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In the Matter of the Application of the Township of Chatham, County of Morris.	SUPERIOR COURT OF NEW JERSEY Law Division, Morris County Docket No. MRS-L-1659-15 **CIVIL ACTION**

FAIR SHARE HOUSING CENTER'S BRIEF IN OPPOSITION TO THE TOWNSHIP OF CHATHAM'S MOTION TO EXTEND IMMUNITY AND IN SUPPORT OF CROSS-MOTION TO TERMINATE IMMUNITY AND TO ENFORCE LITIGANT'S RIGHTS

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I. Preliminary Statement

The Mount Laurel doctrine's overriding aim is to provide housing that is affordable to New Jersey's working families. In order to achieve that aim, Mount Laurel requires that each municipality take the necessary steps to create a realistic opportunity for its fair share of housing.

Despite the clarity of the aim, the promise of Mount Laurel has often been frustrated by some municipalities' determination to avoid compliance with their constitutional obligations. Whatever these towns seemingly give, at length and grudgingly, with one hand, they have tried to take back with the other.

When confronted with this kind of municipal resistance, New Jersey's courts have firmly demanded that towns either meet their constitutional obligations or face the loss of immunity from exclusionary zoning actions, and other appropriate remedies. As the New Jersey Supreme Court recognized in Mount Laurel II, to do otherwise -- to allow towns to evade their obligations without recourse -- would subvert Mount Laurel by leading not to housing but to process, paper, and indefinite delay. Worst of all, it would deny lower-income households access to opportunity and deny them equal treatment under New Jersey's Constitution.

In the present matter, despite the obligations that Chatham Township assumed voluntarily when it settled with Fair Share Housing Center (FSHC) in December 2018, it has engaged in a pattern

of dilatory conduct that has not led to a realistic opportunity for its fair share.

More than a year after settling, the Township is in undisputed violation of numerous provisions in the court-approved settlement agreement and does not appear to be much closer to coming into full compliance. Instead, it stalls, procrastinates, and repeatedly asks for lengthy extensions of time while failing to take meaningful steps toward the creation of a realistic opportunity for the affordable housing credits it received in the agreement. The Township seems to miss the point that housing promised but that remains unbuilt is not much better than housing never promised in the first place.

Notably, under the terms of the settlement agreement, Chatham agreed to, and received 100 credits for, a proposed one-hundred-percent affordable project to be developed on an appropriate site or sites to be identified by the Township and submitted to the Special Master and FSHC for review. The Township committed to identifying and acquiring the necessary site within a matter of months, as confirmed in the February 22, 2019 preliminary order on fairness and compliance, so that a final hearing could be held in July 2019.

Half a year after that agreed-upon target date, and following three lengthy extensions of the date for compliance, the Township now claims that it needs at the very least until June 14, 2020, to identify and acquire a site, in addition to a one-year delay from

June 30, 2021, to June 30, 2022, of the agreed-upon construction start date.

Phrased another way, if the Township's motion is granted, it will have been given more than an extra year to comply with a settlement agreement and court order that directed it to take the necessary steps within 150 days. In exchange, lower-income households will have been denied, for another year, the realistic opportunity that Mount Laurel demands. And based on the Township's pattern of repeatedly pushing the compliance date with nothing to show for the delay, FSHC has no credible reason to believe that the Township will finally do on its own what it was supposed to have done about a year ago.

FSHC does not lightly urge courts to expose municipalities to builder's remedy litigation. When a municipality is willing to voluntarily comply, an amicable resolution most often leads to the development of affordable housing more quickly than adversarial proceedings. Here, however, Chatham has taken wholly inadequate steps and at an utterly unreasonable pace.

Based on the above as well as what is detailed below, FSHC respectfully asks for the following relief: (i) the termination of the Township's immunity from builder's remedy suits; (ii) the appointment of the Special Master as an implementation monitor with defined powers subject to judicial oversight; (iii) the stay of vesting of rights for all site plan approvals and the imposition of scarce resource restraints; (iv) no action on the Township's

submitted spending plan until it proves compliance; and (v) the award of reasonable fees and costs to FSHC for bringing this enforcement action.

At minimum, any brief extension of immunity -- of no longer than ninety days at most -- should be conditioned upon a clear and firm schedule established and overseen by the Special Master that would remedy the Township's breach of the settlement agreement and ensure that it fully complies with its Mount Laurel obligations by the end of that ninety-day period. If the Township were to fail to meet any of the steps, its immunity should be immediately terminated and FSHC should be granted whatever additional relief necessary to vindicate the rights it obtained in the court-approved settlement agreement.

II. Facts & Procedural History

In March 2015, the New Jersey Supreme Court held that the Council on Affordable Housing (COAH) had been rendered "moribund," and, "[d]ue to COAH's inaction," it established "judicial processes" to "provide the means for a town . . . to demonstrate that its housing plan satisfies Mount Laurel obligations." In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 5-6 (2015) (Mount Laurel IV).

The Court directed that, "[i]f a municipality seeks to obtain an affirmative declaration of constitutional compliance, it will have to do so on notice and opportunity to be heard to FSHC and interested parties" and that trial courts "will be assisted in rendering . . . preliminary determination[s] on need by the fact

that all initial and succeeding applications will be on notice to FSHC and other interested parties." Id. at 23, 29.

The Court directed further that, "for those towns that had only 'participating' status with COAH," such as Chatham Township, courts could "provide initial immunity" but that they would then have to conduct an ongoing "individualized assessment" to "evaluate the extent of the obligation and the steps, if any, taken toward compliance with that obligation." Id. at 28.

In July 2015, hundreds of New Jersey municipalities, including Chatham Township, filed complaints seeking a judicial determination that their housing plans were constitutionally compliant. Over the following three and a half years, Chatham Township and FSHC engaged in negotiations regarding both the scope of its constitutional obligations as well as its plan to meet those obligations.

On December 13, 2018, FSHC entered into a settlement agreement with Chatham Township that sought to amicably resolve the Township's Mount Laurel IV action.[1] (Cert. of B. Gergi ¶ 3, Exh. A.[2])

The settlement agreement determined that Chatham has a Third Round Prospective Need of 387. The Township sought and received a

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[1] The Township's brief in support of its motion states on page 4 that the settlement agreement was reached in December 2019. Then, on page 5, it states that the settlement agreement was reached in December 2020. FSHC respectfully submits that both those dates are incorrect. The agreement was reached in December 2018

[2] "Cert. of B. Gergi" refers to the attached certification of Bassam F. Gergi, Esq.

vacant land adjustment of its obligation that calculated a realistic development potential (RDP) of 200 units. (Cert. of B. Gergi ¶ 3, Exh. A at 2.)

In the agreement, the Township chose to meet half of its RDP with a one-hundred-percent affordable development of 74 family rental units and 26 bonuses rather than permit additional inclusionary development. The agreement specified terms that the Township had to meet in order to create a realistic opportunity for the development. (Cert. of B. Gergi ¶ 3, Exh. A at 4.)

First, the Township agreed to provide a memorandum of understanding with a developer for the project and to provide whatever other information necessary to demonstrate a realistic opportunity. Second, it agreed to identify a site(s) for the project and to submit it to the Special Master and FSHC for review at least 30 days in advance of a hearing. Third, it agreed to acquire or obtain, including through tax foreclosure, an appropriate site. Fourth, it agreed to do so within 150 days so that a compliance hearing could be held in July 2019. Fifth, it agreed that construction on the project would start by June 30, 2021. (Cert. of B. Gergi ¶ 3, Exh. A at 4-9.)

The agreement contemplated two hearings. The first, to be held in February 2019 was to evaluate the overall fairness of the plan. The second, to be held in July 2019, was to be "limited to the 74-unit 100% affordable family rental development on a site or

sites to be identified and provided by the municipality." (Cert. of B. Gergi ¶ 3, Exh. A at 9.)

On February 22, 2019, the Hon. Maryann L. Nergaard, J.S.C., found the December 13, 2018 settlement agreement[3] fair and reasonable. (Cert. of B. Gergi ¶ 5, Exh. C.)

In so finding, Judge Nergaard ordered in Paragraph 7 that a compliance hearing was to be scheduled within 150 days, "by which time the Township shall have complied with the above-referenced conditions (including a resolution of the site for the 74 unit [one-hundred-percent affordable] development." In Paragraph 4, she also incorporated all of the obligations from the settlement agreement as well as the conditions in the attached February 5, 2019 report of the Special Master, where he "recommend[ed] the Court set a time limit of 150 days . . . within which the Township will identify the site(s) for the 74 unit municipally-sponsored project." (Cert. of B. Gergi ¶ 5, Exh. C.)

Instead of meeting its conditions within 150 days, the Township has repeatedly sought and received lengthy extensions -- on at least three occasions -- in order to identify a site for the municipal project and to proceed to final compliance. (Cert. of B. Gergi ¶ 6, Exh. D.)

Most recently, in September 2019, the Township received an extension after it represented to the court, the Special Master,

[3] Note that there was a minor amendment to the agreement on January 10, 2019. (Cert. of B. Gergi ¶ 4, Exh. B.)

and FSHC that it had identified an ideal site for the one-hundred-percent affordable development, the municipal site, and that it needed a short period of time to finalize it. Since then, the Township has changed course. Now, the Township seeks further time until June 14, 2020, to identify a different site. In addition, it seeks to delay the agreed-upon date for the start of construction by at least a year.

Even if FSHC were inclined to consent to such extensions, which it is not, it is unclear whether the Township has any real intent to abide by its commitments and to comply with Mount Laurel. One statement published online in December 2019 by a former Chatham Township mayor and committee member should suffice to illustrate FSHC's point. (Cert. of B. Gergi ¶ 7, Exh. E.) As to the Township's compliance with Mount Laurel, he wrote:

> If you care about your community and neighborhood, now is the time to fight. To fight for your town, to fight for your property and home values, to fight for what you have earned and have a right to protect. . . .
>
> . . . .
>
> We should not fear lawsuits . . . . A builder still has to buy the land, still go through the planning board process, still conform to reasonable zoning densities. If we end up in the same place as to where we started well at least we fought the good fight. . . .
>
> [(Cert. of B. Gergi ¶ 8, Exh. F at 3.)]

It has been openly reported that the result of such statements has been to "convince" the Chatham Township Governing Body in late

November 2019 to "reconsider their votes that designated the municipal building as an affordable housing site" and to "sa[y] it would try to delay its compliance to a court settlement." (Cert. of B. Gergi ¶ 9, Exh. G at 1.) The five-person Governing Body appears to be trending toward following the publicly stated advice of one of its current members: to "risk 'builders remedy' lawsuits." (Cert. of B. Gergi ¶ 9, Exh. G at 1-2.)

III. Legal Argument

A. Chatham Township Bears the Burden of Proving That It Is Complying With the Terms of the Settlement Agreement and Its Mount Laurel Obligations. If the Township Fails to Meet Its Burden, the Court Has Broad Remedial Powers.

Chatham Township bears the burden of proving that it is complying with the terms of its settlement agreement with FSHC and its Mount Laurel obligations. The Township's arguments to the contrary conflict with well-settled precedent and would turn the entire doctrine on its head by placing the legal onus on those who have the least, the State's working families.

In Mount Laurel II, the New Jersey Supreme Court was pellucidly clear when it held that

> [e]qual treatment requires at the very least that government be as fair to the poor as it is to the rich in the provision of housing opportunities. That is the basic justification for Mount Laurel. . . . [I]t is the municipality, and not the plaintiffs, that must prove every element of compliance. It is not fair to require a poor man to prove you were wrong the second time you slam the door in his face.

> [S. Burlington Cnty. NAACP v. Mount Laurel, 92 N.J. 158, 306 (1983) (Mount Laurel II) (emphasis added).]

In determining whether the municipality has complied with Mount Laurel, the Court directed trial courts to apply an objective standard and not to consider defenses of "good faith":

> [P]roof of a municipality's bona fide attempt to provide a realistic opportunity to construct its fair share of lower income housing shall no longer suffice. Satisfaction of the Mount Laurel obligation shall be determined solely on an objective basis: if the municipality has in fact provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the Mount Laurel obligation to satisfy the constitutional requirement; if it has not, then it has failed to satisfy it. Further, whether the opportunity is "realistic" will depend on whether there is in fact a likelihood to the extent economic conditions allow that the lower income housing will actually be constructed.
>
> [Id. at 220-22 (footnotes omitted).]

And if the court determines that Chatham Township is not complying with the terms of its settlement agreement with FSHC and its Mount Laurel obligations, it has broad remedial powers.

In Mount Laurel IV, the Court stressed that, "[i]n the event of a municipality's inability or failure to adopt a compliant plan to a court's satisfaction, the court may consider the range of remedies available to cure the violation." 221 N.J. at 20. The range of remedies appropriate in the Mount Laurel context were delineated previously in Mount Laurel II, where the Court wrote that, among other options, a trial court may order "that certain

types of projects or construction as may be specified by the trial court be delayed within the municipality" and order "that the municipality adopt such resolutions and ordinances, including particular amendments to its zoning ordinance, and other land use regulations, as will enable it to meet its Mount Laurel obligations." 92 N.J. at 285-86. The Court noted that the goal of such remedies and the reason trial courts must "closely supervise orders designed to compel compliance" is to avoid "interminable delay." Id. at 307.

B. Immunity Is Intended to Reward "Prompt Voluntary Compliance," Not Permit Abuse of the Process and Delay.

In Mount Laurel IV, the New Jersey Supreme Court explained that immunity is a privilege intended to reward "prompt voluntary compliance," not a right, and should extend only for a "brief, finite period" during which the municipality must act with "good faith effort and reasonable speed." 221 N.J. at 28, 33-34. Consistent with that understanding, the Court adopted generous standards for initial grants of immunity, but it held that more discerning standards should be applied after municipalities were provided an opportunity to demonstrate their good faith, or lack thereof.

The Court directed trial judges to conduct an ongoing "individualized assessment" to "evaluate the extent of the obligation and the steps, if any, taken toward compliance with that

obligation." Id. at 28. It provided clear guidance for how the "individualized assessment" should be conducted:

> Mount Laurel-designated judges . . . [should] 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 orders should therefore occur with periodic regularity and on notice.
>
> . . . .
>
> . . . Immunity, once granted, should not continue for an undefined period of time; rather, the trial court's orders in furtherance of establishing municipal affordable housing obligations and compliance should include a brief, finite period of continued immunity . . . .
>
> [Id. at 26, 28.]

The Court linked "prompt voluntary compliance" with immunity from builder's remedy litigation, writing as follows: "If [prompt voluntary compliance] 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 . . . ." Id. at 33-34.

C. Chatham Township's Immunity Should Be Terminated Because Its Failure to Comply With the Terms of the Settlement Agreement Has Resulted in a Long Delay and the Denial of Equal Treatment to the State's Lower-Income Households.

Chatham Township has had more than a year -- and three lengthy extensions of immunity -- to satisfy the outstanding conditions and proceed to a final compliance hearing. It has known since at least

December 2018 what it would have to do in order to be compliant with Mount Laurel, but it has repeatedly stalled and asked for extensions during which time little to nothing is accomplished. Most recently, it represented to the court, the Special Master, and FSHC that it had identified an ideal site for the one-hundred-percent affordable development, the municipal site, and that it needed a short period of time to take the necessary steps to actualize it. Now, however, it has repudiated that representation and is trying, after more than a year of delay, to return to square one. Such flagrant conduct smacks of bad faith and is an abuse of the process.

The Supreme Court has unequivocally condemned such conduct, and it has stressed that "[t]he obligation is to provide a realistic opportunity for housing, not litigation." Mount Laurel II, 92 N.J. at 199 ("We have learned from experience, however, that unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals.").

Notably, in similar situations, courts have found that such dilatory and non-compliant behavior as that evidenced by Chatham Township warrants a revocation of immunity. For example, in In re Twp. of S. Brunswick, 448 N.J. Super. 441, 451, 466 (Law Div. 2016), the Hon. Douglas K. Wolfson, J.S.C., revoked South Brunswick's immunity "because of the Township's systematic 'abuses' of the declaratory judgment process," which was "measured by its

insistence on including in its plans mechanisms that were inconsistent with COAH regulations and judicial precedent[] and . . . marked by its steadfast refusal to make the necessary modifications."

Likewise, this past August, the Hon. Christine A. Farrington, J.S.C., revoked the Borough of Englewood Cliffs's immunity on the basis of the Borough's "chosen path of resistance" to its fair share obligations -- including the Borough's attempt "to stall, procrastinate and evade its obligations." (Cert. of B. Gergi ¶ 10, Exh. H.) See also J.W. Field Co. v. Franklin, 204 N.J. Super. 445, 468 (Law Div. 1985) ("If a municipality chooses not to voluntarily comply, it brings upon itself the potential that multiple builders will force it to comply. The choice is the municipality's.").

D. The Rights of Lower-Income Households Should Be Enforced By Implementing Remedies to Protect Their Interests and to Compel Chatham Township to Comply.

FSHC obtained litigant's rights through its agreement with Chatham Township and through the court's February 22, 2019 order. Indeed, the court order provides in Paragraph 7 that a compliance hearing was to be scheduled within 150 days, "by which time the Township shall have complied with the above-referenced conditions (including a resolution of the sire for the 74 unit [one-hundred-percent affordable] development." (Cert. of B. Gergi ¶ 5, Exh. C.) Because the Township has not satisfied the outstanding conditions within that timeframe, especially as to the one-hundred-percent affordable development, FSHC cross-moves to enforce its rights

regarding the municipality's overall failure to demonstrate compliance with Mount Laurel.

Rule 1:10-3 provides litigants with a remedy when the government has failed comply with court orders. See, e.g., Abbott by Abbott v. Burke, 163 N.J. 95 (2000) (Rule 1:10-3 used to invalidate Department of Education's failure to properly implement preschool programs); see also Loigman v. Committee of Middletown, 308 N.J. Super. 500, 503 (App. Div. 1998) (Rule 1:10-3 used to require municipal body to comply with Open Public Meetings Act).

The Township's violations of the settlement agreement and court order have harmed FSHC and the interests of lower-income persons. By its own admission, Chatham Township has failed to date to provide a realistic opportunity for half of its realistic development potential. Accordingly, FSHC respectfully urges the court to order the following relief.

1. The Special Master Should Be Appointed With Defined Powers, Subject to Judicial Review, As an Implementation Monitor to Prepare Chatham Township's Fair Share Plan, to Select the Site for the One-Hundred-Percent Affordable Development, and to Take Whatever Other Steps Necessary to Ensure Compliance.

FSHC recommends that the Special Master be appointed with defined powers, subject to judicial review, as an implementation monitor to prepare Chatham Township's fair share plan, to select the site for the one-hundred-percent affordable development, and to take whatever other steps necessary to ensure compliance.

In Mount Laurel IV, the Court quoted Rule 4:59-2 when it noted that "[t]he Court Rules overall evince an intent toward flexibility when the enforcement of rights is at stake. They provide various means for securing relief and allow for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order." 221 N.J. at 17-18.

The appointment of an "implementation monitor" or a Special Master with added authority has been used as a "means for securing relief" when courts have faced municipal non-compliance. See, e.g., Cranford Dev. Assocs., LLC v. Twp. of Cranford, 445 N.J. Super. 220, 232-33 (App. Div. 2016) ("Given the Township's record of obstructing affordable housing projects, and the Planning Board's past hostility to a much more limited affordable housing plan, the court's decision to appoint the hearing examiner was justified in this case."); see also Tomu Dev. Co. v. Borough of Carlstadt, No. A-5512-05T1 (App. Div. Aug. 29, 2008) ("The appointment of the Implementation Monitor, with defined powers, is an inspired and appropriate exercise of the court's judicial powers, consistent with the Mount Laurel decisions, to assume oversight responsibility for the constitutional right to have zoning throughout New Jersey appropriately accommodate affordable housing where, as here, the municipalities neglected such constitutional obligations.").

Here, enabling the Special Master, subject to judicial review, to prepare Chatham Township's fair share plan, including selecting

a site for the one-hundred-percent affordable development and whatever outstanding steps are necessary to ensure compliance, would be an appropriate exercise of the court's remedial powers and would hopefully lead to the desired end-point.

2. Until Chatham Township Proves Compliance, the Court Should Stay the Vesting of All Site Plan Approvals and Should Order That Scarce Resource Restraints Be Imposed.

Until Chatham Township proves compliance, FSHC submits that the court should stay the vesting of all site plan approvals and should order that scarce resource restraints be imposed. The stay of vesting and the imposition of restraints is necessary because, if not ordered, insufficient land may be available to support the provision of affordable housing in Chatham Township through development and redevelopment.

That the use of scarce resources essential to the production of affordable housing, such as land or sewerage access, are subject to restraints by Mount Laurel courts is well-established. See generally Hills Development Co. v. Bernards, 103 N.J. 1, 62-63 (1986) (discussing scarce resources in the Mount Laurel context); Tocco v. N.J. Council on Affordable Hous., 242 N.J. Super. 218 (App. Div. 1990) (same).

Scarce resource restraints were also long available under rules adopted by COAH. See N.J.A.C. 5:91-10.1 ("At any time, upon its own determination or upon the application of any interested party, and after a hearing and opportunity to be heard, the Council may issue such orders as may be necessary to require that a

participating municipality take appropriate measures to preserve scarce resources that may be essential to the satisfaction of the municipality's obligation to provide for its fair share of its region's present and prospective need for low and moderate income housing.").

The facts in this matter indicate that land is a scarce resource in Chatham Township. Although the settlement agreement calculated the Township's Third Round Prospective Need at 387, Chatham received a vacant land adjustment and its RDP was calculated to be 200 units. Under that agreement, Chatham agreed to meet 100 units of its RDP via a one-hundred-percent affordable development project on a site to be identified, but it has failed to do so, and in the interim, Chatham's already scarce land may have -- and may yet -- further dissipate.

In this context, restraints and a stay of the vesting of approvals are appropriate. Without an injunction on future conduct that further exacerbates the scarcity of development and redevelopment opportunities, the public interest will be harmed.

Rule 4:52-2 permits parties by motion to apply for temporary restraints or an interlocutory injunction during the pendency of an action. The factors to be considered when determining whether such relief is warranted include: the character of the interest to be protected; the relative adequacy of the injunction to the plaintiff as compared with other remedies; the unreasonable delay in bringing suit; any related misconduct by plaintiff; the comparison of

hardship to plaintiff if relief is denied, and the hardship to defendant if relief is granted; the interests of others, including the public; and the practicality of framing the order or judgment. Paternoster v. Shuster, 296 N.J. Super. 544, 556 (App. Div. 1997); see also Sheppard v. Twp. of Frankford, 261 N.J. Super. 5, 10 (App. Div. 1992) (identifying additional factors to be considered).

Here, a stay of approvals and a scarce resource restraints are called for because lower-income households will suffer immediate and irreparable harm if available land is dissipated by the fact that developable land is already scarce in Chatham Township and by the fact that the municipality has fair share obligations that, by its own admission, it may be unable to meet.

Ultimately, there is no other remedy that can truly protect or replace developable land in Chatham. Although the order should be narrowly tailored, and although procedures to be excused from the restraints should be readily available, no other remedy, such as monetary damages, would permit the enforcement of the remedies that result from Mount Laurel litigation. The Township could always petition for relief from the restraints, but the use of more developable and redevelopable land for purposes other than affordable housing could substantially frustrate Chatham's satisfaction of its Mount Laurel obligation.

In particular, the stay of the vesting of all site plan approvals is essential because, as the Township's brief indicates, on December 16, 2019, it granted preliminary and final subdivision

approval on the Dixiedale Farm and Arbor Green at Chatham developments, which would produce only a fifty-three unit market-rate development with twenty-four off-site affordable units. FSHC agreed in the settlement to permit such a project and at a relatively low density due to the understanding that the Township would be pursuing an affordable family rental development of 74-units. In the absence of such a development, it is important to ensure that the Dixiedale site and other such sites that may have approvals that have yet to vest are potentially subject to challenge in order to, for example, increase density in exchange for additional affordable housing.

3. Until Chatham Township Proves Compliance, the Court Should Not Approve Its Spending Plan.

Until Chatham Township proves compliance, the court should not approve its spending plan. As the Township itself acknowledges, the appropriate stage in the normal course to consider the plan is at the compliance hearing.

Especially here, it is important to wait until the Township can prove compliance to approve the spending plan. Without knowing whether and what the Township will have to do in order to demonstrate compliance, it is premature to approve a plan for the expenditure of funds.

Indeed, COAH's applicable rules clearly state that "municipalities that have not received substantive certification or a judgment of repose shall not spend development fees until they

have received substantive certification or a judgment of repose." N.J.A.C. 5:93-8.2(c). Because Chatham has not received a judgment of repose and because the status of its compliance with Mount Laurel is precarious, it should not have its spending plan approved at this point.

4. FSHC Should Receive Reasonable Fees and Costs for Bringing This Enforcement Action.

Because Chatham Township's actions in contravention of the court-approved settlement agreement have forced FSHC to bring this enforcement action, FSHC respectfully submits that it is entitled to reasonable attorney's fees, costs, and interest expended in litigating this matter.

The court's authority to award fees and costs is long recognized under Rule 1:10-3, which provides in relevant part that "[t]he court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule." R. 1:10-3.

Comments on the rule explain that, "[a]lthough the so-called American rule . . . continues to require each party to bear his own attorney's fees except as otherwise provided by R. 4:42-9, this rule provision allowing for attorney's fees recognizes that as a matter of fundamental fairness, a party who willfully fails to comply with an order or judgment . . . is properly chargeable with his adversary's enforcement expenses." Pressler & Verniero, Current N.J. Court Rules, cmt. 4.4.5 on R. 1:10-3 (2018).

E. At Minimum, Chatham Township Should Be Required to Abide By a Clear and Firm Schedule That Brings the Township Into Full Compliance Within Ninety Days at Most.

At a minimum, Chatham Township should be required to abide by a clear and firm schedule that brings the Township into full compliance within ninety days at most. Such a timeframe is eminently reasonable in light of the fact that the settlement agreement and February 22, 2019 court order envisioned compliance occurring within 150 days, and more than a year has passed since then.

As noted above, the Supreme Court in Mount Laurel IV contemplated that municipalities could receive immunity from builder's remedy litigation on certain terms that demonstrate a "good faith" attempt to comply with Mount Laurel with "reasonable speed." 221 N.J. 33-34.

It would be contrary to the Supreme Court's directives for this court to grant any further extensions of immunity without establishing a definite schedule for Chatham to meet its obligations. If the court chooses this course, FSHC respectfully urges it to rely on the Special Master to prepare a series of clear steps that the municipality is required to complete and a firm timeline for doing so.

IV. Conclusion

For the foregoing reasons, FSHC respectfully urges the court to terminate Chatham Township's immunity from builder's remedy suits and to grant the following relief necessary to enforce

litigant's rights: the appointment of the Special Master as an implementation monitor with defined powers subject to judicial oversight; the stay of vesting of all site plan approvals and the imposition of scarce resource restraints; no action on the Township's submitted spending plan until it proves compliance; and the award of reasonable fees and costs.

At minimum, any brief extension of immunity -- of no longer than ninety days at the most -- should be conditioned upon a firm and clear schedule established and overseen by the Special Master. If the Township were to fail to meet any of the steps, its immunity should be immediately terminated and FSHC should be granted whatever additional relief necessary to vindicate the rights it obtained in the court-approved settlement agreement.

Respectfully submitted,

Dated: January 24, 2020

FAIR SHARE HOUSING CENTER

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