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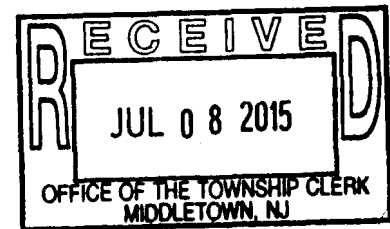
**IN THE MATTER OF THE  
APPLICATION OF THE  
TOWNSHIP OF MIDDLETOWN,  
MONMOUTH COUNTY, a  
municipal corporation of the State  
of New Jersey.**

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**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MONMOUTH COUNTY**

**DOCKET NO.: MON-L-**

Civil Case  
(Mount Laurel)



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**THE TOWNSHIP OF MIDDLETOWN'S BRIEF IN SUPPORT  
OF ITS MOTION FOR TEMPORARY IMMUNITY**

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## PRELIMINARY STATEMENT

This is a declaratory judgment action brought by the Township of Middletown (“Middletown”) pursuant to the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. (“FHA”) and the New Jersey Supreme Court’s recent decision in the matter entitled In Re N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015). In 2009, Middletown was one of only 68 municipalities to receive full substantive certification from the Council on Affordable Housing (“COAH”), which determined that Middletown had a surplus of 105 credits for the Third Round. Accordingly, the Township is filing this action pursuant to the Supreme Court’s recent decision, seeking judicial review of its compliance with its affordable housing obligations.

More immediately, Middletown has filed a motion seeking the entry of an order temporarily preserving its immunity from builder’s remedy litigation for at least five months to allow it to revise and update its Housing Element and Fair Share Plan for the third time in a decade. Middletown should not be punished by losing its protection from builder’s remedy suits due to the inaction of COAH in adopting constitutionally sound Third Round Rules after having in good faith relied and acted upon the 2008 version of the Third Round Rules for the last six years. For the reasons set forth herein, Middletown respectfully requests that it be granted temporary immunity from suit while it engages in the planning work necessary to prepare and adopt a supplemental Housing Element and Fair Share Plan while pursuing the Court’s approval of the same.

## **PROCEDURAL AND FACTUAL HISTORY**

For decades Middletown has demonstrated its commitment to voluntarily complying with the Mount Laurel Doctrine. Despite the size of its population, availability of developable land, public utilities and great access to public transportation, Middletown has received substantive certification in both the First and Third Rounds and has never been the subject of a successful builder's remedy or exclusionary zoning lawsuit.

On March 14, 1994, the Township received Cycle I substantive certification from COAH. See Certification of Anthony P. Mercantante, PP, AICP at ¶ 13 (hereinafter "Mercantante Cert."). On March 13, 2000, the Township timely petitioned COAH for substantive certification for its Cycle I and II obligations. See Mercantante Cert. at ¶ 14. Despite COAH's inability to act on Middletown's Cycle II plan, Middletown continued to implement it, resulting in the development of a number of inclusionary projects. See Mercantante Cert. at ¶ 15. On December 20, 2005, the Township first petitioned for Cycle III substantive certification based upon the original version of COAH's Third Round Rules that were invalidated in large part by the Appellate Division in the case of In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1 (App. Div.) certif. denied 192 N.J. 72 (2007). See Exhibit A. Even though COAH was not able to act on Middletown's first Third Round plan before the Appellate Division invalidated its original set of Third Round Rules, Middletown continued to implement it through rezoning and various approvals that resulted in the development of a number of significant inclusionary developments. See Mercantante Cert. at ¶ 17.

To quickly comply with the first set of revised Third Round Rules adopted in October 2008, on December 31, 2008, the Township filed for substantive certification under COAH's revised Cycle III regulations. See Exhibit B. Even prior to receiving substantive certification, the Township began implementing its plan through the adoption of a series of ordinances and resolutions creating inclusionary sites throughout town while authorizing the conveyance of numerous properties and the entry of numerous developer's agreements for the development of affordable housing.

On June 15, 2009, the Township adopted Ordinance No. 2009-2969 authorizing the acquisition and conveyance of the Coe Property with various parties, including Impact Oasis, to provide eight (8) affordable supportive housing beds for autistic youth, and the later dedication of \$40,000 in affordable housing trust funds to bring the structure to code for such purposes. See Exhibit C. On July 20, 2009, the Township adopted Ordinance No. 2009-2979, rezoning highly developable properties commonly known as the Meadowview, Mountain Hill and Four Ponds sites, specifically to facilitate inclusionary development. See Exhibit D. On September 8, 2009, implementing Ordinance No. 2009-2979, the Township adopted Resolution No. 09-219, authorizing the execution of a Developer's Agreement that was entered with Mountain Hill LLC to provide for the development of eighty (80) low and moderate income family rental units, with at least fifty percent (50%) of the units being reserved as low income rentals. See Exhibit E.

On September 29, 2009, COAH staff issued its Compliance Report, which in addition to recommending the Township receive substantive certification, concluded that the Township's 2008 Cycle III plan created a surplus of 105 credits. See Exhibit F. On

October 14, 2009, Middletown became just one of 68 municipalities in the State to be granted full substantive certification by COAH with its adoption of Resolution No. 42-09. See Exhibit G.

Immediately after receipt of substantive certification, Middletown continued to expeditiously implement its housing plan. On November 16, 2009, the Township adopted Ordinance No. 2009-2991 conveying property for the development of affordable housing to Housing and United Services (“HUS”), and authorized and entered a Developer’s Agreement with HUS for the development of eight (8) supportive housing beds in two separate homes. See Exhibit H. On November 16, 2009, the Township adopted Ordinance No. 2009-2992 further rezoning various properties throughout the Township, commonly known as the Laurel Avenue, Steiner, Atlantic Pier, and Taylor’s Lane sites specifically for the purpose of facilitating inclusionary development, as well as establishing a Residential Over Commercial program. See Exhibit I. On November 16, 2009, the Township adopted Ordinance No. 2009-2994 establishing necessary rules for the administration of the Township’s wide variety of affordable housing programs. See Exhibit J.

After rezoning properties to enhance inclusionary opportunities, a number of projects came to fruition with the approval of site plans including for the provision of a significant volume and variety of affordable housing. On March 3, 2010, the Township’s Planning Board approved the application of Meadowview LLC for the development of thirty eight (38) condominiums, including nine (9) affordable units for low to moderate income households, plus a payment to the Township’s affordable housing trust fund for a twenty five percent (25%) affordable set-aside. See Exhibit K. On January 22, 2013, the

Township adopted Ordinance No. 2013-3077 conveying property on Unity Road and authorizing the entry of a Developer's Agreement for the development of four (4) affordable supportive housing beds as part of the Township's Scattered Sites program with HUS. See Exhibit L. On May 7, 2014, the Township's Planning Board approved the application of the Atlantic Pier Company, Inc. for the development of forty (40) units, including ten (10) affordable family rental units for a twenty five (25%) affordable set-aside. See Exhibit M.

On December 3, 2014, the Township's Planning Board approved the application of Bayshore Village LLC for the development of one hundred and ten (110) one hundred percent (100%) affordable senior rental units to replace ninety six (96) units not previously credited or deed restricted by COAH that were substantially destroyed in Superstorm Sandy. See Exhibit N. Notably, Bayshore Village is an entirely new inclusionary site not included in any prior Township housing plan, which adds one hundred and ten (110) units to the Township's one hundred and five (105) credit surplus as determined by COAH in 2009 for Cycle III compliance.

On March 4, 2015, the Township's Planning Board approved the application of American Properties at Middletown LLC, which was a significant inclusionary site in the Township's certified Cycle III plan, for the development of one hundred ninety five (195) townhomes, plus forty nine (49) affordable for sale units. See Exhibit O. On March 4, 2015, the Township's Planning Board also approved the application of 190 Main Street LLC for the development of two (2) affordable rentals over commercial as part of a mixed use building. See Exhibit P. On July 1, 2015, the Township's Planning Board approved a General Development Plan ("GDP") for Village 35, LP and Toll Brothers as

contract purchasers of the Mountain Hill site contained as a significant inclusionary site in the Township's certified Cycle III plan to include up to three hundred and fifty (350) residential units, including seventy (70) affordable rental units. See Exhibit Q.

Clearly, for the last six years Middletown, developers and numerous non-profit organizations providing supportive housing throughout the community have relied upon Middletown's substantively certified housing plan. Properties have been conveyed, developed and millions of dollars expended in reliance upon Middletown's substantively certified plan, which has gone without challenge to the plan itself or the ordinances implementing it. Due to the efforts of the Township to fully comply with the Mount Laurel Doctrine, since 2008 alone, at least two hundred and ten (210) new affordable housing units have been issued certificates of occupancy, representing thirty one percent (31%) of the six hundred and twenty four (624) total residential units issued certificates of occupancy through February 2015. See Mercantante Cert. at ¶ 36.

Accordingly, Middletown is clearly entitled to continuing immunity against constitutional compliance, exclusionary zoning or builder's remedy litigation while Middletown engages its planners to develop supplemental plans conforming with the recent guidance provided by the Supreme Court for the Court's review and approval.



## LEGAL ARGUMENT

### **MIDDLETOWN IS ENTITLED TO TEMPORARY IMMUNITY WHILE IT DEVELOPS A SUPPLEMENTAL HOUSING ELEMENT AND FAIR SHARE PLAN AND SEEKS THE COURT'S APPROVAL OF THE SAME**

In its March 10, 2015 decision, the Supreme Court noted that the "Mount Laurel series of cases recognized that the power to zone carries a constitutional obligation to do so in a manner that creates a realistic opportunity for producing a fair share of the regional present and prospective need for low and moderate income families." In Re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 10-11 (2015). This recital of the long established Mount Laurel Doctrine, along with the Fair Housing Act, N.J.S.A. 52:27D-301 et. seq. ("FHA"), govern how requests by municipalities seeking to address their affordable housing obligations through the courts should be treated.

In its recent decision, the Supreme Court specified that "the judicial processes authorized herein reflect as closely as possible the FHA's processes and provide the means for a town's transition from COAH's jurisdiction to judicial actions to demonstrate that its housing plan satisfies Mount Laurel obligations." In Re N.J.A.C. 5:96 and 5:97, 221 N.J. at 15. This determination follows prior Supreme Court precedent from immediately after the adoption of the FHA whereby the Court held that when municipalities elect to address their obligations in the courts rather than through COAH, trial judges should still follow COAH's "decisions, criteria and guidelines" "wherever possible." Hills Dev. Co. v. Tp. of Bernards, 103 N.J. 1, 63 (1986). The Supreme Court added that "evaluation of a town's plan that had received substantive certification . . . may result in the town's receipt of the judicial equivalent of substantive certification and accompanying protection as provided under the FHA. In Re N.J.A.C. 5:96 and 5:97, 221

N.J. at 14-15. Further, the Court took notice that the FHA “rewards compliance . . . for a town whose fair share housing plan secures substantive certification from COAH, by providing a period during which the municipality’s implementing ordinances enjoy a presumption of validity in any ensuing exclusionary zoning litigation.” Id. at 12.

Accordingly, the Supreme Court determined that:

it bears emphasizing that the process established is not intended to punish the towns represented before this Court, or those that are not represented but which are also in a position of unfortunate uncertainty due to COAH’s failure to maintain the viability of the administrative remedy. Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes, where appropriate, that are similar to those which would have been available through COAH for the achievement of substantive certification.

[Id. at 42-43].

With these principles in mind, the Supreme Court established a process to guide municipalities now required to “subject themselves to judicial review for constitutional compliance, as was the case before the FHA was enacted.” Id. at 36. The Supreme Court required that municipalities having received substantive certification that have “ordinances adopted . . . in furtherance of an approved housing element, must be evaluated to determine if they provide for a realistic opportunity for the municipality to achieve its ‘fair share of the present and prospective regional need for low and moderate income housing.’” Id. at 45 (citing Mount Laurel I and II).

The Court recognized that in order to accomplish this task “supplementation of a plan may be necessary” while noting that “[i]mplemented ordinances should not be lightly disturbed.” Id. at 45-46. The Supreme Court held that the “previous methodologies employed in the First and Second Round Rules should be used to establish present and prospective statewide and regional affordable housing need.” Id. at 53. Therefore, plans

predicated on COAH's 2008 Third Round Rules utilizing the "growth share" approach must be supplemented to comply with the Court's holding, which takes time that the Supreme Court allows trial courts to account for by applying the same standards used under the FHA.

Specifically, pursuant to N.J.S.A. 52:27D-309, a municipality could secure immunity from its mere passage of a "resolution of participation." Further, a municipality could achieve immunity by filing an affordable housing plan with COAH before the institution of an exclusionary zoning lawsuit. N.J.S.A. 52:27D-316. Both of these statutory provisions reflect the Legislature's and the Supreme Court's preference to encourage and facilitate voluntary compliance by offering immunity for the same. The Supreme Court has again sought to follow this principle by providing participating municipalities seeking to obtain a court declaration that their affordable housing plans are presumptively valid "five months in which to submit their supplemental housing element and affordable housing plan." In Re N.J.A.C. 5:96 and 5:97, 221 N.J. at 49-50. The Supreme Court has now held that during this period "the [trial] court may provide initial immunity preventing any exclusionary zoning actions from proceeding." Id.

**1. Middletown Should Be Entitled To Temporary Immunity Due To Its Continuing Voluntary Compliance With The Mount Laurel Doctrine and Fair Housing Act.**

In the instant matter, Middletown was one of a small percentage of municipalities to actually receive substantive certification from COAH in the Third Round.

Middletown's Third Round Housing Element and Fair Share Plan, however, was premised on the rules promulgated by COAH at that time, which relied upon the "growth share" methodology invalidated a second time by the Appellate Division on October 8,

2010. In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462 (App. Div. 2010).

During this time, COAH did not adopt new regulations by which municipalities could be guided. Nevertheless, Middletown continued to voluntarily implement a substantial portion of its certified housing plan while waiting for COAH or the courts to promulgate new rules. Obviously, Middletown could not develop a new housing plan without any standards to be guided by. Middletown, therefore, should not be punished by being exposed to suit due to COAH's inability or unwillingness to act.

For the last six years Middletown, developers and numerous non-profit organizations providing supportive housing throughout the community have relied upon Middletown's substantively certified housing plan. Properties have been rezoned, conveyed, developed and millions of dollars expended in reliance upon Middletown's substantively certified plan, which has remained unchallenged along with the ordinances implementing it. Due to the efforts of the Township to fully comply with the Mount Laurel Doctrine, since 2008 alone, at least two hundred and ten (210) new affordable housing units have been issued certificates of occupancy, representing thirty one percent (31%) of the six hundred and twenty four (624) total residential units issued certificates of occupancy through February 2015. See Mercantante Cert. at ¶ 36. Allowing Middletown to lose its immunity while it revises its housing plans to conform with the Supreme Court's recent directive would greatly prejudice not just the Township, but all of those who have relied upon its continuing efforts to create a realistic opportunity for the development of affordable housing. Any other result would greatly discourage continued voluntary compliance, which the receipt of immunity has incentivized.

**2. Middletown Should Be Entitled To Immunity For A Period of Five Months From the Time At Which Its Fair Share Obligation is Determined By The Court.**

In its recent decision, the Supreme Court indicated that substantively certified or participating municipalities affirmatively seeking a declaration that their housing plans are valid “should have no more than five months in which to submit their supplemental housing element and affordable housing plan.” In Re N.J.A.C. 5:96 and 5:97, 221 N.J. at 49-50. The Court further allowed that during this period “the [trial] court may provide initial immunity preventing any exclusionary zoning actions from proceeding.” Id. The Court, however, failed to identify what triggers the tolling on this five month period of immunity.

It is Middletown’s position that immunity must continue until the Court determines what the municipality’s new Third Round obligation is, at which time the Township should be provided five months to prepare a supplemental housing plan. The practical problem presented is that the Court cannot determine what Middletown’s fair share obligation is without first making a determination as to the regional need. Specifically, the Supreme Court required that municipalities having received substantive certification that have “ordinances adopted . . . in furtherance of an approved housing element, must be evaluated to determine if they provide for a realistic opportunity for the municipality to achieve its *‘fair share of the present and prospective regional need for low and moderate income housing.’*” Id. at 45 (citing Mount Laurel I and II) (emphasis added). Obviously, Middletown cannot prepare, adopt and file a supplemental housing plan until it knows what its obligation is. This is the precise problem that the Township has faced since the Appellate Division’s invalidation of COAH’s revised Third Round Rules in

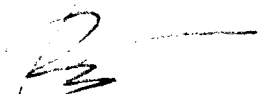
2010. This process may be lengthy and will certainly require the presentation of expert testimony by many parties involved. In sum, Middletown should not be punished by loss of its immunity due to the failure of other parties to act.

**CONCLUSION**

For the foregoing reasons, the motion filed by the Township of Middletown seeking the entry of an order providing it with temporary immunity from suit from the time of the filing of the immediate motion and then for a period of at least five months from the date that the Court issues a final determination as to Middletown's fair share obligation should be granted.

Respectfully submitted,

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Township of Middletown

By:   
\_\_\_\_\_  
Brian M. Nelson

Dated: July 7, 2015