



## INTRODUCTION

The Chatham Township is considered a participating municipality under the New Jersey Supreme Court decision, In re: Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015) (“In re COAH”), and submits that it is entitled to temporary immunity as provided in that case. The Supreme Court in In re COAH developed a procedure by which the courts could take on the role of the Council On Affordable Housing (“COAH”) to assist the municipalities of New Jersey to develop fair share housing plans that comply with the Fair Housing Act N.J.S.A. 52:27d-301 et. seq. (“FHA”), and the Mount Laurel doctrine. The Court provided that municipalities which have been involved in the COAH process may file a declaratory judgment action to place their existing housing element and fair share plan before the trial courts. The trial courts would then make a determination of the fair share housing need for that municipality. If the existing plan failed to comply, the town would be given the opportunity to supplement the plan. During this process the Supreme Court allowed the trial courts to grant the municipality immunity from exclusionary zoning litigation, including claims for a builder’s remedy, while the municipality, the court, and any appointed special master, worked to develop a plan that complies. The Court provided no standards or tests to be met for immunity to be granted. Rather, the Court stated its preference for voluntary compliance by the municipalities rather than compelled rezoning under threat of exclusionary zoning litigation and the threat of a builder’s remedy. The immunity to be granted was “temporary” and was subject to review by the trial courts to ensure that the municipality was cooperating and endeavoring to develop a plan that complies with the fair share housing obligation as determined by the court. To that end, it is expected that experts will be presented to the trial court on behalf of many municipalities, including Chatham , which will aid the trial court in determining the affordable housing obligation of each municipality before the court. Even though the Court did not set forth any

particular standards or requirements to be met for a town to be entitled to temporary immunity, Warren Township provides herein a summary of its past and current efforts to comply with the FHA. Due to the failure of COAH to develop Third Round Rules neither Chatham nor any other municipality can know what is considered to be its "fair share." It is only after the municipality's fair share is determined that Chatham's current plan can be assessed and, if necessary, supplemented. Accordingly, the five (5) month period to supplement the Borough's Plan should not commence until the trial court has made a "preliminary determination" of the Township's fair share. During this time, Chatham should be provided immunity exclusionary zoning litigation, including immunity from the threat of a builder's remedy, Chatham, otherwise the process of achieving compliance through sound planning would be distracted and further delayed, if not thwarted.

### **STATEMENT OF FACTS<sup>1</sup>**

Chatham Township has been actively participating in the COAH process for over twenty years. The Township elected to participate in the COAH process and submitted a Housing Element and Fair Share Plan dated April 1995 along with its petition for Second Round Substantive Certification on May 19, 1995. COAH calculated the Township's fair share obligation for the period 1987 to 1999 at 89 affordable units, including a 6 unit indigenous need and an 83 unit new construction obligation. (Banisch Cert. par. 5-6) 75 affordable housing units, previously developed at Chatham Glen, were deducted from the 89 unit total, leaving a fair share of 14 yet to be satisfied. (Banisch Cert. par.7)

The Township's 1995 Housing Element and Fair Share Plan proposed satisfying the remaining obligation of 14 units through a combination of methods that included rehabilitation

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<sup>1</sup> The facts set forth herein are based upon the certification of the Township's planner, Francis J. Banisch, III, which is submitted with this motion.

of the 6 indigenous need units, credits for 2 alternative living arrangements (group homes), each with 3 bedrooms eligible for credit, and a Regional Contribution Agreement, which was then permitted by the COAH rules. (Banisch Cert. par. 8) As a result of the mechanisms included in the 1995 Housing Element and Fair Share Plan, the Township achieved constitutional compliance with a plan that included a Regional Contribution Agreement (“RCA”) for all 18 units and an acknowledgement that another 6 additional credits could be sought for the group homes. (Banisch Cert. par. 9) COAH memorialized the sufficiency of the Township’s 1995 Housing Element and Fair Share Plan when it granted the Township Second Round Substantive Certification and protection from builder remedy lawsuits on March 5, 1997. (Banisch Cert. par. 10)The Township’s Second Round Substantive Certification was extended on May 11, 2005 through December 20, 2005, and by COAH to December 31, 2008 for all municipalities. (Banisch Cert. par. 11)

In 2005 and 2008 the Township’s planner developed compliance plans for the Township to address the changing Third Round obligations identified by COAH. Table 1 in the 2005 Housing Element and Fair Share Plan identified the Township’s Third Round Affordable Housing Obligation, based upon the rules that were in place at that time, at 79 units as follows:

	MPO	Locally-derived
Total Recalculated Second Round (Appendix C – COAH Third Round rules)	52	52
Growth Share	18	27
Rehabilitation Obligation	0	0
Total Third Round Obligation	70	79

(Banisch Cert. par. 12-14)The substantive rules for COAH’s Third Round recalculated the Township’s Second Round obligation, downward from 89 to 52. Thus, when combined with the

growth share estimate of 27 additional units, a combined total of 79 affordable units would be required for all three rounds – 10 units less than the prior round calculation of 89. (Banisch Cert. par. 15)

After the Appellate Division found flaws in the original (2004) Third Round regulations, COAH recalculated each municipality’s prior round obligation, remaining rehabilitation component and anticipated residential and non-residential growth through the year 2018, to generate new affordable housing obligations for each municipality. (Banisch Cert. par. 16)

In a continued attempt to comply with the evolving rules, in 2008 the Township prepared and adopted a Housing Element and Fair Share Plan. Table 1 from the 2008 Housing Element and Fair Share Plan identified the Township’s Third Round fair share obligation, as well as the cumulative obligation for all prior rounds, as follows:

Prior round new construction obligation (1987-1999)		83
Number of affordable units based upon projected residential growth to Year 2018	87.4	
Number of affordable units based upon projected non-residential growth to Year 2018	22.3	
Total 3 <sup>rd</sup> round new construction obligation to Year 2018		109.7
Rehabilitation obligation: 2004-2018		19
Total Fair Share Obligation		212*

\* Rounded.

(Banisch Cert. par. 17) Combining the 83 unit recalculated prior round obligation with the 110 unit growth share obligation and a 19 unit rehabilitation need resulted in a 212 unit affordable housing obligation through 2018. (Banisch Cert. par. 18)

The Township's 2008 Housing Element and Fair Share Plan was submitted to COAH with a petition for Third Round Substantive Certification on December 31, 2008 and the application was deemed complete on May 18, 2009. (Banisch Cert. par. 19)

To date, the Township has provided 75 affordable for-sale units, 6 group home bedrooms and 8 units rehabilitated through a RCA. With rental bonus credits assigned to the group homes, 6 bonus credits were included, for a total of 95 affordable units/credits:

Chatham Glen (for sale)	75
RCA	8
Group Homes	6
+ rental bonuses	6
Units and credits	95

(Banisch Cert. par. 20)

The Township's 2008 Housing Element and Fair Share Plan (Table 5 reproduced below) applied 83 of the Township's COAH recognized units and credits to fully address the 83 unit recalculated prior round obligation and carried forward the 12 group home credits to be applied toward the very low income requirement:

<i>Affordable Housing Types</i>	<i>#</i>	<i>Rentals</i>	<i>Very Low Income</i>	<i>Portion of Need Addressed</i>
Accessory apartments	11	11		Growth share
Market to affordable-existing apartments	5	5		Growth share
Group homes*	19	19	19	Growth share
Extended Affordability Controls	75			Growth share
Rehabilitation program	19			Rehabilitation
Rental bonuses (27 maximum)	TBD			Growth share
<i>Total affordable units and credits</i>	129	35	19	

\*Includes 12 units/credits from prior COAH certification; Township will provide residential lot for new group home. (Banisch Cert. par. 21)

The Township's 2008 Housing Element and Fair Share Plan, as submitted to COAH for certification, fully met and exceeded the prior round obligation with a 19 unit rehabilitation program in cooperation with the County of Morris, an 11 unit accessory apartment program, a market-to-affordable program to deed restrict 5 apartments to be affordable by low and moderate income households, 19 group home bedrooms, and the extension of expiring controls on the 75 affordable units at Chatham Glen. (Banisch Cert. par. 22)

The Township has been diligent in its efforts to meet its affordable housing obligations. The Township is prepared to supplement its exiting plan should it be necessary based upon the decision of the courts. Accordingly, the Township should be afforded immunity from builder remedy lawsuits as provided by the Supreme Court to allow development of a revised and updated Housing Element and Fair Share Plan, once the Township's fair share obligation is established.

**LEGAL ARGUMENT**  
**POINT I.**

AS A PARTICIPATING MUNICIPALITY, CHATHAM IS ENTITLED  
TO PRELIMINARY IMMUNITY FROM EXCLUSIONARY  
ZONING LITIGATION.

- A. Overview: Municipalities that file for declaratory judgment are entitled to temporary immunity.

In In Re COAH the Supreme Court concluded that COAH had not fulfilled its duty to create acceptable Third Round Rules and directed that all fair share housing matters are to be addressed by designated trial judges. Because many municipalities had already submitted fair share compliance plans based upon COAH's Third Round Rules that, which were subsequently rejected by the Appellate Courts, the Supreme Court set forth a framework for municipalities to voluntarily comply with their fair share housing obligations. 221 N.J. at 29-34. The Supreme Court provided that through the filing of declaratory judgment action a municipality can submit its current plan for review by the trial court. Id. at 25. The Supreme Court also provided that municipalities which avail themselves of this opportunity would be entitled to temporary immunity. Id. at 25-29. Temporary immunity provides the municipality and the trial court time to deal with the matters at hand: the development of a plan that will provide the realistic opportunity for the development of the municipality's regional fair share of low and moderate income housing.

- B. Procedure: The trial court must make a determination of fair share.

The first step in the process is for the municipality to file a declaratory judgment action by which it places its current fair share housing plan before the trial court. This submission is to be on notice to certain designated parties as well as other interested parties. Id. at 25. In order to evaluate the plans, the trial courts will need to take the next step: making a preliminarily

determination of the fair share housing needs of the municipality, Id. at 28-29, which by necessity requires that the trial court make a determination of the fair share needs of the state, then break that down to the regions, and then the municipalities. Id. At 30 (“...previous round methodologies...should be used to establish prospective statewide and regional affordable housing need.”) It is only after the fair share determination has been made that the trial court and the municipality can assess whether the existing plan complies, or whether it needs to be supplemented. During this time it is sensible and practical to provide temporary immunity to the municipality. This approach is rational: it allows the municipality and trial court the opportunity to achieve the desired result, but without the distraction of exclusionary zoning litigation. This is consistent with the Supreme Court’s long expressed preference for voluntary compliance by municipalities as opposed to a municipality being compelled to rezone under the builder’s remedy. See, South Burlington County N.A.A.C.P v. Tp. Of Mount Laurel, 92 N.J. 158, 214 (1983) (“Mount Laurel II”) (“...we intend to encourage voluntary compliance with the constitutional obligation...”) and, In Re COAH 221 N.J. at 34, 51 (recognizing that in the FHA the legislature stated a preference for voluntary compliance over “compelled rezoning.”) This is also consistent with the legislature’s unequivocal “preference for the resolution of existing and future disputes involving exclusionary zoning” by means *other* than the use of the builder’s remedy. N.J.S.A 52:27D-303. Accordingly, in In Re COAH, the Supreme Court endeavored to develop a procedure that “reflect[s] as closely as possible the FHA’s process and provide[s] a means for a municipality to transition from COAH’s jurisdiction to judicial actions to demonstrate that its housing plan satisfies Mount Laurel obligations.” 221 N.J. at 6. Further, the Supreme Court was emphatic that it was not intending to punish municipalities for “COAH’s failure to maintain the viability of the administrative remedy.” Id. at 23. In other words, the

Supreme Court understood that the limbo in which the parties have found themselves since 2007 when the Appellate Division first struck down portions of the Third Round Rules, was not caused by the municipalities, but by COAH. Had acceptable Third Round Rules been adopted, the municipalities, the FSHC, the builders, and other interested parties would have had a way to move forward to have plans developed, revised or supplemented to meet the requirements of the rules within the administrative process. The Court recognized that municipalities should not be put at a disadvantage due to circumstances beyond their control; the failure of COAH to adopt Third Round Rules.

Because of the failure of COAH to develop acceptable rules for the Third Round, there was no administrative, regulatory or objective guidance for a municipality to determine its “fair share” so it can develop a complying fair share housing plan. Accordingly, the second step (after the filing of the declaratory judgment action) is for the trial court to make a determination of the present and prospective need of a municipality. Id. at 28-29 By necessity this requires that the trial court make a determination of the statewide need, the regional need and the fair share obligation of each municipality that has placed its plan before the trial court.<sup>2</sup> Id. at 30 (“...based on the court’s determination of present and prospective regional need...”). Depending on the conclusions drawn by the trial judge, the municipality’s plan may be acceptable “..as is, or as supplemented-...” Id. at 26. All these determinations are to be done under the jurisdiction and oversight of the designated trial judge.

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<sup>2</sup> Many municipalities will be presenting an analysis that is being prepared by Dr. Burchell. It is believed there may be other experts that will provide their analysis of this issue. It is also evident, that the decision on this issue by any court will impact all of the municipalities in the county, as well as the region and the state.

C. Immunity is tied to the time for court review and supplementing of plans.

In order to be able address these issues in an orderly manner consistent with the intent and purpose of the FHA, the Supreme Court *authorized* the trial court to “provide a municipality whose plan is under review immunity from challenges *during the court’s review proceedings, even if supplementation of the plan is required during the proceedings.*” 221 N.J. at 24. (Emphasis added). The Supreme Court stated that temporary immunity can be provided to municipalities that have received *Substantive Certification* under the invalidated Third Round Rules, Id. at 26, and also for municipalities that are *participating municipalities*, Id. at 29. The Supreme Court even stated that immunity may be provided to a municipality does not file a declaratory judgment action but waits to be sued. Id.

The Supreme Court specifically stated that the trial “court should be generously inclined to grant applications for immunity from subsequently filed exclusionary zoning actions” for municipalities that received *Substantive Certification* under the invalidated Third Round Rules. Id. at 26. *Participating* municipalities are also entitled to “initial immunity” treatment similar to that which was provided to the *participating* municipalities under the FHA, N.J.S.A. 52:27D-316, such as when the cases were transferred to COAH from the courts. 221 N.J. at 27. See also, N.J.S.A. 52:27D-309 and 316. The Supreme Court specifically directed that *participating* municipalities should be given five months to submit their supplemental housing element and affordable housing plan during which time the trial court is permitted to provide “initial immunity.” 221 N.J. at 27. The Supreme Court provided no standard for the grant of “initial immunity” for Substantive Certification municipalities and participating municipalities other than to provide them time to allow submission of a supplemental plan that adequately responds to the fair determination made by the trial court.

The Supreme Court only outlined an analysis to be followed by the trial court when considering a request for immunity by municipalities that *do not* file a declaratory judgment action but wait to be sued. The Supreme Court allowed those municipalities to request immunity “covering any period of time during the court’s review.” Id. The trial court is to determine if immunity is to be provided to these municipalities based on an assessment of the extent of the municipality’s obligation, the steps that have been taken to comply with that obligation; including whether a housing element has been adopted, “activity that has occurred in the municipality affecting need” and progress that the municipality has made in satisfying past obligations. Id.

It is evident that the Supreme Court intends to allow the process to proceed uncluttered by exclusionary zoning suits; most certainly in cases where a municipality files for declaratory judgment during the applicable period as was done in this case. The Supreme Court intended to have the proceeding mirror the process for compliance determinations under COAH to the extent possible. Therefore, it stands to reason that immunity should be provided except in the most exceptional circumstances. Further, municipalities should be provided sufficient time to supplement their plans, if necessary, after the trial court makes a determination of the applicable fair share numbers.

It is important to place all these issues in the context of the Supreme Court’s direction that the trial courts that are handling these matters should be flexible, referring to J.W. Field Company, Inc. v. Municipality of Franklin, et al. 204 N.J. 445 (App. Div. 1985) (“J.W. Fields”). 221 N.J. at 26. In that decision the Supreme Court stated that “the good or bad faith of a municipality in attempting to comply is no longer relevant,” when evaluating the proper fair share; rather, the municipality’s “efforts are to be measured against the standard of whether its

ordinances *in fact* provide a realistic opportunity for construction of its regional fair share obligation.” 204 N.J. Super at 452-3, *citing*, South Burlington Cty. NAACP v. Mount Laure Tp. 92 N.J. 158,220-221(1983) (Mount Laurel II). The Supreme Court in J.W. Fields then stated that *immunity* from a builder’s remedy action would be appropriate “if the municipality will stipulate noncompliance and obtain the court’s approval of a proposed fair share number.” 204 N.J. Super. at 257.

There can be little question that no municipality can be certain at this time whether its current plan creates a realistic opportunity for the development of its fair share because the threshold issue - the fair share of the municipality - has yet to be determined. Even municipalities that received *Substantive Certification* in the Third Round under the rejected growth share methodology must have their plans evaluated based upon the trial court’s fair share determination and given the opportunity to supplement if necessary. 221 N.J. at 26. All this can only be accomplished after a municipality’s fair share number has been determined by the court. Id. at 30. The fact that a municipality is presenting its plan to the trial court with the understanding that the plan may need to be supplemented to achieve compliance demonstrates the municipality’s recognition that its plan may not be compliant.<sup>3</sup> Indeed, there is no way for a municipality to know until there is a determination of its Third Round obligation. Further, given the complexities of prioritizing the development of property by one particular builder over that of another, as well as the potential conflict between the builder’s remedy and the public interest in sound planning, *see*, J.W. Fields, 204 N.J. Super. at 459-467, there is no reason to complicate the process by having the trial court have these matters proceed in the adversarial manner of an

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<sup>3</sup> This is not an admission or stipulation of non-compliance because that simply cannot be determined until the trial court makes a fair share determination. Nevertheless, by initiating this action, Chatham placed its plan before the trial court for evaluation.

exclusionary zoning suit before there is a determination of a municipality's fair share, and the municipality is given the opportunity to supplement or adjust its plan to comply.

D. Five month period for participating towns to supplement plan commences on ruling on fair share.

One issue that remains is when the five month period for a participating municipality to supplement its plan it to commence. Consistent with the Courts' intention and directive to follow the FHA and the intent of the legislature as close as possible, the time for the evaluation and supplementation of a town's HEFSP must commence once the court makes a determination of a municipality's fair share obligation. Under the FHA a town is provided immunity for five months to prepare and file a HEFSP **after COAH adopts "criteria and guidelines."** N.J.S.A. 52:27d-309 and 316. The Court, however, also recognized that once immunity is provided, it should not continue indefinitely, and should be periodically reviewed. The Court also did not intend to create rigid application of the time frames; it provided that additional time may be warranted to allow a reasonable time for the municipality to achieve compliance. 221 N.J. 26-27 Accordingly, the Court did not tie the five month period for *initial immunity for participating municipalities* to the deadline for filing the declaratory judgment action. This would simply have created an obligation for municipalities to develop, adopt and take all the necessary governmental actions necessary to implement a Plan to achieve some number of affordable housing units, then to further supplement that Plan after the trial court makes a determination of fair share; all in the course of five months. Since the Supreme Court directed the trial court to make the "preliminary determination" of fair share, it follows that this is the threshold decision is necessary to enable the municipalities to supplement the Plan, if necessary, in an appropriate and efficient manner. This is all consistent with the Supreme Court's directive that the trial courts "should employ similar flexibility in controlling and prioritizing litigation" as was done in pre-

FHA litigation. Id. at 26. Under COAH, municipalities were provided a fair share number, then a plan was developed to meet the number. It is respectfully submitted that this process not only makes sense, it is consistent with the FHA.

E. Summary

It is evident that the Supreme Court has favored the granting of temporary immunity to towns that have filed a declaratory judgment action. It is understood that certain parties that have been placed on notice and some may be given the opportunity to participate in the proceedings in some manner; however, the goal is to create a path to voluntary compliance by the municipality, not compliance under threat of compulsory rezoning. The Court unquestionably favors sound planning in the interest of the public at large as opposed to spending public funds on litigation or providing preference to a particular builder.

Chatham has been engaged in the Mount Laurel process and has demonstrated an intent and effort to comply with its regional fair share obligations. It has received *Substantive Certification* in the Second Round; it has submitted a petition for *Substantive Certification* in the Third Round, and has a plan that follows the guidelines that were in place at the time of the petition. As detailed above, Chatham has provided 75 affordable for-sale units, 6 group home bedrooms and 8 units rehabilitated through a Regional Contribution Agreement. Including rental bonus credits, the total units and credits provided in the prior rounds is 95. This number, when applied against a prior round obligation of 83, yielded 12 group home credits to be applied toward the very low income requirement. The Township's 2008 Housing Element and Fair Share Plan, as submitted to COAH for certification, fully met and exceeded the prior round obligation with a 19 unit rehabilitation program in cooperation with the County of Morris, an 11 unit accessory apartment program, a market-to-affordable program to deed restrict 5 apartments to be affordable by low and moderate income households, 19 group home bedrooms, and the extension

of expiring controls on the 75 affordable units at Chatham Glen. Despite the uncertainty of the COAH rules and the recent economic struggles the Township is prepared to address the issues in this matter and will be prepared to develop a supplemental HEFSP if necessary to achieve compliance. Chatham's willingness to participate and cooperate demonstrates a strong basis for the court to grant it temporary immunity as provided for in In Re COAH, pending the trial court's determination of Chatham's fair share obligation and the opportunity for Chatham to supplement its plan, if necessary.

### CONCLUSION

For the foregoing reasons, the Township of Chatham respectfully requests that the Court enter an order providing temporary immunity from builder's remedy suits or other claims challenging Chatham's HEFSP.

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Dated: July<sup>6</sup>, 2015