SUPREME COURT OF NEW JERSEY
DOCKET NO. 67,126
A-90/91/92/93/94

IN THE MATTER OF THE ADOPTION OF N.J.A.C. 5:96 AND 5:97 BY THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING

SUPERIOR COURT
APPELLATE DIVISION

Docket No.: A-5451-07T3
Lead Docket Number A-5382-07T3

CIVIL ACTION

On Appeal from the Council on Affordable Housing, with a remand in In re N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462 (App. Div. 2010), aff'd 215 N.J. 578 (2013)

BRIEF AND APPENDIX OF AMICI CURIAE NEW JERSEY FUTURE, AMERICAN PLANNING ASSOCIATION-NEW JERSEY CHAPTER, AND THE HOUSING & COMMUNITY DEVELOPMENT NETWORK OF NEW JERSEY IN SUPPORT OF FAIR SHARE HOUSING CENTER'S MOTION TO ENFORCE LITIGANT'S RIGHTS

LOWENSTEIN SANDLER LLP
65 Livingston Avenue
Roseland, New Jersey 07068
973.597.2500
Attorneys for Amici Curiae

On the Brief:
Catherine Weiss, Esq.
Bar No. 018582006
cweiss@lowenstein.com
Ryan J. Cooper, Esq.
Bar No. 034012006
rcooper@lowenstein.com

July 8, 2014

TABLE OF CONTENTS - BRIEF

Page

TABLE OF CONTENTS - APPENDIX ii

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENTS OF INTEREST OF AMICI CURIAE 3

STATEMENT OF FACTS AND PROCEDURAL HISTORY 3

ARGUMENT 4

POINT I

BY ADOPTING NEW METHODOLOGY THAT ENTIRELY ELIMINATES AFFORDABLE HOUSING OBLIGATIONS THAT CANNOT BE MET THROUGH THE DEVELOPMENT OF VACANT LAND, THE PROPOSED RULES BOTH FAIL TO MEET THE NEED AND REMOVE ANY INCENTIVE TO CREATE AFFORDABLE HOUSING THROUGH THE REUSE OF PREVIOUSLY DEVELOPED LAND. 5

POINT II

BY ADOPTING NEW METHODOLOGY THAT REDUCES OR ELIMINATES PRIOR ROUND OBLIGATIONS, THE PROPOSED RULES DISRUPT ONGOING DEVELOPMENT. 12

POINT III

BY ADOPTING NEW METHODOLOGY TO SET MAXIMUM DENSITIES, THE PROPOSED RULES REWARD PAST EXCLUSIONARY ZONING AND UNDERMINE SOUND REGIONAL PLANNING. 16

POINT IV

BY REQUIRING NEW ECONOMIC FEASIBILITY STUDIES, THE PROPOSAL WILL PROLONG THE ALREADY LENGTHY DEVELOPMENT PROCESS FOR NO SOUND PLANNING PURPOSE. 20

CONCLUSION 23

TABLE OF CONTENTS - APPENDIX

Page

Livingston Short Hills Coalition, LLC v. Twp. of Livingston Planning Bd., No. A-4101-12T1, 2014 N.J. Super. Unpub. LEXIS 1254 (App. Div. June 2, 2014) 1a

Joseph Kushner Hebrew Academy, Inc. v. Twp. of Livingston, No. A-5797-10T1, 2013 N.J. Super. Unpub. LEXIS 2170 (App. Div. Aug. 30, 2013) 9a

TABLE OF AUTHORITIES

PAGES

CASES

Abbott v. Burke,
163 N.J. 95 (2000) 4

Asbury Park Bd. of Educ. v. N.J. Dep't of Educ.,
369 N.J. Super. 481 (App. Div.), aff'd in part, 180 N.J. 109 (2004) 4

Fair Share Hous. Ctr., Inc. v. Twp. of Cherry Hill,
173 N.J. 393 (2002) 14

In re Adoption of N.J.A.C. 5:96 and 5:97,
416 N.J. Super. 462 (App. Div. 2010), aff'd, 215 N.J. 578 (2013) 4, 4-5, 21, 22

In re Adoption of N.J.A.C. 5:96 and 5:97,
Order (March 14, 2014) 4

In re Fair Lawn Borough,
406 N.J. Super. 433 (App. Div. 2009) 15

In re Six Month Extension,
372 N.J. Super. 61 (App. Div. 2004) 14

In re Twp. of Warren,
132 N.J. 1 (1993) 9

Joseph Kushner Hebrew Academy, Inc. v. Twp. of Livingston,
No. A-5797-10T1, 2013 N.J. Super. Unpub. LEXIS 2170 (App. Div. Aug. 30, 2013) 15, 17

Livingston Short Hills Coalition, LLC v. Twp. of Livingston Planning Bd.,
No. A-4101-12T1, 2014 N.J. Super. Unpub. LEXIS 1254 (App. Div. June 2, 2014) 14

P.T. v. M.S.,
325 N.J. Super. 193 (App. Div. 1999) 4

S. Burlington Co. N.A.A.C.P. v. Twp. of Mount Laurel,
67 N.J. 151 (1975) 17

S. Burlington Co. N.A.A.C.P. v. Twp. of Mt. Laurel,
92 N.J. 158 (1983) 12

Toll Brothers v. Twp. of West Windsor, 173 N.J. 502 (2002) 14

STATUTES AND ORDINANCES

N.J.S.A. 40A:12A-3 6

N.J.S.A. 52:27D-302a, d, e; -311a, 314a, b 9

N.J.S.A. 52:27D-311(a)(1) 17

N.J.S.A. 52:27D-313 23

N.J.S.A. 52:27D-314(b) 23

Fair Lawn, N.J., Code § 49-14 (2010) 15

RULES

R. 1:10-3 4

R. 1:36-3 14

R. 2:6-1 14

REGULATIONS

N.J.A.C. 5:92-1.3 ..... 6, 9

N.J.A.C. 5:93 13

N.J.A.C. 5:93 Appendix A 6, 9, 13

N.J.A.C. 5:93-4.2(h) 6, 9, 13

N.J.A.C. 5:93-5.4 21

N.J.A.C. 5:93-5.6(b) 17, 21

N.J.A.C. 5:97, App. F: Inclusionary Housing: Lessons from the National Experience 22

N.J.A.C. 5:99-3.3 at 46 N.J.R. 931 ..... 7, 8, 12-13, 21

N.J.A.C. 5:99-4.3(a)4 at 46 N.J.R. 932 ..... 20, 21, 23

N.J.A.C. 5:99-5.1 at 46 N.J.R. 932 13

N.J.A.C. 5:99-7.2(b) at 46 N.J.R. 935 21

40 N.J.R. 3088 22

46 N.J.R. 925 7-8

46 N.J.R. 927 9

46 N.J.R. 929 6

46 N.J.R. 955 8

46 N.J.R. 956 .... 8, 9

46 N.J.R. 1013 13

46 N.J.R. 1014 15

46 N.J.R. 1019 15

46 N.J.R. 1031 15

46 N.J.R. 1037-1050 7

46 N.J.R. 1038 9

46 N.J.R. 1039 .... 16-17, 17, 18

46 N.J.R. 1040 11

Other Authorities

Tim Evans, Is Redevelopment the "New Normal?" (Jan. 28, 2014), http://www.njfuture.org/2014/01/28/redevelopment-new-normal/ 10

John Hasse & Richard Lathrop, Changing Landscapes in the Garden State (July 2010), http://gis.rowan.edu/projects/luc/changinglandscapes2010.pdf 12

John Hasse, John Reiser & Alexander Pichacz, Rowan University, Evidence of Persistent Exclusionary Effects of Land Use Policy Within Historic and Projected Development Patterns in New Jersey: A Case Study of Monmouth and Somerset Counties (June 2011), http://gis.rowan.edu/projects/exclusionary/exclusionary _zoning_final_draft_20110610.pdf 18

James W. Hughes & Joseph J. Seneca, Demographics, Economics and Housing Demand (Apr. 2012), http://policy.rutgers.edu/reports/rrr/RRR29apr12.pdf 19-20, 20

James W. Hughes & Joseph J. Seneca, The Beginning of the End of Sprawl? (May 2004), http://policy.rutgers.edu/ reports/rrr/rrrmay04.pdf 9-10

Ronda Kaysen, Future Takes Shape for Bell Labs Site, N.Y. Times, Sept. 11, 2013, available at http://www.nytimes.com/2013/09/11/realestate/commercial/future-takes-shape-for-bell-labs-site.html?smid=pl-share 11

David Kinsey, Back to the Future: Imagine New Jersey Without Mount Laurel (Jan. 23, 2014), http://njplanning.org/wp-content/uploads/Back-to-the-Future.pdf 21

N.J. State Planning Comm'n, New Jersey State Development and Redevelopment Plan (March 1, 2001), http://www.state.nj.us/state/ planning/spc-state-plan.html 7, 16, 18-19, 19

Somerset Cnty. Planning Bd., Supporting Priority Investment in Somerset Cnty. Through Access and Mobility Improvements (June 2013), http://www.co.somerset.nj.us/planweb/pdf/Supporting%20Priority%20Investment_Final%20Report.pdf 11

Twp. of Cherry Hill Hous. Plan (2011), http://www.cherryhill-nj.com/DocumentCenter/View/1614 14

Twp. of Cranford Hous. Plan Element and Fair Share Plan (Apr. 3, 2013), http://www.cranford.com/uploads/township/affordable /2013-03-20-Housing_Plan_Element_and_Fair_Share_Plan.pdf 10-11

Voorhees Twp. Hous. Element and Fair Share Plan (Feb. 2010), http://www.nj.gov/dca/affiliates/coah/reports/petitions/0434.pdf 10

PRELIMINARY STATEMENT

The Council on Affordable Housing ("COAH") has failed to comply with this Court's September 2013 and March 2014 orders to issue Third Round Rules based on the prior round rules' methodology. The Court fashioned the remedy it did in those orders because almost fifteen years have passed without enforceable rules to implement the legislative mandate of the Fair Housing Act and the state constitutional obligation to create realistic opportunities for housing for families at all income levels, including low- and moderate-income families, in each region of the State.

As this Court noted in its 2013 decision, the prior round rules used a methodology for calculating affordable housing obligations that was consistent with the mechanisms developed by the trial courts before the enactment of the Fair Housing Act. The First and Second Round Rules survived legal challenge largely intact. This Court affirmed the Appellate Division's remedy, ordering expedited promulgation of Third Round Rules based on this previously tested and accepted methodology, to end the unconscionable delay. The remedy was intended to ensure the swift implementation of valid Third Round Rules, although the Court noted that the Legislature remained free to devise and propose alternative methodologies.

The rules COAH proposed on June 2, 2014, defy the Court's order in several ways. This brief will focus on a particularly damaging deviation: the brand new concept of the "Buildable Limit." The Buildable Limit attempts to assess the vacant land available for residential development throughout New Jersey. The word "Limit" reflects the way the concept operates under the proposal: all unmet obligations allocated in prior rounds and all obligations designed to meet prospective need are simply erased insofar as they exceed the Buildable Limit. Because of how it is derived and because of the absolute cap it places on municipal obligations, the Buildable Limit (1) eliminates tens of thousands of affordable units that COAH has said are required to meet the need, while undoing incentives to use redevelopment to meet these obligations, (2) cancels out unmet obligations allocated in prior rounds, and (3) rewards municipalities for their historic exclusionary zoning practices. In each of these ways, the Buildable Limit conflicts with the prior round rules' methodology, and does so in a way that undermines sound planning. This divergence from prior rounds is substantial and damaging. To pick just one example, the proposed rules wholly ignore the potential for the residential development of sites once used for other purposes even though such redevelopment is quickly becoming the dominant source of new construction in New Jersey.

In addition, the proposal requires municipalities to submit an economic feasibility study on each inclusionary development, with the planner who prepares the study certifying that the development will create a realistic opportunity for the creation of affordable housing. Again, this proposal breaks with prior rounds, which set general rules - including presumptive densities and set-asides for affordable housing, and locations mapped to growth centers in the State Plan - to create the conditions necessary for the construction of affordable housing. Instead, the proposal introduces a costly, contentious, and time-consuming system of one-by-one evaluations of each site.

STATEMENTS OF INTEREST OF AMICI CURIAE

Amici refer to and incorporate the Statements of Interest in the Brief and Appendix of Amici Curiae New Jersey Future, American Planning Association-New Jersey Chapter, and the Housing & Community Development Network of New Jersey filed in this matter on June 15, 2011.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici rely on and incorporate by reference the Facts and Procedural History in the Brief and Appendix in Support of Fair Share Housing Center's Motion to Enforce Litigant's Rights, filed on June 17, 2014.

ARGUMENT

This Court should grant Fair Share Housing Center's Motion to Enforce Litigant's Rights because COAH has failed to comply with this Court's orders to impose "third-round obligations based on the previous rounds' method of allocating fair share obligations among municipalities." In re Adoption of N.J.A.C. 5:96 and 5:97, 215 N.J. 578, 620 (2013); see also In re Adoption of N.J.A.C. 5:96 and 5:97, Order at 2 (March 14, 2014). Pursuant to New Jersey Court Rule 1:10-3, a party moving to enforce litigant's right need show only that another party is capable of complying but has failed to comply with an order of the court. See Asbury Park Bd. of Educ. v. N.J. Dep't of Educ., 369 N.J. Super. 481, 486 (App. Div.), aff'd in part, 180 N.J. 109 (2004); Abbott v. Burke, 163 N.J. 95 (2000); P.T. v. M.S., 325 N.J. Super. 193, 218 (App. Div. 1999). Because COAH's most recent proposal disregards this Court's orders, COAH should be compelled swiftly to propose Third Round Rules based on the prior rounds' methodology or, in the alternative, enforcement of the Mt. Laurel doctrine should be returned to the trial courts.

As this Court recognized nine months ago, "COAH's failure to enact lawful regulations to govern municipalities' ongoing obligation to create affordable housing" compelled the Court to order COAH to enact Third Round Rules based on the prior round methodology "without delay." In re Adoption of

N.J.A.C. 5:96 and 5:97, 215 N.J. at 586 (emphasis added). Despite this order, COAH first delayed and then defied this Court's mandate. Should the Court countenance COAH's recalcitrance, it will only further prolong "the limbo in which municipalities, New Jersey citizens, developers, and affordable housing interest groups have lived for too long," id. at 620, and frustrate the State's public policy of sound planning and smart growth as development continues without clear and constitutional rules for creating affordable housing opportunities. Accordingly, this Court should grant Fair Share Housing Center's motion and the relief sought there.

POINT I

BY ADOPTING NEW METHODOLOGY THAT ENTIRELY ELIMINATES AFFORDABLE HOUSING OBLIGATIONS THAT CANNOT BE MET THROUGH THE DEVELOPMENT OF VACANT LAND, THE PROPOSED RULES BOTH FAIL TO MEET THE NEED AND REMOVE ANY INCENTIVE TO CREATE AFFORDABLE HOUSING THROUGH THE REUSE OF PREVIOUSLY DEVELOPED LAND.

The First and Second Round Rules preserved the obligation to meet the full, allocated, regional affordable housing need COAH assigned to a municipality, even if that need could not be met through the initial development of vacant land. By preserving the obligation, this system created a realistic opportunity to meet the need for affordable housing and led municipalities to do so in part through the redevelopment of

sites that had already been built.[1] The proposed rules do away with this system, calculating a municipality's obligation based only on its available vacant land, and entirely and permanently erasing any need that cannot be met through development on such land. This new methodology thus eliminates any obligation to create tens of thousands of affordable units that fall within COAH's own calculation of the need and removes any incentive to incorporate affordable housing into redevelopment planning and construction.

The prior round rules preserved unmet affordable housing need and relied on redevelopment to satisfy such need where there was a shortage of suitable vacant land. See, e.g., N.J.A.C. 5:93-4.2(h) (establishing continuing obligation to fulfill affordable housing need that could not be met through development of vacant land by assessing other areas "that may develop or redevelop"); N.J.A.C. 5:93 Appendix A at 93-59 (requiring that unmet obligations be retained "for future affordable housing efforts as development and redevelopment occur in the community"); N.J.A.C. 5:92-1.3 (First Round Rules' definition of "vacant land" included "land suitable for

[1] Amici use the term "redevelopment" to mean development on land that was previously built. This includes, but is not limited to, redevelopment as more technically defined by COAH to describe construction under a redevelopment plan pursuant to N.J.S.A. 40A:12A-3. See 46 N.J.R. 929 (defining "Redevelopment").

redevelopment or infill at higher densities"). The preservation of the obligation ensured that affordable housing needs would continue to be met even once vacant, developable land was exhausted. In such circumstances, a municipality would rely on reuse to fulfill its duty to ensure inclusionary development. Such revitalization and redevelopment furthered both the goal of the Mt. Laurel doctrine to ensure housing opportunities for all and the goal of preserving open space and encouraging smart growth as articulated in the New Jersey State Development and Redevelopment Plan. See N.J. State Planning Comm'n, New Jersey State Development and Redevelopment Plan ("State Plan"), 5-7 (March 1, 2001), http://www.state.nj.us/state/ planning/spc-state-plan.html.

In contrast, by way of the Buildable Limit, the proposed Third Round Rules altogether erase unmet affordable housing obligations based on a lack of available vacant land without regard for the present or future opportunity to satisfy this need through redevelopment. The Buildable Limit is described as a constraint arising from "development capacity." N.J.A.C. 5:99-3.3 at 46 N.J.R. 931; see also 46 N.J.R. 1037-1050. It functions as an absolute cap on municipal obligations - every unit that cannot be absorbed by vacant land is eliminated. See, e.g., 46 N.J.R. 925 ("The buildable limit reduction is the process . . . whereby a municipality's

development capacity for new units is determined via a review of Statewide GIS parcel layers to net out total available and developable land. A municipality's affordable new construction obligation is thereby reduced to that which can be accommodated as determined by its land capacity per the table provided in chapter Appendix E.") (emphasis added); N.J.A.C. 5:99-3.3(b) at 46 N.J.R. 931 ("A municipality's Fair Share of Prospective Need and/or Unanswered Prior Obligations shall be adjusted to that which can be accommodated as determined by land capacity . . . .") (emphasis added).

This new methodology is inconsistent with the prior round rules in two ways. First, the Buildable Limit simply erases from the municipal obligation tens of thousands of affordable units that COAH itself says are needed. For example, COAH sets the adjusted total prospective need at 39,360 units. 46 N.J.R. 955 (Adjusted Total Projected Need by Region (2014-2024)).[2] The Buildable Limit eliminates any obligation ever to create 8,414 (21.4%) of these units. 46 N.J.R. 956 (Buildable Limit Losses by Region (2014-2024)). Likewise, COAH estimates total unmet adjusted prior round obligations at 22,171

---

[2] As Fair Share Housing Center (FSHC) notes, this projection is already significantly depressed by virtue of deviations in methodology from prior rounds. E.g., FSHC Br. at 12-13 (discussing new proprietary method for estimating population growth at lower levels than projected by the Department of Labor).

affordable units. Ibid. (Prior Obligation by Region (1987-2014)). Yet the Buildable Limit losses associated with this obligation amount to 28,993 units, ibid., entirely eliminating prior round obligations and then some. The prior round rules did not make obligations disappear in this manner, no doubt because the Fair Housing Act requires "that municipalities must provide through their zoning ordinance a realistic opportunity to satisfy their fair share of their region's present and prospective need for low- and moderate-income housing." In re Twp. of Warren, 132 N.J. 1, 12 (1993) (citing N.J.S.A. 52:27D-302a, d, e; -311a, 314a, b)).

Second, the Buildable Limit is inconsistent with provisions in prior rounds that incentivized redevelopment. See, e.g., N.J.A.C. 5:93-4.2(h); N.J.A.C. 5:93 Appendix A at 93-59; N.J.A.C. 5:92-1.3. Unlike these earlier rules, the new proposal treats vacant land as the exclusive source of residential development. 46 N.J.R. 927 (defining "Buildable Limit" as a "methodological constraint" based on "developable land"); 46 N.J.R. 1038 (explaining that methodology excludes all developed land from calculation). Yet over the past two decades, the trend in development and growth has shifted from the development of vacant land to the redevelopment and repurposing of existing land uses. See generally, James W. Hughes & Joseph J. Seneca, The Beginning of the End of Sprawl?

(May 2004) (detailing data indicating shift in 1996 from suburban growth to urban growth), http://policy.rutgers.edu/ reports/rrr/rrrmay04.pdf. That trend has accelerated. Between 2008 and 2012, the 271 municipalities with the least vacant land (determined to be at least 90% "built-out") accounted for 54.5% of the State's population growth. Tim Evans, Is Redevelopment the "New Normal?" (Jan. 28, 2014), http://www.njfuture.org/ 2014/01/28/redevelopment-new-normal/. Consistent with their increasing populations, those communities issued 2.7 times more building permits in the first decade of this century than they had in the 1990's. Ibid.

Contrary to the assumptions in the proposal, several mechanisms exist for complying with regional housing need that are not land-based or consumptive. Conversions of older rental properties or the reuse of former non-residential buildings for apartments or condominiums are not based on the new consumption of vacant land and have often been part of compliance plans. See, e.g., Voorhees Twp. Hous. Element and Fair Share Plan, 32 (Feb. 2010) (noting "opportunities to create new uses where old uses have gone vacant or where buildings and site design have become obsolete"), http://www.nj.gov/dca/affiliates/coah/reports /petitions/0434.pdf; Twp. of Cranford Hous. Plan Element and Fair Share Plan, 21 (Apr. 3, 2013) (identifying three existing redevelopment projects as the means to meet affordable housing

obligation), http://www.cranford.com/uploads/township/affordable/2013-03-20-Housing_Plan_Element_and_Fair_Share_Plan.pdf. Further, planning boards around the State have identified the redevelopment of vacant office parks, including 2.53 million square feet in Monmouth County alone, as a key challenge in the near-term. See, e.g., Ronda Kaysen, Future Takes Shape for Bell Labs Site, N.Y. Times, Sept. 11, 2013, at B5 (describing redevelopment of former Bell Labs site in Holmdel, and the prevalence of unused office complexes including 2.53 million square feet in Monmouth County alone), available at http://www.nytimes.com/2013/09/11/realestate/commercial/future-takes-shape-for-bell-labs-site.html?smid=pl-share; Somerset Cnty. Planning Bd., Supporting Priority Investment in Somerset Cnty. Through Access and Mobility Improvements, ii (June 2013) (identifying seven developed sites to be evaluated for redevelopment), http://www.co.somerset.nj.us/planweb/pdf/Supporting%20Priority%20Investment_Final%20Report.pdf. There is no justification for a model that treats the availability of vacant land as an absolute constraint when vacant land is not necessary for compliance.

New Jersey is the most developed state in the nation; estimates, including COAH's own, suggest that fewer than one million acres of vacant developable land remain. 46 N.J.R. 1040 (finding 603,000 acres of developable land in New Jersey); see

also John Hasse & Richard Lathrop, Changing Landscapes in the Garden State, 5 (July 2010), http://gis.rowan.edu/projects/luc/ changinglandscapes2010.pdf. Yet, development and growth continue and are accelerating through the redevelopment and revitalization of already built sites. Thus the proposed rules are inconsistent with the prior rules, the reality of development in this State, and the Mt. Laurel doctrine's prescient requirement that affordable housing obligations should be satisfied through "sound municipal land use planning." S. Burlington Co. N.A.A.C.P. v. Twp. of Mt. Laurel, 92 N.J. 158, 211 (1983); see also id. at 215 ("[T]he fact that a municipality is fully developed does not eliminate [its allocated affordable housing] obligation although, obviously, it may affect the extent of the obligation and the timing of its satisfaction.")

POINT II

BY ADOPTING NEW METHODOLOGY THAT REDUCES OR ELIMINATES PRIOR ROUND OBLIGATIONS, THE PROPOSED RULES DISRUPT ONGOING DEVELOPMENT.

The prior round rules' methodology, including even previous iterations of the Third Round Rules, retained obligations from prior rounds largely intact. COAH has now proposed a new methodology that substantially reduces or eliminates prior round obligations by way of the Buildable Limit. N.J.A.C. 5:99-3.3(b) at 46 N.J.R. 931 ("A municipality's Fair Share of Prospective Need and/or Unanswered Prior

Obligations shall be adjusted to that which can be accommodated as determined by land capacity as set forth in Chapter Appendix E.") (emphasis added).[3] In addition to eliminating any prospect of affordable housing for tens of thousands of households whom COAH itself has identified as in need, the undoing of prior round obligations will disrupt ongoing Mt. Laurel compliance throughout the State.

Compliance with the Second Round Rules and the affordable housing obligations they imposed is continuing. Although the Second Round Rules applied to the period 1987 to 1999, the allocations for this period did not become binding until 1994. See N.J.A.C. 5:93 (Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning June 6, 1994). Many municipalities applied for and received

---

[3] In addition to losses occasioned by the Buildable Limit - which themselves swallow the entire adjusted unmet prior obligation, see 46 N.J.R. 1013 (showing adjusted prior obligation of 22,171 units and associated Buildable Limit losses of 28,993 units) - the new methodology for calculating the Vacant Land Adjustment also permanently eliminates prior round obligations. A Vacant Land Adjustment is based on a municipality's showing that it lacks suitable vacant sites for affordable housing. See N.J.A.C. 5:99-5.1 at 46 N.J.R. 932. While earlier methodology preserved prior obligations to be met through redevelopment and other means, see, e.g., N.J.A.C. 5:93-4.2(h); N.J.A.C. 5:93 Appendix A at 93-59, the new proposal provides that the "Prior Obligation for the 1999 to 2014 period is reduced to zero if a community has a vacant land adjustment outstanding for a prior period and it was ruled that no land exists after building prior affordable housing," 46 N.J.R. 1013. The Vacant Land Adjustment eliminates 4,958 units from prior obligations, on top of those lost to the Buildable Limit. Ibid.

substantive certification late in the period, as well as during the interim extension of the Second Round Rules. See In re Six Month Extension, 372 N.J. Super. 61 (App. Div. 2004). Actual development pursuant to these plans will require many more years because of the length and complexity of the development process from plan approval to completion.

Reflecting this prolonged compliance period, this Court decided two cases in 2002 concerning municipal obligations under the prior round rules. Toll Brothers v. Twp. of West Windsor, 173 N.J. 502 (2002); Fair Share Hous. Ctr., Inc. v. Twp. of Cherry Hill, 173 N.J. 393 (2002). Twelve years later, Cherry Hill has yet to complete the projects at issue in the 2002 case. See Twp. of Cherry Hill Hous. Plan 27 (2011) (describing ongoing efforts to produce affordable units on redevelopment site that was the subject of this Court's 2002 decision), http://www.cherryhill-nj.com/DocumentCenter/View/1614. Many other municipalities likewise remain engaged in fulfilling their prior round affordable housing obligations. See, e.g., Livingston Short Hills Coalition, LLC v. Twp. of Livingston Planning Bd., No. A-4101-12T1, 2014 N.J. Super. Unpub. LEXIS 1254 (App. Div. June 2, 2014)[4] (affirming dismissal of challenge to site approval compelled by Second Round

[4] In accordance with Rules 1:36-3 and 2:6-1, unpublished opinions are included in the Appendix (referred to as Aa__). Counsel are not aware of any contrary unpublished opinions.

builder's remedy litigation) (Aa1a); Joseph Kushner Hebrew Academy, Inc. v. Twp. of Livingston, No. A-5797-10T1, 2013 N.J. Super. Unpub. LEXIS 2170 (App. Div. Aug. 30, 2013) (affirming builder's remedy based on Second Round fair share obligation) (Aa9a); In re Fair Lawn Borough, 406 N.J. Super. 433, 439 (App. Div. 2009) (rejecting Fair Lawn's appeal of COAH decision enforcing overlay zoning required by Second Round plan); Fair Lawn, N.J., Code § 49-14 (2010) (creating inclusionary multifamily residential district in accordance with court order on remand), http://ecode360.com/10050731.

COAH's Building Limit approach retroactively sets the obligations of both Fair Lawn and Livingston to zero and substantially reduces Cherry Hill's obligation. 46 N.J.R. 1014 (Fair Lawn), 1019 (Livingston), 1031 (Cherry Hill). Yet, in each of these communities, courts have already determined that there is capacity to develop on reuse sites that advance sound planning principles and will provide affordable housing opportunities in proximity to employment and community services consistent with the State Plan and the regional interest.

The proposal's new methodology eliminating or reducing these prior round obligations has thrown into doubt the continuing validity of more than twenty years of efforts to plan for and meet the Second Round obligations. The Buildable Limit methodology calls into question whether existing compliance

plans are still binding, whether pending planning and zoning board applications can proceed, whether current builder's remedy lawsuits continue or are dismissed, and whether years of planned affordable housing development go forward or are extinguished. This Court should not tolerate so dramatic and consequential a departure from its order requiring COAH to follow the tested methodology of prior rounds. By any process, implementation of final, valid Third Round Rules will take time to achieve. There can be no justification for subjecting Second Round compliance to this same vortex of uncertainty and delay.

POINT III

BY ADOPTING NEW METHODOLOGY TO SET MAXIMUM DENSITIES, THE PROPOSED RULES REWARD PAST EXCLUSIONARY ZONING AND UNDERMINE SOUND REGIONAL PLANNING.

The Buildable Limit reflects COAH's calculation of how many residential units a parcel of vacant land will support. The methodology involves a complex Residential Density Matrix that results in density ranges significantly lower than those applied in prior rounds. In all municipalities, other than large cities, located in areas designated for growth in the State Plan (i.e., Planning Areas 1 and 2, see State Plan at 190, 196), COAH's densities range from 1.95 to 6.34 units per acre. 46 N.J.R. 1039 (Table: Land Use Category (D[welling] U[nits] per Acre), columns 2, 3, and 4 (listing densities for Planning Areas

1 and 2, other than large cities)). Yet the Second Round Rules required that inclusionary development generally occur at a minimum density of six units per acre, N.J.A.C. 5:93-5.6(b), and courts enforcing these rules in suburban settings have affirmed significantly higher densities, see, e.g., Joseph Kushner Hebrew Academy, 2013 N.J. Super. Unpub. LEXIS 2170 at *15 (affirming density of 14.6 units per acre on reuse site in Livingston) (Aa13a).

In addition, COAH applied a "caveat" that "no new development would occur at densities more than 25 percent higher than the municipality's current average density." 46 N.J.R. 1039. This caveat conflicts with the prior round methodology and the Fair Housing Act. The Act demands "[r]ezoning for densities necessary to assure the economic viability of any inclusionary developments." N.J.S.A. 52:27D-311(a)(1). Both the prior rounds and the Act reflect the fundamental tenet of the Mt. Laurel doctrine calling for "high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply" of need for affordable housing. S. Burlington Co. N.A.A.C.P. v. Twp. of Mount Laurel, 67 N.J. 151, 187 (1975). COAH's density caveat breaks with this precedent by rewarding those communities with the lowest average density, i.e., those that have most

successfully used exclusionary zoning to maintain large-lot residential development.

Nor can COAH's density caveat be reconciled with the State Plan and sound planning principles. Many of the communities with artificially low densities that will be perpetuated by the density caveat are located in areas the State Plan designates for residential growth because of their proximity to jobs, schools, and transportation. See 46 N.J.R. 1039 (creating low density ranges for suburban municipalities located in Planning Areas 1 and 2). This caveat bears no relationship to the regional need for affordable housing and has no analog in the prior round rules.

The consequence of the new density caveat will be to entrench exclusionary land use patterns, as academic studies confirm. John Hasse, John Reiser & Alexander Pichacz, Rowan University, Evidence of Persistent Exclusionary Effects of Land Use Policy Within Historic and Projected Development Patterns in New Jersey: A Case Study of Monmouth and Somerset Counties (June 2011), http://gis.rowan.edu/projects/exclusionary/exclusionary_zoning_final_draft_20110610.pdf. For example, in Monmouth County only 2.7% of available vacant land allows high-density development and 84% of the remaining land is designated "rural" and zoned for less than one unit per acre. Id. at 18. As the State Plan observes: "The low-density zoning prevalent in many

New Jersey communities is increasingly singled out as the most important barrier to greater provision of affordable housing in the state." State Plan at 84. Increasing the historically low densities in New Jersey's suburban growth areas is therefore one of the central goals of planning at the state level. Id. at 190, 196. While the Fair Housing Act and Mt. Laurel are intended to compel changes to exclusionary zoning, the proposed caveat instead perpetuates it by minimizing municipal affordable housing obligations in a manner that aligns with and reinforces historic resistance to growth through low-density zoning.

Moreover, the density caveat undermines sound planning because it constrains future development based on past rather than future needs. Existing housing stock reflects, not just past policy (including zoning policy), but also the needs of the past: the demographic composition of residents, the economy, transportation, and other factors that drive the creation of housing. For example, over the past sixty years residential development has gone through stages of mass development beginning with single family homes, then apartments, condominiums, and townhouse developments, and finally age-restricted, active-adult communities, in response to the birth, adulthood, and retirement of the baby boomer generation. James W. Hughes & Joseph J. Seneca, Demographics, Economics and Housing Demand, 3-4 (Apr. 2012), http://policy.rutgers.edu/

reports/rrr/RRR29apr12.pdf. Today, as the children of the baby boomer generation begin their own families, "higher-density living and working closely adjacent to activity environments have gained new market prominence." Id. at 6. Basing future densities on pre-existing development, as the new caveat does, is inconsistent with the need to plan future development based on future housing needs.

The Buildable Limit's density caveat is incompatible with the prior round rules' methodology. The caveat rewards past and perpetuates future exclusionary zoning, threatening to make the Fair Housing Act and the Mt. Laurel doctrine irrelevant to the zoning decisions that will shape our collective future.

POINT IV

BY REQUIRING NEW ECONOMIC FEASIBILITY STUDIES, THE PROPOSAL WILL PROLONG THE ALREADY LENGTHY DEVELOPMENT PROCESS FOR NO SOUND PLANNING PURPOSE.

COAH has introduced a new requirement that municipalities seeking certification submit an "economic feasibility study" for "each site or zoning district" where an inclusionary development is planned. N.J.A.C. 5:99-4.3(a)4 at 46 N.J.R. 932. The stated purpose of the study is to have a professional planner certify that each site is developable and "that the set-asides, densities, and financial incentives associated with the zoned affordable housing sites included in the Fair Share Plan provide a realistic opportunity for the

construction of affordable housing." Ibid.; see also N.J.A.C. 5:99-7.2(b) at 46 N.J.R. 935. Yet Amici, organizations whose memberships include many of the planners who will be called upon to perform these studies and many nonprofit developers who will be asked to underwrite them, believe they serve only to prolong an already over-burdened development process without advancing sound planning goals.

In contrast to this new one-by-one system, the prior round rules established bright-line standards for inclusionary zoning with presumptive densities and set-asides. E.g., N.J.A.C. 5:93-5.6(b) (generally requiring municipalities to "zone inclusionary sites at a minimum gross density of six (6) units per acre with a 20 percent set-aside [for affordable units]"). Moreover, the Second Round Rules directed the location of inclusionary developments to the sites most suitable in each Planning Area established in the State Plan. N.J.A.C. 5:93-5.4. This system created clear general standards for affordable housing construction that did not demand particularized justification as to each development. As this Court has noted, the prior rounds produced significant compliance, with more than 60,000 affordable units built. In re Adoption of N.J.A.C. 5:96 and 5:97, 215 N.J. at 606 (citing ranges from 36,000 to 60,000 units developed between 1985 and 2010); see also David Kinsey, Back to the Future: Imagine New Jersey Without Mount Laurel, slide 11 (Jan. 23, 2014) (citing 60,746 units developed between 1980 and 2012), http://njplanning.org/wp-content/uploads/Back-to-the-Future.pdf.

In abandoning such clear standards in favor of a requirement of individual economic feasibility studies at each site, COAH reverts to the kind of "project-by-project determination[s]" that the Appellate Division already rejected in the opinion affirmed by this Court in this matter. In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 492 (App. Div. 2010), aff'd, 215 N.J. 578 (2013). In response to objections from the Builders Association below that the presumptive densities and set-asides in the last version of the Third Round Rules failed to create the conditions for "economically feasible" development, COAH argued that a developer was free to seek a waiver of the rules. Ibid. The Appellate Division rejected this defense, noting that COAH's own housing consultant had advised that "[i]nclusionary housing programs function best when they have a clear and predictable affordable housing requirement that market actors can take into account when they buy land and choose whether to invest funds in a deal." Ibid. (citing N.J.A.C. 5:97, App. F: Inclusionary Housing: Lessons from the National Experience, 40 N.J.R. 3088 (June 2, 2008)). Emphasizing the need for "bright line standards," the court concluded that a waiver provision could not save rules that failed to provide a realistic opportunity for the creation of affordable housing. Id. at 492-93.

Just as a waiver provision cannot substitute for clear, general, predictable standards, neither can individual economic feasibility studies replace such standards. And the costs associated with one-by-one studies undermine a goal of the

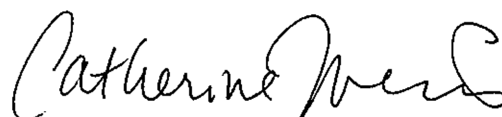
Fair Housing Act, which instructs COAH to root out "cost-generating features" in municipal affordable housing plans submitted for substantive certification. N.J.S.A. 52:27D-314(b). As with other parts of the proposal, the new requirement of individual "economic feasibility stud[ies]," N.J.A.C. 5:99-4.3(a)4 at 46 N.J.R. 932, conflicts with prior round methodology, defies court orders in this matter, and subverts sound planning.

CONCLUSION

For these reasons, Amici respectfully request that this Court grant Fair Share Housing Center's Motion to Enforce Litigant's Rights and either order COAH swiftly to comply with this Court's prior orders or lift COAH's protection from Mt. Laurel litigation under N.J.S.A. 52:27D-313 and allow actions to proceed in the Law Division.

Date: July 8, 2014

Respectfully submitted,



Catherine Weiss, Esq.
Ryan J. Cooper, Esq.
Counsel for Amici Curiae
LOWENSTEIN SANDLER LLP
65 Livingston Avenue
Roseland, New Jersey 07068
973.597.2500

APPENDIX

Analysis
As of: Jul 03, 2014

LIVINGSTON SHORT HILLS COALITION, LLC., Plaintiff-Appellant, v. TOWNSHIP OF LIVINGSTON PLANNING BOARD AND TMB PARTNERS, LLC, Defendants-Respondents.

DOCKET NO. A-4101-12T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2014 N.J. Super. Unpub. LEXIS 1254

January 13, 2014, Argued
June 2, 2014, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1] On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-5787-12.
TMB Partners v. Twp. of Millburn, 2014 N.J. Super. Unpub. LEXIS 1251 (App.Div., June 2, 2014)

COUNSEL: Stuart J. Lieberman, argued the cause for appellant (Lieberman & Blecher, attorneys; Michael G. Sinkevich and Mr. Lieberman, on the brief).

Gary T. Hall, argued the cause for respondent Livingston Township Planning Board (McCarter & English, attorneys; Mr. Hall, on the brief).

Richard J. Hoff, Jr., argued the cause for respondent TMB Partners, LLC (Bisgaier Hoff, LLC, attorneys; Jeffrey K. Newman and Mr. Hoff, on the brief).

JUDGES: Before Judges Ashrafi, St. John and Leone.

OPINION

PER CURIAM

Plaintiff Livingston Short Hills Coalition, LLC filed a complaint in lieu of prerogative writs challenging the

decision by defendant Township of Livingston Planning Board (Board) to grant site plan approval and bulk variances to the land use application of defendant TMB Partners, LLC (TMB). The trial court dismissed the complaint with prejudice. Plaintiff appeals. We affirm.

I.

TMB owns a 4.275-acre property, located at the corner of South Orange Avenue and White Oak Ridge Road, designated on the Livingston Tax Map as Block 7001, Lot 1 ("the Property" or "the Site"). The Property is currently used as a day care center. [*2] In 2007, TMB commenced a builder's remedy action pursuant to *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983)* (*Mt. Laurel II*), against the Board and the Township of Livingston (Livingston), seeking to construct affordable housing on the Property. Plaintiff, an organization of citizens who live near the Property, unsuccessfully moved to intervene, but was permitted to participate in the litigation as amicus curiae, along with the Township of Millburn (Millburn).

In August 2010, the Board, Livingston, and TMB entered into a Settlement Agreement in the *Mt. Laurel* action, subsequently approved by the Law Division as fair to low income households. Livingston and the Board agreed to consider rezoning the property to permit TMB's sixty-two unit multi-family development, including fifty "market-rate" units for sale, and twelve affordable-housing units for rent in separate "Market-Rate" and "Affordable" buildings. In accord with the Settlement Agreement, Livingston rezoned the Property by ordinance passed in December 2010.

TMB filed an application requesting preliminary and final site plan approval for the development and any needed bulk variances. The Board held hearings, at which experts testified for TMB and Millburn. Plaintiff presented [*3] no expert testimony. The Board found that the proposed development met the zoning requirements in most respects, granted several bulk variances, and gave preliminary and final site approvals by resolution dated June 19, 2012.

Plaintiff now appeals the trial court's dismissal of its complaint in lieu of prerogative writs. We must hew to our standard of review. "In reviewing a planning board's decision, we use the same standard used by the trial court." *Bd. of Educ. of Clifton v. Zoning Bd. of Adjustment of Clifton, 409 N.J. Super. 389, 433, 977 A.2d 1050 (App. Div. 2009).* "[W]hen a party challenges a zoning board's decision through an action in lieu of prerogative writs, the zoning board's decision is entitled to deference." *Kane Props., LLC v. City of Hoboken, 214 N.J. 199, 229, 68 A.3d 1274 (2013).* Indeed, "zoning boards, 'because of their peculiar knowledge of local conditions[,] must be allowed wide latitude in the exercise of delegated discretion.'" *Price v. Himeji, LLC, 214 N.J. 263, 284, 69 A.3d 575 (2013).* "'The questions on appeal are only whether or not the action of the board was arbitrary, capricious or patently unreasonable, and whether it acted properly under the statute, that is, in accordance with the statutory standard.'" *Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 54-55, 711 A.2d 273 (1998).* Thus, "courts ordinarily should not disturb the discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles [*4] of land use law." *Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58-59, 733 A.2d 464 (1999).*

II.

Plaintiff first argues that the Board improperly approved the application even though TMB had no feasible plan to obtain sewer access for the development. Millburn had been providing sewer service to the Property for decades through an existing sewer, which drained into the Millburn sewer system and then fed into the treatment system of the Joint Meeting of Essex and Union Counties (Joint Meeting). Millburn took the position, however, that sewer service to TMB's proposed development should be provided by Livingston, absent a showing that Livingston lacked the capacity to handle the development's projected sewer output of 14,000 gallons per day. This resulted in litigation brought by TMB against Millburn and Livingston to obtain sewer access, which is the subject of our companion opinion issued today in *TMB Partners, LLC v. Twp. of Millburn, No. A-3554-12, 2014 N.J. Super. Unpub. LEXIS 1251 (App. Div. June 2014)* (*TMB v. Millburn*).

The Board addressed the sewer access issue:

> Based upon the evidence and testimony presented, the Board finds that the record shows that the Township of Millburn has provided wastewater sewage service to the Site under an agreement with [Livingston]. That agreement expressly [*5] precludes services for apartment houses. The Board further finds that the Township of Millburn has not agreed to accept wastewater from the Site if developed as proposed; and that the Applicant has commenced legal proceedings seeking to compel the Township of Millburn to provide the service.

Given that the issue of which township would provide sewer access had not been resolved, the Board conditioned its site approvals on TMB obtaining sewer service for the Property:

> The Site shall have a single wastewater sewage service. If such service is not provided by the Township of Livingston, Applicant shall have obtained the service from the Township of Millburn. Any such service from the Township of Millburn shall be pursuant to a Sanitary Sewer Services agreement between the two townships, and any necessary actions by the Joint Meeting of Essex and Union Counties or by Essex County in regard to the Essex County wastewater management plan.

The Board also provided that this condition "shall be met before issuance of any permits or commencement of any work."

The Municipal Land Use Law (MLUL), *N.J.S.A. 40:55D-1 to -163*, permits conditional approvals by the Board, which the MLUL refers to as a "municipal agency." [*6] *N.J.S.A. 40:55D-1 to -163 N.J.S.A. 40:55D-5. N.J.S.A. 40:55D-22(b)* provides that "[i]n the event that development proposed by an application for development requires an approval by a governmental agency other than the municipal agency, the municipal agency shall, in appropriate instances, condition its approval upon the subsequent approval of such governmental agency[.]"

Nonetheless, plaintiff argues that the conditional grant of approval here was improper. Plaintiff relies on *Field v. Mayor & Council of Franklin, 190 N.J. Super. 326, 463 A.2d 391 (App. Div.), certif. denied, 95 N.J. 183, 470 A.2d 409 (1983)*. There, a planning board granted preliminary approval of a development of a 396.5-acre tract, including 1,332 townhouses and 1,332 garden apartments. *Id. at 328*. The township council reversed because the applicant had proposed three possible options to provide sewerage, but had provided insufficient information on the feasibility of any of those options. *Id. at 333*.

In upholding the council's action, we distinguished between "preliminary approval granted subject to subsequent approval by appropriate public agencies and preliminary approval granted subject to later submission of additional information fundamental to an essential element of the development plan." *Id. at 332*. The former is permitted by *N.J.S.A. 40:55D-2(b)*, but the latter is inappropriate. *Field, supra, 190 N.J. Super. at 331-33*. We noted that "[c]ertain elements -- for example, drainage, sewage [*7] disposal and water supply -- may have such a pervasive impact on the public health and welfare in the community that they must be resolved at least as to feasibility of specific proposals or solutions before preliminary approval is granted." *Id. at 332-33; see N.J.S.A. 40:55D-38(b)(3)*.

We distinguished *Field* in *W.L. Goodfellows & Co. of Turnersville, Inc. v. Washington Twp. Planning Bd., 345 N.J. Super. 109, 783 A.2d 750 (App. Div. 2001)*. We held that, where an applicant presented sufficient information on the feasibility of its drainage plan, the planning board should have granted preliminary approval conditioned on the applicant obtaining a drainage easement. *Id. at 117; see Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215, 234-35, 963 A.2d 1224 (App. Div. 2009)* (upholding preliminary approval conditioned on the vacating of a public right of way).

We similarly distinguished *Field* in *Dowel Assocs. v. Harmony Tp. Land Use Bd., 403 N.J. Super. 1, 33-36, 956 A.2d 349 (App. Div.), certif. denied, 197 N.J. 15, 960 A.2d 745 (2008)*. We held that, where an applicant presented

sufficient information on the feasibility of the sewage disposal system, the planning board should have granted preliminary approval conditioned upon the applicant's acquisition of the necessary permit and water quality management plan amendments from the New Jersey Department of Environmental Protection (NJDEP). We also noted that "it does not appear from the opinion that *Field* involved a site that the municipality designated as an inclusionary site in order to obtain substantive certification or settle litigation, as [*8] in the present case." *Id. at 33.*

Here, as the trial court found, "the unresolved issues were based on litigation" and "permitability," rather than "any physical or technical issues relating to feasibility." Thus, this case is more analogous to *Dowel, Randolph,* and *W.L. Goodfellows* than to *Field.* As the trial court stated, the development in *Field* was "exponentially larger" than the development here. *See Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 37 n.2, 76 A.3d 1236 (2013)* (distinguishing *Field* because of the massive size of that development, which "justified the board's close examination of sewage and drainage").

Moreover, in the Settlement Agreement, Livingston agreed "to cooperate with TMB in its efforts to obtain utility service for the TMB Property, including sewer service from" Millburn, and to obtain any necessary approvals from NJDEP, Essex County, and other government agencies. There was already an agreement with Millburn, and negotiations had commenced with Millburn, Livingston, and Essex County. Thus, this case is further distinguishable from *Field,* because the applicant there presented as one option a sewer connection through South Brunswick Township even though there was no agreement with that township and negotiations had not even been commenced. [*9] *Field, supra, 190 N.J. Super. at 333.*

Further, the evidence before the Board indicated that sewer access was feasible. TMB's expert in planning and engineering, Gary Szelc, testified that he had "talked to the Joint Meeting as far as any capacity issues, and they said that because it was a small change in sanitary flow, they wouldn't expect any problems and would be able to accept the flow." Szelc also related that Essex County and NJDEP "felt that there should be no problem getting the amendment to the sewer service area." Even though plaintiff, Livingston, and Millburn participated in the proceedings before the Board, no evidence was introduced contradicting these assurances or indicating that it was not feasible for either Millburn or Livingston to handle the sewage flow from the development.[1]

1 Plaintiff on appeal cites a certification by Livingston's engineer Richard Calbi, but that certification is dated June 20, 2012, after the Board's June 19, 2012 resolution. Because it was not part of the evidence before the Board, we do not consider it.

It is undisputed that, as a result of TMB's separate litigation against Livingston and Millburn, one of those municipalities ultimately will be obligated to provide sewer access [*10] to the development. Livingston's potential obligation arises because it is the location of the inclusionary development. Millburn's potential obligation could arise because of its current agreement to provide sewer service to the Property, or because it might be ordered "'to make existing sewer capacity available to *Mt. Laurel* inclusionary development sites'" in a neighboring town. *See Bi-County Dev. of Clinton v. Borough of High Bridge, 174 N.J. 301, 317, 326, 805 A.2d 433 (2002)*; *Dynasty Bldg. Corp. v. Borough of Upper Saddle River, 267 N.J. Super. 611, 616, 632 A.2d 544 (App. Div. 1993)*, *certif. denied, 135 N.J. 467, 468, 640 A.2d 849 (1994).*

In our companion opinion, we reverse the summary judgment entered against Millburn in that separate litigation, and remand to the Law Division to resolve whether the sewer agreement compels Millburn to accept the development's sewage, whether Millburn and Livingston have adequate sewer service, and whether the costs to connect to Livingston are more substantial. *TMB v. Millburn, supra, 2014 N.J. Super. Unpub. LEXIS 1251, slip op. at 16.* The issue of which of the two municipalities must provide sewer access to the development will be resolved in that litigation, and cannot be resolved by the Board in this case. *See Dowel, supra, 403 N.J. Super. at 29* (noting that the issue of sewage disposal was appropriately left for decision by the NJDEP). Thus, the action of the Board in granting approval conditioned on sewerage supplied by Millburn or Livingston was not arbitrary, capricious or patently [*11] unreasonable, or contrary to the MLUL.

Finally, we note that while preliminary site plan approval may be conditionally granted under *N.J.S.A. 40:55D-22(b)*, it is less clear that final approval may be so conditioned. Under the MLUL, "'[f]inal approval' means the official action of the planning board taken on a preliminarily approved major subdivision or site plan, after all conditions, engineering plans and other requirements have been completed or fulfilled[.]'" *N.J.S.A. 40:55D-4*; *see N.J.S.A. 40:55D-50(a)*. Thus, "the provision for final approval contemplates completion or fulfillment of conditions of preliminary approval." *Field, supra, 190 N.J. Super. at 332*; *see Knowlton Riverside Estates, Inc. v. Planning Bd. of Knowlton, 347 N.J. Super. 362, 370, 790 A.2d 194 (App. Div.), certif. denied, 172 N.J. 357, 798 A.2d 1270 (2002)*. However, plaintiff has not asked us to draw a distinction between the preliminary and final site plan approval, and we decline to do so sua sponte.

III.

Plaintiff similarly argues that the Board improperly approved the site plan application without a feasible plan for stormwater management. We conclude the Board's action was not arbitrary, capricious, patently unreasonable, or contrary to the MLUL.

TMB's expert Szelc testified as follows. The existing impervious coverage on the Property totaled 77,940 square feet, but the development would reduce that total to 66,644 square feet, which would decrease the [*12] total volume of stormwater runoff from the Property. The existing 55,997 square-foot parking lot largely drained directly into the adjacent Canoe Brook Tributary No. 1, with pavement up to the bank of the stream. However, the development would remove 45,947 square feet of pavement, including the pavement near the stream bank. It would insert a vegetative zone between the building and the stream, which would serve as a non-structural means of handling stormwater runoff and provide some groundwater recharge. The Property would be heavily landscaped, and the vegetation would provide stormwater management, with most of the stormwater absorbed into the ground before reaching the stream. The front of the Property, including the roof drains, would drain into and be contained by a series of rain gardens.

Szelc also testified that the development followed best management practices regarding stormwater management. The development's buffer zones of forty feet or more exceed NJDEP's twenty-five-foot minimum buffer zone, the distance of 140-feet or more from the parking lot to the stream exceed NJDEP's overland flow requirements, the development's intrusion into riparian zones was less than allowed [*13] by NJDEP regulations, and NJDEP issued a flood hazard permit for the property.

Plaintiff offered no contrary testimony. Millburn's environmental engineering expert, James Cosgrove, saluted the use of underground parking for the Market-Rate building, and acknowledged the stone trench bordering the Affordable Building's front parking lot, and its wide drainage area. He expressed concern that runoff in large storms might overflow the drainage area, concentrate and erode the vegetation, and form an erosion ditch down in the area closer to the stream. In response, Szelc testified that even in a 100-year storm, the water velocity would be insufficient to erode the soil let alone the vegetation, that it would not create an erosion ditch, and that the maintenance manual would require correction if it did. On cross, Szelc conceded that if the water were to concentrate and exceed the allowable velocity, erosion was possible.

The Board "was entitled to accept the expert" testimony offered by TMB's expert. *TSI E. Brunswick, LLC v. Zoning Bd. of Adjustment of E. Brunswick, 215 N.J. 26, 46, 71 A.3d 762 (2013)*. "If the testimony of different experts conflicts, it is within the Board's discretion to decide which expert's testimony it will accept." *Klug v. Bridgewater Twp. Planning Bd., 407 N.J. Super. 1, 13, 968 A.2d 1230 (App. Div. 2009)*. Through Szelc's testimony, "sufficient information [*14] was presented by [TMB] concerning the specificity of its drainage plan, including its feasibility and adequacy." *See W.L. Goodfellows, supra, 345 N.J. Super. at 117*. Accordingly, the Board concluded: "Based upon the evidence and testimony presented, the Board finds that the stormwater management plan proposed meets the requirements of the Residential Site Improvements Standards, the Township Code provisions and the requirements of the NJDEP." Plaintiff does not show any error in the Board's finding, which was supported by substantial evidence.

The Board specifically found that NJDEP had issued TMB a permit to construct the development and had required a conservation easement, a riparian buffer zone, and landscaping to "protect the water quality of runoff that enters the Canoe Brook Tributary No. 1." Szelc testified that NJDEP "do[es] get involved with stormwater review" for a project of this size, and Livingston's engineer stated that NJDEP "reviewed all aspects of the drainage." Plaintiff counters that the issuance of an NJDEP permit does not necessarily mean that NJDEP has found a development's stormwater management plan complies with its regulations. *See Save Hamilton Open Space v. Hamilton Twp. Planning Bd., 404 N.J. Super. 278, 283-86, 961 A.2d 732 (App. Div. 2008)*. However, the Board itself found compliance with NJDEP requirements, and with [*15] the Township Code, which sets specific requirements to limit the adverse effects of stormwater runoff. Twp. of Livingston Ordinance §§ 170-119 to -124.

Further, the Board imposed several conditions on its approvals. The final stormwater management plan had to be reviewed and accepted by Livingston's engineer before issuance of any permits or commencement of work. The Board required post-construction certification that all NJDEP permit conditions have been met before a certificate of occupancy would issue. Livingston retained the right of access to ensure that water-handling features "are properly maintained and functioning properly as part of the storm water management plan for the Site," and reserved the right to repair any uncorrected conditions at the expenses of TMB or the condominium association, with the requisite consent of NJDEP, to be obtained by TMB, the association, or Livingston.

Finally, the Board provided as a continuing condition:

> If stormwater flow from [the] Affordable Building Site causes erosion, the Applicant or the condominium association shall make improvements as set forth in the Stormwater [M]aintenance Manual, provided such improvements are approved by [the] Township Engineer. If any [*16] proposed improvements require the approval of NJDEP, the Applicant or the condominium association shall obtain the NJDEP['s] approval.

The Board thus took Cosgrove's testimony and concerns into account. This precautionary condition did not reflect a rejection of Szelc's testimony or the absence of "information fundamental to an essential element of the development plan." *Field, supra, 190 N.J. Super. at 332*. Indeed, the Board rejected Millburn's demand for further modeling of flows after TMB's counsel noted that TMB had "provided all of the modeling that's required" and produced expert testimony "that the erosion plan will work."

Plaintiff contends that the Board's findings lack sufficient detail. "'Local boards and their counsel should take pains to memorialize their decisions in resolutions that explain fully the basis on which the Board had acted, with ample reference to the record and the pertinent statutory standards.'" *See CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd., 414 N.J. Super. 563, 580, 999 A.2d 1151 (App. Div. 2010)* (quoting *Commercial Realty & Res. Corp. v. First Atl. Props. Co., 122 N.J. 546, 566-67, 585 A.2d 928 (1991))*. Here, given the Board's finding of compliance with the specific regulations and ordinances, and the careful stormwater conditions it imposed, the Board's resolution was "fully reflective of the statutory standards" and "based on the record before the Board," including Szelc's detailed [*17] testimony. *Commercial Realty, supra, 122 N.J. at 566*.

IV.

Plaintiff next argues that the Board was arbitrary and capricious in allowing a trash enclosure to be placed in front of the Affordable Building. The Board found:

> The Zone Ordinance Section 170-87(E)(1)(e) requires that all accessory structures be in the rear yard. The Affordable Building will have a trash enclosure in the front yard adjacent to the parking lot. Due to the topography of the lot, NJDEP constraints and the riparian buffer, there is no other location for this accessory structure. Based upon the evidence and testimony presented, the Board finds that the record justifies grant of a variance.

The Board thus granted a bulk variance "so that the trash enclosure next to the Affordable Building may be in the front yard." The Board also granted a bulk variance permitting the trash enclosure to be thirty-five feet from the property line, rather than fifty feet as required by the Zone Ordinance Section 170-194.1(J)(9)(b).

Plaintiff notes that the Township of Livingston Code § 265-5(E) states that "[a]ll collections [of solid waste] shall be made at ground level from the rear of the building," and that Table XI of the Essex County District Solid Waste Management Plan indicates that the point of pickup in Livingston is "Backyard," [*18] rather than "Curbside" as in some other towns. Plaintiff complains that the Board failed to recognize it was contravening those provisions.

Plaintiff, however, failed to raise any such claim before the Board. Nor was the Board required to raise such issues sua sponte. "It is not the function of the board of adjustment to determine whether or not an applicant does or will in fact be able to comply with such [non-zoning] ordinances, since the jurisdiction of the board is related solely to the provisions of the zoning ordinance." William M. Cox & Stuart R. Koenig, *N.J. Zoning & Land Use Admin.* § 28-3.4(c) at 668 (2014); *see N.J.S.A. 40:55D-62, -70(c) & (d)*; *see generally Pizzo Mantin Grp. v. Twp. of Randolph, 137 N.J. 216, 226-30, 645 A.2d 89 (1994)*. Similarly, "[t]he board may not act on matters which are under the exclusive jurisdiction of another agency, whether municipal, county, or state." Cox & Koenig, *supra*, § 28-3.4(d) at 668.

In any event, the trial court found that Livingston had approved any variance from Livingston's Code § 265-5(E) because its municipal council and mayor had to approve the Board's variance for the trash enclosure. The court also noted that plaintiff had offered no evidence or case law showing that TMB or the Board "would need to receive permission from Essex County in order to grant a variance regarding the [*19] location on a property of a trash [e]nclosure." We have no reason to doubt those observations.

Plaintiff also contends that picking up trash from the enclosure will cause traffic problems on South Orange Avenue. Szelc testified, however, that the waste management company stated that such pickups were not unusual on the avenue, would not be a problem as the pickup is typically after rush hour, and would produce only brief delays. TMB's traffic engineering expert testified that the development would produce less traffic at peak hours than the daycare center it would replace. Based on the evidence, the Board found that the development was unlikely "to involve exceptional risk of traffic congestion, public safety or hazard." We cannot say the variance was arbitrary, capricious, patently unreasonable, or contrary to the MLUL.

V.

Lastly, plaintiff argues the Board's resolution violates the regulations of the Council On Affordable Housing (COAH). Plaintiff quotes COAH regulations stating that inclusionary zoning ordinances "shall require, to the extent feasible, that developers fully integrate the low- and moderate-income units with the market units," and "shall require that affordable units . . . have [*20] access to all community amenities available to market-rate units and subsidized in whole by association fees." *N.J.A.C. 5:97-6.4(f)*, (g). Plaintiff cites no case holding that these COAH regulations, designed to guide municipalities in enacting "[i]nclusionary zoning ordinances," *ibId.*, create "a list of provisions that zoning boards must comply with every time they review a site plan application that includes inclusionary development."

Plaintiff also ignores that the Settlement Agreement in the *Mt. Laurel* litigation specified that "COAH's preference for physical integration of the affordable and market rate units shall not be applicable since the affordable units will be rental units while the market rate units will be sale units that will be in separate components of the development," namely the Market-Rate Building and the Affordable Building. The Settlement Agreement further provided that Livingston and the Board would rezone the Property "consistent with the proposed Ordinance attached hereto." The proposed Ordinance provided that the Market-Rate Building would have "private recreation and function facilities, and similar services for residents of the building."

In the subsequent fairness hearing, the Law Division [*21] approved the Settlement Agreement, finding it "to be

fair to the interests of lower income persons who are the beneficiaries of *Mount Laurel* litigation consistent with the standards articulated" in *East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 669 A.2d 260 (App. Div. 1996)*, and other cases. One of the purposes of a fairness hearing is to determine "that a proposed settlement satisfies those criteria" in COAH's regulations. *Livingston Builders, Inc. v. Twp. of Livingston, 309 N.J. Super. 370, 380, 707 A.2d 186 (App. Div. 1998)*; *e.g., East/West Venture, supra, 286 N.J. Super. at 323*. No one appealed the Law Division's decision.

Given the Settlement Agreement in the *Mt. Laurel* litigation, and its unchallenged approval in the Law Division's fairness hearing, we agree with the trial court that the Board acted within its discretion by relying on the Settlement Agreement and the proposed Ordinance as being adequate under COAH's regulations. TMB's application to build an Affordable Building and a Market-Rate Building with "an entry area, card rooms, other amenities, and an outdoor swimming pool" which "would be for the use of the residents of this building only and their guests," was largely consistent with the Settlement Agreement and the proposed and subsequently-enacted Ordinance.[2] The Board's resolution approving TMB's application did nothing more than require condominium ownership for the Market-Rate Building [*22] and rental tenancy for the Affordable Building, and provide that "[t]he Market Rate Building central core amenities and pool shall not be rented to parties who are not residents of the Market Rate Building."

2 The proposed Ordinance had stated that a pool could be provided "for residents of the development and their guests," but not for the "general public."

The Board's resolution expressly incorporated the Settlement Agreement, as approved by the Law Division, and required TMB to "comply with all of its obligations under said Settlement Agreement." Plaintiff has failed to show that the Board had any further obligation under the COAH regulations, or that the propriety of the unappealed Settlement Agreement is properly before us in this zoning appeal. Accordingly, we do not address the compliance of the development with COAH regulations. Instead, we hold only that plaintiff has failed to show the Board's resolution was arbitrary, capricious, patently unreasonable, or contrary to the MLUL.

Affirmed.

Analysis
As of: Jul 03, 2014

JOSEPH KUSHNER HEBREW ACADEMY, INC., and TMB PARTNERS, LLC, Plaintiffs, v. TOWNSHIP OF LIVINGSTON, LIVINGSTON TOWNSHIP COUNCIL and LIVINGSTON PLANNING BOARD, Defendants. SQUIRETOWN PROPERTIES, LLC, Plaintiff-Respondent, v. TOWNSHIP OF LIVINGSTON, LIVINGSTON TOWNSHIP COUNCIL and LIVINGSTON PLANNING BOARD, Defendants-Appellants. HILLSIDE-NORTHFIELD PARTNERS, LLC, Plaintiff-Respondent, v. TOWNSHIP OF LIVINGSTON, LIVINGSTON TOWNSHIP COUNCIL and LIVINGSTON PLANNING BOARD, Defendants-Appellants.

DOCKET NO. A-5797-10T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2013 N.J. Super. Unpub. LEXIS 2170

January 8, 2013, Argued
August 30, 2013, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket Nos. L-9126-07, L-9785-07, and L-7509-08.
In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 6 A.3d 445, 2010 N.J. Super. LEXIS 201 (App.Div., 2010)

COUNSEL: Gary T. Hall argued the cause for appellants (McCarter & English, LLP, attorneys; Mr. Hall, of counsel and on the briefs).

Craig M. Gianetti argued the cause for respondent Squiretown Properties, LLC (Giordano, Halleran & Ciesla, P.C., attorneys; Paul H. Schnieder, of counsel; Mr. Gianetti, on the brief).

Robert Axel Kasuba argued the cause for respondent Hillside-Northfield Partners, LLC (Bisgaier Hoff, LLC, attorneys; Mr. Kasuba, on the brief).

JUDGES: Before Judges Alvarez, Waugh and St. John.

OPINION

PER CURIAM

Defendants Township of Livingston, Livingston Township Council, and Livingston Planning Board appeal from builder's remedies awarded to plaintiffs

Squiretown Properties, LLC, (Squiretown) and Hillside-Northfield Partners, LLC (Hillside).[1] On September 1, 2009, the Township adopted a housing element and fair share plan as required by a February 20, 2009 order. Thereafter, defendants moved for reconsideration by the trial court after the Supreme Court accepted certification on *In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 6 A.3d 445 (2010), certif. granted, 205 N.J. 317, 15 A.3d 325 (2011).* [*2] The relief was denied. The parties have not submitted the transcript for that hearing.

1 Defendants earlier entered into a settlement agreement with plaintiffs Joseph Kushner Hebrew Academy (JKHA) and TMB Partners (TMB) in accord with the special master's recommendation.

After three days of trial on Hillside's builder's remedy, on November 4, 2010, Judge Carey issued an oral decision granting plaintiffs relief.

I

We briefly discuss, for context, the history of affordable housing and the builder's remedy. In 1975, the Supreme Court held that our Constitution requires each municipality to "plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including . . . low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries." *S. Burlington County. N.A.A.C.P. v. Twp. of Mount Laurel, 67 N.J. 151, 179, 336 A.2d 713 (1975), cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (Mount Laurel I).* If a municipality has been adjudicated to be non-compliant with its obligation, and has not adequately revised its zoning ordinances, a prospective developer may seek [*3] a "builder's remedy." *S. Burlington County. N.A.A.C.P. v. Twp. of Mount Laurel, 92 N.J. 158, 279-80, 456 A.2d 390 (1983) (Mount Laurel II).* "'The builder's remedy is a device that rewards a plaintiff seeking to construct lower income housing for success in bringing about ordinance compliance through litigation.'" *Mount Olive Complex v. Twp. of Mount Olive, 340 N.J. Super. 511, 525, 774 A.2d 704 (App. Div. 2001), remanded on other grounds, 174 N.J. 359, 807 A.2d 192 (2002)* (quoting *Allan-Deane Corp. v. Bedminster Twp., 205 N.J. Super. 87, 138, 500 A.2d 49 (Law Div. 1985)).*

A developer is entitled to a builder's remedy if it satisfies three prongs: (1) it succeeds in *Mount Laurel* litigation; (2) it proposes a project with a substantial amount of affordable housing; and (3) the site is suitable, that is, the municipality fails to meet its burden of proving that the site is environmentally constrained or construction of the project is contrary to sound land use planning. *Mount Laurel II, supra, 92 N.J. at 279-80; Mount Olive, supra, 340 N.J. Super. at 525.* Although the issue of a substantial amount of suitable housing is determined on a case by case basis, the Court characterized allocating twenty percent of a project to affordable housing as [*4] a "reasonable minimum." *Mount Laurel II, supra, 92 N.J. at 279 n.37.*

In 1985, the Legislature enacted the Fair Housing Act (FHA), *N.J.S.A. 52:27D-301 to -329.4*, which created the Council on Affordable Housing (COAH). L. 1985 c. 222. The legislation authorized COAH with, among other things, adopting criteria and guidelines for "[m]unicipal determination of its present and prospective fair share of housing need in a given region[.]" *N.J.S.A. 52:27D-307(c)(1).* COAH adopted "first round" and "second round" rules establishing municipalities' affordable housing obligations for six-year periods, from 1987 to 1993, and 1993 to 1999. *N.J.A.C.* 5:92-1.1 to 18.20, and Appendix A to F; *N.J.A.C. 5:93-1.1 to 15.1*, and Appendix A to H. As we further discuss below, we have twice invalidated parts of COAH's third-round rules, for the period from 1999 to 2014. *See In re Adoption of N.J.A.C. 5:96 and 5:97, supra, 416 N.J. Super. 462.* It is against this backdrop that we consider this appeal.

II

Under the second-round rules, COAH determined that the Township had a first-round and second-round (1987 to 1999) fair share housing obligation of 375 units, called a "pre-credited need" or new construction housing [*5] obligation. The Township failed to prepare and submit to COAH an affordable housing plan to meet this obligation prior to the institution of *Mount Laurel* litigation by two developers.

On February 7, 2000, Judge Jack B. Kirsten signed a final judgment in that litigation, *Livingston Builders, Inc. v. Township of Livingston*, Nos. L-7641-94 and L-2148-96, finding the Township to be in compliance with its prior affordable housing obligation. The judge approved the affordable housing compliance plan that had been adopted by the Township Planning Board on February 4, 1997, and granted the Township a six-year

period of repose and protection from challenges to its zoning and land development ordinances premised on claims that the ordinances do not adequately satisfy the Township's obligation to provide a realistic opportunity for low- and moderate-income housing.

As part of the judgment of repose, the judge granted the Township a "vacant land adjustment" or [*6] unmet need of 182 units resulting in a realistic development potential of 193 units. The resulting figure of 193 units represented the adjusted affordable housing obligation based on the lack of sufficient vacant developable land in the Township.

The vacant land inventory in the Township's second-round plan included lots 35 and 37 in block 5900, for a combined acreage of 9.8 acres. These two lots largely correspond to the current Squiretown property and were assigned a combined realistic development potential of eleven affordable units.

The Township fully implemented its obligation for 193 units except for twenty-two units that were to be addressed by two regional contribution agreements (RCA) that were fully funded.[2] In 2008, the Legislature cut off any further RCAs.[3] L. 2008, c. 46 § 4.

2 The plan called for four RCAs; two were fully performed but the other two were prevented from proceeding due to the law change.

3 One RCA for eleven units had been pending at COAH since 2006 but was neither approved nor rejected.

In December 2004, COAH adopted new regulations for its third round, covering a cumulative period from 1999 through 2014. *36 N.J.R. 5748(a)* (Dec. 20, 2004) (substantive rules); [*7] *36 N.J.R. 5895(a)* (Dec. 20, 2004) (procedural rules). Under these rules, a municipality's fair share affordable housing obligation had three components: a rehabilitation obligation; a prior-round (1987-1999) obligation; and a growth share obligation (2000 to 2014). *N.J.A.C. 5:94-2.1*; *N.J.A.C. 5:97-2.2*.

COAH recalculated municipal new construction obligations for 1987 to 1999, called the prior-rounds obligation, and determined in 2004 that the Township's prior-rounds obligation was 259 units. Thus, the Township's unmet need was sixty-six units (259 units minus the realistic development potential of 193 units).

Prior to June 21, 2011, when Judge Carey signed the final judgment adopting the Township's Housing Element and Fair Share Plan, defendants had not submitted a plan to COAH or a court that covered the third-round housing cycle as set forth in *N.J.A.C. 5:94*.

On January 25, 2007, we invalidated portions of COAH's third-round rules, including the growth share methodology, and required COAH to adopt new regulations. *In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 54-56, 88, 914 A.2d 348 (App. Div.), certif. denied, 192 N.J. 71, 926 A.2d 856-72, 926 A.2d 856 (2007)*. We also stated that only certain builder's remedy [*8] suits were stayed:

> We also stay the filing of any builder's remedy actions for any municipality whose application for substantive certification is affected by this opinion. A stay furthers the policy of the FHA [Fair Housing Act, *N.J.S.A. 52:27D-301 to -329.19*] to resolve affordable housing disputes through COAH rather than in the courts. Municipalities that have acted in good faith in devising fair share plans to comply with the existing third round rules should not be subjected to an exclusionary zoning law suit.
>
> [*Id. at 88*.]

Defendants admit that they received correspondence from COAH, dated March 28, 2007, which stated that COAH was still accepting petitions for substantive certification and was available to work with municipalities on individual projects or plans.

In January 2008, COAH proposed revised third-round regulations, which were adopted on May 6, 2008. *40 N.J.R. 2690(a)* (June 2, 2008); *40 N.J.R. 3161(a)* (June 2, 2008). Thereafter, on October 20, 2008, COAH adopted substantial amendments to the revised third-round rules, and the rules became *N.J.A.C. 5:96-1.1 to -20.4* and *N.J.A.C. 5:97-1.1 to -10.5* and Appendices A through F. *See In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 471-77* [*9] (setting forth history of third-round rules).

Prior round obligations were readjusted in *N.J.A.C. 5:97* Appendix C. COAH modified the growth share

methodology in *N.J.A.C. 5:97-2.2* with COAH projecting growth rather than municipalities. *N.J.A.C. 5:97* Appendix F. COAH calculated the Township's prior-round share at 375 units, *N.J.A.C. 5:97* Appendix C, and its growth share obligation at 308 affordable units. Formerly at *N.J.A.C. 5:97* Appendix F(2). Squiretown's planner calculated that when combined with its prior-round obligation, the Township had a total new construction affordable housing obligation under the rules of 683 units for the third round.

In *In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 480, 483*, portions of the revised third-round rules were struck down, including the revised growth share methodology for the same reason we had invalidated the original growth share methodology. We directed COAH "to adopt third round rules that incorporate a methodology similar to the methodology set forth in the first and second round rules, which were approved by the courts in most respects." *Id. at 484*. The New Jersey Supreme Court granted [*10] certification in March 2011, but has not yet issued a decision. *205 N.J. 317, 15 A.3d 325 (2011).*

III

Squiretown's site consists of a largely undeveloped mostly wooded lot designated as block 5900, lots 35, 36, 37, 42, and 44.01. Within the site, 12.37 acres are developable. It is currently zoned P-B1 Professional Office, permitting a maximum building height of forty feet and maximum impervious coverage of seventy percent, and R-2 Residential, permitting a minimum lot size of 25,000 square feet for a gross density of 1.74 dwelling units per acre. It is within planning area 1 of the State Development and Redevelopment Plan.

IV

The Hillside site consists of 4.52 acres, block 550, lots 5 (in part), 7, 8, and 9. It is within planning area 1 of the State Development and Redevelopment Plan. The site is located in the R-3 zone, which generally permits single-family residential uses. Since the 1930s the site has been used as a nursery, and as a landscaping business since 1958. Situated on two of the lots are older, dilapidated single-family homes.

V

Squiretown requested a builder's remedy for 250 multi-family apartments with a twenty percent set aside, or fifty units, for affordable housing. David Minno, Squiretown's [*11] expert in the field of architecture, testified regarding Squiretown's proposal to construct six buildings, four stories high over parking, with a maximum height of 68.5 feet.

Harold Maltz, Squiretown's expert in traffic engineering, conducted studies in October and November 2002, for a project that was to have twenty-two units, issuing a report dated November 24, 2003. He prepared a traffic study dated July 1, 2009. Maltz did not conduct new counts of traffic because from 2002, when he previously conducted studies for the earlier project, to 2009, there were no major changes in the area that would affect traffic flows. He used traffic projections for low-rise buildings, as he considered this to be a worst-case scenario and the most conservative analysis of projected traffic. The relevant figure in Maltz's analysis was the actual number of trips generated by the project and not the percentage increase. That figure was well within the Residential Site Improvement Standards (RSIS)[4] average daily traffic maximum for a residential access street. Maltz concluded that from a traffic standpoint, the project's impact on traffic would not be contrary to sound land use planning. He conceded, however, [*12] that some mitigation should be introduced.

4 The New Jersey Residential Site Improvement Standards, *N.J.A.C. 5:21-1.1 to -8.1*, apply to

> any site improvements . . . to be carried out in connection with any application for residential subdivision site plan approval, or variance before any planning board or zoning board of adjustment created pursuant to the Municipal Land Use Law (*N.J.S.A. 40:55D-1 et seq.*); or in connection with any other residential development approval required or issued by any municipality or agency or instrumentality thereof.
>
> [*N.J.A.C. 5:21-1.5(a).*]

They were promulgated by the Department of Community Affairs pursuant to the Residential

Site Improvement Standards Act, *N.J.S.A. 40:55D-40.1 to -40.7. Norris v. Borough of Leonia, 160 N.J. 427, 445, 734 A.2d 762 (1999).*

Creigh Rehenkamp, Squiretown's expert in planning and affordable housing, testified that since February 2008, he worked with architects, engineers, and attorneys to develop the plan that Squiretown presented to the court. Rehenkamp testified with regard to the second prong of the builder's remedy test, stating that the project's twenty percent, or fifty units, was substantial. *See Mount Laurel II, supra, 92 N.J. at 279*; *Mount Olive, supra, 340 N.J. Super. at 525.* [*13] He also testified that under the third prong he considered the site suitable and not contrary to sound planning. Rehenkamp concluded the area was appropriate for either single-family or multi-family residences. The site had ready access to streets, sewer, and water.

Rehenkamp considered the project consistent with the State plan, which places the site in planning area one, and conforming to environmental requirements. The project fulfilled COAH requirements for density and height in planning area one. The building's height over parking was typical for multi-family structures and similar to projects in other municipalities.

John Cicchino, a member of Squiretown, testified regarding efforts to develop inclusionary housing on the site prior to the builder's remedy lawsuit being filed. This included meetings with Township officials in September 2005 and February 2006, which resulted in revisions to Squiretown's plans and changes in density. Although Township officials promised to respond to further discuss the plan, nothing further was heard after Squiretown presented its third revised concept.

Janice Talley, defendants' planning consultant, testified that she did not do a site suitability [*14] analysis of the Squiretown site because it was not included in the Township's housing plan. It was specifically excluded because it had been addressed in the second round. The Township was interested in developing the site for a public works facility and not for affordable housing.

Talley submitted a planner's report responding to Squiretown's site suitability analysis. She claimed that the Squiretown proposal was contrary to sound land use planning principles because the size and scale of the buildings was inconsistent with the low-density character of the Township and the height and density of other inclusionary developments in the Township. In Talley's view, the proposal "creates problems in terms of traffic volumes on adjacent roadways."

Talley opined the proposed housing was too close to power lines and required screening. It would significantly increase traffic. Although she agreed the site was suitable for multi-family development, she opined density in the proposal was too great, the buildings too high, and that there was insufficient buffer. Talley's concern with the project was the number of units. She conceded that the original TMB settlement had a gross density of 22.4 units [*15] per acre, while this proposal was for less than 12 per acre. The final settlement approved for TMB was 14.6 units gross density per acre.

Furthermore, Squiretown's proposal was out of character for the Township because of building heights. Although at least one other development was taller, this project was different in character and was also different from regional shopping centers that are planned to be visible.

Special Master Elizabeth McKenzie issued a report submitted to the court on March 18, 2010, in which she recommended construction of approximately 220 units, of which forty-four would be affordable family rental units. A reduction in the height of the buildings would help the visual impact, and despite the decrease in the total number of units, the site would still make a substantial contribution to the Township's affordable housing stock.

McKenzie concluded the site was suitable for inclusionary, multi-family-residential development. Her conclusion was based on the surrounding land uses and environment, and access to appropriate streets. The existence of wetlands on the site did require transition between areas, but the builder's remedy did not propose to build in that area [*16] except for a crossing to create a driveway to a nearby street.

While Squiretown proposed 250 units in six buildings with four levels for residences and one for parking, McKenzie recommended the reduction in density to reduce the height of three of the buildings to bring the visual impact of those buildings down. She also recommended eliminating one building but making two others a bit longer, which would make the project less intrusive. McKenzie concluded that there was a good

plan for recreation on the site.

McKenzie rejected Talley's claim that the Squiretown site's inclusion as part of the Township's realistic development potential calculation for its court-approved second-round housing element and fair share plan precluded the site from being part of a third-round plan. McKenzie concluded that this argument was not relevant in light of COAH's current rules, which require that any unmet need from the prior round be addressed in addition to the calculated realistic development potential. She added:

> The grant of a "vacant land adjustment" in the prior round is viewed as having essentially divided a municipality's affordable housing obligation into that which had to be addressed within [*17] the scope of the prior round plan (the [reasonable development potential]) and that which could be addressed over time as opportunities presented themselves (the unmet need) though "softer" mechanisms designed to capture unforeseen affordable housing opportunities.
>
> If a plaintiff in a *Mount Laurel* lawsuit proposes a suitable site for inclusionary residential development and such a development will address part of the unmet need, it cannot now be exempted from consideration merely because the site was not needed to meet the Court-approved [reasonable development potential].

In Judge Carey's oral decision granting Squiretown a builder's remedy, he initially noted that Squiretown fulfilled the first prong of the three-prong test as a successful *Mount Laurel* litigant. Next, the judge stated that the second prong of the test was not disputed because even Talley agreed that the proposals put forth by Squiretown contained a substantial amount of affordable housing. Addressing the third prong of the test, the judge accepted the special master's conclusions that the project was clearly consistent with sound land use planning.

The judge also found Minno, Maltz, and Rehenkamp extremely qualified, [*18] and he accepted their testimony. He granted the builder's remedy for 220 units, but granted the Township the opportunity in subsequent hearings to eliminate one building and incorporate those units into two others. The judge also accepted the special master's interpretation that there was no impediment to the plan based on part of the property having been counted in the second round.

VI

Minno, who also served as Hillside's architectural expert, testified about Hillside's development proposals, the surrounding area, and the presentation of plans to the Township. Hillside's plan involved construction of four three-story buildings containing eighty multi-family-dwelling units, sixteen of which would be affordable to lower-income households, and a fifth building housing a club facility. The gross density in the proposal was 17.7 units per acre based on the entire tract area.

Thomas Auffenorde, Hillside's environmental regulations expert, found no wetlands, streams, category one waters, or threatened or endangered species habitat on the site. He did find one wetland area off-site, and one wetland transition area that encroached the site but posed a very insignificant impact on development.

Michael [*19] Schweitzer, Hillside's expert in compliance with environmental regulations, testified about due diligence work performed on-site to identify potential contamination. Due to prior use of the land as farmland, a nursery, or an orchard, the potential existed for elevated levels of pesticides. In 2007, testing showed levels of chlordane above the Department of Environmental Protection's clean-up standard. Schweitzer's company collected soil samples and determined that the only impact to the site would be the cost of remediation and soil disposal, which was not unusual.

Stanley Omland, Hillside's civil engineering expert, testified about the location of the project, soils, coverage of the site, storm water, proposed ingress and egress, and proximity to highways. He noted that after development of a more detailed design, a traffic study might be warranted.

Jonathan Schwartz, a member of Hillside, testified about the company's history of developing properties and the negotiations with the Township for the Hillside property. He stated that Hillside decided to file suit in

September 2008. Hillside was the contract purchaser of the site since April or May 2008, and prior to that time, Sheldon [*20] Dubrow, the owner, had had discussions with another developer about the site.

The previous prospective purchaser and developer had meetings with Township officials concerning a project with fifty-five to seventy units. Schwartz testified that before filing suit, Hillside knew that the Township had not been interested in the project moving forward. After Hillside filed suit, there were meetings with Township officials and plans presented for the site. Due to Township concerns about density and buffers, Hillside revised plans to lower the number of units.

Willy Dittmar, Hillside's licensed home inspector, testified about two single-family homes on the Hillside site, located at 245 and 247 Northfield Avenue, and submitted reports about the conditions of the two homes.[5] He concluded that 247 had a problematic bulge on the right side wall, had termite damage, defects in the main girder, columns, and footers in the basement, and a floor joist which had been cut completely in half. The water heater, plumbing, and electricity were defective. The first floor pitched to the right, the attic had a cracked roof rafter, and there were mice in the crawl space.

5 His report incorrectly lists the house [*21] number of 247 as 257.

The house at 245 Northfield Avenue had a worn out roof that was three layers deep, and the roof below the chimney and extending to the rear addition was rotten, including the roof sheathing and part of the rafters. The structure itself was infested with carpenter ants, a basement window was rotten, and the chimney was in poor condition. The detached garage appeared so structurally unsound and unsafe that Dittmar did not enter, and the electrical power to the garage was improperly connected. The basement had a cracked floor joist and floor framing that was too wide. There was evidence of water in the basement and crawl space, and termites. The plumbing had frozen, and the water heater was leaking. A wall-mounted heater had the wrong voltage for its outlet and could be a fire hazard.

Dittmar concluded that both homes were in such poor condition that necessary repairs to make them habitable would cost more than their value. Both houses were vacant although tenants had recently occupied them.

Art Bernard, Hillside's professional planner, testified about the suitability analysis he conducted regarding the construction of affordable housing on the site. He opined that [*22] Hillside's proposal was consistent with sound land use planning principles. The site had access to appropriate streets, was relatively free of environmental constraints with access to public water and sewer, and was compatible with land uses. From a planning perspective, he saw no justification for not allowing demolition of the two single-family homes.

Talley also testified for defendants about the Hillside proposal. She stated that the plan was too dense and should be reduced to twelve units per acre, allowing for a total of forty-six units with nine of them being affordable. She also wanted greater distance for setback for parking and between buildings.

Talley agreed that the redevelopment of the site was a good idea because it converted a preexisting non-conforming use to one that is more conforming to the neighborhood. However, she concluded that Hillside's plan was contrary to sound land use principles based on the project's size and potential impact on surrounding land uses. Talley also wanted to maintain the two single-family houses.

McKenzie endorsed Hillside's proposal and agreed with the opinions in Bernard's and Omland's reports. She opined that the site was suitable for the [*23] proposed development.

McKenzie addressed an issue raised by Talley concerning the two existing houses on lots 8 and 9:

> Each of these lots contains an existing single-family home and is less than two acres in area. Talley cites the Fanwood amendment to the Fair Housing Act (*N.J.S.A. [52:27D-]311.1* and *313.1*), which specifically exempts single-family homes on lots of two acres or less from being required to be demolished to make way for inclusionary development. The Fair Housing Act does, however, articulate certain extenuating circumstances under which such demolitions would be permissible.
>
> Among these circumstances is a situation where the residential structure in

> question has either been declared unfit for human occupancy or is found to be unfit but not as a result of negligent or willful action during the preceding three years.

In McKenzie's opinion, it was appropriate from a land use planning perspective to include the lots on which the two homes were located as part of the site. She considered the two houses on the site to be currently unfit for human occupancy and to have been so for a period longer than three years. While they could be made habitable, she was not an expert as to [*24] whether the cost of the repairs would exceed the ultimate value of the houses. However, generally with houses of this type, a buyer knocks the houses down and builds new. McKenzie did not think these houses would survive on individual single-family lots. For these reasons, she stated it was better to include the two lots in the project.

McKenzie confirmed that there had been meetings in 2006 and 2007 between another developer, the owner of the property, and the Township. The intent was to include affordable housing on the site, but nothing came of those meetings. While there were no meetings with Hillside prior to filing this lawsuit, McKenzie concluded that negotiations would have been futile. The Township was aware that the site was available for inclusionary purposes and chose not to amend its zoning to accommodate the proposals that had been submitted.

McKenzie also addressed the issue that portions of the third-round rules had been invalidated. She noted that the total number of affordable units that the Township will get from all four plaintiffs on all four sites would still not completely address the Township's second round unmet need. Thus, there was nothing about the Appellate [*25] Division's ruling that would preclude a builder's remedy for the Hillside site as part of the fulfillment of the prior round obligation for the Township.

Judge Carey issued an oral decision granting the remedy. He concluded that his February 2, 2009 order fulfilled the first prong of the applicable test that Hillside was a successful *Mount Laurel* litigant. The judge found that it was uncontested that Hillside satisfied the second prong that the project provide a substantial amount of affordable housing.

Addressing the third prong, the judge concluded that Hillside engaged in good faith negotiations and was not barred from litigating the claim. He agreed with McKenzie's analysis that the site was appropriate for multi-family dwellings. Using a balancing test, the judge found that the two houses were "a nightmare," out of character for the area, served no valid planning purpose, and agreed with McKenzie's recommendation to remove the homes. From a land planning perspective it was both appropriate and reasonable to include the two lots. He concluded that Hillside met its burden to establish all three prongs of the test, and granted the builder's remedy.

VII

On appeal, defendants raise the [*26] following points of error:

> POINT I
> THE NON-SETTLING PLAINTIFFS WERE NOT ENTITLED TO BUILDER'S REMEDIES BECAUSE LIVINGSTON REMAINED IN COMPLIANCE WITH ITS ADJUSTED SECOND ROUND AFFORDABLE HOUSING OBLIGATION.
>
> POINT II
> THE BUILDER'S REMEDIES AWARDED TO HILLSIDE-NORTHFIELD WAS NOT APPROPRIATE UNDER MOUNT LAUREL II AND SUBSEQUENT SUPREME COURT DECISIONS.
>
> POINT III
> HILLSIDE'S BUILDER'S REMEDY CLAIM IS BARRED BY THE FAILURE TO PRESENT A BONA FIDE AFFORDABLE HOUSING PROPOSAL PRIOR TO FILING SUIT, AS UNAMBIGUOUSLY REQUIRED BY MOUNT LAUREL II.
>
> POINT IV
> HILLSIDE'S BUILDER'S REMEDY CLAIM SHOULD BE REVERSED BASED ON THE PROHIBITION IN *N.J.S.A. 52:27D-313.1.*
>
> POINT V
> SQUIRETOWN'S BUILDER'S REMEDY CLAIM IS BARRED BY

PRIOR EXCLUSION OF THE PROPERTY FROM REZONING FOR AFFORDABLE HOUSING IN THE COURT-APPOINTED SECOND ROUND PLAN CONSISTENT WITH *N.J.S.A. 52:27D-307(c)(2)* AND *N.J.A.C. 5:94-4.2.*

POINT VI
BOTH BUILDER'S REMEDIES ARE CONTRARY TO SOUND LAND USE PLANNING PRINCIPLES.

A. THE APPROPRIATE LEGAL STANDARD.
B. THE BUILDER'S REMEDY AWARDED TO HILLSIDE.
C. THE BUILDER'S REMEDY AWARDED TO SQUIRETOWN.
D. SUMMARY.

VIII

Defendants contend that Hillside and Squiretown were not entitled to builder's remedies because the Township [*27] remained in compliance with its adjusted second-round housing obligation. They assert that Judge Carey's decision elevated form over substance by disregarding the specific character of the Township's adjusted affordable housing obligation as previously determined and the Township's continuing actions to address the obligation. Defendants claim that there was no basis for the assumption that the Township became noncompliant when the six-year period of repose expired on February 7, 2006. Defendants, however, are mistaken. The compliance judgment specifically states that the "period of repose shall run for a period of six years from the date of this Final Judgment."

Defendants rely on *Toll Brothers, Inc. v. Township of West Windsor, 334 N.J. Super. 77, 94-95, 756 A.2d 1056 (App. Div. 2000), certif. denied, 168 N.J. 295, 773 A.2d 1159 (2001)*, for the proposition that the courts have clearly recognized that compliance judgments do not expire when the period of repose ends. Defendants have taken the language in that decision out of context.

In *Toll Brothers*, the owners of two tracts of land entered into consent judgments in 1985 as part of the settlement of a *Mount Laurel* action brought by an affordable housing corporation. [*28] *Id. at 85-86.* The landowners did not want their properties rezoned for affordable housing, but both eventually acceded. *Id. at 86.* The consent judgments specifically delineated their rights and obligations, and under the settlement, the municipality obtained repose for six years until July 22, 1991. *Ibid.*

In 1993, Toll Brothers sought a builder's remedy. *Ibid.* During the pendency of that action, the municipality notified the two landowners whose property had been rezoned as part of the 1985 *Mount Laurel* litigation that it intended to delete their sites for affordable housing. *Id. at 87.* The landowners objected and attempted to intervene in the Toll Brothers' litigation. *Ibid.*

The trial judge directed the landowners to file a separate action to enforce their rights under the 1985 consent judgment, which the judge then consolidated with the Toll Brothers' action "for limited purposes." *Ibid.* In 1998, after a trial, the judge entered a final judgment and an order of repose which authorized the municipality to delete the landowners' sites and treated all orders entered in the 1985 litigation as "having expired." *Ibid.*

On appeal, the Appellate Division rejected the characterization of the [*29] 1985 judgment as having expired after six years. *Id. at 94-95.* The judgment protected the municipality from litigation for that period only, but the judgment itself did not expire. *Id. at 94.* The Appellate Division observed that if *Mount Laurel* judgments simply "expired after six years, municipal defendants would have every incentive to delay approval of inclusionary developments or other unpopular affordable housing plans." *Id. at 95.* Since the judgment was still in effect, the Appellate Division held that the question of whether it should be modified to delete the sites was governed by *Rule 4:50-1(e)*, which allowed relief where a "'judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application.'" *Id. at 98* (quoting *R. 4:50-1(e)*). The *Toll Brothers* judgment survived and was subject to the rules pertaining to modification because no part of the judgment provided for its expiration.

Thus, *Toll Brothers* stands for the proposition that after the repose period expires, a developer may file a

builder's remedy [*30] suit challenging the validity of a municipality's zoning and land use regulations even though the municipality had previously received a judgment of repose approving a compliance plan. The opinion has no impact on Hillside's and Squiretown's right to builder's remedies.

It is notable that beginning in January 2006, Talley advised the Township to voluntarily prepare an affordable housing plan to comply with its affordable housing obligations. She testified that she agreed that from February 7, 2006, the Township was vulnerable to a builder's remedy lawsuit.

In support of their arguments, defendants also claim that the prior vacant land adjustment reducing the Township's affordable housing obligation from 375 units to 193 units did not expire. For this proposition, they rely on *N.J.A.C. 5:97-5.1(c)*, which provides:

> A vacant land adjustment that was granted as part of a second round certification or judgment of compliance shall continue to be valid provided the municipality has implemented all of the terms of the substantive certification or judgment of compliance. If the municipality failed to implement the terms of the substantive certification or judgment of compliance, [COAH] may reevaluate [*31] the vacant land adjustment.

Defendants further claim that the Township's continuing obligation was to seek to capture additional affordable housing obligations when developed properties became available for redevelopment. In their view, the record is clear that the Township complied with that obligation by discussing redevelopment proposals with owners of developed property, JKHA and TMB. As a result, they argue that it was improper to render a judicial finding of noncompliance absent a finding that the Township was being unreasonable in its negotiations.

The problem with defendants' argument is that they became noncompliant because RCAs became illegal and were halted. Thus, defendants were in noncompliance for failing to transfer twenty-two units. Under *N.J.A.C. 5:97-5.3(a)*, COAH "shall review the municipality's mechanisms to address unmet need and may require the municipality to amend or add additional mechanisms" to meet unmet need. Given the amount of affordable housing opportunities that were available in the Township, defendants could have done more to address unmet need before plaintiffs filed suit.

Defendants also maintain that the technical finding of noncompliance was based [*32] solely on the absence of a filing with COAH based on third-round regulations that have been invalidated twice by the Appellate Division, with the last appeal pending before the New Jersey Supreme Court. While defendants are correct about portions of the regulations, COAH continued to accept filings and those municipalities that did file are entitled to be considered in a different category from defendants.

Defendants correctly state that because of litigation, municipalities that filed with COAH have not had to implement their plans, while defendants voluntarily implemented settlements with TMB and JKHA. Defendants assert that it is difficult to believe that the Supreme Court intended broad statements written more than twenty-seven years ago in *Mount Laurel II* to be applied to achieve this result.

COAH was still accepting petitions for substantive certification after January 2007. On March 28, 2007, COAH wrote to all municipalities that were required to submit a cumulative Housing Element and Fair Share Plan by May 15, 2007, under *N.J.A.C.* 5:95-15.3 concerning how to proceed in light of *In re Adoption of N.J.A.C. 5:94 & 5:95, supra, 390 N.J. Super. 1*. COAH wrote: "COAH is continuing [*33] to accept petitions for substantive certification and is available to work with you on an individual project or on the plan as a whole in keeping with the Appellate Division decision. Alternatively, you may submit a request for a waiver pursuant to *N.J.A.C.* 5:95-15.3." Defendants could have followed that route but failed to do so.

Therefore, there is no merit to defendants' argument that Hillside and Squiretown were not entitled to builder's remedies because the Township remained in compliance with its adjusted second-round housing obligation. Neither is there merit to defendants' assertion that they have no further obligations because third round regulations were invalidated.

IX

Defendants maintain that Hillside's builder's remedy was not appropriate under *Mount Laurel II* and subsequent Supreme Court decisions, and that even if second-round compliance is ignored and the Township is deemed to be technically non-compliant because a third-round affordable housing plan was not filed with COAH, a builder's remedy award is not appropriate. They contend that builder's remedies should not be blindly awarded without consideration of other legal principles recognized by the Court. Affordable housing [*34] was being achieved in the Township and the Court did not intend for developers such as Hillside and Squiretown to override that.

Defendants further contend that Judge Carey relied on an erroneous mechanistic reading of *Mount Laurel II*, improper because compliance was already compelled as a result of the initial litigation by JKHA and TMB. In their view, this is particularly applicable to Hillside, because it cannot be characterized as having succeeded in this litigation by belatedly joining it.

Defendants take the position that the Township was in compliance with its affordable housing obligation as set forth in the final judgment that approved a vacant land adjustment consistent with the FHA. There was no determination that the Township failed to implement the court-approved plan. In addition, finalization and adoption of a judicially acceptable affordable housing plan was inevitable once litigation was initiated by JKHA and TMB.

Defendants emphasize that the builder's remedy should ordinarily be rare. It is true that in *Mount Laurel II, supra, 92 N.J. at 207*, the Court cited to *Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 551-52 n.50, 371 A.2d 1192 (1977)*, where the *Madison* Court [*35] had stated that "[s]uch relief will ordinarily be rare, and will generally rest in the discretion of the court, to be exercised in the light of all attendant circumstances." But *Mount Laurel II* then acknowledged that experience had demonstrated that "builder's remedies must be made more readily available to achieve compliance with *Mount Laurel*." *Id. at 279*.

Furthermore, the Court revisited the builder's remedy in *Toll Brothers, Inc. v. Township of West Windsor, 173 N.J. 502, 803 A.2d 53 (2002)*. The intent behind builder's remedies is to incentivize affordable housing construction, and the Court in *Toll Brothers* recognized that the developer in that case was the catalyst for change to push the municipality to comply with its constitutional obligation. *Id. at 560*.

The record in this case shows that four different plaintiffs all sought to build affordable housing in the Township. While defendants settled with two out of the four plaintiffs, that does not mean that defendants fulfilled their continuing obligation to provide affordable housing.

Here, Talley conceded that Hillside was an appropriate site for multi-family dwellings and that it was a good idea to take a pre-existing non-conforming use and [*36] create something more conforming to the neighborhood. Her main concern was the density of units. McKenzie's report and testimony also supported the conclusion that Hillside's proposal was proper for the site. Thus, this situation is not one where excessive plaintiffs weaken municipal planning options.

Builder's remedies come into play when a municipality has failed to properly address the lower-income housing required under its constitutional obligation. We agree with defendants that builder's remedy litigation is public interest litigation in which the true parties in interest are low-income individuals, not developers who pursue such litigation to advance their economic self-interest. Here, the interests of lower-income persons are furthered by Judge Carey's grant of a builder's remedy to Hillside.

Defendants' negotiated agreements with JKHA and TMB do not fulfill the Township's obligation. Those agreements call for a total construction of fifty-seven units while the Township's unmet prior round obligation was 134 units. By granting builder's remedies to both Squiretown and Hillside, the judge has furthered litigation that is in the public interest.

Additionally, Judge Carey was correct [*37] in concluding that Squiretown and Hillside were technically entitled to partial summary judgment that the Township was not in compliance with its current third-round affordable housing obligation. The record shows that unlike many other municipalities, the Township never submitted a third-round plan to COAH. Municipalities that did not submit third-round plans to COAH are not insulated from builder's remedy suits.

Defendants incorrectly state that JKHA and TMB are the only plaintiffs that would have been entitled to

builder's remedies and that settlements with them preclude the award of a remedy to Hillside. If the settlements and changes to the zoning ordinance and fair share element had taken place before Hillside filed suit, then perhaps there would be more substance to defendants' claim. Instead, when Hillside filed suit, negotiations were ongoing with JKHA, TMB, and Squiretown, and a prior developer had approached the Township concerning a plan for affordable housing on the Hillside site. In this scenario, the settlement with two out of four plaintiffs did not preclude the judge's award of a builder's remedy to Hillside.

The goal of a builder's remedy suit is to compel the adoption [*38] of a municipal affordable housing compliance plan creating the reasonable opportunity for the provision of affordable housing. *See Mount Olive, supra, 340 N.J. Super. at 525*. Here, the combination of projects on four sites creates that opportunity. Hillside as a developer and plaintiff has carried out a meaningful role compelling the Township to take action to allow construction of affordable housing. Judge Carey therefore correctly concluded that Hillside's proposal for affordable housing fit the criteria for a builder's remedy.

Defendants rely on *In re N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 462*, where we invalidated COAH regulations that were based on the growth share concept. In that context, we held that stays of litigation should be considered by trial courts based on consideration of the "status of the individual municipality's compliance with its affordable housing obligations and all other relevant circumstances." *Id. at 512*. However, defendants concede that we did not make any reference to consideration of the impact of a stay on builder's remedy plaintiffs. The goal is still to advance the fulfillment of the constitutional obligation to provide affordable housing. [*39] While we invalidated the growth share portion of COAH's regulations, municipalities still have that obligation and the Township can fulfill part of its obligation with Hillside's proposal for affordable housing.

Defendants emphasize that the Court in *Hills Development Co. v. Township of Bernards, 103 N.J. 1, 42, 510 A.2d 621 (1986)*, stated that "the builder's remedy itself has never been made part of the constitutional obligation." However, the Court explained that the builder's remedy is simply a method for achieving the constitutionally mandated goal. *Ibid.* That goal remains, and the path where plaintiffs filed builder's remedy suits could have been avoided if defendants had chosen to file with COAH. They failed to do so and do not have a basis for overturning the builder's remedy awarded to Hillside.

There is no merit to defendants' argument that Hillside's builder's remedy was not appropriate under *Mount Laurel II* and subsequent Supreme Court decisions.

X

Defendants assert that Hillside's builder's remedy claim is barred by the failure to present a bona fide affordable housing proposal prior to filing suit.

Defendants are correct that the Court stated that a precondition to the potential award of [*40] a builder's remedy is a determination that "the plaintiff has acted in good faith [and] attempted to obtain relief without litigation[.]" *Mount Laurel II, supra, 92 N.J. at 218*. But a developer prior to Hillside made a bona fide affordable housing proposal for this site before litigation was instituted. The Township refused to rezone the parcel for an inclusionary development on the Hillside site, and Talley was unaware of these meetings when she prepared an analysis of available properties in the Township to address its affordable housing obligations. Schwartz testified that Hillside was aware of these unproductive negotiations when it entered into its contract to purchase the property. Hillside emphasizes that it also knew it was seeking a higher density than the previous developer, so it is fair to conclude that negotiations for an even higher density would not have been fruitful.

Defendants argue that Hillside did not attempt to comply with this requirement. Instead they state that there was only a "vague proposal" involving some affordable housing presented by a prior prospective purchaser of the property well over one year before Hillside sued. In addition, Hillside did not assert [*41] that it took any follow-up actions regarding that proposal, so defendants claim it is not evidence of a bona fide good faith effort.

Defendants claim that Hillside could have inquired and learned that the Township was concluding proposed settlements with JKHA and TMB, had obtained a second-round compliance judgment, was continuing to implement the second-round compliance judgment, and was finalizing an overall third-round affordable housing

plan. But the record demonstrates that there were drawn out negotiations with other developers and that the Township was not interested in any affordable housing on Hillside's property. The bona fide offer by the prior developer of Hillside's property is therefore sufficient.

There is no merit to defendants' argument that Hillside's builder's remedy claim is barred by the failure to present a bona fide affordable housing proposal prior to filing suit.

XI

Defendants claim that the prohibition in *N.J.S.A. 52:27D-313.1* bars Hillside's builder's remedy claim. Defendants and their planner argued to the trial judge that the Fanwood amendment to the FHA, *N.J.S.A. 52:27D-311.1* and *-313.1*, barred Hillside's builder's remedy. *N.J.S.A. 52:27D-311.1* provides:

> Nothing [*42] in the act to which this act is supplementary, P.L.1985, c.222 (C.52:27D-301 et al.), shall be construed to require that a municipality fulfill all or any portion of its fair share housing obligation through permitting the development or redevelopment of property within the municipality on which is located a residential structure which has not been declared unfit, or which was within the previous three years negligently or willfully rendered unfit, for human occupancy or use pursuant to P.L.1942, c.112 (C.40:48-2.3 et seq.), and which is situated on a lot of less than two acres of land or on a lot formed by merging two or more such lots, if the development or redevelopment would require the demolition of that structure. Any action heretofore taken by the Council on Affordable Housing based upon such a construction of P.L.1985, c.222 is invalidated.

N.J.S.A. 52:27D-313.1 provides:

> The Council on Affordable Housing shall not consider for substantive certification any application of a housing element submitted which involves the demolition of a residential structure, which has not been declared unfit, or which was within the previous three years negligently or willfully rendered unfit, [*43] for human occupancy or use pursuant to P.L.1942, c.112 (C.40:48-2.3 et seq.), and which is situated on a lot of less than two acres of land or on a lot formed by merging two or more such lots, unless an application for development has been previously approved by the municipal planning board or municipal zoning board pursuant to procedures prescribed by the "Municipal Land Use Law," P.L.1975, c.291 (C.40:55D-1 et seq.).

Defendants claim additional support for their position is found in *Hills Development Co., supra, 103 N.J. at 37*, where the Court noted that judicial decisions in *Mount Laurel* litigation should conform to COAH's various determinations. Thus they assert that an express legislative policy that COAH not compel municipalities to achieve affordable housing objectives by destruction of residences that have not been declared to be unfit for human habitation should equally apply to builder's remedy suits. Hillside responds that there is no known decision applying these provisions to limit the property that may be used for a builder's remedy.

Defendants contend Judge Carey improperly disregarded the legislative policy. However, since the legislation specifically refers to COAH, [*44] we do not believe it applies to builder's remedy actions. In any event, McKenzie concluded that the houses on the site were neglected for a period of time longer than three years and were unfit for human habitation. Nothing in the record supports the proposition that making the structures habitable was economically viable. There is no merit to defendants' argument that the prohibition in *N.J.S.A. 52:27D-313.1* bars Hillside's builder's remedy claim.

XII

Defendants maintain that Squiretown's builder's remedy claim is barred by prior exclusion of the property from rezoning for affordable housing in the court-approved second-round plan that is consistent with *N.J.S.A. 52:27D-307(c)(2)* and *N.J.A.C. 5:94-4.2.* Defendants consider the builder's remedy awarded to Squiretown to be contrary to *N.J.S.A. 52:27D-307(c)(2).*

N.J.S.A. 52:27D-307 provides:

> It shall be the duty of [COAH] . . . to:
>
> . . . .
>
> c. Adopt criteria and guidelines for:
>
> . . . .
>
> (2) Municipal adjustment of the present and prospective fair share based upon available vacant and developable land, infrastructure considerations or environmental or historic preservation factors and adjustments shall be made whenever:
>
> (a) The preservation of historically [*45] or important architecture and sites and their environs or environmentally sensitive lands may be jeopardized,
>
> (b) The established pattern of development in the community would be drastically altered,
>
> (c) Adequate land for recreational, conservation or agricultural and farmland preservation purposes would not be provided,
>
> (d) Adequate open space would not be provided,
>
> (e) The pattern of development is contrary to the planning designations in the State Development and Redevelopment Plan prepared pursuant to sections 1 through 12 of P.L.1985, c.398 (C.52:18A-196 et seq.),
>
> (f) Vacant and developable land is not available in the municipality, and
>
> (g) Adequate public facilities and infrastructure capacities are not available, or would result in costs prohibitive to the public if provided.

Defendants emphasize that the consideration that COAH had to make for available vacant and developable land was set forth in former *N.J.A.C.* 5:92-8.1 to 8.5 (superseded in 1994) and *N.J.A.C. 5:94-4.1* and 4.2. They assert that consistent with and in reliance on these regulations, they previously accounted for and addressed the affordable housing obligation associated with development of the Squiretown property. [*46] They then maintain that prior court approval of that action was nullified by Judge Carey's award of a builder's remedy for the same property.

The court approved the Township's second-round plan by adjusting the second-round affordable housing obligation from 375 to 193 units based on a vacant land adjustment and realistic development potential analysis conducted in accordance with *N.J.A.C. 5:94-4.1* and 4.2, which required an inventory of all vacant land and assessment of its potential suitability for inclusionary multi-family development, resulting in the projected cumulative yield of affordable housing units if all such sites were rezoned. Defendants assert that the resulting figure, the realistic development potential, represents the adjusted affordable housing obligation based on lack of sufficient vacant developable land, as provided by *N.J.S.A. 52:27D-307(c)(2)*.

The vacant land inventory in the second-round plan included lots 35 and 37 in block 5900, with a combined acreage of 9.8 acres. These two parcels largely correspond with the developable portion of the current Squiretown property, are suitable for multi-family development, and are assigned a reasonable development potential [*47] of eleven affordable units. That number was included in the Township's total reasonable development potential of 193 units, which represented the Township's adjusted affordable housing obligation.

Defendants state that consistent with *N.J.A.C. 5:93-4.2(g)*, they determined to address through other means the eleven units arising from the reasonable development potential for lots 35 and 37, thus reserving the property for other uses, single-family residences consistent with the zoning designation.

Hence defendants reason, the result Squiretown persuaded Judge Carey to adopt is indistinguishable from the result rejected by the Appellate Division in *In re Petition for Substantive Certification filed by Borough of Roseland, 247 N.J. Super. 203, 210, 588 A.2d 1256 (App. Div. 1991), rev'd on other grounds, 132 N.J. 1, 622 A.2d 1257 (1993)*. The argument lacks merit.

The Court in *Borough of Roseland* addressed a vacant land adjustment from the first round. *Id. at 208-09*. After applying to COAH, the municipality received an adjustment for vacant land. *Id. at 209*. Here, defendants did the same thing in the second round and were permitted to do so under COAH's second-round regulations. In *Borough of Roseland*, the Public Advocate [*48] was opposed to the use of an RCA and the Court rejected the argument. *Id. at 210*.

McKenzie rejected Talley's claim that because the Squiretown site had been included as part of the Township's realistic development potential calculation for its court-approved second-round housing element and fair share plan it could not be part of a third-round plan. McKenzie concluded that this argument was not relevant in light of COAH's current rules, which require that any unmet need from the prior round be addressed in addition to the calculated realistic development potential. She concluded that if a plaintiff in a *Mount Laurel* lawsuit proposes a suitable site for inclusionary residential development and such a development will address part of the unmet need, it cannot be exempted from consideration merely because the site was not needed to meet the court-approved reasonable development potential.

Defendants do not explain how this result is unfair. Judge Carey accepted this explanation and found no basis for not allowing this property to be considered. There is no merit to defendants' argument that Squiretown's builder's remedy claim is barred by prior exclusion of the property from rezoning for [*49] affordable housing in the court-approved second-round plan.

XIII

Defendants contend that Hillside's and Squiretown's builder's remedies are contrary to sound land use planning principles. A careful analysis of the language set forth by the Court and the record in this case show that this position is also without merit.

In *Mount Laurel II, supra, 92 N.J. at 279-80* (footnote omitted), the Court discussed the builder's remedy:

> Experience since [*Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977)*] . . . has demonstrated to us that builder's remedies must be made more readily available to achieve compliance with *Mount Laurel*. We hold that where a developer succeeds in *Mount Laurel* litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning. . . .

After the builder's remedy suit is filed, the judge must initially determine whether the municipality's zoning ordinance satisfies its *Mount Laurel* obligation. *Id. at 281*. If the obligation [*50] is not satisfied, he or she orders the municipality to incorporate into a new ordinance devices that are most likely to lead to the construction of lower-income housing. *Ibid.* To help with the revisions, the judge may appoint a special master to assist the municipality in developing constitutional zoning and land use regulations. *Ibid.*

Next, ninety days later, the municipality must present its revised plan and ordinances to the judge, and the special master, if one was appointed, gives his or her opinion as to the municipality's compliance with its *Mount Laurel* requirements. *Id. at 284*. If the revised ordinance meets the obligations, the judge issues a judgment of compliance. *Id. at 285*. If not, or if no revised ordinance is submitted within the time period, the judge has other orders available respecting compliance. *Id. at 284-90*.

In a footnote, the Court explained:

> What is "substantial" in a particular case will be for the trial court to decide. The court should consider such factors as the size of the plaintiff's proposed project, the percentage of the project to be devoted to lower income housing (20 percent appears to us to be a reasonable minimum), what proportion of the defendant [*51] municipality's fair share allocation would be provided by the project, and the extent to which the remaining housing in the project can be categorized as "least cost." The balance of the project will presumably

> include middle and upper income housing. Economically integrated housing may be better for all concerned in various ways. Furthermore, the middle and upper income units may be necessary to render the project profitable. If builder's remedies cannot be profitable, the incentive for builders to enforce *Mount Laurel* is lost.
>
> [*Id. at 279 n.37.*]

Defendants claim that the decision to award builder's remedies should have been made in the context of 2010 and not the context of the 1983 *Mount Laurel II* decision; that in 1983 there was frustration with widespread municipal disregard of the *Mount Laurel* doctrine, but since then the Legislature adopted the FHA, and the Court decided *Hills Development Co., supra, 103 N.J. at 74*, a ringing endorsement of the FHA. Defendants thus conclude that the high density developments authorized by Judge Carey are excessive and inappropriate from a land use planning perspective and should not have been forced on defendants by the judge.

Nonetheless, defendants' [*52] planner agreed that both sites were appropriate for multi-family use, the main difference of opinion being the density and number of units. McKenzie reviewed the projects and made recommendations that Judge Carey accepted. Defendants have not identified convincing reasons why these projects are contrary to sound land use planning. Defendants rely on *East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 330, 669 A.2d 260 (App. Div. 1996)*, where the court stated:

> Imposition of the constitutionally-mandated obligation to provide affordable housing "does not require bad planning." [*92 N.J.] at 238, 92 N.J. 158, 456 A.2d 390.* The specific location of "decent housing for lower income groups" continues "to depend on sound municipal land use planning considerations in this State." *Id. at 211, 456 A.2d 390.*

Defendants also find it significant that the Court in *Toll Brothers* did not address the substance of the builder's remedy awarded by the trial court, since the specifics were to be addressed at a later date. *See Toll Brothers, supra, 173 N.J. at 510.* However, that builder's remedy involved conventional, single-family detached housing on small lots, *id. at 518-19*, rather than high density multi-family development, [*53] thus there was no discussion of "sound land use planning" considerations in relation to the builder's remedy.

Here, Talley did not conclude that the only proper dwellings for these properties would have been single-family houses. Instead, she conceded that multi-family dwellings were appropriate. Builder's remedies only come into play when a municipality has failed to follow other procedures and failed to adequately address the obligation for affordable housing.

Addressing Hillside's builder's remedy, defendants note that it involves construction of four three-story buildings containing eighty multi-family-dwelling units, sixteen of which would be affordable to lower-income households. Without any citation to the record, defendants explain that this represents a proposed density of 17.73 units per acre based on the entire tract of approximately 4.6 acres, which includes the area occupied by two single-family residences that will be demolished. They state that the Township's current plan recognizes that multi-family development is appropriate in order to advance affordable housing objectives, but with a density of twelve units per acre. The current plan contemplates retention of the two [*54] single-family residences and the front portions of the two lots, resulting in a remaining tract of approximately 3.91 acres that would be rezoned for multi-family development.

Implementation of this recommendation would allow development of approximately forty-seven multi-family units, of which nine would be affordable rental units, all on the portion of the property not occupied by the two single-family units.

But this information does not mean Hillside's plan as accepted by the court is contrary to sound land use planning. Instead, both the court approved plan and the Township's current plan could be proper and sound land use planning.

Defendants also argue that while it was appropriate for Judge Carey to give due consideration to the special master's comments, the final decision on this issue was made by the trial judge. Defendants have not identified any errors committed by the judge.

Addressing Squiretown's builder's remedy, defendants explain that it involved construction of five five-story buildings, with heights from sixty-seven to seventy-three feet, containing 250 multi-family-dwelling units. Defendants state that most of the developable portion of the property and the surrounding [*55] area are in the R-2 zone, which provides for single-family housing with a minimum lot size of 25,000 square feet.

From these facts, defendants argue that the judge improperly evaluated Squiretown's proposal based on the gross density of the project and that such an analysis is clearly contrary to sound land use planning. Since the site has a considerable amount of wetlands and required transition areas where there can be no building, the density of housing is quite different when using gross density as opposed to net density. When looking at the site, Talley was equally concerned with the size and scale of the buildings and how the project fit with the character of the area. However, differences of opinion as to specific density do not indicate that the judge's decision was not based on the record or that he failed to independently analyze the proposed remedy. Nothing in defendants' argument shows that the Squiretown project as approved is contrary to sound land use planning. *See Mount Laurel II, supra, 92 N.J. at 280.*

Defendants have not convinced us that Hillside's and Squiretown's builder's remedies are contrary to sound land use planning principles.

Affirmed.