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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.**

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MONMOUTH COUNTY

DOCKET NO.: MON-L-

Civil Case
(Mount Laurel)

**COMPLAINT FOR DECLARATORY
JUDGEMENT PURSUANT TO THE
MOUNT LAUREL DOCTRINE**

Petitioner, the Township of Middletown (“Township” or “Middletown”) by way of complaint for declaratory relief hereby alleges as follows:

Background

1. The Township is a municipal corporation organized under the laws of the State of New Jersey, with its principal offices being located at 1 Kings Highway, Middletown, New Jersey 07748, located in the East Central Housing Region (Region 4) as established by the Council on Affordable Housing (“COAH”).

2. The Township Committee is the governing body of the Township and is responsible, *inter alia*, to ensure that Middletown takes the actions necessary to achieve and maintain compliance with its obligations under the Mount Laurel Doctrine and the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 et seq. (“FHA”).

3. The Planning Board of the Township is the municipal agency responsible under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et. seq., (“MLUL”), for

formulating the Housing Element of the Township's Master Plan in a manner that complies with the Township's obligations under the Mount Laurel Doctrine.

The Mount Laurel Doctrine and the Fair Housing Act

4. Since 1975, the Supreme Court has prohibited the discriminatory use of municipal zoning powers while mandating that each municipality "must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income." So. Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 67 N.J. 151, 179 (1975), cert. denied, 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed.2d 28(1975) ("Mount Laurel I").

5. In 1983, the Supreme Court reaffirmed the constitutional obligation of municipalities in that they must provide "a realistic opportunity for the construction of [their] fair share of present and prospective regional need for low and moderate income housing." So. Burlington County N.A.A.C.P. v. TR. of Mount Laurel, 92 N.J. 158, 205 (1983) ("Mount Laurel II").

6. Collectively, the Mount Laurel I and Mount Laurel II cases establish what is commonly referred to as the Supreme Court's "Mount Laurel Doctrine."

7. In response to a tsunami of Builder's Remedy litigation, in 1985, the Legislature codified the Mount Laurel Doctrine through its adoption of the FHA and establishment of COAH as the entity charged with the primary responsibility for the implementation and administration of the FHA.

8. Upon its formation, COAH adopted rules set forth under N.J.A.C. 5:92-1.1 to 18.20 governing affordable housing for the compliance period extending from 1987 through 1993 (“First Round”).

9. Thereafter, COAH adopted rules set forth under N.J.A.C. 5:93-1.1 to 15.1 governing the compliance period covering 1987 through 1999. (“Second Round”).

Third Round COAH Rules

10. On December 20, 2004, COAH rules set forth under N.J.A.C. 5:94 and 5:95 governing the compliance period covering 1999 through 2014 became effective utilizing a new approach known as the “growth share” methodology that linked affordable housing obligations with actual metrics of municipal development and growth. (“Third Round”).

11. On January 25, 2007, the Appellate Division invalidated the principle provisions of the 2004 version of COAH’s Third Round Rules, resulting in COAH’s adoption of its first set of revised Third Round Rules that became effective in October 2008, establishing a December 31, 2008 deadline for municipalities to submit plans to address their Third Round obligations.

12. On October 8, 2010, the Appellate Division invalidated the principal provisions of the 2008 version of COAH’s Third Round Rules and ordered COAH to formulate new rules within five (5) months, which was stayed and extended by the Supreme Court while accepting a number of petitions for certification on the matter.

13. On March 14, 2014, the Supreme Court ordered COAH to adopt new Third Round Rules in time for publication in the November 17, 2014 New Jersey Register.

14. To assist in adopting new rules to conform with the Supreme Court's order, the State retained experts from Rutgers University, specifically, Robert W. Burchell, Ph.D., a professor with the Rutgers University Center for Urban Policy Research at the Edward J. Bloustein School of Planning and Public Policy who previously helped develop COAH's First and Second Round methodologies for determining affordable housing obligations throughout the state.

15. Dr. Burchell again utilized his expertise to assist COAH in complying with Section 307 of the FHA to calculate the present and prospective regional need for affordable housing, and to allocate these regional needs to all municipalities in the state.

16. In addition to Dr. Burchell, COAH's experts also included William Dolfin, M.A. and Jinwoo Kwon, M.R.P..

17. This team of experts developed and filed the technical appendices included in COAH's 2014 rule proposals, published in the New Jersey Register on June 2, 2014. See 46 N.J.R. 949-1051.

18. On October 20, 2014, however, COAH deadlocked 3-3, failing to adopt new Third Round Rules pursuant to the Supreme Court's deadline; accordingly, it was never determined whether the 2014 version of COAH's Third Round Rules and Dr. Burchell's methodology were acceptable as a matter of substantive law.

19. COAH's continued failure to act led to the Supreme Court's March 10, 2015 decision In Re N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015) dissolving the FHA's exhaustion of administrative remedies process that returned determinations relating to compliance with the Mount Laurel Doctrine to the courts.

Middletown's Efforts To Provide Affordable Housing

20. Middletown received substantive certification under COAH's First Round Rules, continued to voluntarily participate during the Second Round, and was one of only 68 municipalities to receive substantive certification in the Third Round with a 105-unit surplus of credits as determined by COAH staff under the 2008 version of COAH's Third Round Rules.

21. In 2009, Middletown fully adopted and implemented all zoning and affordable housing ordinances required of it under its certified Third Round Housing Plan.

22. In six years since receiving substantive certification, no developer has challenged the Township's certified Housing Plan or implementing ordinances.

23. Since 2009, the Township has entered numerous Development Agreements with affordable developers in reliance upon the Township's certified Housing Plan and implementing ordinances.

24. During this period, numerous developers, non-profit organizations and the Township have spent millions of dollars acting in reliance of the Township's certified Housing Plan and implementing ordinances.

25. Since 2009, the Township's Planning Board has acted in reliance upon the Township's certified Housing Plan and implementing ordinances in making numerous decisions approving site plan applications.

26. All but for one site specifically identified in the Township's certified Housing Plan has already been approved for development, with one significant addition already having been added.

27. Since 2009, no sites specified in the Township's certified Housing Plan have been denied approvals.

28. Many of these approved sites have already been developed or are currently undergoing construction.

29. Since 2008, 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.

30. Middletown has clearly complied with the Mount Laurel Doctrine by not only creating a realistic opportunity for the development of affordable housing, but by actually securing its development throughout the Township at a rate greater than is required by law.

COUNT I

Temporary Immunity Should Be Granted

31. Middletown repeats and incorporates herein the allegations set forth in all preceding paragraphs as if fully set forth herein.

32. The process now developed by the Supreme Court is intended to track the process established under the FHA "as closely as possible." In Re N.J.A.C. 5:96 and 5:97 at 15.

33. The Supreme Court specifically noted 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.

34. Middletown was one of only 68 municipalities to receive substantive certification from COAH in 2009.

35. Having been awarded substantive certification and not being the subject of any suit for violation of its obligations to provide affordable housing, in accordance with N.J.S.A. 52:27D-309, Middletown should be summarily entitled to temporary immunity for a period of at least five (5) months so that it may prepare, update, revise and submit to the Court a supplemental Housing Element & Fair Share Plan along with any ordinance amendments that may be necessary as the methodology acceptable for calculating Third Round affordable housing obligations is still unclear.

WHEREFORE, the Petitioner, Township of Middletown, hereby demands judgment granting the following relief ordering that:

a. Middletown, as having received substantive certification, is entitled to continued immunity under the FHA and the Supreme Court's decision In Re N.J.A.C. 5:96 and 5:97.

b. Middletown is entitled to the entry of an order providing it with temporary immunity against constitutional compliance, exclusionary zoning or builder's remedy litigation for a period of at least five (5) months so that it may prepare, update, revise and submit to the Court a supplemental Housing Element & Fair Share Plan along with any necessary implementing ordinances.

c. The grant of such other relief as may be just and equitable.

COUNT II

Declaratory Judgment of Compliance for Judgment of Repose

36. Middletown repeats and incorporates herein the allegations set forth in all preceding paragraphs as if fully set forth herein.

37. Upon submission of its updated Housing Element & Fair Share Plan along with any necessary implementing ordinances as contemplated by the Supreme Court's recent decision, Middletown requests that the Court conduct an individualized assessment of its Housing Plan and determine and declare that Middletown's plan is in conformance with the Mount Laurel Doctrine and issue a Judgment of Repose protecting Middletown from builder's remedy lawsuits for a period of ten (10) years as provided under the FHA.

WHEREFORE, the Petitioner, Township of Middletown, demands a declaratory judgment that:

- a. Approves Middletown's Housing Element & Fair Share Plan as being in compliance with the Mount Laurel Doctrine and FHA and issuing a Judgment of Repose for a period of ten (10) years.
- b. The grant of such other relief as may be just and equitable.

COUNT III

Declaratory Judgment and Trust Fund Injunction

38. Middletown repeats and incorporates herein the allegations set forth in all preceding paragraphs as if fully set forth herein.

39. Subject to certain conditions, the FHA expressly permits municipalities to collect fees from residential developers and requires municipalities to collect development fees from non-residential developers. See N.J.S.A. 52:27D-329.2.

40. Upon collection, municipalities must deposit all relevant fees into an Affordable Housing Trust Fund.

41. Municipalities cannot expend these funds without securing approval from COAH, which has “exclusive jurisdiction” pursuant to Section 3292 of the FHA.

42. COAH has approved the Township’s Spending Plan in the past upon its receipt of substantive certification in 2009.

43. Since COAH is no longer a functioning agency, the Appellate Division ruled that COAH violated its statutory duty to adopt regulations providing guidance to municipalities on the “commit to expend” requirement set forth in N.J.S.A. 52:27D-329.2. *In re Council on Affordable Hous. to Adopt Trust Fund Commitment Regulations*, 440 N.J. Super. 220 (App. Div. 2015) (“*In re Affordable Housing Trust Funds*”).

44. Since that ruling, COAH has also declined to approve Spending Plans, leaving that task to trial judges who will determine the viability of whatever affordable housing plan evolves out of the judicial process.

45. While updating its Housing Plan, the Township intends to submit a duly updated spending plan for the Court to consider for review and approval so that it can continue to expend funds to facilitate implementation of the Township’s Housing Plan.

46. As to the commit to expend requirement previously referenced, the FHA also requires affordable housing trust funds to be expended or committed to expend within four (4) years of collection. N.J.S.A. 52:27D-329.2.

47. Relative to this provision, however, the Legislature directed COAH to promulgate regulations to define when trust funds are properly “committed.” Ibid.

48. COAH failed to promulgate such mandatory regulatory guidelines.

49. In In re Affordable Housing Trust Funds, the Appellate Division ruled that COAH violated its statutory duty to adopt regulations providing guidance to municipalities on the “commit to expend” issue.

50. The Appellate Division also enjoined the state from seizing any trust funds, unless “an appropriate body of the State” files applications with the courts in cases where the municipality, “under any rational interpretation of the relevant statutory terms, failed to commit funds.” Id. at 228 n. 10.

51. Consistent with the Supreme Court’s recent ruling, the Appellate Division held: “The use and disposition of those funds will hereafter be decided, in the first instance, by Mount Laurel-designated trial judges.” Ibid.

52. In light of the relevant statutory provisions and the conclusions recently rendered by the Appellate Division, the Township is seeking: (a) a judicial determination defining when its trust funds are properly “committed;” and (b) a reasonable period of time to permit the Township to demonstrate that none of its collected affordable housing trust funds should be forfeited to the state under the circumstances.

WHEREFORE, the Petitioner, Township of Middletown, hereby demands judgment granting the following relief:

a. The entry of an Order approving the Township’s Spending Plan, in its current form or as amended in the future, and declaring that the Township is free to expend the funds consistent with the programs contemplated in its Spending Plan.

b. The entry of an Order defining the circumstances and proofs needed to demonstrate when affordable housing trust funds are properly committed pursuant to N.J.S.A. 52:27D-329.2.

c. The grant of such other relief as may be just and equitable.

ARCHER & GREINER P.C.
Attorneys for Petitioner
Township of Middletown


By: 
Brian M. Nelson

Dated: July 7, 2015

DESIGNATION OF TRIAL COUNSEL

Brian M. Nelson, Esq., is hereby designated as trial counsel on behalf of the Petitioner, Township of Middletown.

ARCHER & GREINER P.C.
Attorneys for Petitioner
Township of Middletown

By: 
Brian M. Nelson

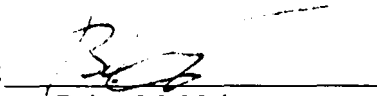
Dated: July 7, 2015

R. 4:5-1 CERTIFICATION

I hereby certify that the within matter is not the subject of any other action pending in any other Court or arbitration process of which the undersigned is aware. I further certify that no other action or arbitration process is contemplated. I further certify that it is not contemplated that any other party should be joined in this action, except for the Planning Board of the Township of Middletown.

ARCHER & GREINER P.C.
Attorneys for Petitioner
Township of Middletown

By: _____


Brian M. Nelson

Dated: July 7, 2015