

Attorney ID: 016211980  
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**DiFRANCESCO, BATEMAN, KUNZMAN,  
DAVIS, LEHRER & FLAUM, P.C.**  
15 Mountain Boulevard  
Warren, New Jersey 07059-5686  
(908) 757-7800  
Attorneys for Township of Chatham

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IN THE MATTER OF THE TOWNSHIP	:	SUPERIOR COURT OF NEW JERSEY
OF CHATHAM FOR A JUDGMENT	:	LAW DIVISION: MORRIS COUNTY
OF COMPLIANCE OF ITS THIRD	:	DOCKET NO.: MRS-L-1659-15
ROUND HOUSING ELEMENT AND	:	(MOUNT LAUREL)
FAIR SHARE PLAN	:	
	:	<i>Civil Action</i>
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**BRIEF OF THE TOWNSHIP OF CHATHAM IN SUPPORT OF THE NOTICE OF  
MOTION FOR APPROVAL OF DEVELOPMENT FEE ORDINANCE AND RELATED  
SPENDING PLAN, EXTENSION OF TIME FOR COMPLIANCE AND TEMPORARY  
IMMUNITY, AND ADJUSTMENT OF CONSTRUCTION START DATE  
(Returnable: February 14, 2020 at 1:30 P.M.)**

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On the Brief  
and Of Counsel:

Albert E. Cruz, Esq.

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**PRELIMINARY STATEMENT**

Through this brief, the Township of Chatham will demonstrate that its actions in complying with the December 13, 2018 affordable housing Settlement Agreement between the Township and Fair Share Housing Center, Inc. are presumptively valid and that the Township has, in fact, acted in good faith and should be granted the following relief: (a) approval of Township Ordinance 2019-22, a Development Fee Ordinance, and related Spending Plan; (b) an extension until June 14, 2020 for compliance; (c) a Compliance Hearing scheduled after June 14, 2020; (d) an adjustment of the construction start date of the 100% municipally sponsored affordable housing development until June 30, 2022 and (e) temporary immunity from builder's remedy lawsuits until the Compliance Hearing.

**PROCEDURAL HISTORY/STATEMENT OF FACTS**

**A. Township as a Participating Municipality**

On March 5, 1997, the Council on Affordable Housing granted the Township Second Round Substantive Certification for the cumulative period of 1987 to 1999 (Cruz Cert. ¶4)<sup>1</sup>.

On December 31, 2008, the Township filed a Third Round Petition with COAH, which COAH deemed complete on May 18, 2009 (Cruz Cert. ¶5).

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<sup>1</sup> "Cruz Cert." refers to the Certification of Albert E. Cruz, Esq., submitted simultaneously with this brief.

On March 10, 2015, the New Jersey Supreme Court decided In re Adoption of N.J.A.C. 5:96 & 5:97 by the Council on Affordable Housing, 221 N.J. 1 (2015) (Cruz Cert. ¶6).

On July 6, 2015, the Township filed this declaratory judgment action (Cruz Cert. ¶7).

On May 4, 2018, a Partial Judgment on Partial Fairness Hearing approving a Settlement Agreement between the Township and the Vernon Grove Condominium Association, Inc. was entered by Judge Maryann L. Nergaard, J.S.C., extending the affordability controls on seventy-two (72) units at the Vernon Grove Condominium, Inc. (Cruz Cert. ¶8).

On February 22, 2019, an Order on Fairness and Preliminary Compliance Hearing approving the December 13, 2018 affordable housing Settlement Agreement between the Township and the Fair Share Housing Center, Inc. was entered by Judge Nergaard (Cruz Cert. ¶9).

The Township was a participating municipality before COAH in 2015 and has actively participated in the judicial process seeking a Judgment of Repose and Compliance (Cruz Cert. ¶10).

#### **B. Township Actions Implementing Settlement Agreement**

On December 13, 2019, the Township and FSHC entered into a Settlement Agreement. Since then, the Township has taken a

series of actions to implement that Agreement (LaConte Cert. ¶3)<sup>2</sup>.

These actions are described in and the supporting Resolutions or Ordinances are attached to the Certification of Gregory J. LaConte, the Township Clerk, and will not be repeated at length in this Procedural History/Statement of Facts.

### **C. Township Actions Promote Affordable Housing**

Prior to the December 13, 2020 FSHC Settlement Agreement, the Township was taking action to promote affordable housing in the Township, including entering into a Settlement Agreement with the Vernon Grove Condominium Association, Inc. to extend the affordability controls for seventy-two (72) units (Cruz Cert. ¶¶14, 15 and 16).

The Vernon Grove Settlement Agreement was approved by Judge Maryann L. Nergaard, J.S.C., on May 4, 2018, well before the FSHC Settlement Agreement (Cruz Cert. ¶17).

The Township entered into the Vernon Grove Settlement Agreement before it knew that FSHC would agree to credit those units against the Township's affordable housing obligation or even whether a settlement with FSHC would occur (Cruz Cert. ¶¶18, 19 and 20).

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<sup>2</sup> "LaConte Cert." refers to the Certification of Gregory J. LaConte submitted simultaneously with this brief.

More recently, on December 16, 2019, the Township Planning Board granted preliminary and final subdivision approval to the Dixiedale Farm and Arbor Green at Chatham developments, a fifty-three (53) unit market development, with twenty-four (24) off-site affordable units at the Skate Park (LaConte Cert. ¶35).

These actions are described in and the supporting Amendment to Vernon Grove Condominium Association, Inc. Master Deed is attached to the Certification of Albert E. Cruz, Esq., the Township Attorney, and will not be repeated at length in this Procedural History/Statement of Facts (Cruz Cert. ¶¶14 to 16, and Exhibit A).

**D. Approval of Development Fee Ordinance and Related Spending Plan**

On December 19, 2019, the Township adopted Ordinance 2019-22, a Development Fee Ordinance, and on January 30, 2020, the Township Clerk anticipates that approval of a Spending Plan will be on the Township Committee Agenda (Cruz Cert. ¶¶21 and 23, Exhibits B and C).

Because the Township made payment to and will continue to make payments to Vernon Grove, the Township requests that both the Development Fee Ordinance and Spending Plan be approved by the Superior Court of New Jersey prior to the Compliance Hearing.

In this fashion, the Township will be able to establish an Affordable Housing Trust Fund and to make payments from the Fund directly to Vernon Grove. Otherwise, the Township will be obligated to continue to make these payments from the general revenue and operating budget thereby reducing the funds for other municipal services (Cruz Cert. ¶25).

**E. Efforts to Select a Site or Sites for a 100% Municipally Sponsored Affordable Housing Development**

On February 1, 2019, Robert S. Hoffmann became the Township Administrator and since then Mr. Hoffmann and the Township professionals have been performing the due diligence necessary to recommend to the Township Committee a site or sites for a 100% municipally sponsored affordable housing development (Hoffmann Cert. ¶1)<sup>3</sup>.

Mr. Hoffmann's Certification describes the Township's efforts regarding several municipally owned properties, including: (a) the River Road Property (Hoffmann Cert. ¶¶5 to 18); (b) Municipal Building Property (Hoffmann Cert. ¶¶19 to 28); (c) the redesign of the buildings at Arbor Green at Chatham, a Township owned property, because the proposed Arbor Green property line prevented future improvements to the adjoining Police Building (Hoffmann Cert. ¶¶29 to 33); (d) utilizing the Municipal Building for affordable housing, senior

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<sup>3</sup> "Hoffmann Cert." refers to the Certification of Robert S. Hoffmann simultaneously submitted with this brief.

center and gym (Hoffmann Cert. ¶¶36 to 41); (e) replacing all or portions of the Municipal Building or Police Building with affordable housing while addressing necessary Township public safety infrastructure (Id.); (f) undertaking discussions, including a pre-application meeting for a Redevelopment Individual Permit, with the New Jersey Department of Environmental Protection to utilize the remainder of Arbor Glen encumbered by wetland buffers for additional affordable housing (Hoffmann Cert. ¶43); (g) presenting findings to the Township Committee (Hoffmann Cert. ¶¶36 to 41); and (h) including public comment and information (Hoffmann Cert. ¶¶45 to 47).

All of these actions are described in detail in Mr. Hoffmann's Certification and will not be repeated at length in this Procedural History/Statement of Facts.

**F. Township's Request for an Extension of Time for Compliance and Temporary Immunity for Builder's Remedy Lawsuits and Adjustment of Construction Start Date**

Mr. Hoffmann's Certification discusses the additional information that the Township Committee requested in order to make a decision on the final site or sites and developer selection for a 100% municipally sponsored affordable housing development (Hoffmann Cert. ¶42). The information sought will allow the Township Committee to reach a decision as part of a comprehensive plan to address both affordable housing and

Township public safety infrastructure. Additionally, Mr. Hoffmann describes why the start of construction should be adjusted; namely, to allow for at least one (1) full tax credit application cycle before the New Jersey Housing and Mortgage Finance Agency (Hoffmann Cert. ¶¶51 to 54).

Francis J. Banisch, III, P.P., the Township's consulting Professional Planner, reviewed the Certifications of Mr. LaConte, Mr. Cruz and Mr. Hoffmann, along with his preparation of a draft Housing Element and Fair Share Plan and concluded that the Township has taken actions to "promote affordable housing within the Township of Chatham and represent good planning" (Banisch Cert. ¶3).<sup>4</sup>

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<sup>4</sup> "Banisch Cert." refers to the Certification of Francis J. Banisch, III, P.P., submitted simultaneously with this brief.

POINT I

**THE TOWNSHIP'S DILIGENT ACTIONS TO  
IMPLEMENT THE TERMS AND CONDITIONS  
OF THE FSHC SETTLEMENT AGREEMENT ARE  
PRESUMPTIVELY VALID, FAIR AND IN GOOD FAITH**

The Township's actions to implement the terms and conditions of the FSHC Settlement Agreement are presumptively valid, fair and in good faith.

Courts presume that a municipality "will act fairly and with proper motives and for valid reasons." Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296-97 (1965); see also Fanelli v. City of Trenton, 135 N.J. 582, 589 (1994). In matters involving local land use and zoning issues, "the ultimate interests of effective zoning will be advanced by permitting the action of the municipal officials to stand, in the absence of an affirmative showing that it was manifestly an abuse of their discretionary authority." Ward v. Scott, 16 N.J. 16, 23 (1954). "Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved." Id. at 23; Reinauer Realty Corp. v. Paramus, 34 N.J. 406, 416 (1961).

A "natural corollary to the presumption of validity of governmental action" is that "the objector must carry the burden of demonstrating" that the municipal body acted in bad faith.

Berninger v. Bd. of Adj. of Midland Park, 254 N.J.Super. 401, 407 (App. Div. 1991) aff'd sub nom. Berninger v. Bd. of Adj. of Bor. of Midland Park, 127 N.J. 226 (1992) (emphasis added); see also Cell South of NJ, Inc. v. Zoning Board of Adjustment of West Windsor, 172 N.J. 75, 81 ("Because a board of adjustment's actions are presumed valid, the party 'attacking such action [has] the burden of proving otherwise.'" ) (quoting New York SMSA Ltd. P'ship v. Bd. of Adj. of Tp. of Bernards, 324 N.J.Super. 149, 163 (App.Div.), certif. denied, 162 N.J. 488 (1999)).

Thus, a challenge to the validity of any municipal action "must overcome the presumption of validity - a heavy burden." Bryant v. City of Atl. City, 309 N.J.Super., 596, 610 (App.Div. 1998) (citing 515 Assocs. v. City of Newark, 132 N.J. 180, 185 (1993); First People Bank v. Medford Tp., 126 N.J. 413, 418 (1991)).

Since December 13, 2018 when the FSHC Settlement Agreement was authorized and signed by the Township, the Township has diligently implemented the terms of the Agreement.

The Certification of Gregory J. LaConte documents the Township Resolutions or Ordinances implementing the Settlement Agreement, including the Township Planning Board grant of preliminary and final site plan approval of Arbor Green and speak to the Township's good faith actions.

The Certification of Robert S. Hoffmann documents the due diligence efforts taken by the Township in order to make a decision on the final site or sites and developer selection for a 100% municipally sponsored affordable housing development.

In reviewing the factual basis for the Township's diligent actions to implement the terms and conditions of the FSHC Settlement Agreement, this Court should presume that the Township is seeking to achieve compliance by acting "fairly and with proper motives and for valid reasons."

In this case, the sole developer intervenor has been satisfied and there is no builder's remedy lawsuit pending (Cruz Cert. ¶¶11 to 13). FSHC, as the other intervenor, has a heavy burden of proof to overcome the presumption of validity and good faith.

Because of the FSHC Settlement Agreement, key disputed items in Mount Laurel litigation such as: (a) present need; (b) prospective need; (c) the Realistic Development Potential; (d) unmet need and (e) the compliance mechanisms have been resolved by the Township and FSHC, leaving only the timing of selecting the 100% municipally sponsored site or sites and developer. While this is a significant component of the FSHC Settlement Agreement, the site or sites have not been confirmed by the Township. This occurred not because of lack of effort but

rather additional time is requested to complete the selection and for the Township to proceed to a Compliance Hearing. Within that context, the Township requests until June 14, 2020 to complete the tasks identified by Mr. Hoffmann and until June 30, 2022 to start construction of the 100% municipally sponsored site or sites as described by Mr. Hoffmann (Hoffmann Cert. ¶42 and ¶¶51 to 55).

For these reasons, this Court should extend compliance and immunity to the Township because the presumptive validity that the Township is acting in good faith to comply voluntarily cannot be overcome.

POINT II

**THE PUBLIC POLICY OF THE STATE OF NEW JERSEY AS  
EMBODIED IN THE FAIR HOUSING ACT IS TO AVOID  
LITIGATION AND PROMOTE VOLUNTARY COMPLIANCE WITH  
MUNICIPAL AFFORDABLE HOUSING OBLIGATIONS**

The New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 et seq, declares that the public policy of this State is to promote voluntary compliance with municipal affordable housing obligations and to avoid litigation, such as builder's remedy lawsuits, except where there is municipal inactivity, intransigence or a path of resistance.

N.J.S.A. 52:27D-303 provides in part that:

. . . The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing.

In In re Adoption of N.J.A.C. 5:96 & 5:97 by the Council on Affordable Housing, 221 N.J. 1 (2015) (commonly referred as "Mount Laurel IV"), the New Jersey Supreme Court reinforced that denying temporary immunity from builder's remedy lawsuits was reserved for those municipalities which abused the process:

. . . We repose such flexibility in the Mount Laurel-designated judges in the vicinages, to whom Mount Laurel compliance-related matters will be assigned post-order, and trust those courts to assiduously assess whether immunity, once granted, should be withdrawn if a particular town abuses the process for

obtaining a judicial declaration of constitutional compliance. Review of immunity order therefore should occur with periodic regularity and on notice.

[Id. at 26].

In fact, the "abuse of the process" standard is one where there must be a demonstration that the municipality is "determined to be constitutionally noncompliant":

. . . Beyond those general admonitions, the courts should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations. If that goal cannot be accomplished, with good faith effort and reasonable speed, and the town is determined to be constitutionally noncompliant, then the court may authorize exclusionary zoning actions seeking a builder's remedy to proceed against the towns either that had substantive certification granted from COAH under earlier iterations of Third Round Rules or that had held 'participating' status before COAH until this action by our Court lifted the FHA's exhaustion-of-administrative-remedies requirement.

[Id. at 33 to 34].

In this case, the Township:

On March 5, 1997, was granted Second Round Substantive Certification for the cumulative period of 1987 to 1999 (Cruz Cert. ¶4).

On December 31, 2008, the Township filed a Third Round Petition with COAH, which COAH deemed complete on May 18, 2009 (Cruz Cert. ¶5).

On March 10, 2015, the New Jersey Supreme Court decided Mount Laurel IV (Cruz Cert. ¶6).

On July 6, 2015, the Township filed this declaratory judgment action (Cruz Cert. ¶7).

On May 4, 2018, a Partial Judgment on Partial Fairness Hearing approving a Settlement Agreement between the Township and the Vernon Grove Condominium Association, Inc. was entered by Judge Maryann L. Nergaard, J.S.C., extending the affordability controls on seventy-two (72) units at the Vernon Grove Condominium, Inc. (Cruz Cert. ¶8).

On February 22, 2019, an Order on Fairness and Preliminary Compliance Hearing approving the FSHC Settlement Agreement was entered by Judge Nergaard (Cruz Cert. ¶9).

The Township was a participating municipality before COAH in 2015 and has actively participated in the judicial process since then seeking a Judgment of Repose and Compliance (Cruz Cert. ¶10).

Under these circumstances, where the Township has already produced ninety-six (96) affordable units out of a Realistic Development Potential of two-hundred (200) and demonstrated that it is an active participant in the process, it is neither intransigent nor engaged in a path of resistance but rather a promotor of affordable housing.

The Township should be granted an extension of temporary immunity from builder's remedy lawsuits because denial of an extension is a remedy of last resort which is unwarranted under these circumstances.

POINT III

**THE COUNCIL ON AFFORDABLE HOUSING  
USED AN EGREGIOUS STANDARD FOR A MUNICIPALITY  
TO LOSE IMMUNITY FROM BUILDER'S REMEDY LAWSUITS**

The Township has been a participating municipality before COAH and now the Superior Court of New Jersey. As such, the Township enjoys temporary immunity from builder's remedy lawsuits and COAH used an egregious standard before exposing municipalities to Mount Laurel litigation.

An interested party could move before COAH for "accelerated denial of substantive certification" if the interested party believed that the municipality was not pursuing substantive certification. N.J.A.C. 5:91-10.2 ("[a]t any time, upon [COAH's] determination, or upon the application of any interested party, and after a hearing and opportunity to be heard, the Council may deny substantive certification without proceeding further with the mediation and review process").

While COAH could grant such a motion thereby relinquishing jurisdiction over the municipality and exposing the municipality to builder's remedy lawsuits, COAH reserved that remedy for the "most extreme cases". See In Re Borough of Fanwood, COAH Dkt. 88/89-115(a) (April 24, 1989) at page 14.<sup>5</sup>

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<sup>5</sup> For a compilation of COAH cases and New Jersey Affordable Housing Law Resources go to the New Jersey Digital Legal Library (NJDLL) [njlegallib.rutgers.edu/housing](http://njlegallib.rutgers.edu/housing).

In a recent unreported Law Division decision, In the Matter of the Application of the Borough of Englewood Cliffs, BER-L-6119-15, "an extension of the Borough of Englewood Cliffs' immunity from builder's remedy suits" was denied because of the Borough's "abuse of the process" at pages 16 and 17 of Opinion (Cruz Cert. Exhibit D)<sup>6</sup>.

In Englewood Cliffs, the Law Division reviewed the procedural and factual status of the Borough declaratory judgment action and concluded that the Borough:

- (1) Continued to insist that it does not know the range of its constitutional obligation at page 10;
- (2) Provided no concrete plan for funding or building affordable units within that range at page 10;
- (3) Failed to produce affordable housing during an extended period at page 15, and
- (4) Failed to negotiate in good faith with a developer who was ready, willing and able to produce affordable housing at page 16.

With this unique set of facts, the Englewood Cliffs Court held that:

The motion for an extension of the Borough of Englewood Cliffs' immunity from builder remedy suits is denied. The motion of 800 Sylvan Avenue, LLC through its counsel for revocation of the Borough of Englewood Cliffs' immunity and FSHC opposition to the Borough's application is granted for the reasons set forth herein.

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<sup>6</sup>A copy of In the Matter of the Application of the Borough of Englewood Cliffs, Docket No. BER-L-6119-15, is attached to the Cruz Cert. as Exhibit D.

[Id. at page 17].

Comparing Englewood Cliffs to the Township leads to an entirely different result because the Township has:

- (1) Been a participating municipality submitting itself to the jurisdiction of COAH through a complete Third Round Petition and the Superior Court of New Jersey through this declaratory judgment action and, in fact, having obtained Orders approving the Vernon Grove Settlement Agreement and FSHC Agreement.
- (2) Agreed to an affordable housing fair share obligation.
- (3) Agreed on the compliance mechanisms and commenced implementation.
- (4) Produced affordable housing through the extension of affordability controls at Vernon Grove and granted site plan approval for Arbor Green thereby reaching a resolution with the sole intervenor.
- (5) Other than FSHC, there are no other intervenors and there is no builder's remedy lawsuit pending.
- (6) Diligently pursued selecting a site or sites for a 100% municipally sponsored affordable housing development.

Under these circumstances, the Township has been actively proceeding to produce or plans to produce affordable housing, has not been intransigent or on a path of resistance.

The Township's willingness to sponsor a 100% affordable housing development speaks to the Township's good faith in volumes and as recently stated by an affordable housing commentator:

. . .The 'good faith' envisioned by the court requires both realistic progress and action toward compliance,

and the trial courts are prepared to enforce that obligation where they must.

["Finding the Outer Edges of 'Good Faith' in 'Mt. Laurel' Litigation", New Jersey Law Journal, November 11, 2019].

The Township's election to utilize a 100% municipally sponsored affordable housing development, instead of inclusionary zoning, demonstrates its good faith in producing affordable housing because there are no intervenors seeking to currently develop within the Township and the Township's actions ensure that affordable housing will be developed independent of the vagaries of when a developer may come forward.

The Township's actions demonstrate good faith, realistic progress and action toward compliance and do not warrant the remedy of last resort and exposure to builder's remedy lawsuits.

POINT IV

**THE DEVELOPMENT FEE ORDINANCE AND  
SPENDING PLAN SHOULD BE APPROVED TO  
COMPLEMENT THE TOWNSHIP'S EFFORTS TO  
PRODUCE AFFORDABLE HOUSING**

On May 4, 2018, the Vernon Grove Settlement Agreement was approved by Judge Nergaard and the Township began to make the payments required by that Agreement (Cruz Cert. ¶¶8, 14 to 16). The Township made these payments from its general revenue and operating budget and not from an Affordable Housing Trust Fund (Cruz Cert. ¶25).

Through this motion, the Township seeks approval of the Development Fee Ordinance and Spending Plan to begin to off-set these expenses.

The Township proceeded to make these payments as a good faith effort to promote affordable housing well before the FSHC agreed to credit these units against the Township's fair share affordable housing obligation.

Under these circumstances, the Township should not be penalized for its good faith. Accordingly, the Development Fee Ordinance and Spending Plan should be approved.

**CONCLUSION**

For all of the above stated reasons, the Township of Chatham has proceeded in good faith and diligence to implement the December 13, 2018 Settlement Agreement with the Fair Share Housing, Inc. and its motion should be granted in full.

Respectfully submitted,

DiFrancesco, Bateman, Kunzman,  
Davis, Lehrer & Flaum, P.C.  
15 Mountain Boulevard  
Warren, New Jersey 07059

By:   
Albert E. Cruz, Esq.

Dated: January 10, 2020