DiFrancesco Bateman
Kunzman, Davis, Lehrer & Flaum, P.C.

15 Mountain Boulevard
Warren, New Jersey 07059

Telephone: (908) 757-7800
Fax: (908) 757-8039
www.newjerseylaw.net

Steven A. Kunzman
Member of the Firm
Extension 170
skunzman@newjerseylaw.net

October 19, 2015

Honorable Thomas C. Miller, P.J. Civ.
Superior Court of New Jersey
Somerset County Historic Court House
20 North Bridge Street
Ceremonial Courtroom 1, Second Floor
Somerville, NJ 08876

Re: In The Matters of the Township of Warren and Boroughs of Watchung, Rocky Hill and Frenchtown for a Judgment of Compliance of Their Third Round Housing Element and Fair Share Plan (MOUNT LAUREL)
Township of Warren: SOM-L-904-15
Borough of Watchung: SOM-L-902-15
Borough of Rocky Hill: SOM-L-901-15
Borough of Frenchtown: HNT-L-309-15

Dear Judge Miller:

The Township of Warren, and the Boroughs of Watchung, Rocky Hill and Frenchtown ("Municipalities") submit this in letter reply brief on the motion of the Municipalities to extend the period of immunity. It is respectfully submitted that there is no sound basis for the opposition to the motion for an extension of time or for the court to deny a reasonable extension. The Supreme Court was unequivocal, the circumstances facing the municipalities was not caused by the municipalities; it sits squarely at the feet of COAH. In re: 5:97, 221 N.J. 1, 23 (2015). The Court was clear that municipalities are not to be punished for the failure of COAH, Id., and further, that exclusionary zoning actions are not permitted at this stage. Id. at 47. It is important to recognize that the Supreme Court characterized these actions as

"compliance actions." Id. at 5-6. The Court expected these matters to be handled so that they "reflect as closely as possible the FHA's processes and provide the means for a town transitioned from COAH's jurisdiction to judicial actions to demonstrate that its housing plan satisfies its *Mount Laurel* obligations." Id. at 7. The current posture of the cases, however, is more akin to exclusionary zoning litigation than a process by which the courts can shepherd the towns through the process of developing a plan that meets the town's regional fair share of the realistic opportunity for the development of low and moderate income housing. It is understood that these proceedings are to involve input from interested parties. FSHC, the NJBA, and the various intervening developers, however, relentlessly assert that Dr. Kinsey's numbers are correct and should simply be adopted, that the towns are dragging their feet, that the towns should have acted faster in retaining a new consultant due to the health issues of Dr. Burchell, and that the analysis should be a simple adjustment of Dr. Kinsey's numbers. Not only do these assertions lack merit, they do not produce housing and they do not create a workable and realistic path to compliance. They are, in essence, asking the Court to toss out due process and the Rules of Court. There is simply no basis for a Court to adopt a party's expert report solely because they contend it is correct; nor should parties be penalized because an expert becomes ill through no fault of the proffering party. The Court Rules still apply to how cases are to be managed, and they make it clear: "The rules...shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." R. 1:1-2. Certainly there is a public interest in the development of low and moderate income housing; however, it is also in the public interest that these cases of public significance be handled in fairly, and in an orderly manner, and that they take into account the interests of the public based upon the realities of 2015. The municipalities

are requesting nothing more than that this process be done in an orderly manner that embodies fairness. Providing sufficient time so that the Econsult report can be prepared is an essential component of the process. The report is expected to be proffered assist the Court in making a decision that considers more than one perspective on an issue that is important to all of New Jersey. The history of the affordable housing regulation demonstrates that there are many factors to be considered and that the thinking and understanding of the proposed solutions evolved over the past thirty years and continues to evolve. It is in the interests of all the citizens of New Jersey that the process be constitutional, particularly where the subject of the process is also of constitutional significance. The Rules of Court ensure that there is due deliberation of the facts, opinions, issues, rights and obligations in rendering a decision. Certainly an issue of such statewide importance is entitled to be fully deliberated and not rushed through the Courts.

FSHC and others argue that the municipalities should demonstrate to the court that they are acting in good faith by submitting the framework of a plan, which also requires that each town estimate its obligation. One Judge has recognized it is a waste of resources to require municipalities to prepare plans without having the opportunity to be advised what standards they are to use and what number they are to meet. Judge Johnson in Atlantic County aptly described the approach being advocated by the opponents to this motion as "akin to being dropped in the middle of a dense forest on a cloudy day, without a compass and told, 'Find your way home.' With a compass one would have some comfort as to the direction to pursue; with the sun, one could plot a general course and hope for the best; with neither, one walks in circles." In re: City of Abesecon, et. al. Superior Court of Atlantic County,

(Numerous Docket No.), slip. Op. 2.[1] Judge Johnson recognized that there is a logical sequence to reaching a solution that doesn't require activity for the sake of activity. A perfectly logical reading of Mount Laure IV allows the citizens of New Jersey to have this process completed in a manner that is guided by achievement of a just purpose, not the most expedient solution.

The Supreme Court placed the towns into three categories; the first are those with third round substantive certification, such as Frenchtown and Rocky Hill. The Court addressed this category of towns in section "C" of the opinion. 221 N.J. at 24-27. Since municipalities that have received certification have approved plan, they deserve and advantage in the review process. Id. at 26. These towns would be given the opportunity to supplement the plan based upon the "newly calculated" prospective need. Id. Trial courts were expect to "be generously inclined to grant applications for immunity from subsequently filed exclusionary zoning actions during the necessary review process unless such process is unreasonably protracted." There is not one mention of the five month limitation in this section of the opinion. It stands to reason that the Supreme Court expected that such towns would be readily willing and able to supplement their plans after the trial court makes the determination of present and prospective need and other threshold determinations. Id. at 28-29. It is submitted that the certifications filed in support of the motions before the Court demonstrate that the delay in obtaining an expert report on a central issue of the case was not created or caused by the municipalities, and that they acted diligently in obtaining a new expert, particularly considering the statutorily required procedures that are necessary for municipalities to act. It is respectfully submitted

[1] In accordance with R. 1:36-3 a complete copy of the opinion is annexed hereto.

that extending the immunity period for certified towns is reasonable. There should be no need to prove anything further.

In section "D" of the opinion the Court addressed "participating" municipalities, which includes Warren and Watchung. The Court stated that these towns should be given like treatment to that which was provided under the FHA, which was that towns had a period of five months to submit their plans. As has been argued many times before the trial court, the FHA requires plans to be submitted after COAH has provided criteria and guidelines. Looking at the situation on a practical level, requiring a municipality to develop and submit a supplemental plan prior to s being advised of the number to be achieved and the guidelines that are to govern the format - including bonuses, caps, credits, and consequences- becomes an exercise that doesn't significantly hasten the preparation of a final plan. There is no need to run through the exercise for the sake of doing it – it won't make the end result any better or arrive more quickly. In addition, the Supreme Court also stated that "the trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court's determination of the municipality's presumptive compliance with its affordable housing obligation. Id. at 28.(emphasis added) The Court went on to state that the immunity periods should not continue for an undefined period of time, but should include such additional periods of immunity as are reasonable, as is determined by the trial court, for the municipality to achieve compliance. Id. It should be significant that the Court referred to "periods" of immunity (plural), that could be extended on a reasonable basis. The Supreme Court empowered the trial courts to control the litigation and the periods of immunity so long as they are not open ended and are subject to review. It is respectfully

submitted that extending the immunity period for these towns is reasonable under the circumstances. There should be no need to prove anything further.

These cases are significant in that they involve planning for development in the State for at least the next ten years. The decisions here involve most every facet of life in the Garden State: housing, planning, economic development, transportation, schools, taxes, jobs, and natural resources, to name a few. The participants should be permitted to prepare their cases as in any other matter by which a trial judge needs to make decisions, which includes the necessity to make adjustments to schedules and order for unforeseen circumstances, such as the illness of a crucial expert witness; the fact that governing bodies, deliberative bodies, sometimes take slightly longer then individuals or businesses to take action; and requiring such actions by the parties that are reasonably related to achieving the goal of a just determination. It is hard to see that anything is gained through the energy that is spent arguing about the additional *months* it will take to address the issue of present and prospective need, particularly when compared to the years that COAH failed to make progress. This battle, and the requirement that the towns keep busy developing *preliminary plans* that will undoubtedly be subject to challenge, seems to be more like exclusionary zoning litigation than a "constitutional compliance action." Id. at 28. These municipalities have all placed themselves before the Court to enable them to continue on the quest they commenced once the first iteration of the Third Round Rules that were promulgated: to develop a plan that will meet the third round obligation. The movant Municipalities had complied with prior obligations, and have received third round certification or were proceeding towards compliance while waiting for COAH to finally comply with its statutory duty. Now they are intending to continue the process once the Court makes the threshold determinations. There will undoubtedly be

meaningful disputes between FSHC, NJBA, intervening developers and the Municipalities on the substance of these actions- the calculation of present and prospective need, the guidelines to be applied, and whether the plans satisfy the obligations- this dispute, however, does not get us any closer to the solution. The Municipalities know that the trial courts will make the necessary decisions at the appropriate time. All that is being asked is that the Municipalities be treated at least as well as a litigant in any other manner. Of course, these cases are not like any other matter; as these are actions by which the Municipalities seek direction from the courts and the opportunity to comply (*compliance actions*). The Supreme Court did not intend these actions to be ones by which the housing advocates and developers seek to prove that the municipalities do not comply (*exclusionary zoning actions.*)

Accordingly the Municipalities request the Court grant an extension of the period of immunity for a sufficient amount of time for the Econsult report to be issued and for the Court to schedule the necessary proceedings to enable the Court to make the necessary threshold determinations. Once that is completed, the Municipalities will be able to use their resources to develop a housing element and fair share plan that complies.

Respectfully submitted,

Steven A. Kunzman

SAK:kc

Attachment – Judge Johnson Opinion

cc: All Counsel/Parties of Record

COURT INITIATED

IN RE:		:	SUPERIOR COURT OF NEW JERSEY
City of Absecon	ATL-L-2726-12	:	
City of Northfield	ATL-L-2050-14		
Township of Egg Harbor	ATL-L-3501-14	:	LAW DIVISION
Township of Galloway	ATL-L-1442-15		ATLANTIC COUNTY and
City of Brigantine	ATL-L-1504-15	:	CAPE MAY COUNTY
Township of Egg Harbor	ATL-L-1506-15		
Township of Hamilton	ATL-L-1517-15	:	
Borough of Buena	ATL-L-1523-15		
City of Corbin City	ATL-L-1533-15	:	
Township of Mullica	ATL-L-1534-15		
City of Somers Point	ATL-L-1538-15	:	
City of Linwood	ATL-L-1539-15		
Town of Hammonton	ATL-L-1573-15	:	
Township of Buena Vista	ATL-L-1639-15		
Borough of Cape May Point	CPM-L-292-15	:	
Borough of West Cape May	CPM-L-302-15		
Township of Upper	CPM-L-303-15	:	
Township of Sea Isle City	CPM-L-304-15		
City of Ocean City	CPM-L-305-15	:	
Borough of Avalon	CPM-L-306-15		
City of Cape May	CPM-L-307-15	:	MEMORANDUM OF DECISION
Borough of Wildwood Crest	CPM-L-309-15		
Borough of Woodbine	CPM-L-310-15	:	
Borough of Stone Harbor	CPM-L-351-15		
		:	

On September 10, 2015, this Court conducted an initial case management conference in the within proceedings and engaged in an extensive colloquy, and received the benefit of the learned opinions of all legal counsel in attendance, whose names, together with counsel for the Fair Share Housing Council (FSHC) and the New Jersey Builders' Association (NJBA), and contact information for all the attorneys involved in these proceedings are set forth in Exhibit "B" of the Court's Order of even date herewith.

Prior to the Case Management Conference, and in an effort to make a preliminary assessment of the current status of compliance with the municipal Plaintiffs' constitutional affordable housing obligations, the Court reviewed the Complaints, Certifications and documentation filed with the Court setting forth the status of the Fair Share Plans of the parties hereto. Subsequent to the aforesaid conference, the Court received a 58 page submission by Kevin D. Walsh, Esquire, on behalf of the FSHC, the same dated September 18, 2015, which was received by the Court at the end of the work day and necessitated additional review and reflection by the undersigned. The Court also received submissions from James E. Franklin, II, Esquire, and Jeffrey R. Surenian, Esquire, and it was necessary to make further examination of pertinent provisions of the Fair Housing Act, N.J.S.A. 52:27D-301, et seq. (the FHA) in light of relevant case law and Mr. Walsh's comments. As a consequence of such further review of the law, and notwithstanding any comments made by the undersigned at the time of the initial Case Management Conference, the Court has determined that some of its preliminary assessments must be modified.

Mr. Walsh's arguments demonstrate the breadth of his knowledge on all the issues before the Court except one, the facts on the ground. As a consequence of COAH's abject failure to perform its duties, and the unfortunate and untimely illness of Dr. Burchell, there presently do not exist rational and reasonable criteria for calculating the affordable housing needs of any of the Plaintiffs.

Mr. Walsh's urgings are not grounded in reality. The task he urges upon the Court is akin to being dropped in the middle of a dense forest on a cloudy day, without a compass and told, "Find your way home." With a compass one would have some comfort as to the direction to pursue; with the sun, one could plot a general course and hope for the best; with neither, one could walk in circles.

Mr. Walsh's demands for this Court to move with urgency read more like hastiness to the undersigned. His demand that the Court review the Plaintiff's Fair Share Plans and calculate their affordable needs is not accompanied by a yardstick; his complaint of a "Free Pass" to the Plaintiffs ignores the reality that Plaintiffs spent tax dollars and public officials' time toward compliance with COAH, only to have their efforts ignored by COAH. This Court refuses to punish Plaintiffs for COAH's failings.

Mr. Walsh's frustration is misplaced. COAH created the mess we are all in and it's all our task to deal with it responsibly. This Court's instinct is to err on the side of preserving precious municipal resources and to avoid unnecessary confrontations and redos upon remands to the trial court. The FSHC will be granted ample opportunity to be heard on the constitutional affordable housing obligations in Atlantic and Cape May Counties in an efficient, cost effective, and reasonable manner.

Accompanying this Memorandum of Decision (MOD) is the Court's Case Management Order of even date herewith (CMO) which establishes the initial procedures for the handling of the twenty-four Declaratory Judgment Actions (DJs) filed in Atlantic and Cape May Counties following the Supreme Court's decision in *IN THE MATTER OF THE ADOPTION OF N.J.A.C. 5:96 AND 5:97 BY THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING*, 221 N.J. 1(2015), (hereinafter "*In Re: COAH*") which decision is the most recent in a series of decisions articulating what is known as "The Mount Laurel Doctrine."

All of the Plaintiff municipalities have filed a D.J., and additionally, as noted by the findings hereinafter supporting "Exhibit A" to the CMO, all of the Plaintiffs – via either prior filings with COAH, and/or substantive certifications from COAH, or the entry of various Court Orders - have acquired a status entitling them to a degree of repose from "Builder's Remedy" litigation. In reliance upon the Complaints, Certifications, legal briefs and documentation filed by the parties, together with the argument of the attorneys present before the Court on September 10, 2015, this Court makes the following preliminary findings of fact.

FINDINGS OF FACT

1. Each of the Plaintiff municipalities have adopted a Resolution of Participation and filed their pleadings with the Court in a timely fashion, consistent with the mandates of the Order and Decision in *In Re: COAH*, and in an apparent good faith effort to go forward toward compliance with their constitutional affordable housing obligations.
2. Most of the Plaintiff municipalities – to varying degrees and at various times - went to considerable expense and effort in submitting a filing of their updated municipal planning documents with COAH, to wit, a Housing Element and Fair Share Plan,

only to have their efforts frustrated and their municipal resources dissipated as a consequence of COAH's failure to act on their submissions.

3. As discussed hereinafter, there is presently an inability to calculate the "fair share," to wit, the number of affordable housing units necessary for each municipality, nor can this Court readily discern what criteria and guidelines to apply regarding the measures to be taken by the municipalities of Atlantic and Cape May counties in satisfying their constitutional affordable housing obligations.
4. In reviewing the various submissions of the parties, it is apparent that there is a significant dispute in the "fair share" calculations advanced by the competing interests in this litigations. Proceeding to a plenary hearing on any of the Plaintiff's constitutional affordable housing obligations in advance of the demonstration of rational and reasonable criteria for calculating the affordable housing needs of the Plaintiffs will yield nothing but frustration.
5. Robert W. Burchell, PhD, a professor with Rutgers University was the individual who prepared the analysis upon which COAH based the third iteration of the "Round 3" regulations for the present and prospective regional need for affordable housing; they were proposed, but never adopted by COAH.
6. David N. Kinsey, PhD, a professor with Princeton University was the individual who prepared the analysis for the Fair Share Housing Council (FSHC) and the New Jersey Builders' Association (NJBA).
7. The divergence in the opinions of Dr. Burchell and Dr. Kinsey as to the need for affordable housing in New Jersey and in the various regions, is a formidable obstacle to an expeditious resolution of the twenty-four DJs pending before this Court.
8. Complicating things further, the Court was advised by legal counsel at the hearing on September 10, 2015 that Dr. Burchell suffered a stroke on July 27, 2015. It was reported to the Court that Dr. Burchell's illness is debilitating to such an extent that he will not be able to participate in these proceedings.
9. Given Dr. Burchell's illness, the Court must recognize the reality that there will be a delay in the finalization of a rational and reasonable criteria for calculating the constitutional affordable housing needs of the Plaintiffs. Despite this Court's

diligent inquiries, it has yet to finalize arrangements for the appointment of a Fair Share Analyst, but is hopeful that will occur soon.

10. The reality recited in the preceding paragraphs, together with the Court's understanding of the law necessitates the five month period of immunity granted to the affected Plaintiff municipalities shall be reviewed periodically.

RULING OF THE COURT SUPPORTING THE ENTRY OF CMO

The procedures for transitioning from a COAH regulated process to one controlled by the Courts, as contemplated in *In Re: COAH* will only operate efficiently upon this Court having assurance that there exists rational and reasonable criteria for calculating the constitutional affordable housing needs of the Plaintiffs. It is this Court's opinion that the Supreme Court's instructions to the trial courts, combined with the pertinent provisions of the FHA, provide ample guidance. From this Court's perspective, a reasonable interpretation of *In Re: COAH* is that the five month period of immunity must be flexible to ensure that no Plaintiff is penalized until it has first had an opportunity to calculate its affordable housing needs in compliance with rational and reasonable criteria, confirmed as such by this Court.

This Court will not engage in a recitation of the evolution of "The Mount Laurel Doctrine" and the many decisions preceding *In Re: COAH*. That's been done quite well in *In Re: COAH*. Additionally, the parties hereto are all represented by capable legal counsel and each of them have provided highly informed briefs on the issues pertinent to the analysis of the facts and law made herein. The undersigned taught a Municipal Land Use course for the Rutgers University Extension Service for 20(+) years and has lived through many of the events which went into making the "Mount Laurel Doctrine" what it is. Suffice it to say, the history preceding this litigation isn't one of New Jersey's finer moments. The struggle never ends.

That said, this Court is mindful of the authority and responsibilities it has been entrusted with by our Supreme Court in addressing the issues raised by these proceedings. The context of this litigation is one in which the exigencies associated therewith arise from the abject failure of COAH to fulfill its responsibilities under both the FHA and its own regulations. COAH's failure has resulted in hardship, uncertainty and dissipation of

resources for all the stakeholders who in good faith relied upon COAH to faithfully and diligently perform its duties. It is now incumbent upon this Court and all the stakeholders involved in these proceedings to make good faith efforts to ensure that the within municipalities affected by this litigation are in compliance with their constitutional affordable housing obligations by as early a date as is practicable.

Notwithstanding any preliminary assessments of the undersigned at the initial Case Management Conference on September 10, 2015, the Court's decision to grant all of the Plaintiff municipalities immunity from Builder's Remedy litigation for an initial period of five (5) months, to be extended as necessary until confirmation of rational and reasonable criteria, is based upon its understanding of the law as set forth hereinafter.

A. The FHA was adopted by the New Jersey Legislature to minimize "Builder's Remedy litigation" and to encourage municipalities to comply with the law without becoming involved in protracted and costly lawsuits. N.J.S.A. 52:27D-303 declares the Legislature's intentions and states in pertinent part:

> The Legislature declares that the statutory scheme set forth in this act is in the public interest ... [and] satisfies the constitutional obligation enunciated by the Supreme Court. The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing.

B. In addition to discussing the status acquired by the adoption of a "resolution of participation," Section 52:27D-309(a) continues and states:

> Within five months after the council's adoption of its criteria and guidelines, the municipality shall prepare and file with the council a housing element, based on the council's criteria and guidelines ...

C. The Supreme Court's decision in *In Re: COAH* expressly articulated a preference for: (1) trial courts to follow the FHA processes "as closely as possible"; (2) trial courts to insure that municipalities receive "like treatment to that which was afforded by the FHA"; and (3) implementing procedures at the trial court level,

judges must "seek[s] to track the processes provided for in the FHA." 221 N.J. at 6, 18 and 19.

D. As noted by the Supreme Court in *In Re: COAH*, 221 N.J. 233 at 16:

> [I]t bears emphasizing that the process established is **not intended to punish the towns represented before this court**, or those that are not represented but which are also in a position of unfortunate uncertainty due to COAH's failure to maintain the viability of the administrative remedy. Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes, where appropriate, that are similar to those which would have been available through COAH for the achievement of substantive certification. (emphasis added)

E. When reading the above provisions of the FHA with the language of our Supreme Court, it is readily apparent that trial courts are obligated to continue enforcing the public policy provided for by the FHA. Because there are no current "criteria and guidelines" adopted by COAH, this Court must proceed with the necessary inquiries for ascertaining rational and reasonable criteria for calculating the constitutional affordable housing needs of Atlantic and Cape May Counties. Absent a basis for calculating the "fair share numbers," the Plaintiff municipalities do not have a target at which to aim in preparing their Housing Element and Fair Share Plan.

F. Plaintiffs share no responsibility for COAH's abject failure to fulfill its responsibility to adopt regulations in a timely fashion as mandated by the FHA. This Court will not punish the Plaintiff municipalities for COAH's failure to enforce the FHA and its own regulations.

G. Stripping the Plaintiff municipalities of immunity from Builder's Remedy litigation, at this juncture in time, will foster unnecessary litigation and will only serve to delay constitutional compliance. New Jersey law and common sense dictate the five month period of repose must be reviewed periodically to ensure that the Plaintiffs are working with rational and reasonable criteria in calculating their affordable housing needs.

H. In the event the FSHC wishes to assist the Court in expediting the process contemplated by the Court's Initial Management Order, paragraph numbers 1 and 2 facilitate the same.

Finally, nearly forty years ago, as a young lawyer, the undersigned was counselled by The Honorable George B. Francis, P.J.Ch., A.J.S., and J.A.D. (deceased), that: "There's nothing fast about justice. However long it takes, that's how long it takes." This Court will not engage in hasty conduct by pushing the twenty-four municipalities before the Court into efforts that are premature. We will do things correctly the first time – however long it takes – rather than on remand.

In addition to the Case Management Order, the Court has entered Orders on each of the Motions filed by the Plaintiffs, originally returnable September 4, 2015, and thereafter, by the Court, made returnable September 18, 2015.

Nelson C. Johnson 9-28-15

NELSON C. JOHNSON, J.S.C.