SUPERIOR COURT OF NEW JERSEY

Thomas C. Miller
Judge Superior Court

Somerset County Courthouse
P.O. Box 3000
Somerville, New Jersey 08876
(908) 203-6092

FAX TRANSMISSION

DATE: October 21, 2015
TO: Steven A. Kunzman, Esq.
FROM: Jill Lynn, Secretary to the Hon. Thomas C. Miller, P.J.Cv.
FAX#: 908-757-8039

Re: In re Borough of Rocky Hill, Docket No. SOM-L-901-15
In re Borough of Watchung, Docket No. SOM-L-902-15
In re Township of Warren, Docket No. SOM-904-15
In re Borough of Frenchtown, Docket No. HNT-309-15

OF PAGES: 21 (including this cover page)

Attached please find Judge Miller's **Preliminary Decision** on the Motion in the above referenced matter returnable October 23, 2015.

I have only provided the attached Preliminary Decision to you as the municipal attorney. I am making it your responsibility to forward same to any intervenor or interested party immediately upon your receipt of same. Each party shall advise with regards to its decision concerning the Preliminary Decision and whether they: (1) accept it; or (2) accept it with objection; or (3) request oral argument.

As a part of this Notice, the Court recognizes that counsel for several objectors have already indicated that they may not be available for oral argument on Friday, October 23, 2015. These attorneys have requested that the Court move oral argument to a non-motion date during the week of October 26, 2015 or thereafter. The Court already has a jury trial scheduled for next week and the week thereafter. As a result, the Court is not able to commit to scheduling an oral argument for any particular date during the week of October 26 or thereafter.

In any event, the Court recognizes that any parties' failure to request oral argument does not constitute a waiver of any disagreement with the Court's decision, especially if that waiver is simply provided in the interest of saving time and resources.

If any party does request oral argument in order to make a record, the Court will entertain the request but on a date to be established when the Court and counsel are available.

FAILURE TO CONTACT CHAMBERS BY 12:00 NOON THURSDAY October 22, 2015, REGARDING THE PRELIMINARY DECISION WILL RESULT IN THIS COURT NOT HEARING ORAL ARGUMENT AND THE MOTION BEING DECIDED ON THE PAPERS.

In the event both parties accept the Preliminary Decision, the Preliminary Decision will become final and shall be set forth in an appropriate order.

CONFIDENTIAL NOTICE

The documents accompanying this facsimile transmission contain information from the Superior Court of New Jersey, Chancery Division, Somerset County, which information is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named in this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this facsimile information is strictly prohibited, and the documents should be returned to the sender immediately. In this regard, if you have received this facsimile transmission in error, please contact the sender immediately by telephone (908) 203-6092 to arrange for the return of the documents. Thank you.

MOTION EXTENDING TIME TO OBTAIN EXPERT REPORT AND ENTRY OF CASE MANAGEMENT ORDER #2

Re: In re Borough of Rocky Hill, Docket No. SOM-L-901-15
In re Borough of Watchung, Docket No. SOM-L-902-15
In re Township of Warren, Docket No. SOM-904-15
In re Borough of Frenchtown, Docket No. HNT-309-15

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The issues before the Court arise from circumstances that have developed as part of the Declaratory Judgment Actions (hereinafter DJs) filed with this Court by the four municipalities listed above in response to the New Jersey Supreme Court's Order of March 10, 2015 enforcing the Court's ruling in the matter known as In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the Council on Affordable Housing, 221 N.J. 1 (2015) (hereinafter "In re COAH").

This Court has been deeply involved in the efforts necessary to make a preliminary assessment of the current status of compliance with each municipalities' constitutional affordable housing obligations. As part of the Court's review, this Court has previously reviewed the Complaints, Certifications, and documentation filed with the Court in this matter. These documents have provided details concerning the status of the determination of the Supplemental Housing Plan Element and Fair Share Plans for each Plaintiff.

With regards to each of the four Plaintiffs that are part of this application, the Court previously found that each of the four Plaintiffs has satisfied the criteria for securing temporary immunity and as such they were each granted immunity from "Exclusionary Lawsuits" for a period of five months with the temporary immunity period to terminate on December 8, 2015.

In recognition of their constitutional obligations, as well as their representation to the Court that they would continue to exercise diligence and good faith in the preparation of their Fair Share Plan, each of the four Plaintiffs entered into a consent order which recognized the grant of temporary immunity from exclusionary zoning suits.

The Court's tight leashed award of temporary immunity required prompt and efficient compliance by the municipalities. The Court's schedule necessitated that the experts that the municipalities had retained perform the necessary tasks expeditiously. Since the municipalities had already retained the key expert who was necessary in order to perform those tasks, the movant municipalities clearly believed that they could perform in accordance with the milestones established in the Order.

The moving papers for the four Plaintiffs contains the Certification of their counsel, Steven A. Kunzman, Esq., which provides much of the specific factual background that forms the basis of their request to extend time to obtain a new expert and extend the period of temporary immunity. The Movants have also referenced the Certification of Jonathan Drill, Esq., counsel for six other pending Mt. Laurel cases within the Court's Vicinage[1]. According to Mr. Drill[2], over 200 municipalities in the state entered into a Municipal Shared Services Defense Agreement (the "MSSDA") with over 200 other municipalities (the form of which was attached as Exhibit A to Plaintiff's counsel's Certification). Mr. Drill certifies that of the dozens of attorneys representing municipalities in the hundreds of Mount Laurel Declaratory Judgment actions pending throughout the state, four of those attorneys have taken a leadership role with respect to the MSSDA, namely, Jeffrey R. Surenian, Jonathan E. Drill, Edward J. Buzak, and Steven Kunzman. (Drill Certification, para. 3) Mr. Surenian is the designated primary attorney to administer the MSSDA and Jonathan Drill is the "backup". (Id. See, paragraphs 3, 4, 7, and 10 of the MSSDA, which was attached as Exhibit A to the Drill Certification)

The primary purpose of the MSSDA was to create a Municipal Group (the "MG") to collectively retain Rutgers, the State University of New Jersey ("Rutgers"), and Robert Burchell, Ph.D. ("Dr. Burchell"), a Rutgers professor, for the purpose of conducting an analysis and preparing a report (the "report") of the affordable housing need for each region of the state and the allocating the regional need to each individual municipality in each region. (Certification, paragraph 4) In fact, as provided in paragraph 3 of the MSSDA, Mr. Surenian signed a Research Study Agreement (the "RSA") with Rutgers on behalf of the MG on July 9, 2015, which was signed by Rutgers and Dr. Burchell on July 13, 2015. (A copy of the RSA was attached as Exhibit B to the Drill Certification)

The purpose of the RSA was to: establish present and prospective statewide and regional affordable housing need and allocating fair share obligations among municipalities in accordance with applicable law, (see paragraph 1 of the RSA); to produce a report for the MG so that its members could use that report in the pending Declaratory Judgment actions and to produce Dr.

[1] In re Township of Alexandria, Docket No. HNT-L-300-15
In re Township of Clinton, Docket No. HNT-L-315-15
In re Borough of Glen Gardner, Docket No. HNT-L-302-15
In re Borough of Milford, Docket No. HNT-303-15
In re Township of Union, Docket No. HNT-305-15
In re Township of Greenwich, Docket No. WRN-L-228-15

[2] And as corroborated by Mr. Kunzman.

Burchell to testify on behalf of individual members of the MG for the purpose of presenting the conclusions of the report (see, paragraph 6 of the RSA). Pursuant to paragraph 6 of the RSA, Dr. Burchell was required to submit the report to the MG by September 30, 2015.

Based on the fact that the four municipalities at issue in this Motion are part of the MG by virtue of entering into the MSSDA, and based on the fact that the RSA provides in paragraph 6 that the Burchell report would be submitted to the MG by September 30, 2015, counsel for the four municipalities (Mr. Kunzman) has effectively represented to the Court that the four municipalities that are subject of this matter would be ready to proceed with a hearing to determine their Fair Share Housing obligation.

On July 28, 2015 Mr. Drill indicates that he learned that Dr. Burchell had suffered a "mini-stroke" on July 27, 2015 while at work. (Drill Certification, para. 10) MG representatives were advised that he would be in the hospital for a few days and that he would then go through rehabilitation at Kessler Institute for three weeks. Id. Mr. Drill indicates that he "was hopeful and [he] believe[d] [his] hope was reasonable based on the reports [he] was getting, that Dr. Burchell would be able to finish the report by the September 30, 2015 contractual deadline and would be able to testify by October 21, 2015." Id.

However, by the beginning of September, 2015, representatives of Dr. Burchell and representatives of Rutgers apparently began indicating that Dr. Burchell would not be able to testify due to the stroke he had suffered[3]. (Drill Certification, para. 11) By letter dated September 11, 2015, Rutgers terminated the RSA on the basis of paragraph 15 of the RSA, sections 1 and 2,

[3] Mr. Kunzman's Certification indicates that he became aware of the severity of Dr. Burchell's disability as early as August 26, 2015. Mr. Kunzman indicates that he met with Dr. Burchell along with Mr. Surenian, Esq. and Edward Buzak, Esq. along with Dr. Burchell's colleague, Dr. David Listokin. He indicates that:

> "[I]t was readily apparent that that Dr. Burchell is not physically or cognitively able to withstand the rigors of depositions and trial testimony. It also appeared that the finalization of the report was in jeopardy due to Dr. Burchell's limitations as well as the inability of the municipalities to present Dr. Burcell to the Court to testify as to the final report. We also learned at the meeting that Dr. Listokin was not involved in the preparation of the report or the underlying analysis, but was solely involved in an administrative capacity after Dr. Burchell fell ill."

Mr. Kunzman also related that:

> "We requested that Rutgers University identify a replacement for Dr. Burchell in accordance with the terms of the agreement between the MSSDA and Rutgers. Rutgers was unable to do so and, therefore, terminated the agreement. In order to avoid any further delay, we immediately commenced efforts to secure an alternative expert."

due to the medical condition of Dr. Burchell. (A copy of the Rutgers termination letter was attached as Exhibit D to the Drill Certification)

On September 10, 2015, the day before Rutgers sent the MG the termination letter, the MG met to discuss what to do in the event that Rutgers terminated the RSA. The MG voted at the September 10th meeting to seek each municipality's authorization to amend the MSSDA to provide for the MG to enter into an agreement with Econsult Solutions, Inc. ("Econsult") for the purpose of establishing present and prospective statewide and regional affordable housing need and allocating fair share obligations among municipalities in accordance with applicable law, and producing a report for the MG so that its members could use that report in the pending Declaratory Judgment actions and producing experts employed by Econsult to testify on behalf of individual members of the MG for the purpose of presenting the conclusions of the report.(Drill Certification, para. 12) While Econsult has been retained by the New Jersey League of Municipalities ("NJLOM") to provide an analysis of Dr. David Kinsey's 2015 calculations of statewide affordable housing obligations which were prepared for the Fair Share Housing Center ("FSHC"), the MG is in the process of retaining Econsult to provide a much broader study and report. Unlike the report done for the NJLOM which identifies and analyzes the methodological issues identified in Dr. Kinsey's report, the report that the MG is in the process of retaining Econsult to perform will determine and allocate municipal housing obligations via Econsult's own independent opinion on the methodology that should be utilized. (Drill Certification, para. 13)

Apparently by September 16, 2015, most (if not all) of the municipalities in the MG would be authorizing amendment of the MSSDA to authorize entry into an agreement with Econsult. In fact, all four of the municipalities that are the Movants in this matter have either authorized the amendment of the MSSDA, or at least have indicated that they will be authorizing the amendment of the MSSDA.

Econsult has advised the MG that it could not produce its report much sooner than the end of the year, December 30, 2015. (Drill Certification, para. 14)

The four Movants indicate that they are in the process of developing a draft HPE & FSP which they intend to submit to the Court even though they do not yet have their proposed "fair share number" at this time. The Movants also note that a municipality that submits a HPE&FSP to COAH is afforded temporary immunity during the review process under the FHA. Elan Associates v. Twp. of Howell, 370 N.J. Super. 475, 481 (App. Div. 2004), *certif. denied*, 182 N.J. Super. 149 (2004).

With that factual background, the six municipalities urge the court to grant the motions to permit them additional time to obtain an expert report from Econsult and for the extension of their temporary immunity for a period that will allow them to accomplish that task "in the interest of justice" and to "avoid manifest injustice".

COURT'S OPINION

A. MOTION REQUEST

In this Motion the Court is faced with the issue as to whether to extend the deadlines established in its earlier Consent Order to permit the four Movants to have additional time to prepare and adopt their "HPE & FSP" in the manner proposed in their Motion. As part of that request, each of the Movants seek to extend time within which it is to provide its expert report and to extend the grant of immunity previously awarded by the Court until March 31, 2016.

The Movants argue that the unexpected and exceptional circumstances that have arisen warrant the relief that is proposed.

The Motion is opposed by the Fair Share Housing Council (FSHC) on the basis that (1) the extension of immunity is not authorized by the New Jersey Supreme Court decision of "*In re COAH*"; and (2) the circumstances also do not warrant the relief requested by the Movants.

The FSHC proposes that the Court adopt a different approach than that offered by the Movants.[4]

The FSHC filed an omnibus response to the Plaintiff's requests in this motion as well as other similar motions field in other cases in Vicinage 13. FSHC opposes the Plaintiff's request and proposed an alternative approach which it claims has been utilized by Judges in four Vicinages.

The FSHC opposes the Plaintiff's requests for three stated reasons:

---

[4] As to Warren Township, Intervenors Chase Partners, Warren, LLC and Chase Partners Warren-2, LLC have also filed a response. Other Intervenor Defendants in other matters filed in Vicinage 13 have joined with the FSHC in their opposition, either in part or in full. The Court has considered the objections filed by other Intervenors in those matters as well as the Court believes that the issue should be addressed uniformly for all affected parties.

It should be noted that several of the municipalities within the Court's Vicinage have argued that there has been no opposition to their specific application so that the Court should consider their particular application as unopposed. The Court notes that each of the municipalities has received copies of the objections filed by the Intervenors in the other actions. In fact, each has responded to those arguments in their own way. In any event, since the Court recognizes that it is equitable to decide these issues uniformly, the Court has considered the submissions of all of the parties to the matters in Vicinage 13 as part of this opinion.

First, these requests simply further the 15 years of delay that the Supreme Court criticized, instructing the trial courts to use aggressive case management and concrete deadlines to end. The municipalities do not acknowledge that there is an alternate approach that trial courts in Mercer, Middlesex, Monmouth and Union Counties have already endorsed, taking into consideration the same facts and circumstances that municipalities rely on here. In all of those counties, Judges are requiring municipalities to submit initial plans within the five months of initial immunity based on a good faith estimate of a fair share number based on the Prior Round methodology – which as detailed further below, municipalities have a considerable amount of information to use in making.

Second, there are substantial reasons to question the diligence of the attorneys who are representing the municipal group. The FSHC indicates that Jeffrey Surenian claims that he and other lawyers decided to dismiss Dr. Burchell as an expert on August 27, 2015. Mr. Surenian and other attorneys have suggested that they have retained alternative consultants, but as of October 9, 2015, more than six weeks after Dr. Burchell was dismissed, according to a response to an Open Public Records Act request filed by the FSHC, the municipal group still has not actually contracted with Econsult. This is an outstanding period of delay in the face of a Supreme Court decision imposing strict deadlines.

Third, the amount of time sought is also unreasonable in the light of the specific findings of the Supreme Court and Appellate Division in the matter that led to these cases. The FSHC contends that if the municipalities' new consultants are genuinely complying with the Supreme Court decision, they should have already been able to produce fair share numbers given that they have already been working on the process for over three months; if what they seek is instead more time to come up with novel methodology inconsistent with the Supreme Court's directives, that is not a basis for this Court to provide more time.

B. FACTUAL BACKGROUND

The Court makes factual findings that are generally contained within the previous submission made by the four moving municipalities as well as findings made by Nelson C. Johnson, JSC, the designated Mt. Laurel Judge in Atlantic and Cape May Counties that are applicable to the cases and the issue before the Court.

FINDINGS OF FACT

1. Each of the Plaintiff municipalities have adopted a Resolution of Participation and filed their pleadings with the Court in a timely fashion, consistent with the mandates of the Order and Decision in *In re COAH*, and in an apparent

good faith effort to go forward toward compliance with their constitutional affordable housing obligations.

2. Most of the Plaintiff municipalities – to varying degrees and at various times – went to considerable expense and effort in submitting a filing of their updated municipal planning documents with COAH, to wit, a Housing Element and Fair Share Plan, only to have their efforts frustrated and their municipal resources dissipated as a consequence of COAH's failure to act on their submissions.

3. As discussed hereinafter, there is presently an inability to calculate the "fair share", to wit, the number of affordable housing units necessary for each municipality, nor can this Court readily discern what criteria and guidelines to apply regarding the measures to be taken by the municipalities of Atlantic and Cape May Counties in satisfying their constitutional affordable housing obligations.

4. In reviewing the various submissions of the parties, it is apparent that there is a significant dispute in the "fair share" calculations advanced by the competing interests in this litigation. Proceeding to a plenary hearing on any of the Plaintiff's constitutional affordable housing obligations in advance of the demonstration of rational and reasonable criteria for calculating the affordable housing needs of the Plaintiffs will yield nothing but frustration.

5. Robert W. Burchell, PhD, a professor with Rutgers University, was the individual who prepared the analysis upon which COAH based the third iteration of the "Round 3" regulations for the present and prospective regional need for affordable housing; they were proposed, but never adopted by COAH.

6. David N. Kinsey, PhD, a professor with Princeton University was the individual who prepared the analysis for the Fair Share Housing Council (FSHC) and the New Jersey Builders' Association (NJBA).

7. The divergence in the opinions of Dr. Burchell and Dr. Kinsey as to the need for affordable housing in New Jersey and in the various regions is a formidable obstacle to an expeditious resolution of the fifty eight DJs pending before this Court in Hunterdon, Somerset and Warren Counties.

8. Complicating things further, the Court is now advised by legal counsel that Dr. Burchell suffered a stroke on July 27, 2015. It was reported to the Court that Dr. Burchell's illness is debilitating to such an extent that he will not be able to participate in these proceedings.

9. Given Dr. Burchell's illness, the Court must recognize the reality that there will be a delay in the finalization of a rational and reasonable criteria for calculating the constitutional affordable housing needs of the Plaintiffs. Despite this Court's diligent inquiries, it has yet to finalize arrangements for the appointment of a Fair Share Analyst, but is hopeful that it will occur soon.

C. LEGAL ANALYSIS

"[C]ourts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full utilization of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of as their paramount objective." Allegro v. Afton Village Corp., 9 N.J. 156, 161 (N.J. 1952) (citing Pepe v. Urban, 11 N.J. Super. 385 (App. Div. 1951). As the Appellate Division explained: "Our ultimate goal is not, and should not, be swift disposition of cases at the expense of fairness and justice. Rather, our ultimate goal is the fair resolution of controversies and disputes." R.H. Lytle Co. v. Swing-Rite Door Co., Inc., 287 N.J. Super. 510, 513 (App. Div. 1996).

It has long been the rule in New Jersey that where an expert on whom a party has relied becomes unavailable due to a medical condition, a reasonable time must be accorded to that party to retain a new expert and furnish a new report. Nadel v. Bergamo, 160 N.J. Super. 213 (App. Div. 1978).

As the Appellate Division explained in Leitner v. Toms River Regional Schools, when it was describing the then recently adopted "Best Practices" amendments to the Court Rules, the rules "are not inflexible, unbending dictates, but vest significant discretion with the trial courts to determine on a case-by-case basis if a discovery period should be extended and, if so, what deadlines and conditions should be set," 392 N.J. Super. 80, 90 (App. Div. 2007) (reversing the trial judge's order denying an extension of discovery in the absence of a fixed arbitration or trial date on appeal in a discrimination suit against a school district). Furthermore, the Leitner Court found that "a trial judge's approach to an application to extend discovery for the purpose of submitting a late expert report should not be materially different from the pre-'Best Practice" approach." The long established prior rule pertaining to situations where an expert on whom a party will rely becomes unavailable is that the trial courts must accord a reasonable time to that party to retain a new expert and furnish a report. Nadel v. Bergamo, 160 N.J. Super. 213, 217-219 (App. Div. 1978). As explained in Pressler & Verniero, *New Jersey Court Rules* (Gann 2015), Comment 1.1 to R. 4:17-7, the "interest of justice standard continues fully viable under Best Practices" and, therefore, "the death or other unavoidable or unanticipated unavailability of the expert whose report and testimony are relied on will continue to constitute an exceptional circumstance warranting relief."

Certainly the reasoning that applies in cases where "Best Practices" amendments to the Court Rules are construed is also applicable to the circumstances presented in this case. For

instance, the Court may, pursuant to Rule 4:24-1(c), enter an order extending discovery for a stated period for good cause shown, and specifying the date by which discovery shall be completed. The extension order must describe the discovery to be engaged in and such other terms and conditions as may be appropriate. If there has not yet been notice of an arbitration or trial date, an extension of the discovery end date will be granted if "good cause" is shown. The Order extending discovery must specify the date by which discovery shall be completed as well as the nature of the additional discovery and any other appropriate terms and conditions.

If, on the other hand, an arbitration or trial date has been set, an extension of the discovery period will be granted only upon the movant's showing of "exceptional circumstances." The court in O'Donnell v. Ahmed, 363 N.J. Super. 44, 51-52 (Law Div. 2003), held that "exceptional circumstances" are defined as legitimate problems beyond mere attorney negligence, inadvertence or the pressure of a busy schedule. The O'Donnell Court articulated an instructive list of extraordinary circumstances, including a personal sudden health problem of counsel, death of a family member, death or health problems of a client, and the death or health problems of a key witness. Id. Certainly, the health problems of the municipalities' key expert, Dr. Burchell, is analogous to the instructive examples of extraordinary circumstances provided by the O'Donnell Court.

"In order to extend discovery based upon 'exceptional circumstances,' the moving party must satisfy four inquiries: (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time." Rivers v. LSC Partnership, 378 N.J. Super. 68, 79 (App. Div. 2005) (internal citation omitted).

In this case, a trial date for the plenary hearing to determine the present and prospective statutory affordable housing need and the present and prospective need for each municipality has been contemplated but not specifically set by the Court. However, the circumstances presented by the municipalities in the circumstances presented to the Court still meet the stricter exceptional circumstances standard.

For instance, the Appellate Division, in Rivers v. LSC Partnership, found that "[t]he Best Practices 'exceptional circumstances' requirement warranting an extension of discovery will not excuse the [plaintiff's] late request to secure expert reports . . . where her counsel failed to exercise

due diligence during the extended discovery period." 378 N.J. Super. 68, 82 (App.Div. 2005). In that case, the plaintiff had already been given a total of 500 days of discovery; however, the plaintiff never even attempted to obtain an expert before the end of the discovery period. This is not the case here. Id. at 81. The municipalities had obtained an expert, Dr. Burchell, and if it not had been for his unfortunate stroke, they would not have been forced to obtain an alternate, nor request for an extension from the Court. In this case, Counsel has exercised due diligence within the prescribed time-frame and promptly contracted with Econsult to replace the void that was unfortunately caued when Dr. Burchell suffered a stroke.

Likewise, in Huszar v. Greate Bay Hotel & Casino, Inc., the Appellate Division found that where the "delay rests squarely on plaintiff's counsel's failure to retain an expert and pursue discovery in a timely manner," there are no exceptional circumstances to warrant an extension. 375 N.J. Super. 463, 473-74 (App. Div. 2005). However, in that case, the plaintiff's counsel gave no excuse for needing the discovery extension other than that the defendant's had failed to provide them with correct information concerning the elevator that allegedly injured the plaintiff. Id. at 473. The Huszar Court indicated that the plaintiff did not even discover the error until after the 300 day discovery period had already passed, and notably, the plaintiff also failed to retain an expert during that period. In this case, the facts before the Court demonstrate the municipalities have been diligent in retaining their alternate expertise in the face of unanticipated and exceptional circumstances. They have pursued their responsibilities in a timely manner, and if it wasn't for Dr. Burchell's stroke, they would likely not be requesting the Court for this extension.

On the other hand, in Garden Howe Urban Renewal Assocs. v. HACBM Architects Eng'rs Planners, LLC, the Appellate Division found that "the trial court mistakenly exercised its discretion by refusing to extend the time for discovery" to allow plaintiff to obtain a new expert report after the judge barred substantially all of the plaintiff's initial expert report. Garden Howe Urban Renewal Assocs. v. HACBM Architects Eng'rs Planners, LLC, 439 N.J. Super. 446, 459-461 (App. Div. 2015). In that case, the discovery end date was adjourned several times and the court scheduled the matter for trial; however, the Appellate Division still found that there were exceptional circumstances to warrant the extension of discovery where the plaintiff's initial expert report was barred on the "eve of trial." Id. Similarly, here, not allowing the municipalities an extension for their new expert to complete his report would be contrary to reason as well as being unjustly prejudicial to the municipalities.

Moreover, it has long been the law that a "pretrial order may be modified at any time to prevent manifest injustice." Wilkins v. Hudson County Jail, 217 N.J. Super. 39, 44 (App. Div. 1987), *certif. denied*, 109 N.J. 520 (1987) (finding that the trial judge was not absolutely bound by the terms of the pretrial order).

The process that was established by the Supreme Court in Mt. Laurel cases is not intended to punish the Towns represented before this Court. The solution to the problem should contemplate that the ultimate goal is to fairly establish the affordable housing obligations of each of the municipalities and then to establish a mechanism whereby that laudable goal can be reached. In so doing, this Court should strive to reject legal strategy and posturing that detracts from the Court's ultimate mission. This Court finds that the approach adopted by Judge Nelson C. Johnson in Atlantic-Cape May is the sensible solution to the problem. As Judge Johnson indicated:

> COAH created the mess we are all in and it's all our task to deal with it responsibly. This Court's instinct is to err on the side of preserving precious municipal resources and to avoid unnecessary confrontations and redos upon remands to the trial court. The FSHC will be granted ample opportunity to be heard on the constitutional affordable housing obligations in Atlantic and Cape May Counties in an efficient, cost effective and reasonable manner. ...
>
> ...
>
> E. When reading the above provisions of the FHA with the language of our Supreme Court, it is readily apparent that trial courts are obligated to continue enforcing the public policy provided for by the FHA. Because there are no current "criteria and guidelines" adopted by COAH, this Court must proceed with the necessary inquiries for ascertaining rational and reasonable criteria for calculating the constitutional affordable housing needs of Atlantic and Cape May Counties. Absent a basis for calculating "fair share numbers", the Plaintiff municipalities do not have a target at which to aim in preparing their Housing Element and Fair Share Plan.
>
> F. Plaintiffs share no responsibility for COAH's abject failure to fulfill its responsibility to adopt regulations in a timely fashion as mandated by the FHA. This Court will not punish the Plaintiff municipalities for COAH's failure to enforce the FHA and its own regulations.
>
> G. Stripping the Plaintiff municipalities of immunity from Builder's Remedy litigation at this juncture in time will foster unnecessary litigation and will on serve to delay constitutional compliance. New Jersey law and common sense dictate the five month period of repose must be reviewed periodically to ensure that the Plaintiffs are working with rational and reasonable criteria in calculating their affordable housing needs.

Unless the Court grants the relief requested by the Movants, a manifest injustice will result in that the municipalities will be unable to retain the services of an expert to offer an approach to fair share methodology in opposition to the Kinsey approach which is being advocated by FSHC and many other intervenors that are before this Court. Having the merits of this issue determined on such a one-sided basis, even if that resolution is only temporary, does not serve to meet the goals of the Court's mission.

The Mt. Laurel IV decision was clear that "the process established is not intended to punish" municipalities "due to COAH's failure to maintain the viability of the administrative remedy." Mt. Laurel IV, 221 N.J. at 23. The Court stressed that the "judicial processes" authorized in its decision should "reflect as closely as possible the FHA's processes" and that the goal was to allow municipalities to demonstrate their Mount Laurel constitutional compliance through "processes . . . that are similar to those which would have been available through COAH for the achievement of substantive certification" and that the "process . . . is one that seeks to track the processes provided for in the FHA." Id. at 6, 23, 29.

The Supreme Court specifically referenced section 316 of the FHA, allowing towns five months to submit their Housing Plan Element and Fair Share Plan during which initial immunity should be provided. Id. at 27-28. Section 316 of the FHA provides that the period of submission of a Housing Plan Element and Fair Share Element should be "within five months from the date of transfer, or promulgation of criteria and guidelines by [COAH] . . . **whichever occurs later**." (emphasis added). The criteria and guidelines by governing the fair share numbers are yet to be established in this matter, and the five-month date should run from when they are so established.

Considering the Court's specific reference to Section 316 of the FHA in Mt. Laurel IV, it is clear that municipalities should first be provided the benefit of being able to present an expert to the court and have the court endorse certain criteria and guidelines by which the municipality can craft its final Housing Plan Element and Fair Share Plan prior to immunity beginning to run. The Court recognizes that the determination of the "fair share" number is one of the "most troublesome" issues in the Mt. Laurel litigation. "It takes the most time, produces the greatest variety of opinions and engenders doubt as to the meaning and wisdom of Mt. Laurel". Mt. Laurel II, 92 N.J. at 248.

It is not unfair to characterize the municipalities' position with regards to the methodology offered by Dr. Kinsey as being that the Kinsey methodology is "deeply flawed". The municipalities argue that the Kinsey report is "fundamentally flawed" because it erroneously assumes that the

Supreme Court required Prospective Need Calculations to be based on a formula "identical" to COAH's prior round methodologies. They claim that such a presumption was never contemplated or required by the Mt. Laurel Courts. The municipalities argue instead that the Courts only have required the approach to be merely "similar to" the approach taken by COAH in the first and second rounds. In fact, they claim that to utilize a methodology exactly the same as the prior rounds would not be practical because the methodologies in the prior rounds differ.

The Court is not charged with making a decision concerning the municipalities' position in this Motion. The Court is mindful, however, that an approach should be adopted that will permit the parties to establish a complete record and for the Court to conduct a full analysis. The relief sought by the municipalities facilitates those purposes.

In fact, to do otherwise, especially at a time when the Movants have lost their expert to a debilitating stroke, could be lead to total disorder and an explosion of builder's remedy and exclusionary zoning litigation, the waste of valuable resources which would otherwise be put towards the provision of affordable housing.

Certain intervenors have argued that granting the extension sought will delay the production of affordable housing that will, itself, constitute a "manifest injustice." The Supreme Court rejected such an argument when it decided Hills Dev. Co. v. Bernards Tp., 103 N.J. 1 (1986) (sometimes referred to as Mount Laurel III). The Court held that a delay in producing affordable housing does not constitute "manifest injustice;" only a circumstance that would render the production of affordable housing "practically impossible" would constitute a "manifest injustice." Id.at 51, 54-56. As the Court explained, to constitute a "manifest injustice," the circumstances must be unforeseen. Id. at 49, 53. If there was ever a circumstance that was unforeseen, it was Dr. Burchell suffering a stroke and Rutgers terminating the RSA.

In fact, this Court specifically referenced section 316 of the FHA, allowing towns five months to submit their HPE&FSP during which "initial immunity" should be provided. Id. at 27-28. Section 316 of the FHA provides that the period for submission of a HPE&FSP should be "within five months from the date of transfer, or promulgation of criteria and guidelines by [COAH] . . . whichever occurs later . . . ." (emphasis added) Here, the date of transfer of the municipalities' cases from COAH to the courts was July 2, 2015, the (approximate) date the Declaratory Judgment actions were filed by the Movants. However, the criteria and guidelines governing the fair share numbers has yet to be established by the court and will not be established until approximately February 19, 2015. The four municipalities are not now asking for five months

from the February 19, 2015 date to adopt and submit their HPE&FSP. In fact, they have proposed a reasonable and "tight" schedule that is unfortunately the best alternative under the circumstances.

Considering that the Court specifically referenced section 316 in Mount Laurel IV, it is evident that the towns should first be provided the benefit of the determination required by section 316, then be given the opportunity to develop a complying plan. Any other sequence – especially at this point and under these circumstances where the municipalities have lost their expert – is neither orderly nor will be in accordance with the normal course of presentation of evidence and, therefore, is fraught with inequity and injustice.

The Movants are simply seeking an Order that keeps the playing field level. To require them to proceed in the illogical manner that necessitates the rather arbitrary assignment of fair share numbers in the first instance and an unnecessary duplication of effort in the second is neither fair nor a valid use of scarce judicial resources.

Finally, the four municipalities note that the Court held that, "as part of the court's review [of a municipality's Third Round HPE&FSP], . . . we authorize . . . a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court's review proceedings, even if supplementation of the plan is required during the proceedings." Id. at 24. "[T]he trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court's determination of the municipality's presumptive compliance with its affordable housing obligation." Id. at 28.

Specifically the objections to Plaintiffs' Motion make several arguments which should be addressed. First, it has been argued that the New Jersey Supreme Court made it very clear that any immunity granted to the municipalities should be limited to five (5) months. In re COAH, supra. at 27.

This Court acknowledges that the Supreme Court did endorse the award of limited grants of immunity. Temporary immunity should be awarded under the parameters that were established by the Court in In re COAH. The power to grant temporary immunity presumes that the Court will exercise its sound discretion when determining whether the municipalities are exercising good faith. With regards to the issues presented to this Court, it must certainly be recognized that the Supreme Court could not have foreseen the circumstances of Dr. Burchell's infirmity and the ramifications of that development upon the municipalities. In any event, this Court does not read In re COAH to mean that the grant of immunity is limited to only five months, especially under unexpected circumstances that have arisen.

The objectors also suggest that the Court adopt alternate approaches to the problem. For instance, the FSHC and other intervenor-objectors suggest that this Court require municipalities to submit their initial plans by December 8, 2015, even though those plans will not be complete as the municipalities will not have a fair share number until the Econsult report is submitted about a month later. They propose that the Trial Court and the Special Master can review the plan, with an opportunity to be heard by interested parties, while waiting for the fair share numbers.

The objectors' proposal does not provide an efficient process for the parties and especially the Court to be able to manage the overburdened calendar. The approach will entail a set of hearings. There are 58 municipalities in this Court's Vicinage that have filed Declaratory Judgment Actions. Virtually all of those municipalities had retained Dr. Burchell to act as their expert in these matters. The process suggested by the FSHC does not simply entail another set of plenary hearings in order to review each of the "partially" prepared municipal plans, but instead it entails a monumental expenditure of judicial resources that will be consumed to hold the first set of plenary hearings while all the time knowing that a second, somewhat duplicative hearing will necessarily follow.

Judge Nelson addressed and rejected that approach. Judge Nelson noted that:

> [The FSHC's] arguments demonstrate the breadth of [its] knowledge on all issues before the Court except one, the facts on the ground. As a consequence of COAH's abject failure to perform its duties, and the unfortunate and untimely illness of Dr. Burchell, there presently do not exist rational and reasonable criteria for calculating the affordable housing needs of any of the Plaintiffs.
>
> [The FSHC's] urgings are not grounded in reality. The task [that it] urges upon the Court is akin to being dropped in the middle of a dense forest on a cloudy day, without a compass, and told "Find your way home". With a compass one would have some comfort as to the direction to pursue; with the sun, one could plot a general course and hope for the best; with neither, one could walk in circles.
>
> [The FSHC's] demands for this Court to move with urgency read more like hastiness ... [The FSHC's] demand that the Court review Plaintiff's Fair Share Plans and calculate their affordable needs is not accompanied by a yardstick; [its] complaint of a "free pass" to the Plaintiffs ignores the reality that the Plaintiffs spent tax dollars and public officials time toward compliance with COAH only to have their efforts ignored by COAH. The Court refuses to punish the Plaintiffs for COAH's failings ...
>
> This Court's instruct is to err on the side of preserving precious municipal resources and to avoid unnecessary confrontations and redos upon remand to the trial court. The FSHC [and interested intervenors] will be granted ample opportunity to be

> heard on the constitutional affordable housing obligations ... in an efficient, cost effective and reasonable manner.

The FSHC and other objectors also raise questions concerning the diligence of the attorneys who are representing the municipalities. In support of its allegation, the objectors point to (1) claimed inconsistencies in the accounts given by the municipalities; and (2) its response to an OPRA request that was filed with the MG, which indicates that as of October 9, 2015 the MB had still not retained Econsult. At least one objector has suggested that the Court hold a plenary hearing concerning the diligence of the MG as well.

The municipalities have, of course, presented a divergent viewpoint, all the while claiming that they have acted in good faith and with diligence. The municipalities indicate that during the pendency of this Motion an agreement has been reached with Econsult and a copy of that agreement was provided to the Court. They also point out that (1) it was Rutgers that terminated Dr. Burchell's contract, not the MG; and (2) certainly the MG would not have incurred the additional cost of $125,000 (plus) for a new expert report if one was not necessary. In support of their "diligence", lead counsel for the municipalities indicates that:

> 1. We sought to persuade Rutgers to assign another employee of the University to complete the contract and thereafter testify about the final report. See Surenian Certification dated October 7, 2015 at paragraph 54.
>
> 2. We tried to persuade Rutgers to retain a sub-consultant, as permitted by the agreement, to complete the report and then testify about it. See Id. at 46.
>
> 3. Immediately after meeting with Dr. Burchell and weeks before Rutgers terminated the contract, we opened negotiations with Econsult, the only entity that could possibly produce a Solutions Report expeditiously, to explore its interest and willingness to prepare a report as quickly as possible setting forth a methodology to identify the need and allocate it. See Id. at 57.
>
> 4. We: (a) reviewed the shared services agreement by the September 10, 2015 meeting of the designated attorneys for the Municipal Group and concluded that we could not retain another consultant without an amendment to the SSA; (b) drafted an Amendment to the SSA by September 11, 2015; and (c) distributed the Amendment to the Municipal Group. See Id. at 61-66.
>
> 5. We negotiated an agreement with Econsult establishing that we would have an expert report by the end of the year. See Edwards Certification, Exhibit E.

The municipalities also claim that in order to meet the "tight schedule" that they propose it will require a "Herculean" effort. The municipalities also point to the "legal requirements" and other red tape that is required for them to retain consultants and take the necessary actions for them

to proceed. The municipalities, as governmental entities, are certainly "encumbered" by statutory requirements created by the requirements of the Open Public Records Act and the Open Public Meeting Act as well as other related Statutes that ensure that they act in a manner that "squares all corners". Certainly the objectors, both profit and non-profit, do not have these impediments. The opposition's seeming callousness with regards to those issues demonstrates a lack of understanding of the manner in which a public body acts and how those processes differ from a private body.

This Court is confronted with the divergent positions on whether the Econosult can produce their report sooner. This Court does not intend to invest the time, expense and energy that would be necessary in order to require the municipalities and Econsult to hold a plenary hearing on that subject. At that plenary hearing the movants indicate that they would like to probe a series of topics[5]. The reality of the situation is that given this Court's calendar, the plenary hearings will likely last longer than the requested extension. The hearings would also likely cause additional delay due to the mobilization effort for the hearings. Neither does the Court have the judicial resources to conduct such a hearing. In any event, such a hearing would only serve to further delay this process and enrich the attorneys and other experts who will be required to prepare and attend.

Again, this Court's emphasis is to produce a result which will fairly assess each municipality's constitutional obligations as well as the preparation development and interpretation of a real plan that will produce real results for the parties that are really affected. Another hearing will not facilitate those goals.

---

[5] Intervenor-Objector, SAR I, LLC, Bridgewater Plaza and K. Hovnanian North Jersey Acquisitions propose the following list of questions as a starting point:

- Why is there no certification from Dr. Burchell explaining that he personally believes that he cannot complete the work he seemingly completed in late July?
- Why is there no certification from anyone at Rutgers University explaining that no one else within Rutgers faculty can finalize Dr. Burchell's report?
- Why has this motion been filed on the eve of the Township's deadline despite the fact that Dr. Burchell's stroke occurred in July 2015?
- Why does Econsult require an additional ninety (90) days to formalize a report that should largely be completed by virtue of the work they have already performed as part of their September 24, 2015 report and the draft report that has been prepared by Dr. Burchell?
- Will the Township guarantee that it will accept the fair share obligation as determined by Econsult or would the Township like to retain the option of rejecting Econsult's conclusions in early 2016 and asking for another delay so as to retain yet another expert?

The municipalities point out that while the objectors make it seem like an easy task for Econsult to generate a new report, the FSHC's own expert, Dr. Kinsey, had "three tries" to formulate his opinion before the New Jersey League of Municipalities provided two expert reports revealing numerous flaws in the analysis. The municipalities indicate that those circumstances belie the Intervenor's arguments that the generation of a new report should be simple.

In any other litigated matter before this Court, the Court would freely extend the time limits to allow a party to obtain a replacement expert and not be placed in a litigation disadvantage due to circumstances beyond its control by reason of losing its expert to a stroke. Certainly if similar circumstances affected the FSHC or any of the other intervenors, the Court would not require them to proceed in the manner that the FSHC and the intervenors have advocated for the municipalities in this case or other companion cases that are before the Court.

Ironically the net effect of having the Movant obtain the requested relief by motion has only caused more delay and expense. The Movant's plans have been interrupted while it waited for the Court to address its Motion in this case as well as the Motions made in other Mt. Laurel cases within this Vicinage. The Movant's limited financial resources were also further taxed by the exercise. Further, the Court's limited judicial resources were required to be marshaled to decide these Motions instead of dedicating its time toward managing its Mt. Laurel calendar with the purpose of advancing these cases in order to achieve real results.

The Court can only hope that the parties will be able to work together more cooperatively in order to avoid these costly forays.

For the reasons set forth above, the Court will GRANT the relief requested by the movant Townships The Movant Townships' grant of "temporary immunity" shall be extended to March 31, 2016.

ADDITIONAL CASE MANAGEMENT CONSIDERATIONS

The Court's opinion has been prepared to address the specific requests to extend the time within which the municipalities can replace Dr. Burchell and submit a replacement report from Econsult. The Court's opinion also addresses the municipality's request to correspondingly extend their grant of temporary immunity.

The issues before the Court do not end there however. By granting the municipality's motion, that does not mean that the court has issued an unconditional reprieve until the early Spring of 2016. The municipalities need to continue to diligently and in good faith advance this matter by preparing for the process of addressing their fair share obligation, the prompt preparation of their Housing Elements and Fair Share Plan. As a part of that process, the Court strongly encourages that process be developed in each municipality to address those issues promptly and efficiently. The process should include a plan to diligently meet with any and all interested parties concerning

their interests and their presentation of any contributions that they can offer towards satisfying the fair share obligation that is ultimately determined.[6]

As a result, the Court will order the following additional requirements as part of this opinion:

(1) The Court's previous Order of temporary immunity and granting intervention as it applies to the Movant Municipality is incorporated herein and remains in effect except as may be specifically altered in the Court's opinion or Order.

(2) On or before January 8, 2016 the Intervenors[7] and the Municipality shall supply each other, to the Special Master, and to the Court their respective expert report(s) on Fair Share Issues.

(3) On or before January 8, 2016 the Municipality shall furnish the Court with its positions and comments relating to compliance standards.

(4) The Municipality shall complete the "matrix forms" that were developed by Mr. Banisch by December 1, 2015 with the understanding that the Municipality may utilize the fair share numbers from the proposed Third Round Rules (that were never adopted due to the 3-3 tie vote) in the completion of the forms[8]. The forms shall be provided to the Court, to the Special Master and to any Intervenors in its matter (including the FSHC).

(5) On or before December 1, 2015 the Municipality shall furnish the Court with a proposed plan, schedule and commentary concerning meetings with any and all interested parties (which should include the designated Special Master, if possible).[9]

(6) The Court shall set a Case Management Conference in mid to late January, 2016, subject to the Court's schedule to set a trial relating to the Municipality's fair share obligations.

(7) With respect to the fair share "trial" that will be scheduled before this Court, each Municipality and any participating Intervenor shall, by December 8, 2015, provide a concise

---

[6] The Court notes that, for instance, in Raritan Township, Hunterdon County, the municipality has already established a "public" process for interested parties to present the opportunities and contributions that they can offer. This Court does not express an opinion one way or the other concerning whether the process must be or should be public, but Raritan should be lauded for initiating a process that provides an early opportunity for interested parties to address their concerns, make proposals and foster communication.

[7] If any are applicable to any of the movants in these matters before the Court.

[8] The forms shall be completed without prejudice and may be supplemented or modified once the municipalities obtain their expert reports or when the Court ultimately determines the actual fair share number.

[9] If the Municipality has already begun that process, the Court will expect a report concerning the progress of those meetings.

position paper concerning (a) the issues to be resolved; (b) the expected number of witnesses that each intends to call; (c) any anticipated issues or problems that need to be addressed; (d) a preliminary list of exhibits or evidence to be presented, which shall be subject to amendment at the Case Management Conference to be scheduled by the Court; (e) the anticipated length of the trial; (f) their proposal for the exchange of Pretrial Information (see R. 4:25-7 and Appendix XXIII to the New Jersey Court Rules; (g) their plan for accomplishing any stipulations on contested procedural, evidentiary or substantive issues; (h) their plan for submission of trial briefs; (i) counsel and expert availability, or if availability is limited, proposal for alternate counsel; and (j) their proposal to address such other issues as any party deems appropriate for the management of the case and/or the "Fair Share" portion of the trial.

(8) The fees incurred by the Special Master shall be divided equally between the Municipality and the Intervenors, except that the FSHC shall not be required to pay a share of the cost.