does a superb job on a case, it would be surprising indeed for another trial judge to reach the identical conclusions, because the resources and competence of the lawyers and experts in each courtroom will largely determine the decisions each trial judge makes. These cases would naturally be followed by a bevy of appeals. In sum, in Mount Laurel II, this Court described the

reasonably foreseeable circumstance that would result from granting FSHC the relief it seeks when it referred to "paper, process, witnesses, trials and appeals." 92 N.J. at 199.[8]

***Conclusion***

In view of all the factors discussed above, the Borough respectfully submits that allowing COAH to complete the process is preferable to igniting builder's remedy suits against COAH municipalities.

**POINT III**

**IF THIS COURT IMPOSES THE NUCLEAR OPTION, IT SHOULD PROVIDE MUNICIPALITIES THE SAME PROTECTIONS FROM LITIGATION THEY ENJOYED PRIOR TO COAH'S RECENT DEADLOCK.**

Municipalities that commit to comply voluntarily are equally protected from the burdens of Mount Laurel litigation regardless of the jurisdiction. For example, COAH's 2008 regulations empowered municipalities to amend their Housing Plans three times before COAH would even consider "site specific

[8] Four Towns' brief illustrates the complexity of the task trial judges would be burdened with if this Court grants FSHC's motion. We agree. Four Towns also states that trial judges could implement a principle embodied in COAH's proposed regulations for inclusionary zoning: namely, to avoid a windfall and maximize the benefits to lower income households, the amount of affordable housing provided by a developer **must be directly proportionate** to the value of the zoning benefit provided by a municipality. This concept is logical, fundamentally fair, **and** soundly rooted in Mount Laurel II and applicable law. We therefore emphasize the particular value of this concept to the development of the doctrine and refer the Court to comments the undersigned submitted to COAH on this point. Ra72-81.

relief," the functional equivalent of a builder's remedy. N.J.A.C. 5:96-3.4(c). COAH's recent proposed procedural rules provide even more latitude for municipalities to amend their affordable housing plans. See 46 N.J.R. 919 (proposed N.J.A.C. 5:98-8.5). These statutory and administrative standards support and highlight the principle that it is vastly preferable for municipalities to comply voluntarily without the burdens of Mount Laurel litigation.

Similarly, in J.W. Field, supra, after balancing all seven "overriding policy objectives" established by this Court in Mount Laurel II, Judge Serpentelli conferred "immunity" from Mount Laurel lawsuits upon any municipality that committed to comply voluntarily. 204 N.J.Super. at 456. More specifically, if a municipality had been sued, the immunity would insulate the municipality from subsequent suits. If the municipality had not been sued, the immunity would empower it to comply free from any Mount Laurel suits. Ibid. Sixteen years after J.W. Field and the enactment of the FHA, Judge Serpentelli reaffirmed the doctrine of temporary immunity in K. Hovnanian Shore Acquisitions v. Tp. of Berkeley, despite the plaintiff's claim that filing a plan with COAH is the sole means to secure protections from builder's remedy suits. The Appellate Division rejected this argument and affirmed the validity of the immunity

procedure. See Ra85-101 (K. Hovnanian Shore Acquisitions v. Tp. of Berkeley, 2003 WL 23206281 (App. Div. Jul 01, 2003).

The very purpose of the builder's remedy, as articulated by this Court, provides strong support for protecting municipalities from builder's remedy lawsuits as they achieve compliance through the trial courts. See Toll Brothers, supra, 173 N.J. at 562 ("The purpose of the remedy, then, was **to accomplish what a municipality might otherwise have been unable or unwilling to do itself**. . . ."){emphasis added). Since each of the 314 COAH municipalities have already demonstrated their ***willingness*** to comply; and indeed would be ***able*** to but for COAH's inability to process petitions; there is no valid reason to expose any of these towns to builder's remedy lawsuits.

In light of the above, it would be eminently reasonable and appropriate for this Court grant immunity to all COAH municipalities while the trial courts establish rules and standards and while municipalities comply with those standards. This way, any municipality that sought to comply voluntarily through the FHA's administrative process would not unfairly lose what it secured by playing by the rules.

If this Court declines to make the protections automatic as they now are under present law for these 314 municipalities by virtue of being under COAH's jurisdiction, then we urge this Court to employ the following process:

1. Provide all 314 municipalities presently under COAH's jurisdiction a 60-day opportunity to seek immunity in accordance with the longstanding procedures described in J.W. Field, KHSA, and referenced by this Court in Mount Laurel III. 103 N.J. at 29-30. Indeed, the immunity doctrine is one of the "innovative refinements" of the doctrine that this Court praised trial judges such as Judge Serpentelli for devising. Id. at 64.

2. Provide immunity from any Mount Laurel lawsuits during the 60-day period to the town and its planning board.

3. If a municipality files its declaratory action within this 60-day period, the immunity should remain in place while the trial judge (a) establishes standards with which the town must comply, and (b) processes the municipality's application for approval of its Affordable Housing Plan.

4. If a town files its declaratory action after the 60-day period, it should be entitled to regain immunity from any Mount Laurel lawsuit not filed in the interim.

The procedure described above employs, in essence, the immunity procedure that trial judges presiding over Mount Laurel matters have routinely used for the last three decades throughout the state. The procedure is also similar to a procedure municipalities currently use when they file their plans with COAH and bring a declaratory relief action in court pursuant to N.J.S.A. 52:27D-313. Thus, unlike the unprecedented relief sought by FSHC, the process we recommended avoids unnecessary litigation, provides a path to compliance for every town seeking to comply voluntarily, ***and keeps finite public resources dedicated to compliance instead of defending builder's remedy lawsuits from developers with deep pockets.***

## POINT IV

**FSHC ASKS THIS COURT TO CREATE AN AMORPHOUS IMMUNITY STANDARD THAT STRIPS THE MUNICPALITY OF PROTECTIONS CONFERRED BY THE LEGISLATURE.**

For the past thirty years, towns have secured the benefits of COAH's jurisdiction merely by taking two actions: adopting a plan, and filing it with COAH prior to the institution of an exclusionary zoning suit.[9]

In the "guidance" section of its brief, FSHC recommends an amorphous standard for immunity far more onerous than the FHA requires. Specifically, FSHC asks this Court to require a town to have fully-complied with its Prior Round obligations and "make progress" towards its (unknown) Round 3 obligations to even qualify for immunity. Mb17. This Court should reject such a high standard.

First, in accordance with its stated purpose, the FHA provides a municipality a clear path to protection from lawsuits by filing its affordable housing plan with COAH before an

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[9] Similarly, under the jurisprudence announced by Judge Serpentelli in J.W.Field, supra, and utilized throughout the state ever since, towns seeking to comply under the court's jurisdiction often stipulated to non-compliance, committed to comply, and secured "temporary immunity orders" either ex parte or via duly-noticed motions. Thus, whether under COAH's or the court's jurisdiction, securing protection from builder's remedy lawsuits was relatively easy and based on a clear path. **The reason is simple: voluntary compliance is preferred, unnecessary litigation should be avoided, and a builder's remedy is only to be used as a "last resort."** See KHSA, supra, at 16 (Ra100).

exclusionary zoning suit is filed in court. N.J.S.A. 52:27D-303, 309 and 316. Accordingly, COAH rules consistently provide great protection from lawsuits by permitting towns to amend their plans multiple times in their efforts to secure plan approval. See Point III, supra at 19. This protection and flexibility explains why 314 municipalities filed affordable housing plans with COAH and petitioned it for approval of same. This Court should not impinge on municipality's statutory right to secure immunity and maintain immunity thereafter as it adjusts its plan to address any concerns of COAH staff.

FSHC also ignores that municipalities have reasonably relied on the rulings set forth by COAH in a resolution on December 8, 2010, which granted six motions for a stay based upon the language cited by FSHC from In re 5:96 and 5:97, 416 N.J.Super. at 512. See Ra82-84. An examination of COAH's decision reveals that, while it encouraged municipalities to continue to capture affordable housing opportunities as they arose, it expressly chose not to **require** municipalities to address Round 3 until it established the regulatory framework with which municipalities must comply.[10] Ibid. Although FSHC

[10] COAH reasonably did not require towns to divert even more resources before it adopted new standards. After all, a municipality may have specific parcels it wishes to devote towards affordable housing and will also have financial resources. How the municipality zones its land and uses its

challenged this policy in In re Adoption of Guidance for Municipalities Regarding October 8, 2010 Appellate Division Decision by the Staff of the Council on Affordable Housing (Docket No.: A-1441-10T3), no court has yet reversed or modified COAH's ruling. As such, municipalities, at the very least, had the right to follow this decision, 103 N.J. at 63, and certainly should not be punished for doing so.[11]

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limited fiscal resources may well depend on the standards with which it must comply which have yet to be adopted.

[11] FSHC's recommendation would also automatically expose every town that did not satisfy its prior round obligations to builder's remedy lawsuits. However, if a municipality filed a duly adopted plan with COAH before an exclusionary zoning suit was filed, it is entitled to protection and to secure a grant of substantive certification free from the burdens any exclusionary zoning lawsuit. FSHC's standard deprives municipalities of these rights. In any event, there may be perfectly valid reasons to explain why a municipality did not satisfy 100 percent of its "prior round obligation," a number which may also change if COAH adopts the proposed regulations. For example, a municipality may have zoned a site for inclusionary housing and the developer may have opted to wait for a more favorable housing market before commencing development. FSHC's standard would expose these municipalities to builder's remedy suits even though the FHA entitles that municipality to protection.

## CONCLUSION

For the reasons set forth above, the Borough of Atlantic Highland urges this Court to deny FSHC's motion and to limit any remedy it may impose as set forth herein.

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