TOWNSHIP OF SOUTH BRUNSWICK

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Via Email (on Feb 18) and Hand Delivery (on Feb 19)

February 18, 2016

Honorable Douglas K. Wolfson, J.S.C.
Superior Court of New Jersey
Middlesex County Courthouse
56 Paterson Street
P.O. Box 964
New Brunswick, NJ 08903-0964

Re: In the Matter of the Application of the Township of South Brunswick
Docket No. MID-L-3878-15
Our File No. L1347

Dear Judge Wolfson:

Please accept this Letter Memorandum on behalf of the Township of South Brunswick ("Township") in reply to the opposition by Richardson Fresh Ponds and Princeton Orchards Associates ("Richardson"); South Brunswick Center ("SBC"); Avalon Bay ("AVB") and Fair Share Housing Center ("FSHC") to the Township's Motion for extension of immunity in the above referenced matter, currently returnable before your honor on February 19, 2016.

All of the arguments in opposition to the Township's motion are virtually identical to the arguments made in opposition to the prior plans submitted by the Township, despite the fact that significant differences exist between the original plan submitted on November 9, 2015 ("November Plan") and the current plan submitted on February 11, 2016 ("February Plan"). Instead of honestly assessing the overall plan currently before the court, the opposition is "merely a rehashing" of the same failed arguments previously submitted to the court. The only real motivation for Richardson's and AVB's vehement opposition to the Township's current plan is that their properties are not included in the Township's plan, while SBC's opposition is motivated by the fact that its property is not in the Township's plan to the extent that it would like. The court has already made abundantly clear that this provides no basis for rejecting the Township's plan or stripping the Township of its immunity.

Need for a Trial

The Township has consistently and repeatedly requested that the court determine the Statewide and Regional need, allocate that need to a specific obligation for the Township, and determine compliance mechanisms acceptable to the court that are available to the Township to meet that obligation. Until such time as this occurs, no final plan can be established.

SBC argues that the determination of the "precise, total number of family units which the Township is obligated to allow is no longer material." Its position is that the Township is not entitled to a trial on these issues, and that the court should remove the Township's immunity from builder's remedy lawsuits without any further proceedings. FSHC and the other objectors argue in a similar vein, although at least FSHC concedes that a trial is necessary. Urging this court to strip the Township of its immunity without first holding a trial flies in the face of the Supreme Court's decision in So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Twp., 92 N.J. 158 (1983) ("Mt. Laurel II") as well as violates the Township's fundamental due process rights. Indeed, the Court in Mt. Laurel II clearly supports what the Township has been requesting:

> The ultimate outcome of [fair share] litigation in most cases shall be ***a determination by the court of a precise region, a precise regional present and prospective need, and a precise determination of the present and prospective need that the municipality is obliged to design its ordinance to meet***.
>
> We recognize that the tools for calculating present and prospective need and its allocation are imprecise and further that it is impossible to predict with precision how many units of housing will result from specific ordinances. ***What is required is the precision of a specific area and specific numbers.*** They are required not because we think scientific accuracy is possible, but because we believe the requirement is most likely to achieve the goals of *Mount Laurel*. Id. at 257 (emphasis supplied).

FSHC's proposed trial is to first allow site-specific counter-claims, then conduct a trial. Such a trial would involve one proceeding that would encompass (1) establishing the Township's obligation, (2) determining whether the Township's proposed plan meets that obligation, (3) and, if it does not, determining whether any of the objector's sites warrant inclusion in the plan. This process is contrary to the Court's decision in In Re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015) ("Mount Laurel IV"). In Mount Laurel IV, the Supreme Court made clear that:

> …a court reviewing the submission of a town that had participating status before COAH will have to render an individualized assessment of the town's housing element and affordable housing plan ***based on the court's determination of present and prospective regional need for affordable housing applicable to that municipality.*** Id. at 39-40.

Thus, as a threshold measure, the court is required to determine the "present and prospective regional need for affordable housing applicable to [the Township]." This has never been done. Only after the court determines the "present and prospective regional need for affordable housing

applicable to [the Township]" can the Township prepare a final plan to address the obligation established by the court.

Permitting site-specific counter-claims before this is done is an unnecessary distraction and undue burden on the parties and the court. It is also very likely to result in poorly planned development of the Township, as the court reviews piecemeal efforts to construct inclusionary developments on each of the objector's sites. Constitutional compliance has never required such a haphazard approach to the production of affordable housing. Indeed, as the Court in Mount Laurel II made clear:

> The Constitution of the State of New Jersey does not require bad planning. It does not require suburban spread. It does not require rural municipalities to encourage large scale housing developments. It does not require wasteful extension of roads and needless construction of sewer and water facilities for the out-migration of people from the cities and the suburbs. There is nothing in our Constitution that says that we cannot satisfy our constitutional obligation to provide lower income housing and, at the same time, plan the future of the state intelligently. Id. at 238.

Clearly the court must determine the Statewide and Regional need, allocate that need to a specific obligation for the Township, and then determine compliance mechanisms acceptable to the court that are available to the Township to meet that obligation. Until such time as this occurs, the Township's immunity from builder's remedy lawsuits should continue.

Comparison of Plans from November 2015 to February 2016

In its February 17, 2016, letter objecting to the Township's current plan, Richardson argues that the Township's February Plan is "merely a rehashing of the same failed compliance mechanisms the Court [previously] rejected." A summary of the progression of the Township's plan is therefore helpful. Contrary to Richardson's assertions, the Court has never rejected the entirety of any of the Township's plans. Indeed, since submission of the November Plan, Special Master Christine Nazzaro-Cofone has made clear that the Township has fully satisfied its Unanswered Prior Obligation. Under the November Plan, this covered the period 1987-2014 (see page 2 of narrative portion of November Plan), encompassing not only the COAH Prior Round period of 1987-1999 but also the period of time this court has termed the "gap period" (1999-2014). The court's concerns regarding the Township's plans have never been about these prior periods but only about aspects of the Township's Third Round Prospective Obligation (2015-2025).

November Plan

The November Plan consisted of **712 units**, produced through a variety of mechanisms. In response to the Township's 712-unit November Plan, the court indicated that it had two specific concerns:

1. REACH Market-to-Affordable Program: The Special Master and the Court felt that 59 new market-to-affordable units were "too ambitious."
2. Wilson Farm and RPM Henderson Road Development: The Special Master and the Court felt that these 100% affordable housing developments were "phantom projects," which were not viable because of their dependence upon tax credit funding.

As a result of these two areas of concern, the Court advised the Township that it needed to revise the November Plan to come up with approximately 300± alternate housing units in its Prospective (2015-2025) Plan that were more realistic than those represented by the above aspects of the November Plan.

December Plan

In response, the Township revised its November Plan with a **720-unit** December Plan. The December Plan addressed the court's concerns as follows:

1. REACH Market-to-Affordable Family Sales: The 59 units contained in the November Plan were reduced to 32 affordable family sales units plus an additional 9 family rental units. As indicated in the narrative portion of the December Plan, this reduced the amount of units to be produced as part of the Prospective obligation to 41, which resulted in a total of 146 units in the Township's program. This is the exact amount previously reviewed and approved by COAH on October 14, 2009. Thus, the December Plan limited the number of Market-to-Affordable units to that which was already approved by COAH.
2. Wilson Farm and RPM Henderson Road 100% Affordable Developments: The Township adopted a resolution confirming funding for both the Wilson Farm and RPM Developments. The narrative portion of the December Plan set forth in detail the advanced nature of both projects, especially the Wilson Farm project, and the funding that had already been secured for these projects. Even if the anticipated funding was not obtained by either Wilson Farm or RPM, on December 8, 2015, the Township Council adopted a resolution confirming its commitment to these projects, which included an assurance of a stable alternative funding source, such as municipal bonding, pursuant to N.J.A.C. 5:93-5.5(a)(3)(ii).

Notwithstanding the Township's firm commitment to these projects, the December Plan also included the following additional units, which were added after meeting with all of the objectors proposing development of their properties:

Windsor Associates	
inclusionary family rentals:	11
Stanton Girard	
family rentals:	100
SB Center	
inclusionary age-restricted sales:	100
	211

In addition, the December Plan also added the following units:

Charleston Place I and II	
extension of controls	
(already completed):	84
Hovnanian	
family rentals:	48
Carlyle Group	
inclusionary family rentals:	10
	142

Detailed descriptions of each were included in the narrative portion of the December Plan. As such, even without Wilson Farm and RPM, the Township added an additional 353 units to its proposed Third Round Prospective Plan. Adding available bonuses contributed another 178 credits for a total unit/credit count of 531. This more than satisfied the Court's direction to propose 300± alternate units in place of the Wilson Farm and RPM units.

January Plan

On December 22, 2015, revised December 30, 2015, the Township's expert, Econsult Solutions, released its report. On January 6, 2016, the Township submitted a revised plan ("January Plan") that would address the Township's **215-unit** obligation as determined by Econsult, which was significantly less than any other estimates previously submitted by other experts. As with every plan submitted to the court, the Township made clear that, in the event the court determined that the Township's actual obligation was more or less than what was reflected in the plan, the Township reserved the right to add or eliminate sites from the plan so that it satisfied the Township's actual obligation established by the court.

In addition, after meeting with the developers of both Wilson Farm and RPM, the Special Master was particularly impressed with the Wilson Farm project, and ultimately recommended

that the Wilson Farm project be placed back into the Township's plan as a viable project. At a January 13, 2016, Case Management Conference, the Special Master and the court indicated that the Wilson Farm project was acceptable as part of the Township's plan. Since the RPM project was not as far advanced as Wilson Farm, the court indicated that the RPM project could be included as a "back up" project, but not as a main part of the Township's plan. The court thereafter directed the Township to add inclusionary developments to its plan. The court specifically reiterated that the Township was under no obligation to choose objectors' sites, but needed to demonstrate inclusionary sites that would provide a realistic opportunity for the production of affordable housing.

February Plan

On February 11, 2016, the Township submitted its **379/1,000-unit** February Plan. Since there has never been any determination of the Township's actual Third Round obligation, and the estimates given by the various experts are so widely divergent, the February Plan consisted of two alternatives – a 379-unit plan based on the Econsult estimates and a 1,000-unit plan based on the Kinsey estimates. As it has maintained throughout the pendency of this matter, the Township once again made clear that it was ready, willing and able to voluntarily comply with its constitutional obligation as determined by the court, and reserved the right to add or eliminate sites from either of these plans once the Township's actual obligation is established by the court.

Contrary to Richardson's assertion that the February Plan "is merely a rehashing of the same failed compliance mechanisms the court thought were problematic on January 13," both alternatives presented in the February Plan comply with the court's directives.

Alternative #1: 379-unit Econsult Plan

Against a 215-unit obligation as determined by Econsult, the Township's Alternative #1 proposal includes projects that have already been completed or have been accepted by the court. It includes the Sassman inclusionary affordable family development (already completed) and the Menowitz (Cambridge Crossing) court-approved inclusionary family development (under construction). It also includes the Wilson Farm project, which was specifically accepted by the court as a viable site. The only new component added to the Plan includes nine (9) credits based upon refunds given by the Township to non-residential developers of past non-residential development fees that had been paid and returned to developers pursuant to State statute, as further described in the narrative to the Plan. This results in 325 units of housing, for a total of 379 total credits, exceeding the Econsult estimate by 164 units/credits.

Alternative #2: 1,000-unit Kinsey Plan

The February Plan makes clear that, if the court rejects the Econsult methodology/ calculations, the Township proposes an alternative plan, contingent upon a final determination of the actual obligation for the Township as determined by the court. This Plan would result in the

production of 750 units of housing and an additional 250 credits/bonuses for a total of 1,000 units/credits as permitted by the Prior Round Rules. The Plan reflects a wide range of housing, including group homes for individuals with developmental disabilities, family sale units, family rental units, extensions of controls on existing units, senior units and inclusionary developments. Indeed, the Alternative #2 of the February Plan adds the following inclusionary developments:

Menowitz (Cambridge Crossing)
Stanton Girard revised proposal
East Meadow Estates
Hovnanian/Ingerman

In addition, the Plan retains the following inclusionary developments as well:

Sassman
Windsor Associates
SB Center
Carlyle Group

Accordingly, contrary to Richardson's assertion that none of the intervenors' properties have been included in the Township's Plan, the February Plan includes three of the five intervenors' properties, plus an additional five other properties (four of which have already been completed, are currently under construction or have received some aspect of preliminary approval).

Accordingly, the February Plan, in either alternative, makes significant changes to the Township's prior plans that are in direct response to the court's specific directive to add inclusionary developments to the Plan.

SBC argues that the Township "withdrew" the prior plans in favor of the subsequent ones. No such "withdrawal" has ever occurred. On the contrary, the Township has made repeated revisions to its proposed plan in response to the specific directives of the court. With each submission, however, the Township made abundantly clear that the revised plans were submitted with a full reservation of the Township's right to add or eliminate sites from the plan based upon the actual obligation determined by the court.

Objections to February Plan

Econsult Methodology

The objectors assert that Alternative #1 of the February Plan ignores this court's decision in In the Matter of the Adoption of the Monroe Township Housing Element and Fair Share Plan and Implementing Ordinances, ___ N.J. Super. ___ (Law Div. 2015) (recently approved for publication, original opinion dated October 5, 2015, Docket No. MID-L-3365-15) ("In Re

Monroe") because the Econsult methodology does not follow the Prior Round methodology, resulting in calculations that do not comply with the Supreme Court's decision in Mount Laurel IV. They assert that the calculations performed, and methodology used, by Dr. David Kinsey and Art Bernard, experts for FSHC and various developers, comply with Mount Laurel IV and In Re Monroe, and arrive at a different estimate for the Township's obligation.

All of these arguments, however, are fact questions to be determined at the time of trial and not by way of argument in the present motion. A determination of whether any or all of the various experts identified in the case comply with the court's various decisions governing how this matter is to be processed must await a trial on the merits, where witnesses can be questioned, opinions probed and subjected to cross-examination. The widely divergent estimates of need and the Township's obligation that have been proffered by the experts demonstrate a clear need for a trial on these issues.

AVB submits a February 11, 2016, report from Dr. Kinsey (seen for the first time by the undersigned today) wherein Dr. Kinsey maintains that Econsult has not followed the Prior Round methodology. In its report dated December 30, 2015, (served upon all parties by the undersigned on January 4, 2016), Econsult indicates that it did follow the Prior Round methodology, and only departed from it when it was clearly warranted. This is a classic case of a "battle of the experts," which demands that a trial be conducted to determine the basis of each expert's opinion, where credibility and conclusions can be tested, erroneous assumptions exposed and a final determination made. It is certainly not appropriate to make such a determination on motion, without testimony and cross-examination. Indeed, even in Dr. Kinsey's February 11, 2016, report, he concedes that "there are a number of sensible changes to the Prior Round methodology" that could be implemented. (See Kinsey February 11, 2016, report, page 2). He believes those changes would result in an increase in the calculated need. The "sensible changes" proposed by Econsult in its report result in a decrease in the calculated need. This is yet another demonstration of the need for a trial to determine these issues. Even FSHC agrees with this aspect of the Township's position.

"Gap Period" Obligation

The objectors further argue that the Township's February Plan fails to account for the "gap period" (1999-2015) obligation, which this court has ruled must be satisfied (See In Re Monroe, supra.). This period, however, was never an issue in any of the Township's Plans, as the Special Master and court stated even with the first Plan submitted in November 2015 that the Township's Plan fully satisfied what was then called the Unanswered Prior Round obligation, which at that time encompassed 1987-2014. Thus, the "gap period" was already fully addressed by the Township and was never a concern for the court. The February Plan did not deal with the "gap period" since, when the Township switched from the 2014 COAH methodology (November and December Plans) to the Econsult/Kinsey methodology for the February Plan, the resulting chart did not carry the gap period forward. This is because Econsult did not recognize the gap period and Kinsey lumped the gap and prospective periods together (1999-2025), capping the

total at 1,000. Since this court's decision in In Re Monroe treats the "gap period" completely different than either of these two experts (and separates the gap period from the prospective period), in hindsight the Township should have shown both on the February Plan.

The attached shows how the Township addresses both the "gap period" and the prospective period in one overall chart (Exhibit A). Even using the Kinsey inflated obligation assigned to the Township, and following this court's formula set forth in In Re Monroe, the worst-case scenario for the Township is a total obligation of 1,533. The attached gap and prospective plan shows 1,271, assuming the court grants the Township's pending motion for a waiver of the senior cap from 25% to 30.3%, which would allow the Township to take credit for the 100 affordable units proposed for the SBC site. (Note that the February Plan gave the Township no credit for this development). Increasing the total obligation from 1,000 to 1,533 also permits additional rental bonuses on the Hovnanian/Ingerman site. If the RPM project is added into the plan, this would put the Township over its worst-case obligation at 1,553.

1,000 Unit Cap

Richardson argues that the Township's Plan fails to follow the 1,000-unit cap decision of this court in In Re Monroe. This assumes, however, that the Township is subject to the 1,000-unit cap. The only basis for Richardson's assertion is that "in all probability, South Brunswick will exceed 1,000 units." Clearly this is pure speculation. Richardson goes on to argue that it "intends to present expert testimony on this issue." Thus, even Richardson concedes that this is an issue to be determined at trial and not as part of the pending motion.

If the Township is subject to the 1,000-unit cap, Richardson indicates that the Township's obligation would be 1,333 units. Without conceding that this is the Township's obligation, a plan that presents 1,000 units certainly demonstrates a good faith attempt to satisfy whatever the Township's ultimate obligation is determined to be, even assuming that Richardson's 1,333 unit assertion is accurate. When the "gap period" formula set forth by this court in In Re Monroe is applied, even using the overinflated Kinsey obligation, the Township's total combined "gap" and prospective obligation is a maximum of 1,533. The Township's plan for both periods, shown in Exhibit A, demonstrates 1,271 units (or 1,553 if the "Back Up" site is included). Given this, it cannot be said that the Township has acted in "bad faith" in presenting its plan.

Write Down/Buy Down

Richardson continues to argue that inclusion of approximately 50 write down/buy down market-to-affordable units are "problematic" since, according to Richardson, the Township has produced only three (3) such units in the past ten (10) years. Unfortunately, Richardson completely misreads the Township's Plan and attempts to mislead the court on the success of the Township's market-to-affordable program. In reviewing the Prior Round obligation chart as well as the Prospective Obligation charts, it is clear that the Township has completed a total twenty-one (21) market-to-affordable units. Fifteen (15) have been allocated to the Prior Round with the

balance included in the Gap/Prospective period. The Township continues to move forward with this program, which is one of the very few successful market-to-affordable programs in the State. Indeed, the Township's long-standing success in producing affordable housing, especially in the market-to-affordable program, resulted in COAH's approval of a total of 146 units to be produced as part of the Township's Third Round plan. This court should not strip away what COAH long ago granted to the Township, and upon which the Township has relied in actually producing affordable housing. Indeed, if the court were to accept Richardson's argument that the Township's market-to-affordable program be limited to no more than 10 units, the Township would immediately lose 11 affordable housing units that have already been purchased, deed-restricted and sold to qualified families. That would be an absurd result, and certainly would punish a municipality for actually producing affordable housing.

100% Affordable Developments

All of the objectors continue to oppose the 100% affordable projects contained in the Township's February Plan.

Wilson Farm and RPM Development: The genesis of, and current state of, the Township's proposed 100% affordable sites has been addressed above in relation to Wilson Farm and RPM Development. Although the court initially rejected Wilson Farm, after the Special Master met with the developer, the Special Master specifically recommended inclusion of the Wilson Farm project and so it was returned to the Township's Plan. RPM remains as a "back-up" development only, in compliance with the court's directive.

Stanton Girard: The Stanton Girard revised proposal included with the February Plan was not the Township's idea but rather a specific revision to the original proposal that was transmitted by Stanton Girard to the Township on January 26, 2016. The proposal seeks to initially provide 120 units of affordable housing by way of a 9% tax credit family cycle funding. In the event funding is not received, however, the proposal would convert the development to an inclusionary development. The 41.7% affordable housing set-aside was not requested by the Township but rather offered by the property owner and developer of the site. As can be seen from the proposal, it is the intention of the developers to use the inclusionary mechanism to fund the 50 affordable units included in the proposal, with the intention that eventually the entire 120 units would be converted to affordable housing, thereby increasing the stock of affordable housing to be produced by this development. This creative funding proposal was attractive to the Township and guarantees that the development will be built either as a 100% affordable housing development or as an inclusionary development.

Hovnanian/Ingerman: Richardson criticizes the increase in the number of units to be produced by the Hovnanian/Ingerman development. The number of units for this development increased, however, because it was converted from a 100% affordable

development of 48 rental units to a combination inclusionary/ 100% affordable development of 231 total units, consisting of a mix of for-sale and rental units. The proposed development would include 150 market-rate for-sale townhouse units and 81 affordable units. Thirty of the 81 affordable units would be produced by Hovnanian as part of its 20% set-aside to its inclusionary development. The remaining 51 units would be funded via 9% tax credit funding and/or Township funding and built by Ingerman.

SB Center Site

The objectors argue that the development proposal for the SBC property is not appropriate or economically realistic at a 33.3% set-aside. Several objectors argue that the presumptive set-aside is 20%, as if this were the maximum set-aside that could be used. Contrary to SBC's argument that the court in Mt. Laurel II set 20% "as the standard," that court actually indicated that **"20 percent appears to us to be a reasonable minimum."** Id. at 279, fn. 37. Thus, a 33.3% set aside is not prohibited. What the objectors ignore is that the development proposal for the SBC site also includes a large amount of commercial development and the purchase of a significant amount of open space, resulting in a $19.4 million net profit to SBC. At a $19.4 million net profit, the Township's development proposal for this site is more than reasonable. See Id. at 273, fn. 34 ("Zoning does not require that land be used for maximum profitability, and on occasion the goals of zoning may require something less.")

SBC's statement that the economic feasibility analysis prepared by Nassau Capital does not account for its prior roadway and sewer infrastructure costs is mistaken. A simple review of the analysis proves that this is incorrect, since these expenses are clearly shown and accounted for in the calculations (see lower left-hand corner of the analysis). AVB argues that this information is not presented by way of a certification. This analysis is presented in response to the court's specific request for more information to demonstrate that the SBC proposal is reasonable. The most efficient way to do so is in the one-page summary submitted to the court. In the event this becomes an issue for trial, of course testimony and supporting evidence can and will be presented by the Township's expert.

Age-Restricted Housing/Waiver of Senior Cap

Contrary to the objectors' argument that there is no market for age-restricted housing, there is a strong demand for age-restricted housing in the Township. This is evidenced by the development of the Princeton Manor age-restricted single-family development by Toll Brothers; Toll Brothers' desire to construct an additional 200+ age-restricted single-family homes on another property in the Township; ongoing development of the age-restricted single-family homes by Lennar; and the development and sale of the Villagio age-restricted single-family home community. Although other parts of the State may be experiencing difficulty in the age-restricted housing market, South Brunswick continues to be strong. The mere fact that AVB decided not to pursue age-restricted housing, but applied for a variance to produce non-age-restricted units, is of no moment. The expert report submitted as part of its Use Variance application (submitted to this

court for the first time with its opposition) criticizes the market for age-restricted condominium units. That is not the product proposed by the Township for the SBC site. As demonstrated by the other age-restricted developments in South Brunswick, the market for age-restricted single family homes remains strong.

Reference is made by some of the objectors to the "Sarlo" bill, codified by the Legislature as N.J.S.A. 45:22A-46.3, et seq. Enacted in 2009 as a measure to address the then "currently eroding economic conditions," it permitted certain developments that had been approved as age-restricted communities but that were not yet built to make application to the local land use board for conversion from an age-restricted community to a non-age-restricted community. It was also enacted in response to the change in COAH's then proposed Third Round Rules that reduced the Senior Cap from 50% to 25%, so as to allow a mechanism for developers who had relied on this rule and received approval for an age-restricted community, to meet this change in COAH's rules. See N.J.S.A. 45:22A-46.3(g). This opportunity was limited, however, to a 25 month period of time, expiring in August 2011. Although the law set forth an ability to extend the application of the law for an additional 24 months (to August 2013), the law was never extended. See N.J.S.A. 45:22A-46.11. Thus, the law itself clearly recognized that these measures were intended to be temporary in nature, in response to a specific, immediate economic and regulatory concern. It was never intended to be a permanent statement for all time on the market for age-restricted housing.

Non-Residential Development Fees (NRDF) Refund Credit

The Township previously provided the court with an order in In Re Hopewell, Docket No. MER-L-563-15 (Superior Court, Law Division, unpublished opinion dated August 31, 2015)(Exhibit O to Township Brief) wherein the court found and declared that "no money for reimbursement [of NRDF refunds] is currently available in the [New Jersey Affordable Housing Trust] Fund…" As a result, pursuant to N.J.S.A. 52:27D-311.3(b), the court found that Hopewell Township was "entitled to a credit" against its Third Round obligation. The number of credits to be granted was to be determined during the course of the Township's Declaratory Judgment Action (See Exhibit O, paras. 2 and 4). The objectors have supplied a subsequent order of the court denying Hopewell's request for such credits, arguing that this demonstrates that the Township is not entitled to any credits for these refunds. Although the subsequent request by Hopewell for a 155-unit credit against a $639,633 refund (See Exhibit B attached hereto) was denied by the court, the court **did not** reverse its earlier ruling that **some** credit was due to Hopewell. On the contrary, Hopewell still has the ability to apply for some level of credit as a result of N.J.S.A. 52:27D-311.3(b). The exact amount of that credit remains to be determined.

Contrary to Hopewell's request for a 155-unit credit against a $639,633 NRDF refund, the Township is seeking 9 credits against a $703,792 NRDF refund. The basis for this calculation is reasonably tied to the cost of producing a market-to-affordable unit (approximately $75,000). Rather than attempting to over-reach and demand an unreasonable credit for its NRDF refund,

the Township has demonstrated a reasonable calculation to receive 9 credits under N.J.S.A. 52:27D-311.3(b).

Conclusion

For the foregoing reasons, as well as those previously expressed to this Court in prior submissions, the Court should grant the Township's request for an extension of its immunity from "builder's remedy" lawsuits.

Thank you for your considerations in this matter. If you have any questions or comments, please do not hesitate to contact me.

Respectfully yours,

s/ Donald J. Sears

Donald J. Sears
Director of Law

DJS/lw
Cc: Robert A. Kasuba, Esq., attorney for AVB
Henry Kent-Smith, Esq., attorney for Richardson
Kenneth D. McPherson, Jr., attorney for SBC
Kevin J. Moore, Esq., attorney for SG
Kevin Walsh, Esq., and Adam Gordon, Esq., attorneys for FSHC
Brett Tanzman, Esq., attorney for Windsor
Benjamin Bucca, Jr., Esq., attorney for SB Planning Board
Christine Nazzaro-Cofone, PP, Special Master

EXHIBIT A

TOWNSHIP OF SOUTH BRUNSWICK
DRAFT PRELIMINARY THIRD ROUND PLAN
(Amended February 18, 2016)

Credits Addressing 842-Unit Prior Round Obligation

South Brunswick's Prior Round Compliance Mechanisms	Prior Round
Prior Cycle Credits (4.1.80 – 12.15.86)	
Deans Apartments	40
Charleston Place I	54
Inclusionary Developments - completed	
Regal Point - affordable family sales	5
Monmouth Walk - affordable family sales	43
Nassau Square – affordable family sales	49
Summerfield - affordable family sales	70
Deans Pond Crossing - affordable family sales	20
Southridge/Southridge Woods - affordable family rentals	124
Buckingham Place – assisted living - affordable senior units	23
100% Affordable Developments - completed	
Woodhaven – affordable family rentals	80
Charleston Place II – affordable senior rentals	30
Oak Woods - affordable senior rentals	73
Alternative Living Arrangements - completed	
Wheeler Rd. Group Home (Dev. Resources/Delta Comm.)	3
Major Rd. Group Home (Dev. Resources/Delta Comm.)	3
CIL Woods	16
CIL Wynwood	7
Market-to-Affordable	
REACH – affordable family sales (of 18 completed)	15
Prior Round Rental Bonuses for completed units = 187	
Southridge/S. Woods - family rentals (124 units x 1.0)	124
Woodhaven family rentals (63 units x 1.0), bonus cap	63
Total	**842**

Maximum Prior Round Seniors = 219 (per N.J.A.C. 5:93-5.14(a)
.25((842 + 117) – 94 prior cycle credits - 0 rehab credits) = 219.50, round down
Minimum Prior Round Rentals = 187; (per N.J.A.C. 5:93-5.15(a))
.25((842 + 130) – 94 prior cycle credits - 130 rehab component) = 187

TOWNSHIP OF SOUTH BRUNSWICK
DRAFT PRELIMINARY THIRD ROUND PLAN
(Amended February 18, 2016)

Credits Addressing the Third Round Gap Period (1999-2015) and Prospective Need (2015-2025) Obligation

ALTERNATIVE #3

Assuming Use of the Kinsey Methodology/Obligation Calculated for South Brunswick, as modified by October 5, 2015, court decision*

South Brunswick's Third Round Compliance Mechanisms – "Gap Period" Obligation (1999-2015) = 533 units Prospective Need (2015-2025) = 1,000 units	Units	Bonuses	Total
Alternative Living Arrangements (all completed)			
Dungarvin group homes	12	12	24
Triple C group homes	6	6	12
Community Options group homes	14	14	28
ARC of Middlesex group homes	15	15	30
Alternative Living Arrangements (executed agreement)			
Dungarvin group homes	4	4	8
Write-Down/Buy-Down (Market to Affordable)			
REACH – inclusionary affordable family sales (6 completed)	32	0	32
REACH – inclusionary affordable family rentals	9	9	18
Extensions of Controls			
Woodhaven/Deans Apts – completed	40	0	40
Regal (5), Mon. Walk (43), Nassau Square (49) – inclus. sales	97	0	97
Wheeler Road Group Home	3	0	3
Major Road Group Home	3	0	3
Dungarvin (Cranston Road) Group Home	4	0	4
Charleston Place I & II - completed	84	0	84
Built, Proposed , Approved Units			
Sassman – inclusionary affordable family sale completed (5)	1	0	1
Menowitz (Cambridge Cross.) – court app'd, inclusionary family sale (85)	8	0	8
Wilson Farm –afford. senior/special needs rentals	280/20	20	320
Windsor Associates – inclusionary family rentals (72)	11	11	22
SB Center –100 inclusionary age restricted sales (300), capped	100	0	100
Carlyle Group – inclusionary family rentals (79)	10	10	20
Stanton Girard – family rentals	120	120	240
East Meadow Estates – inclusionary family sales (55)	6	0	6
Hovnanian/Ingerman – inclusionary family sales/rentals (231)	81	81	162
NRDF refund credits	9	0	9
TOTAL 1999-2025 WITHOUT BACK UP SITE	**969**	**302**	**1,271**

"Back Up" site			
RPM – family rentals/special needs rentals	185/15	82	282
TOTAL 1999-2025	**1,169**	**384**	**1,553**

Maximum Third Round Seniors = .303 (1,533) = 464**
Minimum Third Round Rentals = .25 (1,533) = 384

* In the event the Township's actual obligation is more or less than what is reflected above, the Township reserves the right to add or eliminate sites from the above so that it satisfies the actual obligation finally determined for South Brunswick.
** Requires that the court grant the Township's motion for a waiver of the Senior cap from 25% to 30.3%.

EXHIBIT B

centraljersey.com
Packet Media Group

http://www.centraljersey.com/news/hopewell_valley_news/hopewell-township-court-awards-housing-credit-instead-of-cash/article_1166496c-51ae-11e5-9dfc-2f321ca52e13.html

HOPEWELL TOWNSHIP: Court awards housing credit instead of cash

By Frank Mustac, special writer Sep 2, 2015

HOPEWELL TOWNSHIP — Instead of the state having to pay back more than a half-million dollars to the township's affordable housing trust fund, a state court decided that the township would receive affordable housing credits instead.

A Superior Court judge ruled last week on a lawsuit filed earlier this year by Hopewell Township to recoup $639,633 from the state.

A developer originally placed the money in the township's trust fund back in 2008 as part of a mandated obligation. The trust fund is used by the township to develop affordable housing in the municipality, however, as stipulated in the New Jersey Economic Stimulus Act of 2009, the township had to refund the entire sum back to the developer.

Hopewell Township Mayor Harvey Lester released a statement on Aug. 28 commenting the court's

decision.

"Finding that the state has 'no funds available to provide reimbursement,' Mercer County Assignment Judge Mary C. Jacobson ruled that the township met the prerequisites for the 'alternative relief' of affordable housing credit towards its COAH obligation," Mayor Lester said.

"The court also determined that 'the issue of [affordable housing] credits will be folded into [the township's] Affordable Housing Declaratory Judgment' court case, which is pending before her. The exact number of affordable housing units to be credited to the township will be determined by the judge at a later date."

The developer in question is Capital Health Systems, which, before the Stimulus Act became law, was required to deposit the $639,633 "non-residential development fee" in the trust fund after building a hospital in the township.

Under the Stimulus Act, the township was entitled to full reimbursement from the state for the $639,633, but despite repeated timely requests, the township never received it, according to a township resolution document.

The law, Hopewell Township Attorney Steven Goodell said, also stipulates that if the state is not able to pay back the money, the township's affordable housing obligation would be reduced.

"Upon being sworn in as mayor in January, one of my first priorities was to pursue this long-neglected case," Mayor Lester said in his statement. "It is gratifying that the court agreed with our analysis that the taxpayers of Hopewell Township were entitled to compensation, and has crafted a way to do so that benefits the township in our current litigation over affordable housing."

As part of the township's separate Affordable Housing Declaratory Judgment case, also being heard by Judge Jacobson, arguments will be presented by the parties involved as to what the Hopewell Township affordable housing obligation should be, meaning how many low- and moderate-income housing units should be built in the municipality.

A proposal Hopewell Township submitted about seven years ago to make provisions for roughly 500 affordable units was rejected by the state's Council on Affordable Housing (COAH).

Figures recently released by the Fair Share Housing Center organization indicate Hopewell Township should provide 1,000 new affordable housing units.

As a means of obtaining its own affordable numbers, the Hopewell Township Committee in early July

approved a cost-sharing agreement with hundreds of other municipalities in New Jersey to finance the preparation of a statewide fair-share affordable housing analysis being undertaken at Rutgers University through Dr. Robert W. Burchell.

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